No. 20-[redacted]

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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V[redacted] [redacted]
*Petitioner*,
v.
MERRICK GARLAND, Attorney General,
*Respondent*.

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**ON PETITION FOR REVIEW OF AN ORDER BY THE BOARD OF IMMIGRATION APPEALS**

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# BRIEF OF *AMICUS CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* submit the following corporate disclosure statement:

*Amicus Curiae* herein is a not-for-profit organization. It has no parent corporation. It has no capital stock held by a publicly traded corporation.

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Proposed *Amicus Curiae* American Immigration Lawyers Association ("AILA") is a national association with more than 15,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to the jurisprudence of immigration laws, and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security, the Executive Office for Immigration Review, the Immigration Courts, the Board of Immigration Appeals ("BIA" or "Board"), U.S. District Courts, the Federal Courts of Appeals, and the U.S. Supreme Court.

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[1] This brief was authored entirely by counsel for *Amicus*. No party, or any counsel for a party, authored this brief, in whole or in part, nor did any party, party's counsel or any other person or entity contribute money to fund the preparation or submission of this brief. This brief is submitted *pro bono*, by counsel of record. Petitioner has consented to the filing of this brief. Respondent does not oppose this filing.

## SUMMARY OF ARGUMENT

A motion to reopen removal proceedings in order to apply for asylum, withholding of removal, and protection under the Convention Against Torture can be filed at any time if it is based on changed conditions in the respondent's country of origin. 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2) (exempting motions to reopen on the aforementioned grounds from time and numerical limitations); *see Xiao He Chen v. Lynch*, 825 F.3d 83, 86 (1st Cir. 2016). To prevail on such a motion, a movant must both produce material evidence of changed country conditions that was not available or discoverable at the original merits hearing and establish a *prima facie* case of eligibility for relief. *See Sánchez-Romero v. Sessions*, 865 F.3d 43, 45 (1st Cir. 2017) (citing 8 U.S.C. § 1229a(c)(7)).

Each of these discrete requirements must be analyzed and evaluated separately. *See Immigration and Naturalization Service v. Abudu*, 485 U.S. 94, 104 (1988). The Supreme Court has made clear that it is error to conflate the "quite separate issues whether the [noncitizen] has presented a prima facie case for asylum with whether the [noncitizen] has . . . offered previously unavailable, material evidence." *Id.* at 108; *see Smith v. Holder*, 627 F.3d 427, 439 (1st Cir. 2010) ("We have indicated that the two burdens are separate . . . Any suggestion to the contrary in our opinions was legally incorrect.").

The Board below erroneously concluded that Petitioner did not satisfy the requirements to have his proceedings reopened because either (1) Petitioner did not establish that "Hun Sen's crackdown against political opposition" had "materially changed," notwithstanding the Board's finding that the Cambodian government's persecution of Sam Rainsy supporters had "intensified" since his individual hearing, A.R. 4; or (2) Petitioner's new evidence would not "likely change the result in the case" and thus did not "show his *prima facie* eligibility for the relief he seeks." A.R. 3 (quoting *Matter of Coelho*, 20 I&N Dec. 464, 472–73 (BIA 1992)). In either of these possible interpretations, the Board committed reversible error.

Each of the ensuing three sections addresses and expands on an error the Board made in the decision below: section one sets forth why the Court should adopt a "logical connection" test, grounded in the plain text of the statute, as the proper analysis for materiality of evidence in the context of a motion to reopen. Section two discusses the proper understanding of the *prima facie* eligibility requirement—and the importance of not conflating it with the materiality requirement—to highlight how the Board erroneously applied a heightened standard in the case below. Finally, section three addresses the Board's recurring tendency to erroneously deny motions that do not necessarily "establish the

existence of new or previously unavailable evidence that would *likely change the result* in the case." *Id.* (quoting *Coelho*, 20 I&N Dec. at 472–73) (emphasis added).

## ARGUMENT

### I. FOR EVIDENCE OF A CHANGE IN COUNTRY CONDITIONS TO BE MATERIAL, THAT EVIDENCE MUST HAVE SOME LOGICAL CONNECTION WITH THE MOVANT'S CLAIM FOR ASYLUM.

When adjudicating a motion to reopen based on changed country conditions, the BIA compares the evidence of country conditions at the time of the merits hearing to the evidence of country conditions submitted with the motion to reopen. *Sánchez-Romero*, 865 F.3d at 45. The evidence proffered in support of the motion to reopen must be material and must have been unavailable during the prior proceedings. *Smith*, 627 F.3d at 434.

*Amicus* argues that the material evidence requirement is most accurately understood by looking to the plain and ordinary meaning of those words. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). Material evidence is that which has "some logical connection with the consequential facts or issues." *Black's Law Dictionary* (11th ed. 2019).

Thus, in the context of a motion to reopen, material evidence is best understood as evidence of changed country conditions that has some logical connection to the facts or issues of consequence to the applicant's claim for

asylum, withholding of removal, or related relief. *See id.*; 8 C.F.R. § 1003.2(c)(3)(ii); *see also Perez v. Holder*, 740 F.3d 57, 62 (1st Cir. 2014) (ruling that evidence is not material unless it has "some impact on the outcome of a petitioner's underlying case"). Because the Board and many courts have sometimes been unclear in their treatment of the statutory term "material" in this context, *Amicus* urges this Court to use the present case to add clarity to the analysis by recognizing that the statutory text itself refers to the materiality of the evidence submitted, rather than the materiality of the change in country conditions. *See* 8 U.S.C. 1229(a)(7)(C)(ii); sec. I(B), *infra*.

### A. The Ordinary Understanding of the Term "Material Evidence" is Consistent with This Court's Precedent Related to Motions to Reopen Based Upon Changed Country Conditions.

Neither this Court nor the BIA has announced a formal test for materiality of evidence in the context of a motion to reopen. This Court has instead operated under a common sense understanding of the term "material evidence," *i.e.*, it must have "some logical connection with the consequential facts." *See Black's Law Dictionary* (11th ed. 2019).[2]

[2] *Cf. Yan Yang v. Barr*, 939 F.3d 57, 71 (2d Cir. 2019) (Lohier, J., concurring) ("No rule of interpretation makes congressional mercy an oxymoron. Nor is there a canon that permits us to ignore the plain language of an immigration statute . . . just because those words happen to favor noncitizens.").

In *Sihotang v. Sessions*, 900 F.3d 46 (1st Cir. 2018), for example, this Court held that the Board abused its discretion in finding that Sihotang had not submitted new, material evidence of changed circumstances in Indonesia. At his initial asylum hearing, the Immigration Judge ("IJ") held that Sihotang's experience of persecution as an evangelical Christian was insufficient for relief. *Id.* at 48. In his motion to reopen, he submitted new evidence detailing intensified persecution against evangelical Christians between the date of his merits hearing and the date on which he filed the motion to reopen. *Id.* at 50–51. In denying the motion, the BIA held that Sihotang had not demonstrated changed country conditions because he merely showed a "continuation of previously existing conditions." *Id.* at 49. This Court disagreed, concluding that Sihotang's evidence was both *new* and *material*. *Id.* at 50.

The Court began by explaining that Sihotang had successfully presented evidence that "might well serve to ground a finding (or at least a reasonable inference) that country conditions have steadily deteriorated" since the date of his merits hearing, and therefore the evidence was *material*. *Id.* at 51. This Court's determination thus demonstrated an application of the ordinary understanding of "material evidence" as evidence with some logical connection to the consequential facts or issues. *Id.* To determine whether the evidence was *new*, the Court looked to evidence submitted that was unavailable in 2006—in particular, evidence of

increased persecution of Indonesians who publicly displayed their Christianity, such as evangelical Christians. *Id.* at 52.

In the instant case, not only did Petitioner introduce new evidence sufficient to support a reasonable inference that country conditions had steadily deteriorated since the time of the merits hearing, but the Board even conceded that such evidence reflects the fact that government persecution had "intensified" since the date of Mr. [redacted] last hearing on the merits. A.R. 4.

Similarly, in *Cabas v. Barr*, 928 F.3d 177, 186 (1st Cir. 2019), this Court held that the Board arbitrarily denied the petitioner's motion to reopen, based on the erroneous assertion that Cabas had not submitted new evidence of changed circumstances in Venezuela. In his motion to reopen, Cabas submitted new evidence detailing an increase in government killings and imprisonment of political opponents in Venezuela that "made it more likely that a political dissident would face persecution upon returning to Venezuela." *Id.* at 182. In denying the motion, the BIA erroneously concluded that the Venezuelan government simply "continued" its targeting of dissidents and thus that Cabas had failed to demonstrate changed country conditions. *Id.* at 181. This Court disagreed with the Board and recognized that Cabas's evidence was both new and material. *Id.* at 181–82. As in *Sihotang*, the Court in *Cabas* used the ordinary understanding of the

term *material evidence*, *i.e.*, having some logical connection with the consequential facts or issues. *Id.* at 181.

Relatedly, in *Smith*, this Court explained that "previously unavailable, material evidence" can consist of evidence of country conditions that a petitioner was not present to personally experience. *Id.* at 435. Accordingly, the Court found that the BIA abused its discretion by requiring that Smith personally witness the changed conditions documented in his motion. *Id.* (finding that such a requirement is an "untenable" construction of the changed country conditions requirement). Thus, the Court concluded that Smith's evidence, which (like Petitioner's) demonstrated a government's intensified persecution of political opponents, presented a logical connection to his claim sufficient to reopen—notwithstanding the fact that he was absent from Zimbabwe during the period in which conditions changed. *See id.*

In contrast, this Court in *Garcia-Aguilar v. Whitaker*, 913 F.3d 215 (1st Cir. 2019), upheld the BIA's denial of that petitioner's motion to reopen, finding that the submitted evidence was deficient in two key respects: it was not material and it did not show a change in country conditions. *Id.* at 220. With regard to the material evidence requirement, the Court found that the evidence submitted with Garcia-Aguilar's motion to reopen did not "forge anything resembling a solid *link* between an alleged change in country conditions and the petitioner's underlying claim for

asylum." *Id.* (emphasis added). This "solid link" standard for material evidence is consistent with the low bar set by the statute—that the evidence must have some logical connection to the facts and issues introduced in the claim.

Unlike in the case below, however, the petitioner in *Garcia-Aguilar* did not submit evidence reflecting a heightened danger in her home country relative to the conditions that existed at the time of her last hearing. *Id.* Rather, the evidence illustrated that violence had peaked around the time of her merits hearing, with such conditions never rising to that level again during the period between her hearing on the merits and her motion to reopen. *Id.* In stark contrast, Petitioner in the case below submitted evidence of heightened human rights violations in Cambodia since his last hearing, with the Board conceding that government persecution had "intensified." A.R. 4.

The above decisions reaffirm the plain text understanding of "material evidence" as evidence that is linked to an element of claim for relief. *Sihotang*, 900 F.3d at 51 (stating that material evidence simply "might well serve to ground a finding (or at least a reasonable inference) that country conditions have steadily deteriorated"); *Cabas*, 928 F.3d at 181–82.

### B. Material Evidence of a Change in Country Conditions Does Not Require a Dramatic or Significant Change in Country Conditions.

Contrary to the Board's ruling in the instant case, for new evidence of changed country conditions to be material, it need not reflect a dramatic change. *Joseph v. Holder*, 579 F.3d 827, 831, 833 (7th Cir. 2009) (holding that the BIA erred in narrowly interpreting "changed circumstances" to require "a dramatic change in the political, religious, or social situation"). The Seventh Circuit reasoned that "[t]he plain language of the regulation . . . does not restrict the concept of 'changed circumstances' to some kind of broad social or political change in the country, such as a new governing party." *Id.* at 834. Likewise, this Court's decisions have repeatedly recognized that gradually worsening conditions may constitute a change in country conditions. *See, e.g.*, *Smith*, 627 F.3d at 431, 434–35 (finding that evidence showing an intensification of political repression over a span of roughly one decade was sufficient to establish changed conditions); *Perez*, 740 F.3d at 62 (noting that evidence can be material if it has "*some impact* on the outcome of a petitioner's underlying case" (emphasis added)).

Moreover, the statutory requirement of *material evidence* of a change in country conditions is not equivalent to a *material change in country conditions*. The statute and regulations demonstrate that the word "material" relates to the type of *evidence* that must be submitted in support of a motion to reopen, not to the type

of *change in country conditions*. *See* 8 U.S.C. § 1229a(c)(7)(C)(ii) (A motion to reopen "based on changed country conditions" must be supported with "*evidence* [that] is *material* and was not available . . . at the previous proceeding." (emphasis added)); 8 C.F.R. § 1003.2(c)(3)(ii) (explaining that the time and number bars "shall not apply to a motion to reopen . . . [t]o apply for asylum . . . based on changed circumstances arising in the country of nationality . . . if such *evidence* is *material* . . ." (emphasis added)); *see also Fesseha v. Ashcroft*, 333 F.3d 13, 20 (1st Cir. 2003) (noting that a motion to reopen must "introduce 'previously unavailable, material evidence'").

While a number of courts, including this one, have at times treated *materiality* as defining the type of change in country conditions required, such an interpretation cannot be fairly derived from the statute or regulations. *Compare Xiao He Chen v. Lynch*, 825 F.3d 83, 89 (1st Cir. 2016) (finding the evidence "failed to make an adequate showing of a *material change in country circumstances*" (emphasis added)); *Jiang v. U.S. Att'y Gen.*, 568 F.3d 1252, 1256 (11th Cir. 2009) (noting that "Jiang had not established a *material change in China's country conditions*" (emphasis added)); *Xing Zheng v. Holder*, 710 F.3d 769, 771 (7th Cir. 2013) (stating that "[t]he parties do not dispute that . . . Zheng was required to show that China's *conditions materially worsened* for Christians" (emphasis added)); *Matter of J-J-*, 21 I&N Dec. 976, 981 (BIA 1997) (noting "the

documents presented . . . [do] not show *materially changed circumstances* in Liberia" (emphasis added)) *with* 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii); *Perez*, 740 F.3d at 62 (stating that to prevail on a motion to reopen, the petitioner must "introduce new, material evidence that was not available at the original merits hearing").

In the instant case, Petitioner satisfied the test for material evidence by proffering evidence that even the Board recognized as reflecting that "Hun Sen's crackdown against political opposition and the media has intensified[.]" A.R. 4. Evidence of an intensification of country conditions endured by political opponents, including members of Petitioner's party, has "some logical connection to the consequential facts or issues" and thus constitutes material evidence of changed country conditions.[3]

## II. A MOVANT ESTABLISHES *PRIMA FACIE* ELIGIBILITY BY SHOWING THAT MATERIAL EVIDENCE OF CHANGED COUNTRY CONDITIONS REFLECTS A "REALISTIC CHANCE" THAT HE WILL BE ABLE TO ESTABLISH ELIGIBILITY FOR RELIEF AT A FULL HEARING.

The *prima facie* case standard does not require a petitioner to prove that he would be *likely* to prevail if given another hearing on the merits of his asylum,

[3] In the case at hand, Petitioner also satisfies the statutorily incorrect, but sometimes erroneously applied standard of showing materially changed country conditions. *See* A.R. 4 (Board finding political persecution had "intensified"); Pet. Op. Br. at 12, 19–20.

withholding of removal, or Convention Against Torture claims. *Cabas*, 928 F.3d at 183.[4] Rather, reopening is warranted where a petitioner produces objective evidence showing a "realistic likelihood" that he will face future persecution based on a statutory ground. *Id.* (quoting *Smith*, 627 F.3d at 437). This standard simply requires the applicant to show there is "a realistic chance that [he] can at a later time establish that asylum should be granted." *Smith*, 627 F.3d at 437 (quoting *Guo v. Ashcroft*, 386 F.3d 556, 564 (3d Cir. 2004)); *see also Kay v. Ashcroft*, 387 F.3d 664, 674 (7th Cir. 2004) (quoting *Matter of L-O-G-*, 21 I&N Dec. 413, 418–19 (BIA 1996)).

This Court's recent decision, *Cabas v. Barr*, 928 F.3d at 182–83, confirmed that the requirement to make out a *prima facie* case at the motion to reopen phase sets a relatively low threshold. *Id.* at 183. There, the Board applied an excessively high standard for *prima facie* eligibility in denying Cabas's motion to reopen. *Id.* The Court corrected the Board, explaining that Cabas "need not establish that he will or *is even likely* to prevail if given another hearing . . . [but] rather, he need only show now that there exists a 'realistic chance' that he can 'at a later time

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[4] As noted, *supra*, this Court has repeatedly explained that "*prima facie*" eligibility is a separate legal inquiry from whether a movant presented "previously unavailable, material evidence" of changed country conditions, and reversed the Board for conflating the two. *See, e.g.*, *Fesseha*, 333 F.3d at 20; *Smith*, 627 F.3d at 439 (reversing the Board and stating "[w]e have indicated that the two burdens are separate . . . Any suggestion to the contrary in our opinions was legally incorrect.").

establish that asylum should be granted.'" *Id.* (emphasis added). The Court then clarified the standard, stating the petitioner "need only produce objective evidence showing a 'reasonable likelihood' that he will face future persecution based on a statutory ground." *Id.*

The *Cabas* Court found that the Board abused its discretion by prematurely rejecting the facts stated in Cabas's affidavit and disregarding its contents. *Id.* at 186. Moreover, the Court emphasized that to make a showing of past persecution or a likelihood of future persecution, "an applicant's testimony, if credible, may be sufficient." *Id.* (citing *Smith*, 627 F.3d at 437).

As in *Cabas*, the Board in the case below applied an excessively high standard, requiring Petitioner to provide significantly more than a *prima facie* showing of eligibility. A.R. 3. The proffered evidence was similar in both cases; petitioners showed that governmental crackdowns on opposition had intensified over a span of several years since the original hearing on the merits. *Compare id. with Cabas*, 928 F.3d at 181–82.

Similarly, in *Smith v. Holder*, 627 F.3d at 439–40, this Court found that the BIA's denial of a motion to reopen for failure to establish a *prima facie* showing of eligibility was an abuse of discretion. *Id.* Smith asserted a fear of persecution in Zimbabwe based on his past activism against the ZANU-PF. *Id.* at 431. He submitted an affidavit describing his earlier persecution, as well as more recent

violence against his family in Zimbabwe who were attacked by a ZANU-PF youth militia. *Id.* He also submitted a judicial opinion from the United Kingdom in which the court concluded that failed asylum applicants face a heightened risk of violence, and a U.S. State Department Country Report on Human Rights which showed a dramatic increase in violence by the ZANU-PF. *Id.* at 431–32. This Court found that the Board erred in taking each individual piece of evidence and looking at it "standing alone." *Id.* at 438. The Court further reasoned that a *prima facie* showing need not be made "entirely through new evidence" but rather may be based on new evidence coupled with "the facts already of record." *Id.* (quoting *L-O-G-*, 21 I&N Dec. at 419). Thus, testimonial evidence can itself be sufficient to make a *prima facie* case, and while previously available evidence of past persecution cannot be the sole basis for reopening, such evidence can be relevant to petitioner's *prima facie* case. *Id.* at 438–39.

The Court proceeded to find that Smith had made a *prima facie* showing of a well-founded fear of persecution because the new facts presented, alongside evidence already on the record, demonstrated a "reasonable likelihood" of future persecution. *See id.* at 437. Therefore, although the evidence presented might "not necessarily mean" that Smith would face persecution, it was sufficient to establish a *prima facie* case of a well-founded fear of persecution. *See id.* at n.12. So too here.

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The Second, Third, Sixth, and Ninth Circuits, as well as the Board, have joined the First Circuit in equating the "reasonable likelihood" language to a "realistic chance" that the movant can at a later time (*i.e.*, in the reopened proceeding) establish that asylum should be granted. *See Reyes v. I.N.S.*, 673 F.2d 1087, 1089 (9th Cir. 1982); *Guo v. Ashcroft*, 386 F.3d 556, 564 (3d Cir. 2004); *see also Poradisova v. Gonzales*, 420 F.3d 70, 78 (2d Cir. 2005); *Matter of S-Y-G-*, 24 I&N Dec. 247, 252 (BIA 2007); *Tiansheng Zou v. Holder*, 517 F. App'x 385, 388 (6th Cir. 2013). It is thus well settled that to make a *prima facie* showing of eligibility as part of a motion to reopen, a petitioner must demonstrate a "realistic chance" of establishing asylum eligibility upon reopening.

*Amicus* urges this Court to use the instant case to formally adopt this phrasing. Because the "reasonable likelihood" language is susceptible to conflation with the ultimate standard to be granted asylum on the merits (*i.e.*, a "reasonable possibility" of persecution, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 (1987)), the "realistic chance" phrasing more accurately underscores that the standard to make out a *prima facie* case at the motion to reopen phase is different from, and necessarily less than, the standard to be granted asylum.

## III. NEITHER THE MATERIALITY NOR THE *PRIMA FACIE* REQUIREMENT MAY BE EQUATED WITH A REQUIREMENT THAT THE NEW, MATERIAL EVIDENCE BE OUTCOME DETERMINATIVE.

The Board in the case at bar cited *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) in referencing a purported "heavy burden" that a movant for reopening must carry. A.R. 3 (citing *Coelho*, 20 I&N Dec. at 472–73 (describing the "heavy burden" as "evidence of such a nature that the Board is satisfied that if proceedings . . . were reopened . . . the new evidence offered would likely change the result in the case")). This language often seeps into the Board's analysis of the materiality and *prima facie* eligibility requirements,[5] as it apparently did in this case. *See* A.R. 4 (concluding that petitioner "has not submitted evidence with his motion to show . . . that he *will* be targeted for harm because of his support for Rainsy when it has been two decades since he departed Cambodia" (emphasis added)).[6]

[5] *See, e.g.*, *Xiu Xia Zheng v. Holder*, 502 F. App'x 13, *14–*15 (1st Cir. 2013) (stating that material evidence must "likely change the result in the case"); *Jiang v. U.S. Att'y Gen.*, 568 F.3d 1252, 1256 (11th Cir. 2009); *Li v. U.S. Att'y Gen.*, 488 F.3d 1371 (11th Cir. 2007); *Allabani v. Gonzales*, 402 F.3d 668, 676 (6th Cir. 2005) (affirming Board's denial of a motion to reopen because "if the proceedings were reopened, the respondent would [not] likely establish eligibility asylum . . . based on the evidence submitted").

[6] Importantly, the standard of risk for *asylum* applications is showing a ten-percent chance of persecution of account of a protected ground, *i.e.*, an asylum applicant need not show harm is affirmatively probable. *See Cardoza-Fonseca*, 480 U.S. at 421.

As explained above, a movant must introduce evidence that has a logical connection to his underlying claim (*i.e.*, that is material) and that, taken together with the existing record, evinces a "realistic chance" of success on the merits (*i.e.*, demonstrates *prima facie* claim); neither of these is an especially "heavy burden." *Contra* A.R. 3. As such, *Amicus* submits that the most accurate reading of *Matter of Coelho* construes its "likely to change the result" language to apply only to the discretionary component of the Board's analysis when considering whether to reopen proceedings to allow a noncitizen to renew an application for relief under INA section 212(c). *See, e.g.*, *Abudu*, 485 U.S. at 105. This narrow interpretation complements, rather than contradicts, the "material evidence" requirement from 8 U.S.C. § 1229a(c)(7)(C)(ii), as well as the "realistic chance" standard derived from *Smith*, 627 F.3d at 437.

The Board in *Coelho* considered how to weigh a motion to reopen filed in the context of a denied application for relief under former section 212(c) of the Immigration and Nationality Act. The movant had been convicted of possession of cocaine with intent to distribute and was sentenced to three-years imprisonment. *Coelho*, 20 I&N Dec. at 465–66. In his initial hearing, the IJ found him statutorily eligible for a section 212(c) waiver because, as a lawful permanent resident of twenty-three years he had more than the required seven years of residence. *Id.* However, section 212(c) also required an applicant to establish that the favorable

factors outweighed the negative, and that the case warranted a positive exercise of discretion. *Id.* In weighing Coelho's adverse considerations against the positive, the IJ concluded that Coelho did not merit 212(c) relief and ordered him deported. *Id.* Coelho appealed and also filed a motion to remand, which the Board considered as a motion to reopen to submit additional information related to his rehabilitation. *Id.*

On appeal, the Board recited the "three independent grounds" for denying the motion to reopen. *Coelho*, 20 I&N Dec. at 472 (citing *Abudu*, 485 U.S. at 104–05, in explaining that the BIA may deny a motion to reopen (1) for "failure to establish a prima facie case," (2) for failure to offer "previously unavailable, material evidence," or (3) "where the ultimate relief is discretionary, the Board may conclude that . . . [it] would not grant relief in the exercise of discretion."). The Board then explained:

> ***In a case such as the present one***, making a *prima facie* showing of eligibility for the underlying relief being sought *is largely irrelevant*, as the respondent has already established eligibility to be considered for relief under section 212(c) of the Act and has already been provided the opportunity to apply for such relief. Moreover, *the issue is not simply whether there is "new" evidence as, in some respects,* ***there arguably always will be additional evidence regarding a respondent's application for relief under section 212(c)*** *. . . as the mere passage of time can be said to augment an applicant's equities*. Rather, ***in cases such as this***, *the Board ordinarily will not consider a* ***discretionary grant . . . unless the moving party meets a "heavy burden"*** *and* ***presents evidence*** *of such a nature that the Board is satisfied* ***that if***

> ***proceedings* . . . *were reopened*, . . . *the new evidence offered would likely change the result in the case*.**

*Id*. at 473 (emphasis added).

Thus, the "heavy burden" referenced in *Coelho* is limited to the third component outlined above—the exercise of discretion in 212(c) relief—and should not be applied outside the 212(c) context. *See id.*; *Abudu*, 485 U.S. at 105. As such, it would be erroneous to apply the "heavy burden" standard of *Coelho* to the separate materiality or *prima facie* prongs of an asylum-based motion to reopen inquiry. Doing so runs afoul of the Supreme Court's prohibition on conflation, *Abudu*, 485 U.S. at 108, and renders the materiality and *prima facie* analyses superfluous, contrary to well-settled principles of statutory and regulatory construction. *See Advocate Health Care Network v. Stapleton*, 137 S.Ct. 1652, 1659 (2017); *Black & Decker Corp. v. Comm'r of Internal Revenue*, 986 F.2d 60, 65 (4th Cir. 1993).

Thus, the Board contradicts both the text of the statute and binding precedent when it grafts a "heavy burden" standard onto the tests for those distinct requirements. *See Cabas*, 928 F.3d at 183 (finding that, to satisfy the *prima facie* requirement, Cabas "need not establish that he will or *is even likely* to prevail if given another hearing before an IJ on the merits of his asylum and withholding claims"); *see also Smith*, 627 F.3d at 437.

## CONCLUSION

For the reasons provided above, *Amicus* supports Petitioner's request to vacate the Board's decision and remand with instruction to reopen Mr. [redacted] case.

Dated: April 09, 2021

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on April 09, 2021, I electronically Filed this *Amicus Curiae* brief of the American Immigration Lawyers Association in support of Petitioner ████████ ██████ using the Court's CM/ECF system which will automatically send an email notification of such filing to the attorneys of record who are registered CM/ECF users:

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1) the undersigned counsel certifies that this brief:

(i) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word and is set in 14-point Times New Roman font, and

(ii) complies with the length requirement of Rule 29(a)(5) because it is 4,871 words.

Dated: April 9, 2021

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