

1 JINGNI (JENNY) ZHAO (#284684)
2 ANOOP PRASAD (#250681)
3 KEVIN CHUN HOI LO (#278908)
4 MELANIE CHUN-YU KIM (#292588)
5 ASIAN AMERICANS ADVANCING JUSTICE –
6 ASIAN LAW CAUCUS
7 55 Columbus Avenue
8 San Francisco, California 94111
9 Telephone: (415) 896-1701
10 Fax: (415) 896-1702
11 Email: jennyz@advancingjustice-alc.org

FILED
Dec 10 2018
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY s/ Jennifer S DEPUTY

12 Attorneys for Petitioners

13 UNITED STATES DISTRICT COURT
14 SOUTHERN DISTRICT OF CALIFORNIA

15 SEAR UN,
16
17 Petitioner,

Case No. '18CV2764 BEN NLS
**PETITION FOR WRIT OF HABEAS
CORPUS**

18 v.
19 GREGORY J. ARCHAMBEAULT,
20 Field Office Director, San Diego
21 Field Office, United States
22 Immigration and Customs
23 Enforcement; RONALD D.
24 VITIELLO, Acting Director, United
25 States Immigration and Customs
26 Enforcement; KIRSTJEN M.
27 NIELSEN, Secretary, United States
28 Department of Homeland Security;
and MATTHEW G. WHITAKER,
Acting United States Attorney
General,

Respondents.

1 **INTRODUCTION**

2 1. Petitioner Sear Un is scheduled for deportation to Cambodia on
3 December 17, 2018. Mr. Un and his family fled the Cambodian genocide when he
4 was an infant. The United States has been his home for the past 34 years.

5 2. Mr. Un was convicted of burglary in 1998, his sole criminal
6 conviction. He has been subject to a final order of removal based on that conviction
7 since 2002. Cambodia, however, declined to accept his repatriation. Mr. Un has
8 lived in the community under the supervision of immigration authorities for the past
9 18 years. He has fully complied with the terms of his supervised release.

10 3. Mr. Un is now the father of two minor U.S. citizen children, with a
11 third expected in early 2019. He lives with his wife, children, and parents in
12 National City, near San Diego, California. He is the sole financial provider for the
13 family because his wife is unable to work due to her pregnancy and other medical
14 issues.

15 4. On September 5, 2018, Mr. Un reported to the San Diego Field Office
16 of Immigration and Customs Enforcement (“ICE”) as required by his order of
17 supervision. ICE officers arrested him without warning or explanation. Mr. Un is
18 currently detained in the Otay Mesa Detention Facility in San Diego and awaits
19 removal to Cambodia.

20 5. Recent changes in law have undermined the validity of Mr. Un’s
21 removal order. Notably, earlier this year the Supreme Court addressed the exact
22 statute under which Mr. Un was convicted—California residential burglary—and
23 held that it is not an aggravated felony under immigration law. *Sessions v. Dimaya*,
24 138 S. Ct. 1204, 1210 (2018). Mr. Un is no longer removable under current law.

25 6. Due process requires that Mr. Un be given a meaningful opportunity to
26 challenge his removal order before he is expelled from a country he has called
27 home for 34 years. Mr. Un has filed a motion to reopen with the Board of
28 Immigration Appeals (“BIA”) contesting his removability. The BIA, however,

1 refuses to adjudicate Mr. Un's request for an emergency stay of removal. Thus, Mr.
2 Un is in imminent danger of being deported based on a legally defective removal
3 order.

4 7. Mr. Un does not seek to challenge his removal order in this Court. He
5 asks the Court to grant a brief stay of removal for the pendency of his motion to
6 reopen. This Court's limited intervention would ensure Mr. Un a meaningful
7 opportunity to be heard prior to deportation and would prevent a gross miscarriage
8 of justice.

9 **JURISDICTION**

10 8. This Court has subject matter jurisdiction under 28 U.S.C. § 2241
11 (habeas corpus), the Suspension Clause of Article I of the U.S. Constitution, 28
12 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1361 (mandamus). The Court
13 may also grant relief under 28 U.S.C. §§ 2201-02 (Declaratory Judgment Act) and
14 28 U.S.C. § 1651 (All Writs Act).

15 **VENUE**

16 9. Venue is proper in the Southern District of California under 28 U.S.C.
17 § 1391(e) because Respondents are federal officers sued in their official capacity,
18 Respondent Archambeault is based in this district, Petitioner Un resides in this
19 district, and a substantial part of the events or omissions giving rise to these claims
20 occurred in this district. Venue is also proper under 28 U.S.C. § 2241 because
21 Petitioner Un is confined in this district.

22 **PARTIES**

23 10. Petitioner Sear Un is a 41-year-old citizen of Cambodia who has lived
24 in the United States since 1984. Mr. Un resides in San Diego County. He has been
25 in ICE custody since September 5, 2018. He is currently detained in the Otay Mesa
26 Detention Facility in San Diego. ICE intends to remove Mr. Un to Cambodia on
27 December 17, 2018.

28

1 house whose occupants were not at home. Two days later, his friends compensated
2 him with \$25 in gas money and \$100 from the proceeds of the burglary.

3 19. Mr. Un was convicted of felony residential burglary under Section 459
4 of the California Penal Code in 1998. He was sentenced to serve one year in county
5 jail.

6 20. A few months after completing his sentence, Mr. Un was detained by
7 immigration authorities for removal proceedings. He was released on bond in 1999
8 while his removal case was pending. The immigration judge ordered Mr. Un's
9 removal on August 31, 1999. Mr. Un appealed the immigration judge's decision.
10 The Board of Immigration Appeals dismissed his appeal on July 29, 2002,
11 rendering his removal order administratively final.

12 21. At the time, Cambodia refused to accept its nationals for removal from
13 the United States, and Mr. Un's removal order was never executed. Instead, Mr. Un
14 was permitted to remain in his community on an order of supervision, which
15 required him to report to ICE on a regular basis. He has fully complied with the
16 order of supervision. Mr. Un has had no further arrests or convictions. In 2011, his
17 1998 burglary conviction was expunged.

18 22. Mr. Un has been in a relationship with his wife for more than nineteen
19 years and they married in February 2017. They have a fourteen-year-old son and a
20 four-year-old daughter, both U.S. citizens, and they are expecting their third child.

21 23. Mr. Un has worked as a bindery operator for over twenty years. He is
22 the sole financial provider for his family. His wife suffers from a birth defect and
23 other medical conditions that have made her unable to work for the past nine
24 months.

25 24. On September 5, 2018, when Mr. Un reported to ICE, he was re-
26 detained without any prior warning. His deportation officer informed him that he
27 would be taken to see the Cambodian consulate. Mr. Un was given a three-minute
28 phone call with his wife and asked her to pick up their car at the ICE office.

1 25. Mr. Un was detained in the Otay Mesa Detention Facility in San
2 Diego. In late September, Mr. Un was transferred to the Krome Detention Center in
3 Miami, Florida to be interviewed by Cambodian government officials. He was
4 transferred back to Otay Mesa in October. The Cambodian government has issued a
5 travel document for Mr. Sear's repatriation.

6 26. Days after being re-detained, Mr. Un consulted with immigration
7 counsel and learned for the first time that he could challenge his removal order
8 based on recent changes in law. In *Sessions v. Dimaya*, the Supreme Court held that
9 California residential burglary is not an aggravated felony because the specific
10 aggravated felony provision at issue is unconstitutionally vague. 138 S. Ct. 1204,
11 1210 (2018). Thus, Mr. Un is no longer removable under current law.

12 27. A noncitizen who has been ordered removed has a statutory right to
13 file a motion to reopen the removal order under these circumstances. *See* 8 U.S.C. §
14 1229a(c)(7). "The motion to reopen is an 'important safeguard' intended 'to ensure
15 a proper and lawful disposition' of immigration proceedings." *Kucana v. Holder*,
16 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1 (2008)).

17 28. While a motion to reopen generally must be filed within 90 days of the
18 removal order, *see* 8 U.S.C. § 1229a(c)(7), the time limitation is subject to equitable
19 tolling. The BIA also has *sua sponte* authority to reopen removal proceedings at
20 any time. 8 C.F.R. § 1003.2(a). The BIA has held that *sua sponte* reopening is
21 appropriate where a "fundamental change in law" impacts the validity of a removal
22 order. *Matter of G-D-*, 22 I&N Dec. 1132, 1135 (BIA 1999); *Matter of X-G-W-*, 22
23 I&N Dec. 71, 74 (BIA 1998).

24 29. Mr. Un, through counsel, filed a motion to reopen with the BIA on
25 September 27, 2018.

26
27
28

1 30. In general, the filing of a motion to reopen does not automatically stay
2 execution of a removal order.¹ 8 C.F.R. § 1003.2(f). The BIA, in its discretion, may
3 grant a stay of removal for the pendency of the motion to reopen. *Id.*

4 31. Mr. Un's counsel mailed an emergency motion to stay removal to the
5 BIA on October 29, 2018. In accordance with the BIA Practice Manual, Mr. Un's
6 counsel began calling the BIA's Emergency Stay Unit on November 6, 2018.² From
7 November 6 to November 27, no one answered the phone and Mr. Un's counsel left
8 a daily voicemail describing Mr. Un's need for a stay of removal.

9 32. On November 28, 2018, Mr. Un's counsel learned that a deportation
10 flight to Cambodia was scheduled to depart the United States on December 17,
11 2018. On December 4, Mr. Un's deportation officer informed Mr. Un's counsel that
12 Mr. Un was scheduled to be deported on December 17. The deportation officer also
13 stated that beginning on December 11, Mr. Un would be transferred to Arizona and
14 then to Texas in preparation for deportation.

15 33. Since November 28, 2018, Mr. Un's counsel has called the Emergency
16 Stay Unit roughly a dozen times a day and has spoken to numerous BIA staff
17 members regarding Mr. Un's stay motion. None were able to confirm a date by
18 which the stay motion would be adjudicated, or even that the stay motion would be
19 adjudicated at all.

20 34. On November 28, 2018, a BIA staff member stated that she had no
21 record of the voicemails left by Mr. Un's counsel but would check on the stay
22 motion. On December 6, a second staff member stated that she had no record of the
23 November 28 conversation with the first staff member. On December 6, a third staff
24 member stated that Mr. Un had been erroneously listed as not detained in the BIA's

25 _____
26 ¹ The exception is the filing of motion to reopen a removal order that was entered *in*
absentia, which does trigger an automatic stay of removal. *Id.*

27 ² Executive Office for Immigration Review, *Board of Immigration Appeals*
28 *Practice Manual* 6.3(c), <https://www.justice.gov/eoir/page/file/1103051/download>
(describing procedures to seek a stay of removal).

1 system. Both Mr. Un's counsel and Mr. Un's deportation officer immediately faxed
2 written confirmation of Mr. Un's detained status to the BIA. Also on December 6, a
3 fourth BIA staff member informed Mr. Un's counsel that the BIA was unlikely to
4 act on the stay motion before Mr. Un's transfer on December 11 because his
5 deportation was not sufficiently imminent. On December 7, a fifth BIA staff
6 member warned Mr. Un's counsel that the BIA might not adjudicate the stay
7 motion until the day of the deportation flight.

8 35. Mr. Un's deportation officer separately contacted the BIA's
9 Emergency Stay Unit and was informed that emergency stays would be not be
10 adjudicated until a day or two before the scheduled removal date.

11 36. ICE has no policy for facilitating the return to the United States of
12 noncitizens who prevail on motions to reopen after being removed.

13 **CLAIM FOR RELIEF**

14 **COUNT ONE**

15 **Unlawful Removal Without Due Process**

16 37. The foregoing allegations are realleged and incorporated herein.

17 38. Mr. Un is a person protected by the Due Process Clause.

18 39. The Due Process Clause guarantees Mr. Un the right to a fair
19 proceeding and a meaningful opportunity to be heard before he is removed from the
20 United States.

21 40. Mr. Un's ground for contesting removal arose after his removal
22 proceedings concluded. He has not received an opportunity to have his new claim
23 heard at a meaningful time and in a meaningful manner.

24 41. Mr. Un is entitled to a stay of removal that allows him to be heard on
25 his challenge to removal before he is separated from his family and his home of
26 over three decades.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that the Court grant the following relief:

- a. Assume jurisdiction over this matter;
- b. Declare that Respondents' intended removal of Petitioner violates the Due Process Clause;
- c. Enjoin Respondents from removing Petitioner until seven days after the Board of Immigration Appeals has adjudicated his motion to reopen;
- d. Award Petitioner reasonable attorneys' fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412, and on any other basis justified under law; and
- e. Grant any other and further relief as the Court deems just and proper.

Dated: December 10, 2018

Respectfully submitted,

/s/ Jingni Zhao

Jingni (Jenny) Zhao
Anoop Prasad
Kevin Chun Hoi Lo
Melanie Chun-Yu Kim
Asian Americans Advancing Justice – Asian
Law Caucus

Attorneys for Petitioners
Email: jennyz@advancingjustice-alc.org

1 **VERIFICATION BY SOMEONE ACTING ON PETITIONER'S BEHALF**
2 **PURSUANT TO 28 U.S.C. § 2242**

3 I am submitting this verification on behalf of the Petitioner because I am one
4 of the Petitioner's attorneys. I have discussed with the Petitioner the events
5 described in this Petition. On the basis of those discussions, I hereby verify that the
6 statements made in the attached Petition for Writ of Habeas Corpus are true and
7 correct to the best of my knowledge.

8
9 Dated: December 10, 2018

/s/ Kevin Chun Hoi Lo

Kevin Chun Hoi Lo
Asian Americans Advancing Justice – Asian
Law Caucus

Attorney for Petitioners
Email: kevinl@advancingjustice-alc.org

10
11
12
13
14
15 I hereby certify that Mr. Lo has authorized the use of his electronic signature
16 on this document.

17
18 Dated: December 10, 2018

/s/ Jingni Zhao

Jingni Zhao
Asian Americans Advancing Justice – Asian
Law Caucus

Attorney for Petitioners
Email: jennyz@advancingjustice-alc.org