

MAR 25 2008

*Hernandez-Perez v. Mukasey*, No. 06-74286CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**IKUTA**, Circuit Judge, dissenting:

The majority here rules that Hernandez's right to due process was violated because the IJ and the BIA failed to consider Dr. Wakefield's affidavit. This conclusion is contrary to our case law, not supported by the record, and constitutes an intrusion "into the domain which Congress has set aside exclusively for the administrative agency." *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Under our well-established case law, we presume that the IJ reviewed all the evidence in the record, even if the IJ and BIA do not mention every item.

*Larita-Martinez v. INS*, 220 F.3d 1092, 1095–96 (9th Cir. 2000) ("We embrace the view of our sister circuits and hold that an alien attempting to establish that the Board violated his right to due process by failing to consider relevant evidence must overcome the presumption that it did review the evidence."); *see also* *Almaghzar v. Gonzales*, 457 F.3d 915, 922 (9th Cir. 2006) (rejecting due process claim based on the IJ's failure to discuss documentary evidence of torture); *Fernandez v. Gonzales*, 439 F.3d 592, 603 (9th Cir. 2006) (rejecting claim that petitioner's due process right was violated by the BIA's failure to discuss new evidence); *Barraza Rivera v. INS*, 913 F.2d 1443, 1448–49 (9th Cir. 1990). We have upheld this presumption of review except when an agency explicitly stated it

was unwilling to consider petitioner’s evidence. *See, e.g., Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 872 (9th Cir. 2003) (en banc) (“[T]he BIA affirmatively and categorically rejected consideration of supplemental evidence.”), *superseded by regulation*, 8 C.F.R. § 1003.1(d)(3)(iv); *Zahedi v. INS*, 222 F.3d 1157, 1164–65 & n.7 (9th Cir. 2000) (holding that the IJ’s explicit rejection of the validity of petitioner’s evidence rebuts the presumption of review). This presumption of review is consistent with the rule in four of our sister circuits.<sup>1</sup>

The majority gives three reasons for holding that Hernandez rebutted the presumption of review in this case. First, the majority states that the Wakefield affidavit’s discussion of the mother’s suicidal tendencies was crucial, and the IJ’s failure to discuss this crucial evidence raises the inference that the evidence was

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<sup>1</sup>*See, e.g., Morales v. INS*, 208 F.3d 323, 328 (1st Cir. 2000) (holding that the BIA and the IJ are not required to “address specifically each claim the petitioner made or each piece of evidence the petitioner presented”) (quoting *Martinez v. INS*, 970 F.2d 973, 976 (1st Cir. 1992)); *Ivanishvili v. U.S. Dep’t. of Justice*, 433 F.3d 332, 344 (2d Cir. 2006) (holding there is “no authority supporting petitioner’s contention that an IJ errs unless he specifically discusses, evaluates, and accepts or rejects each piece of documentary evidence submitted”); *Kamara v. Attorney Gen. of U.S.*, 420 F.3d 202, 212 (3d Cir. 2005) (“Agency action is entitled to a presumption of regularity, and it is the petitioner’s burden to show that the BIA did not review the record when it considered the appeal.”); *Man v. INS*, 69 F.3d 835, 838 (7th Cir. 1995) (“[A]bsent evidence to the contrary, we assume that the BIA reviewed the specific findings of the immigration judge in light of the record . . .”).

not considered.<sup>2</sup> Second, the majority notes that the Wakefield affidavit discussed the mother's concern about permanent separation from her son, but the IJ did not address the significance of this permanent separation.<sup>3</sup> Finally, the majority notes that the BIA did not reference the affidavit's statements that Hernandez's deportation would have a severe psychological impact on Hernandez's mother.

In essence, the majority's three reasons boil down to a single point: neither the IJ nor the BIA mentioned Dr. Wakefield's affidavits and the purportedly

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<sup>2</sup>The majority could not hold that the IJ failed to consider the *issue* of the mother's suicidal tendencies. The IJ discussed Hernandez's concern about this issue in some detail. The IJ also listed a declaration to that effect from Dr. Wakefield as being part of the record. However, the IJ found that the evidence did not establish the "extreme hardship" necessary to meet the standard in 8 U.S.C. § 1182(h)(1)(B). The IJ reasoned that Hernandez "has not lived with his mother for years and he has not provided her with meaningful emotional or financial support. . . . [Hernandez's] mother can legally travel to Mexico to visit her son which she did when he was living in Mexico. . . . [T]he court finds that the hardship suffered by [Hernandez's] daughter and mother is not different from the ordinary hardship of separation of a family member when that family member is deported or removed from the United States." The BIA affirmed the IJ's determination as being based on facts that were not clearly erroneous. These findings are binding on us. 8 U.S.C. § 1252(b)(4)(B). Moreover, they are confirmed by Hernandez's subsequent decision to allow himself to be removed to Mexico (a fact admittedly not before the BIA when it affirmed the IJ's factual findings), which indicates that Hernandez's assessment of his mother's condition was similar to the IJ's.

<sup>3</sup>Rather, the IJ may have rejected Dr. Wakefield's characterization of the separation as being permanent. The IJ noted that Hernandez's mother would be free to visit her son in Mexico and to communicate with him via telephone.

crucial information it contains. As noted above, this is not enough to rebut the presumption of review. If a petitioner could rebut the presumption of review merely by showing that the IJ failed to mention a document that is important to the petitioner's claim for relief, the presumption would be meaningless. Under the majority's approach, *Larita-Martinez* would be limited to the presumption that the agency has reviewed only the *unimportant* parts of the record. Of course, no court could find a due process violation based on a charge that the IJ and BIA overlooked evidence that is immaterial, as there could be no showing of prejudice. *See, e.g., Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) (there is a due process violation only if the outcome of the proceeding may have been affected by the alleged error).

In ignoring the presumption of review, the majority erodes the bedrock principle of administrative law that "agencies are entitled to a presumption that they 'act properly and according to law.'" *Kohli v. Gonzales*, 473 F.3d 1061, 1068 (9th Cir. 2007) (quoting *FCC v. Schreiber*, 381 U.S. 279, 296 (1965)). "The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926); *see also INS v. Miranda*, 459 U.S. 14, 18 (1982). Our presumption

that the agency properly reviewed the evidence in the record is based on this principle. *See Larita-Martinez*, 220 F.3d at 1095 (“[I]t is so expected that a court would review all relevant materials in the record that reviewing courts have presumed it.”). The majority here presumes instead that the IJ and BIA failed to act properly, despite no direct evidence supporting this conclusion and all signs to the contrary.

In sum, there is no basis in this case for rebutting the presumption that the IJ and the BIA considered Dr. Wakefield’s affidavit. Nor is there support for the majority’s conclusion that the agency’s failure to discuss the substance of the single affidavit made the proceeding “so fundamentally unfair that the alien was prevented from reasonably presenting his case.” *Reyes-Melendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2003) (internal quotations omitted). Here, Hernandez was represented by counsel who vigorously argued his case. He introduced a substantial amount of evidence, including testimony from witnesses, and received a full hearing from an IJ who is not alleged to be biased. Both the IJ and the BIA provided a complete and careful decision. An error that could turn this manifestly fair proceeding into a fundamentally unfair one would have to be egregious indeed. There is no such error in this case and therefore no due process violation here.