No. 19-3956 & 20-2427

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OUSMAN DARBOE,

Petitioner,

v.

WILLIAM P. BARR, United States Attorney General,

Respondent.

On Petition for Review of a Final Decision of the Board of Immigration Appeals, No. A 201 119 754

BRIEF FOR PETITIONER OUSMAN DARBOE

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PRELIMINARY STATEMENT

Petitioner Ousman Darboe ("Mr. Darboe") has lived in New York for two decades, since he was brought to this country as a young child. His entire family – including his spouse and daughter, his parents, and his eight siblings – lives in the United States. They are all U.S. citizens or lawful permanent residents. Seeking to remain with his family in his adopted homeland, Mr. Darboe applied for adjustment of status through his U.S. citizen wife, who has been his partner since they were teenagers. At the time of his application, Mr. Darboe had a single criminal conviction that rendered him inadmissible, requiring him to simultaneously apply for a waiver of inadmissibility. Mr. Darboe and his wife testified in support of his applications for relief from removal, and he presented voluminous evidence regarding the exceptional hardship to his wife and daughter that would result from his deportation, his rehabilitation, and his family and community ties. In legally and factually flawed decisions, the Immigration Judge ("IJ") and Board of Immigration Appeals ("BIA") denied his application for a waiver and found him to be ineligible to adjust status. Shortly after his removal proceedings concluded, however, Mr. Darboe's case materially changed: he was granted a full and unconditional pardon of his sole criminal conviction by Governor Andrew Cuomo. Despite this rare and extraordinary equity, and in

contravention of over a century of precedent, the BIA denied Mr. Darboe's ensuing motion to reopen.

Through this consolidated appeal, Mr. Darboe respectfully seeks review of the denial of his statutory motion to reopen and his underlying order of removal. Each element of the BIA's decision denying the motion is infected by legal error: the BIA departed, without explanation, from well-established precedent holding that a pardon overcomes conviction-based inadmissibility; inexplicably concluded the pardon had no impact on the discretionary calculus; and erroneously refused to reopen for voluntary departure despite Mr. Darboe's statutory eligibility. Moreover, the IJ and BIA's original decisions denying his application for a waiver contained legal errors that can only be cured through remand: they failed to consider hardship to Mr. Darboe's infant U.S. citizen daughter and ignored the extent to which his deportation would impact his spouse; made prejudicial factual errors regarding his testimony; exaggerated his criminal history; applied an incorrect standard of appellate review; and relied, without legal authority, on an adverse credibility determination to deny the waiver in discretion. These manifold errors require vacatur and remand such that the agency can properly adjudicate Mr. Darboe's applications for relief from deportation.

STATEMENT OF JURISDICTION & VENUE

Jurisdiction rests on Petitioner's timely-filed Petitions for Review, dated November 27, 2019, and July 30, 2020, which were consolidated. The first petition seeks review of a final agency decision issued on November 14, 2019, in which the BIA affirmed the IJ's decision denying Petitioner a waiver of inadmissibility, finding him ineligible to adjust status, and ordering him removed; the second petition seeks review of the final agency order dated July 16, 2020, in which the BIA denied Petitioner's statutory motion to reopen. Both petitions were filed pursuant to 8 U.S.C. § 1252; venue is proper in this Circuit because the Immigration Court decision was by IJ James McCarthy in New York, New York.

STANDARD OF REVIEW

Where, as here, the BIA affirms the IJ's decision and "closely tracks the IJ's reasoning," this Court reviews both decisions for the sake of completeness. *Suzhen Meng v. Holder*, 770 F.3d 1071, 1073 (2d Cir. 2014); *see also Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 166 (2d Cir. 2008) (reviewing both decisions where the BIA agreed with IJ's adverse credibility determination and "adopt[ed] particular parts of the IJ's reasoning").

This Court reviews questions of law and the application of law to undisputed facts *de novo*. *Vasconcelos v. Lynch*, 841 F.3d 114, 117 (2d Cir. 2016); *accord Guerrero-Lasprilla v. Barr*, 140. S. Ct. 1062, 1068–69 (2020). Whether the agency

has failed to "consider an important fact in the record" in coming to a legal conclusion is a question subject to *de novo* review. *Yi Long Yang v. Gonzalez*, 478 F.3d 133, 141–42 (2d Cir. 2007). The agency's factual findings are reviewed under the substantial evidence standard and are upheld only if supported by "reasonable, substantial and probative evidence in the record." *Yanqin Weng v. Holder*, 562 F.3d 510, 513 (2d Cir. 2009) (internal citations omitted). This Court will "vacate and remand for new findings . . . if the agency's reasoning or its factfinding process was sufficiently flawed." *Lin v. Mukasey*, 553 F.3d 217, 220 (2d Cir. 2009).

ISSUES PRESENTED

1. Whether the BIA erred in finding that Petitioner required a waiver of inadmissibility to adjust status, despite the full and unconditional gubernatorial pardon of his sole criminal conviction, in contravention of Board precedent.

2. Whether, in light of Petitioner's eligibility for adjustment of status due to his pardon, remand is required for a new analysis of Petitioner's application under the correct discretionary standard articulated by BIA precedent.

3. Whether the IJ and BIA committed reversible error in denying Petitioner's application for a waiver of inadmissibility pursuant to 8 U.S.C. § 1182(h).

    a. Whether remand is required for a new hardship analysis under a lowered standard because Petitioner's pardoned conviction cannot constitute a violent or dangerous crime.

    b. Whether the original hardship analysis was flawed because the IJ and BIA overlooked and seriously mischaracterized record evidence regarding hardship to Petitioner's qualifying relatives.

c. Whether the discretionary analysis requires vacatur and remand because it was based on an inaccurate recitation of Petitioner's criminal history, an adverse credibility determination unsupported by substantial evidence, and failure to consider positive equities as required by precedent.

4. Whether the BIA erred in failing to reopen Petitioner's proceedings for consideration of voluntary departure in light of his full and unconditional pardon.

SUMMARY OF ARGUMENT

The agency's decisions must be vacated and this matter remanded for application of the correct legal standards to Mr. Darboe's applications for relief. First, nearly 140 years of precedent counsels that the full and unconditional gubernatorial pardon of his sole criminal conviction eliminates inadmissibility such that he is eligible for adjustment of status without a waiver. The BIA's denial of Mr. Darboe's motion to reopen reversed this long-standing understanding that pardons cure inadmissibility based on conviction for a crime involving moral turpitude ("CIMT"), without explanation or acknowledgement. The BIA's decision was also arbitrary and capricious because it constituted an unexplained departure from a settled course of adjudication. Second, the BIA erred in denying reopening by suggesting that the previous discretionary denial of Mr. Darboe's application for a waiver precluded the discretionary grant of simple adjustment of status, and that the discretionary calculus was unaffected by the pardon. This is a clear misapplication of Board precedent, which establishes distinct legal standards for

the discretionary analyses for a waiver of inadmissibility and adjustment, and which supports a finding that the extraordinary relief of a pardon is a positive equity that must be meaningfully considered.

Additionally, remand is required even if this Court holds, despite the weight of historical precedent to the contrary, that Mr. Darboe still requires a waiver of inadmissibility. The denial of his application for a waiver was based on numerous, prejudicial legal and factual errors. First, the IJ and BIA overlooked and seriously mischaracterized the record evidence of hardship to Mr. Darboe's qualifying relatives. Second, the alternative holding that Mr. Darboe's waiver application should be denied on discretionary grounds was based on indisputable—and highly consequential—record errors regarding Mr. Darboe's testimony and his criminal history. The IJ and BIA's reliance on testimonial credibility as a freestanding and significant negative discretionary factor was also unsupported legal error. Finally, the IJ and BIA impermissibly ignored the voluminous evidence of Mr. Darboe's material and relevant equities, despite agency and Circuit precedent requiring their consideration. And, the Board erred in refusing to reopen Mr. Darboe's proceedings for consideration of voluntary departure, for which he became statutory eligible due to the pardon.

Remand is therefore required for Mr. Darboe to pursue adjustment of status, and, if this Court finds that he remains inadmissible, for *de novo* adjudication of his application for a waiver.

STATEMENT OF THE CASE

Petitioner Ousman Darboe is a citizen of the Gambia. After being placed in removal proceedings in 2011 for overstaying his non-immigrant visa as a child, he sought a waiver of inadmissibility from the Immigration Judge in connection with his application for adjustment of status through his U.S. citizen spouse. The IJ denied Mr. Darboe's application for a waiver and found him to be ineligible to adjust status in May 2019. CAR 125–39. On November 14, 2019, the Board of Immigration Appeals adopted and affirmed the IJ's decision. CAR 52–57. Mr. Darboe timely petitioned this Court for review. On February 12, 2020, Mr. Darboe filed a motion to reopen his removal proceedings based on the grant of a full and unconditional pardon by Governor Andrew Cuomo of his sole criminal conviction on February 3, 2020. CAR 19–49. The BIA denied that motion on July 16, CAR 3–6, and Mr. Darboe thereafter filed a second petition for review with this Court. *See* ECF No. 99.

I. Factual Background

Mr. Darboe, a 26-year-old Black Muslim man who grew up in the Bronx, New York, has lived in the United States since he was a young child. Over the

twenty years that he and his family have resided here, Mr. Darboe has built a loving and supportive community. He is married to a U.S. citizen, Lashalle Darboe, and together they have a two-year-old U.S. citizen daughter. CAR 858–64. Mr. Darboe's mother, father and eight siblings also live in the U.S. and are all lawful permanent residents ("LPRs") or U.S. citizens. CAR 894–24. His older sister, Sergeant Adama Darboe, currently serves in the U.S. Marines Corp. CAR 894–900.

Mr. Darboe first lawfully came to this country in 2000, when he was only six. CAR at 166. He and his family settled in the Fordham Heights area of the Bronx where he experienced intense poverty, violence, and heightened policing. CAR 89, 683–760. At school, he was often bullied for his accent, clothes, and for being "too black" or "African;" at home, gun shootings and robberies were the norm in his neighborhood. CAR 630–31, 634, 373–78. The violence in his community mirrored the violence in his schools. CAR 377–78. Unlike his older sister who attended Marble Hill High School for International Studies, a college preparatory high school in a different area of the Bronx, Mr. Darboe started at DeWitt Clinton High School in 2009, a notoriously underfunded, low-performing, and highly policed school in his neighborhood. CAR 88–89, 895, 662–82. At DeWitt Clinton, Mr. Darboe witnessed physical violence almost every day. CAR 86–87, 377, 631, 674, 681, 894–95, 902. He and other students were surveilled by

the New York Police Department ("NYPD") and processed through metal detectors that caused hour-long delays, contributing to an environment "so toxic that more than 1,500 students marched over to the Department of Education" as their treatment made them feel "like inmates." CAR 86, 376.

At the time of his first arrest in 2010, Mr. Darboe was living and attending school in the poorest congressional district in the country. CAR 84; 761–63. During this time, New York City residents—particularly Black and Latinx ones like Mr. Darboe—were subject to astronomical rates of unlawful stops under stop-and-frisk policing, NYPD's notorious policy of searching people based on perceived criminality that resulted in the disproportionate seizures of Black and Latinx New Yorkers. CAR 683–760. In 2011 alone, pursuant to this policy, NYPD stopped over half a million New Yorkers. CAR 690. However, of all stops between 2009 and 2012, only 3% resulted in a conviction, demonstrating that those subjected to stop-and-frisk were "overwhelmingly innocent" despite their police contact. CAR 691–93, 759.

Prior to being granted a gubernatorial pardon in February 2020, Mr. Darboe's criminal record included several arrests between 2010 and 2016, resulting in a single criminal conviction from an arrest in 2014. His other arrests resolved with three dismissals; a youthful offender adjudication, which is not deemed a criminal conviction under New York state or immigration law; one

disorderly conduct violation, a non-criminal offense under state law; and one acquittal at trial. CAR 563–64.

Mr. Darboe's first arrest occurred when he was 16—he was alleged to have stolen headphones from a classmate. All the charges against him were dismissed. CAR 378, 941–43. In January 2011, he was stopped and arrested in the Bronx on marijuana possession charges; the criminal charges were dropped and he received a non-criminal disposition for disorderly conduct. CAR 381, 950–52. In 2013, Mr. Darboe was adjudicated as a youthful offender and sentenced to one year and four months to four years of incarceration for the unarmed robbery of a purse in 2010 and a cell phone in 2012. CAR 563–64, 944. After serving approximately 27 months, he was released on parole in April 2014. CAR 388, 482. On September 11, 2014, he was arrested for the alleged unarmed robbery of gold chains. CAR 397–400, 958–60. While he was subsequently arrested in May 2015, November 2015, and September 2016, all the charges from two of those arrests were fully dismissed, and he was acquitted of all charges related to the November 2015 arrest. CAR 563–64, 961–69.

Although only one of his eight arrests resulted in a criminal conviction, Mr. Darboe's repeated police contact between ages 16 and 22 led to lengthy periods of criminal detention, primarily on Rikers Island. CAR 379–402. Exposed to the brutalities of Rikers Island as a teenager and young adult, including extreme

violence and months of solitary confinement, Mr. Darboe experienced significant harm to his mental health. CAR 386; 465–66; 632. While in jail, he suffered suicidal ideation, lost 30 to 40 pounds, was diagnosed with depression, and engaged in self-harm. *Id.*

It was the terror of incarceration and solitary confinement on Rikers Island, and desperation to put his experience with the criminal legal system behind him, that he pled guilty in February 2017 to assure his immediate release. Mr. Darboe pled to robbery in the third degree for his September 2014 arrest. CAR 95, 397, 400, 958. He was released from criminal custody on February 27, 2017. CAR 400, 958. At liberty in his community without incident for five months, Mr. Darboe returned to his life with Ms. Darboe, then his girlfriend, and his family. He resumed his familial responsibilities, frequently caring for his five younger siblings and nieces and nephews while his parents and older siblings worked, including changing their diapers, bathing them, and walking them to school. CAR 406, 866, 896, 904, 910.

On July 31, 2017, Immigration and Customs Enforcement ("ICE") arrested Mr. Darboe at his parents' home. CAR 96, 401, 486. Under the pretense that they were local police with a warrant to arrest someone else in his neighborhood, ICE officers entered the home and arrested him. CAR 95–96. Five days after his detention, Ms. Darboe learned that she was pregnant with their first child. CAR

403, 488, 867, 869. By that time, they had been in a romantic relationship for three years, and had been close friends since 2011 when they met in high school. CAR 482.

At the time of his ICE arrest, Mr. Darboe had completed a comprehensive reentry and job readiness program through Getting Out Staying Out ("GOSO"), an organization that works with young men to avoid further involvement with the criminal legal system. CAR 397, 422, 424, 935. Through GOSO, Mr. Darboe worked at a community garden and completed a job readiness curriculum and earned a paid internship. CAR 432, 438–39. He and Ms. Darboe were planning to leave the Bronx and to live with his older brother in Ohio or his sister, Sgt. Darboe, in California. CAR 401–02, 420–21, 515–16, 896, 904.

Mr. Darboe's family, and Mr. Darboe himself, were devastated by his civil arrest and detention, but Mr. Darboe remained committed to continuing on the path of rehabilitation and growth he had begun before being detained. Within the first six months of his ICE detention, he earned his G.E.D. certification at Hudson County Correctional Facility. CAR 424, 631, 633, 934. Upon his transfer to Bergen County Jail in September 2018, Mr. Darboe was selected by correctional officers to be the leader of his unit and help identify and advocate for detainee needs. CAR 49, 344.

Mr. Darboe's commitment to rehabilitation was strengthened by the news of Ms. Darboe's pregnancy. Upon learning they would be having a child, Mr. Darboe asked Ms. Darboe's father for permission to marry his daughter, consistent with their plan to marry given their long relationship. CAR 436, 868. On September 26, 2017, Mr. Darboe proposed and they married on December 27, 2017. CAR 859, 868. Their daughter S was born on April 10, 2018. CAR 862. The birth of his daughter marked a transformative change in Mr. Darboe's life. His wife suffered acutely because he could not be with her for their child's birth, but he called her at the hospital (needing to reconnect every 15 minutes over the jail phone line) throughout her labor until the jail ended phone access for the evening. CAR 405–06, 490–91, 868. Despite the long distance, Ms. Darboe and their daughter visited Mr. Darboe each week and spoke by phone several times each day; he and his daughter have built a very strong bond. CAR 872–73, 418–19, 514.[1]

In Mr. Darboe's absence, Ms. Darboe and their young daughter struggled psychologically and financially. Ms. Darboe relied on Mr. Darboe for emotional support. CAR 486-88, 865-891. A psychological evaluation by Dr. Lucia Lezama details that Ms. Darboe is diagnosed with Post Traumatic Stress Disorder (PTSD) due to her complex trauma history involving years of sexual abuse by multiple

[1] After over three years of detention, on September 28, 2020 Mr. Darboe was released from ICE detention after being granted bond by the IJ. He is currently residing with his U.S. citizen wife and 2-year-old daughter.

family members as well as early childhood separation from her mother, who was incarcerated for a decade and struggled with substance use until her death in 2016. CAR 410, 486–88, 876–82. Ms. Darboe testified that her husband's potential deportation is a threat to the only stable emotional support she has had in her entire life. CAR 507–10.

In addition, in Mr. Darboe's absence, Ms. Darboe experienced severe economic hardship. CAR 407–10, 858–92. Even while working long hours to support her infant daughter, Ms. Darboe and S were homeless for approximately a year, living in the city's shelter system. CAR 103, 413–14, 493–94, 865–92, 896. During this time, Ms. Darboe commuted from the shelter in Queens to the Bronx to leave S in daycare with her friend and then to lower Manhattan for work. CAR 870–74. The strain of Mr. Darboe's detention also impacted her physically. Ms. Darboe was scheduled for gastric bypass surgery, which she had delayed for nearly a year due to her concerns about childcare for her daughter while her husband was detained. CAR 50.

The threat of Mr. Darboe's deportation also endangers his daughter's physical safety due to the prevalence of female genital mutilation/cutting ("FGM/C") in The Gambia. If Mr. Darboe were deported and his wife and daughter joined him in an effort to keep their family together, their daughter would be at significant risk of FGM/C and the attendant physical harm. Mr. Darboe's

older sisters and mother are all survivors of the practice, CAR 427–28, 451–53, 510–14, 534, 874, 897–98, and despite the practice being outlawed, country conditions evidence as well as sworn testimony by Mr. Darboe, Ms. Darboe, and Sgt. Darboe confirm that FGM/C continues throughout The Gambia. CAR 971–90, 1000, 1012–85.

Mr. Darboe seeks to remain with his large and loving family in the United States; they have attended each of his court dates and will remain his motivation as he pursues lawful status. CAR 336–37, 476–77.

II. Proceedings Below

Mr. Darboe last entered the U.S. on a B-2 visa on September 2, 2001. On February 16, 2011, the Department of Homeland Security ("DHS") charged Mr. Darboe as deportable pursuant to 8 U.S.C. § 1227(a)(1)(B) for having overstayed his visa. CAR 1522–23. Mr. Darboe's mother, Gibbeh Kambie, had filed an affirmative application for asylum, in which Mr. Darboe was included as a derivative beneficiary. The application was referred to immigration court, which granted Ms. Kambie LPR status. CAR 160-64, 238. On December 3, 2014, Mr. Darboe's removal proceedings were severed from his mother's and administratively closed due to his pretrial detention related to his September 2014 arrest. CAR 202, 231, 233.

Following his arrest by ICE, DHS moved to recalendar Mr. Darboe's removal proceedings to the detained docket. CAR 1487. He first appeared at the Varick Immigration Court on September 15, 2017. CAR 230–35. On January 29, 2018, Ms. Darboe filed an I-130 Petition for Alien Relative on her husband's behalf. Mr. Darboe's proceedings were adjourned for the adjudication of the I-130 petition and it was approved by U.S. Citizenship and Immigration Services on October 23, 2018. CAR 793, 1449–53.

Mr. Darboe appeared for an individual hearing on his applications for adjustment of status with a waiver of inadmissibility pursuant to INA § 212(h), 8 U.S.C. § 1182(h) ("§ 212(h) waiver") via video teleconference from detention on February 6, 2019. That day, Mr. Darboe was not physically produced to court due to DHS error, causing significant delay. CAR 337–39, 344–45, 349–60. DHS's error also delayed the testimony of his sister, Sgt. Darboe, who had flown from a military base in California to testify in support of her brother's applications. *Id.* DHS did not object to the admission of any evidence filed by Mr. Darboe, CAR 341–42, and it was admitted into the record, CAR 539–40. On April 22, 2019, Mr. Darboe's hearing continued for Ms. Darboe's testimony. Mr. Darboe's counsel asked that both Sgt. Darboe's affidavit, due to her inability to testify in person due to the delay on February 6, and Dr. Lezama's psychological evaluation detailing Ms. Darboe's mental health, be given full weight. CAR 539–40.

A. Immigration Judge Decision

On May 20, 2019, the IJ issued a decision denying Mr. Darboe's application for a § 212(h) waiver, finding him ineligible to adjust status, and denying voluntary departure. CAR 125–39. The IJ rarely cited to the evidentiary record in support of his factual findings, many of which are contradicted by the record.

The IJ first made an adverse credibility determination, finding that Mr. Darboe's testimony was "overall not credible" as well as "vague, evasive, and contradictory" because Mr. Darboe "refus[ed] to volunteer information about the circumstances surrounding his arrests." CAR 131. The IJ cited examples such as Mr. Darboe's vacillation and failure to "give an exact number" of headphones and cellphones he had stolen, and his inability to remember the number of orders of protection issued against him. CAR 131. However, as described *infra*, the IJ's characterizations of Mr. Darboe's testimony are contradicted by the transcript of proceedings. The IJ also faulted Mr. Darboe for "only acknowledg[ing] committing the crime he was ultimately convicted of but denied committing the other crimes that he was charged by the police." CAR 132.

The IJ determined that Mr. Darboe's February 2017 conviction for Robbery in the Third Degree constituted a violent or dangerous crime under 8 C.F.R. § 1212.7(d), and therefore he had to "show exceptional and extremely unusual hardship to his qualifying family members to warrant a favorable exercise of

discretion." CAR 134–35. The IJ recognized that Mr. Darboe had two qualifying relatives: his U.S. citizen spouse and daughter. *Id.* The IJ determined that Ms. Darboe would not suffer exceptional and extremely unusual hardship if Mr. Darboe was deported because she never resided with Mr. Darboe; he was detained for the entirety of their marriage and their daughter's life, and thus unable to provide financial support; and there was insufficient evidence of Ms. Darboe's mental health problems. CAR 134–35. The IJ also made an unsupported factual finding that if ordered deported Ms. Darboe and S would remain in the U.S., ignoring record evidence that they wanted to remain united as a family. CAR 130, 135. Based on Mr. Darboe's "repeated encounters with law enforcement, his lengthy criminal history, and his lack of candor regarding the circumstances of his arrests," the IJ concluded that Mr. Darboe did not warrant a § 212(h) waiver as a matter of discretion. CAR 136–37.

The IJ also denied Mr. Darboe voluntary departure, concluding that he was statutorily barred because the 364 day sentence tied to his 2017 conviction occurred within the five years preceding his application. CAR 138–39.

B. Board of Immigration Appeals Decision

On November 14, 2019, the Board dismissed Mr. Darboe's appeal, adopting and affirming the IJ's decision. The BIA affirmed the IJ's adverse credibility determination due to his criminal history, specifically his September 2014 arrest

and subsequent February 2017 conviction for robbery. CAR 52–57. The Board fully adopted the IJ's assessment of Mr. Darboe's credibility. CAR 55. On *de novo* review, the Board addressed the IJ's discretionary determination in one sentence: "Regarding the Immigration Judge's discretionary denial, we agree that the respondent's equities in the United States are outweighed by his criminal history and credibility." CAR 54. Despite Mr. Darboe's arguments about the IJ's discretionary determination, the heightened hardship standard, and the IJ's analysis of hardship, the Board did not address any of these issues. *Id.*

C. Motion to Reopen and BIA Decision

On February 3, 2020, the Governor of the state of New York, Andrew Cuomo, granted Mr. Darboe a full and unconditional pardon of his sole criminal conviction for Robbery in the Third Degree, dated February 2, 2017. CAR 41. On February 12, 2020, within the 90-day statutory period, Mr. Darboe filed a motion to reopen his removal proceedings due to new, previously unavailable and material evidence. CAR 19–51. Mr. Darboe noted that the gubernatorial pardon presented extraordinary evidence of rehabilitation and good character, requiring remand for discretionary relief; allowed Mr. Darboe to adjust status without the § 212(h) waiver, requiring a new hardship analysis; and rendered Mr. Darboe eligible for voluntary departure. *Id.*

On July 16, 2020, the Board denied Mr. Darboe's Motion to Reopen, stating that he has "not demonstrated his prima facie eligibility for adjustment of status, inasmuch as the respondent's motion to reopen does not establish that he merits a favorable exercise of discretion." CAR 4. Concluding that Mr. Darboe "has not attempted to rehabilitate his credibility," the Board ruled the gubernatorial pardon "does not refute the validity and finality of the Immigration Judge's adverse credibility finding in his prior proceeding." CAR 4–5. Bypassing over a century of Board precedent, the BIA also ruled that "Congress did not intend the pardon waiver to extend to grounds of inadmissibility" and that Mr. Darboe still requires a § 212(h) waiver. CAR 6. Finally, the Board found that Mr. Darboe waived further consideration of his voluntary departure application and remained statutorily ineligible due to his imprisonment for at least 180 days, describing the imprisonment related to his February 2017 conviction as "a fact which is not changed by the pardon." CAR 6.

D. Proceedings in This Court

Mr. Darboe petitioned this Court for review of the BIA's decision ordering him removed on November 27, 2019. On March 16, 2020, this Court granted Mr. Darboe's motion to hold this appeal in abeyance pending the BIA's consideration of his motion to reopen based on the pardon of his sole criminal conviction. ECF No. 46. On May 19, 2020, this Court granted Mr. Darboe's motion for a stay of

removal pending the adjudication of his petition for review. ECF No. 93. After the BIA denied his motion to reopen, Mr. Darboe filed a petition for review of that order, *see* ECF No. 99, and this Court consolidated the two appeals.

ARGUMENT

I. The BIA's Conclusion that Mr. Darboe Required a Waiver of Inadmissibility, Despite His Pardon, Was Legal Error.

Before the IJ, Mr. Darboe sought a § 212(h) waiver of inadmissibility because, at the time, he had a conviction that rendered him inadmissible. CAR 794. After the conclusion of Agency proceedings, Governor Cuomo issued Mr. Darboe a full and unconditional pardon of that conviction. CAR 41.[2] As a result, Mr. Darboe was no longer inadmissible and did not require a waiver, yet the BIA erroneously denied reopening. CAR 4-6.

A. The BIA ignored more than a century of precedent establishing that pardons overcome conviction-based inadmissibility

The BIA's decision reflects an unexplained reversal of longstanding law, policy, and practice.[3] Its superficial analysis rests on a mere negative implication:

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[2] There is no dispute that the pardoned conviction was the sole basis of inadmissibility. While Mr. Darboe is only removable under deportability grounds, *see* CAR 1522, applicants for adjustment of status must be admissible to the United States. *See* 8 U.S.C. § 1255(a)(2).

[3] Prior to the enactment of IIRIRA, "inadmissibility" was referred to as "excludability." For simplicity, this brief uses the modern term except when quoting a source that uses the old term.

certain deportability grounds are expressly subject to waiver by pardon, 8 U.S.C. § 1227(a)(2)(A)(vi), whereas there is no comparable provision for inadmissibility grounds. In concluding that this statutory asymmetry compels the conclusion that a pardon does not overcome conviction-based grounds of inadmissibility, the BIA ignored an overwhelming body of precedent to the contrary, dating back nearly 140 years. CAR 5–6. The BIA's decision is thus legally unsupported and incorrect. Further, its insufficient and flawed reasoning renders its decision arbitrary and capricious, requiring vacatur and remand.

From the time of the enactment of the first laws denying admission to non-citizens based on criminal convictions, such inadmissibility has been overcome by a pardon, notwithstanding the absence of explicit statutory text to that effect. The Immigrant Act of 1882 provided that "foreign convicts . . . upon arrival shall be sent back to the nations to which they belong and from whence they came." P.L. 47-376, 22 Stat. 214, § 4 (Aug. 3, 1882). The statute contained no mention of pardons. Nonetheless, the Executive Branch understood pardons to cure inadmissibility. In a case referred to the Attorney General by the Treasury Department (then responsible for regulating immigration), the Attorney General held that an immigrant pardoned for a crime that would otherwise render him inadmissible "should be permitted to land." Immigrant Act, 18 U.S. Op. Att'y Gen. 239, 239–40 (U.S.A.G. 1885), 1885 WL 2817; *see also* Jason Cade, *Deporting the*

Pardoned, 46 U.C. DAVIS L. REV. 355, 367–68 (2012) (collecting agency records from between 1900 and 1920 that show pardons waived conviction-based inadmissibility despite absence of statutory language to that effect) [hereinafter Cade].[4]

In so deciding, the Attorney General relied on Supreme Court cases holding that a pardon eliminated all legal consequences, including collateral consequences under civil statutes, of a conviction. In *Ex parte Garland*, the Court addressed a law that required for admission to the bar an oath, under penalty of perjury, that the affiant never participated in any government or army hostile to the United States. 71 U.S. 333, 335 (1866). Mr. Garland, a member of the Confederate Congress, fell squarely in the law's prohibition. *Id.* Yet the Court held that his pardon prevented the law from operating against him, reasoning:

> A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offense.

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[4] As the numerous cases cited by Cade reflect, federal immigration officials in the Dept. of Commerce and Labor often weighed in by writing letters in support or against noncitizens' pardon applications because it was understood that the grant of a pardon would eliminate conviction-based inadmissibility, *see, e.g.*, Subject File No. 53,028-17, Subject File No. 53,344-70, and applied an understanding of the law that full pardons were sufficient to cure inadmissibility, *see, e.g.*, Subject File No. 52,395-36 (cited in Cade, *supra*, at notes 46 and 47).

Id. at 380. A decade later, the Supreme Court again confirmed that a pardon "releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights." *Knote v. United States*, 95 U.S. 149, 153 (1877); *see also* Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647, 653 (1915) (explaining that pardons overcome any legal disability based on the fact of conviction).

As the Attorney General correctly ascertained, *see* 18 U.S. Op. Att'y Gen. at 240 (quoting *Knote* and *Ex parte Garland*), Congress knew of this common-law backdrop when it enacted the conviction-based ground of inadmissibility, and as such, it assumed and intended that pardons would also overcome conviction-based inadmissibility.[5] Indeed, basic principles of statutory construction direct courts to read statutory silence in light of the "backdrop against which Congress enacted [the law]." *Stewart v. Dutra Constr. Co.*, 543 U. S. 481, 487 (2005). The settled,

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[5] Congressional silence on pardons in the Immigrant Act of 1882 was deliberate, not an oversight. Congress considered, but declined to adopt, language that would have rendered pardons ineffective where the pardon was conditioned on the recipient agreeing to emigrate—a common practice in Europe that resulted in unwanted migration to the United States. E.P. HUTCHISON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798–1965, 51, 75 (1981). This strongly suggests Congress did not wish to prevent the operation of pardons to overcome inadmissibility. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) (noting principle of statutory construction that "Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded").

common-law understanding of the effect of pardons was thus correctly applied to interpret the 1882 Act.

In subsequent legislation, Congress re-enacted conviction-based inadmissibility and never disturbed this settled common-law understanding, which was thus incorporated into the statute according to conventional methods of statutory interpretation:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Morissette v. United States, 342 U.S. 246, 263 (1952). Because Congress knew of the settled interpretation that pardons overcome conviction-based inadmissibility—which was incorporated and applied to the statute by and as reflected in the correspondence of Attorney General and the Departments of Treasury and Commerce, *see supra* note 4—the continued re-incorporation of conviction-based inadmissibility without rejecting that interpretation shows that Congress was "satisf[ied] with widely accepted definitions," *Morissette*, 342 U.S. at 263.

Yet here, the BIA in no way engaged or acknowledged the history of interpretation, amendment, and re-affirmation that pardons cure conviction-based inadmissibility under § 1182, and instead found that the existence of a "pardon-

waiver" provision in 8 U.S.C. § 1227 foreclosed Mr. Darboe's argument that a pardon cures inadmissibility under § 1182. This conclusory, oversimplified analysis, which entirely ignored the BIA's past published decisions, is untenable.

In 1917, Congress provided for deportation based on post-entry convictions.[6] The 1917 law included a pardon-waiver provision, creating the asymmetry (which exists to this day) between grounds of deportability and inadmissibility on which the BIA sought to rely in Mr. Darboe's case. Yet, even though the inadmissibility provision of the immigration statute never made any mention of pardons, the BIA and Circuit Courts repeatedly held that a pardon cured conviction-based inadmissibility. *See, e.g.*, *Matter of K-*, 9 I&N Dec. 121, 125 (BIA 1960) ("[A] pardon. . . has the effect of immunizing the [respondent] insofar as that conviction is concerned regardless of whether the proceeding against him is to exclude and deport or expel and deport and regardless of [] the statutory provision involved."); *Matter of E-V-*, 5 I&N Dec. 194, 194 (BIA 1953) (holding a noncitizen is not criminally inadmissible "when he admits committing acts which constitute the essential elements of a [CIMT] if such admission relates to the same crime for which he [] previously . . . obtained a pardon"); *Perkins v. U.S. ex rel. Malesevic*, 99 F.2d 255, 257 (3d Cir. 1938) (finding, in a case brought under deportability provision for those inadmissible at the time of entry, that "it was the intention of

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[6] Immigration Act of 1917, P.L. 64-301; 39 Stat. 874, 889 (Feb. 5, 1917).

Congress to recognize the effect of an effective pardon given by one of the States of the United States for a crime committed by an [noncitizen] within a State prior to his re-entry into the United States"); *Matter of Winter*, 12 I&N Dec. 638, 643–44 (BIA 1968). Indeed, the legislative history that exists, while limited, supports the view that Congress simply saw no need to enact statutory language codifying the common law understanding. Cade, at 368–70.[7]

In *Matter of H–*, 6 I&N Dec. 90 (BIA 1954), the BIA explicitly recognized the import of this history. The BIA reasoned that because both agencies and courts had long held pardons overcome inadmissibility, and because Congress adopted the relevant provision in the Immigration and Nationality Act ("INA") without disturbing that settled interpretation, the history of interpretation and amendment showed "clearly expressed Congressional intent" that pardons overcome conviction-based inadmissibility under the INA. *Id.* at 96. It concluded:

> [T]he relief from [deportation] granted under the pardoning clause should be extended to immunize the same alien for the same offense when he seeks to reenter the United States, where . . . a valid pardon has been granted to prevent his expulsion; essentially, it does not matter whether the alien is the subject of [inadmissibility] proceedings or [deportation] proceedings. *Id.*

Any doubt as to congressional intent is resolved by the fact that Congress, against this backdrop of decisions, amended the INA in a manner that demonstrates

[7] The sponsor of an early version of the bill that became the 1917 law stated, when asked about the fact that there is "nothing in [the] bill" about the effect of pardons, that "[T]he pardon wipes out the conviction." 42 CONG. REC. 2753 (Mar. 2, 1908).

its attention to issues related to inadmissibility exemptions and the effect of pardons. Congress amended the inadmissibility exemptions in 1954 and 1961.[8] Between these revisions, in 1956, Congress removed controlled substance offenses from the deportability "pardon-waiver" provision in response to immigration officials applying pardons to deportability grounds more broadly than Congress intended.[9] Yet despite the numerous precedential decisions of the BIA, Congress made no comparable restriction with regard to grounds of inadmissibility. This combination of regular revision of exemptions from inadmissibility and deportability—including pardon-based exemptions—in response to interpretations by federal agencies, and Congressional inaction in the face of repeated BIA and Circuit Court decisions, clearly establishes congressional intent.

By never disturbing the consistent, century-old interpretation that pardons overcome conviction-based inadmissibility—despite amendments to closely related provisions and even wholesale restructuring in IIRIRA—Congress ratified

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[8] Act of Sept. 3, 1954, P.L. 83-770, § 4, 68 Stat. 1145; Act of Sept. 26, 1961, P.L. No. 87-301, § 13, 75 Stat. 650.

[9] The Senate Judiciary Committee noted in 1955 that "[c]ontrary to this Department's contention, the [Immigration Act's deportability pardon-waiver] section has been interpreted as possibly applying to the deportation of aliens convicted of narcotic offenses." COMM. ON THE JUDICIARY, S. REP. NO. 1997 (S. 3760) (1955). The next year, the Narcotic Control Act of 1956, P.L. 84-728, § 301, 70 Stat. 567, 575, specified that deportability based on narcotics convictions was not overcome by a pardon. *Matter of Lindner*, 15 I&N Dec. 170, 171 (BIA 1975) (recognizing change). No similar change was made to CIMT grounds.

the interpretation of the INA that pardons overcome conviction-based inadmissibility. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 382 n.66 (1982) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change."); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). The force of congressional ratification as a tool for interpretation is at its strongest where, as here, the prior understanding is longstanding, prominent, and known to Congress. *Farragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) (holding that the "force of precedent [] is enhanced" where Congress amends the same provisions at issue in past decisions "without providing any modification of [the past] holding").

Consistent with this history and congressional intent, the State Department continues to recognize that pardons overcome conviction-based inadmissibility. In 1991, the State Department enacted regulations providing that conviction-based inadmissibility for a crime involving moral turpitude ("CIMT")[10] is overcome by a pardon. 22 C.F.R. § 40.21(a)(5) ("[a]n alien shall not be considered ineligible under INA 212(a)(2)(A)(i)(I) by reason of a conviction of a crime involving moral turpitude for which a [] pardon has been granted by [] the Governor"); 56 Fed.

[10] Mr. Darboe's inadmissibility was based on a conviction for a CIMT. *See* CAR 5.

Reg. 30422-01 (July 2, 1991). Again, notwithstanding IIRIRA's complete structural overhaul of the INA, which included an amendment to the pardon-waiver deportability provision —showing that Congress was paying attention to this issue—Congress elected not to disturb the longstanding understanding shared by federal agencies and federal courts that conviction-based inadmissibility is overcome by a pardon.[11] The State Department has subsequently reaffirmed that the settled understanding persists post-IIRIRA.[12]

In denying Mr. Darboe's motion to reopen, the BIA failed to acknowledge, let alone explain its departure from, this century of precedent and practice finding pardons overcome grounds of inadmissibility. Instead, it primarily relied on a single case that rejected the argument that a pardon waived a specific ground of *deportability*, not inadmissibility. *See* CAR 6 (citing *Matter of Suh*, 23 I&N Dec. 626 (BIA 2003)). *Matter of Suh* is inapplicable to Mr. Darboe's case for two reasons: it solely addresses deportability, and it pertains to a new ground of

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[11]Indeed, the DOJ has elsewhere argued that because of the significant changes implemented by IIRIRA, Congress's failure to revise "longstanding administrative interpretation" in IIRIRA is "persuasive evidence" of intent to adopt prevailing interpretations. *See, e.g.*, *Pena-Muriel v. Gonzales*, 489 F.3d 438, 442–43 (1st Cir. 2007) ("[T]he government argues that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.").

[12] 64 Fed. Reg 197, 55417 (Oct. 13, 1999) (revising the inadmissibility regulations but retaining guidance that pardon overcomes inadmissibility for conviction of CIMT); *see also* 22 C.F.R. § 40.21(a)(5); 9 FAM 302.3-2(B)(3)(h)(1).

deportability added to the INA in 1996 relating to child abuse. 23 I&N Dec. at 267. Congress specifically opted not to add the new child abuse ground in the statutory list of pardonable deportability grounds, despite adding a different new deportability ground to the list. *Id.* For this reason, the BIA reasonably concluded that Congress did not intend for a pardon to prevent deportability on the basis of child abuse. *Id.* at 627. But this decision does not address the question in Mr. Darboe's case, which involves inadmissibility for a CIMT. *Matter of Suh* therefore does nothing to disturb the longstanding precedent holding that pardons eliminate the impact of CIMTs in both the deportability and inadmissibility contexts.

The limited circuit court authority to consider this issue is inapposite and, to the extent it suggests a different result, unpersuasive. In an unpublished, non-precedential decision, this Court noted in dicta that a pardon did not waive inadmissibility based on a conviction for a controlled substance offense. *Montesquieu v. Holder*, 536 F. App'x 145, 146 (2d Cir. 2013). As discussed *supra*, controlled substance convictions were expressly exempted from the deportability pardon-waiver ground, which provides some evidence—absent here—that Congress wished to exempt that type of conviction from pardonability. *Id.* at 146. In contrast, the CIMT ground of inadmissibility at issue in Mr. Darboe's case has repeatedly been found to not apply where the underlying conviction has been pardoned. *See, e.g.*, *Matter of H-*, 6 I&N Dec. at 91; *Perkins*, 99 F.2d at 257.

Indeed, finding Mr. Darboe inadmissible despite his pardon squarely contradicts longstanding State Department regulations, whereas the ruling in *Montesquieu* was consistent with those regulations, which exclude controlled substance convictions from the list of convictions overcome by pardons.[13] Moreover, Mr. Montesquieu had waived the issue by not raising it to the agency, and was concededly still inadmissible for a second controlled substance offense. *Id.* Thus, the analysis in *Montesquieu* sheds no light on this case.

Other Circuit precedent is similarly not on point. The Ninth Circuit reached the same result in a case also involving a controlled-substance offense, which is inapposite for the same reasons. *See Aguilera-Montero v. Mukasey*, 548 F.3d 1248, 1255 (9th Cir. 2008). The Eleventh Circuit held that a pardon cannot overcome inadmissibility for reasons similar to those of the BIA here, *see Balogun v. U.S. Atty. Gen.*, 425 F.3d 1356, 1359 (11th Cir. 2005), but the persuasive force of its decision is diminished by oversights and errors. First, *Balogun* ignored the history of the statutory scheme discussed *supra*. Further, it did not acknowledge *Matter of H-* or other BIA precedent applying a contrary rule, as acknowledged by later decisions in that Circuit. *See Dung Quol Tran v. U.S. Atty. Gen.*, 545 F. App'x 879, 880 (11th Cir. 2013) (noting *Matter of H-*'s determination that Congress had ratified practice of applying pardons to overcome inadmissibility and *Balogun*'s

[13] *See supra* notes 9, 12.

ignorance of that decision). Finally, *Balogun* appears to wrongly presume Congress enacted conviction-based inadmissibility and conviction-based deportability at the same time, while including a pardon-waiver only in the latter. *See* 425 F.3d at 1362–63 (citing a Supreme Court case comparing simultaneously enacted provisions). *Balogun* should therefore carry little, if any, weight.

B. The BIA's unexplained, unacknowledged departure from its settled course of adjudication renders its decision arbitrary and capricious

It is clear, in light of the century of historical authority dating back to the first statute providing for conviction-based inadmissibility, that Mr. Darboe's pardon overcomes his inadmissibility and obviates the need for a § 212(h) waiver. But even if the Court concludes that the statute's purported silence renders it ambiguous, the BIA's unacknowledged reversal of course on the issue renders its decision arbitrary and capricious. In *I.N.S. v. Yueh-Shaio Yang*, 519 U.S. 26 (1996), a case involving a discretionary waiver, the Court held that the BIA was not free to reverse course on a "settled course of adjudication" without explanation—even where its choice among permissible interpretations would have been "unfettered at the outset." *Id.* at 32. Since *Yang*, circuit courts have reviewed BIA decisions to determine whether they "depart from its settled course of adjudication." *Thompson v. Barr*, 959 F.3d 476, 490 (1st Cir. 2020) (remanding because BIA did not follow its precedents about pardon-waiver clause of INA § 237); *see also Sang Goo Park v. Attorney Gen.*, 846 F.3d 645, 654 (3d Cir. 2017)

(holding that where the BIA's past cases create a baseline "such that the BIA's discretion can be meaningfully reviewed for abuse," a petitioner can raise a "settled-course" claim). As demonstrated, the BIA abandoned—without acknowledgement—its consistent historical interpretation that a pardon overcomes inadmissibility.[14] That unexplained reversal renders its decision arbitrary and capricious, requiring remand.

II. As Petitioner No Longer Requires a Waiver of Inadmissibility, Remand is Required for an Entirely New Analysis of His Adjustment Application.

Because Mr. Darboe's pardon waives his sole ground of inadmissibility, he no longer requires a § 212(h) waiver and remand is required to evaluate his adjustment of status application using the proper discretionary standards that apply to adjustment under 8 USC § 1255(a).

A. The standard for exercising discretion in an application for adjustment of status is materially distinct from the standard for § 212(h) waivers

Mr. Darboe applied for a § 212(h) waiver of inadmissibility in conjunction with his application for adjustment of status, because in order to adjust status, a non-citizen must be "admissible" to the United States. 8 U.S.C. §§ 1255(a)

[14] The BIA has, on other issues about which the post-IIRIRA statute is silent, held that the Congressional decision not to disclaim past interpretations indicates Congress accepted those interpretations. *See, e.g.*, *Matter of Rivens*, 25 I&N Dec. 623, 625–26 (BIA 2011) (holding that "historical practice and the absence of any evidence that Congress intended a different" result from that under the historical practice meant that past interpretation incorporated into current version of INA).

(establishing the requirement of admissibility); 1182 (listing grounds of inadmissibility). This type of waiver can clear the path to adjustment of status for those who are inadmissible for a CIMT under § 1182(a)(2)(A)(i)(I), if the non-citizen can establish that (a) the denial of relief would cause "extreme hardship" to a U.S. citizen or LPR spouse, parent, son, or daughter; and (b) he merits the favorable exercise of discretion. § 1182(h)(1)(B), (2).

When a non-citizen is admissible and therefore does not need a waiver to adjust, the IJ must also assess whether the grant of adjustment is warranted in discretion under a standard established by case law. *See* 8 U.S.C. § 1255(a); *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970). For a simple adjustment application, "[i]n the absence of adverse factors, adjustment will ordinarily be granted . . . as a matter of discretion." *Id.* at 496. Only when adverse factors are present is it necessary for the applicant to "offset" them by showing equities like "family ties, hardship, length of residence in the United States, etc." *Id.*

The BIA has laid out a separate, much more stringent standard that controls the discretionary analysis for § 212(h) waivers. An IJ "must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country." *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 300 (BIA 1996). Within

this balancing, the adverse factors include the grounds of removal, immigration violations, an applicant's criminal record and other evidence of bad character or undesirability as a permanent resident; the favorable considerations include family ties, residence of long duration beginning at a young age, evidence of hardship to the applicant and his family, service in the military, employment, evidence of rehabilitation, and other evidence as to an applicant's good character. *Id.* at 301. However, in certain cases, an elevated hardship standard must be met. Upon a finding that a non-citizen has been convicted of a "violent or dangerous crime," he must show "exceptional and extremely unusual hardship" to his qualifying family members to warrant a favorable exercise of discretion. 8 C.F.R. § 1212.7(d); *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002); *see also Matter of C-A-S-D-*, 27 I&N Dec. 692 (BIA 2019).

These differing discretionary standards for the § 212(h) waiver, adjustment of status, and other forms of relief, have been carefully and individually developed by binding agency precedent. The BIA has long held that "it is prudent to avoid cross-application, as between different types of relief from deportation, of particular principles or standards for the exercise of discretion." *Matter of Marin*, 16 I&N Dec. 581, 586 (BIA 1978); *see also Matter of C-V-T-*, 22 I&N Dec. 7, 10 (BIA 1998).

Although the Board found applicable to the § 212(h) context the general balancing of favorable and adverse factors from *Matter of Marin*, which addressed a different waiver provision (§ 212(c) of the INA), the discretionary analysis for adjustment of status was deemed inappropriate because a waiver is a "distinct" form of relief, "with the balancing of factors to be undertaken in view of the particular purposes either stated or inherent in the statute." *Matter of Mendez-Moralez*, 21 I&N Dec. at 300. The result is that the discretionary standard applied to § 212(h) waivers is significantly more stringent than the lower standard applied to simple adjustment applications.

B. Remand is required because the agency never applied the correct adjustment standard to Petitioner's case

In Mr. Darboe's case, the agency conducted the discretionary analysis using the standard for § 212(h) waivers. Neither the IJ nor the BIA performed, at any stage of the proceedings below, the distinct analysis for simple adjustment of status as is required in light of Mr. Darboe's pardon. Remand is necessary for that particularized review given the difference in the standards and the significance of the pardon in the analysis. As outlined above, the legal standard for analyzing whether adjustment is warranted in the exercise of discretion is distinct from the standard for discretion for a waiver of inadmissibility, and presents a lower bar to clear, akin to a presumption in the absence of adverse factors. The BIA here, however, failed to follow its own directives about this important distinction.

The three agency decisions at issue—one from the IJ, and two from the BIA—each held that Mr. Darboe required a § 212(h) waiver but was not entitled to one in the exercise of discretion. CAR 1, 52, 125. The IJ twice cited *Mendez-Moralez* for the § 212(h) discretionary standard, CAR 133, 137, and imposed the heightened requirement of "exceptional and extremely unusual hardship" based on the conclusion that Mr. Darboe had been convicted of a violent or dangerous crime, CAR 134. After conducting the analysis laid out in *Mendez-Moralez*, the IJ concluded that a § 212(h) waiver was not merited as a matter of discretion because Mr. Darboe had not met the heightened hardship standard, and because his criminal history and lack of candor outweighed his positive equities. CAR 135–36. The BIA adopted the IJ's decision, agreeing that the discretionary denial of the waiver was justified because "the respondent's equities in the United States are outweighed by his criminal history and lack of credibility." CAR 54.

On the motion to reopen, the BIA incorrectly held that Mr. Darboe still required a waiver despite the pardon, and reaffirmed the IJ's original discretionary determination, finding that "the issuance of the pardon does not affect the Immigration Judge's adverse credibility finding or his overall conclusion that the respondent does not deserve a favorable exercise of discretion." CAR 4. The BIA never acknowledged, let alone applied, its own careful precedents establishing that a distinct legal standard controls discretionary determinations for adjustment of

status; its analysis on discretion was cabined to the § 212(h) waiver context as it erroneously insisted the waiver was required despite the pardon.

Because of this blinkered—and incorrect—focus on the discretionary standard for waivers of inadmissibility, Mr. Darboe's proceedings must now be remanded for the agency to conduct the distinct discretionary analysis specifically tailored for adjustment of status without a waiver in the first instance. *See Gonzales Bordonave v. Holder*, 432 F. App'x 35, 36–37 (2d Cir. 2011) (noting that the BIA "has repeatedly instructed" that a proper discretionary determination "can only be made after a complete review of the favorable factors" in a case).

C. Petitioner merits an exercise of discretion under the standard for adjustment applications

To the extent the BIA decision could be read to hold that Mr. Darboe does not merit an exercise of discretion under the *Matter of Arai* standard for adjustment of status, that conclusion was not clearly stated. The Board failed to even cite *Arai* or reference the standard set forth therein; nor did the BIA provide any reasoning regarding why a new analysis under the correct standard was not required. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947) (stating the long-standing principle of administrative law that agencies must state the reasons for their decision-making "with such clarity as to be understandable"); *see also Yu Sheng Zhang v. Dep't of Justice*, 362 F.3d 155, 158 (2d Cir. 2004) ("When agency action is subject to judicial review, the law requires that the agency provide reasoned bases for its

decision.”). Indeed, such an analysis would be inappropriate for the BIA as an appellate body to conduct in the first instance, given the impact of the pardon on the fact-bound balancing test for discretion. 8 C.F.R. § 1003.1(d)(3)(iv) (BIA cannot engage in fact finding). An IJ must first consider the impact of the pardon by engaging in fact finding and a *de novo* discretionary analysis under the adjustment standard. Furthermore, this question reached the BIA in the context of a motion to reopen, where the only question before it was whether Mr. Darboe put forward a “prima facie case” for adjustment of status--it was not tasked with actually undertaking a discretionary analysis.

There can be little doubt that, applying the proper standard articulated in *Matter of Arai*, and taking into account his gubernatorial pardon, Mr. Darboe merits an exercise of discretion. First, the pardon eliminates his sole criminal conviction, leaving him with a record of a youthful offender adjudication and arrests with uncorroborated, dismissed charges. *See Matter of Sotelo-Sotelo*, 23 I&N Dec. 201, 205 (BIA 2001) (finding that, in the absence of a conviction, an outstanding warrant should not be considered an adverse factor in a discretionary analysis). Under the *Mendez-Moralez* discretionary standard for the waiver, the agency relied heavily on Mr. Darboe’s robbery conviction, citing in particular to his 364-day sentence and raising questions as to whether Mr. Darboe was truly rehabilitated. CAR 137, 55. Now, this key “adverse factor” has been eliminated,

and replaced with an extraordinary positive factor, the formal and rare grant of a pardon from the highest official of the state. This gives rise to a presumption of the favorable exercise of discretion under the *Arai* standard.

Second, the grant of a full and unconditional executive pardon is a significant equity that does not merely erase a criminal conviction; it speaks affirmatively to an individual's rehabilitation and standing in their community.[15] *See Matter of S-*, 7 I&N Dec. 370, 372 (BIA 1956) (a pardon "blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense . . . [I]f granted after conviction, it removes the penalties and disabilities.") (quoting *Ex parte Garland*, 71 U.S. at 380-81). The Board has previously held that a pardon not only impacts removability but also absolves the pardoned individual from "all consequences flowing from that act." *Matter of H-*, 7 I&N Dec. 249, 250 (BIA 1956).

The BIA disregarded well-established case law on the significance of pardons and abused its discretion when it stated without analysis that "[e]ven without considering the conviction for which he was pardoned, the record fully

[15] In announcing recent pardons, Governor Cuomo has explained that: "In New York we believe in equal opportunity for all, and these actions will give this group of deserving New Yorkers who have proven their remorse and undergone successful rehabilitation a second chance." *Governor Cuomo Grants Clemency to 11 Individuals: Commutations and Pardons Granted to Individuals Demonstrating Remorse, Rehabilitation and Commitment to Their Communities*, Jan. 3, 2020, https://www.governor.ny.gov/news/governor-cuomo-grants-clemency-11-individuals.

supports the denial of relief in the exercise of discretion." CAR 4–5. This conclusory statement is patently insufficient for purposes of reviewability. Moreover, it is both incorrect, as it fails to contend with the importance or context of the pardon, and lacks any of the required legal analysis under *Matter of Arai*. Remand is required for the IJ to conduct an analysis that takes both into account.

III. The Agency Committed Reversible Error in Denying the § 212(h) Waiver.

Even if this Court finds, despite the long-standing precedent laid out in Section I, that Mr. Darboe requires a waiver of inadmissibility, remand is still required: his pardoned conviction can no longer be a "violent or dangerous crime," and thus a lower hardship standard applies; the original denial of the waiver improperly overlooked legally-relevant evidence of hardship to his qualifying relatives; and the discretionary analysis was rife with errors of fact and law.

A. <u>Should this Court determine that Mr. Darboe remains inadmissible despite the pardon, remand is required for a new analysis of the lowered hardship standard.</u>

Because the IJ found that Mr. Darboe's conviction for robbery was a violent or dangerous crime, he applied a heightened hardship standard to Mr. Darboe's application for a § 212(h) waiver, CAR 133–34. While the IJ acknowledged that Mr. Darboe's "removal would result in hardship" to his wife and daughter, and "a finding of 'extreme hardship' could be warranted in this case," he concluded that the elevated hardship standard was not met. CAR 135. The BIA did not address the

correct hardship standard on appeal. CAR 54-56. In adjudicating the motion to reopen, the Board failed to address Mr. Darboe's argument that the elevated hardship standard no longer applied due to the pardon of the conviction that the IJ deemed to be "violent and dangerous." CAR 4-5. Because this conviction has been fully pardoned, it can no longer constitute such a crime and thus the normal "extreme hardship" standard should apply. *See* § 1182(h)(1)(B).

An executive pardon, as it has been understood by the BIA for decades, has the effect of eliminating the concerns animating the "violent or dangerous crime" element of the discretionary waiver analysis. "[A] full pardon has the same legal effect as if the offense had not been committed." *Matter of B-*, 7 I&N Dec. 166, 168 (BIA 1956). The BIA has repeatedly relied on the Supreme Court's guidance on "the effect and operation of a pardon" such that after the grant of a full pardon, "in the eye of the law the offender is as innocent as if he had never committed the offence." *Id.* (quoting *Ex parte Garland*, 71 U.S. at 380).

Ignoring the question of which hardship standard properly applies, the BIA held it need not remand because the IJ denied the waiver in discretion. However, because the discretionary analysis was legally erroneous in the first instance, *see infra* Section III.C, and these errors were compounded by the failure to account for the pardon, *see supra* Section II, the issue of which hardship standard applies is crucial should this Court determine a waiver of inadmissibility is still required. As

recounted below, Mr. Darboe presented overwhelming evidence of extreme hardship resulting from his deportation to his U.S. citizen wife and daughter. *See* CAR 135. Remand is therefore required for application of the correct, lowered hardship standard.

B. The IJ and BIA overlooked and mischaracterized record evidence regarding hardship to Petitioner's qualifying relatives.

The Agency committed legal error by overlooking key evidence of hardship that Mr. Darboe's qualifying relatives—his U.S. citizen wife and daughter—would endure if he were deported to The Gambia. *See Matter of Monreal*, 23 I&N 56, 63 (BIA 2001) ("[W]e consider the ages, health, and circumstances of the qualifying lawful permanent resident and United States citizen relatives."); *Mendez v. Holder*, 566 F.3d 316, 323 (2d Cir. 2009) ("where . . . some facts important to the subtle determination of 'exceptional and extremely unusual hardship' have been totally overlooked and others have been seriously mischaracterized . . . an error of law has occurred"). As a result, the hardship analysis must be corrected on remand.

Neither the BIA nor the IJ conducted an individualized hardship analysis for Mr. Darboe's infant daughter, despite the IJ noting that she is a qualifying relative and reciting the correct standard. CAR 134 n.4. At no point did the IJ acknowledge the evidence that S would face FGM/C; a lowered standard of living; and other adverse conditions in The Gambia. CAR 510-13. Neither did he consider the

hardship that she would suffer if she were to remain in the United States and Mr. Darboe was deported.

Importantly, the IJ's categorical statement that Ms. Darboe and S would not go to The Gambia with Mr. Darboe mischaracterizes her testimony and ignores the evidentiary record. CAR 130, 134. The transcript indicates that Ms. Darboe did *not* state that "she would not go to The Gambia with Mr. Darboe." *Id.* (IJ statement with no citation to the record). Ms. Darboe and Mr. Darboe both testified about their shared fears of moving to The Gambia because of the practice of FGM/C and its impact on their daughter. CAR 511–13. Despite these fears, Ms. Darboe explicitly stated in her sworn affidavit that she planned to move to The Gambia to keep their family together, particularly given her own experience growing up with a single parent. CAR 489; 874. The IJ's mischaracterization of Ms. Darboe's testimony and evidentiary record requires remand. *See Mendez*, 566 F.3d at 323.

A proper analysis of Mr. Darboe's infant daughter as an independent qualifying relative leads to the conclusion that her age, health, and circumstances would subject her to exceptional and extremely unusual hardship if he were deported. In her affidavit and testimony,[16] Ms. Darboe details that she fears their daughter would be subjected to FGM/C in The Gambia given the experiences of

[16] The IJ found Ms. Darboe's testimony "generally credible;" it therefore must be credited. CAR 132, 150.

women in Mr. Darboe's family. CAR 510–13; 874. Mr. Darboe testified to similar fears. CAR 427–28, 451–53. In her affidavit, Sgt. Darboe confirms that she was subjected to FGM/C in The Gambia. CAR 897. She further notes that "preventing [FGM/C] is practically impossible in the Gambia . . . . It is just a cultural thing that is deeply rooted in them. When they firmly believe something like that, they will make it happen no matter what." *Id.* She also described that Mr. Darboe's other sister and their mother were all subjected to FGM/C as young girls, and that the strength of people's beliefs in The Gambia made her "certain that it would happen to [S] if she moved there." *Id.* The country conditions evidence corroborates Sgt. Darboe's testimony that FGM/C is a culturally pervasive practice. CAR 971–90; 1011–73.[17] Mr. Darboe also submitted other decisions by the Agency finding that the likelihood of qualifying relatives suffering FGM/C in The Gambia satisfied the requisite hardship standard. CAR 1074–85.

Despite the extensive evidence that established the serious threat to S from the practice of FGM/C, the IJ did not address the likelihood that she would experience FGM/C in The Gambia at all. *See generally* CAR 53–60, 125–39. The

[17] The 2017 State Department Human Rights Report details that "FGM/C is a deeply rooted practice in society, and many are hesitant to report FGM/C cases, either because they do not agree with the law or because they are uncomfortable reporting family members or neighbors . . . . Despite [the law banning FGM/C] the practice was very prevalent, with approximately 76 percent of girls and women between the ages of 15–49 believed to have undergone FGM/C." CAR 982. Prevalence of FGM/C in the Mandinka ethnic group (to which Mr. Darboe belongs) is in the range of 94.3% to 96.7%. CAR 1033, 1064, 1067.

IJ also failed to consider other relevant factors, including her decreased educational opportunities, lack of community ties, language barriers, and other adverse conditions in The Gambia. CAR 910-1010; *see also Monreal*, 23 I&N Dec. at 63.

The IJ also totally overlooked the hardship S would suffer if she were to remain in the United States and Mr. Darboe were deported, such as indefinite separation from her father, psychological trauma, behavioral conditions, economic hardship, increased likelihood of contact with the state child welfare system, housing instability, and negative performance in school. CAR 1086–97. Mr. Darboe presented ample evidence that such hardships were not merely hypothetical but already occurring in her first year of life. CAR 486, 493, 500, 504–077, 539, 870–74, 876–92. The record also established that Ms. Darboe's pre-existing mental health conditions would be exacerbated by her husband's deportation, thereby leaving S with only one vulnerable parent: Ms. Darboe has PTSD, little to no familial support, and trauma related to early childhood family separation. CAR 865–82. While the IJ passingly acknowledged that Ms. Darboe has mental health issues, CAR 135, he entirely overlooked how her struggles would in turn impact S should her other parent be deported. The IJ instead erased S's life—and her relationship with her father, Mr. Darboe—from the hardship analysis, thus committing "an error of law." *Mendez*, 566 F.3d at 323.

The IJ also mischaracterized the hardship that Ms. Darboe would suffer if her husband was deported. *See Monreal*, 23 I&N Dec. at 63. The IJ ignored that although they married in 2017, CAR 144, at the time of his decision, Ms. Darboe had known Mr. Darboe for nearly half her life. CAR 134–35, 402, 483, 866. Between ages 15 and 25, they had been close friends, high school sweethearts, married, and first-time parents. By limiting the hardship analysis to only the two years of their marriage, the IJ mischaracterized the significance of their relationship: Mr. Darboe was Ms. Darboe's *only* emotional support through many of her most traumatic experiences that continue to impact her today. CAR 865–69, 873–82.

The precariousness of Ms. Darboe's mental health—and the significance of Mr. Darboe's emotional support to her—was also misconstrued. Contrary to the IJ's finding, Ms. Darboe's mental health continued to deteriorate and her financial and emotional stability rapidly declined during her separation from Mr. Darboe due to his ICE detention. CAR 134–35, 486, 496, 500, 504–507, 539, 865–69, 873–82, 892. The IJ noted that Ms. Darboe testified that she has not taken any medication or sought out treatment for her mental health condition, CAR 135, but ignored the reality that Ms. Darboe lacked the requisite money and time. CAR 500-01. He overlooked evidence of her individualized circumstances: she was a 24-year-old first-time mother who went through pregnancy and giving birth while her

husband was detained; she was living in a shelter with little to no familial support; she had a history of PTSD and child sexual abuse and experienced ongoing trauma symptoms, causing her to mistrust almost everyone except Mr. Darboe; and she lost her low-wage job due to absences related to child care. CAR 486–88, 490–91, 493, 497–99, 877–79, 881–82. Compounding these errors, the Agency failed to aggregate the hardship to Mr. Darboe's two qualifying relatives. *See Tobar-Bautista v. Sessions*, 710 F. App'x 506, 508 (2d Cir. 2018). The failure to consider the cumulative hardship constitutes reversible error.

C. <u>The findings underlying the Agency's discretionary analysis are rife with errors, requiring remand.</u>

Notwithstanding Mr. Darboe's extensive equities, the IJ and BIA found he did not merit a favorable exercise of discretion based solely on an adverse credibility finding regarding his testimony about his criminal history, and his criminal history itself. Remand is required because the BIA erred in affirming the IJ's erroneous credibility determination and discretionary analysis.

1. The Agency inflated Petitioner's criminal history through factual and legal errors.

The IJ and BIA, in concluding that Mr. Darboe's criminal record was "serious," CAR 131, and "sever[e]," CAR 55, relied on an inflated and factually inaccurate view of Mr. Darboe's criminal history. Further, the IJ's decision (adopted by the BIA), erroneously regarded arrests as evidence of guilt.

Ignoring documentary evidence that conclusively establishes that three arrests in 2015 and 2016 resulted in dismissal or acquittal of all charges, CAR 939–69, the IJ held that Mr. Darboe's "crimes," plural, "are serious." *Id.* at 137. Although the precise meaning of the IJ's reference to multiple "serious" "crimes" is inscrutable, any plausible meaning reflects errors of fact and law. Mr. Darboe's arrests led to only one criminal conviction.[18] If the IJ intended to refer to Mr. Darboe's youthful offender (YO) adjudication, that was error, as BIA precedent forecloses finding YO designations to be convictions for a crime,[19] and New York law forecloses finding them "serious."[20]

More likely, the IJ erroneously tallied acquitted or dismissed conduct among Mr. Darboe's "serious" "crimes." Elaborating on this finding, the IJ referred not only to Mr. Darboe's sole (now pardoned) conviction, but also stated that he was "concerned" that Mr. Darboe "continued to re-offend after his youthful offender adjudication" and described his criminal history as "lengthy." CAR 137. In reality,

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[18] Mr. Darboe has a non-criminal violation for disorderly conduct, and, based on conduct that occurred when he was a minor, he was adjudicated a youthful offender (YO) in 2013.

[19] *Matter of Devison-Charles*, 22 I&N. Dec. 1362, 1364 (2001) (YO finding "is not a conviction for a crime."). DHS concedes that YO findings are not convictions for crimes. CAR 14.

[20] *People v. Francis*, 30 N.Y.3d 737, 884–85 (2018) (stating YO designation is a matter of "discretion," reserved for instances when "the interest of justice would be served by relieving the eligible youth from the onus of a criminal record," reflecting "legislative desire not to stigmatize" those who deserve a "fresh start").

Mr. Darboe had only a single post-YO offense; the other arrests resulted in acquittal or dismissal. Nonetheless, the IJ included, among the reasons for finding Mr. Darboe did not merit a favorable exercise of discretion, all four post-YO arrests and allegations, *id.* at 136–137, but nowhere in the analysis did the IJ differentiate between the arrest leading to conviction and the three arrests leading to dismissals or acquittal. *Id.* at 132–37. Indeed, nowhere in the discretionary analysis sections does the Agency acknowledge that most of Mr. Darboe's arrests, including those for the most serious charges—for possessing a weapon while incarcerated and for gun possession—resulted in acquittal or total dismissal. Uncontested documentary evidence dispositively establishes those facts. The IJ therefore erred by treating each law enforcement contact as proof of wrongdoing, adding up to a "lengthy" record of "re-offend[ing]." *Id.*

Indeed, the IJ's reasoning elsewhere confirms that he erred by treating arrests as sufficient to establish guilt and by treating convictions, YOs, acquittals, and dismissals alike: in referring to a YO disposition, the IJ faulted Mr. Darboe for "only acknowledg[ing] committing the crime he was ultimately convicted of [*sic*] but den[ying] committing the other crimes that he was charged with by the police." CAR 132. In addition to wrongly calling a YO disposition a conviction, the statement makes clear that the IJ assumed Mr. Darboe was guilty of certain charges

even though they had been dismissed.[21] The BIA "adopt[ed] and affirm[ed]" the IJ's decision without specifically discussing criminal history, CAR 54, notwithstanding that the IJ's recitation of the facts evinces clear error in light of the record evidence. CAR 563–64, 941–67.

By treating arrests as convictions and assuming the truth of dismissed allegations contained in arrest reports or charging documents, the IJ committed legal error. It is axiomatic that the IJ may not "go beyond the judicial record to determine the guilt or innocence of a[] [respondent]." *Mendez-Moralez*, 21 I&N Dec. at 304. Although the IJ may consider arrest reports or charging documents in the discretionary analysis, this Court has held, in relation to discretionary relief, that the Agency "may not base its decision denying relief upon the assumption that the facts contained in such documents are true." *Padmore v. Holder*, 609 F.3d 62, 69 (2d Cir. 2010). Similarly, the BIA itself has cautioned that "we are hesitant to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein." *Matter of Arreguin*, 21 I&N Dec. 38, 42 (BIA 1995) (reversing denial of discretionary relief where IJ relied on

[21] Treating every police contact as evidence of guilt is particularly inappropriate given that Mr. Darboe is a Black Muslim immigrant who grew up in post-9/11, stop-and-frisk New York. *Cf. Friedman v. Rehal*, 618 F.3d 142, 157 (2d Cir. 2010) ("[A]llegations against petitioner must be viewed in the context of the late-1980's and early-1990's, a period in which allegations [similar to those against petitioner] spread like wildfire. . . . [P]etitioner's case appears as merely one example of what was then a significant [] trend.").

uncorroborated arrest report); *accord Matter of Sotelo-Sotelo*, 23 I&N Dec. at 205 ("In the absence of a conviction, we find that the outstanding warrant should not be considered an adverse factor").

Here, the IJ's decision contravened Circuit and Board precedent: despite engaging in *no* fact-finding regarding the truth of the allegations listed in any arrest or charging document, he manifestly assumed, in several instances, that they were true despite dismissal or acquittal and, in some instances, uncontroverted testimony to the contrary. *See* CAR 132, 136–37, 395–97, 457. This was error. *See James v. Mukasey*, 522 F.3d 250, 257 (2d Cir. 2008) (finding agency should not credit factual allegation in charging instrument); *Avila-Ramirez v. Holder*, 764 F.3d 717, 725 (7th Cir. 2014) (finding that the Board had "failed to follow its binding precedent in *Arreguin* . . . when it gave significant weight to uncorroborated arrest reports" to deny discretionary relief); *Billeke-Tolosa v. Ashcroft*, 385 F.3d 708, 712-13 (6th Cir. 2004) (holding that under *Arreguin*, the IJ erred by denying discretionary relief based on uncorroborated criminal complaints alleging sexual abuse, even where noncitizen was convicted of lesser crimes resulting from same arrest); *see also Schware v. Bd. Of Bar Examiners*, 353 U.S. 232, 241 (1957) ("The mere fact that a man has been arrested has very little, if any, probative value in showing that he engaged in any misconduct.").

Taken together, the IJ's analysis makes clear that he mischaracterized and ignored record evidence regarding criminal history in reaching the discretionary determination. *Cf. Rai v. Barr*, 810 F. App'x 48, 51 (2d Cir. 2020) (remanding where IJ ignored documentary corroboration). The BIA adopted and affirmed, notwithstanding the IJ's numerous factual and legal errors, without discussing the IJ's criminal history findings, CAR 54, and therefore remand is required.

Despite having a second chance to get the facts right in adjudicating Mr. Darboe's motion to reopen, the BIA instead largely repeated the above errors—and added a new one. In concluding that, even without the pardoned conviction, Mr. Darboe would not merit a favorable exercise of discretion, the BIA falsely stated that he has "4 youthful offender cases." CAR 5 n.2. However, Mr. Darboe was adjudicated a youthful offender *once*, not four times. CAR 944. Because the BIA denied reopening due to his perceived criminal history, its erroneous quadrupling of the youthful offender cases on Mr. Darboe's record renders its denial of reopening flawed.[22]

2. The adverse credibility finding relied on repeated mischaracterizations of testimony.

The IJ found, and the BIA affirmed, that Mr. Darboe did not testify credibly as to his criminal history. These findings are based on numerous errors and not

[22] The youthful offender disposition addressed charges from two incidents. *See* CAR 938. But even if the BIA meant "incidents" rather than "cases," there are only two, not four.

supported by substantial evidence. To the contrary, Mr. Darboe's testimony was unfailingly consistent and forthcoming.

The IJ provided three primary reasons for why Mr. Darboe was "overall not credible" and his testimony "vague, evasive, [] contradictory," and "inconsisten[t]." CAR 131, 136. Each of these reasons is unsupported by the record. The credibility determination thus fails the "substantial basis" test, which requires remand if the IJ's findings are not "supported by reasonable, substantial and probative evidence in the record when considered as a whole" and "based on specific, cogent reasons that bear a legitimate nexus to the finding." *Kone v. Holder*, 596 F.3d 141, 151 (2d Cir. 2010); *see also Gurung v. Barr*, 929 F.3d 56, 59 (2d. Cir. 2019) ("In reviewing an IJ's evaluation of a witness's credibility, we require that evaluation to be 'tethered to the evidentiary record.'").

The IJ's first reason reflects a demonstrable, unambiguous record error. The IJ said, "[w]hen asked . . . how many headphones and/or cellphones he stole in total, [Mr. Darboe] vacillated and was unable to give an exact number. Instead, he stated that he did it because he needed the money." CAR 131. But the relevant testimony squarely contradicts the IJ's account:

> [ICE]: How many times have you stolen cell phones from people before this incident?
> [Darboe]: None.
> [ICE]: So this was the first time[,] you were with your friend and you just both randomly decided to steal this man's cell phone?
> [Darboe]: Yes.

[ICE]: Why did you decide to do that?
[Darboe]: We both was desperate for money at the time.

CAR 448. (Mr. Darboe was never asked how many times he stole headphones). As this testimony was uncontroverted and displays no vacillation, one of the three main reasons supporting the IJ's adverse credibility finding is simply invented. Under Circuit precedent, this constitutes legal error. *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 328–29 (2d Cir. 2006) ("[F]act-finding [] is flawed by an error of law . . . where the IJ states that his decision was based on petitioner's failure to testify to some pertinent fact when the record of the hearing reveals unambiguously that the petitioner did testify to that fact"). This error alone—uncorrected by the BIA—requires remand. *Gurung*, 929 F.3d at 59 (remanding where "a reasonable reading of the record fail[ed] to support" some of the purported inconsistencies relied upon by IJ in making adverse credibility determination).

The IJ's second reason is equally flawed. The IJ found that, in testifying as to his (now pardoned) conviction for stealing gold chains, Mr. Darboe "lacked candor" in asserting innocence because he pled guilty and because the complainant—someone from his neighborhood—identified him. CAR 94, 131, 136, 398, 400, 546. The IJ found—wrongly—there were "inconsistencies in [Mr. Darboe's] testimony" as to this case, and thus found a "lack of candor and credibility." CAR 136. However, Mr. Darboe testified entirely consistently to each

fact each time the incident was raised: that he did not engage in the charged conduct, that he knew the complaining witness, that he believed he was initially targeted as a suspect because of his previous record, and that he pled guilty because doing so ensured his release from jail. *See* CAR 399–400, 442–43, 462–64. There is no inconsistency in his testimony, and the IJ erred by so finding. *Gurung*, 929 F.3d at 59.[23]

In addition to resting on testimonial inconsistency where none existed, the credibility determination is flawed because the IJ ignored Mr. Darboe's consistent explanation and the extensive record evidence that supports it. *See Cao He Lin v Dept. of Justice*, 428 F.3d 391, 403 (2d Cir. 2005) ("Absent a reasoned evaluation of [his] explanations, the IJ's conclusion that his story is implausible was based on flawed reasoning and, therefore, cannot constitute substantial evidence supporting her conclusion."). Mr. Darboe testified that he pled guilty because doing so offered

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[23] Rather than inconsistency, the basis for the IJ's finding appears to have actually been implausibility: he seemed to find it objectively implausible that Mr. Darboe did not commit a crime he pled guilty to. *See* CAR 131, 136; *cf.* CAR 463 (IJ asking "So [] your testimony is even though you pled guilty to this and the woman whose chains were stolen says that you did it, you're telling me you didn't do it?"). Insofar as a different basis such as implausibility may have been viable if stated, this Court does "not . . . seek alternative grounds for affirmance where the grounds set forth by the IJ are insufficient" and instead "limit[s] [] review . . . to the reasons she actually articulates." *Lin v. Gonzales*, 445 F.3d 127, 136 (2d Cir. 2006). Because the "actually articulate[d]" ground of inconsistency is not viable, the IJ's reasoning is not supported by substantial evidence and cannot be sustained.

a way to immediately leave Rikers. CAR 280–81.[24] In light of his explanation, the IJ and BIA were required to consider—but ignored—the extensive evidence related to Mr. Darboe's suffering in Rikers, which motivated him to prioritize obtaining freedom over any other goal. Mr. Darboe testified extensively as to the fear he experienced at Rikers, the terrifying violence in the jail, his suffering and mental health deterioration in solitary confinement (bolstered by an expert evaluation documenting his self-harm and suicidality during this period), and the hardship of separation from his family while at Rikers. *See, e.g.*, CAR 384–88, 442, 632. Ignoring the extensive record evidence supporting Mr. Darboe's explanation is error. *Pavlova v. I.N.S.*, 441 F.3d 82, 90–91 (2d Cir. 2006) ("[T]he IJ appears to have ignored [Petitioner's] explanation . . . . The IJ's failure to address this explanation was error."); *Zhi Wei Pang v. Bureau of Citizenship and Immig. Servs.*, 448 F.3d 102, 108 (2d Cir. 2006) ("Although the [IJ] is not required to credit [the respondent's] explanation, the [IJ] is required to present specific, cogent reasons for rejecting it"). Because extensive record evidence (to say nothing of common sense and widely-recognized facts about the prevalence of and

[24] Despite no objection from DHS, the IJ refused to let Mr. Darboe present additional evidence corroborating that his testimony was consistent with his contemporaneous account to police at the time of his 2014 arrest. CAR 443–45 (IJ refusing to permit Mr. Darboe's counsel to re-file the 2014 statement notice into the removal record, which was already in the bond record, after specifically asking Mr. Darboe whether he had submitted evidence of his interview with the police).

motivation behind guilty pleas) supports Mr. Darboe's explanation that he pleaded guilty to get out of jail, the IJ's failure to provide any reason—much less "specific, cogent reasons"—for rejecting this explanation requires remand.[25]

Finally, the third of the IJ's examples in support of finding Mr. Darboe to be "vague, evasive, and contradictory" is likewise not tethered to the record. The IJ found Mr. Darboe "vacillated" regarding the number of orders of protection that had been filed against him, CAR 131, and the BIA cited this as support that he was "not forthcoming" as to his criminal history, CAR 55. But the record reveals no basis for these characterizations. The IJ erred in stating that Mr. Darboe testified

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[25] In treating it as incredible that an innocent person could plead guilty, the IJ and BIA displayed an understanding that lags 50 years behind that of the Supreme Court, which has expressly recognized the phenomenon—and affirmed the constitutionality—of guilty pleas by persons who believe themselves innocent. *North Carolina v. Alford*, 400 U.S. 25, 37–38 (1970). Extensive research confirms that factually innocent people often plead guilty. Andrew D. Leipond, *How the Pretrial Process Contributes to Wrongful Conviction*, 42 AM. CRIM. L. REV. 1123, 1154 ("[W]e know that sometimes innocent people plead guilty"); Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 74 (2009) ("Plea bargaining has an innocence problem."); Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 56 (2012) ("[T]he incentives to bargain are powerful enough to force even an innocent defendant to falsely confess guilty[.]"); *see also Missouri v. Frye*, 566 U.S. 134, 144 (2012) (citing research that the trial penalty and release-related incentives have driven a wedge between guilty pleas and culpability). Thus, insofar as the Agency treated the fact of a guilty plea as the basis for an adverse credibility determination, that reasoning was "illogical" and reflected a "dubious analytical process." *Cf. Singh v. Mukasey*, 553 F.3d 207, 214 (2d Cir. 2009). Recognizing the possibility of pleading guilty despite innocence does not require going behind the record to re-assess guilt or innocence. Rather, it merely requires acknowledging that a guilty plea is an insufficient basis to adjudge Mr. Darboe not credible for maintaining his innocence.

"he did not know" when asked "if any orders of protection had been filed against him," before testifying that he remembered one such order. CAR 131. The relevant exchange was:

> [ICE]: Sir, how many times have the protective orders been issued against you[?]
> [Darboe]: I don't know how many times, to be honest, you know?
> [ICE]: Do you remember one time a protective order has been issued against you?
> [Darboe]: Yes.
> [ICE]: When?
> [Darboe]: I think it's the first, the first, the purse snatching.
> [ICE]: And how long was the protective order issued against you?
> [Darboe]: I don't remember the . . . length of the order of protection.
> [ICE]:. . . [D]o you remember another time that a protective order was issued . . .?
> [Darboe]: Yes, with the cell phone case.

CAR 445.

As the transcript shows, the actual question asked of Mr. Darboe was "*how many times*" protective orders had been issued, *id.*, after which he testified to two such orders and was not asked again how many protective orders there were. *Id.* at 445–47. These are perfectly compatible statements: Mr. Darboe could not immediately recall the total number of protective orders issued against him over many years, but he remembered individual instances of protective orders. This Court has instructed that the Agency must be precise in its identification of inconsistencies. *See Gurung*, 939 F.3d at 59 (vacating where "[t]he [] purported inconsistencies . . . are not in fact inconsistent" and instructing that because "an inconsistency finding places a heavy burden on the applicant, it is especially

important for the IJ and the BIA to apply the correct standard"). Here, there is simply no inconsistency (or "vacillation") in not knowing the total number, while remembering two specific orders. Thus, the IJ's finding lacks a substantial basis. *See Kone*, 596 F.3d at 151.

Even if this Court finds that characterizing this testimony as "inconsistent" is supportable, it still does not serve as the proper basis of an adverse credibility finding. Where, as here, a purported inconsistency is not obvious, BIA precedent requires that the IJ or ICE bring the purported inconsistency to the Respondent's attention to provide an opportunity to explain. *Matter of Y-I-M-*, 27 I&N Dec. 724 (BIA 2019) (holding an IJ may rely on a subtle, non-obvious inconsistency to support an adverse credibility finding if and only if the IJ or DHS identified the discrepancy and gave the respondent an opportunity to explain it during the hearing); *see also Hong Fei Gao v. Sessions*, 891 F.3d 67, 77 (2d Cir. 2018) (stating that "[a] trivial inconsistency . . . that has no tendency to suggest a petitioner fabricated his or her claim will not support an adverse credibility determination").[26]

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[26] The Agency also found that Mr. Darboe "minimized" his conduct, in part because he did not admit conduct that was dismissed or acquitted. As discussed *supra*, this analysis is flawed. To the extent the Agency also found minimization based on Mr. Darboe referring to some conduct as "mistakes," CAR 55, 131, that characterization is untenable. Mr. Darboe testified: "I feel like I made a lot of bad mistakes . . . . I [] feel ashamed for the things I did, . . . now I'm more mature . . . I know way more options to take and way more routes to take than, other than

Stripped of these legal and factual errors, the only surviving basis for the adverse credibility determination is that Mr. Darboe on "multiple occasions . . . hesitated and provided vague explanations." CAR 149–50 (providing no citation to the transcript). But the IJ cited no examples to support this description. *Gurung*, 929 F.3d at 59 ("[W]e require that [an IJ]'s evaluation of a witness's credibility" be 'tethered to the evidentiary record.'"). While the BIA supplied a cite to the record that it speculated was the basis of the IJ's finding, CAR 55 (*citing* CAR 454–469), the cited testimony clearly shows Mr. Darboe answered the IJ's questions forthrightly to the best of his ability. This Court cannot look beyond the non-existent explanations provided by the Agency here to guess at what it might have been referring to. *See Shi Liang Lin v. Dep't of Justice*, 416 F.3d 184, 192 (2d Cir. 2005) (court cannot "be compelled to guess at the theory . . . nor . . . expected to chisel that which must be precise from what the agency has left vague and indecisive."). Further, "testimonial vagueness cannot, without more, support an adverse credibility determination unless government counsel or the IJ first attempts to solicit more detail from the [respondent]"—even where there is "some support in the record" for calling testimony vague. *Li v. Mukasey*, 529 F.3d 141, 147 (2d

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stealing and causing other people harm[.]" CAR 424; *see also* CAR 469 ("I just want to say I know I made a lot of mistakes, and I take full responsibility, and that I apologize to all the victims that I cause harm to, and that I am a better person from back then."). Taking the word "mistake" out of context to paint this testimony as minimizing is plainly a misrepresentation.

Cir. 2008). Neither the IJ nor the BIA cite a concrete example of Mr. Darboe refusing to provide detail in response to questioning. In light of the failure to solicit detail or identify examples of non-forthrightness, the vagueness finding is not supported by substantial evidence.

Because an adverse credibility determination must be based on the totality of the circumstances, *see* CAR 131; INA § 240(c)(4)(C), where one or more bases of the determination does not survive review, the "proper remedy" is to remand the case. *Gurung*, 929 F.3d at 929. That is especially so where, as here, the vast majority of the grounds for the adverse finding are not supported by substantial evidence, because the IJ and BIA did not provide specific, cogent reasons tied to accurate characterizations of the record.

3. The Agency erred in relying on a credibility finding to deny the § 212(h) waiver.

In addition to factual errors in making the credibility finding, the Agency also improperly treated an adverse credibility determination as a freestanding negative factor in the discretionary analysis for a § 212(h) waiver without a basis in law. The BIA affirmed the IJ's finding that Mr. Darboe's "equities in the United States are outweighed by his criminal history and lack of credibility," CAR 54, and then found Mr. Darboe's purported "lack of candor and credibility is a *significant adverse factor* in his case," CAR 136 (emphasis added). In denying re-opening, the BIA doubled down, acknowledging that the waiver "was denied based on an

adverse credibility finding." CAR 5 (quoting *Matter of F-[S]-N*, 28 I&N Dec. 1 n.3 (BIA 2020)). However, none of the Agency decisions provide *any* authority for the proposition that a credibility determination, standing alone, is a pertinent consideration in adjudicating an application for a § 212(h) waiver, or any form of non-asylum discretionary relief—particularly where, as here, there exists significant corroborating evidence regarding the relevant facts. Indeed, neither Board nor Circuit precedent support relying on a credibility finding for denial of such relief.

The Agency therefore abused its discretion in treating a finding that Mr. Darboe's testimony was not adequately forthcoming, CAR 136, as one of the only two negative factors in the discretionary analysis. The BIA has held that the § 212(h) discretionary analysis should count, as a negative factor, "evidence indicative of a[] [respondent]'s bad character or undesirability as a permanent resident[.]" *Mendez-Moralez*, 21 I&N Dec. at 301. But this case is unlike one in which an applicant proffers fabricated testimony or submits fraudulent documents in support of the waiver. Although such conduct may permissibly be considered under BIA and Circuit case law as reflecting negatively on character, there is no support or precedent for the Agency's conclusion here: that imperfect testimony, standing alone, justifies discretionary denial, and the relevant authority all concludes the opposite. *See Huang v. I.N.S.*, 436 F.3d 89, 99 (2d Cir. 2006)

(holding "testimonial embellishment at the margins" cannot "justify a [discretionary] denial of asylum"); *Canales-Lopez v. I.N.S.*, 76 F.3d 381 (7th Cir. 1996) ("[T]he mere fact that Canales' testimony was not credible cannot be the sole basis for denial of waiver."). Indeed, in denying the motion to reopen, the BIA makes clear that it is not Mr. Darboe's *conduct*, but rather the mere *fact of an adverse credibility finding* that constitutes the negative discretionary factor. CAR 4–5 ("[R]espondent . . . has not attempted to rehabilitate his credibility. . . . The issuance of a gubernatorial pardon . . . does not refute the validity and finality of the [IJ]'s adverse credibility finding.").

This emphasis on the fact of an adverse credibility determination is especially concerning post-REAL ID Act, when the bases for making an adverse credibility determination have become numerous and the standards unforgiving. *See Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 165-68 (2d Cir. 2008) (reviewing change in standard). Ensuring that the factual predicate of the adverse credibility determination actually reflects "bad character or undesirability" is even more important. Here, the IJ and the BIA failed to connect the factual basis of the credibility finding—that is, Mr. Darboe's actual testimonial conduct—to *any* attribute that reflects poorly on his character or desirability as a permanent resident. Because the fact of an adverse credibility finding alone sheds no light on whether Mr. Darboe warrants the opportunity to remain with his family in his

adopted country, the Agency's reliance on it as one of the only negative factors constituted an abuse of discretion.

4. The Agency ignored positive equities relevant to the discretionary analysis.

The BIA and IJ entirely ignored legally relevant equities that must be balanced in the discretionary analysis. This error of law compounds the errors *supra*, but even standing alone, it requires remand. *See Mendez*, 556 F.3d at 323 (finding legal error where facts important to a discretionary determination were "totally overlooked" or "seriously mischaracterized"). Circuit precedent holds that an agency's "failure to consider material evidence warrants remand because it [] deprive[s] [this Court] of the opportunity to provide meaningful judicial review." *Ahmed v. Lynch*, 804 F.3d 237, 240 (2d Cir. 2015); *see also Mendez-Moralez*, 21 I&N Dec. at 301 (holding that the IJ, "review[ing] [] the record as a whole . . . is required to balance equities and adverse matters to determine whether discretion should be favorably exercised" and that the "basis for the [] decision must be enunciated in his opinion."). Where, as here, the Agency ignores material evidence, the matter must be remanded for a consideration of the entire record. *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 149 (2d Cir. 2006) ("[S]erious legal errors such as failure to consider the entire record . . . ordinarily will require vacatur and remand for further consideration[.]").

The IJ's decision featured a manifestly inadequate account of Mr. Darboe's extensively documented equities, which BIA precedent requires be considered as positive factors in the discretionary analysis. The IJ acknowledged only Mr. Darboe's close relationship to his wife and daughter who were struggling financially without him and that his wife "appeared very emotionally distraught as a result of currently being separated from [Mr. Darboe] during his detention;" the IJ also stated without support or elaboration that the "Court has taken into consideration [Mr. Darboe's] length of residence in the U.S. as well as his family and community ties in New York City." CAR 136.

This deficient statement disregards *Mendez-Moralez*, 21 I&N Dec. at 301, which lists factors that the IJ must consider, including:

> family ties in the United States, residence of long duration in this country (particularly where the [respondent] began his residency at a young age), evidence of hardship to the [respondent] and his family if he is . . . deported, . . . evidence of value and service to the community, evidence of genuine rehabilitation . . . , and other evidence attesting to the [respondent]'s good character (e.g., affidavits from family, friends, and responsible community representatives).

Mr. Darboe submitted evidence for each of the above-listed categories; almost none were considered. The evidence the Agency failed to consider included: (*i*) Mr. Darboe's close relationships with his parents and his eight siblings, all of whom are U.S. citizens or LPRs, CAR 237–38, 913–29; (*ii*) the support he provides to his aging parents, CAR 914–17; (*iii*) the care he provides

for his young siblings, CAR 894–96; (*iv*) his close relationship with his wife and daughter, who he made every effort to support during his prolonged incarceration by ICE, CAR 436, 868, 405–06, 490–91, 868, 872–73, 418–19, 514; (*v*) the devastating emotional, financial, and health consequences his deportation would have on his wife and daughter, CAR 103, 413–14, 493–94, 858–92, 896; (*vi*) his active role supporting people in his community, as reflected in character letters, CAR 925, 928; (*vii*) his extensive efforts at rehabilitation, demonstrated by his pursuit of a GED while detained, CAR 934, a support letter from the clinical director of Getting Out Staying Out, CAR 935, and the fact that Bergen Jail entrusted him with the "houseman" position, CAR 49; (*viii*) the young age from which he resided here; (*ix*) the re-entry plan and extensive re-entry support he has secured, CAR 897, 931; (*x*) his complete lack of family ties and network in The Gambia, CAR 634, 898; and (*xi*) his serious mental health needs that would go unmet there, CAR 386, 465–66, 632.

Rather than correct this error, the BIA exacerbated it, merely referring to Mr. Darboe's "equities in the United States"—a fleeting reference instead of meaningful consideration of record evidence—while citing no specifics. The BIA incorrectly applied a deferential standard of review, clear error, despite the fact that it is required to review discretionary determinations *de novo*. 8 C.F.R. §1003.l(d)(3)(ii). The BIA recognized its obligation to conduct a *de novo* review,

but failed to do so, instead stating merely that Mr. Darboe "does not persuade us of any error below" in how the IJ "weighed the evidence." CAR 56. Application of the incorrect standard of review is reversible error. *See Alom v. Whitaker*, 910 F.3d 708, 712 (2d Cir. 2018) (reversing on this basis); *Chen v. Bureau of Citizenship & Immig. Servs.*, 470 F.3d 509, 514 (2d Cir. 2006) (remanding because "BIA review under an incorrect standard of review implicates [respondent]'s due process rights").

Overall, the Agency's utter failure to engage with the vast majority of this evidence of positive equities necessitates remand. *See Gonzales Bordonave*, 432 F. App'x at 37 (remand appropriate if BIA ignores evidence "its own precedent had established was relevant to its exercise of discretion"); *Alam v. Gonzales*, 438 F.3d 184, 187 (2d Cir. 2006) (holding that "the BIA has an obligation to consider the record as a whole") (internal quotations omitted); *Jorge-Tzoc*, 435 F.3d at 149. This Court regularly remands where the BIA or IJ ignores evidence far less extensive than that ignored here. *See, e.g.*, *Tobar-Bautista*, 710 F. App'x at 507–08 (reversing as agency failed to consider factors such as evidence that petitioner was sole wage-earner, conditions in home country were "volatile," and children's ages); *Iza-Pullataxig v. Sessions*, 700 F. App'x 60, 61 (2d Cir. 2017) (reversing because agency failed to consider psychological report about child).

IV. The BIA's Refusal to Reopen Proceedings for Voluntary Departure was Error.

The BIA affirmed the IJ's denial of post-conclusion voluntary departure for three reasons, each of which reflects an error of law. First, the BIA found that Mr. Darboe "waived further consideration" of the denial of voluntary departure because "he did not raise any allegation of error on appeal." CAR 6. But this misapprehends the nature of a motion to reopen: the grant of a pardon following the dismissal of Mr. Darboe's appeal is clearly evidence that is "material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.2(c)(1). Prior to the pardon, there was no basis to challenge the IJ's decision that Mr. Darboe was statutorily barred from establishing the good moral character necessary for voluntary departure. CAR 138. After the pardon, he became eligible for that relief.

This Court has repeatedly remanded where the Agency denies a motion to reopen because it finds that, prior to the availability of new evidence, the Petitioner abandoned the claim for which he seeks reopening. *See, e.g.*, *Singh v. U.S. Dep't of Justice*, 461 F.3d 290, 297 (2d Cir. 2006); *Norani v. Gonzales*, 451 F.3d 292, 294–95 (2d Cir. 2006). The pertinent question is whether the evidence is material and previously unavailable. *See generally id.*; 8 C.F.R. § 1003.2(c)(1). Because the BIA did not address the pertinent issues, and introduced a new requirement

inconsistent with the purpose and function of motions to reopen, its decision requires remand.

Second, the BIA wrongly held, in violation of its own clear precedent, that the good moral character bar for having been incarcerated for over 180 days is "not changed by the pardon" of the underlying conviction. CAR 6; *cf. Matter of H-*, 7 I&N Dec. at 249 (holding that noncitizen was not precluded from establishing good moral character despite serving two-year sentence where the underlying conviction had been pardoned). This reasoning ignores that a pardon renders both the conviction *and the sentence* a legal nullity. CAR 41. Indeed, as the BIA has recognized, a pardon cures conviction-based good moral character bars, including the one at 8 U.S.C. § 1101(f)(7). *Matter of H*, 7 I&N Dec. at 250 ("the pardon which eliminated the crime as a basis for deportation proceedings, should immunize the alien from the statutory bar created because of her confinement for that very crime"). As such, Mr. Darboe is now statutorily eligible for voluntary departure. *See also* Immig. & Naturalization Serv., Interpretation Letter 316.1, 2001 WL 1333876 (D.O.J. Oct. 1, 2001) ("[A] petitioner who was confined for six or more months . . . is not precluded from establishing good moral character by reason of section 101(f)(7), if he has been granted a full, unconditional, executive pardon for the offense.").

Third, the BIA proclaimed, in a conclusory fashion unsupported by any reasoning or citation to the record, that Mr. Darboe "has not demonstrated . . . that he merits voluntary departure in the exercise of discretion," a question that the IJ never reached. CAR 6, 138–39. But the BIA did not articulate or apply any of the factors that govern the determination whether a respondent merits the favorable exercise of discretion for voluntary departure. *See Matter of Gamboa*, 14 I&N Dec. 244, 248 (BIA 1972) (listing factors); *Matter of Arguelles-Campos*, 22 I&N Dec. 811 (BIA 1999) (reaffirming *Gamboa* factors). This was error, and the matter should be remanded to the IJ for an initial evaluation of the merits of Mr. Darboe's request for voluntary departure. *See Yu Sheng Zhang*, 362 F.3d at 158 (requiring agency to "provide reasoned bases for its decision").

CONCLUSION

For the foregoing reasons, the petitions for review should be granted, the Board of Immigration Appeals' decisions vacated, and Mr. Darboe's proceedings remanded for further relief.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because: This brief contains 17,985 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(i), and this Court granted Petitioner's timely filed motion to file an oversized brief under Local Rule 27.1(e), requesting an additional 4,000 words, for a total of 18,000 permissible words.

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