No. _____

In the
Supreme Court of the United States

SERAH NJOKI KARINGITHI,
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MATTHEW A. RICHARDS
TRACY S. ICKES
NIXON PEABODY LLP
One Embarcadero Center
32nd Floor
San Francisco, CA 94111
mrichards@nixonpeabody.com
tickes@nixonpeabody.com

JEROME MAYER-CANTÚ
Counsel of Record
4287 Gilbert Street
Oakland, CA 94611
(415) 530-6444
jmayercantu@gmail.com

Attorneys for Petitioner

October 7, 2019

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Congress has determined the "sole and exclusive procedure" for certain removal proceedings. 8 U.S.C. § 1229a(a)(3). To commence these proceedings, the government must serve noncitizens with a "notice to appear" specifying the proceedings' "time and place." *Id.* § 1229(a)(1)(G)(i).

The agency's implementing regulations define "notice to appear" differently—they do not require a "notice to appear" to specify the proceedings' time and place. *See* 8 C.F.R. § 1003.15(b). The Board of Immigration Appeals applies the regulation's definition and not the statute's.

Three circuits, including the court below, have applied *Auer* deference to the Board of Immigration Appeals' decision, even though the government has recently conceded that doing so conflicts with *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). Two circuits refuse to apply *Auer* deference and instead hold that the government violated section 1229.

The questions presented are:

1. Whether the government may commence removal proceedings by serving a noncitizen with a "notice to appear" that fails to specify the hearing's time and place.

2. Whether *Auer* deference allows an executive agency to interpret a regulation in a way that conflicts with a congressional statute.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Petitioner Serah Njoki Karingithi and Respondent William P. Barr,[1] in his official capacity as Attorney General of the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

- *Karingithi v. Whitaker*, No. 16-70885 (9th Cir.), on petition for review from Board of Immigration Appeals (opinion issued January 28, 2019; petition for rehearing denied May 8, 2019).

There are no additional proceedings in any state or federal court that are directly related to this case.

[1] William P. Barr has been substituted for former Acting Attorney General Matthew Whitaker, who was substituted for former Attorney General Jefferson B. Sessions III, who was substituted for former Attorney General Loretta Lynch.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The order and opinion of the court of appeals relating to the "notice to appear" is reported at 913 F.3d 1158. Pet. App. 1-12. The petition for rehearing was denied. Pet. App. 58-59.

The order and opinion of the court of appeals (Pet. App. 13-15), the opinion of the Board of Immigration Appeals (Pet. App. 16-26), and the immigration judge's order (Pet. App. 27-57) on the merits of Petitioner's asylum claim are unreported.

JURISDICTION

The order and judgment of the court of appeals was entered on January 28, 2019. The petition for rehearing was denied on May 8, 2019. On July 25, 2019, the time to file this petition was extended to October 7, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are as follows and reproduced at Pet. App. 60-69: 8 U.S.C. § 1229; 8 C.F.R. § 1003.14; 8 C.F.R. § 1003.15; and 8 C.F.R. § 1003.18.

INTRODUCTION

In any immigration case, the stakes are high. Deportation is a "drastic measure," akin to lifelong "banishment or exile." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (citations omitted). Ms. Karingithi faces an order of removal that would separate her from her husband and child in America and return her to

Kenya, where close family members have been victims of female genital mutilation. For Ms. Karingithi, deportation can strip away "all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

But this is no ordinary immigration case. It involves a federal immigration statute that the government has ignored in "almost 100 percent" of cases "over the last three years." *Pereira v. Sessions*, 138 S. Ct. 2105, 2111 (2018).

The statute in question describes the amount of notice noncitizens must receive before they are removed from this country. And Congress has spoken in unambiguous terms: the government "shall" serve noncitizens with a "notice to appear" specifying the proceedings' "time and place." 8 U.S.C. § 1229(a)(1)(G)(i).

This Court has already concluded that whenever the statute uses the phrase "notice to appear," those words carry the same meaning. *Pereira*, 138 S. Ct. at 2116. Moreover, this Court has concluded that the statutory phrase is so "clear and unambiguous" that the executive agency has no authority to alter its definition. *Id.* at 2113.

The Department of Homeland Security routinely ignores this congressional command. Instead, DHS chooses to follow its subsequently promulgated regulations, which define "notice to appear" differently than Congress did.

One regulation allows a notice to appear to omit the proceedings' time and place. 8 C.F.R. § 1003.15(b). A second regulation states that the government need only

provide that information "where practicable." *Id.* § 1003.18(b).

This petition asks whether an executive agency can write loopholes into statutes enacted by Congress. The answer is no.

An executive agency "literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986). Thus, if a statute and an agency regulation conflict, the statute must prevail—otherwise, the executive branch could "override Congress." *Id.* at 375.

The Ninth Circuit inverted this rule. It recognized a "significant difference" in the statutory and regulatory definition of the same three words. Pet. App. at 8. Yet the panel chose to follow "the regulatory definition, not the one set forth in [the statute]." Pet. App. at 9. The court reasoned that it was compelled to do so because the regulatory phrase "notice to appear" was ambiguous, so *Auer* deference tipped the scales in the government's favor. Pet. App. at 11. This approach mirrors the approach taken by the First and Sixth Circuits. *See Goncalves Pontes v. Barr*, __ F.3d __, No. 19-1053, 2019 WL 4231198, at *5 (1st Cir. Sept. 6, 2019) (lending "great deference" to the BIA); *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 312 (6th Cir. 2018) (affording "substantial deference").

The government has since abandoned the theory of deference that prevailed below. In a subsequent case, the government conceded that "the regulations at issue in this case are *not* 'genuinely ambiguous,'" so there "is no role for deference to play." Government's Response

to Petition for Rehearing, *Aguilar-Galdamez v. Barr*, No. 18-4122, Docket No. 20 (6th Cir. July 30, 2019) at 6 (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019)). (emphasis added). In other words, the government now recognizes that three circuits have applied the wrong legal standard.

The government's concession may have been prompted by the Seventh and Eleventh Circuits, which refuse to apply *Auer* deference. The Seventh Circuit applied no deference and found the agency had "brushed too quickly over the Supreme Court's rationale in *Pereira* and tracked the dissenting opinion rather than that of the majority." *Ortiz-Santiago v. Barr*, 924 F.3d 956, 962 (7th Cir. 2019). And the Eleventh Circuit similarly determined that the government's theory is "foreclosed" by this Court's decision in *Pereira. Perez-Sanchez v. U.S. Attorney Gen.*, 935 F.3d 1148, 1153 (11th Cir. 2019).

Ultimately, courts are split on the most important question of all: whether the government violated section 1229. Whereas eight circuits have answered in the negative, the Eleventh Circuit has concluded that the government's acts were "unquestionably deficient under the statute." *Perez-Sanchez*, 935 F.3d at 1153. Similarly, the Seventh Circuit was compelled to "conclude that the Notice [Petitioner] received was defective," such that the "omission violated the Immigration and Nationality Act." *Ortiz-Santiago*, 924 F.3d at 958, 961.

If courts agree on anything, it is the exceptional importance of this legal issue, which could affect "thousands, if not millions, of removal proceedings[.]"

Ortiz-Santiago, 924 F.3d at 962. Accordingly, the potential ramifications are "seismic." *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019).

STATEMENT OF THE CASE

Statutory and regulatory scheme. Before 1996, federal law allowed the government to initiate removal proceedings with a two-step notification system. *See* 8 U.S.C. § 1252b (1995). Under that system, the government first issued an Order to Show Cause to the noncitizen, who later received a second document: a Notice of Hearing which contained the hearing's time and place. *Id.*

Congress streamlined this two-step system when it enacted the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("Act"). The Act sets forth the "sole and exclusive" procedure for removal hearings. 8 U.S.C. § 1229a(a)(3). In a statutory section titled "Initiation of removal proceedings," Congress instructed that the government "shall" serve noncitizens with a single "notice to appear" specifying the proceedings' "time and place." § 1229(a)(1)(G)(i).

Section 1229 contains no exceptions to this time-and-place requirement. The absence of any exceptions is all the more stark given that a "practicability" exception can be found *elsewhere* in section 1229: though a notice to appear must ordinarily be served in person, service by mail is permitted "if personal service is not practicable." 8 U.S.C. § 1229(a)(1); *see* § 1229(a)(2) (providing a similar carve-out).

After section 1229 was enacted, the agency passed regulations to "implement the language of the amended

Act indicating that the time and place of the hearing must be on the Notice to Appear." *See* Conduct of Removal Proceedings, 62 Fed. Reg. 444-01, 449 (proposed January 3, 1997) (emphasis added).

Two of those regulations conflict with the statute. One regulation carves out an exception that doesn't exist in the statute: the government must provide this time-and-place information only "where practicable." 8 C.F.R. § 1003.18(b). A second regulation allows a notice to appear to omit time-and-place information altogether. § 1003.15(b). Put simply, the regulations "rewr[ote] the statute." *Lopez v. Barr*, 925 F.3d 396, 401 (9th Cir. 2019).

The agency originally described the "practicability" exception as applying to exceptional circumstances, such as "power outages" or "computer crashes/downtime." Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444-01, 449 (1996).

But at some point, the government allowed the exception to swallow the rule. In recent years, the government has "apparently never found it 'practicable' to send Notices that contained time and date information." *Ortiz-Santiago*, 924 F.3d at 960 (citation omitted). This despite the fact that "a scheduling system previously enabled DHS and the immigration court to coordinate in setting hearing dates in some cases." *Pereira*, 138 S. Ct. at 2119.

As the government conceded in *Pereira*, DHS has invoked this exception in "almost 100 percent" of

immigration cases over the past few years. 138 S. Ct. at 2111.

Pereira v. Sessions. In *Pereira*, the Court held that if a document fails to include the hearing's time and place, it is not a "notice to appear" under section 1229.[2] The question arose in the context of the "stop-time rule," which is triggered when a "notice to appear under section 1229(a)" has been filed. *See* 138 S. Ct. at 2109. To answer that "narrow" question (*id.* at 2110), the Court addressed several broader issues. The Court concluded that the phrase "notice to appear" always "carries with it the substantive time-and-place criteria required by § 1229(a)." *Id.* at 2116; *see id.* at 2115 ("[I]dentical words used in different parts of the same act are intended to have the same meaning.") (citation omitted).

Pereira recognized that this definition is uniform throughout the statute. For example, the phrase "notice to appear" appears in section 1229(b)(1), which governs noncitizens' ability to secure counsel. *Pereira* held that this version of a "notice to appear" necessarily had the same meaning. *See id.* at 2114-15. The Court also recognized that a notice to appear doubles as a charging document under the agency's regulations. *See id.* at 2115 n.7. The Court rejected the notion that this "regulatory" definition could deviate from the statutory definition depending on the purpose served by notice in a particular instance—it deemed that notion "atextual," "arbitrar[y]," and lacking any "convincing basis." *Id.*

---

[2] *Pereira* reversed decisions reached by the BIA and six courts of appeal. *See* 138 S. Ct. at 2120 (Kennedy, J., concurring).

In short, the Court has concluded that whenever the statute uses the phrase "notice to appear," the phrase carries the same meaning. *Pereira*, 138 S. Ct. at 2116 ("After all, it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." (citing *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 571 (2012))).

Further, since the statute is "clear and unambiguous," the Court concluded that there was no room for deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). *See Pereira*, 138 S. Ct. at 2113.

The Board of Immigration Appeals interprets *Pereira* narrowly. The BIA subsequently concluded that *Pereira* was "narrow" and "distinguishable." *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 443 (BIA 2018). It found that *Pereira* does not affect cases where "the 'stop-time' rule is not at issue." *Id.* The BIA therefore concluded that "a two-step notice process is sufficient" and refused to cancel removal proceedings where the notice to appear did not specify the time and place of the initial removal hearing. *Id.* at 447.

The proceedings below. Ms. Karingithi is a Kenyan citizen who overstayed her tourist visa. Pet. App. at 6. The immigration judge entered an order of removal, and the BIA rejected her appeal. Pet. App. at 55-56; *id*. at 22.

This Court issued its decision in *Pereira* while Ms. Karingithi's appeal to the Ninth Circuit was pending. Ms. Karingithi's "notice to appear" did not specify her removal hearing's time and date; instead, she received

that information in a separate document that same day. Pet. App. at 6. Following *Pereira*, she argued to the Ninth Circuit that the notice to appear was insufficient.

The Ninth Circuit rejected her appeal, reasoning that her argument was foreclosed by the BIA's decision in *Bermudez-Cota*. Pet. App. at 10-12. The Ninth Circuit recognized that the statute and the regulation defined "notice to appear" differently. Pet. App. at 8. Yet the panel explicitly declined to apply the "normal rule of statutory construction"—namely, that "identical words used in different parts of the same act are intended to have the same meaning." Pet. App. at 8-9 (citation omitted).

The Ninth Circuit excused this discrepancy by reasoning that the statute and the regulations are "unrelated." Pet. App. at 10. The panel concluded that Ms. Karingithi's challenge was "jurisdictional" in nature, and that "Section 1229 says nothing about the Immigration Court's jurisdiction." Pet. App. at 8. The panel distinguished *Pereira* because "the word 'jurisdiction' [does not] appear in the majority opinion." Pet. App. at 10.

The panel then deferred to the BIA's opinion in *Bermudez-Cota*. Without discussing whether or why the regulation interpreted by the BIA was ambiguous in the first instance, the panel held that "substantial deference" to the BIA's opinion was required unless "plainly erroneous, inconsistent with the regulation, or [did] not reflect the agency's fair and considered judgment." Pet. App. at 11 (quotation marks and citation omitted). The panel held that *Bermudez-Cota*'s

interpretation of *Pereira* "easily meets this standard." *Id.*

The Ninth Circuit denied Ms. Karingithi's petition for panel rehearing and rehearing en banc, with no judge requesting a vote. Pet. App. at 58-59.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with *Kisor v. Wilkie*.

A. *Kisor* reinforced the limits of *Auer* deference.

Courts retain a "critical role" in interpreting agency rules, an important limit on the "far-reaching influence of agencies and the opportunities such power carries for abuse." *Kisor v. Wilkie*, 139 S. Ct. at 2423. Accordingly, *Kisor* reassessed the doctrine of "*Auer* deference" and "reinforce[d] its limits." *Id.* at 2408. The Ninth Circuit's decision conflicts with *Kisor* in two ways:

First, *Kisor* emphasized that *Auer* deference is unwarranted when the regulation simply "parrots the statutory text." *Id.* at 2417 n.5 (citing *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006)). In this case, however, the Ninth Circuit gave "substantial deference" to the BIA's conclusion that the regulatory definition of "notice to appear" controls, even though the statutory phrase "notice to appear" has a "significant[ly] differen[t]" meaning. Pet. App. at 8, 11. This violation of the "anti-parroting" canon could not be more clear.

Second, *Kisor* requires that "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Kisor*, 139 S. Ct. at 2415 (citation omitted). The Court explained that in this fashion, *Auer* requires the "same approach" that *Chevron* does. *Id.* (citation omitted). But in this case, the Ninth Circuit found ambiguity without exhausting the traditional tools of construction. In fact, the court did not even discuss whether the regulation was ambiguous—it simply *assumed* that it was. Pet. App. at 11.

The Ninth Circuit's assumption cannot be reconciled with *Pereira*, where this Court held that the phrase "notice to appear" is subject to a traditional canon of construction: namely, the canon that "identical words used in different parts of the same act are intended to have the same meaning." 138 S. Ct. at 2115 (citation omitted). Accordingly, the Court concluded that the words "notice to appear" were not ambiguous and did not trigger *Chevron* deference. 138 S. Ct. at 2113.

The Ninth Circuit explicitly refused to apply this canon. *See* 913 F.3d at 1160 (admitting that it was abandoning the "normal rule"). But if *Auer* and *Chevron* demand the "same approach," *see Kisor*, 139 S. Ct. at 2415, there is no way that the phrase "notice to appear" could trigger deference under one doctrine (*Auer*) but not the other (*Chevron*).

B. The government has conceded that *Auer* deference is unwarranted here.

In a Sixth Circuit case involving the same issue, the government conceded that *Auer* deference is unwarranted. In that case, the government admitted

that "the regulations at issue in this case are *not* 'genuinely ambiguous,' and thus there is *no role for deference to play*." Government Response to En Banc Petition, *Aguilar-Galdamez v. Barr*, No. 18-4122, Docket No. 20 (6th Cir. July 30, 2019) at 6 (citing *Kisor*, 139 S. Ct. at 2414) (emphasis added). Accordingly, the government necessarily concedes that the Ninth Circuit was wrong to place a thumb on the scales in the government's favor.[3]

In sum, the Ninth Circuit's decision cannot be reconciled with *Kisor*, and the government now recognizes as much. In fairness to the Ninth Circuit, its decision was rendered before *Kisor* was decided, and before the government conceded that *Auer* deference was unwarranted. Thus, at the very least, if this Court does not grant plenary review, it should instead grant the petition, vacate the order below, and remand the case for further proceedings in light of *Kisor*.

---

[3] The Ninth Circuit's version of *Auer* deference is generous indeed. That court has explained that an agency's interpretation of its own regulation "is afforded *even more* deference than that which courts normally give agency interpretations of statutes." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 1004 (9th Cir. 2010) (citation omitted) (emphasis added). *Kisor* abrogated a materially identical standard. *See* 139 S. Ct. at 2416 (overruling *Ohio Dept. of Medicaid v. Price*, 864 F.3d 469, 477 (6th Cir. 2017), which held that "agency constructions of rules receive greater deference than agency constructions of statutes").

II. This issue has left the circuit courts in an irreconcilable three-way split.

Ten circuits have weighed in on the proper definition of a "notice to appear," and those decisions have generated circuit splits on three separate questions:

- Whether *Auer* deference applies;
- Whether 8 U.S.C. § 1229(a)(1)(G)(1) is a jurisdictional requirement or a claims-processing rule; and
- Whether the government violated the statute.

This Court's intervention is urgently needed to bring order to the chaos created by the circuits below.

A. Three circuits believe that *Auer* deference is owed, but seven circuits disagree.

The Sixth Circuit was the first to address this issue. *Hernandez-Perez v. Whitaker*, 911 F.3d 305 (6th Cir. 2018).[4] That court concluded that the regulations were entitled to *Auer* deference, and thus it was required to rule in the agency's favor unless its actions were "plainly erroneous or inconsistent with the regulation."

[4] There, petitioner's counsel raised this argument for the first time in a reply brief, then "abandoned" it during oral argument. *Id.* at 310-11. The Sixth Circuit therefore ruled without the benefit of full exploration of the issue.

Id. at 312.[5] The Sixth Circuit admitted that its legal analysis generated some "common-sense discomfort" but reassured itself by reasoning that a ruling for the petitioner "would have unusually broad implications." *Id.* at 314.

In the proceedings below, the Ninth Circuit followed the Sixth Circuit's lead and applied *Auer* deference. Pet. App. at 11. The First Circuit has taken a similar path. *Goncalves Pontes v. Barr*, No. 19-1053, 2019 WL 4231198, at *5 (1st Cir. Sept. 6, 2019) (extending "great deference" to the BIA) (citation omitted).

No other circuit has suggested that any deference is warranted. In fact, in *Ortiz-Santiago*, the Seventh Circuit rejected the BIA's analysis because the agency "brushed too quickly over the Supreme Court's rationale in *Pereira* and tracked the dissenting opinion rather than that of the majority." 924 F.3d at 962. And in *Perez-Sanchez*, the Eleventh Circuit concluded that the government's request for deference was "foreclosed" by *Pereira*. 935 F.3d at 1153.

B. Six circuits believe that the agency defines its own jurisdiction, four circuits disagree, and all misunderstand the application of "jurisdiction" to administrative agencies.

In *City of Arlington v. F.C.C.*, 569 U.S. 290 (2013), the Court warned that in the agency context, any

---

[5] As noted above, *Kisor* recently invalidated the Sixth Circuit's version of *Auer* deference. *See* 139 S. Ct. at 2416 (abrogating *Ohio Dept. of Medicaid v. Price*, 864 F.3d 469, 477 (6th Cir. 2017)).

distinction between "jurisdictional" and "nonjurisdictional" matters is a "false dichotomy." *Id.* at 304, 297 ("a mirage"). For Article III courts, the distinction is "very real," but for agencies, that distinction is "illusory." *Id.* at 297-98. It follows that "judges should not waste their time in the mental acrobatics needed" to decide whether a rule is "jurisdictional" or "nonjurisdictional." *Id.* at 301. Instead, "[n]o matter how it is framed, the question … is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *Id.* at 297 (emphasis in original).[6]

The courts of appeals have lost sight of this guidance and are mired in a debate as to whether a defective notice to appear deprives the immigration court of jurisdiction or is merely a claims processing error.

The Second, Third, and Eighth Circuits have proceeded under a "jurisdictional" theory: namely, that section 1229 governs the requirements of a notice to appear, whereas the concept of "jurisdiction" is governed by the agency's regulation. *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *accord Banegas Gomez v. Barr*, 922 F.3d 101, 111 (2d Cir. 2019); *Nkomo v. U.S. Att'y Gen.*, 930 F.3d 129, 134 (3d Cir. 2019). The First Circuit, the Sixth Circuit, and the Ninth Circuits have

---

[6] In another case involving the "notice to appear" issue, the government has agreed: "in the context of administrative courts, "jurisdiction" is an ill-fitting term; the real question is the agency's statutory authority to act." Government's Supplemental Answering Brief, *United States v. Valverde-Rumbo*, Nos. 16-10188, 17-10415, 2018 WL 5927532 (9th Cir. Nov. 6, 2018), at *8.

adopted similar reasoning. *Goncalves Pontes*, 2019 WL 4231198, at *5; *Hernandez-Perez*, 911 F.3d at 313; Pet. App. at 8.[7]

These courts have erected a false dichotomy: namely, that the petitioners' challenges were "jurisdictional" in nature, and that section 1229 "does not … explain when or how jurisdiction vests with the immigration judge." *See, e.g.*, Pet. App. at 10. The decision below engaged in similar acrobatics to distinguish *Pereira*, reasoning that *Pereira* is silent on jurisdiction. *Id*.

City of Arlington v. F.C.C. demolishes this false construct. The question is not "jurisdiction" but the extent of the agency's statutory authority. As a matter of statutory interpretation, the answer to this question is straightforward: Congress determined the "sole and exclusive" procedure for removal hearings like the one at issue here. 8 U.S.C. § 1229a(a)(3). In a section titled "Initiation of removal hearings," Congress commanded that the government "shall" serve noncitizens with a single "notice to appear" specifying the removal proceedings' "time and place." 8 U.S.C. § 1229(a)(1)(G)(i). Here, the record is clear: the agency's Notice to Appear did not include the hearing's time and

[7] Ms. Karingithi asserted in the proceedings below that "neither the IJ nor the BIA had subject matter jurisdiction." Ninth Circuit Docket No. 56 at 14. This phrasing was the product of her challenging *Bermudez-Cota*'s formulation and application of the concept. But whether labeled jurisdiction or something else, Ms. Karingithi's position has been consistent: the agency's regulations remain "inconsistent with … the statutory text." Ninth Circuit Docket No. 56 at 17.

place. Accordingly, the agency strayed beyond the bounds of its statutory authority.

A simple hypothetical explains the flaw in the approach taken by the court below. Section 1229(a)(1) specifies that the notice to appear must be served personally or via mail. Imagine that DHS found this to be impractical, and so it promulgated a regulation allowing service by email. Obviously, that would be unlawful, for regulations "must be consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 U.S. 864, 873 (1977); *accord Chevron*, 467 U.S. at 842–43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

Now imagine that the agency passed the following regulation: "Jurisdiction vests, and proceedings before an Immigration Judge commence, when a Notice to Appear is emailed to the noncitizen." Under the Ninth Circuit's logic, this *would not* violate the statute, because "the regulations, not § 1229(a), define when jurisdiction vests," and "Section 1229 says nothing about the Immigration Court's jurisdiction." Pet. App. at 8.

Put simply, the view of "jurisdiction" espoused by the First, Second, Third, Sixth, Eighth, and Ninth Circuits gives agencies a roundabout method to defy Congress.

Four circuits, in contrast, have concluded that the regulation is a claims-processing rule, and so any defects in a "notice to appear" are not jurisdictional. The Seventh Circuit was the first to conclude that the

statute dictating the content of a Notice to Appear is a claims-processing rule. *Ortiz-Santiago*, 924 F.3d at 9623. The Seventh Circuit indicated this was the first application of such a concept to administrative agencies. *Id.* at 962-63.

After *Ortiz-Santiago* was decided, the Fourth Circuit agreed that the "notice to appear" regulation is claims-processing rule, though it concluded that the government had complied with the statute and the regulations. *United States v. Cortez*, 930 F.3d 350, 359 (4th Cir. 2019), *as amended* (July 19, 2019) (recognizing the circuit split on the jurisdictional issue); *id.* at 363 (recognizing the circuit split on whether the notice to appear violated the statute). The Fifth Circuit largely agreed with the Fourth Circuit's analysis. *Pierre-Paul v. Barr*, 930 F.3d 684, 691 (5th Cir. 2019) (recognizing the circuit split). The Eleventh Circuit followed suit, though it ultimately concluded that the government violated section 1229. *Perez-Sanchez*, 935 F.3d at 1153.

The Fourth, Fifth, Seventh, and Eleventh Circuits are wrong because they are framing this as though claims-processing rules can be imported from jurisprudence regarding jurisdiction. In doing so, they sidestep the fundamental question: did the government have statutory authority to act? *Arlington*, 569 U.S. at 304.

Of course the agency cannot enforce a regulation that is contrary to a statute. The sudden trend among the circuits of excusing the error as one of claims-processing and permitting a government agency to violate a statute with impunity is a fundamental breach of the separation of powers.

C. Seven circuits hold that the government complied with section 1229, but two circuits hold that the government violated the statute.

The First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits have held that the government complied with section 1229. However, the Eleventh Circuit has concluded that the government's acts were "unquestionably deficient under the statute." *Perez-Sanchez*, 935 F.3d at 1153. And the Seventh Circuit was compelled to "conclude that the Notice [Petitioner] received was defective," such that the "omission violated the Immigration and Nationality Act." *Ortiz-Santiago*, 924 F.3d at 958, 961.

The Seventh Circuit has described the government's key arguments as "unpersuasive," "absurd," and contrary to "the most basic rules of statutory interpretation." *Id.* at 962. That court started with the "uncontroversial proposition" that no agency has may "rewrite the text of a statute." *Id.* (citing *Chevron*, 467 U.S. at 842-43). It went on to conclude that "[i]f Congress has defined a term, then an implementing regulation cannot re-define that term in a conflicting way." *Id.*

From there, the court rejected the government's "efforts to salvage the Notice" as "unpersuasive":

> [The government] wants us to find that 8 C.F.R. § 1239.1, entitled "Notice to Appear," is not talking about the same "Notice to Appear" that is defined in the statute. *See also* 8 C.F.R.

> §§ 1003.15, 1003.18 (also referring to a "Notice to Appear"). *That is absurd.*

Id. at 961-62 (emphasis added).

The Seventh Circuit also rejected the government's suggestion that *Pereira* was "narrow" to the point of irrelevance: "*Pereira* is not a one-way, one-day train ticket." *Id.* at 961. Accordingly, the court concluded that the defective notice "violated the Immigration and Nationality Act" (*id.* at 958), and "urge[d] the Department of Homeland Security to be more scrupulous in its statutory compliance" (*id.* at 965).

In short, the only circuit courts to examine the agency's authority to act, without applying deference where none is due, have concluded that the government violated the Act. *Ortiz-Santiago*, 924 F.3d at 958; *Perez-Sanchez*, 935 F.3d at 1153.

III. This case is an ideal vehicle to resolve the circuit conflict.

This issue presents a purely legal question of statutory interpretation that does not meaningfully vary from case to case. Ms. Karingithi raised this issue in her supplemental brief and petition for rehearing below. The Ninth Circuit issued a published decision addressing her argument. Moreover, nine other circuits have already weighed in on this matter.

IV. This recurring issue is exceptionally important.

A. Because of the government's actions, this issue could affect hundreds of thousands of immigration cases.

There is one area where the circuits are unanimous: this issue could affect "thousands, if not millions, of removal proceedings[.]" *Ortiz-Santiago*, 924 F.3d at 962.

The Sixth Circuit recognized that resolving this issue could have "unusually broad" consequences. *Hernandez-Perez*, 911 F.3d at 314. And the Eighth Circuit described this issue as containing ramifications that are "seismic." *Ali*, 924 F.3d at 986; *accord Banegas Gomez*, 922 F.3d at 112 (recognizing that this issue could have "far reaching … consequences").

The government has made the same point to various circuit courts. Recently, the government stated that the "disruptive potential of this argument is enormous[.]" Government's Brief, *United States v. Veloz-Alonzo*, No. 18-3940 (6th Cir. Nov. 30, 2018), 2018 WL 6435776, at *28 n.1. It has elsewhere described the issue as "sweeping" and "broad." Government's Supplemental Answering Brief, *United States v. Valverde-Rumbo*, Nos. 16-10188, 17-10415 (9th Cir. Nov. 6, 2018), 2018 WL 5927532, at *13-14.

Since a valid removal order is an element of a prosecution for illegal reentry under 18 U.S.C. § 1326, the government has recognized that this issue could affect "the prosecution of thousands of similarly situated defendants." Government's Brief, *United*

States v. Pedroza-Rocha, 2019 WL 1568040, at *9 (5th Cir. Apr. 18, 2019); *id.* at *28 (deeming the consequences "staggering"). And since the government seeks deference on an issue with potential criminal consequences, "alarm bells should be going off." *See United States v. Havis*, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring).

It is profoundly regrettable that the Executive branch has chosen to ignore Congress for so long, to the point that the prospect of adhering to the law may now seem daunting.

Whatever the short-term consequences may be, they are not a valid reason to deny this petition. The government should not be allowed to break the law in a systematic fashion, and then invoke the breadth of its lawlessness as a reason to deny relief. Accordingly, this Court should resolve the split in favor of Ms. Karingithi and "urge the Department of Homeland Security to be more scrupulous in its statutory compliance: it is much easier to do things right the first time than to do them over." *Ortiz-Santiago*, 924 F.3d at 965.

B. The decision below threatens the separation of powers.

Under our system of government, Congress makes laws and the "President, acting at times through agencies ..., faithfully executes them." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 327 (2014).

But the Executive's power to execute the laws "does not include a power to revise clear statutory terms that turn out not to work in practice." *Id.* (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (agency

lacked authority "to develop new guidelines or to assign liability in a manner inconsistent with" an "unambiguous statute")). Why? Because there is "no principle of administrative law" that permits the Executive branch to "rewrite" a "clear statutory term." *Id.* at 328 n.8.

But that is exactly what the agency did—it "rewr[ote] the statute." *Lopez*, 925 F.3d at 401. Even though Congress enacted a rule that contained no exceptions, the Executive branch bestowed upon itself a "practicability" exception. Having done so, "DHS apparently never found it 'practicable'" to comply with the statute. *Ortiz-Santiago*, 924 F.3d at 960.

When the agency created this regulatory escape hatch for itself, it did more than break the law; it also violated the separation of powers. The Ninth Circuit panel compounded the error—for "[i]f a court mistakenly allows an agency's transgression of statutory limits," then it "green-light[s] a significant shift of power from the Legislative Branch to the Executive Branch." *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at *22 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting). This Court should not allow the Ninth Circuit to "go down that road." *Id.*

CONCLUSION

The petition should be granted to resolve a circuit split regarding the Department of Homeland Security's ability to rewrite unambiguous congressional statutes. This Court's intervention is urgently needed—not just because this issue affects hundreds of thousands of

cases, but also because this issue squarely implicates the constitutional separation of powers. Courts cannot abdicate their critical role in checking agency overreach by deferring to the agency's interpretation of a regulation that conflicts with an unambiguous statute.

In the alternative, the Court should grant the petition, vacate the Ninth Circuit's decision, and remand for reconsideration in light of this Court's recent decision in *Kisor v. Wilkie*.

Respectfully submitted,

JEROME MAYER-CANTÚ
Counsel of Record
4287 Gilbert Street
Oakland, CA 94611
(415) 530-6444
jmayercantu@gmail.com

MATTHEW A. RICHARDS
TRACY S. ICKES
NIXON PEABODY LLP
One Embarcadero Center
32nd Floor
San Francisco, CA 94111
mrichards@nixonpeabody.com
tickes@nixonpeabody.com

Attorneys for Petitioner

October 7, 2019

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-70885

Agency No. A087-020-992

[Filed January 28, 2019]

SERAH NJOKI KARINGITHI, *Petitioner*,	)
v.	)
MATTHEW G. WHITAKER, Acting Attorney General, *Respondent.*	)

OPINION

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted October 11, 2018
San Francisco, California

Filed January 28, 2019

Before: M. Margaret McKeown, William A. Fletcher, and Jay S. Bybee, Circuit Judges.

App. 2

Opinion by Judge McKeown

SUMMARY*

Immigration

The panel denied Serah Karingithi's petition for review of the Board of Immigration Appeals' denial of relief from removal, holding that a notice to appear that does not specify the time and date of an alien's initial removal hearing vests an immigration judge with jurisdiction over the removal proceedings, so long as a notice of hearing specifying this information is later sent to the alien in a timely manner.

The Supreme Court recently held in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), that a notice to appear lacking the time and date of the hearing before an immigration judge is insufficient to trigger the stop-time rule for purposes of cancellation of removal relief. In light of *Pereira*, Karingithi argued that a notice to appear lacking the time and date of the hearing was insufficient to vest jurisdiction with the immigration court.

The panel rejected this argument. The panel noted that *Pereira* addressed the required contents of a notice to appear in the context of the stop-time rule and the continuous physical presence requirement for cancellation of removal under 8 U.S.C. §§ 1229(a), 1229b, but was not in any way concerned with the

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

immigration court's jurisdiction. The panel held that *Pereira*'s narrow ruling does not control the analysis of the immigration court's jurisdiction because, unlike the stop-time rule, the immigration court's jurisdiction does not hinge on § 1229(a). The panel explained that the issue of immigration court jurisdiction is instead governed by federal immigration regulations, including 8 C.F.R. §§ 1003.13, 1003.14(a), 1003.15(b), which do not require that the charging document include the time and date of the hearing.

The panel noted that its reading of the regulations was consistent with the Board's recent decision in *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (BIA 2018), which held that "a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings . . . so long as a notice of hearing specifying this information is later sent to the alien." The panel also concluded that the Board's decision in *Bermudez-Cota* warranted deference.

Because the charging document in this case satisfied the regulatory requirements, and Karingithi received subsequent timely notices including the time and date of her hearing, the panel held that the immigration judge had jurisdiction over the removal proceedings.

The panel declined to consider Karingithi's argument, in the alternative, that *Pereira* renders her eligible for cancellation of removal, because cancellation relief was a new claim that was not part of the present petition for review.

The panel addressed the merits of Karingithi's petition for review of the denial of asylum and related relief in a contemporaneously filed memorandum disposition.

COUNSEL

Ruby Lieberman (argued), Law Office of Ruby Lieberman, San Francisco, California, for Petitioner.

Greg D. Mack (argued) and Leslie M. McKay, Senior Litigation Counsel; Terri J. Scadron, Assistant Director; Joseph H. Hunt, Assistant Attorney General; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

Lonny Hoffman, Law Foundation Professor of Law, University of Houston Law Center, Houston, Texas, as and for Amicus Curiae.

OPINION

McKEOWN, Circuit Judge:

We consider whether the Immigration Court has jurisdiction over removal proceedings when the initial notice to appear does not specify the time and date of the proceedings, but later notices of hearing include that information. This question is governed by federal immigration regulations, which provide that jurisdiction vests in the Immigration Court when a charging document, such as a notice to appear, is filed. 8 C.F.R. §§ 1003.13, 1003.14(a). The regulations specify the information a notice to appear must contain; however, the time and date of removal proceedings are

not specified. 8 C.F.R. § 1003.15(b). Because the charging document in this case satisfied the regulatory requirements, we conclude the Immigration Judge ("IJ") had jurisdiction over the removal proceedings. This reading is consistent with the recent interpretation of these regulations by the Board of Immigration Appeals ("BIA" or the "Board"), *see Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (BIA 2018), and the only other court of appeals to reach this issue, *see Hernandez-Perez v. Whitaker*, 911 F.3d 305, 310–15 (6th Cir. 2018). We also note that the petitioner, Serah Njoki Karingithi, had actual notice of the hearings through multiple follow-up notices that provided the date and time of each hearing.

The Supreme Court recently addressed the required contents of a notice to appear in the context of cancellation of removal under 8 U.S.C. §§ 1229(a), 1229b. *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). *Pereira* was not in any way concerned with the Immigration Court's jurisdiction. Rather, the Court considered what information a notice to appear must contain to trigger the stop-time rule, which determines whether a noncitizen has been continuously present in the United States long enough to be eligible for cancellation of removal. *Id.* at 2110; *see also* 8 U.S.C. § 1229b. Unlike the stop-time rule, the Immigration Court's jurisdiction does not hinge on § 1229(a), so *Pereira*'s narrow ruling does not control our analysis. We conclude that the IJ had jurisdiction over Karingithi's removal proceedings and that the Board properly denied her petition. We address the merits of Karingithi's petition for review in a separate

memorandum disposition filed contemporaneously with this Opinion.

BACKGROUND

Karingithi, a native of Kenya, entered the United States on July 7, 2006 on a tourist visa. She violated her visa's terms by remaining in the United States past its six-month limit. On April 3, 2009, the Department of Homeland Security commenced removal proceedings by filing a notice to appear with the Immigration Court, charging Karingithi with removability under 8 U.S.C. § 1227(a)(1)(B). The notice to appear specified the location of the removal hearing. The date and time were "To Be Set." The same day, Karingithi was issued a notice of hearing, which provided the date and time of the hearing.

Karingithi conceded removability, but filed with the Immigration Court an application for asylum, withholding of removal, and protection under the Convention Against Torture. In the alternative, she requested voluntary departure. After multiple continuances spanning five years, as well as numerous hearing notices providing the date and time of proceedings, the IJ rejected all four grounds for relief, and ordered Karingithi removed. The BIA affirmed. Karingithi now challenges the IJ's jurisdiction over her removal proceedings and the BIA's decision.

ANALYSIS

The Attorney General has promulgated regulations governing removal proceedings, including when jurisdiction vests with the IJ. The relevant regulation, entitled "Jurisdiction and commencement of

proceedings," dictates that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court." 8 C.F.R. § 1003.14(a). A charging document is "the written instrument which initiates a proceeding before an Immigration Judge," and one of the enumerated examples is a notice to appear. 8 C.F.R. § 1003.13.

Because both the regulation and a statutory provision, 8 U.S.C. § 1229(a), list requirements for the contents of a notice to appear, we consider whether their requirements differ, and if so, which authority governs the Immigration Court's jurisdiction. According to the regulation, a notice to appear must include specified information, such as "[t]he nature of the proceedings," "[t]he acts or conduct alleged to be in violation of law," and "[n]otice that the alien may be represented, at no cost to the government, by counsel or other representative." 8 C.F.R. § 1003.15(b). Importantly, the regulation does not require that the time and date of proceedings appear in the initial notice. *See id.* Rather, the regulation compels inclusion of such information "*where practicable*." 8 C.F.R. § 1003.18(b) (emphasis added). When "that information is not contained in the Notice to Appear," the regulation requires the IJ to "schedul[e] the initial removal hearing and provid[e] notice to the government

and the alien of the time, place, and date of hearing."[1] *Id.*

Section 1229(a) requires that "[i]n removal proceedings . . . written notice (in this section referred to as a 'notice to appear') [ ] be given" to the noncitizen. The statute goes on to specify what information the notice must contain, and it largely mirrors the regulation's requirements with one significant difference: it requires, without qualification, inclusion of "[t]he time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i). Notably, the statute is silent as to the jurisdiction of the Immigration Court. *See generally* 8 U.S.C. § 1229.

Karingithi argues that if a notice to appear does not state the time for her initial removal hearing, it is not only defective under § 1229(a), but also does not vest jurisdiction with the IJ. The flaw in this logic is that the regulations, not §1229(a), define when jurisdiction vests. Section 1229 says nothing about the Immigration Court's jurisdiction. And for their part, the regulations make no reference to § 1229(a)'s definition of a "notice to appear." *See generally* 8 C.F.R. §§ 1003.13–1003.14. If the regulations did not clearly enumerate requirements for the contents of a notice to appear for jurisdictional purposes, we might presume they *sub silentio* incorporated § 1229(a)'s definition. *Cf. Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) ("The

---

[1] *Pereira* appears to discount the relevance of 8 C.F.R. § 1003.18 in the distinct context of eligibility for cancellation of removal. *See Pereira*, 138 S. Ct. at 2111. However, as discussed below, *Pereira*'s narrow holding does not govern the jurisdictional question that we address.

normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks omitted)). But the plain, exhaustive list of requirements in the jurisdictional regulations renders that presumption inapplicable here. Not only does that list not include the time of the hearing, reading such a requirement into the regulations would render meaningless their command that such information need only be included "where practicable." 8 C.F.R. § 1003.18(b). The regulatory definition, not the one set forth in § 1229(a), governs the Immigration Court's jurisdiction. A notice to appear need not include time and date information to satisfy this standard. Karingithi's notice to appear met the regulatory requirements and therefore vested jurisdiction in the IJ.

Pereira does not point to a different conclusion. To begin, *Pereira* dealt with an issue distinct from the jurisdictional question confronting us in this case. At issue was the Attorney General's statutory authority to cancel removal of "an alien who . . . has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of" her application for relief. 8 U.S.C. § 1229b(b)(1)(A). Under the statute's "stop-time rule," the "period of . . . continuous physical presence" is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). In *Pereira*, the Court acknowledged that it decided only a single, "narrow question": "If the Government serves a noncitizen with a document that is labeled 'notice to appear,' but the document fails to specify either the

time or place of the removal proceedings, does it trigger the stop-time rule?" *Pereira*, 138 S. Ct. at 2110. The Court held it did not, emphasizing multiple times the narrowness of its ruling. *See, e.g.*, *id.* at 2110, 2113.

Pereira's analysis hinges on "the intersection" of two statutory provisions: § 1229b(d)(1)'s stop-time rule and § 1229(a)'s definition of a notice to appear. *Id.* at 2110. The stop-time rule is not triggered by *any* "notice to appear"—it requires a "notice to appear *under section 1229(a)*." 8 U.S.C. § 1229b(d)(1) (emphasis added). *Pereira* treats this statutory cross-reference as crucial: "the word 'under' provides the glue that bonds the stop-time rule to the substantive time-and-place requirements mandated by § 1229(a)." *Pereira*, 138 S. Ct. at 2117. There is no "glue" to bind § 1229(a) and the jurisdictional regulations: the regulations do not reference § 1229(a), which itself makes no mention of the IJ's jurisdiction. *Pereira*'s definition of a "notice to appear *under section 1229(a)*" does not govern the meaning of "notice to appear" under an unrelated regulatory provision.

In short, *Pereira* simply has no application here. The Court never references 8 C.F.R. §§ 1003.13, 1003.14, or 1003.15, nor does the word "jurisdiction" appear in the majority opinion. This silence is hardly surprising, because the only question was whether the petitioner was eligible for cancellation of removal. *Pereira*, 138 S. Ct. at 2112–13. The Court's resolution of that "narrow question" cannot be recast into the broad jurisdictional rule Karingithi advocates.

The BIA recently issued a precedential opinion in which it rejected an argument identical to the one

advanced by Karingithi. *Bermudez-Cota*, 27 I. & N. Dec. at 442–44. The BIA's interpretations of its regulations are due "substantial deference," and should be upheld "so long as the interpretation sensibly conforms to the purpose and wording of the regulations." *Lezama-Garcia v. Holder*, 666 F.3d 518, 525 (9th Cir. 2011) (internal quotation marks omitted). We therefore defer to the Board's interpretations of ambiguous regulations unless they are "plainly erroneous," "inconsistent with the regulation," or do "not reflect the agency's fair and considered judgment." *Id.* (internal quotation marks omitted). *Bermudez-Cota* easily meets this standard and is consistent with our analysis.

In *Bermudez-Cota,* the Board stated that "a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings . . . so long as a notice of hearing specifying this information is later sent to the alien." *Id.* at 447. Regarding the regulations, the Board emphasized that 8 C.F.R. § 1003.14(a) does not "mandate that the [charging] document specify the time and date of the initial hearing before jurisdiction will vest" and that "8 C.F.R. § 1003.15(b) . . . does not mandate that the time and date of the initial hearing must be included in that document." *Id.* at 445. The Board also noted that the regulations only require a notice to appear to include the "time, place and date of the initial removal hearing, *where practicable*." *Id.* at 444 (quoting 8 C.F.R. § 1003.18(b)) (emphasis in original).

The BIA also found *Pereira*'s analysis inapplicable to the Immigration Court's jurisdiction, noting that "the respondent is not seeking cancellation of removal, and the 'stop-time' rule is not at issue, so *Pereira* is distinguishable." *Id.* at 443. The BIA placed significant weight on the fact that, in *Pereira*, "the Court did not purport to invalidate the alien's underlying removal proceedings or suggest that proceedings should be terminated." *Id.*

Recognizing the weakness of her jurisdictional argument, Karingithi urges, in the alternative, that *Pereira* renders her eligible for cancellation of removal. However, cancellation is a new claim that is not part of this petition for review. Karingithi has raised her cancellation claim in a motion to reconsider to the BIA, and she must await its determination. *See Plaza-Ramirez v. Sessions*, 908 F.3d 282, 286 (7th Cir. 2018) (refusing to consider cancellation claim pending before BIA that had not been raised in initial administrative proceeding); *see also Garcia v. Lynch*, 786 F.3d 789, 792–93 (9th Cir. 2015) (noting that we cannot "reach[ ] the merits of a legal claim not presented in administrative proceedings below" (internal quotation marks omitted)).

The bottom line is that the Immigration Court had jurisdiction over Karingithi's removal proceedings. And, as in *Bermudez-Cota*, the hearing notices Karingithi received specified the time and date of her removal proceedings. Thus, we do not decide whether jurisdiction would have vested if she had not received this information in a timely fashion.

PETITION DENIED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-70885

Agency No. A087-020-992

[Filed January 28, 2019]

SERAH NJOKI KARINGITHI,	)
	)
Petitioner,	)
	)
v.	)
	)
MATTHEW G. WHITAKER, Acting Attorney General,	)
	)
Respondent.	)
	)

MEMORANDUM[*]

On Petition for Review of an Order of the
Board of Immigration Appeals

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted October 11, 2018
San Francisco, California

Before: McKEOWN, W. FLETCHER, and BYBEE, Circuit Judges.

Serah Njoki Karingithi petitions for review of the Board of Immigration Appeals' ("BIA") decision denying her applications for asylum and withholding of removal. We have jurisdiction under 8 U.S.C. § 1252(a)(1), and deny the petition.[1]

The BIA correctly found that Karingithi was ineligible for asylum because her application was filed more than a year after she entered the United States. *See* 8 U.S.C. § 1158(a)(2)(B). Karingithi's plan to obtain other lawful immigration status was not an "extraordinary circumstance" excusing her late filing. *See* 8 U.S.C. § 1158(a)(2)(D). None of the examples of extraordinary circumstances listed at 8 C.F.R. § 1208.4(a)(5) include planning to apply for a visa or adjustment of status, nor is such a plan "of a similar nature or seriousness" as the enumerated examples. *Gasparyan v. Holder*, 707 F.3d 1130, 1135 (9th Cir. 2013).

Substantial evidence supports the BIA's conclusion that Karingithi was ineligible for withholding of removal. *See Sanjaa v. Sessions*, 863 F.3d 1161, 1164 (9th Cir. 2017). At most, Karingithi established she was subject to "unfulfilled threats," which does not

[1] We address Karingithi's contention that the Immigration Court lacked jurisdiction in this matter in an Opinion filed contemporaneously with this memorandum disposition.

compel the conclusion that she was subject to past persecution. *Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000). And while there is no doubt "that female genital mutilation constitutes persecution," *Benyamin v. Holder*, 579 F.3d 970, 976 (9th Cir. 2009), Karingithi has not shown a "clear probability" that she will be subject to female genital mutilation upon return to Kenya, *see Garcia v. Holder*, 749 F.3d 785, 791 (9th Cir. 2014).

PETITION DENIED.

APPENDIX C

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Date: MAR – 1 2016

File: A087 020 992 – San Francisco, CA

In re: SERAH NJOKI KARINGITHI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ruby Lieberman, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law

APPLICATION: Asylum, withholding of removal, Convention Against Torture

The respondent, a native and citizen of Kenya, appeals from an Immigration Judge's September 4, 2014, decision pretermitting as untimely her application for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, and

denying her applications for withholding of removal under section 241 (b)(3) of the Act and pursuant to the Convention Against Torture. The appeal will be dismissed.

We review an Immigration Judge's factual determinations, including credibility determinations, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i). The Board uses a de novo standard of review for questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent's asylum application is governed by amendments to the Act brought about by passage of the REAL ID Act of 2005 (I.J. at 4). The respondent, as an applicant for relief under the Act, bears the burden of establishing that she is eligible for, and deserving of, all relief sought. 8 C.F.R. § 1240.8(d); section 240(c)(4) of the Act.

The respondent's asylum claim is based on her fear of being forcibly subjected to the practice of female genital mutilation ("FGM") by the Mungiki (an anti-Western criminal group operating in Kenya) due to her being a Kikuyu and a westernized woman. The respondent claims that she was threatened with FGM before she left Kenya, and that the Mungiki have vowed to perform the procedure on all women, regardless of their age or marital status. *See* Exh. 2; Respondent's Brief at 21.

The Immigration Judge entered an adverse credibility determination based on the fact that the respondent represented herself as married in an

application for a nonimmigrant visa, and on the fact that an immediate relative visa petition filed on the respondent's behalf by her United States citizen husband was denied because the marriage was determined to be fraudulent. *See* I.J. at 10-13. Because we will affirm the Immigration Judge's denial of relief on the alternative basis that the respondent did not meet her burden of proof, we need not address the credibility determination.

We affirm the Immigration Judge's determination that the respondent failed to timely file an asylum application within one year of her July 2006 arrival into the United States and that the late filing (in August 2009) is not excused by changed circumstances that materially affect the respondent's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the filing period (I.J. at 6-8). *See* sections 208(a)(2)(B), 208(a)(2)(D) of the Act; *see also* 8 C.F.R. § 1208.4(a)(2). The respondent argued below that the delay in filing her asylum application is excused by the pending visa petition and application for adjustment of status (based on her marriage to the United States citizen), and the advice of an adviser that she pursue those forms of relief, i.e., that these constitute extraordinary circumstances.

We are unpersuaded by these arguments. The visa petition and the adjustment application were not filed until July 23, 2007—after the one-year deadline for her asylum claim had already passed (I.J. at 7). The fact that applications were not pending at the time that the one-year deadline passed undermines the respondent's claim that her reliance upon these applications

justified her delay in filing for asylum (I.J. at 7). Furthermore, to the extent that the respondent argues that she relied on her *plan* to file for adjustment of status based on her marriage to a United States citizen even before that application was prepared, we do not find such reliance reasonable where the application had not yet been filed. Finally, we affirm the Immigration Judge's finding that given the fact that the respondent was unable to testify about when, exactly, she received the advice from the immigration adviser to file for adjustment of status (instead of asylum), she is unable to meet her burden to prove that this advice constitutes an extraordinary circumstance excusing the delay in filing her asylum application. *See* I.J. at 7-8.

We therefore find no reason to disturb the Immigration Judge's decision to pretermit the respondent's asylum claim. We specifically reject the respondent's appellate contention that our unpublished decision stating that an "approved labor certification qualified as an 'extraordinary circumstance'" is persuasive authority in favor of finding an exception to the filing deadline in the respondent's case. *See* Respondent's Brief at 17. First, the decision referenced in the Respondent's brief provides no details with regard to the timing of the labor certification, i.e., to demonstrate that the circumstances there were similar to those of the respondent's case, in which the visa petition was not even filed when the one year deadline passed. Second, the case is distinguishable since in that decision, we stated that the *approved* labor certification could constitute an extraordinary circumstance, and here, the respondent's visa petition was not approved,

and certainly was not approved around the time of the asylum filing deadline.

Turning to the remaining application for withholding of removal under section 241(b)(3) of the Act, we first affirm the Immigration Judge's finding that the respondent did not suffer past persecution, given the absence of physical harm or reliable evidence that the threats levied against her rose to the level of persecution (I.J. at 14-16).[1] *See Halim v. Holder,* 590 F.3d 971, 976 (9th Cir. 2009); *Sangha v. INS,* 103 F.3d 1482, 1487 (9th Cir. 1997). Accordingly, no presumption as to future harm arises on this record.

The Immigration Judge found that based on the record as a whole, the threat of future harm to the respondent in the form of FGM does not rise to the level of "more likely than not" (I.J. at 17-20). The Immigration Judge found without clear error that although the record reflects that about 34% of Kikuyu women undergo FGM, the vast majority of the FGM procedures are performed on women and girls younger than the respondent (I.J. at 18-19). Anecdotal evidence of FGM being performed on women in their 40s and older—such as the two described in the respondent's mother's letter—does not constitute adequate evidence to establish that the respondent faces a probability of undergoing forcible FGM (I.J. at 19-20). *See Ridore v. Holder,* 696 F.3d 907 (9th Cir. 2012).

---

[1] We reach this conclusion even considering the letter from the principal of the respondent's school, discussing the efforts to protect schoolgirls from the Mungiki. *Cf.* Respondent's Brief at 22-23.

We note, and agree with, the respondent's appellate contention that having the Mungiki threaten to perform FGM on all women regardless of their age can support a subjective fear. *Cf.* Respondent's Brief at 21. But as the Immigration Judge found, without objective evidence in the record that the Mungiki actually carried out that threat, or at least took steps to carry it out, the threat does not support a conclusion that a person in the respondent's circumstances would face a *likelihood of* FGM. We therefore find that the record does not reflect that she is eligible for relief on this basis, even assuming arguendo that her fear is on account of a protected ground. *See Matter of A-T-,* 24 I&N Dec. 296, 302-04 (BIA 2007), vacated on other grounds, *Matter of A-T-,* 24 I&N Dec. 617 (A.G. 2008).

We also affirm the finding that the respondent has not shown a clear probability of torture at the instigation of, or with the consent or acquiescence of, current government officials or persons acting in an official capacity (I.J. at 21-22). We first find no clear error in the finding that the respondent has not shown that it is likely that she would be subjected to FGM (I.J. at 22). *Ridore v. Holder, supra.* A public official's acquiescence to torture "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." 8 C.F.R. § 1208.18(a)(7). We affirm the Immigration Judge's finding that the fact that some tribes continue to practice FGM does not necessarily indicate that a person in the Kenyan government would affirmatively consent, acquiesce, or remain

willfully blind to this (I.J. at 23). *See Matter of J-F-F-,* 23 I&N Dec. 912 (A.G. 2006).

The respondent argues that the Immigration Judge should not have denied her the relief of voluntary departure in the exercise of discretion. *See* Respondent's Brief at 24. This contention appears related to her appellate argument that the Immigration Judge erred in finding that she lacked credibility. Considering the record as a whole, we find no clear error in the Immigration Judge's finding that the respondent was untruthful in her testimony about her 2006 nonimmigrant visa application, in which she claimed to be married when she was not (I.J. at 10; Exh. 12). Although the respondent attempts to explain this misrepresentation by saying that she considered her boyfriend to be her de facto husband, this statement does not explain why she initially denied ever claiming that she was married (Tr. at 104-05). The finding that the respondent lied during testimony to the Immigration Judge, when she discussed her application for a nonimmigrant visa, does not contain clear error (I.J. at 10-11). We also find no clear error in the finding that this application was completed when the respondent lived in Botswana, and as such, she was not fleeing persecution in Kenya (I.J. at 11-12, Tr. at 107). Based on this, we find no cause to disturb the Immigration Judge's discretionary denial of voluntary departure.

Accordingly, the following order is entered.

ORDER: The appeal is dismissed.

/s/
FOR THE BOARD

March 2015

Note:

On October 1, 2013, the Board's mailing address changed, and mail operations were modified to accommodate that change. Per J Panel policy, this notice will be attached to incoming mail received during the month of March. Filings should be construed as timely, provided that the following conditions are met:

(1) The filing was due during the month of March 2015, and

(2) It was received at the Board no later than April 6, 2015.

Donna Carr
Chief Clerk

[SEAL]

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

Lieberman, Ruby
Law Office of Ruby Lieberman
369 Pine Street, # 725
San Francisco, CA 94104

DHS/ICE Office of Chief Counsel - SFR
P.O. Box 26449
San Francisco, CA 94126-6449

Name: KARINGITHI, SERAH NJOKI

A 087-020-992

Type of Proceeding: Removal

Type of Appeal: Case Appeal

Date of this notice: 2/9/2015

Filed By: Alien

NOTICE - BRIEFING EXTENSION REQUEST GRANTED

Alien's original due date: 2/19/2015
DHS' original due date: 3/12/2015

o The request by the alien for an additional amount of time to submit a brief, which was received on 2/5/2015 , is GRANTED.

o The alien's brief must be **received** at the Board of Immigration Appeals on or before 3/12/2015

o The DHS' brief must be **received** at the Board of Immigration Appeals on or before 4/2/2015

PLEASE NOTE

WARNING: If you indicate on the Notice of Appeal (Form EOIR-26) that you will file a brief or statement, you are expected to file a brief or statement in support of your appeal. If you fail to file a brief or statement within the time set for filing in this briefing schedule, the Board may summarily dismiss your appeal. See 8 C.F.R. § 1003.1(d)(2)(i)(E).

The Board generally does not grant more than one extension per party or per case, if detained. Therefore, if you have received an extension, you should assume that you will not be granted any further extensions. Each party's current due date is stated above.

If you file your brief late, you must file it along with a motion for consideration of your late-filed brief. There is no fee for such a motion. The motion must set forth in detail the reasons that prevented you from filing your brief on time. You should support the motion with affidavits, declarations, or other evidence. Only one such motion will be considered by the Board.

FILING INSTRUCTIONS

IMPORTANT: The Board of Immigration Appeals has Included two copies of this notice.

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

File: A087-020-992

[Filed September 4, 2014]

In the Matter of	)
	)
SERAH NJOKI KARINGITHI	)
	)
RESPONDENT	)
	)

IN REMOVAL PROCEEDINGS

CHARGES:	Section 237(a)(1)(B) of the Immigration and Nationality Act - Visa overstay.
APPLICATIONS:	Asylum, withholding of removal under the Immigration and Nationality Act, protection under the Convention Against Torture, and in the alternative voluntary departure.

ON BEHALF OF RESPONDENT: RUBY LIEBERMAN

ON BEHALF OF DHS: AARON KEESLER, ERIN LOPEZ

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a female native and citizen of Kenya. She was born July 7, 1978. Respondent was served with a Notice to Appear on April 2, 2009 charging her with removability under Section 237(a)(1)(B) of the Immigration and Nationality Act as someone who remained longer than was permitted by the visa that he or she used to enter. At a master calendar hearing on July 8, 2009 respondent admitted the factual allegations, which the Court renumbered oddly, as is reflected in the Notice to Appear. Respondent also conceded the charge of removability. Accordingly the Court finds that removability has been established by clear and convincing evidence.

Respondent seeks relief from removal in the form of asylum, withholding of removal under the Immigration and Nationality Act, and protection under Article 3 of the Convention Against Torture. In the alternative respondent requests relief in the form of voluntary departure. The issue before the Court today then is respondent's eligibility for these various forms of relief.

EVIDENCE

The Court has marked and admitted into evidence the majority of the exhibits that have been marked. To the extent that exhibits have been excluded from the record I will address that after I identify the exhibits for the record. Exhibit 1 is the Notice to Appear. Exhibit 1-A is a lodged allegation 4 which explains the odd numbering on the NTA. For the record respondent

admitted factual allegation 4 in the I-261 at Exhibit 1-A. Exhibit 2 is an asylum application and supporting documents which respondent submitted in court August 12, 2009. Exhibit 3 are supporting documents submitted by the respondent at the window March 8, 2012 and they consist of Tabs J through O. Exhibit 4 is a single page which contains updates to the respondent's I-589 application regarding respondent's employment. Exhibit 5 are supplemental documents submitted by the respondent at the window March 29, 2013. Exhibit 6 is the Country Report on Human Rights Practices for Kenya for 2011. Exhibit 7 is a submission of documents by the Department of Homeland Security. Exhibit 7 is admitted except for page 5 which is excluded from the record as the Court will explain later. Exhibit 8 are supporting documents for the asylum application submitted June 3, 2013 by the respondent. Exhibit 9 are other supporting documents with no cover sheet. It appears that they were attached to a brief. So I marked these documents as an exhibit but did not mark the other documents that were attached to the brief. Exhibit 10 is an update to the Form I-589 and other supporting documents for the asylum application submitted at the window July 14, 2014. Exhibit 11 is the respondent's application for adjustment of status which was submitted in court I believe by the Department of Homeland Security on August 4, 2014. Exhibit 12 is respondent's application for a non-immigrant visa which was submitted in court by the Department of Homeland Security on August 4, 2014. Exhibit 13 is the Human Rights Report for Botswana for 2013. Exhibit 14 is the Human Rights Report for Botswana for 2007. Exhibit 15 is the Human Rights Report for Botswana for 2003.

With respect to the Human Rights Reports at Exhibits 13, 14, and 15 the one with the most relevance apparently is the one from 2003 but the Court will admit all of them into the record as there really is no reason to exclude them.

With respect to Exhibit 7 page 5, that document contains a statement by the respondent's ex-husband regarding their marriage here in the United States, and since that document was offered by the Department of Homeland Security but no effort was made on behalf of the Department of Homeland Security to secure the declarant as a witness in court so that he could be cross-examined, the Court excluded the hearsay statement under Ninth Circuit case law, specifically Cunanan v. INS, 856 F.2d 1373 (9th Cir. 1988). The Ninth Circuit in that case indicated that reasonable efforts must be made to produce a witness for cross-examination before such a hearsay statement should be admitted in an Immigration proceeding. That absent an effort to make the witness available for cross-examination it would be unfair to allow the hearsay into the record. In this case, the Government was given an opportunity to produce a witness and declined to do so. So page 5 of Exhibit 7 is excluded.

On that same note, the Court did allow the CIS letter, which states the basis for the denial of the respondent's application for adjustment of status, and refers to the statements made by her ex-husband. I admitted as non-hearsay on the grounds that it is being offered to explain why CIS took the path that it took and why it made the decision it made, rather than being admitted for the truth of the matter asserted

therein, and therefore was not hearsay in the CIS document.

The Court will also note that there are several statements in the record, a couple I believe from the respondent's mother, and some other documents. For example, a letter that purports to be from respondent's school in Kenya, the boarding school she was at in high school. The Court will admit those documents in the record but they will be given reduced weight because the preparers of those documents were not presented for cross-examination and therefore the Government did not have an opportunity to challenge the basis for the statements that were made in those documents, or the foundation for those statements.

Based upon the evidence in the record, including the testimonial and documentary evidence, the Court makes the following findings of fact and conclusion of law.

ASYLUM

Respondent bears the burdens of proof and persuasion on her application for asylum. See INA Section 208 and 8 C.F.R. Section 1240.8(d). To establish eligibility for a grant of asylum an alien must demonstrate that she is a refugee. The Act defines refugee as any person who is unable or unwilling to return to her home country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA Sections 208 and 101 (a)(42)(A). Under the REAL ID Act, which is applicable to respondent's application as it was submitted well

beyond the effective date of that Act, an applicant must establish that one of the five enumerated grounds was or will be at least one central reason for persecution of the applicant. INA Section 208(b)(1)(B)(i).

If an applicant for asylum presents specific facts establishing that she has actually been a victim of persecution based on one of the five enumerated grounds then the applicant is entitled to a rebuttable presumption of a well-founded fear of future persecution. 8 C.F.R. Section 1208.13. In the absence of a presumption based upon past persecution an alien must show that a reasonable person in her circumstance would fear persecution on one of the five enumerated grounds if she were to return to her country of nationality. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

To meet the burden of establishing the existence of a well-founded fear an asylum applicant must demonstrate both a subjectively genuine and objectively reasonable fear. Cardoza-Fonseca, 480 U.S. at 430-31. This subjective component may be satisfied by respondent's own testimony if that testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for the alien's fears. Corroborative evidence may be necessary, however, particularly when an alien's asylum claim is based upon general conditions of the alien's country of origin.

The objective component requires the respondent to show, through credible, direct, and specific evidence in the record, facts that would lead a reasonable person in similar circumstances to fear persecution. Dyarte-De

Guinac v. INS, 179 F.3d 1156, 1159 (9th Cir. 1999). The objective reasonableness of an alien's fear can be based on accounts of what has happened to others similarly situated such as those reported in the current Department of State County Report on Human Rights Practices or on other reliable sources. See Matter of Exame, 18 I&N Dec. 303, 304-5 (BIA 1982).

The applicant must establish that there is a reasonable possibility of suffering persecution on account of one of the five enumerated grounds if she were to return to her country, and that she is unable or unwilling to return to, or avail herself of the protection of that country because of such fear. 8 C.F.R. Section 1208.13.

TIME LIMIT FOR FILING APPLICATION

In 1996 Congress amended INA Section 208 to require that an asylum applicant demonstrate by clear and convincing evidence that she filed her application no more than one year after last entering the United States. An applicant may overcome the one-year bar by establishing the existence of changed circumstances which materially affect the applicant's eligibility for asylum, or by showing extraordinary circumstances relating to the delay in filing the application. INA Sections 208(a)(2)(B) and (a)(2)(D). The terms, changed circumstances and extraordinary circumstances, are defined by regulation at 8 C.F.R. Section 1208.4(a)(4) and (a)(5).

Respondent entered the United States on a visitor's visa on July 7, 2006. She submitted her asylum application to the Court on August 12, 2009. On its

face, therefore, the application is untimely. Respondent argues that she should be excused from complying with the one-year deadline due to extraordinary circumstances. First, she claims that she should be excused from filing within one year because she was pursuing adjustment of status based upon her marriage to a United States citizen. Second, respondent claims that she should be excused from the one-year requirement because an immigration consultant advised her to apply for adjustment of status rather than asylum. The Court will address each argument in turn.

The respondent married Addis Porter, a United States citizen, on February 6, 2007. Sometime thereafter, respondent does not recall when, she and Mr. Porter went to American Legal Services in Oakland. There she was told that they would assist her in applying for adjustment of status for $3,000. Respondent declined their help because she could not afford to pay. They told her where to find the forms on the internet and the respondent's half-sister helped her fill the forms out. The record of proceedings does not contain the I-130 and I-485 that respondent submitted and that was submitted on her behalf. However, Exhibit 7 at page 3 contains a letter from Citizenship and Immigration Services to Mr. Porter acknowledging his testimony under oath that he entered into a marriage with respondent to have a debt he owed excused, and his withdrawal of the visa petition on respondent's behalf. That letter reflects that the I-130 was submitted on July 23, 2007.

Respondent did testify that when she and Mr. Porter went to American Legal Services they were aware that the individuals with whom they were speaking were not attorneys. Respondent claims that she inquired about filling an asylum application when she entered the office.

As the wife of a United States citizen respondent was eligible to submit her application for adjustment of status concurrently with the I-130 by Mr. Porter. Since the I-130 was filed on July 23, 2007, the soonest the I-45 could have been filed is July 23, 2007. Respondent's one-year deadline to apply for asylum had expired on July 7, 2007. Respondent cannot rely on the pendency of an application for adjustment of status as extraordinary circumstances excusing her compliance with the one-year deadline when that application was not filed until after the one-year deadline had passed. Likewise, respondent cannot claim that she was in other lawful status due to a pending adjustment application as such status would not have begun until after the adjustment application was submitted, and the adjustment application was submitted after the one-year deadline had passed. Accordingly, respondent's first argument fails.

Respondent's second argument is that extraordinary circumstances exist by virtue of the advice given to respondent by a non-attorney at American Legal Services. Respondent asserts that this position is supported by a Ninth Circuit entitled Virdiana v. Holder, 646 F.3d 1230 (9th Cir. 2011). In the Virdiana case a non-attorney took money from Ms. Virdiana and told her that he would file an asylum application on her

behalf and then failed to do so. The Ninth Circuit held that notary fraud caused the respondent's delay in submitting her asylum application and that the fraud constituted an extraordinary circumstances excusing respondent from complying with the one-year deadline for filing her asylum application.

Respondent's reliance on Virdiana is misplaced. There is no evidence that any fraud was perpetrated against the respondent by a non-attorney. According to her testimony respondent inquired about filing an asylum application but was advised to pursue adjustment of status instead. There is no fraud inherent in advising an individual to apply for non-discretionary relief for which she appeared prima facie eligible, instead of discretionary relief as to which her eligibility was far from certain.

Respondent has provided no evidence to suggest that the non-attorney should have anticipated that CIS would ultimately make a finding that the marriage lacked bonafides. Unless respondent can demonstrate that she or her husband informed the non-attorney that the marriage was a sham there is no reason for the non-attorney to have suggested pursuing relief other than adjustment of status when she appeared eligible for it.

In addition, respondent does not recall when she went to American Legal Services. She only recalls that she filed the I-130 after she went there. Based upon the lack of evidence regarding timing respondent cannot prove, and has not proved, by clear and convincing evidence that she would have filed her asylum application on a timely basis but for the advice she

received at American Legal Services. As she cannot establish that she was the victim of poor advice, much less notary fraud, respondent cannot establish extraordinary circumstances excusing her failure to comply with the one-year deadline.

In addition, as the Court held during the pendency of these proceedings, the fact that an individual submits an application for adjustment of status does not prevent them from pursuing asylum. That does not mean that the advice she received was necessarily poor advice. But it is true that the respondent could have pursued both forms of relief simultaneously, and the fact that she chose one over the other does not excuse her compliance with the one-year deadline.

CREDIBILITY DETERMINATIONS UNDER THE REAL ID ACT

The Court may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness; the inherent plausibility of the applicant's account; the consistency between the witness' written and oral statements, whether made under oath or not; the internal consistency of each statement; the consistency of such statements with other evidence in the record; and any inaccuracies or falsehoods in such statements without regard to whether an inaccuracy, inconsistency or falsehood goes to the heart of the applicant's claim. INA Section 208(b)(1)(B)(iii). Credibility determinations must be reasonable and take into consideration the individual circumstances of the witness or applicant. If the Court makes an adverse credibility determination it is

required to describe the factors that form the basis of that determination.

The Ninth Circuit has held that an Immigration Judge may find a respondent lacking in credibility if the respondent is shown to have lied to the Government authorities in the past. See Singh v. Holder, 643 F.3d 1178, 1181 (9th Cir. 2011). "An asylum applicant who lies to Immigration authorities casts doubt on his credibility and the rest of his story." Singh v. Holder, 643 F.3d at 1181.

The record in this case establishes that the respondent has in fact lied to Immigration authorities.

In 2002 the respondent moved to Botswana with her son and some of her other family members, I believe a cousin or a sister. She obtained temporary residency permits every 90 days for the first year, and after the first year she obtained a four-year residency permit. In 2004 respondent applied for a non-immigrant visa to visit the United States. That visa application was denied. See Exhibit 12 to the record of proceedings. In 2006 respondent submitted another application for a non-immigrant visa to come to the United States. In that application respondent indicated that she intended to come to the United States for two weeks to attend a graduation ceremony.

On direct examination respondent's counsel asked respondent whether there was anything incorrect on her visa application. Respondent answered no. Counsel then asked whether respondent indicated on that application that she was married. Respondent testified that she had not. She then testified that she was not

married at the time and did not marry until she married Mr. Porter on February 6, 2007 in the United States.

On cross-examination the Assistant Chief Counsel presented respondent with her non-immigrant visa application. Respondent confirmed that she read and understood English and that she had filled out the application herself. Respondent identified her signature and her photo on the application. On the non-immigrant visa application respondent claimed to be married and identified her husband as Paul Kinyua.

Mr. Kinyua was respondent's boyfriend and the father of her son. They did not live together in Kenya. Respondent resided with her mother there. Respondent and Mr. Kinyua did live together for some time in Botswana but Mr. Kinyua began seeing another woman and then left the respondent. See Exhibit 2 at page 5.

On cross-examination the Assistant Chief Counsel asked respondent whether she had lied because it was easier to obtain a visa if you were married. Respondent disagreed saying that anyone can get a visa if they have sufficient income. She then asserted that she was not lying on the application. She claimed that she considered Paul to be her husband because they lived together. She further asserted that no distinction is made in Kenya between people who are legally married and people who live together.

Respondent's attempt to explain her lie is unpersuasive, particularly given other evidence in the record to the contrary. On direct examination respondent clearly denied having listed herself as

married and testified that she had not been married. In the declaration that respondent prepared in support of her asylum application respondent stated, "I thought of Paul as my boyfriend and called him my fiance. We never did marry, however." Exhibit 2 at page 4. Elsewhere in her declaration she referred to Mr. Kinyua as her fiance. Exhibit 2 at page 5. Furthermore, none of the background documents regarding Kenya corroborate respondent's assertion that individuals who are cohabiting are considered to be married.

Respondent clearly lied about her marital status on her non-immigrant visa application. Her attempts to deny the lie, particularly in light of her own contrary testimony, constitute further lies on her part, this time to the Immigration Judge. Nor can respondent excuse her lie on the grounds that she was lying in order to flee persecution. At the time respondent completed the non-immigrant visa application she was residing in Botswana as a legal resident and she had one year left on her residency and the ability to apply for additional residency at the conclusion of the four-year permit that she had at the time. Respondent testified about problems in Botswana, being yelled at and discriminated against because she was a foreigner. She claims that her laundry would be taken down and dirtied on occasion and that sometime people threw rocks towards their house. Despite some minor problems that she encountered on account of xenophobia respondent had lived and worked in Botswana for several years at the time she applied for a visa. The problems that respondent had were relatively minor in nature and would be properly characterized as discrimination and not persecution of

the respondent. Respondent insisted on cross and redirect that at the time she completed the non-immigrant visa application she did not intend to remain indefinitely in the United States, though she did not wish to return to Botswana or Kenya.

The record does not support a finding that respondent's lie regarding her marital status should be excused because she needed to flee persecution. Rather it appears that she lied in order to increase her chances of obtaining a visa that she was seeking. Since respondent has demonstrated that she is willing to lie in order to obtain an Immigration benefit such as a visa, the credibility of all of her testimony is called into question.

Citizenship and Immigration Services also concluded that respondent lied, this time in order to obtain adjustment of status. In February 2007 respondent married a United States citizen named Addis Jerome Porter. On July 23, 2007 Mr. Porter submitted an I-130 on respondent's behalf. On April 2, 2009 respondent and Mr. Porter were interviewed. Presumably respondent testified, as she did before the Immigration Judge, that she married Mr. Porter for love, that she lived with him as husband and wife and that they had consummated their marriage. However, CIS did not believe the respondent. CIS denied the respondent's I-485 application stating as follows, "The record reflects that the petitioner has testified under oath that this was an arranged marriage in order to assist the beneficiary in obtaining her lawful permanent residence in exchange for cancelling the debt of the $3,000. The petitioner has testified that he

never lived with you as husband and wife and that your marriage has never been consummated. USCIS has concluded that your relationship must be a sham for the purposes of obtaining benefits for the beneficiary to which you are not entitled." Exhibit 7 at page 2. "Since it has been concluded that the marriage of the petitioner to Serah Njoki Karingithi is a sham, entered into for purposes of evading Immigration laws and procuring benefits for which the beneficiary is not entitled, then Section 204(c) of the Act will apply in this case." Exhibit 7 at page 2.

As stated above the Court concluded that the written statement by Mr. Porter was hearsay and had to be excluded on fundamental fairness grounds because the Government did not undertake reasonable efforts to produce him for cross-examination. See Cunanan v. INS, 856 F.2d 1373 (9th Cir. 1988). However, the Court did admit CIS' denial letters and the statements reflected therein since the statements served to demonstrate why CIS reached the conclusion it reached rather than for the truth of the matter asserted in the statements themselves. The CIS denial letters establish that CIS concluded, based on testimony other than the respondent's, that respondent had entered into a sham marriage. Therefore CIS concluded that respondent committed marriage fraud in order to attempt to qualify for adjustment of status in the United States.

Government Counsel and the Court pointed out to the respondent that she had the burden of proof regarding good moral character and the task of persuading the Court that she was entitled to a

favorable exercise of the Court's discretion and, to that end, she could call Mr. Porter to testify in an effort to establish that she had entered into a bonafide marriage. Respondent declined asserting that Mr. Porter had lied and was a hostile witness.

Since the Court excluded Mr. Porter's testimony for the truth of the matter asserted therein the Court cannot make an independent finding that respondent lied to CIS. However, the Court can recognize the fact that CIS, in possession of the evidence, reached that conclusion. Based upon the Court's finding that the respondent lied on her non-immigrant visa application, and CIS's finding that the respondent attempted to get an Immigration benefit by engaging in a sham marriage, the Court concludes that it is appropriate to make an adverse credibility determination against the respondent.

Because the Court makes an adverse credibility determination with respect to respondent, the Court will exclude from consideration the respondent's testimony for purposes of determining whether or not the respondent has established past persecution for purposes of the presumption for withholding of removal, that she has a clear probability of persecution on account of one of the enumerated grounds were she to be removed from the United States and returned to Kenya.

As stated above, the respondent is not eligible for asylum because she has not met the one-year deadline. Therefore, the Court will not consider whether she has established a well-founded fear, but the Court will consider past persecution for purposes of determining

whether respondent is entitled to a presumption for purposes of her withholding of removal application. Since the respondent's testimony lacks credibility the Court will examine the information provided by the respondent in support of her application that comes from sources other than the respondent to establish to whether respondent has met her burden of establish past persecution.

The respondent provided a letter from her school, or a letter that purports to be from her school. The Court's making that distinction because the letter is not on any kind of standard letterhead. The letter, which is undated, purports to come from Kiganjo Amboni Secondary School in Kiganjo, Kenya. The letter states this is to confirm that Serah Njoki Karingithi was our former student between 1993 to 1996. During that time there was a lot of violence between the Mungiki, which was circumcising women old and young. At this time they were kept indoors and even at night their dormitories were locked because of attack. Up to date we are still taking care of our students because they are still violent. For the school principal, John Nuduru. And then there is a stamp that says Kiganjo Secondary School, Gift Education is Treasure. And then it has a P.O. Box address in Kiganjo, Kenya.

At Exhibit 5, pages 244 and 245 there is a letter that purports to be from the respondent's mother, and I believe it was written by respondent's aunt because her mother does not write in English, indicating that she believed her late brother, whose name was Kihara, was a member of the Mungiki sector and that she believes that he told the Mungiki that Serah was with

her, and because of that the Mungiki kept coming to the house she says night and day. There is no evidence in the record that the respondent was ever circumcised, and the respondent's testimony is that she was not circumcised. So there is no reason to believe that she was ever actually found by the Mungiki and harmed. The evidence in the record would be that she was, as well as the other students at her school, perceived by the school to be at some risk and for that reason they took security measures. This was a boarding school so the girls actually were there at night. The school took some risks to ensure their safety and the respondent's mother indicates that the Mungiki looked for the respondent with the aim of circumcising her and that they did so repeatedly. The Court finds that this evidence is not sufficient for respondent to establish past persecution.

There is also some background evidence in the record with respect to the issue of circumcision or female genital mutilation, whichever term one wishes to use. At Exhibit 5 at page 367 the indication is that female genital mutilation is widely practiced, although it says at page 368 that the proportion of Muslim women who are subject to FGM is double that of the Christian female population. Respondent is a Christian. Apparently among respondent's ethnic group, the Kikuyu, approximately 34 percent of the females are circumcised. The Kikuyu represent approximately 17 percent of the population, see Exhibit 5 at page 386, and they are the largest single ethnic group in Kenya and principally inhabit the central region of Kenya.

While there is certainly a risk that a female, a Kikuyu individual, a young female especially as respondent was at the time she was in high school, could be subject to female genital mutilation. The respondent, other than being frightened at the prospect and having to hide to prevent herself from being found, has not established harm. She was not physically harmed. She was never encountered. No one had to rescue her. In fact, the only information in the record that suggests respondent was at any risk comes from her mother who obviously has an interest in helping the respondent with her application, and as the Court noted the mother's letter is entitled to reduced weight because she was not presented for cross-examination. The other evidence, which simply indicates that there was some risk, was from the high school and, again, there was no identification information provided for the individual who allegedly wrote the letter, and the letter is not on any sort of formal letterhead that would give the Court any sense of confidence that it came from the source it purports to. That letter as well was accorded reduced weight as a result of the fact that the preparer of the letter was not presented for cross-examination.

As a result of the reduced weight accorded to the admissible evidence in the record, and as a result of the respondent's lack of credibility, the Court finds that the respondent has not met her burden of establishing that she suffered past persecution.

Now the Court will note that the respondent identified a variety of proposed particular social groups that she claimed were the basis for her alleged persecution. The Court will note what those are but

does not need to discuss whether or not the Court believes they constitute cognizable particular social groups because respondent has not met her burden with respect to the issue of persecution or harm.

The respondent's particular social groups are as follows. There are three of them. Number one is Kikuyu women, number two is westernized Kikuyu women, and number three is Kikuyu women who have not been circumcised and oppose circumcision.

Because the Court finds that respondent has not established past persecution the respondent is not entitled to a rebuttable presumption of a clear probability of persecution for withholding of removal purposes. Accordingly, the respondent bears the burden of establishing a clear probability of persecution on account of one of the enumerated grounds in the asylum statute.

CLEAR PROBABILITY OF PERSECUTION

As with the past persecution discussion and the credibility discussion above, the Court has found that an adverse credibility determination should be made with respect to the respondent. Accordingly, the respondent's testimony is disregarded for purposes of establishing the clear probability of persecution because this is a withholding claim now and not an asylum claim. The documents in the record, the objective documents, the background information, demonstrate that female genital mutilation is overwhelming performed on pre-adolescent girls. There is very little information in the record to suggest that a woman in middle age such as the respondent would

be at any risk of female genital mutilation were she to return to Kenya. There is an account at Exhibit 5 page 378 about the forcible circumcision of a middle-aged woman. However, in that case the woman's husband had colluded with some other individuals to circumcise his wife. So that is not a typical scenario if the assumption is going to be that the respondent would be circumcised forcibly by members of the Mungiki. The respondent's mother in her letter says that she knows two older women who were circumcised against their will in their sixties and one who was 70. Again, the mother's letter has been accorded reduced weight and is really entitled to very little weight at all as a result of the fact that the mother has every incentive essentially to lie in support of her daughter's application to help her daughter remain in this country. The respondent's counsel did provide this notice that was issued by the Mungiki that indicated that they were demanding that all women, and they stated a very inclusive age range, which I cannot put my hands on at the moment, but I believe it was between the ages of 5 and 60. It was very inclusive. That they had 90 days in which to appear to be circumcised if they had not yet been circumcised. That ultimatum, if you will, was issued quite a long time ago, several years ago. And as Government Counsel pointed out during closing argument, there is no indication that it was ever enforced.

The Government believes that the Court should not consider there to be any risk at all of FGM because the government has outlawed it. The Court will note, though, that the background documents suggest that even though it has been allowed it is still widely

practiced. So the Court does not agree with Government Counsel that it is no longer an issue at all. However, the Court finds that the respondent has not met her burden of establishing a clear probability that it will occur to her against her will if she returns to Kenya. And the Court makes that finding, first of all, because only 34 percent of Kikuyu women have been subject to female genital mutilation. It is not clear what percentage of those were done with the consent of the parents. And there is certainly very little evidence in the record that an individual of the respondent's age, as stated before she was born in 1978, has any perceptible risk of having being forced to undergo female genital mutilation. There is simply, other than the two cases referred to by the respondent's mother, and the one case referred to in the background documents, there is simply no objective evidence that this poses any significant risk to the respondent. Accordingly, based upon the objective evidence in the record, and even taking into consideration a letter provided by the respondent's mother, the respondent has failed to establish a clear probability that she will be forced to undergo female genital mutilation or harmed in any other way if she returns to Kenya. The Court finds that respondent has not met her burden of proof for a grant of withholding of removal.

In the alternative, if the Court were to accept the respondent's testimony as credible, the Court finds that the outcome would not differ in any way. The respondent's testimony was largely consistent with the information that her mother and the individual from the school provided, and that is that they were locked in at night to protect them, that they had to hide on

several occasions to prevent themselves from being found by individuals who she claimed were trying to take her to forcibly inflict female genital mutilation on her. The Court does not find that this evidence rises to the level of past persecution and protecting children from harm is something that is done in all cultures as far as this Court knows, and there is potential harm available in many forms that cause children everywhere to be at risk. The fact that she had people come hunting for her, or searching for her, on many occasions is not sufficient. It is much like being threatened. She was never actually harmed. She was never found. It is not as if they dragged her away and someone saved her at the last minute. The fact is that she was successfully able to avoid all efforts to find her. So either they did not look very hard or she was very good at hiding. But whatever the case may be, the Court finds that the fact that the respondent had to take efforts to avoid female genital mutilation is insufficient to establish past persecution.

With respect to the issue of a clear probability, the Court also finds that even if it were to accept the respondent's testimony as credible, respondent would not have met her burden of proof. There is nothing in respondent's testimony regarding the risk that she would run if she were to return to Kenya that differs from what the Court has already addressed with respect to clear probability in its discussion above. The respondent has not lived in Kenya since 2006 so she has not really in any condition at this point in time to offer an opinion about how active the Mungiki are. The Court will note that the uncle, the maternal uncle of the respondent who is the one who allegedly notified

the Mungiki regarding respondent's whereabouts, has passed away according to her mother's letter. She refers to him as her late brother. This suggests that he is no longer there and is no longer going to be communicating with the Mungiki which should substantially reduce any risk to the respondent.

Whether the Court excludes respondent's testimony on the grounds that an adverse credibility determination has been made, or whether the Court considers that testimony, under both alternatives the Court finds that the respondent has not met her burden of proof that there is a clear probability that she will be harmed on account of one of the enumerated grounds were she to be returned to Kenya.

As stated earlier, because the Court finds that the respondent has not established the necessary risk of harm and nor does the past harm qualify for the relief that she seeks, the Court is not going to address the issue of whether or not the particular social group she identified are cognizable under the Immigration and Nationality Act for purposes of her withholding claim.

PROTECTION UNDER THE CONVENTION AGAINST TORTURE

Pursuant to Article 3 of the Convention Against Torture an applicant may not be removed to a country where it is more likely than not that she would be tortured. 8 C.F.R. Section 1208.16 and Section 1208.17. The alien bears the burden of establishing that it is more likely than not that she would be tortured if removed to the proposed country of removal. Kamalthas v. INS, 251 F.3d 1279, 1282 (9th Cir. 2001).

Torture is an extreme form of cruel and inhuman treatment and is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. 8 C.F.R. Section 1208.18(a)(2). The act must be directed against a person in the torturer's custody or physical control and must be 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. 8 C.F.R. Section 1208.18(a). For a government official to acquiesce in an act of torture by a private party the public official need not have knowledge of, or willfully accept the torture. Rather, such acquiescence requires only that the public official, prior to the activity constituting torture, have an awareness of such activity whether that awareness takes the form of actual knowledge of willful blindness, and thereafter breaches his legal responsibility to intervene to prevent such activity. 8 C.F.R. Section 1208.18(a)(1) and Zheng v. Ashcroft, 332 F.3d 1186, 1189-90 (9th Cir. 2003).

As an initial matter the Court finds that female genital mutilation done without the consent of the female involved constitutes torture, that I think it is sufficiently cruel and inhumane, that it meets the definition of torture. That having been said, the question remains as to whether or not the respondent can establish that it is more likely than not that she would be subject to female genital mutilation if she were to return to Kenya and whether it would be done with the consent or acquiescence of the government of Kenya. First of all, with respect to whether it is more likely than not, the Court will return to the statistics that have been provided and the background

information. According to the background information, approximately 34 percent of Kikuyu women are circumcised. That is they have been subject to female genital mutilation. On its face that suggests that it is less than 50 percent of the population of the females, and based on that the respondent is not going to be able to meet the burden of proof. In addition to that, the majority of the information in the background documents suggest that female genital mutilation is almost exclusively performed on pre-adolescent girls. So if you look at Exhibit 5 page 373 it talks about girls between the ages of 8 and 12 being circumcised. Exhibit 8 page 468, the Country Report on Human Rights Practices, suggests that female genital mutilation is usually performed at an early age. There is only one report in the objective documents of a middle-aged woman being circumcised against her will and that appears to have done with the collusion of her husband. Exhibit 5 page 378. Other than the respondent's mother's letter which indicates that she was aware of two individuals who were older, in their 60s and 70s, who had been subject to female genital mutilation. There is no evidence that, other than this one woman who was circumcised with the collusion of her husband, that this is something that routinely occurs to middle-aged women. The Court will note that when respondent was questioned she indicated that, when asked if she knew of any older woman who had been circumcised, she initially identified her mother as one of the older women who had been circumcised. However, in later testimony the respondent indicated that she did not know what age her mother had been when her mother had been circumcised. So perhaps her testimony was simply that her mother is older now and

she knows that her mother had been circumcised. But there is insufficient evidence in the record that the respondent's mother was circumcised at a later age.

In addition to being unable to establish that it is more likely than not that she would be circumcised if she returned to Kenya the respondent cannot meet her burden of establishing that the government would consent or acquiesce to that act were it to occur. The government has made circumcision illegal and, while it is something that is still being practiced, it is against the law. So the government has taken action to express that it is not consenting or acquiescing to female genital mutilation. There is insufficient evidence in the record to establish that the government turns a blind eye. Rather, the problems with respect to enforcement of the law seem to be that the female genital mutilation has been considered a cultural norm for a very long period of time and, as a result, people continue to undertake it even though it is illegal. The fact that it is still occurring does not mean that it occurs with the consent or acquiescence of the government of Kenya, though, and the Court finds that given that the government has made it illegal that the respondent cannot meet her burden of proof, particularly in the absence of objective evidence that the government routinely fails to prosecute or ignores the offense when it occurs.

Based upon the foregoing the Court finds the respondent has failed to meet her burdens of proof with respect to protection under Article 3 of the Convention Against Torture in that she has failed to establish that it is more likely than not that she would be tortured,

and she has failed to establish that the torture, were it to occur, would be with the consent or acquiescence of the government of Kenya. For those reasons the Court denies respondent's application for protection under Article 3 of the Convention Against Torture.

VOLUNTARY DEPARTURE

The Court may grant voluntary departure in lieu of removal pursuant to Section 240B(b) of the Immigration and Nationality Act. To warrant a grant of this form of relief a respondent bears the burden of establishing both that she is statutorily eligible and that she is deserving of a favorable exercise of the Court's discretion. See Matter of Toms, 21 I&N Dec. 20 (BIA 1995).

In this case the Court finds that the respondent is statutorily eligible for voluntary departure but the Court will deny the relief in the exercise of discretion. The Court finds that the respondent has repeatedly lied to Immigration officials and to this Court, and that she is attempting to manipulate the Immigration process to her own benefit, and because of this the Court finds that the respondent does not merit a favorable exercise of the Court's discretion. Accordingly the Court will deny respondent's application for voluntary departure.

In light of the foregoing the Court will enter the following order.

ORDER

IT IS HEREBY ORDERED that the respondent's application for asylum is denied.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal under the Immigration and Nationality Act is denied.

IT IS FURTHER ORDERED that the respondent's application for protection under Article 3 of the Convention Against Torture is denied.

IT IS FURTHER ORDERED that the respondent's application for voluntary departure is denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Kenya on the charge in the Notice to Appear.

_____

ALISON E DAW
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE ALISON E DAW, in the matter of:

SERAH NJOKI KARINGITHI

A087-020-992

SAN FRANCISCO, CALIFORNIA

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/Emily Morris
EMILY MORRIS (Transcriber)

DEPOSITION SERVICES, Inc.-2

November 29, 2014
(Completion Date)

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-70885

Agency No. A087-020-992

[Filed May 8, 2019]

SERAH NJOKI KARINGITHI, Petitioner,	)
v.	)
WILLIAM P. BARR, Attorney General, Respondent.	)

ORDER

Before: McKEOWN, W. FLETCHER, and BYBEE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Karingithi's petition for panel rehearing and Karingithi's petition for rehearing en banc are denied.

APPENDIX F

STATUTES AND REGULATIONS

8 U.S.C. § 1229. Initiation of removal proceedings

(a) NOTICE TO APPEAR

(1) IN GENERAL In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F)

(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)

(i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) NOTICE OF CHANGE IN TIME OR PLACE OF PROCEEDINGS

(A) In general In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the

alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying—

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

(3) CENTRAL ADDRESS FILES

The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

(b) SECURING OF COUNSEL

(1) IN GENERAL

In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

(2) CURRENT LISTS OF COUNSEL

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1229a of this title. Such lists shall be provided under subsection (a)(1)(E) and otherwise made generally available.

(3) RULE OF CONSTRUCTION

Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

(c) SERVICE BY MAIL

Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F).

(d) PROMPT INITIATION OF REMOVAL

(1) In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction.

(2) Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the

United States or its agencies or officers or any other person.

(e) CERTIFICATION OF COMPLIANCE WITH RESTRICTIONS ON DISCLOSURE

(1) IN GENERAL

In cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 1367 of this title have been complied with.

(2) LOCATIONS The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization.

(B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of section 1101(a)(15) of this title.

8 C.F.R. § 1003.14 - Jurisdiction and commencement of proceedings.

(a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed. However, no charging document is required to be filed with the Immigration Court to commence bond proceedings pursuant to §§ 1003.19, 1236.1(d) and 1240.2(b) of this chapter.

(b) When an Immigration Judge has jurisdiction over an underlying proceeding, sole jurisdiction over applications for asylum shall lie with the Immigration Judge.

(c) Immigration Judges have jurisdiction to administer the oath of allegiance in administrative naturalization ceremonies conducted by the Service in accordance with § 1337.2(b) of this chapter.

(d) The jurisdiction of, and procedures before, immigration judges in exclusion, deportation and removal, rescission, asylum-only, and any other proceedings shall remain in effect as it was in effect on February 28, 2003, until the regulations in this chapter are further modified by the Attorney General. Where a decision of an officer of the Immigration and Naturalization Service was, before March 1, 2003, appealable to the Board or an immigration judge, or an application denied could be renewed in proceedings

before an immigration judge, the same authority and procedures shall be followed until further modified by the Attorney General.

8 C.F.R. § 1003.15 - Contents of the order to show cause and notice to appear and notification of change of address.

(a) In the Order to Show Cause, the Service shall provide the following administrative information to the Executive Office for Immigration Review. Omission of any of these items shall not provide the alien with any substantive or procedural rights:

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship;

(5) The language that the alien understands;

(b) The Order to Show Cause and Notice to Appear must also include the following information:

(1) The nature of the proceedings against the alien;

(2) The legal authority under which the proceedings are conducted;

(3) The acts or conduct alleged to be in violation of law;

(4) The charges against the alien and the statutory provisions alleged to have been violated;

(5) Notice that the alien may be represented, at no cost to the government, by counsel or other representative authorized to appear pursuant to 8 CFR 1292.1;

(6) The address of the Immigration Court where the Service will file the Order to Show Cause and Notice to Appear; and

(7) A statement that the alien must advise the Immigration Court having administrative control over the Record of Proceeding of his or her current address and telephone number and a statement that failure to provide such information may result in an *in absentia* hearing in accordance with § 1003.26.

(c) ***Contents of the Notice to Appear for removal proceedings.*** In the Notice to Appear for removal proceedings, the Service shall provide the following administrative information to the Immigration Court. Failure to provide any of these items shall not be construed as affording the alien any substantive or procedural rights.

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship; and

(5) The language that the alien understands.

(d) ***Address and telephone number.***

(1) If the alien's address is not provided on the Order to Show Cause or Notice to Appear, or if the address on the Order to Show Cause or Notice to Appear is incorrect, the alien must provide to the Immigration Court where the charging document has been filed, within five days of service of that document, a written notice of an address and telephone number at which the alien can be contacted. The alien may satisfy this requirement by completing and filing Form EOIR-33.

(2) Within five days of any change of address, the alien must provide written notice of the change of address on Form EOIR-33 to the Immigration Court where the charging document has been filed, or if venue has been changed, to the Immigration Court to which venue has been changed.

8 C.F.R. § 1003.18 - Scheduling of cases.

(a) The Immigration Court shall be responsible for scheduling cases and providing notice to the government and the alien of the time, place, and date of hearings.

(b) In removal proceedings pursuant to section 240 of the Act, the Service shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, where practicable. If that information is not

contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing. In the case of any change or postponement in the time and place of such proceeding, the Immigration Court shall provide written notice to the alien specifying the new time and place of the proceeding and the consequences under section 240(b)(5) of the Act of failing, except under exceptional circumstances as defined in section 240(e)(1) of the Act, to attend such proceeding. No such notice shall be required for an alien not in detention if the alien has failed to provide the address required in section 239(a)(1)(F) of the Act.