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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MOHSEN SEYED MIRMEHDI, aka  
Musen Meermedi,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney  
General,

Respondent.

No. 04-74743

Agency No. A075-617-462

MEMORANDUM\*

MOHAMMED-REZA MIRMEHDI, aka  
Muhamed Meer Medi,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney  
General,

Respondent.

No. 04-74744

Agency No. A075-622-144

On Petition for Review of an Order of the  
Board of Immigration Appeals

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Argued and Submitted October 22, 2008  
Pasadena, California

Before: PREGERSON and HALL, Circuit Judges, and EZRA, \*\* District Judge.

Mohsen Mirmehdi (Mohsen) and Mohammad-Reza Mirmehdi (Mohammad), brothers and natives of Iran, claim the Board of Immigration Appeals (BIA) abused its discretion by denying their asylum claims on discretionary grounds. The BIA, in detailed opinions, affirmed the Immigration Judge's grant of withholding and CAT relief and found that the brothers' prior fraudulent immigration claims were not outweighed by the probability of future persecution, given the grant of withholding and CAT protections. We find the BIA did not abuse its discretion and therefore deny their petition. Because the parties are familiar with the facts of the case, we do not recite them here.

**I.**

Factual determinations underlying the exercise of discretion are reviewed for substantial evidence. *Gulla v. Gonzales*, 498 F.3d 911, 915 (9th Cir. 2007). Substantial evidence supports the BIA's factual determinations in Mohsen's case, and all but one in Mohammad's. The Government concedes one factual error in Mohammad's decision, but that error did not serve as the basis for the Board's

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\*\* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

decision that Mohammad was engaged in immigration fraud, and was therefore harmless. *See United States v. Erickson*, 75 F.3d 470, 479 (9th Cir. 1996).

## **II.**

Mohsen claims the BIA improperly considered the misconduct of his brothers in its exercise of discretion. *See Virk v. INS*, 295 F.3d 1055, 1060 (9th Cir. 2002). Rather than substantively considering his brothers' conduct, however, the BIA relied upon Mohsen's knowledge of their misconduct only as evidence that he knew his own claim was fraudulent.

Mohammad claims the BIA improperly considered his fraud committed when entering the United States, because the BIA made no specific finding that the fraud was "deliberate and voluntary," as required by INA § 212(a)(6)(c)(i). *See Espinoza-Espinoza v. INS*, 554 F.2d 921, 925 (9th Cir. 1977). But, "a factor that falls short of the grounds of mandatory denial is not for that reason alone excluded from consideration as an adverse factor for the discretionary, entitlement prong." *Kalubi v. Ashcroft*, 364 F.3d 1134, 1139 (9th Cir. 2004).

## **III.**

The Mirmehdis argue that BIA failed to explain its reasons for finding their mitigating explanations regarding the extent of their fraud implausible. The BIA did not make an "adverse credibility determination" in the traditional sense,

however, but rather carefully explained the reasons why it found the Mirmehdis' explanations implausible, and thus not mitigating. The Mirmehdis were not escaping persecution when they entered the United States, and hence had no excuse to circumvent any of the normal asylum laws. Denial of discretionary relief is appropriate when the denial is based on fraud perpetuated throughout immigration proceedings. *See Hosseini v. Gonzales*, 464 F.3d 1018, 1021 (9th Cir. 2006); *see also Matter of Pula*, 19 I. & N. Dec. 467, 474 (1987).

#### IV.

The Mirmehdis argue that the BIA improperly weighed positive factors in its exercise of discretion, including significant personal ties to the United States, whether the Mirmehdis had family legally present in the United States and the likelihood of future persecution upon return to Iran. However, no Mirmehdi brother was *legally* present in United States at the time of the BIA's decision. "An applicant for asylum has the burden of establishing that the favorable exercise of discretion is warranted," and neither Mirmehdi argued that significant personal ties predated their decision to come to the United States and "motivated him to seek asylum here rather than elsewhere." *Matter of Pula*, 19 I. & N. at 474; *see also Gulla*, 498 F.3d at 917-918. Finally, while "[t]here is no question that in determining whether to grant asylum as a discretionary matter, the likelihood of

future persecution is a particularly important fact to consider . . . withholding of removal eliminates that chance of future persecution as [the Mirmehdis] cannot be returned to [Iran].” *Kalubi*, 364 F.3d at 1141. The BIA did not abuse its discretion.

PETITION DENIED.