

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 24 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROT MYTHONG,

Petitioner,

v.

PAMELA BONDI, Attorney General,

Respondent.

No. 23-2412

Agency No.
A023-780-088

MEMORANDUM*

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

Argued and Submitted February 11, 2026
Pasadena, California

Before: SCHROEDER, WARDLAW, and BADE, Circuit Judges.
Dissent by Judge BADE.

Rot Mythong, a native and citizen of Cambodia, seeks review of a decision by the Board of Immigration Appeals (“BIA”) dismissing his appeal from an Immigration Judge’s (“IJ”) denial of his application for deferral of removal under the Convention Against Torture (“CAT”). We have jurisdiction under 8 U.S.C. § 1252. We grant the petition and remand.

Where, as here, the BIA summarily adopts the IJ’s decision without writing

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

its own opinion, we review the IJ’s decision as if it were the BIA’s. *Sinha v. Holder*, 564 F.3d 1015, 1019–20 (9th Cir. 2009). We review “legal determinations de novo, including whether the [agency] applied the wrong legal standard.” *Umana-Escobar v. Garland*, 69 F.4th 544, 550 (9th Cir. 2023). We review factual findings, including CAT determinations, for substantial evidence. *Andrade v. Garland*, 94 F.4th 904, 914 (9th Cir. 2024).

1. The IJ erred by considering each reason Mythong may face torture separately and failing to consider his “overall risk of being tortured.” *Cole v. Holder*, 659 F.3d 762, 775 (9th Cir. 2011). “CAT claims must be considered in terms of the aggregate risk of torture from all sources, and not as separate, divisible CAT claims.” *Velasquez-Samayoa v. Garland*, 49 F.4th 1149, 1154 (9th Cir. 2022) (quoting *Quijada-Aguilar v. Lynch*, 799 F.3d 1303, 1308 (9th Cir. 2015)). “Thus, in assessing a CAT claim from an applicant who has posited multiple theories for why he might be tortured, the relevant inquiry is whether the *total* probability that the applicant will be tortured—considering all potential sources of and reasons for torture—exceeds 50 percent.” *Id.*

Here, in support of his CAT claim, Mythong identified multiple theories for why he could suffer torture if he is removed to Cambodia, including (1) his belief in free speech and equal rights, and (2) his status as an outsider from the United States. However, the IJ required Mythong to show “more likely than not proof at

each stage, at each step of the chain,” that each theory *individually* would occur. In doing so, the IJ “misapplied our precedent.” *Velasquez-Samayoa*, 49 F.4th at 1155. Because Mythong presented multiple theories for why he could be tortured in Cambodia, the IJ “should have assessed whether aggregating the risks posed by [Mythong’s] theories results in a probability greater than 50 percent that he will be tortured.” *Id.* at 1156.¹

2. The IJ erred by failing to consider the risk Mythong would be tortured on account of his status as a convict who served twenty-nine years incarcerated in the United States. In evaluating a CAT claim, the agency must “consider all evidence relevant to the possibility of future torture.” *Velasquez-Samayoa*, 49 F.4th at 1156 (citation and quotation marks omitted). Although the agency is not required to “discuss each piece of evidence submitted,” it must give “reasoned consideration” to any “highly probative or potentially dispositive evidence.” *Cole*, 659 F.3d at 771–72. Because Mythong provided evidence that criminals in Cambodia are tortured, and, as the IJ acknowledged, Mythong committed “murder, which is probably the only culturally universally proscribed crime,” Mythong’s

¹ We discern no principled basis for the government’s argument that aggregation is required only when the risk of torture comes from more than one perpetrator, but not when a petitioner offers multiple theories for why he may be tortured by a single perpetrator. Instead, the agency must “assess whether the applicant’s *aggregate* risk of torture—considering all theories collectively—entitled him to CAT relief.” *Velasquez-Samayoa*, 49 F.4th at 1155.

status as a criminal deportee was the sort of highly probative evidence that merited the agency's explicit consideration. *See Cole*, 659 F.3d at 771–72.

3. Remand is necessary to correct the IJ's error. "[T]he function of the reviewing court ends when [an agency's] error of law is laid bare," and an exception occurs only in the "narrow circumstances . . . [w]here the agency was *required* to take a particular action." *Calcutt v. FDIC*, 598 U.S. 623, 629–30 (2023) (citation and quotation marks omitted); *see also I.N.S. v. Orlando Ventura*, 537 U.S. 12, 16–17 (2002) ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands. This principle has obvious importance in the immigration context."). The "narrow" exception to the usual remand rule does not apply here, given the IJ's failure to consider Mythong's status as a criminal deportee and the "highly fact specific and contextual" CAT inquiry to which the IJ applied the incorrect legal standard. *Calcutt*, 598 U.S. at 630; *see Velasquez-Samayoa*, 49 F.4th at 1154 n.1 ("Adjudicating a CAT claim will generally involve speculation about the likelihood of future events, and it will not be possible, or even desirable, to quantify probabilities precisely.").

The dissent's approach does precisely what our precedent forbids. The dissent argues that because the IJ described Mythong's different theories of torture as "hypothetically possible," "possible," and "could happen," we can infer that,

had the IJ considered the possibilities of torture in the aggregate, Mythong’s CAT claim would have failed. But these vague descriptors were stated in the context of the IJ’s application of an incorrect legal standard, and do not provide specific factual findings that would render this case one of the “‘narrow circumstances’ where remand is unwarranted because the law dictates the outcome that the agency must reach.” *Park v. Garland*, 72 F.4th 965, 978 (9th Cir. 2023) (quoting *Calcutt*, 598 U.S. at 630).

For example, in response to Mythong’s theory that he would be tortured because he is an “outsider,” the IJ stated that “such a thing could happen, but I can’t find on this record that it’s shown at that juncture to be *more likely than not* that it would happen. And so I’m afraid under [*Matter of J-F-F-*, 23 I. & N. Dec. 912 (A.G. 2006)] that we don’t have that *more likely than not* standard met.” The fact that a claim, considered individually, fails to meet a “more likely than not standard” does not mean that several claims, taken together, would also fail.² Thus, we remand in accordance with our guidance to “heed[] *Ventura*’s remand requirement after determining that the BIA applied an erroneous legal standard in resolving a substantive issue.” *Lopez v. Ashcroft*, 366 F.3d 799, 806–07 (9th Cir.

² The dissent also argues that we should presume that the IJ applied the correct legal standard, but the IJ’s analysis, and its repeated application of *Matter of J-F-F-*, which applies only “when an applicant posits *a single theory* for why he would be tortured,” illustrates that the IJ clearly applied the incorrect legal standard. *Velasquez-Samayoa*, 49 F.4th at 1155 & n.1.

2004).

PETITION GRANTED AND REMANDED.³

³ The motion for a stay of removal, Dkt. 2, is denied as moot.

MAR 24 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS*Mythong v. Bondi*, No. 23-2412

BADE, Circuit Judge, dissenting:

I disagree with the majority’s decision to grant Mythong’s petition for three reasons. First, I disagree that the record discloses legal error. Immigration officials, like all other public officers, are entitled to the presumption “they will act properly and according to law” in the performance of their regular duties. *FCC v. Schreiber*, 381 U.S. 279, 296 (1965); *Cruz v. Bondi*, 146 F.4th 730, 739 (9th Cir. 2025). Accordingly, “a reviewing court must ‘uphold’ even ‘a decision of less than ideal clarity if the agency’s path may reasonably be discerned.’” *Garland v. Ming Dai*, 593 U.S. 357, 369 (2021) (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

In his oral decision, the IJ recited the correct legal standard four separate times. First, he stated that under CAT, the government “may not remove an alien to a country where it’s more likely than not that he would be tortured. The applicant bears the burden of establishing that it’s more likely than not that he would be tortured if removed to the proposed country of removal.” Second, he stated “I think it would be more likely than not that someone in [Mythong]’s situation would be tortured if they were being returned to the Khmer Rouge, but they’re not.” Third, he reiterated the correct standard, stating “the issue is whether there’s a more likely than not possibility that [Mythong] would be tortured if

removed to the current country of Cambodia.” And, fourth, he stated that “there’s a high standard; you have to be sure that this is someone who is more likely than not to be tortured or killed in their country.”

Then, at the outset of his legal analysis, the IJ stated that “it’s not clear how exactly [Mythong] would go from his situation, upon landing at the airport in Cambodia, to being tortured by the government of Cambodia.” This statement too indicates that he was evaluating Mythong’s CAT claim holistically. And then in the middle of his analysis, the IJ explained his reasoning, stating: “[A]t this point, basically, we don’t have anything other than really bad human rights conditions in Cambodia generally with regard to political opposition, people, protesters, criminals, things of that nature. And [Mythong] at this point doesn’t fall into any of those categories.” Thus, even if the IJ “did not make it perfectly clear that [he] was performing an aggregate analysis,” these statements demonstrate that the “main point remained in focus: [Mythong had] to establish an *overall* likelihood of torture of greater than 50%.” *Iraheta-Martinez v. Garland*, 12 F.4th 942, 960 (9th Cir. 2021).

In reaching a contrary conclusion, the majority fails to apply the presumption of regularity. Instead, the majority uncritically accepts Mythong’s framing of the IJ’s analysis and ignores the litany of countervailing indications that the correct legal standard was applied. But “questionable” error is not a sufficient

basis to set aside final agency action. *INS v. Miranda*, 459 U.S. 14, 18 (1982); accord *McCarthy Co. v. Comm'r*, 80 F.2d 618, 622 (9th Cir. 1935) (“It is the duty of [the challenger] to bring up a record that affirmatively shows error.”).

Second, even assuming that the IJ applied the wrong legal standard, any such error was harmless because, “as a result of [the IJ’s] factual findings, ‘neither the result nor the [IJ]’s basic reasoning would change’” had the proper standard been applied. *Park v. Garland*, 72 F.4th 965, 978 (9th Cir. 2023) (quoting *Singh v. Barr*, 935 F.3d 822, 827 (9th Cir. 2019) (per curiam)). To obtain CAT relief, an alien must show a particularized and non-speculative risk of torture upon removal. See *Tzompantzi-Salazar v. Garland*, 32 F.4th 696, 706 (9th Cir. 2022); *Garcia v. Wilkinson*, 988 F.3d 1136, 1147–48 (9th Cir. 2021).

Here, the IJ made it clear that he found Mythong’s particularized theories of torture, whether considered individually or in the aggregate, to be based on “pure speculation.” *B.R. v. Garland*, 26 F.4th 827, 845 (9th Cir. 2022). He directly addressed each theory, stating that “[i]t’s hypothetically possible, I suppose, that he could be seen as a spy,” that “it’s hypothetically possible that he could become homeless” and be put in jail as a result, and that “it’s possible that at some point in the future [Mythong] could engage in a protest that the government of Cambodia could decide to crush by shooting into crowds or things like this.” But these hypothetical possibilities, the IJ noted, were based on nothing more than

speculation, because “at this point, basically, *we don’t have anything other than really bad human rights conditions in Cambodia generally* with regard to political opposition, people, protesters, criminals, things of that nature.” (emphasis added) The denial of CAT relief was therefore appropriate because “speculative fear of torture is not sufficient to satisfy the applicant’s burden.” *Garcia*, 988 F.3d at 1148.

The majority suggests that these were not “specific factual findings.” Mem. Disp. at 5. But the IJ’s statements plainly express his assessment of the likelihood of Mythong being tortured upon removal to Cambodia. An immigration judge need not “follow a particular formula or incant ‘magic words’” to make factual findings—so long as the findings are “reasonably discernible,” we must credit them as such. *Ming Dai*, 593 U.S. at 369. By insisting on magic words, the majority’s decision improperly “convert[s] judicial review of agency action into a ping-pong game.” *Singh*, 935 F.3d at 827 (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969)).

Third, the majority’s other assignment of error—that the IJ erred by failing to consider whether Mythong would be tortured because of his status as a criminal deportee—was not argued to the BIA and therefore cannot be a basis for granting Mythong’s petition. *See* 8 U.S.C. § 1252(d)(1). Although an alien “need not raise a ‘precise argument’ before the BIA in order to exhaust it,” he must at least “give[]

the BIA ‘an adequate opportunity to pass on the issue.’” *Arizmendi-Medina v. Garland*, 69 F.4th 1043, 1051 (9th Cir. 2023) (quoting *Diaz-Jimenez v. Sessions*, 902 F.3d 955, 960 (9th Cir. 2018)). The need for exhaustion before the agency is especially acute when an alien asserts that the IJ failed to consider the totality of the evidence, because the alien bears the burden of “explaining what [evidence] was specifically ignored” and “showing that the [ignored] evidence was ‘highly probative’ or ‘potentially dispositive.’” *Cruz*, 146 F.4th at 741 (quoting *Cole v. Holder*, 659 F.3d 762, 772 (9th Cir. 2011)).

Nothing in Mythong’s brief to the BIA could have put the agency on notice that he was arguing error on this basis. In his brief, Mythong identified two errors in the IJ’s CAT analysis. First, he argued that “the IJ erred in finding that he did not show that every step in the hypothetical chain of events will [make torture] more likely than not to happen,” and in doing so the IJ “failed to evaluate . . . all of the evidence presented to him” and “failed to give due weight to the country conditions filed.” Second, he argued that the IJ erred by failing to evaluate his claims in the aggregate. He did not mention the IJ’s supposed failure to consider his status as a criminal deportee, nor did he explain why such status would be “highly probative” or “potentially dispositive” of the likelihood that he would be tortured.¹ *Cruz*, 146 F.4th at 741 (quoting *Cole*, 659 F.3d at 772).

¹ Even in his briefs to this court, he fails to develop the latter argument.

In reaching this supposed error notwithstanding the failure to exhaust, the majority disregards the IJ's statement that "[a]ll evidence and testimony has been considered, whether or not specifically referenced in this decision." Moreover, the majority and Mythong fail to cite any country-conditions evidence showing that criminal deportees are likely to be tortured in Cambodia. And there is nothing in the record that supports the conclusion that criminal *status*, as opposed to criminal *detention*, is even slightly probative of torture, let alone highly probative or potentially dispositive. Accordingly, the IJ did not err by not explicitly addressing Mythong's criminal-deportee status.

I respectfully dissent.