

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 28 2026

FOR THE NINTH CIRCUIT

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

LINGYING WEI,

Petitioner,

v.

TODD BLANCHE, Acting Attorney
General,

Respondent.

No. 22-92

Agency No.
A215-675-021

MEMORANDUM*

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

Submitted August 13, 2026**
Reno, Nevada

Before: BADE, FORREST, and VANDYKE, Circuit Judges;
Concurring in the Judgment by Judge VANDYKE

Petitioner Lingying Wei, a native and citizen of China, seeks review of a decision of the Board of Immigration Appeals (BIA) dismissing her appeal from an Immigration Judge's (IJ) decision denying her motion to reopen and rescind her *in*

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

**The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

absentia removal order based on exceptional circumstances and ineffective assistance of counsel.

When the BIA “issues its own decision but relies in part on the [IJ’s] reasoning, we review both decisions.” *Budiono v. Lynch*, 837 F.3d 1042, 1046 (9th Cir. 2016) (citation omitted). We review for abuse of discretion the BIA’s denial of a motion to reopen. *Hernandez-Velasquez v. Holder*, 611 F.3d 1073, 1077 (9th Cir. 2010). “The BIA abuses its discretion when it acts arbitrarily, irrationally, or contrary to law.” *Id.* (citation modified). We have jurisdiction under 8 U.S.C. § 1252, and we grant the petition for review and remand for further proceedings.

An *in absentia* removal order “may be rescinded only . . . upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances.” 8 U.S.C. § 1229a(b)(5)(C)(i). To meet the “exceptional circumstances” standard, “the circumstances (1) must cause the noncitizen’s failure to appear, (2) must be beyond the petitioner’s control, and (3) must be sufficiently compelling.” *Montejo-Gonzales v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc). Ineffective assistance of counsel is “an independent basis for rescission of [an] *in absentia* removal order.” *Singh v. Garland*, 117 F.4th 1145, 1151 (9th Cir. 2024).

1. The agency did not abuse its discretion in determining that the instructions Wei received from the Department of Homeland Security (DHS) did

not support a finding of “exceptional circumstances” to warrant rescission of the *in absentia* removal order. 8 U.S.C. § 1229a(b)(5)(C)(i). Wei failed to show that DHS’s issuance of a document directing her to appear for an October 2, 2018, appointment in New York caused her to miss her September 26, 2018, Immigration Court hearing in San Diego. *See Montejo-Gonzales*, 166 F.4th at 854. Wei’s Notice of Release, issued on September 25, 2018, advised her that “[i]f you have already appeared before the Immigration Judge, you have been told when to appear for a further hearing.” At Wei’s last appearance before the San Diego Immigration Court, the IJ informed Wei that her next scheduled hearing was on September 26, 2018, and that she would be expected to proceed at that hearing. Wei was notified that failing to appear at that hearing could result in her being removed *in absentia*. Wei did not explain why the appointment on October 2 prevented her from attending the September 26 hearing.

2. Wei submitted a sworn affidavit stating that her previous attorney told her that she did not have to appear for the September 26 hearing because she had been released and would have a new hearing date in New York. The agency erred by failing to consider Wei’s sworn statement to determine whether ineffective assistance from her counsel caused her failure to appear at her final hearing. *See Singh*, 117 F.4th at 1151 (explaining that “a petitioner who fails to show up to a hearing because of an attorney can establish exceptional circumstances even in

cases where the petitioner was informed by separate notice contradicting an attorney's advice.”).

The agency rejected Wei's arguments that she failed to attend her September 26 hearing because of her prior counsel's advice, in part because Petitioner did not prove substantial compliance with the procedural requirements of *Matter of Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988). But “[s]ubstantial compliance with the *Lozada* factors is not required for consideration of an attorney's involvement as it relates to the totality of the circumstances” that may constitute exceptional circumstances under 8 U.S.C. §1229a(b)(5)(C)(i). *Singh*, 117 F.4th at 1151. Instead, compliance with the *Lozada* factors “only bears on the viability of ineffective assistance of counsel as an independent basis for rescission of the *in absentia* removal order.” *Id.* (citations omitted).

The agency also erred by treating the assertions in Wei's affidavit as “uncorroborated by evidence” and by rejecting the affidavit as unsupported by adequate documentary evidence. The agency relied on *Matter of S-L-H- & L-B-L-* to conclude that Wei's assertions were uncorroborated and “insufficient to establish exceptional circumstances that would warrant reopening removal proceedings.” 28 I. & N. Dec. 318, 325 (B.I.A. 2021).

The agency applied the incorrect standard in reviewing Petitioner's motion to reopen and supporting evidence. “Because motions to reopen are decided

without a hearing, we generally require the [agency] to accept the petitioner’s affidavits as true’ unless the facts stated ‘are inherently unbelievable.’” *Trigueros Quizar v. Blanche*, --- F.4th ---, No. 24-4847, 2026 WL 2620433, at *4 (9th Cir. Sept. 4, 2026) (alteration in original) (quoting *Arredondo v. Lynch*, 824 F.3d 801, 805–06 (9th Cir. 2016)). “Corroboration of a credible declaration by [a petitioner] moving to reopen” is therefore unnecessary. *Id.* (alteration in original) (quoting *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 892 (2002)).

The agency did not find that Petitioner’s affidavit was “inherently unbelievable,” *Arredondo*, 824 F.3d at 806, and therefore was required to credit the facts stated within it. *Singh*, 117 F.4th at 1148 n.1. The BIA’s reliance on *Matter of S-L-H- & L-B-L-* for its evidentiary standard was misplaced; the agency’s precedent cannot displace our own. *Trigueros Quizar*, 2026 WL 2620433, at *5 (citing *Mota v. Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008)).

We grant the petition and remand for further proceedings, during which the agency should consider Petitioner’s 8 U.S.C. § 1229a “exceptional circumstances” claim based on ineffective assistance of counsel in light of *Trigueros Quizar* and *Singh*.

PETITION GRANTED AND REMANDED.

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Wei v. Blanche, No. 22-92

VANDYKE, Circuit Judge, concurring in the judgment:

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

Another day, another casualty of our circuit’s absurd deem-true rule. I recently wrote about the utter illogic and unlawfulness of the Ninth Circuit’s deem-true rule, which—without any textual or practical justification—requires the agency to accept as true a petitioner’s stated excuse for why she missed an immigration court hearing. *Trigueros Quizar v. Blanche*, --- F.4th ---, No. 24-4847, 2026 WL 2620433, at *5–11 (9th Cir. 2026) (VanDyke, J., dissenting). Even though the petitioner has an obvious incentive to lie to avoid removal from this country—and even if other record evidence shows her asserted excuse to be implausible—the agency must treat whatever the petitioner says as gospel. *Id.* at *8–9. In the real world, we account for situations where people can gain a lot from lying by requiring them to back up their claims with proof. *See id.* at *8. But here in the Ninth Circuit, requiring corroboration is verboten, *see Celis-Castellano v. Ashcroft*, 298 F.3d 888, 892 (9th Cir. 2002), and “the self-serving nature of a declaration in support of a motion to reopen is not an appropriate basis for discrediting its content.” *Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005). Indeed, nothing—and I mean that literally—is an “appropriate basis” in our court for the agency doubting a petitioner’s declaration in support of a motion to reopen. It must be treated as 100% true, 100% of the time.

In this case calendared for argument just two days after *Trigueros Quizar*, the deem-true rule strikes again. This time, it requires that we accept as true Petitioner

Lingying Wei’s claim that her purported prior attorney inexplicably advised her to skip her September 26, 2018, immigration court hearing despite a notice warning that failing to attend could result in her removal *in absentia*. The agency reasonably found that there was no record evidence that Huang ever was Wei’s attorney. And it reasonably concluded that without a predicate attorney-client relationship, Wei’s exceptional-circumstances claim based on alleged ineffective assistance of counsel necessarily failed. *See Singh-Bhathal v. INS*, 170 F.3d 943, 946–47 (9th Cir. 1999); *see also Hernandez v. Mukasey*, 524 F.3d 1014, 1017–19 (9th Cir. 2008); *Monjaraz-Munoz v. INS*, 327 F.3d 892, 896 (9th Cir. 2003). Because of the deem-true rule, however, the agency “erred”—because it was required to simply accept Wei’s assertion that she did, in fact, have an attorney-client relationship with Huang.

I acknowledge that the agency was required by our circuit’s indefensible precedent to treat Wei’s claim as true. I therefore concur in the judgment.¹ Until an en banc panel of our court—or more realistically, the Supreme Court—corrects our flawed precedent, cases like this will continue to pour out of the Ninth Circuit.

I.

In July 2018, Customs and Border Patrol (CBP) officers encountered Wei

¹ I also agree that Wei failed to explain why an October 2, 2018, DHS appointment in New York caused her to miss her September 26, 2018, removal hearing in San Diego. Mem. Disp. at 2–3. Because the facts and law related to that claim are not relevant to this concurrence, I will not discuss them here.

attempting to enter the United States by hiding in a vehicle. Wei had no valid entry documents, and her two prior applications for a visa had been denied. Wei told the officers she'd flown from China to Tijuana, Mexico, where she toured with friends for one month while her parents arranged for a smuggler to transport her to the United States. Her goal, she admitted, was to live and work with her father's cousin in New York. Wei also told the officers she feared returning to China because she had been arrested by Chinese police for attending her first-ever Christian function. The Department of Homeland Security (DHS) took Wei into custody pending her completion of a credible fear interview.

During the credible fear interview, Wei said that an attorney named Lanhui Huang would represent her. But Huang had not entered—and never would enter—an appearance before the agency on Wei's behalf. When the asylum officer conducting the interview tried to contact Huang at the number Wei provided, Huang's assistant answered and conveyed that Huang was unavailable for the interview. Wei elected to conduct the interview without an attorney. During the interview, Wei disavowed holding any religious beliefs but again claimed that she feared religious persecution if she returned to China. The asylum officer found Wei had shown a credible fear of persecution and issued her a Notice to Appear. Her first immigration court hearing was set for September 4, 2018.

Wei appeared pro se at the September 4th hearing and requested a continuance

so she could seek the services of an attorney. The IJ granted Wei's request, and Wei was personally served with a notice informing her that her next hearing was set for September 19, 2018. At the September 19th hearing, Wei again appeared pro se and requested more time to retain counsel. The IJ granted another continuance but instructed Wei that if she did not have an attorney by the next hearing, she would be expected to represent herself. Wei was again personally served with notice that her next hearing was set for September 26, 2018. The notices Wei received warned that failing to appear at a scheduled hearing could cause her to be ordered removed *in absentia*.

On September 25, 2018, Wei was released from DHS custody and personally served with a notice of release that warned, “[i]f you have already appeared before the [IJ], you have been told when to appear for a further hearing.... If you do not appear for the hearing ... [y]our deportation hearing may be held in your absence.” Again, since Wei had only appeared pro se, all the notices Wei received were served only on Wei.

Wei failed to appear at her September 26th hearing, and the IJ ordered her removed *in absentia*. A few weeks later, Wei—now represented by an attorney named Huma Kamgar—moved to reopen proceedings and rescind her *in absentia* removal order. As relevant here, Wei argued that her “prior counsel’s” ineffective

assistance was an exceptional circumstance that caused her failure to appear.² Wei submitted an affidavit stating that, on the day she was released from custody, her “previous attorney Ms. Huang” told her she didn’t have to attend her September 26th hearing.

The agency rejected Wei’s ineffective-assistance-based claim because it concluded, among other things, that Wei failed to show that she ever had an attorney-client relationship with Huang.³

II.

We conclude today that the agency erred by refusing to accept as true Wei’s claim that Huang was her attorney because it was “uncorroborated by evidence.” Mem. Dispo. at 4–5. That result is unavoidable under our deem-true precedent. *See Trigueros Quizar*, 2026 WL 2620433, at *4–5. It also (again) illustrates the problems with that precedent.

To achieve reopening and rescission of her *in absentia* removal order, Wei must demonstrate, through “affidavits or other evidentiary material,” 8 U.S.C.

² Wei recognized that her claim was based on ineffective assistance of counsel and asserted that she had attempted to comply with the requirements of *Matter of Lozada*, 19 I & N. Dec. 637 (BIA 1988).

³ The IJ’s decision focused more extensively on Wei’s failure to establish the predicate attorney-client relationship. Because the BIA’s decision approved of the IJ’s reasoning, we “review both decisions.” *Sarr v. Blanche*, 181 F.4th 933, 941 (9th Cir. 2026) (quoting *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1293 (9th Cir. 2018)).

§ 1229a(c)(7)(B), that “exceptional circumstances” caused her failure to appear, *id.* § 1229a(b)(5)(C)(i). It was entirely reasonable, in assessing whether Wei met that burden, for the agency to require Wei to substantiate her claim that Huang represented and improperly advised her. *See Trigueros Quizar*, 2026 WL 2620433, at *8 (VanDyke, J., dissenting). And since the evidence strongly suggested that Huang never was Wei’s attorney, it was similarly reasonable—and certainly not an abuse of discretion—to conclude that Wei’s ineffective-assistance-based claim failed.⁴ But in the deem-true world, acting rationally is reversible error: the agency may look only to Wei’s affidavit and must ignore any evidence that contradicts what Wei said in it, despite the obvious incentive for Wei to lie or embellish. *See id.* at *8–9.

As this case illustrates, our deem-true regime virtually guarantees that a petitioner will obtain rescission of an *in absentia* removal order. All a petitioner needs to do is find something that our court has called an “exceptional circumstance”—like the incorrect advice of an attorney, *see Singh v. Garland*, 117 F.4th 1145, 1151 (9th Cir. 2024)—“and then submit a barebones declaration claiming that very circumstance is what caused [her] failure to appear.” *Trigueros*

⁴ With her motion to reopen, Wei filed a screenshot of an email that seems to suggest that Huang bought her an airline ticket to New York on September 26, 2018. But Wei does not explain how this screenshot supports her claim that Huang was her attorney.

Quizar, 2026 WL 2620433, at *10 (citations omitted). Ironically, the more honest a petitioner is, the less likely she is to obtain rescission of her *in absentia* removal order. If a petitioner's declaration asserts the true reason she missed her hearing, there's a chance it won't count as an exceptional circumstance. But if a petitioner (or her attorney) is clever enough to (falsely) base the claim on the fact patterns this court has already identified as likely exceptional circumstances, she is certain to succeed.

And while I'm loath to give immigration attorneys any ideas how to game our easily gamed immigration precedent in this circuit, our deem-true case law places no apparent limit on how many times an alien can pull this off. Here, for instance, Wei could skip her next removal hearing and claim that her attorney told her to do so once again. Or if Wei wants to be creative, she can mix things up and assert a variety of "exceptional circumstances." Maybe the first time, her attorney told her to skip the hearing. Then the second time, she left with ample time to make her hearing but "encountered severe traffic that more than doubled [her] travel time." *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 857 (9th Cir. 2026) (en banc). And maybe the third time, she experienced a sudden bout of memory loss due to a lingering head injury. *Cf. Hernandez-Galand v. Garland*, 996 F.3d 1030, 1035 (9th Cir. 2021), *overruled on other grounds by Montejo-Gonzalez*, 166 F.4th at 854. Any normal person would want to see some proof before accepting such claims. But they

aren't "*inherently* unbelievable," and therefore, in the Ninth Circuit, they must be blindly treated as truth. *See Trigueros Quizar*, 2026 WL 2620433, at *4. As I said just a few weeks ago, this rule and its attendant results cannot be right. *Trigueros Quizar*, 2026 WL 2620433, at *11 (VanDyke, J., dissenting).⁵

* * *

Because the memorandum disposition correctly applies our deem-true precedent, I reluctantly concur in the judgment. But because that precedent is wrong, I write separately in the hope that it will be corrected.

⁵ The memorandum disposition also faults the agency for requiring Wei to demonstrate "substantial compliance" with the *Lozada* requirements. *See* Mem. Disp. at 4. And as it correctly notes, a panel of our court recently held that *Lozada* compliance "only bears on the viability of ineffective assistance of counsel as an independent basis for rescission of the *in absentia* removal order," but "[s]ubstantial compliance with the *Lozada* factors is not required for consideration of an attorney's involvement as it relates to the totality of the circumstances." *Singh*, 117 F.4th at 1151. *Singh* strikes me as incorrectly decided. But without the deem-true rule, we wouldn't need to reach the *Singh* issue here. If our case law allowed the agency to require Wei to corroborate her asserted excuse and look at *all* the evidence bearing on the credibility of her claim, then the agency could reasonably reject Wei's claim for failing to establish the predicate attorney-client relationship without getting into the *Lozada* requirements.