

1 UNITED STATES COURT OF APPEALS  
2 FOR THE FIFTH CIRCUIT

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3 No. 91-4975 and 92-4383  
4 Summary Calendar

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5 JOSE CASTILLO-HERNANDEZ,

6 Petitioner,

7 VERSUS

8 UNITED STATES IMMIGRATION  
9 AND NATURALIZATION SERVICE,

10 Respondent.

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11 Petition for Review of an Order of the  
12 Board of Immigration Appeals  
13 (A70 000 807)

14 (November 25, 1992)

15 Before KING, DAVIS, and WIENER, Circuit Judges.

16 PER CURIAM:\*

17 Petitioner Jose Castillo-Hernandez challenges the Board of  
18 Immigration Appeals' (BIA's) denial of his application for asylum  
19 and his subsequent motion to reopen his case. Castillo claims  
20 that the BIA erred by determining, in accordance with the

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

21 Immigration Judge's (IJ's) findings, that Castillo was not a  
22 credible witness and that he failed to demonstrate that he had a  
23 well-founded fear based on race, religion, nationality,  
24 membership in a particular social group, or political opinion.  
25 He also attacks the BIA's denial of his motion to reopen as an  
26 abuse of discretion. As we find no reversible error, we affirm.

27 **I.**

28 **FACTS AND PROCEEDINGS**

29 Castillo, a native of El Salvador, illegally entered the  
30 United States on about April 2, 1992. Shortly thereafter, the  
31 Immigration and Naturalization Service (INS) issued an order to  
32 show cause seeking his deportation. Admitting his illegal  
33 status, Castillo appeared before an IJ and expressed his intent  
34 to file for asylum. The IJ continued the proceedings, during  
35 which time Castillo obtained counsel and filed, with the  
36 assistance of another alien, a Form I-589 application for asylum.

37 At the continued hearing, Castillo testified in support of  
38 his application for asylum. He testified that he was a farmer  
39 who had a history of aiding the guerrillas in order to preserve  
40 his well-being. For example, he provided free food to the  
41 guerrillas despite their willingness to pay for it. In addition,  
42 he admitted to having helped the guerrillas by carrying parcels  
43 for them and, at least on one occasion, by burying guns. His  
44 assistance in this last matter was allegedly reported to the

45 authorities by a local informant,<sup>1</sup> and the government issued a  
46 warrant for his arrest. Castillo fled his village, eventually  
47 arriving in the United States.

48 Elements of Castillo's testimony, however, conflicted with  
49 the answers given on his Form I-589. Specifically, conflicts  
50 existed regarding his age, his marital status, and his treatment  
51 by the government and the guerrilla forces. The IJ characterized  
52 the age and marital status discrepancies as minor, but  
53 nonetheless discussed at length the significance of the  
54 inconsistencies. Specifically, that most of the information was  
55 correct, and only a few items were incorrect. The IJ concluded  
56 that there was no explanation for the discrepancies given the  
57 overall accuracy of the form except that Castillo must have  
58 intended to give incorrect answers regarding his birth date and  
59 marital status.

60 Regarding his treatment by the government, Castillo answered  
61 in his Form I-589 that he had not been mistreated by the  
62 authorities. At the hearing, however, he testified that this was  
63 incorrect, and that the soldiers had arrested him and detained  
64 him for three days, during which time he was forced to stand neck  
65 deep in a cesspool, with his hands tied. His testimony also  
66 created an apparent conflict when he stated that the guerrillas  
67 tortured him after his release by the government. When asked how  
68 the guerrillas had tortured him, Castillo responded that "[t]hey

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<sup>1</sup> This same informant allegedly exposed Castillo's uncle who had collaborated with the guerrillas.

69 just kept asking me if I had turned over their weapons." The IJ  
70 termed Castillo's selection of the word "torture" as  
71 "interesting" given the fact that Castillo was seeking relief not  
72 from persecution by the guerrillas, but by the government.

73 At the conclusion of the hearing, the IJ denied Castillo's  
74 application for asylum, noting the inconsistencies between his  
75 answers on the Form I-589 and his testimony at the hearing. In  
76 his Oral Opinion, the IJ focused primarily on the statement in  
77 Castillo's Form I-589 that the government had not mistreated him,  
78 and contrasting this with Castillo's testimony that the  
79 government had arrested him and detained him under oppressive  
80 conditions. The IJ observed that it was noteworthy that the  
81 military released Castillo without pressing charges. The IJ also  
82 looked askance at Castillo's use of the word "torture" to  
83 describe his treatment by the guerrillas. The IJ concluded that  
84 under the circumstances he could not rely on Castillo's oral  
85 testimony.

86 The IJ also concluded that Castillo had not met his burden  
87 of proving a well-founded fear of persecution on the basis of  
88 race, religion, nationality, membership in a particular social  
89 group, or political opinion if he were returned to El Salvador.  
90 Castillo, he noted, had fled the country on notice that the  
91 government had issued an arrest warrant for collaborating with  
92 the guerrillas, a charge to which Castillo freely admitted.  
93 Castillo also admitted that collaboration was a punishable  
94 offense under Salvadoran law. The IJ deduced that Castillo's

95 departure was motivated by the general conditions of anarchy in  
96 El Salvador and by the arrest warrant for his illegal  
97 collaboration with the guerrillas; thus Castillo was not entitled  
98 to asylum.

99 Castillo timely filed an appeal to the BIA, which affirmed  
100 the IJ's decision, holding that Castillo had failed to meet the  
101 burdens of proof either for granting asylum or withholding  
102 deportation. The BIA accepted the IJ's findings regarding  
103 Castillo's credibility, noting that the IJ had sufficient grounds  
104 for his conclusion given the unexplained inconsistencies.  
105 Moreover, the BIA found that the IJ's credibility findings were  
106 supported by the military's release of Castillo with no charges  
107 being filed.

108 The BIA further held that, even if credible evidence had  
109 been submitted, Castillo would not have been entitled to asylum  
110 as he had failed to establish that the actions of the Salvadoran  
111 government were motivated by Castillo's race, religion,  
112 nationality, membership in a particular social group, or  
113 political opinion. Rather, the BIA found, Castillo's claim arose  
114 from the general conditions of anarchy in El Salvador and from  
115 the government's lawful investigation and imprisonment of  
116 Castillo for his collaboration with the guerrillas. Castillo  
117 filed a timely appeal of the BIA's denial of his application for  
118 asylum and withholding of deportation.

119 Subsequently, Castillo moved the BIA to reopen his case,  
120 submitting two letters from family members and his own unsworn

121 declaration. The two letters, one from his wife, the other from  
122 his step-mother, indicated that Castillo's house had been burned  
123 and a portion of his livestock killed by the military when they  
124 discovered weapons stored there. The letters also claimed that  
125 the military was showing a photograph of Castillo to his  
126 neighbors and inquiring as to his whereabouts. In his  
127 declaration, Castillo stated that his sister had phoned him,  
128 warning that his life was in danger.

129 The BIA denied Castillo's motion to reopen, finding that he  
130 had failed to meet the standards for reopening of a case. The  
131 BIA held that the letters and declaration were insufficient in  
132 that they (1) failed to address the credibility issue and (2)  
133 failed to establish a prima facie case. Castillo timely appealed  
134 the BIA's denial of his motion to reopen. We consider the two  
135 appeals together pursuant to 8 U.S.C. § 1105(a).

## 136 **II. APPLICATION FOR ASYLUM**

137 An alien may obtain asylum under the Immigration and  
138 Nationality Act (INA)<sup>2</sup> if he or she qualifies as a refugee.  
139 "Refugee" is defined as "any person who is outside any country of  
140 such person's nationality . . . who is unable or unwilling to  
141 return to . . . that country because of persecution or a well-  
142 founded fear of persecution on account of race, religion,  
143 nationality, membership in a particular social group, or  
144 political opinion."<sup>3</sup> A request for asylum is deemed to include a

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<sup>2</sup> 8 U.S.C. §§ 1-1557 (1988).

<sup>3</sup> Id. § 1101(a)(42)(A).

145 request for withholding of deportation.<sup>4</sup>

146 A. STANDARD OF REVIEW

147 In immigration cases, we are authorized to review only the  
148 decision of the BIA, not that of the IJ.<sup>5</sup> Moreover, we do not  
149 review the IJ's decision when it "turn[s] purely on the  
150 immigration judge's assessment of the alien petitioner's  
151 credibility."<sup>6</sup> We consider the errors of the IJ only to the  
152 extent they effect the decision of the BIA,<sup>7</sup> which conducts a de  
153 novo review of the administrative record.<sup>8</sup>

154 We grant the BIA broad discretion in its interpretation of  
155 the administrative record "unless there are compelling  
156 indications that it is wrong."<sup>9</sup> "We review the BIA's factual  
157 conclusions that an alien is not eligible for withholding of  
158 deportation only to determine whether it is supported by  
159 substantial evidence."<sup>10</sup> We apply the same substantial evidence  
160 standard to the BIA's finding that an alien is not entitled to

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<sup>4</sup> 8 C.F.R. § 208.3(b).

<sup>5</sup> Castillo-Rodriguez v. INS, 929 F.2d 181, 183 (5th Cir. 1991) (citations omitted).

<sup>6</sup> Mantell v. United States Dep't of Justice, INS, 798 F.2d 124, 127 (5th Cir. 1986) (citing Vasquez-Mondragon v. INS, 560 F.2d 1225, 1226 (5th Cir. 1977)).

<sup>7</sup> Adebisi v. INS, 952 F.2d 910, 912 (5th Cir. 1992).

<sup>8</sup> Castillo-Rodriguez, 929 F.2d at 183.

<sup>9</sup> Id. at 184 (citations omitted).

<sup>10</sup> Zamora-Morel v. INS, 905 F.2d 833, 838 (5th Cir. 1990) (citing Young v. INS, 759 F.2d 450, 455-56 n.6 (5th Cir) cert. denied, 474 U.S. 996 (1985)).

161 asylum.<sup>11</sup> "The substantial evidence standard requires only that  
162 the [BIA's] conclusion be based upon the evidence presented and  
163 be substantially reasonable."<sup>12</sup>

#### 164 B. CASTILLO'S ASYLUM APPLICATION

165 The substantial evidence standard erects a daunting barrier  
166 to Castillo on appeal, a barrier which he fails to scale. Given  
167 the deferential standard of review, Castillo can succeed only by  
168 demonstrating that his evidence of a well-founded fear of  
169 persecution is so compelling "that a reasonable factfinder would  
170 have to conclude that the requisite fear of persecution  
171 existed."<sup>13</sup> Castillo's evidence fails to meet this test.

172 Castillo first attacks the IJ's negative credibility  
173 finding, asserting that controlling law does not allow an IJ to  
174 base such a finding on minor discrepancies such as dates and  
175 marital status. Moreover, Castillo argues that applicable law  
176 requires that we reverse the BIA for failing to make independent  
177 credibility findings. Castillo errs not only in his  
178 characterization of the record, but also in his statement of the  
179 law.

180 We disagree first with Castillo's insistence that the IJ  
181 premised his credibility findings on minor discrepancies. To the  
182 contrary, the IJ relied on a number of discrepancies and

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<sup>11</sup> Id; Castillo-Rodriguez, 929 F.2d at 184.

<sup>12</sup> Rojas v. INS, 937 F.2d 186, 189 (5th Cir. 1991).

<sup>13</sup> INS v. Elias-Zacarias, 502 U.S. \_\_\_, 112 S.Ct. 812, 817 (1992).



183 suspicious details in addition to birth date and marital status.  
184 Moreover, Castillo is incorrect in stating that the BIA made no  
185 credibility findings. The BIA specifically addressed the IJ's  
186 credibility findings and adopted them as reasonable on the basis  
187 of the evidence. We find that the BIA was substantially  
188 reasonable in reaching this determination.

189 Castillo's counsel also commits a serious error in his  
190 statement of the law, which he characterizes as "controlling."  
191 To the contrary, the cases cited for his proposition, uniformly  
192 from the Ninth Circuit, do not control the disposition of this  
193 case. We note that counsel does not urge that we adopt the Ninth  
194 Circuit's cases, but boldly asserts that we are required to  
195 follow them. We are not. Moreover, counsel fails to cite two  
196 Fifth Circuit cases that are in fact controlling here: Mantell v.  
197 United States Department of Justice, INS<sup>14</sup> and Vasquez-Mondragon  
198 v. INS.<sup>15</sup>

199 Next, Castillo claims that the BIA erred in concluding that  
200 the military would not persecute him on the basis of a political  
201 opinion imputed to him by the military. The INS objects that we  
202 may not consider this argument because Castillo did not raise it  
203 before the BIA. We consider it nonetheless, as, in our opinion,  
204 it was implicit in his claim and therefore implicitly rejected by  
205 the BIA in its decision.

206 The BIA determined in its decision that Castillo did not

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<sup>14</sup> 798 F.2d 124 (5th Cir. 1986).

<sup>15</sup> 560 F.2d 1225 (5th Cir. 1977).

207 have a well-founded fear of persecution on account of a political  
208 opinion that he held. Instead, his fear was attributed to the  
209 chaotic conditions in El Salvador and his illegal collaboration  
210 with the guerrillas. Castillo maintains that the BIA erred in  
211 its decision because his fear that the military would torture and  
212 execute him for assisting the guerrillas stated a well-founded  
213 fear that the government would persecute him by imputing the  
214 guerrilla's political beliefs to him. We disagree.

215 Castillo states in his brief that "the Board failed to view  
216 the facts of Mr. Castillo's case from the perspective of the  
217 Salvadoran military and ignored controlling law.<sup>16</sup> In the  
218 instant case, the question is whether, from the perspective of  
219 the Salvadoran military, Mr. Castillo's cooperation with the  
220 guerrillas manifested a political opinion that the Salvadoran  
221 military would seek to overcome." If this is the question, then  
222 Castillo's prospects for success are bleak indeed given the  
223 Supreme Court's pronouncement in INS v. Elias-Zacarias<sup>17</sup> that  
224 "`persecution on account of . . . political opinion' in §  
225 101(a)(42) is persecution on account of the victim's political  
226 opinion, not the persecutor's."<sup>18</sup>

227 Even if we here misapprehend the meaning of Elias-Zacarias,

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<sup>16</sup> We note that, in connection with this claim, Castillo's view of "controlling law" contained predominately Ninth Circuit cases, with only one Fifth Circuit case mentioned in support of a general statement of law.

<sup>17</sup> 112 S.Ct at 812.

<sup>18</sup> Id. at 816.

228 and Castillo has stated the question properly, he nonetheless  
229 fails to present evidence sufficient to meet the stringent  
230 standard of review. The BIA found unconvincing Castillo's claims  
231 that he would be subject to torture and execution by the  
232 military, noting that he would be subject to prosecution for his  
233 crimes, not persecution. Based on a review of the record, we  
234 cannot say that this is substantially unreasonable.

235 Castillo also argues that the BIA erred in not considering  
236 his claim that he would be persecuted for his membership in a  
237 particular social group*S*i.e., peasants who aid the guerrillas.  
238 Again, we find that Castillo has mischaracterized the BIA's  
239 opinion. The BIA specifically stated that Castillo's claim did  
240 not fall within one of the five enumerated grounds required for  
241 relief. Moreover, the BIA held that Castillo's unwillingness to  
242 return to El Salvador resulted from conditions of anarchy in that  
243 nation. The brevity of the BIA's discussion was no doubt  
244 attributable to the vagueness of Castillo's claim. As Castillo  
245 did not even attempt to prove that the social group in question  
246 was the target of persecution, and presented no arguments why the  
247 group qualified under § 101(a)(42)(A), we conclude that the BIA's  
248 decision was supported by substantial evidence.

249 In addition to facing a deferential standard of review,  
250 Castillo's efforts to obtain a reversal of the BIA's decision are  
251 hampered, in part, by his counsel's misplaced reliance on Ninth  
252 Circuit cases, which as noted he mischaracterizes as controlling  
253 law. Although the case law of other Circuits may provide

254 guidance to us in reaching our decisions, they are not binding  
255 precedent. Moreover, the advisory value of other circuits  
256 opinions vanishes when we have already spoken to the issue in  
257 question.

258 In addition, counsel diminishes his own credibility when, as  
259 here, he fails to cite pertinent Fifth Circuit and Supreme Court  
260 decisions that undeniably weaken his position. We remind counsel  
261 that, in addition to his role as advocate, he is also an officer  
262 of the court. As such, his duty is to disclose and then attempt  
263 to distinguish those cases that contradict his arguments.  
264 Anything less is a breach of his professional obligation to this  
265 court.

### 266 **III. MOTION TO REOPEN**

267 The BIA has authority to reopen a deportation pursuant to  
268 regulations promulgated by the Attorney-General.<sup>19</sup> This  
269 regulation prohibits the BIA from granting motions to reopen,  
270 however, "unless it appears to the [BIA] that evidence sought to  
271 be offered is material and was not available and could not have  
272 been discovered or presented at the former hearing."<sup>20</sup> In  
273 reliance on this language, the Supreme Court has held that the  
274 grant of a motion to reopen is discretionary.<sup>21</sup> Moreover, the  
275 Court has held that there are at least three grounds on which the

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<sup>19</sup> INS v. Doherty, 502 U.S. \_\_\_\_, 112 S.Ct. at 719, 724 (1992).

<sup>20</sup> 8 C.F.R. § 3.2 (1987).

<sup>21</sup> Doherty, 112 S. Ct. at 724 (citing INS v. Phinpathya, 464 U.S. 183, 188 n.6 (1984)).

276 BIA could base a denial of a motion to reopen: "failure to  
277 establish a prima facie case for the relief sought, failure to  
278 introduce previously unavailable material evidence, and a  
279 determination that even if these requirements were satisfied, the  
280 movant would not be entitled to the discretionary grant of relief  
281 which he sought."<sup>22</sup>

282 A. STANDARD OF REVIEW

283 When the BIA bases a denial of a motion to reopen on the  
284 alien's failure to establish a prima facie case, as it did in the  
285 instant case, we review for an abuse of discretion.<sup>23</sup> This  
286 standard applies to motions to reopen "regardless of the  
287 underlying basis of the alien's request [for relief]."<sup>24</sup>

288 B. CASTILLO'S MOTION TO REOPEN

289 In its opinion, the BIA denied Castillo's motion to reopen  
290 on two grounds: (1) the new evidence did not directly address the  
291 basis of the negative credibility finding and (2) the new  
292 evidence did not demonstrate a prima facie eligibility for  
293 relief. The BIA concluded that Castillo failed to establish a  
294 prima facie case because his evidence did not address the BIA's  
295 previous determination that investigation and arrest of a person  
296 suspected of aiding a guerrilla organization was not persecution.

297 Castillo argues that the BIA's denial of his motion to  
298 reopen constitutes a clear abuse of discretion, warranting

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<sup>22</sup> Id. at 725.

<sup>23</sup> Id.

<sup>24</sup> INS v. Abudu, 485 U.S. 94, 99 (1988).

299 reversal. In support of his assertion, Castillo cites Bernal-  
300 Garcia v. INS,<sup>25</sup> in which we remanded for consideration of a  
301 letter indicating that Salvadoran soldiers had included the alien  
302 on a "death list." Although the evidence warranting remand in  
303 Bernal-Garcia is similar to the evidence in the instant case, the  
304 proceedings are markedly different.

305 In Bernal-Garcia, the appeal came to us from the BIA's  
306 denial of asylum. Not the denial of a motion to reopen. This  
307 distinction is important. In Bernal-Garcia, we remanded for  
308 consideration of the evidence because it was material and had not  
309 been considered. In the instant case, however, the evidence has  
310 been considered by the BIA in the motion to reopen and has been  
311 rejected as insufficient to create a prima facie case. Because  
312 the BIA has already considered the letters, we are restricted to  
313 an abuse of discretion review.

314 Castillo argues, nonetheless, that the BIA's decision is an  
315 abuse of discretion because the letters clearly show that  
316 Castillo will be subject to persecution. We cannot agree. The  
317 BIA has set forth its reasons for the denial of the motion to  
318 reopen. It was not convinced that the burning of the house was  
319 related to persecution, but noted that the house could have been  
320 burned as a result of the chaos in El Salvador. Moreover, the  
321 BIA observed that a fact previously known—the presence of  
322 guerrilla guns in the home—had not been disclosed to the IJ.  
323 Finally, the BIA found that Castillo had not addressed the

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<sup>25</sup> 852 F.2d 144 (5th Cir. 1988).

324 negative credibility finding. Based on these reasons, we are  
325 loathe to hold that the BIA abused its discretion in denying  
326 Castillo's motion to reopen.

327 AFFIRMED.

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