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Non-Detained

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

_____	)	
In the Matter of	)	
	)	
Patrick Raimundo Santana	)	File No. A 221-290-316
	)	
In Removal Proceedings	)	
	)	
_____	)	

RESPONDENT'S BRIEF IN SUPPORT OF INTERLOCUTORY APPEAL

Appeal from the July 31, 2026 Order of the Immigration Judge
Seattle Immigration Court

**ORAL ARGUMENT NOT REQUESTED — THREE-MEMBER PANEL REVIEW
REQUESTED**

I. INTRODUCTION

Patrick Raimundo-Santana, born August 28, 2007, is a native and citizen of Brazil. He fears persecution there on account of his membership in the particular social groups “Gay Men in Brazil,” “LGBTI+ Individuals in Brazil,” and “Homosexual Males with Female Traits in Brazil.” He is charged in his own Notice to Appear, bears his own A-number, and appears as a rider Respondent in these proceedings, in which his mother, Mirian Raimundo, is the lead Respondent, and is named as a derivative on her asylum application. Ms. Raimundo’s claim is independent of his.

Respondent has never had his own applications for asylum, withholding of removal, and protection under the Convention Against Torture adjudicated. Under the order on appeal, he never will. Because he was a minor when the Immigration Court set an April 21, 2025 filing deadline, and because no separate application was filed on his behalf before that date, the Immigration Judge deemed his opportunity to apply for relief waived. I.J. abandonment decision at 1 (May 2, 2025). On October 14, 2025 — forty-seven days after turning eighteen — Respondent filed a complete Form I-589, a detailed personal declaration, and a motion to accept the late filing; the accompanying fee was paid two days later. None of it was rejected. For nearly eight months no ruling issued, until the Immigration Judge acknowledged in a written order that the motion had been “invertedly overlooked.” I.J. untimely filing decision at 1 (June 5, 2026). He then denied the motion, *id.* at 2, and later denied reconsideration. I.J. at 3.

What is at stake is not merely the form of Respondent’s participation. Asylum may be conferred derivatively on a child, and Respondent is listed as a derivative on his mother’s application. INA § 208(b)(3)(A). Withholding of removal under INA § 241(b)(3) and protection under the Convention Against Torture cannot be conferred derivatively at all. 8 C.F.R. §§ 1208.16–1208.18. The July 31, 2026 order therefore leaves Respondent with no access whatsoever to two forms of mandatory protection, and with derivative asylum that depends entirely on the outcome of a claim built on different facts and a different protected ground.

Respondent respectfully asks the Board to exercise jurisdiction, vacate the July 31, 2026 order, and remand for reconsideration of the denial of his October 14, 2025 Motion to Accept Untimely Filing.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A.The March 20, 2025 Master Calendar Hearing and the Filing Deadline

Respondent was born on August 28, 2007. Undersigned counsel entered his appearance for lead Respondent Ms. Miriam Raimundo and rider Respondents on March 14, 2025.

On March 20, 2025, Ms. Raimundo and Respondent appeared for a master calendar hearing before Immigration Judge Tisocco. They admitted the factual allegations and conceded removability, and identified the Form I-589 as the relief sought. The Immigration Court set April 21, 2025 as the deadline for the filing of complete applications.

Respondent was seventeen years and approximately six months old on that date. He would remain a minor for another five months.

B.The Family's Filings and the May 2, 2025 Order Deeming Respondent's Application Waived

Ms. Raimundo filed her Form I-589 on March 10, 2025. That filing was rejected for defective proof of service. She re-submitted on April 23, 2025. The Immigration Court found that application incomplete and directed correction by May 8, 2025; she filed a corrected and complete application, with her declaration and supporting evidence, on May 8, 2025.

No separate application was filed on Respondent's behalf by April 21, 2025. By order dated May 2, 2025, the Immigration Judge found that Respondent had waived his opportunity to apply for asylum and related relief and would be considered only as a derivative on his mother's application. I.J. abandonment decision (May 2, 2025) at 1.

C.Respondent Attains Majority and Files Within Forty-Seven Days

Respondent turned eighteen on August 28, 2025.

On September 22, 2025 — twenty-five days later — he executed a personal declaration setting out in detail the persecution he suffered in Brazil on account of his sexual orientation. On

October 14, 2025, forty-seven days after attaining majority, he filed through counsel his own Form I-589, together with a Motion to Accept Untimely Filing. The filing fee was paid on October 16, 2025 (Tracking ID 27SASMJU).

The Immigration Court issued no notice of rejection as to the Form I-589 or the motion. Both entered the record.

D.Nearly Eight Months Pass Without a Ruling

Separately, on September 23, 2025, Respondents had filed a motion to accept untimely supplemental evidence and a pre-hearing brief in advance of an individual hearing then scheduled for October 21, 2025. That motion was filed in both cases. On October 20, 2025, the Immigration Court granted it in both cases. The October 21, 2025 individual hearing was subsequently continued.

No order was issued on Respondent's October 14, 2025 motion. Months passed. On April 22, 2026, the Immigration Court granted the Department's motion to consolidate proceedings under Lead Respondent, Ms. Raimundo, set a consolidated merits hearing for July 16, 2027, and directed each respondent to take specified action within thirty days. As to Respondent, the order stated that "his I-589 was previously deemed abandoned per the Court's 05/02/2025 Order." I.J. consolidation decision (Apr. 22, 2026). It made no reference to the October 14, 2025 filing.

Because the procedural status of the application underlying the sworn statement required of him remained unresolved, counsel filed on Respondent's behalf a Motion to Clarify within the thirty-day window, asking the Immigration Court to rule directly on the October 14, 2025 motion and to confirm whether the Form I-589 remained active in the record.

E.The June 5, 2026 Order

By order dated June 5, 2026, the Immigration Judge stated: "On 14 October 2025, only the co-Respondent filed a motion to accept the untimely filing of his I-589. The Court invertedly overlooked this motion but will address it now."

The order then denied the motion. Its reasoning occupies a single paragraph. It observed that counsel had entered his appearance for both respondents on March 14, 2025 and represented both throughout; that "respondents and counsel were present at the 20 March 2025 hearing" and

“[a]ll were advised of the filing deadline yet failed to comply”; that “it is possible that the decision to not submit an application for the co-Respondent was a strategic or tactical decision by counsel and Respondents”; and that the regulation Respondent had cited, 8 C.F.R. § 1003.31(c), “speaks only to the submission of original documents.” As to Respondent’s minority, the order stated only: “This argument is unavailing.”

F.The July 31, 2026 Order on Appeal

Respondent moved for reconsideration on July 1, 2026. By order dated July 31, 2026, the Immigration Judge denied the motion in four sections. I.J. at 1–3.

On process, the order stated that even if delayed, the Court had considered the motion and explained its decision, and that Respondent “was provided a reasonable opportunity to present his application and he failed to comply. 8 CFR § 1003.31(h). He could have requested an extension of time to file the application at any time, but none was made.” On minority, it stated that 8 C.F.R. § 1208.4(a)(5)(ii) governs the one-year filing issue rather than compliance with deadlines; that *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042 (9th Cir. 2007), addresses the assessment of harm to a minor rather than filing deadlines; that Respondent “is not an unaccompanied alien child or a minor proceeding pro se” and “had the safeguard of counsel”. On the tactical-decision question, the order reasoned that counsel had been retained “to pursue asylum relief on the family’s behalf,” that counsel had spoken in the plural about “applications” at the March 20, 2025 hearing, and concluded that “it is conceivable that the filing of one application and the inclusion of Respondent only as a derivative could have been a tactical decision.” On prejudice, the order stated that Respondent “was provided a reasonable opportunity to present his claim, the Court properly found his application abandoned, and the Court considered his motion to accept untimely filing.”

No final administrative order of removal has been entered. The consolidated merits hearing remains scheduled for July 16, 2027.

III. ISSUES PRESENTED FOR REVIEW

Whether the Board should exercise jurisdiction over this interlocutory appeal, where the question presented recurs across family cases involving a minor rider and where deferral would leave no record for the Board to review.

Whether the Immigration Judge erred in deeming Respondent's application waived where, unlike the respondent in *Matter of R-C-R-*, 28 I&N Dec. 74 (BIA 2020), Respondent filed a motion accompanied by a complete application, offered an explanation for the delay, and alleged facts constituting a prima facie claim.

Whether Respondent's minority during the period in which the filing deadline ran constitutes good cause for his delay in applying for relief, and whether the good cause determination is sustainable where neither order identifies the applicable standard or balances the relevant factors.

Whether the Immigration Judge was required to weigh, as part of the good cause inquiry, that Respondent was a minor throughout the period in which the deadline ran and lacked capacity to file an application independently of his mother.

Whether the rulings below deprived Respondent of the full and fair opportunity to be heard guaranteed by INA § 240(b)(4)(B) and the Due Process Clause of the Fifth Amendment.

Whether the finding that Respondent's failure to file "could have been a tactical decision" is clearly erroneous.

IV. STANDARD OF REVIEW

The Board reviews an Immigration Judge's findings of fact, including credibility determinations, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). Questions of law, discretion, and judgment, and all other issues arising on appeal from decisions of Immigration Judges, are reviewed de novo. *Id.* § 1003.1(d)(3)(ii). Whether the Immigration Judge applied the correct legal standard in deeming an application waived under 8 C.F.R. § 1003.31(h), and whether it conducted the good cause inquiry that provision requires, are questions of law reviewed de novo. Due process claims are likewise reviewed de novo. *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620 (9th Cir. 2006).

A decision to deem an application for relief abandoned is reviewed for abuse of discretion. *Gonzalez-Veliz v. Garland*, 996 F.3d 942, 948 (9th Cir. 2021). That discretion is not

unbounded: a determination is arbitrary where the adjudicator “fails to offer a reasoned explanation for its decision, [or] distorts or disregards important aspects” of the claim. *Alcarez-Rodriguez v. Garland*, 89 F.4th 754, 759 (9th Cir. 2023) (citation omitted).

29. The Board does not engage in factfinding in the course of deciding appeals. 8 C.F.R. § 1003.1(d)(3)(iv). Where resolution of an issue raised on appeal requires findings the Immigration Judge did not make, the proper course is remand to the Immigration Court for further factfinding. *Id.*

V. SUMMARY OF ARGUMENT

Respondent does not ask the Board to disturb settled law. He asks the Board to apply it.

Matter of R-C-R- is the governing precedent, and the Immigration Judge applied half of it. *R-C-R-* holds that an application may be deemed waived when a firm deadline passes “and no good cause for noncompliance has been shown.” 28 I&N Dec. at 83 (emphasis added). The respondent there lost because he did nothing: he never sought an extension, never filed a motion with a completed application, never explained his delay, and never alleged facts supporting a prima facie claim. The Board said so explicitly, and said equally explicitly what would have changed the result — “[h]ad the respondent filed either type of motion and provided good cause for missing the deadline, reconsideration or reopening by the Immigration Judge would likely have been appropriate.” *Id.* at 78–79. Respondent did each of the things the *R-C-R-* respondent failed to do. The July 31, 2026 order faults him for not seeking a pre-deadline extension — the first path *R-C-R-* describes — without addressing that he took the second, which *R-C-R-* endorses.

The Ninth Circuit, whose law governs these proceedings, has read *R-C-R-* the same way. In *Alcarez-Rodriguez v. Garland*, 89 F.4th 754 (9th Cir. 2023), the court held that *R-C-R-*’s good-cause passage is not dictum but a holding entitled to *Skidmore* deference, and described it as “expressly recogniz[ing] that IJs *should accept* late applications” filed by either of two routes — a pre-deadline motion to extend, or a post-deadline motion to reopen or reconsider accompanied by a completed application, an explanation, and good cause. (quoting *Matter of R-C-R-*, 28 I&N Dec. at 78).

Second, good cause requires a reasoned explanation, and none appears. The Ninth Circuit has held that a “one-sentence dismissal” of a respondent’s personal circumstances as not amounting to good cause, “with no further explanation,” is “a textbook example of a conclusory statement” that cannot sustain review. *Alcaarez-Rodriguez*, 89 F.4th at 764. The June 5, 2026 order disposed of Respondent’s minority in five words: “This argument is unavailing.” The July 31, 2026 order adds only that Respondent “had the safeguard of counsel.” The good-cause inquiry “requires consideration and balancing of all relevant factors.” *Matter of L-A-B-R-*, 27 I&N Dec. 405, 413 (A.G. 2018), *cited in Matter of R-C-R-*, 28 I&N Dec. at 78. Neither order identifies a standard or weighs Respondent’s minority, his prompt filing on attaining capacity, or the nearly eight months his motion sat adjudicated.

Third, neither order weighs the fact that Respondent was a minor throughout the period in which the deadline ran and could not file an application independently of his mother — a circumstance the Ninth Circuit has held must be assessed from the perspective of the child, not that of an adult.

Fourth, the tactical-decision finding rests on what the Immigration Judge found “conceivable,” not on evidence.

Fifth, the consequence of these rulings — the permanent loss of non-derivative protection — appears nowhere in the reasoning.

VI. ARGUMENT

A. The Board Should Exercise Jurisdiction Over This Interlocutory Appeal

To avoid piecemeal review, the Board does not ordinarily entertain interlocutory appeals, and generally limits them to matters involving important jurisdictional questions regarding the administration of the immigration laws or recurring problems in the handling of cases by Immigration Judges. *Matter of M-D-*, 24 I&N Dec. 138, 139 (BIA 2007); EOIR Policy Manual, Part III, Ch. 3.14(c).

This appeal presents a recurring problem. The configuration is ordinary: a minor appears as a rider Respondent in proceedings led by a parent and is named only as a derivative on the parent’s asylum application; the Immigration Court sets a filing deadline and announces it to the adults in the room; the minor holds facts supporting an independent claim under a different

protected ground; and no separate application is filed. What follows — the permanent loss of withholding and CAT eligibility for a person who could not have filed on his own behalf — turns on a question the published decisions do not answer: what must a good cause determination show, and what weight must it give to the applicant’s minority, before a court-set filing deadline forecloses non-derivative protection? Counsel is aware of no published decision addressing that question.

The question will also evade review if deferred. The Board has exercised jurisdiction over interlocutory appeals for precisely that reason. *See Matter of J-A-F-S-*, 29 I&N Dec. 195, 195 (BIA 2025) (“Because these issues often become moot prior to a case appeal and therefore evade review, we deem it appropriate to exercise jurisdiction over this interlocutory appeal.”); *Matter of A-C-M-*, 29 I&N Dec. 703 (BIA 2026) (exercising jurisdiction “to correct the recurring misapplication of 8 C.F.R. § 1240.11(h) . . . by Immigration Judges”). Here the concern is more acute than mootness. If Respondent has no application, there will be no claim adjudicated on July 16, 2027, no testimony taken on his behalf, no country conditions evidence directed to his claim, and no factual findings for the Board to review. On a later appeal, the Board would be asked to assess prejudice from a record emptied of the showing that would establish it.

Review now costs nothing. The merits hearing is more than ten months away. No continuance is sought. The Department has never opposed the October 14, 2025 motion, and no prejudice will result from the adjudication of an application that has been in the record since October 2025.

**B.Matter of R-C-R- Describes Two Paths to Relief From a Missed Deadline;
Respondent Took the Second, and the Orders Below Address Only the First**

In *Matter of R-C-R-*, the Board held that “[a]fter an Immigration Judge has set a firm deadline for filing an application for relief, the respondent’s opportunity to file the application may be deemed waived, prior to a scheduled hearing, if the deadline passes without submission of the application *and no good cause for noncompliance has been shown.*” 28 I&N Dec. at 83 (emphasis added). Good cause is not an equitable gloss on the rule. It is a condition of the holding.

The respondent in *R-C-R-* failed that condition comprehensively, and the Board catalogued the failures. He “ha[d] not explained his failure to comply with the Immigration Judge’s application deadline or identified any difficulties he may have encountered that prevented his compliance.” *Id.* at 78. He could have moved to extend the deadline, “[h]owever, the respondent made no such request.” *Id.* He could have moved to reconsider or reopen after the deadline, submitting a completed application with an explanation — and the Board stated that “[h]ad the respondent filed either type of motion and provided good cause for missing the deadline, reconsideration or reopening by the Immigration Judge would likely have been appropriate. However, the respondent made no attempt to file such a motion with a completed application at any time after the deadline had passed.” *Id.* at 78–79. And on appeal he had “not alleged facts . . . that would constitute a prima facie claim for any form of relief,” though “[h]ad the respondent done so and shown good cause for missing the deadline, a remand may have been appropriate.” *Id.* at 79.

Respondent did each of those things.

He filed a motion — a Motion to Accept Untimely Filing — on October 14, 2025. He filed it *with* a completed Form I-589 and paid the fee two days later. He offered an explanation for the delay: he was a minor when the deadline ran and lacked the capacity to retain counsel or file an application independently of his mother, and he acted within forty-seven days of the first date on which that impediment lifted. And he alleged facts constituting a prima facie claim — persecution in Brazil on account of his sexual orientation — set out in a detailed personal declaration that has been in the record since September 2025 and that the Immigration Court has never rejected.

Against this, the July 31, 2026 order states: “He could have requested an extension of time to file the application at any time, but none was made.” I.J. at 1. That sentence tracks the first of the two paths *R-C-R-* describes, at 78. It does not engage the second, described in the very next paragraph of the same decision. Respondent took the second path. Neither the June 5, 2026 order nor the order on appeal says why taking it was insufficient; neither acknowledges that he took it. I.J. untimely filing decision at 2 (June 5, 2026); I.J. at 1–2.

R-C-R- is not authority Respondent brings to the Immigration Judge’s attention for the first time. The May 2, 2025 decision cites it, alongside *Taggar v. Holder*, 736 F.3d 886, 889 (9th

Cir. 2013), and *Matter of Interiano-Rosa*, 25 I&N Dec. 264 (BIA 2010), as the basis for the warning that non-compliance would result in waiver. I.J. abandonment decision at 1 (May 2, 2025). The Immigration Judge thus relied on *R-C-R-* for the proposition that a deadline may be enforced, but did not apply the condition the same decision attaches to that authority, or the second route it describes.

The Ninth Circuit has confirmed this reading. In *Alcarez-Rodriguez v. Garland*, 89 F.4th 754 (9th Cir. 2023), the court addressed whether the Board’s discussion of good cause was binding or merely dictum. The concurrence took the view that it was dictum; the majority disagreed, holding that *R-C-R-*’s discussion of good cause is not dictum. Because the Board “confront[ed] an issue germane to the eventual resolution of the case” and “resolve[d] it after reasoned consideration,” the court held that the good-cause holding is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Alcarez-Rodriguez*, 89 F.4th at 762.

The court then described *R-C-R-* in terms that map directly onto this case: the Board “expressly recognized that IJs *should accept* late applications when the noncitizen files either (1) a motion to extend the application deadline that ‘explained [the petitioner]’s failure to comply with the . . . deadline or identified any difficulties he may have encountered that prevented his compliance’ and ‘established good cause for extending the application deadline,’ or (2) a motion to reopen or to reconsider that ‘[included] a completed application with an explanation for his untimely filing’ and ‘provided good cause for missing the deadline.’” *Id.* (quoting *Matter of R-C-R-*, 28 I&N Dec. at 78). Respondent proceeded under the second route, and satisfied each of its elements.

Judge Forrest, concurring in the judgment, would have held that no good-cause exception applies to a late application for discretionary relief in the reopening context. *Id.* (Forrest, J., concurring). That view did not carry, and in any event Respondent’s claims include withholding of removal and CAT protection, which are not discretionary. The majority opinion states the law of the circuit in which these proceedings arise.

The weight of that inquiry is not uniform across forms of relief. Asylum is discretionary. 8 C.F.R. § 1208.14(a). Withholding of removal and protection under the Convention Against Torture are not; the Ninth Circuit describes them as “nondiscretionary relief.” *Alcarez-Rodriguez*, 89 F.4th at 760. They implement the obligation of non-refoulement — the duty not to return a

person to a country where he faces persecution or torture — and where they are established, they must be granted. A deadline that forecloses discretionary relief withholds an opportunity. A deadline that forecloses withholding and CAT protection extinguishes an entitlement. The good cause inquiry that *R-C-R-* requires, and the prejudice that follows from denying it without explanation, are correspondingly graver here.

The decisions the Department is likely to invoke share a single feature that this case does not. In *R-C-R-*, the respondent “made no attempt to file such a motion with a completed application at any time after the deadline had passed.” 28 I&N Dec. at 79. In *Taggar v. Holder*, 736 F.3d 886, 889 (9th Cir. 2013), the petitioner “did not file her application for relief by . . . the extended due date.” In *Gonzalez-Veliz v. Garland*, 996 F.3d 942, 948–49 (9th Cir. 2021), the abandonment finding was sustained where the petitioner was on notice of that consequence and no application followed. Each of those respondents left the record empty. Respondent did not. His complete Form I-589, his signed declaration, his motion, and his paid fee have been in the record since October 2025, and the Immigration Court has never rejected any of them.

This is not a request that the Board depart from *R-C-R-*. It is a request that the Board apply the portion of *R-C-R-* that the June 5, 2026 and July 31, 2026 orders leave unaddressed.

C.The Good Cause Determination Identifies No Standard and Balances No Factors

Respondent does not dispute the Immigration Judge’s authority under 8 C.F.R. § 1003.31(h) to “set *and extend*” filing deadlines. He disputes how that authority was exercised. The good-cause inquiry “requires consideration and balancing of all relevant factors.” *Matter of L-A-B-R-*, 27 I&N Dec. 405, 413 (A.G. 2018). That is not an importation from an unrelated context: *R-C-R-* itself cites *L-A-B-R-* for that proposition in the course of analyzing a missed application deadline, 28 I&N Dec. at 78, and the Ninth Circuit has relied on the same passage in the context of a minor who was “unaware of his apparent eligibility for relief until so advised, and thereafter diligently pursue[d] relief.” *C.J.L.G. v. Barr*, 923 F.3d 622, 628 n.6 (9th Cir. 2019) (en banc).

The Ninth Circuit has applied that requirement to this precise setting. In *Alcaarez-Rodriguez*, the Board had acknowledged the petitioner’s circumstances and then concluded, in a single sentence, that they “do not amount to good cause.” The court held that this

would not do: “Its one-sentence dismissal of [the petitioner’s] personal circumstances as ‘not amount[ing] to good cause,’ with no further explanation, is a textbook example of a conclusory statement that ‘falls short of setting out terms sufficient to enable us as a reviewing court to see that the Board has heard, considered, and decided’ the issue.” 89 F.4th at 764 (quoting *Kalubi v. Ashcroft*, 364 F.3d 1134, 1141 (9th Cir. 2004)). “Absent an explanation . . . we have no choice but to conclude that the denial of the [motion] was arbitrary and unreasonable.” *Id.* (quoting *Ahmed v. Holder*, 569 F.3d 1009, 1014 (9th Cir. 2009)).

The order under review here is more conclusory still. Where the Board in *Alcaarez-Rodriguez* at least recited the petitioner’s circumstances before dismissing them, the June 5, 2026 order addressed Respondent’s minority — the entire premise of his motion — in five words: “This argument is unavailing.” I.J. untimely filing decision at 2 (June 5, 2026).

Neither order identifies the standard it applied to good cause. The June 5, 2026 order recites that counsel had appeared and that the deadline had been announced; the July 31, 2026 order adds that Respondent “had the safeguard of counsel.” Neither order addresses:

- that Respondent was a minor throughout the entire period in which the deadline ran, and remained one for four months after the waiver order issued;
- that he prepared a personal declaration within twenty-five days, and a complete Form I-589 within forty-seven days, of attaining majority;
- that the filing entered the record without any notice of rejection;
- that the motion then sat adjudicated for nearly eight months, through what the Immigration Judge described as the Court having “invertedly overlooked” it; or
- that the Department never opposed the motion.

The Board recently vacated a good cause determination on precisely this ground, holding that the Immigration Judge’s order “reflects no evaluation or balancing of the factors that we have previously found to be relevant to a finding of good cause” where a single consideration was identified and the remainder went unweighed. *Matter of I-B-M-S-*, 29 I&N Dec. 628 (BIA 2026). *Matter of I-B-M-S-* arose under 8 C.F.R. § 1003.20(b) and applied the change-of-venue factors of *Matter of Rahman*, 20 I&N Dec. 480 (BIA 1992). Respondent cites it not as controlling authority on § 1003.31(h) but for the reviewing principle it applies, which is not

confined to venue: a good cause determination that identifies one consideration and stops does not permit meaningful review.

The Ninth Circuit has identified the framework that should guide this inquiry. In *Alcaarez-Rodriguez*, the court observed that “a good-cause framework as articulated in *Ahmed v. Holder*, 569 F.3d 1009 (9th Cir. 2009), governs the analogous question of whether good cause exists to grant a continuance,” that “[t]he crux of the issue in both cases is whether removal proceedings should be extended so as to ensure that those proceedings remain fundamentally fair to a petitioner who demonstrates diligence,” and suggested “that the BIA consider whether a similar analysis should apply to extending filing deadlines.” 89 F.4th at 764. The *Ahmed* factors are “(1) the nature of the evidence excluded as a result of the denial of the continuance, (2) the reasonableness of the immigrant’s conduct, (3) the inconvenience to the court, and (4) the number of continuances previously granted.” *Ahmed v. Holder*, 569 F.3d 1009, 1012 (9th Cir. 2009).

Each factor favors Respondent, and neither the June 5, 2026 order nor the order on appeal addresses any of them. I.J. untimely filing decision at 2 (June 5, 2026); I.J. at 1–3. As to the first, the ruling excludes Respondent’s entire claim: his Form I-589, his personal declaration, and every fact supporting his fear of persecution on account of his sexual orientation. As to the second, Respondent was a minor without capacity to file on his own behalf until August 28, 2025, and he acted within forty-seven days of that date. As to the third, the inconvenience to the Immigration Court is nil: the October 14, 2025 filing required no continuance, no hearing was displaced, and the consolidated merits hearing remains scheduled for July 16, 2027. The Ninth Circuit found an abuse of discretion in *Arizmendi-Medina v. Garland*, 72 F.4th 1132 (9th Cir. 2023), on a record in which the petitioner *had* received prior continuances and the proceedings *would* have been briefly delayed. Neither circumstance is present here.

D.Respondent’s Minority Is a Recognized Consideration Bearing on Good Cause, and Neither Order Weighed It

The explanation Respondent offered for the delay was structural, not personal. Proceedings had been consolidated; the family was pursuing relief through a single application on which Respondent was named as a derivative; and Respondent was seventeen years old,

without capacity to retain counsel, to direct the conduct of the litigation, or to file an application independently of his mother. Whether anyone ought to have appreciated earlier that withholding of removal and CAT protection could not pass to him derivatively is not the question before the Board. The question is whether the Immigration Judge, presented with that explanation in the October 14, 2025 motion, engaged with it. He did not.

The Ninth Circuit has held that a child's circumstances are not measured against an adult standard in removal proceedings. In evaluating a claim, an adjudicator must consider events from the perspective of the age at which the applicant experienced them, because a child's comprehension of and response to his situation differs meaningfully from an adult's. *See Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045–46 (9th Cir. 2007). Respondent does not contend that *Hernandez-Ortiz* governs court-set filing deadlines; it addresses the assessment of harm. But the principle it applies bears directly on the second *Ahmed* factor — the reasonableness of the applicant's conduct — and neither order below acknowledges it.

The agency's own regulations reflect the same judgment. In the context of the one-year asylum filing deadline, 8 C.F.R. § 1208.4(a)(5)(ii) treats a minor's status as a legal disability capable of excusing an untimely filing. Respondent does not contend that the provision governs a deadline set by an Immigration Judge; the July 31, 2026 order is correct that it does not. I.J. at 2. The provision is cited for a narrower purpose: it shows that the agency itself regards minority as material to the timeliness of an application for relief, and that judgment is a relevant factor in a balancing the orders never performed.

Nor does the presence of counsel dispose of the point. The July 31, 2026 order reasons that Respondent “is not an unaccompanied alien child or a minor proceeding pro se,” was “in the care of his mother,” and “had the safeguard of counsel.” I.J. at 2. Those observations bear on whether the household was informed. They do not address whether Respondent, at seventeen, possessed the legal capacity to act on that information in his own right. He did not, and that incapacity is the premise of the good cause showing the orders declined to analyze.

Finally, the orders describe what occurred as a waiver. Under 8 C.F.R. § 1003.31(h), the opportunity to file “shall be deemed waived” when a court-set deadline passes. That is a waiver by operation of regulation, not by any act of Respondent's: neither order identifies anything Respondent himself did, said, or declined to do. Where the agency fails to address an argument,

the proper course is to “remand for additional investigation or explanation.” *Muradin v. Gonzales*, 494 F.3d 1208, 1210 (9th Cir. 2007), *quoted in Alcarez-Rodriguez*, 89 F.4th at 761. The Board does not engage in factfinding on appeal. 8 C.F.R. § 1003.1(d)(3)(iv).

E. The Rulings Below Deprived Respondent of a Full and Fair Opportunity to Be Heard

Removal proceedings “must conform to the Fifth Amendment’s requirement of due process.” *Salgado-Diaz v. Ashcroft*, 395 F.3d 1158, 1162 (9th Cir. 2005). An alien facing removal must receive “a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf.” *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620 (9th Cir. 2006) (quoting *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000)); *see also* INA § 240(b)(4)(B). Due process is not satisfied where “(1) the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case, and (2) the alien demonstrates prejudice.” *Zetino v. Holder*, 622 F.3d 1007, 1013 (9th Cir. 2010) (quoting *Ibarra-Flores*, 439 F.3d at 620–21).

Both elements are present. As to fundamental fairness, Respondent was seventeen when the deadline ran and could not file on his own behalf; the advisals described in the orders were directed to the adults around him; his application, when he was finally able to file one, was accepted into the record without rejection and then went unadjudicated for nearly eight months through an acknowledged oversight; and the ruling that followed rested in part on an inference of tactical delay drawn from nothing in the record.

As to prejudice, the standard is not demanding. Prejudice is established where the Immigration Judge’s conduct “potentially [affected] the outcome of the proceedings.” *Colmenar*, 210 F.3d 967, 972 (9th Cir. 2000) (quoting *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999)). A respondent need not explain “exactly what evidence [he] would have presented.” *Id.* In *Arizmendi-Medina v. Garland*, the Ninth Circuit held that the rejection of a relief application “clearly [affected] the outcome of the proceedings because the merits of his application were never considered by the agency at all,” and that remand for the Immigration Judge to consider the application in the first instance was therefore appropriate. 72 F.4th at 1144; *see also Correa-Rivera v. Holder*, 706 F.3d 1128, 1133 (9th Cir. 2013) (quoting *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1226 (9th Cir. 2002)) (failure to file an application “unquestionably affected the

outcome of the proceedings”; remanding with instructions that the Board allow the application to be submitted).

That is this case. The merits of Respondent’s claim have never been considered by anyone. If the order on appeal stands, they never will be.

F.The Finding That the Delay “Could Have Been” Tactical Is Clearly Erroneous

The July 31, 2026 order concludes: “Given the above, it is conceivable that the filing of one application and the inclusion of Respondent only as a derivative could have been a tactical decision.” I.J. at 2. The June 5, 2026 order used the same register: “it is possible.” I.J. untimely filing decision at 2 (June 5, 2026).

Conceivability is not a finding. A determination that a respondent forfeited mandatory protection through litigation strategy must rest on evidence in the record, not on the inability to exclude a possibility. The record contains no statement by Respondent, by Lead Respondent, or by counsel indicating that any such decision was made, and neither order identifies one.

The two supports offered do not bear the weight placed on them. That counsel was retained “to pursue asylum relief on the family’s behalf” describes the ordinary posture of counsel for a family unit; it says nothing about a decision to forgo an independent claim for one member.

The inference is also implausible on its own terms. Withholding of removal and CAT protection are mandatory, and they exist to prevent return to persecution and torture. No representative would trade a young man’s independent access to that protection — on a claim resting on his own sexual orientation — for derivative status on an application resting on his mother’s experience of domestic violence. The exchange has no upside. Derivative status secures nothing that Respondent’s own application would not have secured, and it forfeits everything his own application would have preserved.

The record affirmatively cuts against the inference. No benefit of any kind would have accrued to Respondent, to Lead Respondent, or to counsel from withholding Respondent’s application. The only consequence of such a course would have been to leave Respondent without independent access to withholding of removal and CAT protection — precisely the outcome the orders now impose. A course of conduct with no advantage and a severe,

irreversible disadvantage is not plausibly characterized as strategy. Nor would a litigant who had strategically withheld a filing turn, within seven weeks of the impediment lifting, to preparing a complete application and a detailed personal declaration and paying the filing fee.

G.The Orders Do Not Weigh the Permanent Loss of Non-Derivative Protection

Respondent does not contend that an Immigration Judge lacks authority to deem an application waived. He contends that where the exercise of that authority eliminates mandatory, non-derivative protection, the reasons given must reflect that the consequence was weighed.

A child may obtain asylum derivatively through a parent, and Respondent is listed as a derivative on Lead Respondent's application. INA § 208(b)(3)(A). No comparable provision exists for withholding of removal under INA § 241(b)(3) or for protection under the Convention Against Torture; each applicant must independently establish eligibility. 8 C.F.R. §§ 1208.16–1208.18.

The effect on Respondent is therefore asymmetric and, in most outcomes, total. If Lead Respondent is granted asylum, Respondent is covered. In every other outcome — a grant of withholding only, a grant of CAT protection only, or a denial — Respondent has nothing, notwithstanding that his claim rests on a different protected ground and on facts distinct from hers. Respondent's claim rests on persecution inflicted upon him on account of his membership in the particular social groups "Gay Men in Brazil," "LGBTI+ Individuals in Brazil," and "Homosexual Males with Female Traits in Brazil." The declaration he filed in September 2025 sets out that persecution in detail and establishes, at a minimum, a prima facie basis for asylum and, in the alternative, for withholding of removal and protection under the Convention Against Torture.

The July 31, 2026 order's prejudice analysis states that Respondent "was provided a reasonable opportunity to present his claim, the Court properly found his application abandoned, and the Court considered his motion to accept untimely filing." Each clause restates the procedural history. None identifies what the abandonment finding forecloses, and none weighs it. No published decision holds § 1003.31(h) inapplicable to withholding or CAT protection, and Respondent does not advance that proposition. His point is narrower and, he submits, unanswerable on this record: the non-derivative character of the relief at stake is a material

consideration, and an exercise of discretion that does not acknowledge it is not adequately reasoned.

H.Preclusion and Correction of the Record

The May 2, 2025 order does not preclude this appeal. To the extent the Department contends that Respondent’s challenge was required to be brought against the May 2, 2025 order, the contention fails. That order was not a final administrative order of removal, and no such order has issued. The Immigration Court retained jurisdiction, and 8 C.F.R. § 1003.23(b)(1) permits a respondent to seek reopening or reconsideration before the Immigration Judge while the case remains before the court. Filing a motion with a completed application after a waiver determination is, moreover, the course *R-C-R-* describes as appropriate. 28 I&N Dec. at 78–79. The Immigration Judge himself did not treat the October 14, 2025 motion as barred: he adjudicated it on the merits on June 5, 2026, and adjudicated the ensuing motion to reconsider on the merits on July 31, 2026. The present appeal is timely taken from the latter.

VII. REQUEST FOR THREE-MEMBER PANEL REVIEW

Respondent asserts that this appeal warrants review by a three-member panel under 8 C.F.R. § 1003.1(e)(6). *See* 8 C.F.R. § 1003.3(b).

Section 1003.1(e)(6)(ii) — the need to establish a precedent construing the meaning of laws, regulations, or procedures. Counsel is aware of no published decision construing what weight a good cause determination must give to an applicant’s minority where the alien is a minor rider Respondent in proceedings in which a parent is the lead Respondent and is named only as a derivative on the parent’s application, or addressing what a good cause determination must show before a court-set deadline forecloses relief that cannot be obtained derivatively.

Section 1003.1(e)(6)(v) — the need to review a clearly erroneous factual determination. The determination that Respondent’s failure to file “could have been a tactical decision” rests on conceivability rather than record evidence.

Section 1003.1(e)(6)(vii) — the need to resolve a novel or recurring issue of law or fact. The configuration presented here arises across immigration courts wherever a minor rider holds facts supporting an independent claim.

VIII. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Board exercise jurisdiction over this interlocutory appeal; vacate the July 31, 2026 order; and remand to the Immigration Court with instructions to grant reconsideration of the denial of his October 14, 2025 Motion to Accept Untimely Filing and to adjudicate that motion under the standard set out in *Matter of R-C-R-*, so that his Form I-589 may be accepted and he may proceed as a principal applicant for asylum, withholding of removal, and protection under the Convention Against Torture. In the alternative, Respondent requests remand for the Immigration Judge to conduct a reasoned good cause analysis under the standard set out in *Matter of R-C-R-* and *Matter of L-A-B-R-*.

Respectfully submitted,



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Proof of Service

On this date, I, Otavio Haverroth Silva, served a copy of the following documents:

RESPONDENT'S BRIEF IN SUPPORT OF INTERLOCUTORY APPEAL

To the following:

Office Location:	Mailing Address:
Office of the Chief Counsel Department of Homeland Security 915 Second Avenue, Suite 708 Seattle, WA 98174	US Immigration and Customs Enforcement US Department of Homeland Security Office of the Chief Counsel 915 Second Avenue, Suite 708 Seattle, WA 98174

by:

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