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

In the Matter of:

Rosalina Lopez-Umanzor

In Removal Proceedings

File No. A 75-011 140

**AMICUS CURIAE BRIEF FOR RESPONDENT
ROSALINA LOPEZ-UMANZOR**

I. INTRODUCTION

This case tests our resolve as to whether a judge may act as a prosecutor and issue ex parte subpoenas over the objections of both adverse parties, engage in ex parte communications, order a new removal hearing without any basis, and then preclude a petitioner calling for cancellation of removal from even challenging the procured evidence ostensibly on the grounds that 4:30 in the afternoon is simply too late in the day. In the United States, this usurpation of the prosecutorial function by a judge is blatantly unconstitutional, and this case must be reversed.

In 1999, Rosalina Lopez-Umanzor was subjected to removal proceedings by the Immigration and Naturalization Services. Lopez-Umanzor applied for relief under 8 U.S.C. § 1229b(b)(2), the Violence Against Women Act (“VAWA”) provision of the Immigration and Naturalization Act, which provides for the cancellation of removal proceedings for battered spouses. As Lopez-Umanzor noted, she was the victim of repeated stalking, beating, and rape by her husband, a lawful permanent resident of the United States. During the removal proceedings, however, Lopez-Umanzor’s claims were categorically rejected. Moreover, grave constitutional due process violations occurred.

Respondent Lopez-Umanzor’s brief ably and amply describes the errors that occurred at the proceedings below, with extensive citations to the record. By contrast, this amicus curiae brief delves more deeply into the legal issues at stake

in this matter and focuses on how Judge Warren, the Immigration Judge presiding over Lopez-Umanzor's removal proceedings, violated key due process protections in reaching his decision. The rights of women eligible to avoid removal under VAWA must be respected and we must ensure that these women (and all individuals alike) receive proper judicial process. Judge Warren's conduct therefore necessitates reversal and a grant of Lopez-Umanzor's request for cancellation of removal.

II. **STATEMENT OF ISSUE ON APPEAL**

We adopt Respondent's Statement of Issues on Appeal and incorporate it herein by reference.

III. **STATEMENT OF STANDARD OF REVIEW**

- We adopt Respondent's Statement of Standard of Review and incorporate it herein by reference. We also add that alleged due process violations are reviewed de novo. See Hartooni v. INS, 21 F.3d 336, 339-40 (9th Cir. 1994); Barraza Rivera v. INS, 913 F.2d 1443 (9th Cir. 1990).

IV. **SUMMARY OF ARGUMENT**

In the removal proceedings held before Immigration Judge Kendall Warren in Anchorage, Alaska in April, 1999 and October, 1999, American justice rapidly degenerated into a Kafkaesque nightmare. The rule of law, the separation of powers, and the use of procedural safeguards to guarantee a fair and just hearing altogether vanished and Judge Warren's Court was transformed into a Byzantine Kangaroo Court devoid of constitutional protections and notions of due process. In short, what transpired before Judge Warren was the antithesis of our judicial system. As even the most cursory examination of Judge Warren's actions indicates, the Board of Immigration Appeals must reverse the Immigration Judge's denial of cancellation of removal proceedings in order to correct the blatant violations of Lopez-Umanzor's basic constitutional rights.

The errors committed at Lopez-Umanzor's removal hearings are multiple and egregious. To begin with, Judge Warren held that Lopez-Umanzor was not a victim of domestic violence. He found that Lopez-Umanzor was not credible and that she presented no evidence to corroborate the fact that she was a victim of domestic violence. In so doing, Judge Warren demonstrated a remarkable ignorance over the realities of domestic abuse. Moreover, he inexplicably refused to consider any of the documents and testimony offered in support of Lopez-Umanzor's claim to be a victim of domestic violence. Meanwhile, Judge Warren held that Lopez-Umanzor was inadmissible because he had "a reason to believe"

that she was a drug trafficker. The record, however, provides no reasonable basis whatsoever to support this finding. In short, Judge Warren rested his adverse-credibility determination solely upon impermissible speculation, subjective evaluation, and unsubstantiated conjecture.

Judge Warren also committed a series of unabashed due process violations during Lopez-Umanzor's removal proceedings. First of all, Judge Warren *sua sponte* ordered a second hearing to occur six months after the initial individual hearing was committed, despite the vigorous protests by both Lopez-Umanzor *and* INS counsel. In an unprecedented usurpation of prosecutorial discretion, he then denied the INS's repeated requests to withdraw its own witness from this hearing. Forcing the hearing to proceed, Judge Warren called Detective Bryant to the stand. Bryant testified regarding his hearsay communications with an informant who has a 20-year criminal history. Judge Warren then relied exclusively on this triple-hearsay testimony to find that Lopez-Umanzor was a drug trafficker, despite the fact that Detective Bryant had no personal knowledge of Lopez-Umanzor or her alleged drug-related conduct.

In addition, prior to the second hearing, Judge Warren had *ex parte* communications with the District Director without notifying the INS counsel or Lopez-Umanzor's counsel. He also inappropriately adjudicated the merits of Lopez-Umanzor's motion to recuse him.

In all, Judge Warren engaged in a series of actions that annihilated any meaningful sense of due process. The egregious nature of his conduct has threatened the public interest by undermining the rule of law, due process safeguards, and the separation of powers. Moreover, his actions demonstrate a severe disregard for legal protections entitled to victims of domestic abuse under the Violence Against Women Act provisions of the Immigration and Naturalization Act. As such, it is imperative that the Board of Immigration Appeals reverse Judge Warren's denial of Lopez-Umanzor's cancellation of removal proceedings and grant her cancellation of removal pursuant to the Violence Against Women Act provisions of the Immigration and Naturalization Act.

V. **FACTUAL BACKGROUND**

We adopt Respondent's statement on the Factual Background and incorporate it herein by reference.

VI. **PROCEDURAL BACKGROUND**

We adopt Respondent's statement on the Procedural Background and

incorporate it herein by reference.

VII. ANALYSIS

The magnitude of the abuses in this astonishing case cannot be understated and warrant immediate reversal on myriad grounds. The flouting of mandatory procedural norms was rampant in Judge Warren's courtroom. Judge Warren's actions in the proceedings below constitute a resounding assault on Lopez-Umanzor's due process rights on at least four specific grounds. First of all, Judge Warren engaged in impermissible fusion of the prosecutorial and adjudicative functions. Second, Judge Warren's reliance on triple-hearsay evidence in the absence of any attempt to afford Lopez-Umanzor the right to confront the witness against her was a clear violation of her due process rights. Third, Judge Warren's failure to grant Lopez-Umanzor an opportunity to rebut the alleged testimony against her or to present witnesses and testimony in her favor constituted a breach of Lopez-Umanzor's due process protections. Fourth, the failure to provide Lopez-Umanzor with proper notice of the charges against her constituted a basic and manifest due process violation. Each of these due process violations had an inextricable effect on the outcome of the proceedings and represent clearly reversible error.

Moreover, Judge Warren engaged in impermissible speculation, subjective evaluation, and unsubstantiated conjecture in reaching his adverse-credibility finding against Lopez-Umanzor. As the relevant jurisprudence plainly dictates, such actions by an immigration judge mandate reversal.

A. Judge Warren’s Actions in the Proceedings Below Constituted a Flagrant and Resounding Assault on Lopez-Umanzor’s Due Process Rights.

Though the constitutional rights of aliens are admittedly scant, it has been established beyond any doubt that “the Fifth Amendment entitles aliens to due process of law in deportation proceedings.” Reno v. Flores, 507 U.S. 292, 306 (1993). Under Ninth Circuit case law, an alien “must receive a ‘full and fair hearing’ in order to meet the requirements of due process.” Campos-Sanchez v. INS, 164 F.3d 448, 450 (9th Cir. 1998). To rise to the level of reversible error, denial of the right to a full and fair hearing need only violate an alien’s right “in a manner so as potentially to affect the outcome of the proceedings.” United States v. Cerda-Pena, 799 F.2d 1374, 1379 (9th Cir. 1986). A closer examination of Judge Warren’s actions reveals that severe due process violations occurred during Lopez-Umanzor’s removal hearings and that these violations were highly prejudicial.

1. **Judge Warren's unbridled usurpation of the prosecutorial function represented an impermissible violation of due process and the separation of roles in the courtroom.**

While the combination of the adjudicative and prosecutorial function in a *single agency* such as the INS is constitutionally permissible, see Winthrow v. Larkin, 426 U.S. 35, 47 (1975); LeTourneur v. INS, 538 F.2d 1368, 1370 (9th Cir.1976), the Due Process Clause of the Constitution unconditionally proscribes the merger of the adjudicative and prosecutorial functions in a *single individual*. Indeed, a hearing wherein prosecutorial and judicial functions become fused in a single person constitutes a manifest violation of the Fifth Amendment. See Figueroa Ruiz v. Delgado, 359 F.2d 718 (1st Cir. 1966).

“Our Constitution has long recognized that combining the roles of prosecutor and adjudicator in a single entity is a recipe for fundamentally unfair and erroneous decision making.” Flores v. Galvez-Maldonado, 942 F.2d 1352, 1368 (9th Cir. 1991) (en banc) (Tang, J., concurring), rev'd on other grounds, Reno v. Flores, 507 U.S. 292 (1993). See, e.g., Schweiker v. McClure, 456 U.S. 188, 195 (“As this Court repeatedly has recognized, due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.”); Tumey v. Ohio, 273 U.S. 510, 534 (“A situation in which an official performs two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process.”). Specifically, immigration judges

cannot engage in investigative and prosecutorial functions. See United States v. Garcia-Martinez, 228 F.3d 956, 962 (9th Cir. 2000) (noting that “*unlike an immigration judge*, a special inquiry officer could engage in investigative and prosecutorial functions for the INS”) (emphasis added).

Judges who have encroached upon the prosecutorial role have received universal condemnation from appellate courts. In Figueroa Ruiz v. Delgado, 359 F.2d 718 (1st Cir. 1966), for example, the First Circuit addressed a situation where Judge Mathes of the United States District Court for the District of Puerto Rico alone called prosecution witnesses to the stand and examined them, cross-examined defense witnesses, and then decided a case. See id. at 719-20. As the First Circuit ruled, this fusion of the prosecutorial and adjudicative functions was a clear violation of due process. See id. at 724. Judges admittedly have a right to question witnesses, the court noted. However, even with such a power, a judge “replaces neither the prosecutor nor counsel for the defense, but, at most, supplements both.” Id. at 720. Judge Mathes’s conduct was not merely ancillary, but fundamental and continuous, intervention. So too was Judge Warren’s intervention.

At most, a judge can only supplement the prosecution. Despite these clear dictates from due process jurisprudence, Judge Warren repeatedly and impermissibly fused the prosecutorial and adjudicative functions together during

Lopez-Umanzor's removal proceedings. First, Judge Warren *sua sponte* ordered a second hearing to occur six months after the initial individual hearing was committed, despite vigorous protests by both Lopez-Umanzor *and* INS counsel. (Oct. 6, 1999 Order of IJ at 3)¹. In an unprecedented usurpation of prosecutorial discretion, he then denied the INS's repeated requests to withdraw its own witness from this hearing. (TR at 149, 157, 165; Oct. 6, 1999 Order of IJ, 3). Forcing the hearing to proceed, Judge Warren called Detective Bryant to the stand. (TR at 163). Bryant testified regarding his hearsay communications with two police informants. (TR at 167, 172). The first informant was under investigation for drug related activities at the time she provided the police with information, and the second informant had a 20-year criminal history. (TR at 167, 190). Judge Warren then relied exclusively on this triple-hearsay testimony to find that Lopez-Umanzor was a drug trafficker, despite the fact that Detective Bryant had no personal knowledge of Lopez-Umanzor or her alleged drug-related conduct.² (TR at 158-159, 189).

Admittedly, federal regulations provide that an Immigration Judge can subpoena a witness to testify in the exceptional circumstance where the Immigration Judge determines that his or her testimony is *essential*, 8 C.F.R. § 3.35(b)(3); 8

¹ "(Oct. 6, 1999 Order of IJ at 3)" refers to page 3 of the Immigration Judge order denying the emergency motion to stay proceedings, dated October 6, 1999.

C.F.R. § 287.4(a)(2)(C). However, the regulations provide no authority whatsoever for an Immigration Judge to issue an *ex parte* subpoena.

In fact, Judge Warren’s actions are so beyond the bounds of acceptable conduct that there is scarcely any precedent discussing such a flagrant usurpation of the prosecutorial function. As the First Circuit has noted, such a fusion of the prosecutorial and adjudicative functions is so “unknown[that] . . . [o]nly three cases in which a trial was so conducted have come to our attention.” Id. at 720. In all three prior cases, along with the Figueroa Ruiz case, the procedures implemented by the judge were thoroughly rebuked. See id. at 721.

The logic underlying the impermissibility of a judicial officer coagulating the prosecutorial and adjudicative is simple:

[W]hen interrogating a witness he is examining for the people, but when listening to the answer to the question he has propounded, he is weighing it as judge, and at the same time considering what question, as prosecutor, to ask next. Correspondingly, when he listens to the answer to a question put by the defense, he must, as judge, impartially evaluate the answer, but, simultaneously, as prosecutor, he must prepare the next question for cross-examination. The mental attitude of the judge and prosecutor are at considerable variance. To keep these two personalities entirely distinct seems an almost impossible burden for even the most dedicated and fairminded of men.

Id. at 720.

As the United States Supreme Court has added,

² When asked about the alleged drug purchases, "So you relied exclusively on what

‘[E]very procedure which would offer a possible temptation to the average man as judge not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law.’ Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way ‘justice must satisfy the appearance of justice.’

Id. at 721 (quoting In re Murchison, 349 U.S. 133, 1336 (1955)). There was no appearance of justice in Immigration Judge Warren’s courtroom during Lopez-Umanzor’s removal proceedings. Simply put, a procedure whereby

the judge was the one to introduce the government’s evidence, and cross-examine of the government’s behalf would neither satisfy the appearance of justice nor be considered free of the ‘possible temptation not to hold the balance nice, clear and true between the State and the accused,’ and hence would deny the accused due process of law.

Id. at 721 (quoting In re Murchison, 349 U.S. 133, 1336 (1955)). Imposition of such a procedure by a presiding judge alone warrants reversal.

the informant told you?," Detective Bryant answered, "Yes." (TR at 189).

2. **Judge Warren's reliance on triple-hearsay evidence in the absence of any attempt to afford Lopez-Umanzor the right to confront the witness against her was a clear violation of Lopez-Umanzor's due process rights.**

Although the Federal Rules of Evidence do not control immigration proceedings, immigration proceedings are not Kangaroo Courts devoid of the strictures of rules and procedures. Specifically, such proceedings are subject to due process requirements. As such, constitutional exigencies delimit the type of evidence that can be presented at immigration hearings and the manner in which it is presented.

- a. **Judge Warren improperly admitted triple-hearsay evidence without first making a reasonable and unsuccessful effort to find the actual witness against Lopez-Umanzor.**

Immigration proceedings are not subject per se to the Federal Rules of Evidence. However, it does not follow that immigration proceedings can flout vital evidentiary standards essential to the provision of fair hearings. For example, the government cannot meet its evidentiary burdens solely on the basis of hearsay. See Matter of De Vera, 16 I. & N. Dec. 266 (B.I.A. 1977); Calderon-Ontivero v. INS, 809 F.2d 1050 (5th Cir. 1986); Matter of Lemhammad, Int. Dec. 3151 (B.I.A. 1991). Moreover, when hearsay is relied upon, it must be demonstrated that a reasonable and unsuccessful effort was made to find the actual witness, see Baliza v. INS, 709 F.2d 1231, 1234 (9th Cir. 1983), as a respondent has a fundamental

right to confront the witnesses against him or her, see Saidane v. INS, 129 F.3d 1063, 1065 (9th Cir. 1993) (“We require that ‘the government must make a reasonable effort in INS proceedings to afford the alien a reasonable opportunity to confront the witnesses against him or her.’”) (quoting Cunanan v. INS, 856 F.2d 1373, 1375 (9th Cir. 1988)).

In Lopez-Umanzor’s immigration proceedings, neither the government nor Judge Warren (acting, in essence, as prosecutor) made a reasonable and unsuccessful effort to find the actual witnesses against Lopez-Umanzor. As the Ninth Circuit has held, a reasonable and unsuccessful effort to locate the actual witness must be made. See Baliza v. INS, 709 F.2d 1231, 1234 (9th Cir. 1983). There is no evidence whatsoever that any such effort was ever made to obtain the attendance of the two witnesses, a confidential police informant and another informant named Georgina Reyes, at the hearing.

Prior to Detective Bryant’s appearance, Lopez-Umanzor’s counsel pointed out to Judge Warren that Detective Bryant had no first hand knowledge of the events about which he was being asked to testify, and that his entire testimony constituted hearsay. (TR at 158-159). Additionally, counsel for Lopez-Umanzor objected to the use of triple hearsay at least a half-dozen times during the course of Detective Bryant’s testimony. (TR at 159, 168, 172, 179, 186). Judge Warren elected to proceed with the testimony anyway, overruling each of these objections.

(Id.).

Despite Lopez-Umanzor's rigorous objections both before and during Detective Bryant's testimony, there is not a scintilla of evidence indicating that any effort was ever made to find either of the two original declarants. Instead of making a reasonable effort to locate the actual witnesses, Judge Warren chose to allow Detective Bryant to present his triple hearsay testimony before even inquiring into the location or availability of either witness.

The Ninth Circuit's precedent plainly dictates that such behavior by an Immigration Judge mandates reversal. Failure to make an effort to directly call a witness and reliance on related hearsay evidence is plainly reversible error, for it denies respondent of the right to a "fundamentally fair hearing." Saidane v. INS, 129 F.3d 1063, 1066 (9th Cir. 1993).

b. Judge Warren improperly admitted triple-hearsay evidence that was unreliable and subject to exclusion.

Moreover, while hearsay is admissible in an immigration proceeding, due process norms require that the evidence be probative and its admission be fundamentally fair. Trias-Hernandez v. INS, 528 F.2d 366, 369 (9th Cir. 1975). Specifically, hearsay evidence offered in immigration proceedings must be "tested for reliability and trustworthiness" and prove to be reliable for the admission of the evidence to be proper. Kiareldeen v. Reno, 71 F. Supp. 2d 402, 416 (D.N.J. 1999). Strong evidence of unreliability forms the basis for a proper exclusion claim.

Espinoza v. INS, 45 F.3d 308, 310 (9th Cir. 1995). In particular, hearsay based on tips from untrustworthy informants is particularly susceptible to inadmissibility. See United States v. Romo, 914 F.2d 889, 890 (7th Cir. 1990) (excluding a police report about tips from informants of the grounds of unreliability). Additionally, statements involving multiple hearsay and relating to events that the witness and/or speaker has not witnessed firsthand have been deemed unreliable. See Murphy v. INS, 54 F.3 605, 611-12 (9th Cir. 1995) (finding that a statement signed by an INS agent, which constituted uncorroborated double hearsay and pertained to events that the agent may not have himself witnessed, was untrustworthy and should not have been relied upon by the lower court).

The testimony of Detective Bryant was thoroughly unreliable and should have been excluded. First, just as in the Romo case, the hearsay testimony presented by Detective Bryant was based upon tips from two informants, Georgina Reyes and a second, unnamed informant. (TR at 167, 170, 189). Neither informant had a history as a trustworthy police informant; both were career criminals. Moreover, just as in Murphy case, Detective Bryant had no firsthand knowledge of the events about which he testified, and the testimony offered against Lopez-Umanzor amounted to *multiple* levels of hearsay. (IJ Dec. at 13-14; TR at 158-59). His testimony was based exclusively upon tips received by these unreliable informants. (IJ Dec. at 13-14; TR at 145, 158-59, 189).

Specifically, neither Georgina Reyes nor the other police informant could be deemed reliable. Georgina Reyes named Lopez-Umanzor as an individual connected with a drug sale while Reyes herself was being questioned about a narcotic sale for which she was being investigated. (TR at 167-68). Georgina Reyes had contact with police officers solely because she was being questioned about a drug transaction in which she was a suspect, not because she was known as a reliable police informant. Due to the pending investigation against her, Georgina Reyes had every incentive to curry favor with the police and to divert the focus of the investigation away from her. In providing the police with Lopez-Umanzor's name, she accomplished precisely these objectives.

The other informant also had no history as a police confidant. In fact, Detective Bryant openly admitted that this informant had never been used in such a capacity. (TR at 218). Instead, the sole connection of the second informant to the police department was as a *repeat offender with a twenty-year criminal history*—hardly the background for a credible informant. (TR at 190). This informant was offered a more lenient sentence if he were able to provide the police with the statements that they had requested. (TR at 190). Given the criminal records of both informants and the fact that they stood to gain substantial benefits if they implicated Lopez-Umanzor in the drug transaction, the trustworthiness of each of informant was questionable *at best*.

Moreover, Detective Bryant's reliability was profoundly suspect. Detective Bryant had lied to the INS by providing *blatantly false* information regarding the District Attorney's policy regarding the prosecution of persons suspected of narcotics offenses. He did so in an attempt to explain away why Lopez-Umanzor had never been prosecuted for her alleged involvement in the sale of drugs. (IJ Dec. at 5). Based on this curious fallacy, the INS itself had grave concerns about Detective Bryant's credibility, honesty, and candor as a witness. As a result, the party best able to ascertain Detective Bryant's veracity elected against calling Detective Bryant to the stand. Finding his prior inaccuracies to be deeply "troubling," the INS concluded that Detective Bryant should not testify. (Id.).

Despite all of these factors militating against a finding of reliability, Judge Warren was adamant about procuring and admitting Detective Bryant's manifestly corrupt testimony. This action, *inter alia*, robbed Lopez-Umanzor of a fair trial and constituted a clear violation of her due process rights.

- 3. Judge Warren's failure to grant Lopez-Umanzor an opportunity to rebut the alleged testimony against her or to present witnesses and testimony in her favor was a clear violation of Lopez-Umanzor's due process rights.**

In addition to constitutional protections of due process, the right to a full and fair hearing is mandated by specific statutory and regulatory provisions. See Campos-Sanchez v. INS, 164 F.3d 448, 450 (9th Cir. 1998). Specifically, 8 C.F.R. § 242.16(a) dictates that aliens be provided with a reasonable opportunity to present testimony on their own behalf. As the Board has held, a respondent is entitled to have her claim evaluated in the context of whatever admissible evidence she desires to submit, as long as the evidence is relevant, material and non-cumulative. See Matter of Exame, 18 I&N Dec. 303, 305 (BIA 1982). Failure to allow respondent the opportunity to admit such evidence mandates reversal, see id., particularly when such evidence aims, as here, to corroborate respondent's statutory basis for relief from removal. See Podio v. INS, 153 F.3d 506, 510 (7th Cir. 1998).

Judge Warren evaded these mandatory procedural rules and norms altogether by denying Lopez-Umanzor the opportunity to present her case before him. In the most egregious example of this violation of Lopez-Umanzor's right to a full and fair hearing, Judge Warren denied Lopez-Umanzor's expert the right to testify simply because it was 4:30 in the afternoon and the judge had grown tired: "I don't believe that I want to hear any testimony from the experts, because – mainly because of the lateness of the hour. If – you know, if we had more time, perhaps, but it is 4:30 and I don't think we could accomplish much in 30 minutes."

(TR at 129-30). As Judge Warren’s own words make clear, his refusal to admit further evidence had nothing to do with his belief that it was irrelevant, immaterial, or cumulative.

This violation of Lopez-Umanzor’s due process rights is particularly significant and ironic since, in his decision, Judge Warren determined that there was insufficient evidence to document Lopez-Umanzor’s claims of domestic abuse. Warren’s curtailment of a proceeding where someone’s life was on the line simply because it was 4:30 in the afternoon and he was tired was plainly abusive and deprived Lopez-Umanzor of her right to a full and fair hearing.

4. **The failure to provide Lopez-Umanzor with proper notice of the charges against her constitutes a basic and manifest due process violation.**

It is indisputable that in a removal proceeding, a respondent must be provided with clear and specific notice of the charges against her. As the Supreme Court has made patently clear, failure to inform an immigrant of “notice of the nature of the charge” against her constitutes a due process violation. See Kwong Hai Chew v. Colding, 344 U.S. 590, 597 (1953).

The front page of the Immigration Judge’s decision, issued on August 28, 2000, clearly cites the charges against Lopez-Umanzor—violation of section 212(a)(6)(A)(i) of the Immigration and Naturalization Act. Unfortunately, and quite disturbingly, this is the *first time* that notice of this charge was *ever* given to

Lopez-Umanzor.

As Judge Warren's decision admits, the basis for his finding of deportability under section 212(a)(6)(A)(i) of the Immigration and Naturalization Act was the testimony of Detective Bryant. However, the purpose of Detective Bryant's testimony was never fully revealed to Lopez-Umanzor. Indeed, she never received notice of the section 212(a)(6)(A)(i) charges against her. This is plain error and a violation of Lopez-Umanzor's due process rights. Cf. Hall v. INS, 167 F.3d 852, 857 (4th Cir. 1999) (finding no due process violation in immigration proceedings of respondent because INS Order to Show Cause specifically cited "the statutory authority for [respondent's] deportation . . . [and t]his was sufficient to give [respondent] notice of the charge he faced"). No court in our nation can or should tolerate the imposition of charges on an individual without advance notice.

5. These multiple due process violations had an inextricable effect on the outcome of the proceedings and constitute clearly reversible error.

Although no prejudice is found when a due process violation does not impact the immigration judge's ruling, see Pereira-Diaz v. INS, 551 F.2d 1149, 1153-54 (9th Cir. 1977),³ it is absolutely clear that the fruits of Judge Warren's due

³ For example, when a judge failed to provide a respondent in an asylum hearing with an opportunity to inspect, explain, and rebut an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs, such a due process violation did not constitute reversible error as the judge's ruling on the asylum application

process violations formed the crux of his decision to deny Lopez-Umanzor cancellation of removal. Thus, Lopez-Umanzor was unequivocally prejudiced by the due process violations committed by Judge Warren.

The very text of Judge Warren's decision renders this proposition explicit. Judge Warren made the following five determinations in his opinion: (1) Lopez-Umanzor is not credible; (2) Lopez-Umanzor is excludable and ineligible to apply for Cancellation of Removal; (3) Lopez-Umanzor has not established that she was abused; (4) it is not necessary to make a determination as to whether Lopez-Umanzor's removal would result in extreme hardship; and (5) Lopez-Umanzor is ineligible for voluntary departure. (IJ Dec. at 25-26). Judge Warren's due process violations inextricably effected each of these conclusions.

First of all, Judge Warren's adverse credibility and § 212(a)(6)(A)(i) finding was inextricably based upon his procurement and admission of unreliable triple hearsay evidence obtained in violation of Lopez-Umanzor's constitutional rights.⁴

indicated that he did not rely upon the advisory opinion. See Pereira-Diaz v. INS, 551 F.2d 1149, 1153-54 (9th Cir. 1977).

⁴ As Judge Warren stated, "the Court has concluded that the Respondent testified untruthfully in these proceedings regarding her involvement in the sale of crack cocaine by Luis Gomez-Mendoza, and that she actually was an active participant in the sales, *as reported by Detective Bryant and the confidential informant.*" (IJ Dec. at 25, emphasis added). As noted earlier, Detective Bryant's testimony was admitted in flagrant disregard for due process protections, for it constituted unreliable triple-hearsay evidence, was obtained through the improper fusion of the prosecutorial and adjudicative functions, and was admitted absent a reasonable attempt to find the original declarants.

(IJ Dec. at 24-25). Secondly, Judge Warren’s finding that Lopez-Umanzor was excludable under § 212(a)(2)(c) and ineligible to apply for a cancellation of removal proceedings was made without proper notice of the drug charges facing Lopez-Umanzor and was also made on the basis of the tainted testimony of Detective Bryant.

Third, Judge Warren found that Lopez-Umanzor had failed to establish that she was battered or subjected to extreme cruelty in the United States. (IJ Dec. at 25). This determination was also the direct product of due process violations, as Judge Warren failed to give Lopez-Umanzor an opportunity to rebut the testimony offered against her or to present witnesses relating to the issue of abuse. Judge Warren also denied her experts the right to testify simply because it was 4:30 in the afternoon and he was tired. (TR at 129-30).

Fourth, “in view of the above findings” —findings that were the direct result of due process violations—Judge Warren concluded that it was not necessary to even inquire into whether Lopez-Umanzor’s removal would result in extreme hardship to Lopez-Umanzor or her children. (IJ Dec. at 25). Finally, Judge Warren determined that Lopez-Umanzor was not eligible for voluntary departure, based on his view that she was not of “good moral character.” (IJ Dec. at 25-26). Judge Warren grounded this view in light of conclusions that she was not credible and that she was involved in the sale of illegal narcotics. (IJ Dec. at 25-26). Thus,

in making this final determination, Judge Warren again relied upon prior findings reached through blatant violation of Lopez-Umanzor's constitutional rights. All told, each and every determination in Judge Warren's decision was the direct product of multiple violations of due process guarantees.

To demonstrate actual prejudice from the procedural defects of her removal hearing, Lopez-Umanzor must also provide plausible grounds for relief from deportation. See United States v. Esparza-Ponce, 193 F.3d 1133, 1136 (9th Cir.1999). The VAWA provisions of the INA, inter alia, meet this burden. Under the Violence Against Woman Act provisions of the Immigration and Naturalization Act, "The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that . . . the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident." 8 U.S.C. § 1229b(b)(2)(i)(II).

B. Warren's Reliance on Impermissible Speculation, Subjective Evaluation, and Unsubstantiated Conjecture in Reaching His Adverse-Credibility Finding Constitutes Reversible Error.

The elevation of speculation over facts has no place in American jurisprudence. As the Ninth Circuit has dictated, "[s]peculation and conjecture cannot form the basis of an adverse credibility finding, which must instead be based on substantial evidence on speculation and conjecture." Shah v. INS, 220

F.3d 1062, 1071 (9th Cir. 2000). Moreover, the subjective views of a judge have no place in an adverse-credibility determination. Bandari v. INS, 227 F.3d 1160, 1167 (9th Cir. 2000). Thus, it is impermissible and reversible error for an Immigration Judge to speculate as to “what a persecuted person would include in his asylum application,” id. at 1167, “when a person should bleed [under the force of a beating],” id. at 1167, why a person would continue to include their names on political fliers critical of a government after being arrested and beaten for writing such fliers, Salaam v. INS, 229 F.3d 1234, 1238 (9th Cir. 2000), “what guerillas likely would and would not do” to a political enemy, see Lopez-Reyes v. INS, 79 F.3d 908, 912 (9th Cir. 1996), or what kind of correspondence an asylum-seeker would have received from the persecuted political party of which he was allegedly a member, see Shah v. INS, 220 F.3d 1062, 1071 (9th Cir. 2000).

As this controlling authority plainly mandates, Judge Warren’s parade of speculations—which formed the basis for his ultimate decision to deny Lopez-Umanzor’s request for cancellation of removal—constitute reversible error. Judge Warren impermissibly engaged in speculation and conjecture, without a scintilla of evidence, as to why Lopez-Umanzor had a miscarriage. When Lopez-Umanzor opined that the miscarriage had resulted from her abuse inflicted upon her by her former husband, Judge Warren callously noted that less than one percent of miscarriages were caused in such a manner (TR at 52), and thus speciously

concluded that Lopez-Umanzor was not credible on this point (IJ Dec. at 22).

When Lopez-Umanzor documented her former husband's abusive behavior, Judge Warren hypothesized that her wounds could have been caused by "self abuse." (TR at 48). To be sure, Lopez-Umanzor's injuries could have also been caused by a falling comet; however, there is no basis for such outrageous conjecture by a presiding judge. As the Ninth Circuit has made clear, groundless speculation on medical injury and physical harm constitutes reversible error.

Bandari v. INS, 227 F.3d 1160, 1167 (9th Cir. 2000).

Armed with nothing more than idle speculation and a remarkable ignorance of the realities of domestic abuse, Judge Warren made a finding of adverse credibility against Lopez-Umanzor, since he found it incomprehensible that an abusive husband would be a stalker, (IJ Dec. at 21), implausible that a victim of domestic violence would return to an abusive home, (IJ Dec. at 21), and unbelievable that an abused wife would not call the police and turn her husband in to the authorities, (IJ Dec. at 21-22). But the law is clear: Baseless astonishment regarding behavior by the persecuted and/or one's persecutors is impermissible and constitutes reversible error. Salaam v. INS, 229 F.3d 1234, 1238 (9th Cir. 2000); Lopez-Reyes v. INS, 79 F.3d 908, 912 (9th Cir. 1996).

Thus, Judge Warren's finding of adverse credibility regarding domestic abuse issues was based entirely upon speculation and conjecture. When a

credibility determination “rest[s] on insufficient and impermissible grounds,” a reviewing court should reverse the adverse-credibility finding and properly deem the appellant’s testimony credible. Akinmade v. INS, 196 F.3d 951, 957-58 (9th Cir. 1999). As the Ninth Circuit has explained, “we presume that if the IJ had any additional reasons to doubt [the petitioner's] credibility, the IJ would have stated so in the decision below. Because the IJ expressed no further concerns, and the only explicitly articulated reasons rested on impermissible factors, then we conclude from the IJ's opinion that [the petitioner] was an otherwise credible witness.” Damaize-Job v. INS, 787 F.2d 1332, 1338 (9th Cir. 1986) (citations omitted). As documented, Judge Warren’s adverse-credibility finding rested solely on insufficient and impermissible grounds. Lopez-Umanzor’s testimony, which forms the basis for her asylum claim, should consequently be held credible.

VIII. **CONCLUSION**

For the foregoing reasons, we respectfully request that the Board of Immigration Appeals reverse Judge Warren’s denial of Lopez-Umanzor’s cancellation of removal proceedings and grant her cancellation of removal pursuant to the Violence Against Women Act provisions of the Immigration and Naturalization Act.

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