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DETAINED-MPP

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In The Matter Of:	
[redacted]	**File No.: A**[redacted]
In Removal Proceedings	

RESPONDENT'S BRIEF ON APPEAL

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STATEMENT OF FACTS

Respondent is a [redacted]-year old native and citizen of Cuba who is fleeing persecution based upon his political opinion. Exh. 3, p. 1. On June 27, 2019, he arrived at the United States border at or near El Paso, Texas without a valid entry document. Exh. 1. Removal proceedings were instituted on June 28, 2019. *Id.* He had never previously visited or attempted to enter the United States. Tr. 43.

On September 20, 2019, Respondent applied for Asylum, Withholding of Removal, and protection under the United Nations Convention Against Torture based upon his political opinions. Exh. 3. Respondent was a self-employed meat vendor who operated a kiosk in [redacted]. *Id.* at 4. He was arrested, beaten, and jailed on May 1, 2019, a national holiday to celebrate the Cuban Revolution, for refusing to close his kiosk. *Id.* at 6. Respondent testified on February 26, 2020 before Immigration Judge [redacted], Hearing Transcript ("Tr."); provided a supporting affidavit, Exh. 5 at 5-7; and other documents, including country condition reports, Exhs. 4 and 5. Respondent was represented by counsel. Tr. 20.

Respondent is high school educated and served in the military in 1985. Tr. 35, 74. Military service is compulsory. Exh. 4 at 27. He has been married since 1987 to [redacted], and has one son, [redacted]. Tr. 35, *see* also Exh. 3 at 2. He lived with his immediate family in the same house in [redacted] since 1995. Tr. 34. Respondent was self-employed beginning in 2010, most recently operating a meat kiosk from 2012 until he left. Tr. 39. Respondent had long-held anti-government views which he publicly manifested by expressing them to kiosk customers and friends; by refusing to participate in the May Day parade; or join the Committee for the Defense of the Revolution ("CDR") and attend their meetings. Tr. 48-52. The CDR is a system of informants and neighborhood committees used by

the Ministry of the Interior to monitor government opponents and report on their activities. Exh. 5 at 68, State Department 2019 Human Rights Report.

Respondent's son left for the United States in late 2016 and has been a permanent resident since 2018 under the Cuban Adjustment Act. Tr. 38, 44-45, Exh. 3 at 7. The son has travelled to Cuba since receiving residency. *Id.* at 11. His last date of re-entry into the United States was January 2, 2019. *Id.* at 13.

Respondent was first harassed by the government in early 2017 in retribution for his son's departure for the United States. Tr. 44-45, Exh. 5 at 5 ¶4. Although dressed in civilian clothing, Respondent believed the attackers were government agents because of the timing of the attack and the names they called him, including "worm," traitor to his country, and anti-revolutionist. Tr. 44-45, Exh. 5 at 5 ¶5. Common criminals do not call people those names. Tr. 44-45, Exh. 5 at 5 ¶5. The attackers also threw rocks, breaking the windows of Respondent's house. Tr. 44. In fear for his life, Respondent fled with his wife to live with his mother for the next month. Tr. 47.

The record contains a letter from an eyewitness neighbor who confirmed that the attack occurred shortly after Respondent's son left; that the attackers yelled at Respondent "worm that has to get himself out of the country," and "counterrevolutionary"; and that they threw stones and broke the windows to Respondent's house. Exh. 5 at 17. The country condition reports and other supporting materials document supposedly spontaneous acts of repudiation in front of people's homes organized and/or sanctioned by the Cuban government to intimidate individuals perceived as opponents. *Id.* at 44, 65, 71, 74, 92-93, 126, 158, 171, 194-95, 198-203, 212, 222, 247, 275-79, 292. These actions involve verbal and physical abuse. *Id.* Those same reports

explain that "worm" is a derogatory term for those critical of revolutionary ideology. *E.g., id.* at 181, 217, 22, 251, 279, 293.

Respondent was next harassed on May 1, 2019, the date of the May Day celebration, when he opened his meat kiosk instead of attending the [redacted] march, which is an obligation for those who support the government. Tr. 47. Within ten minutes of opening, state security arrived and told him he needed to be at the march. Tr. 47, 50. When he responded that he never participated, the officers hit him, including with a baton, kicked him, and arrested him. Tr. 47. They destroyed the kiosk and stole the merchandise. Exh. 3 at 12, Exh. 5 at 6 ¶¶ 9, 12.

At the police station, officers threatened to make Respondent disappear. Tr. 48. They locked him in a "hidden room," Tr. 48, which Respondent described as a "small dungeon," Exh. 5 at 6 ¶10, alone for two days without food, water, or medical attention, Tr. 48, Exh. 5 at 6 ¶11. During that time, the officers threatened him, mocked him, and told him he was going to die. Exh. 5 at 6 ¶11. They warned Respondent that he had to give up his business license, and if he went back to his kiosk they would "disappear him." Tr. 48-49, 57-58. Respondent believes he was arrested, detained, and beaten because he is not a government sympathizer and because his son left the country, which the government knew about. Tr. 52.

The record includes a letter from Respondent's mother and two from neighbors describing the May 1, 2019 incident. Exh. 5 at 11-17. They each describe how Respondent was told by the head of sector police to attend the parade. *Id.* When Respondent stated that he never attended, and would not attend, the police destroyed his kiosk; beat, kicked, and arrested him; and took him away for two days. *Id.*

Respondent testified that he could no longer obtain employment in Cuba. Tr. 53-54. The government controls employment, with only two options: obtain a business license from the

government to work in a privately-operated job or obtain a government job. Tr. 53-55. A Political Polat, who is a delegate of the CDR, recommends people for a business license or government job. Tr. 53-54, 71.

Respondent's license suspension was permanent and the CDR would not give him a reference for a government job because of his political opposition. Tr. 53-54. The record contains a letter from [redacted] D[redacted] ("Polat letter"), who identified himself as being from the People's Power of Zone 5. Exh. 5 at 20-21. The record also includes a copy of D[redacted]'s national identification card. *Id.* at 22. The letter states that Respondent does not participate in the guards, volunteer work, CDR meetings or any other events they organize, and "does not agree with the Revolution; he manifests himself against it so he is not reliable to assign any task." *Id.* Although the letter is handwritten, it contains a seal at the bottom. *Id.* at 21. In response to questions from the IJ about the letter being handwritten and not on government stationery, Respondent explained that Polat delegates work from home. Tr. 71-73. He obtained the letter through his wife and his son's friend. Exh. 5 at 24. Multiple documents explain that the Cuban government uses the grant of a job and harassment of business license owners to repress dissent. Exh. 5 at 43, 51, 54-57, 69, 75, 83, 100-01, 104, 130, 137, 167-73, 180, 222, 227, 248, 251, 282-83.

Respondent did not try to find other work after he was threatened with death and lost his business license. Tr. 56-58. In response to questions from the IJ, Respondent explained that his wife could not get a job because she was a 66-year old retired schoolteacher who received a pension and it is very difficult to get rehired in Cuba once one retires. Tr. 61-62.

Respondent further explained that he did not believe he could relocate safely within Cuba because the CDR controls the relocation process. Tr. 53. The State Department Cuba 2018

Human Rights Report found that the government restricts movement within the country and citizens need CDR permission to move. Exh. 4 at 19. "Dissidents frequently reported authorities prevented them from leaving their home provinces or detained and returned them to their homes even though they had no formal or written restrictions on them." *Id.* *See also*, Exh. 5 at 57, 60, 75-76, 100, 107, 120, 137-38, 194 (regarding government control of the ability to move internally).

Respondent, in fear of his life and without a means to make a living, left Cuba on June 13, 2019 for Nicaragua by pretending he was going on vacation there. Tr. 33, Exh. 5 at 6 ¶15. Respondent chose Nicaragua because Cuba has an agreement with that country enabling Cubans to go there without any problems. Exh. 5 at 6 ¶ 15. Respondent then travelled through Honduras, Guatemala, and Mexico to reach the United States. Tr. 33, 40.

A June 19, 2019 Reuters article – published less than a week after Respondent left -- reports the findings of a Spanish organization documenting increased attempts by Cuba's state security apparatus to force dissidents into exile. Exh. 5 at 117-19. Dissidents are taken to the airport, given a boarding pass, and told never to return. *Id.* *See also,* 2019 Freedom House Report on Cuba, *id.* at 100 ("Former political prisoners are often encouraged to go into exile").

And multiple country conditions reports and news articles document a switch by the Cuban government in recent years towards using short-term, sometimes violent detentions, lasting several hours to several days to control independent expression and political activity of even those who express subtle criticism of the government. *E.g.*, Exh. 5 at 40 ("Those who peacefully protest or even express subtle criticism of the government's political or economic model are frequently targeted"); *id.* at 54 ("Cuban government continues to employ arbitrary detentions to harass and intimidate critics, independent activists, political opponents, and

others."); *id.* at 63 ("Police and security officials continued to use short-term and sometimes violent detentions to prevent independent political activity or free assembly."); *id.* at 88 ("In recent years, Cuba has shifted to using short-term detentions and harassment to repress dissent").

On January 10, 2020, the United States suspended public air travel to Cuba because the government uses travel revenue "to finance its on-going repression of the Cuban people." Exh. 5. at 35. Further, according to a January 13, 2020 New York Times report based upon Cuban government documents, Cuba has the highest imprisonment rate in the world and holds individuals on dubious charges generated by the state security apparatus. *Id.* at 32-34.

Respondent's wife left Cuba on September 5, 2019 on a B1/B2 visa for Florida, where the couple's son lives and does not plan to return. Tr. 36, 62, 68, Exh. 3 at 2. She had the visa since 2016 and had been to the United States several times to visit their son. Tr. 37. She had not experienced problems with the government because she was not working, and had not openly expressed her views or government defiance as Respondent had. Tr. 61, 78.

The IJ questioned Respondent about the absence of evidence from his wife. Tr. 69-70. Respondent explained that he did not see it as a need, but offered to obtain it. Tr. 71. The IJ refused the offer, stating that "today is the day of your hearing." *Id.* In closing argument, Respondent's counsel explained that Respondent's wife had not been openly critical of the government, and he had. *Id.* at 78.

On February 26, 2020, Judge [redacted] denied Respondent's application. IJ at 1-17. The IJ found Respondent's testimony to be consistent with the documentary evidence of his prior statements, but believed many of his assumptions were conclusory and uncorroborated, including that the persons who harassed him in 2017 were government officials. *Id.* at 4. The judge also

"struggled with understanding the circumstances of the case where Respondent has lived for many years in the country" without issue until 2017 and 2019. *Id.*

The IJ believed Respondent had not put forth corroborating evidence "to understand the plausibility of his claim that after 50-some-odd years in Cuba, the government in a matter of just a specific moment on May 1 of 2019 decided to end his career" and prevent him from working. IJ at 6. The IJ repeatedly noted that Respondent's son had visited Cuba between 2017 and 2019; his wife had also travelled between the two countries; and Respondent had no apparent issues leaving Cuba for Nicaragua. *Id.* at 4-6, 9, 11, 14. The judge also repeatedly referenced the lack of corroboration from Respondent's wife and son, including of her intention to stay in the United States. *Id.* at 4-6, 9. And he found the Polat letter suspect because it was handwritten, two sentences long, and not on official government letterhead. *Id.* at 5-6.

The IJ denied asylum, concluding that Respondent had not adduced sufficient evidence of past persecution based upon Respondent's actual, or imputed, political opinion. IJ at 7-12. The IJ deemed the 2017 and 2019 incidents isolated and not extreme enough to establish persecution. *Id.* at 10. He also believed the police could have attacked Respondent on May 1 because "he was operating a kiosk in the midst of a celebration or parade." *Id.* at 9, *see also, id.* at IJ at 13. The IJ found no economic discrimination because Respondent left within six weeks of his arrest without trying to find new employment and his wife could work. *Id.* at 10-12.

The IJ further believed that Respondent had not demonstrated an objectively reasonably fear of future persecution because Respondent had not publicly opposed the government. IJ at 13-14. He believed that if Respondent were being targeted by the government because of his son's departure to the United States his kiosk would have been attacked sooner and his son and

wife would not have been allowed to travel between the two countries. *Id.* at 14. The resolution of the asylum claim was dispositive of the withholding of removal application. *Id.* at 14-15.

The judge denied the CAT application based upon insufficient evidence of past conduct arising to the level of torture; insufficient evidence that Respondent would be targeted by the government or tortured if he returned; and insufficient evidence regarding his ability to relocate within Cuba. IJ 15-17.

STATEMENT OF ISSUES

1. Whether the Respondent is entitled to relief on his asylum and other claims where the IJ erred as a matter of law by resolving Respondent's credibility against him based upon speculation.

2. Whether the Respondent is entitle to relief on his asylum and other claims where the IJ erred as a matter of law by giving undue weight to the purportedly absent corroboration from Respondent's son and wife and applying a legally erroneous authentication standard, and failing to evaluate the cumulative evidence as a whole.

STANDARD OF REVIEW

Factual findings, including adverse credibility determinations, are reviewed for clear error. 8 C.F.R. 1003.1(d)(3)(i). Questions of law, discretion, and judgment and all other issues are reviewed de novo. 8 C.F.R. 1003.1(d)(3)(ii).

NEED FOR REVIEW BY THREE-MEMBER PANEL

This case should be referred to a three-member panel due to the need to reverse the Immigration Judge's decision. 8 C.F.R. 1003.1(e)(6)(vi).

SUMMARY OF THE ARGUMENT

The IJ improperly applied the law regarding credibility determinations and corroboration to reject Respondent's asylum, withholding of removal, and CAT applications based upon perceived evidentiary gaps where none actually existed. Considering the totality of the evidence, Respondent met his burdens of proof to show entitlement to relief. The opinion repeatedly fails to acknowledge, let alone discuss, the substantial and unbiased eyewitness accounts, country condition reports, and other documents that corroborated Respondent's claims and resolved the "implausibilities" the IJ based his denial upon.

Instead, the IJ found Respondent not credible based upon his erroneous categorization of corroboration issues as ones of credibility. He then compounded that error by misapplying the law on corroboration by giving undue weight to the purportedly absent evidence from Respondent's son and wife, and applying a legally erroneous authentication standard to justify disregarding the Polat letter.

Accordingly, the Board should sustain the Respondent's appeal and grant his application for asylum. Alternatively, the Board should remand with instructions that the Respondent be deemed fully credible and to have met his burden of proof of establishing past and future persecution, and a nexus to his political opinions; to entitlement to withholding of removal; and to relief under CAT. In the least, the Board should remand for a rehearing in which Respondent is given the opportunity to produce the corroborative evidence the IJ found lacking.

I. THE IJ IMPROPERLY APPLIED THE LAW REGARDING CREDIBILITY.

The IJ found Respondent's testimony consistent with the documentary evidence and prior statements, but found him not credible for two reasons: purportedly conclusory statements and inherent plausibility. IJ at 4-5. The IJ, however, only identified one purportedly conclusory

statement: that the individuals who threw rocks at Respondent in early 2017 were government agents. *Id.* at 4. Although set forth in the credibility section of the opinion, the IJ also claimed that the statement was not corroborated. *Id.* The IJ further found it implausible that the government would start persecuting Respondent in 2017 after he had lived unmolested in [redacted] for approximately 50 years; his son had immigrated to the United States; his wife and son had travelled between the two countries; and Respondent had no apparent issues leaving Cuba. *Id.* at 4-5. Each of the IJ's findings were improper as a matter of law because the IJ overlooked the record evidence, and also categorized corroboration issues as ones of credibility.

Under the REAL ID Act of 2005, the IJ must weigh the credible testimony along with the other evidence of record. INA §208(b)(1)(B)(ii). The IJ may base a credibility assessment on, among other factors, the inherent plausibility of the claim, the internal consistency of statements, and the consistency of statements with the evidence of record (including the reports of the Department of State on country conditions). INA § 208(b)(1)(B)(iii). Credibility determinations must be supported by the record and cannot be based upon conjecture and speculation. *E.g., Mwembie v. Gonzales*, 443 F.3d 405, 410 (5th Cir. 2006), *Matter of S-A*, 22 I &N Dec. 1328,1331 (BIA 2000). Credible testimony standing alone can be sufficient to meet the burden of proof. INA §208(b)(1)(B)(ii), § 240(c)(4)(B).

A. Evidence Of Who Attacked In 2017.

The IJ found the Respondent's testimony that those who attacked him in 2017 were government agents to be conclusory and "not corroborated in any other way." IJ at 4. But there was nothing incredible about the Respondent's testimony: he explained his belief that the attackers were government agents because of the timing of the attack shortly after his son left for the United States, and the epithets used, including "worm," "traitor to his country," and "anti-

revolutionist." Tr. 44-45. Respondent provided a letter from an eyewitness verifying both the timing of the attack in relation to Respondent's son's departure and the language used. Exh. 5 at 17. Credibility relates to the Respondent's account of events, INA § 208(b)(1)(B)(ii), and his account was unchallenged.

Further, even if Respondent's conclusion about the identity of his attackers raised a credibility issue, his conclusion fully squared with the country conditions report, a component of INA § 208(b)(1)(B)(iii). The State Department's 2019 Human Rights Report details "state-orchestrated" acts of repudiation "directed against independent civil society groups and individuals." Exh. 5 at 65. Multiple other documents also detail acts of repudiation and use of epithets such as "worm." *Id.* at 44, 65, 71, 74, 92-93, 126, 158, 171, 181, 194-95, 198-203, 212, 217, 222, 247, 251, 275-79, 292-93. Thus, the IJ's finding is legally erroneous when viewed as either credibility or corroboration.

B. Purported Implausibilities.

It is undisputed that Respondent had not been attacked by anyone he believed to be a government agent until shortly after his son left the country. Yet the IJ found it implausible that Respondent could live for years in Cuba without problems until his son left, or that the government could persecute him based upon actual or imputed political opinions, if it let his relatives travel. IJ at 4-5. These findings violated the law on credibility regarding the impropriety of speculation.

While the IJ could have required corroboration about the nature of the 2017 and 2019 attacks – which, as set forth above, Respondent produced – the IJ could not judge Respondent's version of events implausible based solely upon his speculation of how he believed the Cuban government operated. *E.g., Chawla v. Holder*, 599 F.3d 998, 1007-09 (9th Cir. 2010) (rejecting

multiple adverse credibility findings in which IJ rejected evidence and testimony as implausible based upon his speculation and conjecture that events could not have occurred in the manner to which witnesses testified); *Mwembie*, 443 F.3d at 410 (rejecting IJ finding that it was implausible that respondent fled her country without saying goodbye to her family because IJ lacked any basis to draw this conclusion). Nor, of course, is it a qualification for credibility that an applicant be persecuted for the duration of his life in his country before fleeing or a certain number of times.

C. Respondent's Ability To Leave Cuba.

Although he did not make a specific credibility finding on the issue, the IJ repeatedly cited Respondent's ability to leave Cuba for Nicaragua as undermining the plausibility of his persecution claim. IJ at 9, 11, 14. That was legal error, again based upon the IJ's erroneous reliance upon speculation. Instead, the record reveals that the Cuban government actively wants objectors to leave. Exh. 5 at 100, 117-19. And precedent renders Respondent's ability to leave legally irrelevant to credibility regarding persecution. In *Kabamba v. Gonzales*, 162 F. App'x 337 (5th Cir. 2006), the court rejected the notion that Respondent's ability to travel back to the Congo was evidence that she was not telling the truth about her persecution. *Id.* at 342. "Apparent inconsistencies in treatment by various government officials provide an insufficient basis to deny asylum where a person has suffered persecution at the hands of some such officials." *Id.*

Because the IJ's credibility findings were legally and factually erroneous, the Board should reverse the denial of asylum.

II. THE IJ IMPROPERLY APPLIED THE LAW REGARDING CORROBORATION.

Even if the Board finds that Respondent's testimony standing alone is not fully credible, the corroborative evidence both bolsters his credibility and meets his burden of proof. The IJ identified three corroboration issues. First, the Polat letter was insufficient corroboration of Respondent's inability to work because handwritten and not on government letterhead. *Id.* at 5. Second, Respondent's wife and son had not explained the "plausibility of his claim that after 50-some-odd years in Cuba, the government in a matter of just a specific moment on May 1 of 2019 decided to end his career, prevent him from working, and not allow him to make a living." *Id.* at 6. *See also, id.* at 11. Third, Respondent should have procured evidence from his wife regarding her travels back and forth to Cuba, and her intent to stay in the United States. *Id.* at 4, 6, 9, 11, 14. Each of these findings was improper because the IJ applied improper authentication standards; assumed an ability to corroborate where none existed; and gave undue weight to the allegedly absent evidence in the face of the substantial weight of the record.

The respondent has a duty to produce evidence corroborating "the material elements of the claim where the evidence is reasonably obtainable." *Matter of L-A-C*, 26 I & N Dec. 516, 519 (BIA 2015), citing *Matter of S-M-J*, 21 I &N Dec. 722, 725 (BIA 1997); 8 U.S.C. § 1158(b)(1)(B)(ii); 8 U.S.C. § 1231(b)(3)(C). This duty requires production of material relating to both general country conditions and the specific facts upon which the claim is based. *Matter of L-A-C*, 26 I & N Dec. at 519-20. However, an IJ "must not place undue weight on the absence of a particular piece of corroborating evidence while overlooking other evidence in the record that corroborates the claim." *Id.* at 522. Further, an IJ cannot hold a Respondent to inflexible authentication standards. *E.g., Shu Han Liu v. Holder*, 718 F.3d 706, 712 (7th Cir. 2013).

A. The IJ Applied Improper Authentication Standards.

The Polat letter contained a seal on it and Respondent also produced copies of the signer's national identity card. Exh 5 at 21, 22. In rejecting the letter's corroborative value because it was handwritten and not on government letterhead, the IJ acted contrary to the law which prohibits applying rigid authentication standards to documents produced in asylum cases.

Courts have recognized that those who escape persecution are rarely going to be in the position to procure fully authenticated evidence of their persecution from the very government that has harmed them. *E.g., Shu Han Liu,* 718 F.3d at 712 (criticizing BIA treatment of un-notarized letter regarding persecution in China); *Qiu Yun Chen v. Holder*, 715 F.3d 207, 212 (7th Cir. 2013) (Board erred in giving no weight to communications from local authorities due to authentication concerns, stating, "how realistic is it to expect the petitioner to be able to obtain an authenticated copy of a communication from a local official that states an intention to violate Chinese national policy . . ."); *Chawla*, 599 F.3d at 1005 (reversing BIA finding that termination letter was unreliable because "poorly drafted and formatted"). Here, precedent required the IJ to accept the seal and documentation of the author's identity as sufficient authentication.

B. Irrelevancy Of Wife's And Son's Corroboration.

The IJ erred in requiring additional corroboration from Respondent's son, and corroboration from his wife, where there was no reason to believe either could provide non-duplicative probative evidence of Respondent's claims. An IJ cannot find against a Respondent because he fails to produce corroboration from witnesses for whom there is no reasonable basis to conclude that they have any relevant knowledge. *See, e.g., Guzman-Vazquez v. Barr*, 959 F.3d 253, 255 (6th Cir. 2020) (while failure to provide corroborating evidence may weigh against credibility, "conversely, we have emphasized the irrelevance of testimony from

individuals who lack such knowledge."); *Uwase v. Ashcroft*, 349 F.3d 1039, 1044-45 (7th Cir. 2003) (failure of sister to corroborate claim cannot be basis of denial where sister's testimony was of little value).

The IJ had no basis to believe Respondent's wife or son had knowledge of the inner workings of the Cuban government's system of repression such that they could corroborate why Cuba would persecute Respondent on May 1, 2019 and end his ability to work. IJ at 6. Instead, the Respondent produced country condition reports, which the IJ never references in his opinion, that corroborated the government's wide net of repression and withholding of employment to quash dissent. *E.g.*, Exh. 5 at 43, 51, 54.

Even more troubling, precisely because he left Cuba in 2016, there was no reason to believe Respondent's son witnessed, and therefore could corroborate, any of the events that form the basis of Respondent's applications. Indeed, the IJ failed to acknowledge, and apparently overlooked, that the son did provide a letter explaining how he helped his father get "the testimonies of the people who were witnesses in Cuba when my father was oppressed by the police." Exh. 5 at 24.

And to the extent the IJ believed that for some reason more was needed from the son, he committed legal error by failing to give Respondent an opportunity to explain its absence. "No circuit has held that an IJ may rule against an applicant on the basis of failing to provide corroborative evidence when the applicant has not had the chance to explain its absence." *Guzman-Vazquez*, 959 F.3d at 255. For these reasons, the IJ could not rely on the purported lack of corroboration from Respondent's son.

Similarly, the IJ's reliance on the failure of Respondent to produce corroboration from his wife regarding her travels and intent to stay in the United States is equally troubling because

there was no basis to believe her corroboration was necessary. As Respondent explained, he did not procure a letter from his wife because "we did not see it as evidence," Tr. 70, and the judge refused his offer to obtain one as untimely, Tr. 71. Respondent's counsel similarly explained any letter from Respondent's wife was a "non-issue in the sense that the persecution my client suffered was specific to him." Tr. 78. Other family members had not been openly critical of the government, and whether Respondent's wife feared for her life was not probative of whether Respondent had been persecuted in the past or had a well-founded fear of future persecution. Tr. 78, 80.

C. The IJ Erred By Failing To Give Respondent An Opportunity To Obtain Corroboration.

The IJ should have given Respondent an opportunity to obtain the corroborative evidence he required. The plain language of the relevant statutes requires an applicant to provide corroborative evidence, 8 U.S.C. § 1158(b)(1)(B)(ii); 8 U.S.C. § 1231(b)(3)(C), which is a burden that Respondent met, *see* Exhs. 4 and 5. That same language also requires that an IJ who determines at a hearing that an applicant "should" provide certain corroboration, *id.*, gives the applicant an opportunity to do so. "To decide otherwise is illogical temporally and would allow for 'gotcha' conclusions in Immigration Judge opinions." *Saravia v. Attorney General*, 905 F.3d 729, 738 (3d Cir. 2018).

Although the Fifth Circuit, along with some other circuits, has recently held that an IJ does not have to give an applicant advance notice of the specific corroborating evidence necessary to meet the applicant's burden of proof or to provide an automatic continuance for the applicant to obtain the evidence, *Avelar-Oliva v. Barr*, 954 F.3d 757, 770-71 (5th Cir. 2020), that holding is contrary to that of the Third and Ninth Circuits, *see, e.g., Saravia*, 905 F.3d at 738;

Ren v. Holder, 648 F.3d 1079, 1090–91 (9th Cir. 2011); *Chukwu v. Attorney General*, 484 F.3d 185, 192 (3d Cir. 2007).

Respondent asserts that the Fifth Circuit ruling is in error based upon the plain language of the relevant statutes and for the reasons set forth in *Ren, Chukwu,* and *Saravia.* An applicant has a statutory obligation to produce corroborative evidence of the elements of his claims and not to divine every specific piece of evidence a particular IJ may find corroborative. To hold otherwise is to render meaningless the statutory due process rights of applicants provided for in the INA and to instead render their rights dependent upon a randomly assigned IJ's view of how that applicant should prosecute his claim. It is further particularly arbitrary and capricious to allow a judge to deny a claim based upon the absence of a piece of evidence that a Respondent represents he can obtain, without giving that Respondent an opportunity to produce it.

D. The IJ Erred By Giving Undue Weight To The Purportedly Absent Corroboration.

In all events, the IJ committed reversible error by giving undue weight to the purportedly absent corroboration from Respondent's wife and son instead of "weigh[ing] all of the evidence provided and consider[ing] the totality of the circumstances in determining whether the applicant has met his burden." *Matter of L-A-C,* 26 I & N Dec at 522. In repeatedly referencing the supposedly missing corroboration from Respondent's wife and son, the IJ overlooked that unsworn statements of facts or letters from family members "can hardly be thought neutral, reliable sources." *Qiu Yun Chen*, 715 F.3d at 212.

By contrast, the IJ never once references the letters from the three witnesses, including two non-family members, who corroborated the events of 2017 and 2019. Exh. 5 at 11, 14, 17. Nor does the IJ ever refer to the country condition reports and other documents corroborating Cuba's practice in recent years of detaining those who even subtly oppose the government; using

of employment to control dissent; and efforts to encourage dissenters to leave. *E.g.*, Exh. 5 at 40, 54, 60-68, 73-76, 83, 88

For all these reasons, this court should reverse the IJ's corroboration findings as contrary to the law and record. They cannot be a basis for denying Respondent relief.

III. THE RESPONDENT IS ENTITLED TO ASYLUM.

Respondent met his burden of proving past persecution or a well-founded fear of future persecution on account of his actual or imputed political opinion. 8 U.S.C. § 208(b)(1)(A). "The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life." *Zhao v. Gonzalez*, 404 F.3d 295, 307 (5th Cir. 2005). A respondent can establish a well-founded fear of future persecution by showing others would target him for persecution or by showing a pattern or practice of targeting people like him. *Id.*

A. Past Persecution

Respondent established past persecution based upon the attacks in January 2017 in which he was harassed for being an anti-revolutionary and his house was vandalized; on May 1, 2019 when his business was destroyed and he was subjected to an unlawful detention for two days without food, water, or medical attention, and government officials threatened to kill him; and through his loss of the ability to work. The IJ rejected his claim, however, concluding the harm Respondent suffered was not severe enough to amount to past persecution and relatedly, that he failed to establish any nexus to his actual or imputed political opinions. IJ at 7-12. That was reversible error. To reach these conclusions, the IJ impermissibly ignored the evidence and mischaracterized the record. *See, e.g., Qiu Yun Chen*, 715 F.3d at 212-14. He further failed to assess the cumulative effective of the applicant's experience including death threats, involuntary

confinement, property destruction, and job loss. *E.g., Herrera-Reyes v. Attorney General of United States*, 952 F.3d 101, 106–07 (3d Cir. 2020).

The IJ's conclusions that Respondent had not established that the 2017 attackers were government agents and his conclusion that Respondent was not harmed, IJ at 8, 10, were contrary to the record. As set forth in the facts and credibility sections above, the IJ overlooked the country condition reports regarding government sponsorship of acts of repudiation and the neighbor's letter regarding the 2017 act and its timing in relation to Respondent's son's departure. Further, the IJ's finding of no harm ignored that the attackers broke the windows of Respondent's home, Tr. 44, and that Respondent fled his home in fear for a month, Tr. 47.

The IJ also minimized the context of the May 1 attack and its severity dismissing it as not severe enough to rise to the level of persecution. IJ at 9-10. The IJ stated that it was "not clear to the Court that these officers were motivated by anything other than the fact that [Respondent] was operating a kiosk in the midst of a celebration or parade." IJ at 9. That ignores that May 1 is a national celebration of the Cuban Revolution and Respondent explicitly refused to attend the [redacted] parade when the state police ordered him to do so. Tr. 47. As one of Respondent's neighbor's explained, the police told Respondent he needed to be in Revolutionary Plaza and opening the kiosk was an act against the government. Exh. 5 at 14. *See also, id.* at 11 (mother's letter that police told him he needed to be marching); *id.* at 17 (neighbor letter that security officers ("got on top of him beating").

There was no evidence to support the IJ's speculation that the police might have attacked Respondent merely because he was operating the kiosk "in the midst" of the parade. IJ at 9. The IJ also minimized the physical harm to Respondent, ignoring that Respondent was locked for two days in a "dungeon" with no food, drink, or medical attention, while being threatened with death.

Tr. 48-49. Instead, the IJ noted only that Respondent was "punched and struck with a baton," suffering a bloody nose and some bruising and "held for two days." IJ at 10.

The IJ similarly found Respondent had not established economic persecution because of the purportedly questionable nature of the Polat's letter, and his failure to seek work in the six weeks between his detention and loss of his business license and his departure from Cuba. IJ at 10-12. But as explained above, the IJ held Respondent to improper standards of authentication and disregarded the country condition reports regarding the government's control over employment. The IJs erroneous application of the law to the facts and disregard of the record also renders improper the IJ's reliance upon family member's ability to travel as well as Respondent's ability to leave Cuba, IJ at 9, 11-12, as reasons to find no nexus between what happened to Respondent and his political opinions.

In sum, the IJ's inaccurate representation of the record and failure to evaluate Respondent's experience as a whole deprives the IJ's order of a rational foundation. Respondent was credible, his version of events was corroborated, and he proved his entitlement to asylum based upon past persecution.

B. Future Persecution.

Alternatively, Respondent established a well-founded subjectively genuine and objectively reasonable fear of future persecution on account of his political views. 8 C.F.R. § 1208.13. The IJ did not dispute Respondent's subjectively genuine fear. Instead, the IJ found insufficient direct or circumstantial evidence of objective fear because Respondent purportedly had not publicly evidenced his opposition to the government. IJ at 12-14. That conclusion is clearly contrary to the record. Instead, when the record is accurately and fully assessed, Respondent's past experiences, inability to work, and Cuba's on-going record of repression as

reflected in the country condition reports and other materials established an objectively reasonable fear of future persecution.

The IJ's description of Respondent voicing his anti-government views "privately when he was running his kiosk," IJ at 13, is self-contradictory. By definition, voicing views to people out shopping is not a private act. Further, the Respondent's opening of his kiosk on May 1 and refusal to attend the parade were public acts of opposition to the government taken on the very day that Respondent was expected to show fealty to it. Respondent also testified that he did not attend CDR meetings or events, Tr. 48-52, which the Polat also attested to, Exh. 5 at 21, and that the government knew of his son's departure as evidenced by the timing of the 2017 attack.

Further, the IJ's conclusion that there was no nexus between Respondent's political views and the attacks he experienced because he lived in Cuba for 50 years "with no issues" and "no prior incidents until after his son left," IJ at 13, gets the analysis exactly backward. The lack of incident prior to 2017 proves Respondent's case: his son's departure was a public act of perceived disloyalty imputed to Respondent. And Respondent's May 1, 2019 outright refusal to attend the May Day celebration was a blatant expression of anti-government views. These actions brought to the fore Respondent's previously more subtle anti-government acts of failure to participate in CDR events. The IJ completely disregarded the country condition reports which put these acts in context and explained that the Cuban government has in recent years broadened its persecution net beyond outspoken dissidents to those who express dissent and opposition in more subtle ways. *E.g.,* Exh. 5 at 40. *See also, id.* at 60-68, 73, 75-76, 83. Indeed, in the month before Respondent's February 2020 hearing, the United States government cut off travel to Cuba precisely because of its widespread repression of its citizens. *Id.* at 35.

In ignoring this evidence, and finding it implausible that after 50 years Respondent would suddenly be targeted for his political views, the IJ committed the same reversible error as occurred in *Zhao*. There, the Fifth Circuit found an abuse of discretion where the BIA and IJ refused to consider country condition reports that described how the Chinese government had broadened its persecution of Falun Gong practitioners to lower-level practitioners and not just leaders. *Zhao*, 404 F.3d at 305, 309. The Board should reverse the IJ and grant Respondent asylum.

IV. THE RESPONDENT IS ENTITLED TO WITHHOLDING OF REMOVAL.

An applicant for withholding of removal must show that his life or freedom would be threatened in his country because of, among other reasons, his political opinion. 8 U.S.C. § 241(b)(3)(A). An applicant must establish that it is more likely than not that he will be subject to persecution either by the government or at the hands of an organization or person from which the government cannot or will not protect the person. *E.g., INS v. Cardoza-Fonesca,* 480 U.S. 421, 430 (1987), *Matter of McMullen,* 17 I&N 542, 545 (BIA 1980). Because the IJ rejected Respondent's asylum claim, it also found he failed to qualify for withholding of removal. IJ at 14-15. Thus, the same misrepresentation of the record that undermines the asylum denial undermines the withholding ruling as well, and that too should be reversed.

V. THE RESPONDENT IS ENTITLED TO RELIEF UNDER THE CONVENTION AGAINST TORTURE.

Relief under CAT requires a two part, bifurcated, analysis: first, is it more likely than not that the alien will be tortured upon return to his homeland; and second, is there sufficient state action involved in that torture. *Iruegas-Valdez v. Yates*, 846 F.3d 806, 812 (5th Cir. 2017); 8 C. F. R. § 1208.16(c)(2). "Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment." 8 U.S.C. §

208.18(a)(2). Torture does not require a nexus to Respondent's political activity. *Tamara-Gomez v. Gonzales*, 447 F.3d 343, 350 (5th Cir. 2006).

The IJ improperly applied CAT when it determined there was insufficient evidence that the Cuban government was interested in harming Respondent, IJ at 16, and, in any event, Respondent could relocate, *id.* As he did in the asylum analysis, the IJ ignored the record, mischaracterized the nature of the 2017 and 2019 attacks on Respondent, and ignored the government's control over relocation. In sum, Respondent is entitled to a new hearing on his CAT claim where the IJ considers the evidence of record.

CONCLUSION

For the foregoing reasons, the Board should sustain the Respondent's appeal and grant his application for asylum. Alternatively, the Board should find Respondent credible and his evidence of corroboration sufficient, and remand to reconsider whether he met his burden of proof on establishing past and future persecution and a nexus to his political opinions; or entitlement to withholding of removal; or relief under CAT. In the least, the Board should remand for rehearing in which Respondent is given the opportunity to produce the additionally corroborative evidence from his wife and son, and the Cuban government regarding his employment prospects.

DATE

June 8, 2020

Respectfully submitted,

/s/ [redacted]
EOIR ID: [redacted]

PROOF OF SERVICE

On June 8, 2020, I, [redacted], mailed or delivered a copy of this Brief and any attached pages to the U.S. Department of Homeland Security/ICE, Office of the Chief Counsel in El Paso, TX by email through the ICE eservice and by first class mail to:

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