

Matter of J-E-D-C-, Respondent

Decided October 19, 2026

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

- (1) The United States Court of Appeals for the Ninth Circuit's requirement that Immigration Judges and the Board must accept as true the facts set forth in an affidavit supporting a motion to reopen unless the facts are inherently unbelievable is inconsistent with the Supreme Court of the United States' reasoning and holding in *INS v. Abudu*, 485 U.S. 94 (1988), and the discussion of credibility in *Garland v. Ming Dai*, 593 U.S. 357 (2021).
- (2) In reviewing affidavits, declarations, or written statements of fact in support of a motion to reopen, Immigration Judges and the Board are not required to accept as true facts set forth by the respondent, even when those statements are not inherently unbelievable.

FOR THE RESPONDENT: Jessica Lewis, Esquire, Phoenix, Arizona

BEFORE: Board Panel: MALPHRUS, Chief Appellate Immigration Judge, HUNSUCKER and VOLKERT, Appellate Immigration Judges.

VOLKERT, Appellate Immigration Judge:

The Immigration Judge ordered the respondent removed in absentia. The respondent filed a motion to reopen and rescind the in absentia removal order, claiming his failure to appear was because of "exceptional circumstances." Section 240(b)(5)(C)(i) of the Immigration and Nationality Act ("INA"), 8 U.S.C. 1229a(b)(5)(C)(i) (2024). The Immigration Judge denied the motion on May 13, 2026, and the respondent appeals from that decision. We will dismiss the appeal.

I. FACTUAL AND PROCEDURAL BACKGROUND

The respondent is a native and citizen of Mexico. On April 13, 2024, the Department of Homeland Security ("DHS") personally served him with a notice to appear, which provided the date, time, and location of his initial hearing. The notice to appear reflected that the respondent was informed in Spanish of that information, as well as his obligation to appear and the consequences for failing to appear at the scheduled hearing. The respondent failed to appear at the October 27, 2025, hearing, and the Immigration Judge issued an in absentia removal order.

On April 24, 2026, the respondent filed a motion to reopen and rescind the in absentia removal order, claiming that exceptional circumstances prevented him from appearing at the October 27, 2025, hearing. INA § 240(b)(5)(C)(i), 8 U.S.C. § 1229a(b)(5)(C)(i). In support of the motion, the respondent filed a declaration attesting that he had “limited communication in Spanish with the [DHS] officer” and that he was told he would “later receive a document with the date of a hearing before the Immigration Court” and would be required to appear at that hearing. The declaration further states that the respondent did not understand at the time that the date on the notice to appear was his hearing date because he “had received notices in the mail previously [from] when [his] case was previously with the Court.”¹ The respondent further attested he “truly understood” that he would receive a subsequent notice providing a date for the hearing at which he would be required to appear.

On May 13, 2026, the Immigration Judge denied the respondent’s motion to reopen and rescind the in absentia removal order, holding that the respondent did not establish exceptional circumstances for his failure to appear. The Immigration Judge found inherently unbelievable the respondent’s averments in his declaration that he did not understand that he was required to appear at the October 27, 2025, hearing and thought he would receive a subsequent hearing notice with a later hearing date. The Immigration Judge reasoned that the respondent was an adult when DHS served him with the notice to appear and the contents of the notice to appear, including the date and time of the hearing and the respondent’s obligation to appear, were explained to him by DHS.

The Immigration Judge also denied the respondent’s request for sua sponte reopening, finding that the respondent’s filings in support of his applications for asylum, withholding of removal, and protection under the regulations implementing the Convention Against Torture (“CAT”)² did not establish a colorable claim for relief and/or protection. The respondent timely appealed the Immigration Judge’s decision to the Board.

¹ The respondent previously appeared in removal proceedings before the Phoenix Immigration Court as an Unaccompanied Alien Child.

² The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994).

II. LEGAL ANALYSIS

A. Motions to Reopen In Absentia Removal Orders

As relevant here, an in absentia removal order may be rescinded only “upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances.” INA § 240(b)(5)(C)(i), 8 U.S.C. § 1229a(b)(5)(C)(i). The INA defines “exceptional circumstances” as

exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

INA § 240(e)(1), 8 U.S.C. § 1229a(e)(1). “In other words, the circumstances (1) must cause the noncitizen’s failure to appear, (2) must be beyond the [respondent’s] control, and (3) must be sufficiently compelling.” *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026).

“In determining whether an alien has established exceptional circumstances, the ‘totality of the circumstances’ pertaining to the alien’s case should be considered.” *Matter of S-L-H- & L-B-L-*, 28 I&N Dec. 318, 321 (BIA 2021); accord *Montejo-Gonzalez*, 166 F.4th at 854. “Evidence relevant to the statutory factors may include whether the [respondents] were diligent, whether they encountered external or unforeseen circumstances, and whether they lacked a motive to evade the hearing.” *Montejo-Gonzalez*, 166 F.4th at 854.

The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that in adjudicating a motion to reopen, Immigration Judges and the Board must accept as true facts stated in an affidavit unless the Immigration Judge or the Board finds those facts “inherently unbelievable.” *Perez-Portillo v. Garland*, 56 F.4th 788, 795 (9th Cir. 2022) (quoting *Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005)); see also *Arredondo v. Lynch*, 824 F.3d 801, 806 (9th Cir. 2016) (holding that the Board erred in disregarding statements in an affidavit); *Ghahremani v. Gonzales*, 498 F.3d 993, 999 (9th Cir. 2007) (same). The Ninth Circuit has also applied this rule in some cases where factual averments were made in motions and declarations. See *Trigueros Quizar v. Blanche*, No. 24-4847, 2026 WL 2620433, at *4 (9th Cir. Sep. 4, 2026) (applying rule to statements made in a motion); *Perez-Portillo*, 56 F.4th at 795 (applying rule to statements made in a declaration).

We recognize and respect that we are generally required to follow circuit court precedent in the circuit in which a case arises. *See Matter of U. Singh*, 25 I&N Dec. 670, 672 (BIA 2012) (holding that the Board must “apply the law of the circuit in cases arising in that jurisdiction”); *see also Trigueros Quizar*, 2026 WL 2620433, at *5 (“A BIA decision cannot displace our precedent.”). However, if circuit court precedent conflicts with precedent of the Supreme Court of the United States, we respectfully must follow the Supreme Court precedent. *See Matter of Jauregui*, 15 I&N Dec. 485, 486–87 (BIA 1975) (declining to follow a Ninth Circuit mandate in light of “[a]n intervening change in controlling authority” from the Supreme Court).

The Ninth Circuit’s inherently-unbelievable standard is inconsistent with the standard for considering motions to reopen set forth by the Supreme Court in *INS v. Abudu*, 485 U.S. 94, 104–11 (1988). In that case, the Ninth Circuit had held below that in determining whether a respondent has established a prima facie case for relief in a motion to reopen, the Board “must accept the factual statements in the alien’s affidavit as true,” analogizing a motion to reopen to a motion for summary judgment and holding that the Board “must draw all reasonable inferences in favor of the alien unless the evidence presented is ‘inherently unbelievable.’” *Abudu v. INS*, 802 F.2d 1096, 1101–02 (9th Cir. 1986) (citation omitted), *rev’d*, 485 U.S. 94. Specifically, the Ninth Circuit had held that the Board was required to accept as true the respondent’s characterization of a surprise visit from a government official as a threat because it was not “inherently unbelievable.” *Id.* at 1102.

The Supreme Court squarely rejected the Ninth Circuit’s approach. It explained:

We have never suggested that all ambiguities in the factual averments must be resolved in the movant’s favor, and we have never analogized such a motion to a motion for summary judgment. The appropriate analogy is a motion for a new trial in a criminal case on the basis of newly discovered evidence, as to which courts have uniformly held that the moving party bears a heavy burden.

Abudu, 485 U.S. at 109–10. It further held that the Board was not required to accept an alien’s “conjectures about probable threats” during “an event with uncertain meaning” as sufficient to meet his burden for reopening. *Id.* at 100, 111. The Supreme Court also recognized that the Board is “entitled to attach significance” to the timing of a claim made for the first time in a motion to reopen “for the purpose of evaluating the probability that the movant can prove his allegations.” *Id.*

After *Abudu*, the Ninth Circuit continued to apply its pre-*Abudu* rule that in deciding whether a respondent has made a prima facie case for the underlying relief sought, the Board is required to accept as true an alien's statements in an affidavit filed with a motion to reopen. See, e.g., *Limsico v. U.S. INS*, 951 F.2d 210, 213 (9th Cir. 1991) (citing *Aviles-Torres v. INS*, 790 F.2d 1433, 1436 (9th Cir. 1986)). This blanket rule conflicts with the Supreme Court's decision in *Abudu*. The Ninth Circuit has not explained in a precedential decision how the continued application of the inherently-unbelievable standard is consistent with the reasoning and holding of *Abudu*.³

In addition to being inconsistent with *Abudu*, we agree with the dissent in *Trigueros Quizar v. Blanche* that the Ninth Circuit's rule as it is applied to motions to reopen in removal proceedings has no textual support in the INA. 2026 WL 2620433, at *7–8 (9th Cir. Sept. 4, 2026) (VanDyke, J., dissenting). The INA requires a motion to reopen to be “supported by affidavits or other evidentiary material.” INA § 240(c)(7)(B), 8 U.S.C. § 1229a(c)(7)(B). Nothing in the INA's provisions governing motions to reopen states that a movant's affidavit is sufficient to support a motion to reopen unless its contents are inherently unbelievable.

We also agree with the dissent's conclusion that the rule conflicts with the Supreme Court's instruction in *Garland v. Ming Dai*, 593 U.S. 357, 371 (2021). See *Trigueros Quizar*, 2026 WL 2620433, at *7–8 (VanDyke, J., dissenting). There, the Supreme Court held that under the INA, there is a difference “between credibility, persuasiveness, and the burden of proof,” and “even if the BIA treats an alien's evidence as credible, the agency need not find his evidence persuasive or sufficient to meet the burden of proof.” *Ming Dai*, 593 U.S. at 371. The Ninth Circuit's requirement that Immigration Judges and the Board deem true a movant's factual averments offered without any corroborating evidence fails to recognize that under the INA, even credible testimony may not be sufficient to meet the alien's burden of proof. See *id.*; see also *Trigueros Quizar*, 2026 WL 2620433, at *8 (VanDyke, J., dissenting) (stating that requiring the agency to ignore corroborating or other record evidence that could “shed light on whether a

³ The Ninth Circuit cited both the Supreme Court's decision in *Abudu* and its inherently-unbelievable standard in *Zacarias v. U.S. INS*, 908 F.2d 1452, 1460 (9th Cir.), amended on reh'g sub nom. *Elias-Zacarias v. U.S. INS*, 921 F.2d 844 (9th Cir. 1990), rev'd sub nom. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). The Ninth Circuit did not, however, address the inconsistency between the inherently-unbelievable standard and the reasoning of *Abudu*. Additionally, the Supreme Court vacated this Ninth Circuit decision on other grounds. See *Elias-Zacarias*, 502 U.S. at 481–84.

[respondent's] proffered excuse for missing his hearing is persuasive . . . makes no sense")

The Ninth Circuit's requirement that Immigration Judges and the Board must accept as true the facts set forth in an affidavit supporting a motion to reopen unless the facts are inherently unbelievable is inconsistent with the Supreme Court's reasoning and holding in *Abudu* and the discussion of credibility in *Ming Dai*. Presuming credibility in this manner places undue restrictions on the Board's ability to properly consider whether a respondent has met his or her "heavy burden" to establish that further proceedings are warranted based on the individual facts and circumstances of that case. *Abudu*, 485 U.S. at 110; *see also Montejo-Gonzalez*, 166 F.4th at 854–55 (holding that the Board must consider the totality of the circumstances in determining whether exceptional circumstances warrant reopening and rescinding an in absentia removal order). Moreover, in other contexts, the Ninth Circuit has affirmed the Board's authority to reject evidence presented with a motion to reopen when it is undermined by evidence in the record. *See Greenwood v. Garland*, 36 F.4th 1232, 1235–36 (9th Cir. 2022) (agreeing with *Matter of F-S-N-*, 28 I&N Dec. 1 (BIA 2020), and holding that the Board may "reject a motion to reopen by relying on a previous adverse credibility determination if that earlier finding factually undermines the [alien's] new claim").

Thus, we respectfully conclude that in reviewing affidavits, declarations, or written statements of fact in support of a motion to reopen, Immigration Judges and the Board are not required to accept as true facts set forth by the respondent, even when those statements are not inherently unbelievable. Instead, consistent with *Abudu* and *Ming Dai*, Immigration Judges and the Board may assess the reliability of an affiant's statements and other evidence proffered in support of a motion to reopen under the same standards that govern credibility determinations in the adjudication of applications for relief and protection under the INA. *See* INA §§ 208(b)(1)(B)(iii), 240(c)(4)(C), 8 U.S.C. §§ 1158(b)(1)(B)(iii), 1229a(c)(4)(C) (2024) (stating that, "[c]onsidering the totality of the circumstances, and all relevant factors," credibility determinations may be based on, among other things, the consistency of an applicant's statements with other record evidence and any inaccuracies or falsehoods in the applicant's statements); *see also Matter of I-S-M-*, 29 I&N Dec. 811, 812 (BIA 2026) ("Under the REAL ID Act, an adverse credibility finding must be based on consideration of the totality of the circumstances and all relevant factors, including the responsiveness of the respondent, the inherent plausibility of the respondent's account, the consistency between the respondent's written and oral statements, and the

internal consistency of each such statement, without regard to whether an inconsistency goes to the heart of the respondent's claim.”).

B. Application to the Respondent's Case

The Immigration Judge properly held that the respondent did not meet his burden of proving that “exceptional circumstances” prevented him from appearing at the October 27, 2025, hearing. INA § 240(b)(5)(C)(i), 8 U.S.C. § 1229a(b)(5)(C)(i). We discern no clear error in the Immigration Judge's findings that the respondent was an adult when DHS served him with the notice to appear and that DHS informed the respondent in Spanish of the hearing date and his obligation to appear at the hearing. Thus, the respondent's contentions in his declaration that he did not know he was required to appear at the October 27, 2025, hearing and thought he would receive a subsequent hearing notice are inconsistent with the record evidence and therefore not credible. *See* INA § 240(c)(4)(C), 8 U.S.C. § 1229a(c)(4)(C).

The respondent claims on appeal that his assumption that the notice to appear would be “supplemented prior to his first hearing” with a new hearing date is reasonable given the “reality of removal proceedings throughout the last decade.” He cites to a 2015 article in the Wall Street Journal documenting what the respondent characterizes as a practice by the Immigration Courts at that time of “parking” removal hearings for nondetained aliens on speculative dates several years into the future. However, the respondent's citation to a decade-old newspaper article and generalized reference to a decade of removal proceedings involving unidentified and unrelated respondents do not explain his failure to appear. DHS complied with its duty to provide complete date, place, and time information on the respondent's notice to appear, the notice to appear was personally served on him, and its contents were explained to him in Spanish. *See generally Niz-Chavez v. Garland*, 593 U.S. 155, 161 (2021) (discussing the necessity of a complete notice to appear to provide proper notice of a hearing).

We also agree with the Immigration Judge that the respondent's applications for asylum, withholding of removal, and CAT protection are not supported by sufficient evidence and legal authority to establish a colorable claim for relief or protection. *See Montejo-Gonzalez*, 166 F.4th at 854 (holding that in determining whether a movant established the requisite “exceptional circumstances” to rescind an in absentia removal order, “the agency may consider whether a [movant] had a colorable claim for relief or was merely delaying the inevitable”); *see also*

Park v. Garland, 72 F.4th 965, 980 (9th Cir. 2023) (“Generalized evidence of violence and crime is insufficient to establish a likelihood of torture.” (citing *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1152 (9th Cir. 2010) (per curiam))). The respondent’s appeal brief does not offer any argument or evidence meaningfully contesting the Immigration Judge’s determination or otherwise establishing a colorable claim for asylum, withholding of removal, or CAT protection.

The respondent also requests that we sua sponte reopen his proceedings. See 8 C.F.R. § 1003.2(a) (2026). This case does not present an exceptional situation that would warrant exercise of our sua sponte authority. See *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (holding that the authority to reopen proceedings sua sponte is limited to “exceptional situations” and “is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship.”).

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by DHS, or conspires to or takes any action designed to prevent or hamper the respondent’s departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to \$998 for each day the respondent is in violation. See INA 274D, 8 U.S.C. § 1324d (2024); 8 C.F.R. § 280.53(b)(14) (2026). Further, any respondent that has been denied admission to, removed from, or has departed the United States while an order of exclusion, deportation, or removal is outstanding and thereafter enters, attempts to enter, or is at any time found in the United States shall be fined or imprisoned not more than 2 years, or both. See INA § 276(a), 8 U.S.C. § 1326(a) (2024).