No. 21-211328

In the Supreme Court of the United States

NIKEL KUZMA,
Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

**On Writ of Certiorari to
the Fourteenth Circuit Court of Appeals**

BRIEF FOR THE PETITIONER

Counsel of Record
TEAM NUMBER P10

ISSUES PRESENTED FOR REVIEW

1. Did Petitioner suffer “extraordinary circumstances” to excuse an untimely asylum application?

2. Should the Court acknowledge a duress exception to the persecutor bar and apply it to Petitioner?

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STATEMENT OF THE CASE

Nikel Kuzma is a thirty-two-year-old woman from the country of Matava. Joint Appendix ("**J.A.**") at 5. Ms. Kuzma lived in Matava, in a small town on the border of Matava and Riela. J.A. at 5. Matava was a colony of Riela, a global superpower, until 1962 when it gained its independence. J.A. at 5. However, Riela continues to consider Matava a rebellious territory and engages in conflicts to seize border towns of Matava. J.A. at 5.

Ms. Kuzma is fluent in both Rielan and Matavan languages. J.A. at 5. In 2019, Rielan soldiers forced Ms. Kuzma at five in the morning to get in a car. J.A. at 5. Despite her initial protest, Ms. Kuzma later obliged and was transported three hours away to a prison that held Matavans. J.A. at 5. There, Rielan soldiers required Ms. Kuzma to translate during interrogations to suspected members of the Matavan resistance. J.A. at 5-6. The soldiers threatened Ms. Kuzma with torture and imprisonment if she did not comply. J.A. at 6. Ms. Kuzma, realizing she was stranded in the middle of the forest, translated for three separate interrogations. J.A. at 6. In each interrogation, she witnessed torture. J.A. at 6. After the interrogations, she was returned to her home. The next night, she left Matava for the United States. J.A. at 6.

She entered the United States from the southern border. The next day, she saw a flyer in Matavan titled "HELP FOR REFUGEES." J.A. at 6. The flyer stated that a local non-governmental organization, the Nation of Ideal Many (NOIM), was offering refugees resettlement assistance. J.A. at 6. She reached out to the number and spoke to a representative who informed her that the resettlement camp was in Myrtle's Orchard, a small rural island community in the Northern United States. J.A. at 6. The representative claimed that NOIM would provide her with transportation, a place to stay, and a job. J.A. at 6. Furthermore, NOIM claimed that they would send Ms. Kuzma

to an immigration nonprofit to help her attain lawful immigration status. J.A. at 6. Ms. Kuzma agreed and went to Myrtle's Orchard. J.A. 6.

At Myrtle's Orchard, she was housed for a few days at a local church and received a job as a dishwasher. J.A. at 6. She moved into an apartment but received no information regarding her immigration status. J.A. at 6. After a month, she contacted NOIM inquiring about the immigration nonprofit agency, but the representative only responded that it would be soon. J.A. at 6. The representative also assured Ms. Kuzma that she had "plenty of time to get her immigration status sorted out." J.A. at 6. After another month, Ms. Kuzma called the number to NOIM again but received the same assurances. J.A. at 6. Finally, after one more month, she called and no one answered the line. She did not attempt to contact NOIM again. J.A. at 6.

Ms. Kuzma stayed mostly to herself. J.A. at 7. She spoke enough English to perform her job and get around with day-to-day tasks. J.A. at 7. There were two immigration attorney offices in Myrtle's Orchard, but neither advertised services in Matavan language and Ms. Kuzma was not aware of their services. J.A. at 7. Myrtle's Orchard had a very small Matavan immigrant community, and the town does not provide any Matavan language resources. J.A. at 7.

After a year and three days after her arrival to the United States, immigration authorities stopped her as she was walking to work. J.A. at 7. The agents questioned her about her immigration status, detained Ms. Kuzma, and initiated removal proceedings. J.A. at 7.

Shortly after Ms. Kuzma's detention, a newspaper published an expose regarding NOIM. J.A. at 7. NOIM was actually an anti-immigrant church that offered resettlements to people who had recently crossed the border to reduce the number of immigrants in their border community. J.A. at 7. While they did assist people in transportation, immediate housing, and job referrals, they did not provide immigration referrals. J.A. at 7. Furthermore, they often provided misinformation to

immigrants regarding the immigration process. J.A. 7. NOIM seized operation a few months after they resettled Ms. Kuzma. J.A. at 7.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the United States Court of Appeals for the Fourteenth Circuit and hold that Petitioner failed to show "extraordinary circumstances" to justify late application for asylum. This Court should also affirm the Fourteenth Circuit in holding that there is no duress exception in relation to the persecutory bar in 8 U.S.C. § 1101(a)(42)(B).

The *Gasparian* court held that analyzing whether "extraordinary circumstances" should excuse an untimely filing involves a two-step process. *Gasparyan v. Holder*, 707 F.3d 1130, 1135 (9th Cir. 2013). The applicant must first "demonstrate… the existence of… extraordinary circumstances relating to the delay." 8 U.S.C. §1158(a)(2)(D). If the existence of "extraordinary circumstances" is established, the reviewing body then considers whether the applicant satisfies the three factors set forth by in 8 C.F.R. §1208.4(a)(5). 8 C.F.R. §1208.4(a)(5). Because the Petitioner's circumstances neither mirror nor are "of a similar nature or seriousness" as the examples of "extraordinary circumstances" provided by 8 C.F.R. §1208.4, the Petitioner did not suffer "extraordinary circumstance" as described in 8 U.S.C. §1158(a)(2)(D). *Gasparyan*, 707 F.3d at 1135; 8 U.S.C. §1158(a)(2)(D). Furthermore, even if this Court finds that the Petitioner's situation constituted an "extraordinary circumstance," this Court should not excuse Kuzma's late asylum application because she fails to satisfy the three additional factors created in 8 C.F.R. §1208.4(a)(5).

In 8 U.S.C. § 1101(a)(42)(B), Congress did not legislate an exception for immigrants who assisted in persecution under duress. 8 U.S.C. § 1101(a)(42)(B). This Court has weighed whether to provide for the exception using canons of statutory construction. *See generally Negusie v.*

Holder, 555 U.S. 511 (2009); *Fedorenko v. United States*, 449 U.S. 490 (1981). When looking to constructively interpret a statute, this Court has long held that it must look to Congressional intent. *See Fedorenko*, 449 U.S. at 512. Congress clearly intended to leave out a duress exception in §1101, and demonstrated it contemplated the issue of duress when they allowed it in other statutes they have enacted. *See id.* at 512, 519. Furthermore, Congress clearly demonstrated their refusal to add a duress exception when they amended § 1101 as recently as July of 2021. *See* H.R. 3237, 117th Cong. 310 (2021). Lastly, this Court has consistently ruled in *Negusie* and *Fedorenko* that *Chevron* deference will be given to administrative rulings about this issue; given BIA and Attorney General's recent 2020 holding, Respondent respectfully request this Court give deference to the 2020 BIA holding that duress exception does not exist in 8 U.S.C. §1101(a)(42)(B). *See Matter of Negusie*, 28 I. & N. Dec. 120, 120 (BIA 2020); *see also Chevron USA Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984); *Negusie*, 555 U.S. 511; *Fedorenko*, 449 U.S. at 512-519.

Therefore, the Respondent respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Fourteenth Circuit.

STANDARD OF REVIEW

This case requires this Court to analyze the applicability of "extraordinary circumstances" under Congress's 8 U.S.C. §1158(a)(2)(D) and the Department of Homeland Security's ("**D.H.S.**") 8 C.F.R. §1208.4(a)(5) and whether an exception for duress to the persecution bar under 8 U.S.C. §1101(a)(42) exists. The Court's review is limited to the BIA's decision except where the IJ's opinion is expressly adopted. *Cordon-Garcia v. INS*, 204 F.3d 985, 990 (9th Cir. 2000). Courts review legal conclusions *de novo*. *Davila v. Barr*, 968 F.3d 1136, 1141 (9th Cir. 2020). Only substantial evidence that the factual findings underlying the BIA's determination that the petitioner

is not eligible for asylum will yield a reversal. *Id.* The Petitioner "must show that the evidence not only supports but compels the conclusion that these findings and decisions are erroneous" to prevail under the substantial evidence standard. *Plancarte v. Garland*, 9 F.4th 1146, 1151 (9th Cir. 2021). Whether an applicant suffered "extraordinary circumstances" directly relating to being unable to file for asylum within a year is a question of law when there is no factual dispute. *Husvev v. Mukasey*, 528 F.3d 1172, 1181 (9th Cir. 2008). Whether there should be an exception for duress to the persecutor bar is also a question of law. *Negusie v. Holder*, 555 U.S. 511, 517 (2009). On these two issues, courts review the BIA's decision *de novo*.

ARGUMENTS AND AUTHORITIES

I. Petitioner Kuzma did NOT suffer "extraordinary circumstances" to excuse an untimely asylum application.

8 U.S.C. §1158 governs the requirements for persons, not a citizen or national of the United States ("aliens"), "who [are] physically present in the United States." 8 U.S.C. §1158(a)(1). The Petitioner falls into this category of individuals, as she is a Matavan refugee that entered the United States. J.A. at 5. However, the code goes on to state that an alien is unable to apply for asylum if they cannot "demonstrate[] by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States." 8 U.S.C. §1158(a)(2)(B). In the present case, it is undisputed that the Petitioner filed her asylum application one year and seven days after her day of arrival. J.A. at 7. 8 U.S.C. §1158 states that a late "application for asylum… may be considered… if the alien demonstrates… the existence of changed circumstances… or extraordinary circumstances relating to the delay in filing an application within the" one year limit. 8 U.S.C. §1158(a)(2)(D). Therefore, this Court must reject the Petitioner's untimely application for asylum unless Petitioner can demonstrate the presence of "changed" or "extraordinary circumstances" related to the delay in filing timely.

It is undisputed that the Petitioner lacked "changed circumstances" as described in §1158(a)(2)(D). J.A. at 9. Thus, the central question is whether Kuzma's situation qualifies as "extraordinary circumstances" that would excuse her late application. DHS further clarified §1158's "extraordinary circumstances" within 8 C.F.R. §1208.4(a)(5). 8 C.F.R. §1208.4(a)(5). The regulation states that the "extraordinary circumstances" must "refer to events or factors directly related to the failure to meet the 1-year deadline" and goes on to provide some examples of "extraordinary circumstances." *Id.* (emphasis added).

The *Gasparian* court held that analyzing whether "extraordinary circumstances" should excuse an untimely filing involves a two-step process. *Gasparyan v. Holder*, 707 F.3d 1130, 1135 (9th Cir. 2013). The applicant must first "demonstrate… the existence of… extraordinary circumstances relating to the delay." 8 U.S.C. §1158(a)(2)(D). Only once the existence of "extraordinary circumstances" is established does the reviewing body consider "the three factors to assess whether those extraordinary circumstances [actually] excuse the untimely filing of the asylum application": (1) the circumstances were not intentionally created by the alien through his or her own action or inaction, (2) that those circumstances were directly related to the alien's failure to file the application within the 1-year period, and (3) that the delay was reasonable under the circumstances. 8 C.F.R. §1208.4(a)(5).

When reviewing an "extraordinary circumstances" determination from the Board of Immigration Appeals ("**B.I.A.**"), the higher court applies the substantial evidence standard. *Lopez–Birrueta v. Holder*, 633 F.3d 1211, 1214 (9th Cir. 2011). Under such a standard, the court must uphold the B.I.A.'s decision "if the decision is supported by reasonable, substantial, and probative evidence on the record considered as a whole." *Tampubolon v. Holder*, 610 F.3d 1056, 1059 (9th Cir. 2010). Additionally, the court should only reverse the agency's determination when "the

evidence in the record compels a reasonable factfinder to conclude that the decision was incorrect." *Id.* Because Kuzma's circumstances do not rise to the level of "extraordinary" and do not satisfy the additional three elements required by the regulation, this Court should not excuse Petitioner's untimely asylum application.

A. Because the Petitioner's Circumstances Neither Mirror nor are "of a Similar Nature or Seriousness" as the Examples of "Extraordinary Circumstances" Provided by 8 C.F.R. §1208.4, the Petitioner's Circumstances do not Rise to the Requisite Threshold that §1158(a)(2)(D) Requires.

The United States Court of Appeals for the Fourteenth Circuit correctly concluded that Petitioner Kuzma failed to satisfy the first step of the "extraordinary circumstances" test as described by 8 U.S.C. §1158(a)(2)(D) and 8 C.F.R. §1208.4(a)(5). J.A. at 9. Opposing counsel argues that Kuzma's experience with the non-governmental organization, Nation of Ideal Many ("**NOIM**"), stress from escaping her home country, and lack of language skills in aggregation rise to "extraordinary circumstances." J.A. at 6, 9. Thus, these circumstances would need to either match one of the enumerated circumstances that the regulation provides or amount to an unenumerated circumstance that "are of a similar nature or seriousness." *Gasparyan*, 707 F.3d at 1135

1. The Petitioner's circumstances fail to mirror any of the enumerated examples of "extraordinary circumstances" provided by 8 C.F.R. §1208.4.

8 C.F.R. §1208.4(a)(5) states that "extraordinary circumstances" may include but are not limited to: (i) serious illness or mental or physical disability, (ii) legal disability, (iii) ineffective assistance of counsel, (iv) applicant maintained lawful immigrant status until a reasonable period before filing, (v) improperly filed application prior to the 1-year deadline, and (vi) death or serious illness of applicant's legal representative or immediate family member. 8 C.F.R. §1208.4(a)(5). Except for legal disability and ineffective assistance of counsel, none of the enumerated

circumstances come relatively close to describing the applicant's experiences, and Kuzma agrees. J.A. at 9.

8 C.F.R. §1208.4(a)(5)(ii) provides "applicant was an unaccompanied minor or suffering from a mental impairment" as examples of the legal disability enumerated circumstance. 8 C.F.R. §1208.4(a)(5)(ii). In *Alquijay*, the Ninth Circuit clarified the meaning of "legal disability" after the petitioner argued that his circumstances constituted a legal disability. *Alquijay v. Garland*, 40 F.4th 1099, at 1103 (9th Cir. 2022). The court went on to state that "the ordinary meaning of 'legal disability' was a lack of ability or capacity to fulfill legal duties due to minority or cognitive issues. *Id.* See also DISABILITY, Black's Law Dictionary (6th ed. 1990) ("[Disability] is generally used to indicate an incapacity for the full enjoyment of ordinary legal rights; thus, persons under age, insane persons, and convicts are said to be under legal disability."). Therefore, since the Petitioner, in this case, is a thirty-two-year-old woman and has not supplied any evidence of cognitive issues, her circumstances will not constitute a legal disability under 8 C.F.R. §1208.4(a)(5)(ii). J.A. 5.

The D.H.S.'s regulation lends additional guidance on the requirements necessary to constitute ineffective assistance of counsel. 8 C.F.R. §1208.4(a)(5)(iii). The regulation states that ineffective assistance of counsel can rise to "extraordinary circumstances" provided that (1) the alien files an affidavit setting forth in detail the agreement that was entered into with counsel, (2) the counsel that is being impugned has been informed of the allegations, (3) and the alien indicates whether a complaint has been filed with disciplinary authorities against the counsel, and if not why. *Id.* When measured against these additional requirements, it becomes clear that Petitioner Kuzma's situation does not match this enumerated circumstance either.

There is no evidence that Petitioner Kuzma even entered into a formal agreement with NOIM; therefore, it is understandable that no affidavit of the agreement would exist in the record. J.A. at

6. Similarly, the Petitioner has failed to provide evidence that she notified NOIM of the allegations, which is consistent with the fact that NOIM did not hold themselves out as an immigration attorney or firm. J.A. at 6 NOIM held itself out to be a "local non-governmental organization" that offered assistance to refugees and never represented itself as a law firm that could provide legal counsel. J.A. at 6. Furthermore, the representative that Kuzma spoke to only informed her that NOIM would pass along her information to another organization that would help with lawful immigration status, not submit the application on her behalf. J.A. at 6. The Petitioner even called NOIM to ask when the separate immigration nonprofit would contact her, which the representative previously alluded to. J.A. at 6. This fact reveals that Kuzma understood that NOIM was not providing legal representation or counseling. Because NOIM never held themselves out to provide legal services, the Petitioner seemingly understood that NOIM was not an attorney providing legal counsel, and Petitioner has not satisfied any of the additional requirements outlined by the regulation, §1208.4(a)(5)(iii)'s ineffective assistance of counsel" does not encompass Kuzma's claim either. 8 C.F.R. §1208.4(a)(5)(iii).

2. The Petitioner's circumstances are not "of a similar nature or seriousness" as the examples of "extraordinary circumstances" provided by 8 C.F.R. §1208.4.

Petitioner argues that her experience can still amount to "extraordinary circumstances" because §1208.4(a)(5) is not limited to the enumerated list that it provides. 8 C.F.R. §1208.4(a)(5). However, the Petitioner fails to provide evidence of why her lack of language skills and stress from escaping her home country should be considered "extraordinary" when the court has previously held otherwise. *Alquijay*, 40 F.4th at 1103; *Toj-Culpatan v. Holder*, 612 F.3d 1088, 1091 (9th Cir. 2010). Furthermore, Petitioner's interaction with NOIM does not equate to "a similar nature or seriousness" as the other examples listed in §1208.4(a)(5). *Gasparyan*, 707 F.3d at 1135.

In *Alquijay*, the petitioner asked the United States Court of Appeals for the Ninth Circuit to overturn the B.I.A.'s determination that "extraordinary circumstances" did not justify the delay in filing his asylum application. *Alquijay*, 40 F.4th at 1103. *Alquijay* emigrated from Guatemala and entered the United States illegally at 22. *Id.* at 1101. Three and a half years later, D.H.S. initiated removal proceedings, and the petitioner responded by applying for asylum 11 months later. *Id.* Similar to Ms. Kuzma, the asylum applicant argued that "his youth, language barrier, ignorance of the legal requirements…, and stress from fleeing his home country" when aggregated "[were] of a similar nature or seriousness" as the "legal disability circumstance" listed in §1208.4(a)(5)(ii). *Id.* at 1103; 8 C.F.R. §1208.4(a)(5). However, the Ninth Circuit disagreed. *Alquijay*, 40 F.4th at 1103.

The court reasoned that a 22-year-old is fully capable of meeting legal requirements absent another disability, so his age was irrelevant. *Id.* Next, the court recalled that, outside of rare cases, "lack of [English language] skills are not an 'extraordinary circumstance.'" *Id.* The court cited *Toj-Culpatan*, which held that "many immigrants who come to the country do not speak English fluently." *Toj-Culpatan*, 612 F.3d at 1091. *Toj-Culpatan* also held that lack of English skills is not an "extraordinary circumstance when the applicant "fails to explain how his inability to speak English is extraordinary… nor how it prevented him from timely filing an asylum application in English, especially given that the government makes translators available to immigrants who do not speak or read English." *Id.* The *Alquijay* court then stated that "as a general rule, ignorance of the law is no excuse," and the immigration context is no different. *Alquijay*, 40 F.4th at 1103; *Luna v. Holder*, 659 F.3d 753, 760 (9th Cir. 2011). Finally, the Ninth Circuit reasoned that because the asylum seeker did not distinguish his stress from fleeing Guatemala from the many immigrants "in a similar stressful situation," it also did not constitute an "extraordinary circumstance. *Alquijay*, 40 F.4th at 1104; *Toj-Culpatan*, 612 F.3d at 1091.

In the present case, the B.I.A. and Fourteenth Circuit followed the precedent outlined in *Alquijay* and reasoned that Kuzma's lack of language skills and stress from escaping her home country is no different from what many other asylum seekers encounter. J.A. at 11. The Fourteenth Circuit reasonably concluded that those aspects do not amount to "extraordinary circumstances" on their own and, therefore, should not be factored into the finding of "extraordinary circumstances" simply because another factor exists. J.A. at 11. The Petitioner may argue that her case is distinguishable because *Alquijay's* application being submitted three and a half years after the 1-year deadline is unreasonably late, which ultimately influenced the court's decision. However, this argument does not hold water because neither the B.I.A. nor the Ninth Circuit "considered the second step of the extraordinary circumstances analysis." *Alquijay*, 40 F.4th at 1105 n.9. This means that the B.I.A. and circuit court both found that no "extraordinary circumstances" existed and, therefore, never analyzed whether "the delay was reasonable under the circumstances." 8 C.F.R. §1208.4(a)(5). Thus, the fact that Kuzma filed only seven days after the expiration would not affect the conclusion that lack of English language skills and stress from fleeing her home country do not rise to the level of "extraordinary circumstances." J.A. at 9.

This determination leaves the Petitioner with only her interaction with NOIM, and, unfortunately, these circumstances also fail to constitute a "similar nature or seriousness" as the other "extraordinary circumstances." *Gasparyan*, 707 F.3d at 1135. Again, the enumerated circumstances that the D.H.S. recognized in the regulation include (i) serious illness or mental or physical disability, (ii) legal disability, (iii) ineffective assistance of counsel, (iv) applicant maintained lawful immigrant status until a reasonable period before filing, (v) improperly filed application prior to the 1-year deadline, and (vi) death or serious illness of applicant's legal representative or immediate family member. 8 C.F.R. §1208.4(a)(5). Each of these instances

would more or less leave the applicant "paralyzed" with respect to filing the asylum application for some time because of the severity of or disruption that comes along with the unfortunate situation, which is why D.H.S. allows for reasonable delay. Thus, the Petitioner's experience and interaction with NOIM would need to have a similar detrimental effect that would leave Kuzma unavoidably "paralyzed" regarding her filing of the asylum application to be "of a similar nature or seriousness" as the enumerated circumstances. *Gasparyan*, 707 F.3d at 1135.

The Petitioner claims that her interaction with the non-governmental organization, NOIM, is equivalent to the *Viridiana* case. However, many distinguishable features make Kuzma's claim considerably less compelling. J.A. at 9. The Ninth Circuit faced a similar question to the one presented here today in *Viridiana*. *Viridiana v. Holder*, 646 F.3d 1230 (9th Cir. 2011). In that case, the petitioner-alien applying for asylum consulted with an immigration advisor and court-certified Indonesian interpreter who offered help with extending the alien's legal status in exchange for $1,300. *Id.* at 1232. The applicant understood that this immigration expert was not a lawyer and his company was not a law firm. *Id.* A month after arriving, the consultant "submitted an application to extend" the alien's visa but was ultimately denied. *Id.* Following this denial, the relationship took a turn.

The immigration advisor stopped returning calls, declined to answer questions about applications, and scheduled appointments, but refused to see the alien the day of. *Id.* at 1232-33. This negligence reportedly went on for over eight months. *Id.* at 1233. Although the lower court seemingly interpreted this as an attempt at satisfying the ineffective assistance of counsel circumstance and therefore denied the application, the Court of Appeals held that "§[1]208.4(a)(5)(iii) [did] not strictly encompass [this] claim," but found another avenue. *Id.* at 1234, 1238. The Fourteenth Circuit mistakenly stated that "the [*Viridiana*] court established that

immigration consultant fraud is an *enumerated* circumstance that can excuse an untimely asylum application." J.A. 9. (emphasis added). The *Viridiana* court held "that immigration consultant fraud is an *unenumerated* circumstance" that could potentially excuse an untimely application. *Viridiana*, 646 F.3d at 1238 (emphasis added. Although the court noted that the applicant had a compelling case, it simply remanded back to the B.I.A. to "consider whether the ordeal experienced by the alien constituted immigration consultant fraud." *Id.*

Petitioner Kuzma's case with NOIM was much less disabling than *Viridiana's* interaction with the immigration consultant in multiple significant ways. First, NOIM never represented that it could file the required paperwork; it merely offered to pass along the Petitioner's name to a nonprofit that would help her attain lawful immigration. J.A. at 6. Kuzma reasonably should have had much lower expectations in NOIM concerning the formal immigration process than the applicant in *Viridiana* after these initial interactions. Furthermore, the consultant in *Viridiana* entered into an agreement with, received money from, and contractually owed services to the asylum seeker. *Viridiana*, 646 F.3d at 1232. NOIM, on the other hand, was not obligated to provide anything to the Petitioner but delivered the "transportation…, a place to stay, and a job." J.A. at 6. It is entirely reasonable for an individual who paid $1,300 to rely on and expect the recipient of that money to furnish the services they presented; however, complete dependence on an organization that only suggested it would send a name to another party is reckless behavior.

Additionally, *Viridiana's* consultant filed an application at one point, revealing that he had the ability to do what the asylum seeker needed. *Viridiana*, 646 F.3d at 1232. Contrarily, NOIM never successfully provided Kuzma with a point of contact with the other organization that could help with the necessary filings. J.A. at 6-7. NOIM did not give any signs of being able to successfully assist the Petitioner with her immigration status itself, which would alert a reasonable person to

seek help elsewhere. *Id.* Finally, the applicant in *Viridiana* regularly attempted to contact the advisor by various means until she successfully filed her asylum application with the help of an attorney. *Viridiana*, 646 F.3d at 1233. Kuzma, instead, called only three times by telephone during her first three months in the country and then passively allowed the next nine months to go. JA., at 6. Therefore, even if the applicant's circumstances in *Viridiana* did amount to an "extraordinary circumstance," Kuzma's experience with NOIM was much less debilitating than that case.

The Petitioner will likely argue that NOIM acted in bad faith to purposefully place immigrants in a helpless position. However, the evidence in the record cannot uphold such an allegation. The only evidence in the record that points to such a determination comes from an unverified newspaper article. J.A. at 7. Furthermore, the article admits that NOIM assisted people with transportation, immediate housing, and job referrals. J.A. at 7. Finally, the fact that a church organization failed to provide accurate information about the intricate immigration process that many practicing attorneys cannot grasp hardly constitutes immigration consultant fraud. J.A. at 7. To categorize NOIM's actions as intentional immigration consultant fraud would require quite a stretch and severely distort what the court in Viridiana initially sought to counter when it established this unenumerated circumstance.

Because the Petitioner's circumstances neither mirror nor are "of a similar nature or seriousness" as the examples of "extraordinary circumstances" provided by 8 C.F.R. §1208.4, the Petitioner's circumstances do not amount to an "extraordinary circumstance" as described in 8 U.S.C. §1158(a)(2)(D). *Gasparyan*, 707 F.3d at 1135; 8 U.S.C. §1158(a)(2)(D).

B. The Petitioner Also Fails to Satisfy the Three Factors Expressed in 8 C.F.R. §1208.4(a)(5) that are Necessary to Excuse the Lapse of Time Between the Expiration Date and the Date of Filing the Application.

Even if this Court finds that the Petitioner's experience with NOIM constitutes an "extraordinary circumstance," this Court should not rule in favor of Kuzma because she fails to satisfy the three additional factors created in 8 C.F.R. §1208.4(a)(5). The regulation states that an application submitted beyond the one-year deadline cannot be excused by "extraordinary circumstances," unless (1) the circumstances were not intentionally created by the alien through his or her own action or inaction, (2) that those circumstances were directly related to the alien's failure to file the application within the 1-year period, and (3) that the delay was reasonable under the circumstances. 8 C.F.R §1208.4(a)(5).

Although Circuit Courts have seldom analyzed the three factors in §1208.4(a)(5), the Ninth Circuit established a working framework in *Gasparyan*. *Gasparyan*, 707 F.3d at 1135. In the case, a battered wife from Armenia fled to the United States to escape her abusive husband. *Id.* at 1132. She initially lived with a family friend, but ten months after her arrival decided to move into the home of the brother and sister-in-law of her husband. *Id.* The alien alleged that her mental health worsened due to the post-traumatic stress that "resurfaced while living with her husband's family." *Id.* at 1133. The court reasoned that because the applicant intentionally created the circumstances that aggravated her PTSD to the point that she could not file her asylum application timely by moving into her husband's family's home, she failed to establish the first factor. *Id.* at 1135. Secondly, the court referenced a psychologist that reported that the alien stated the primary reason for delaying the filing were monetary and language-related. *Id.* The court concluded that the petitioner's mental health was only indirectly related to the untimely application, and therefore she also failed to satisfy the second factor. *Id.* Because the three factors work in conjunction, failure

of any of the three factors produces an inexcusable delay and the court rejected the applicants petition. *Id.*

In the present case, the Petitioner fails to establish any of the regulation's three factors. Like *Gasparyan*, Kuzma voluntarily accepted the offer NOIM presented when it offered "transportation to Myrtle's Orchard, a place to stay, and a job." J.A. at 6. NOIM did not coerce Kuzma into accepting the offer and provided a large majority of what was discussed. In *Gasparyan*, even though the applicant did not know that moving into her husband's family's home would aggravate her trauma, the court still held that she intentionally created the circumstances by choosing to go live there. *Gasparyan*, 707 F.3d at 1133. Similarly, the fact that Myrtle's Orchard presented heightened difficulties concerning bilingual support does not play a factor because the Petitioner "intentionally created" the circumstance "through… her own action." J.A. at 15; 8 C.F.R. §1208.4(a)(5).

The second factor states "that those circumstances were directly related to the alien's failure to file the application within the 1-year period." 8 C.F.R. §1208.4(a)(5). Regarding this second factor, the court in *Singh* held that "the relevant inquiry is why [the applicant] delayed [their] application." *Singh v. Holder*, 656 F.3d 1047, 1055-56 (9th Cir. 2011). Respondents concede that Kuzma's circumstances may have played a direct role in delaying the filing of the application to some extent, but Kuzma's experience with NOIM was not directly related to her "failure to file within the 1-year period." 8 C.F.R. §1208.4(a)(5). The Petitioner stopped contacting NOIM just three months after entering the United States. J.A. at 6. This left her with at least nine months to contact either of the two immigration attorney offices in town and file the asylum application in a timely manner. J.A. at 7. Instead, Kuzma intentionally chose to wait idly and let the time expire. J.A. at 7. Courts have previously held that "ignorance of the law is no excuse," and the immigration context is no

different. *Alquijay*, 40 F.4th at 1103; *Luna*, 659 F.3d 760 (9th Cir. 2011). Additionally, Kuzma only applied for asylum after immigration authorities detained her and removal proceedings began. J.A. at 7. This fact cuts directly against the third factor requiring that "the delay [be] reasonable under the circumstances." 8 C.F.R. §1208.4(a)(5). Under the present circumstances, neglecting to file over nine months after all contact with the party that allegedly caused the delay ended is unreasonable and inexcusable.

Therefore, even if this Court finds that the Petitioner's experience with NOIM constitutes an "extraordinary circumstance," this Court should not excuse Kuzma's late asylum application because she fails to satisfy the three additional factors created in 8 C.F.R. §1208.4(a)(5).

II. THE COURT SHOULD NOT ACKNOWLEDGE A DURESS EXCEPTION TO THE PERSECUTOR BAR AND, EVEN IF SUCH DURESS EXCEPTION WERE TO EXIST, THE COURT SHOULD NOT APPLY IT TO THE PETITIONER'S CASE.

8 U.S.C. § 1101(a)(42)(B) states that any noncitizen who "ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in particular social group, or political opinion" are not eligible for asylum as refugees. 8 U.S.C. § 1101(a)(42)(B). In the present case, the facts are undisputed. J.A. at 12. The Petitioner provided translation services for Rielan soldiers during three separate interrogations where Petitioner witnessed torture. J.A. at 6. The Petitioner contended that she was under duress and that there is a duress exception for the persecutor bar. J.A. at 11. In examining this issue, this Court has held in *Negusie* that it was ambiguous if the duress exception existed in the persecutor bar statute and remanded it back to the BIA for the Attorney General to weigh. *Negusie v. Holder*, 555 U.S. 511 (2009). In 2018, the BIA and the Attorney General held that there is a limited duress exception with five elements that the applicant must establish by preponderance of the evidence. *Matter of Negusie*, 27 I. & N. Dec. 347, 347 (BIA 2018). However, most recently in 2020, the Attorney

General and the BIA held that there are no such exceptions to the persecutor bar for duress. *Matter of Negusie*, 28 I. & N. Dec. 120, 120 (BIA 2020). Under the principles of *Chevron USA Inc.*, this Court should defer to the administrative ruling, affirm the United States Court of Appeals for the Fourteenth Circuit ruling, and hold that there is no duress exception to the persecutor bar. *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Even if this Court holds that the 2018 narrow exception for duress exists, overruling the recent 2020 administrative holding, the Petitioner is prevented from seeking relief under the exception because the Petitioner has not met the five elements stated in the exception. *See Matter of Negusie*, 27 I. & N. Dec. 347. The five elements are:

> (1) he acted under an imminent threat of death or serious bodily injury to himself or others; (2) he reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting; (3) he had no reasonable opportunity to escape or otherwise frustrate the threat; (4) he did not place himself in a situation in which he knew or reasonably should have known that he would likely be forced to act or refrain from acting; and (5) he knew or reasonably should have known that the harm he inflicted was not greater than the threatened harm to himself or others.

Id.

Failure to satisfy any of the elements is dispositive of the issue. *Id.* Petitioner clearly fails to satisfy elements (3) and (5) by a preponderance of the evidence. J.A. at 5-6. As the applicant is required to satisfy all five elements, it is unnecessary to pontificate about elements (1), (2), and (4). *See Matter of Negusie*, 27 I. & N. Dec. 347. In the present circumstance, Petitioner was translated in Matavan for Rielan soldiers who did not know the language. J.A. at 5. Petitioner had repeated chances to frustrate the Rielan interrogators by passing messages in her native tongue, mistranslating in favor of the tortured prisoners, or organizing resistance against the oppressors whenever she had a chance to translate. *See* J.A. at 5-6. Furthermore, Petitioner knew, or reasonably should have known, that the harm she was inflicting was greater than the harm

threatened to herself. *See* J.A. at 5-6. While Petitioner was threatened with imprisonment and torture, the harm she caused on three separate interrogations exceeds the harm that would have been inflicted on her as she was the direct cause of the torture and imprisonment of at least three subjects of interrogation. *See* J.A. at 5-6. Unfortunately for the Petitioner, a potential duress exception is narrowly construed and requires the satisfaction of all five elements. *See Matter of Negusie*, 27 I. & N. Dec. 347. Lack of bravery should not excuse assisting of torture and political persecution; therefore, as Petitioner failed to meet the elements of the duress exception, Petitioner should not be allowed relief.

A. Adhering to Canons of Statutory Construction and Following the Precedents Shows There is No Duress Exception to the Persecutor Bar.

This Court has examined surrounding issues that support Respondent's position that, under the canons of statutory construction, this Court has found there is no implied duress exception for the persecutor bar in 8 U.S.C. § 1101(a)(42)(B). *See Fedorenko v. United States*, 449 U.S. 490, 512 (1981); *Negusie*, 555 U.S. 511; *see also Sesay v. Att'y Gen. of U.S.*, 787 F.3d 215 (3d Cir. 2015); *Singh v. Gonzalez*, 417 F.3d 736 (7th Cir. 2005). Furthermore, following the precedents of *Negusie* and *Chevron USA Inc.*, along with the current judgment and reasoning from the United States Court of Appeals for the Fourteenth Circuit, would urge this Court to rule in favor of Respondent and affirm the lower appellate court ruling. *Negusie*, 555 U.S. at 517, 525; *Chevron USA Inc.*, 467 U.S. 837.

1. Statutory construction of 8 U.S.C. § 1101(a)(42)(B) does not yield an implied duress exception to the persecutor bar.

Statutory construction of enacted laws requires the Court to interpret Congressional intent when enacting the specific law. *Matter of M-H-Z-,* 16 I. & N Dec. 759, 764 (BIA 2016). In an

adjacent matter, courts have repeatedly held they will not imply an exception for duress when interpreting statutes that Congress had shown no intent to provide duress exceptions for. *See Hincapie-Zapata v. Att'y Gen. of U.S.*, 977 F.3d 1197, 1202 (11th Cir. 2020); *see also Hernandez v. Sessions*, 884 F.3d 107, 110-12 (2d Cir. 2018); *Sesay*, 787 F.3d at 222-24; *Barahona v. Holder*, 691 F.3d 349, 353-356 (4th Cir. 2012); *Rayamajhi v. Whitaker*, 912 F.3d 1241, 1244 (9th Cir. 2019). By looking at the legislative history of 8 U.S.C. § 1102(42)(B) and past federal court rulings about statutory constructions regarding those legislations, it is clear that there is no room for an implied duress exception in the case at hand. *See Fedorenko*, 449 U.S. at 512; *Negusie*, 555 U.S. 511; *see also Sesay*, 787 F.3d at 217 ("[L]ong standing canons of statutory construction…convince us that there is no such [duress] exception."); *Singh*, 417 F.3d at 741 (stating that Congressional intent was important when analyzing the meaning of "assisted"); *cf. Annachamy v. Holder*, 733 F.3d 254, 262 (9th Cir. 2014) (stating that Congress clearly intended to address duress when drafting the Immigration and Nationality Act but chose to apply it only to a totalitarian party).

While *Fedorenko* is not binding law for the purposes of analyzing whether duress exception exists in relation to the persecutor bar, this Court demonstrated how it chose to constructively interpret statutes. *See Fedorenko*, 449 U.S. at 512, 519 (holding that a concentration camp survivor who was forced to work as a Nazi guard should have his U.S. citizenship revoked). In *Fedorenko*, this Court stated that because Congress had included the word "voluntarily" in other surrounding statutes, Congress clearly intended to exclude a voluntariness limit to "assisted the enemy in persecuting civil[ians]." *See id.* at 512 (demonstrating that Congress did not hesitate to add a voluntariness limitation when drafting "voluntarily assisted the enemy forces" in the same Act).

In the present case, 8 U.S.C. § 1101(a)(42)(B) excludes any duress limitation. Although Congress has amended the statute in question as recently as July of 2021, Congress refused to add any duress limitation to 1101(a)(42)(B). *See* H.R. 3237, 117th Cong. 310 (2021). Furthermore, 8 U.S.C. § 1182(a)(3)(D)(ii) provides for an exception to (i) for involuntary actions. *See* 8. U.S.C. § 1182(a)(3)(D)(i), (ii). This demonstrates that Congress clearly considered the issue of duress when drafting surrounding statutes. Similarly with *Fedorenko*, this evidences Congress's intent to exclude a duress limitation in the statute. *See Fedorenko*, 449 U.S. at 512. The Court has also weighed whether refusal to assist terrorist organizations while facing brutal torture was enough to construe a similar statute with an incredibly narrow duress exception. *See generally Sesay*, 787 F.3d 215 (ruling that the material support bar for terrorism does not include a duress exception). The Court held that, even in the direst of circumstances, they would be forced to apply the canons of statutory construction and held that there was no duress exception in the statute. *Id.* at 217. Therefore, Respondent believes it is more reasonable to provide for statutory construction consistent with this Court's opinion in *Fedorenko*. *See generally Fedorenko*, 449 U.S. 512.

2. Even if this Court believes that the statute is ambiguous despite the canons of statutory construction, precedents in *Negusie* and *Chevron* encourage the Court to uphold the most recent BIA holding in 2020.

In *Negusie*, this Court held that 8 U.S.C. 1101(a)(42)(B), the statute in question, was too ambiguous to include or exclude a duress exception for the persecutor bar. *Negusie*, 555 U.S. at 525. Deferring to the administrative agency, Justice Kennedy wrote that if the "BIA decides to adopt a standard that considers voluntariness to some degree, it may be prudent and necessary" for the immigration judge to conduct fact-finding based on the new standards. *Id.* at 524-25. The *Negusie* Court also stated that if the BIA does hold a position for ambiguous statutes, *Chevron* deference would apply. *See Negusie*, 555 U.S. at 516-17 (citing to *INS v. Aguirre-Aguirre*, 526

U.S. 415 and restating that the Court should apply *Chevron* deference towards BIA interpretations).

Presently, and unlike *Negusie*, there *is* a BIA ruling from the Attorney General in 2020. *Matter of Negusie*, 28 I. & N. Dec. at 120. The Attorney General stated that the persecutor bar does not have a duress exception, and that no such duress exception exists in the statute. *Id.* Following the holding in *Negusie* would result in this Court granting *Chevron* deference to the BIA ruling and holding that there is no duress exception to 8 U.S.C. 1101(a)(42)(B). *See id.*; *see also Negusie*, 555 U.S. at 516-17. Therefore, applying the precedents to the case at hand, there is no duress exception to the persecutor bar as of 2020.

In addition, the United States Court of Appeals for the Fourteenth Circuit ruled in favor of the Respondent; however, the court claimed that they would be "superseding" the administrative courts in reaching their conclusion. J.A. 12-13. Respondent respectfully disagrees on the basis of semantics, albeit important semantics. Respondent believes the Fourteenth Circuit was not "superseding" in its judgment. Presently, the only BIA ruling in effect is that of 2020, and the Fourteenth Circuit ruling is consistent with all applicable administrative and judicial holdings. The Fourteenth Circuit has properly applied the binding decision in *Negusie* and deferred to the administrative ruling that the duress exception does not exist in relation to the persecutor bar. This Court for the case presently in front of the Honorable Justices, should rule consistently with all binding precedents, including the Fourteenth Circuit judgment, and administrative holdings in which it has granted the *Chevron* deference. In totality, these precedents can only be consistent with a ruling from this Court that states there is no duress exception in the persecutor bar. Therefore, Respondent respectfully requests this Court affirm the ruling of the United States Court of Appeals for the Fourteenth Circuit.

B. Even if the Court Finds That a Duress Exception Exists in Relation to the Persecutor Bar, the Petitioner is Prevented from Seeking Relief Because Petitioner Fails to Meet All the Elements of the Duress Exception.

Even if a duress exception exists, the BIA only allowed a narrow interpretation of the exception. *Matter of Negusie*, 27 I. & N. Dec. at 347. The BIA listed five elements that must be satisfied for an applicant to use the duress exception. *Id.* The elements are:

> (1) he acted under an imminent threat of death or serious bodily injury to himself or others; (2) he reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting; (3) he had no reasonable opportunity to escape or otherwise frustrate the threat; (4) he did not place himself in a situation in which he knew or reasonably should have known that he would likely be forced to act or refrain from acting; and (5) he knew or reasonably should have known that the harm he inflicted was not greater than the threatened harm to himself or others.

Id.

In the present case, Petitioner was held captive and threatened with imprisonment and torture if she did not provide translation services to Rielan soldiers. Rielan soldiers were imprisoning and torturing suspected members of the Matavan resistance, which Petitioner testified to seeing. J.A. at 6. Petitioner did not raise any factual claims that she purposefully mistranslated or frustrated any goals of the Rielan soldiers. Furthermore, Petitioner failed to raise any factual claims that she attempted to rebuff the Rielan soldiers or organize any resistance against their oppression. In fact, Petitioner admitted to assisting, through translation, in the Rielan persecution and torture of Matavan prisoners in three separate interrogations. J.A. 5-6.

Respondent does not concede that Petitioner has satisfied any one of these elements and acknowledges that the burden of proof was on the Petitioner to establish beyond a preponderance of evidence that she had satisfied all five elements. Respondent respectfully guides the attention of the Court to elements three and five.

Regarding element three, Petitioner had many attempts to frustrate the threats of the Rielan interrogators who did not speak her language. J.A. at 5-6 In fact, the sole reason she was translating for the Rielan soldiers was because they could not speak her language. J.A. at 4. Despite this knowledge, she made no attempts to frustrate the threat of Rielan soldiers. J.A. at 4 Petitioner could have attempted to organize a resistance, purposefully mistranslate to avoid causing the torture of Matavans, or pass messages to prisoners to attempt to escape. Petitioner attempted nothing, and willfully translated for Rielan soldier that culminated in the torture of three Matavans. By Petitioner's own admissions, she rebuffed every reasonable attempt to escape or frustrate the threat and her actions were material to the persecution of three Matavans. Furthermore, compared to the prisoner in *Sesay* who was actively being tortured, Petitioner's lack of refusal or attempts to escape during the interrogations show that she did not use all reasonable means available to her; it is important to note that even in *Sesay*, the Third Circuit nonetheless refused to allow for a duress exception to the material support bar. *See generally Sesay*, 787 F.3d 215. Therefore, Petitioner cannot be allowed to qualify for a possible duress exception for the persecutor bar.

The Petitioner also fails to meet element five. Petitioner's translation for Rielan soldiers culminated in the imprisonment and torture of three Matavans. The threat that Petitioner received was of imprisonment and torture. J.A. at 5-6. Because it is reasonable to assume that substantively the torture that one prisoner receives is relatively equal to the torture that another prisoner receives, it is reasonable to believe that Petitioner caused a harm three times greater than the threat of harm placed upon her. Furthermore, there is no doubt that the Petitioner knew, or should have known, that the harm she was inflicting outweighed the harm that was threatened upon her. By the end of her first interrogation, she knew her actions resulted in the same imprisonment and torture that was threatened upon her; yet she translated two additional times. Therefore, because Petitioner knew

the harm inflicted on others were greater than the harm threatened up on her, she fails element five.

As the Petitioner fails to meet each of the five elements for a potential duress exception for the persecutory bar, Respondent respectfully requests this Court, in the event the Court finds the duress exception exists in relation to the persecutory bar, rule that Petitioner does not qualify.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court decline to excuse Petitioner Kuzma's asylum application because no "extraordinary circumstance" was suffered, decline to acknowledge a duress exception to the persecution bar, and affirm the decision of the United States Court of Appeals for the Fourteenth Circuit.