

No. 06-1569

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

GUILLERMO RAMIREZ PEYRO,  
Petitioner,  
v.

ALBERTO GONZALEZ,  
UNITED STATES ATTORNEY GENERAL,  
Respondent

Petition for review of the decision of the Board of Immigration Appeals

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**BRIEF FOR PETITIONER**

Jodylyn M. Goodwin, Esq.  
1322 East Tyler  
Harlingen, Texas, 78550

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No. 06-1569

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Petitioner,

v.

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United States Attorney General,  
Respondent

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Guillermo Ramirez Peyro.
2. Alberto González, Attorney General of the United States.
3. Counsel for Petitioner, Jodilyn M. Goodwin.

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Jodilyn M. Goodwin, Esq.  
1322 East Tyler Avenue  
Harlingen, Texas, 78550  
(956) 428-7212

## REQUEST FOR ORAL ARGUMENT

The petitioner, Guillermo Ramírez Peyro, (“Mr. Ramírez”), respectfully requests oral argument. This petition for review asks whether the Board of Immigration Appeals, (“BIA”), overturned the IJ’s decision which was based on substantial record evidence, consisting of statements, reports, and declarations of officials of agencies of the United States government. Oral discussion of the facts and the applicable precedent would benefit the Court.

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## **STATEMENT OF JURISDICTION**

Title 8, United States Code, (“8 U.S.C.”), §1252, (Section 242 of the Immigration and Nationality Act), is entitled, “Judicial Review of Orders of Removal.” 8 USC § 1252 (a) establishes this Court’s jurisdiction to review the denials by the Immigration Judge and the BIA of the petitioner’s application for asylum. This Court has jurisdiction to review the legal arguments of the parties as well as the analysis of the lower courts.

## **STATEMENT OF THE ISSUES**

ISSUE ONE: The IJ’s decision granting petitioner’s application for relief under Article III of the United Nations Convention Against Torture was improperly overturned by the BIA in the face of sufficiently corroborated evidence demonstrating that petitioner has a well-founded fear of torture at the hands of agents of the Mexican government in the event of his return to Mexico.



## STATEMENT OF THE CASE.

### Proceedings below

#### Removal proceeding before the United States Immigration Judge

Removal Proceedings began with issuance of a Notice to Appear, (“NTA”), on May 9, 2005. The NTA alleges Mr. Ramírez is not a citizen of the United States but a citizen of Mexico who was not in possession of a valid entry document when he presented himself for admission to the United States on April 22, 2005. Certified Administrative Record, (“AR”), at 608-610.

At a hearing before the IJ on June 9, 2005, Mr. Ramírez admitted the truth of the factual allegations, conceded inadmissibility as alleged, and requested relief in the forms of Asylum, withholding of removal, and relief under the CAT. Mr. Ramírez subsequently stipulated in his pre-hearing brief that his involvement in drug trafficking rendered him ineligible for asylum and withholding of removal. See AR 111, 249. *See also In re Y-L, A-G- R-S-R-*, 23 I& N Dec. 270 (BIA 2003). Mr. Ramírez was heard on the merits of his application for relief pursuant to Article III of the United Nations Convention Against Torture on August 8, 2005. See 8 CFR §208.16-208.18. *See also* 8 CFR §1208.16 through 1208.18. 64 Fed Reg. 8478 (February 19, 1999).

Mr. Ramírez testified he entered the Mexican drug trafficking industry after he left the Mexican federal highway police. AR 190. His first job was as a distribution

manager in Guadalajara, Jalisco, Mexico. AR 369. He became a United States government informant in 2000 and subsequently made contact with the Carrillo Fuentes Organization, (“CFO”), in Ciudad Juárez. AR 149. His performance as an informant is extensively documented in the record. AR 265-293. Mr. Ramírez explained he was tasked with infiltrating groups of organized criminals as a means to effectuate the arrest and prosecution of high level participants. AR 153-54. Mr. Ramírez testified he was present when individuals who were involved with CFO in drug trafficking or whom CFO members believed were a threat were assassinated by two Mexican police officers in Ciudad Juárez. AR 183-86, 201-06. Mr. Ramírez submitted payment records confirming he was paid over \$200,000. AR 168, 266-67, 270. The record details over fifty persons were successfully prosecuted and are serving prison sentences as a result of his cooperation. AR 155-56, 159. Mr. Ramírez was taken into custody as a material witness when Heriberto Santillán was arrested. Mr. Ramírez was placed into protective custody after death threats upon his life came to the attention of the United States Attorney.

Court records show Heriberto Santillan pled guilty before trial. Mr. Ramirez, of no further use to United States law enforcement agencies in an informant’s role, was compelled to seek protection in the United States. AR 603-18

Appeal to the Board of Immigration Appeals

The Department of Homeland Security, (“DHS”), disapproves of the findings of fact and the conclusion of the IJ and insists the record contains no evidence that Mr. Ramírez would be tortured by Mexican law enforcement while acting in their official capacity. The DHS also contends the record does not support a finding that Mr. Ramírez would be tortured by Mexican drug traffickers with the acquiescence of Mexican law enforcement. AR 06-47. The BIA concentrated on documentary evidence and concluded that the Mexican government is strengthening drug enforcement laws and is now more effective in eliminating organized drug traffickers such as those against whom Mr. Ramirez informed. AR 03-04. The BIA paid special attention to testimony and record evidence concerning an offer of immunity from the Mexican government and stated it’s opinion that because most drug trafficking organizations operate in northern Mexico, the petitioner would remain safe if he relocated to a different part of the country. AR 04. Thus, the BIA reasoned, even though Mr. Ramírez’ life may be in danger, the record does not support the IJ’s finding that the Mexican government would cooperate with trafficking organizations who wish to harm him.

### **STATEMENT OF THE FACTS**

Mr. Ramirez is a 35 year old married male. He is a native and citizen of Mexico. AR 260-61. Mr. Ramírez was a police officer in the Mexican state of Guerrero until

1995. He became involved in drug trafficking when he left the police force. AR 520-28. Between 1995 and 1998, he coordinated transshipments of narcotics within Mexico and from the Mexican interior to the U.S. Mexico border.

As an informant for United States Customs, redesignated the Bureau of Customs and Immigration Enforcement, (“ICE”), pursuant to the Homeland Security Act of 2003, Mr. Ramirez provided information to the Drug Enforcement Administration, (“DEA”), the Bureau of Alcohol, Tobacco and Firearms, (“ATF”), the Federal Bureau of Investigation, (“FBI”), and the United States Secret Service. AR 158. Mr. Ramirez successfully infiltrated the CFO in Ciudad Juarez, Chihuahua. Ciudad Juarez is directly opposite El Paso, Texas, and CFO transports drugs through El Paso to distribution points throughout the United States.

Mr. Ramirez’ cooperation resulted in seizures of drugs as well as many arrests of traffickers. AR 287-92. Most notably, information provided by Mr. Ramirez led to the arrest and prosecution of Heriberto Santillan Tabares, a highly placed member of CFO. AR 274-77. Mr. Ramirez’ assistance to the United States government also prompted many threats, and two actual attempts, on his life. AR 278-81. He realized he could never be safe in Mexico, and sought protection in the United States. He has been in protective custody since February 2004. AR 520. On May 1, 2005, Mr. Ramirez was found to have a credible fear of being returned to Mexico due to his

assistance to the United States government in prosecuting members of the CFO. In that decision, the Asylum Officer stated:

Here, applicant infiltrated a drug smuggling Mexican cartel and became an informant for ICE, which resulted in multiple arrests. Since that time two separate attempts have been made on the applicant's life by the Cartel and applicant now believes that if he returns to Mexico he will be killed by the Cartel because of his actions as an informant. Current country conditions support applicant's claim. Country reports on Mexico indicate Police corruption was a problem. "Police have been involved in kidnappings, armed robbery, and extortion, as well as protection of criminals and drug traffickers. From January to July, in Mexico city alone, 140 policemen were charged for various crimes, compared with 502 in 2003. In April, the Governor of Morelos State dismissed all 552 policemen after the arrest of two top officers for allegedly protecting drug dealers. (2004 Department of State Country Reports on Human Rights Practices.)

AR 511.

### **SUMMARY OF THE ARGUMENT**

Asylum officer Jack Berger interviewed Mr. Ramírez concerning his fear of returning to Mexico on May 1, 2005, approximately one week prior to the initiation of removal proceedings. AR 608-11. Relying on a report by the United States Department of State issued in 2004, Officer Berger found Mr. Ramírez had a credible fear of the Mexican government. Pursuant to 8 CFR § 208.30, Supervisory Asylum Officer Helen Mireles reviewed the credible fear proceedings and concurred with Officer Berger. AR 616. The IJ found that the record presents various aspects of police involvement in

Mexican drug trafficking, and in combination with the petitioner's credible testimony, he had established a probability of torture by drug traffickers and law enforcement in Mexico if he were forced to return. AR 112-14. Mr. Ramírez' substantiated his credible testimony by presenting documents prepared by agencies of the United States government, including the Office of the United States Attorney and the DEA. Substantial evidence in the record supports the findings of the IJ. Precedent decisions of the United States Supreme Court, this Court, and the BIA establish the IJ's decision should be upheld when the IJ carefully reviews the entire record and "reasonable, substantial, and probative evidence," supports the decision. *I.N.S. v. Elias Zacarias*, 502 U.S. 478 (1992), *Louulou v. Ashcroft*, 354 F.3d 706, (8<sup>th</sup> Cir. 2003); *In re S-H-*, 23 I&N Dec. 462 (BIA 2002).

**Issue I. THE IMMIGRATION JUDGE WAS CORRECT IN GRANTING**

## **RELIEF UNDER THE CONVENTION AGAINST TORTURE.**

The DHS called no witnesses at Mr. Ramírez' individual hearing on August 11, 2005. The DHS never made a closing statement. AR 243. Exhibit 10, offered by the DHS, contains an article entitled, *Mexican Drug War Turns Uglier: Troops Called in to Remove Corrupt Police Force, Take Over City On US Border*. AR at 434. That portion of the DHS' own evidence recounts cooperation by state police with drug trafficking organizations and states: "There are very clear signs of a relationship between elements of the Nuevo Laredo police and drug smuggling..." AR at 435. Another article, entitled, *Mexican Governor Fires Entire State Police Force*, recounts the connection between law enforcement and the Juarez Cartel, against whom Mr. Ramírez informed. AR at 443-44. An article entitled, *Several State Police Officers in Ciudad Juarez Questioned About Involvement in Drug Trafficking, Murders*, discusses the Juarez Cartel, and declares that ordinary Mexicans "fear officers in this border city take part in the crime they should be fighting." AR 445. An article entitled *Mexican Anti-Drug Force Busted For Narco Corruption* begins, "The Mexican government announced that yet another anti-drug unit, the Federal Special Prosecutor's Office for Drug Crimes or FEADS, has been busted for involvement with drug trafficking and narcocorruption." That article goes on to say, "...[T]he new evidence of serious problems inside FEADS is an embarrassing reminder of how deep corruption runs

inside Mexico's police forces." AR at 447. All of this documentary evidence directly contradicts the BIA's conclusion that agencies of Mexican law enforcement do not cooperate with organized drug traffickers. Referring to Exhibit 10, the BIA deduced, "The evidence indicates that the Mexican federal government is actively fighting the drug cartels, and numerous articles entered into evidence indicate increased efforts on the part of the Mexican government to combat drug cartels." The BIA's finding is directly contradicted by information contained in the very same exhibit.

The DHS' appeal brief declares, "The record is devoid of any objective evidence to support the respondent's various theories of possible torture upon return to Mexico." AR at 41. That assertion contradicts information in Exhibit 5, the account of the United States Department of State concerning murders carried out by Mexican law enforcement officers in Ciudad Juarez of individuals who were involved with CFO in drug trafficking or whom CFO members believed were a threat. Page 3 of Exhibit 5, Subsection b, is entitled, "Disappearance", and refers to the central events giving rise to Mr. Ramirez' need for protection under the Torture Convention. AR 545. That paragraph confirms Mexican law enforcement officers murdered at the behest of the CFO. Mr. Ramirez was present when several of those assassinations were carried out. See AR at 371-77. His sworn declaration, taken in Dallas, Texas, on February 12, 2004, in the presence of the Associate Legal Attaché from the Attorney General's



Office of the Mexican Republic, recounts the same events in extensive detail. Information in the State Department report concerning murder and torture by Mexican police officers in Ciudad Juarez is corroborated by the petitioner's own eye witness account. Mr. Ramírez respectfully urges this Court to consider the DHS position that the record contains no objective evidence of the possibility of torture in light of his own sworn declaration and the recounting of the same events in the report of the United States Department of State.

The record demonstrates Mr. Ramírez was issued temporary permission to enter the United States in order to carry out his work as an informant. AR 263. The BIA decision mentions Mr. Ramírez may have been eligible for status in the United States through his activities as an informant. AR 002. *See also* 8 USC §1101(a)(15)(S). The DHS asserts in its brief, "There is no objective proof that the Mexican government would do anything to respondent other than protect him." AR 40. If Mr. Ramírez had any confidence in the promises of the Mexican government to protect him, he would have freely returned to Mexico. Instead, Mr. Ramírez presented himself at a United States Port of Entry on April 22, 2005. AR 587. He has been isolated in protective custody since that date. AR 160-164. Had any of Mr. Ramírez' handlers at ICE, DEA and the Office of the United States Attorney complied with their promises, Mr. Ramírez would not be in protective custody in the United States. The BIA's

conclusion that Mr. Ramírez could live safely in Mexico must be measured against the failure of United States law enforcement agencies to fulfill their promises along with Mr. Ramírez' informed decision to accept indefinite detention rather than certain death upon return to his native country.

Information in the DHS' own submission mentions Commander Miguel Loya of the Chihuahua State police in connection with the Juarez murders. AR 445. Mr. Ramírez' declaration confirms Loya's ongoing involvement and assistance to the CFO. AR 371. While the DHS complains there is no basis for the IJ's conclusion that Mexican law enforcement would harm him at the behest of CFO, the US State Department reported Mr. Ramirez' version of events. The Asylum Officer concluded Mr. Ramírez had reason to fear torture at the hands of the Mexican government. AR 611.

In reversing the IJ, the BIA noted that an applicant for relief under the Torture Convention "must do more than show that the officials are simply aware of the activity constituting torture yet are powerless to stop it." AR at 003, citing *Matter of S-V- 22* I& N Dec. 1306 (BIA 2000). The BIA then pointed to selected elements of record, especially the State Department Country Report on Mexico, to justify its refutation of the initial finder of fact. "[T]he evidence does not establish that it is more likely than not that public officials would consent or acquiesce to such torture of the respondent."

AR at 003. Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. Nonetheless, the possibility of drawing two inconsistent conclusions from the evidence does not prevent the initial findings from being supported by substantial evidence upon administrative review. Here, two inconsistent conclusions may be drawn based on the facts. The BIA simply adopted its version of the record over the IJ's conclusion. In this regard, the BIA did not focus its judicial inquiry on whether the evidence is sufficient to support the decision made. Rather, it set aside the factual findings of the IJ, substituted its judgment for that of the IJ, and reweighed the evidence to come to a contrary conclusion.

In *Matter of Burbano*, 20 I&N Dec. 867, (BIA 1994), the IJ granted relief from deportation under INA §212(c), 8 U.S.C. §1182(c). The INS appealed the decision. In deciding whether or not “relief from deportation is warranted as a matter of discretion”, the BIA addressed the standard of review applied to immigration judges:

The Board...has recently been questioned concerning the standard of review we utilize when considering a discretionary decision of the immigration judge,...” (internal citations omitted). Specifically, we have been questioned about the relationship between the Board and the immigration judge in terms of discretionary authority. We state at the outset that when the Board engages in a review of a discretionary determination by an immigration judge, we rely upon our own independent judgment in deciding the ultimate disposition of the case. This is in accord with our mandate to "exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary

for the disposition of the case." See 8 CFR § 3.1(d)(1). The authority of the Board to issue a discretionary decision independent from that of the immigration judge has been recognized by the federal courts. See, e.g... *Ghassan v. INS*, 972 F.2d 631, 635 (5th Cir. 1992), cert. denied, U.S. , 113 S. Ct. 1412 (1993);... Thus, we do not employ an abuse of discretion standard when reviewing discretionary determinations of immigration judges.

20 I&N Dec. 867, 869.

The BIA decision in *Burbano* emphasizes that the IJ, as the trier of fact, has the benefit of studying the demeanor and deportment of the witness or applicant.

Moreover, we recognize that the immigration judge who presides over a case has certain observational advantages due to his or her presence at the... hearing. For example, the Board ordinarily gives significant weight to the determinations of the immigration judge regarding the credibility of witnesses at the hearing. See, e.g., *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987); *Matter of Magana*, 17 I&N Dec. 111 (BIA 1979); *Matter of T-*, 7 I&N Dec. 417 (BIA 1957); cf. *Ghassan v. INS*, *supra* (recognizing that the Board retains power to make independent credibility determinations when appropriate). Similarly, we also may give significant consideration to other findings of an immigration judge that are based upon his or her observance of witnesses when the basis for those findings are articulated in the immigration judge's decision.

*Id* at 870.

Nonetheless, the BIA will make the decisive determination as to whether or not the IJ erred, either as a matter of law or in use of discretion. "...the Board relies upon its own independent judgment in deciding the ultimate disposition of a case when reviewing a discretionary determination of an immigration judge." *Ibid*. "The Attorney General's ultimate decision whether to grant or deny a refugee asylum, however, must

be upheld “absent a showing that such action was arbitrary, capricious, or an abuse of discretion.” *Behzadpour v. INS*, 946 F.2d 1351 (8<sup>th</sup> Cir. 1991).

A careful examination of the record herein reveals that the BIA should have upheld the well-reasoned and thoroughly articulated decision of the IJ. He considered the application, supporting documentation and testimony, then succinctly summarized the respondent’s claim. He properly cited and then applied the standards for the facts presented in the record. AR 112-13.

In *INS v. Ventura*, 537 U.S. 12, (2002), the United States Supreme Court found the Ninth Circuit improperly relied on information in a State Department Report to overturn the decision of the IJ and the BIA. 537 U.S. 12, 14. There, the IJ denied relief and the BIA upheld the IJ's denial. The Ninth Circuit found the evidence of record compelled a different conclusion and granted relief. The Supreme Court was deeply troubled by the Ninth Circuit's heavy reliance on background information in a State Department Country Report as the sole justification for disturbing the determination of the initial finder of fact. "First, the State Department Report is, at most, ambiguous about the matter." 537 U.S. 12, 16.

When, as here, the BIA's rationale for disregarding the IJ's initial finding is based chiefly on a State Department document containing contrary information, the Supreme Court admonishes that findings of the primary decision maker should not be disturbed. Beginning with the Asylum Officers and continuing with the IJ, three reasonable fact finders concluded that the requisite fear of torture existed. This standard has been codified in statutory law. "The administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. §1252(b)(4)(B). While the BIA's findings may have some support in the record, its standard of review prevents the BIA from taking on the role of fact finder. The BIA appears to have taken on the role of fact finder and discounted the IJ's own findings,

which are supported by substantial evidence in the record. The BIA's role is not to second guess the Asylum Officers and the IJ, but to weigh the evidence and overturn the IJ only if the facts compel a contrary conclusion.

#### CONCLUSION

For all the foregoing reasons, petitioner, Guillermo Ramírez Peyro, respectfully requests this Court remand this matter to the BIA, ordering the agency to issue a decision consistent with the legal arguments presented herein.

Respectfully submitted,

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Jodilyn M. Goodwin, Esq.  
1322 East Tyler  
Harlingen, Texas, 78550

CERTIFICATE OF SERVICE

I, Jodilyn M. Goodwin, certify that today, June 12, 2006, a two copies of the brief of petitioner and a diskette containing a PDF version of the same brief were served upon Nancy Friedman, Office of Immigration Litigation, U.S. Department of Justice, P. O. Box 878, Ben Franklin Station, Washington, D.C. 20044 by Express Mail tracking number ER 533892967 US.

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Jodilyn M. Goodwin, Esq.

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32.(a)(7), undersigned counsel certifies that this brief complies with the type-volume limitations of 8<sup>TH</sup> CIR. R. 32.2.7(b).

1. Exclusive of the portions exempted by 8<sup>TH</sup> CIR. R. 32.2.7(b)(3), this brief contains 16 pages printed in a proportionally spaced typeface.
2. This brief is printed in a proportionally spaced, serif typeface using Times New Roman 14 point font in text, produced by WordPerfect Version 10.
3. Undersigned counsel will provide an electronic version of this brief to the Court in compliance with Rule28A(d).



4. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 8<sup>TH</sup> CIR. R. 32.2.7, may result in the Court's striking this brief and imposing sanctions against the person who signed it.

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Jodilyn M. Goodwin, Esq.