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Critical Analysis of Section 101 of The REAL ID Act of 2005

Executive summary

1. The proposed statutory standards are being advertised as an attempt to establish a uniform rule applicable to all circuits and adjudicators in order to bring an end to non-uniform standards enforced in different jurisdictions.

    a. Yet the actual effect is likely to be less uniformity, not more, in actual adjudications. The proposed standard provides no guidance for adjudicators beyond the adjudicator's own "discretion" as to what evidence to consider, what corroboration to require, and what factors to weigh in determining credibility. Taken together, the proposed changes make an immigration judge's (IJ's) factual determinations immune from review. Thus, judges who are perceived by Government trial attorneys as being too "soft" on aliens will use their discretion to find aliens to be credible, while judges who are perceived by private lawyers to be too "hard" on asylum-seekers will use their discretion to find aliens to be incredible. Administrative and judicial review, which currently function to correct errors in IJ decision-making even under present constrained conditions, will cease to exercise any meaningful guiding influence over fact-finders' discretionary determinations.

2. The proponents of the legislation claim that the new statutory standards are merely a codification of rules already established for the determination of credibility, corroboration and demeanor.

    a. Yet the proposed statutory language "cuts and pastes" snippets of current standards together to create an entirely new standard that is, for all intents and purposes, no standard at all.

        i. Current law requires fact finders to consider all of the evidence in a case, and to state cogent reasons for why some evidence is to be given greater weight than other evidence, and why discretion is to be exercised in one way rather than another. Explanations of this kind facilitate administrative and judicial review and help to ensure that IJs are

adjudicating cases fairly and consistently.

ii. The proposed new standard would give fact finders unrestricted discretion to give no consideration to items of evidence, or even to the great preponderance of evidence, in a case, and to determine the credibility of an applicant for asylum, or for any other relief from removal, or for any other discretionary determination under the immigration laws, on the basis of any inaccuracy or inconsistency in any statement made by the applicant or by a witness, no matter how minor, and any failure to provide the court with corroborative evidence, no matter how unreasonable the demand, unless the alien can prove that the evidence is unavailable.

iii. Since the fact-finder would be authorized to make a determination of fact, or of credibility, on virtually any basis at all, the BIA and the courts would be left with no meaningful statutory tools to ensure consistency, uniformity and fairness in individual adjudications. Thus, by providing blanket discretion, a so-called "uniform standard" would license non-standard decision-making and bring chaos to asylum adjudication.

3. Section 101 is being advertised as a necessary weapon in America's war against terrorists.

   a. Yet the provisions of Section 101 are not likely to be more effective than current asylum laws at "screening terrorists." The new rules of Section 101 would apply to all asylum applicants, and they do not even purport to be directed specifically at terrorists. If rules of this kind were to be proposed for use in proceedings involving citizens, every patriotic citizen would reject them outright as creating unconstitutional "kangaroo courts." Yet these unfair rules will apply to alien wives, husbands, children, parents, friends, neighbors and essential employees of citizens, as well as to all other non-citizens who apply for benefits under the immigration laws.

4. Taken together, the legislation creates an unfair and unworkable mess based on three untenable presumptions:

   a. Section 101 presumes absolute perfection on the part of the Immigration Judges: perfection in temperament, in wisdom, in clarity of insight, and in understanding of human nature. Only perfect human beings could ever wield such a complete and unreviewable power of life and death over their fellow human beings without risking grave error. Yet real-life experience is full of evidence that few, if any, such God-like persons have ever served as Immigration Judges.

   b. Section 101 requires absolute perfection of applicants for asylum and all other removal remedies and discretionary grants; a perfection that would be required to extend over all statements made during their entire lifetimes, and that would be required similarly to extend to their immigration lawyers and to all witnesses in

their cases. Yet real-life experience is full of deserving applicants who have, at some point in their lives, stretched the truth, failed to speak with accuracy, failed to prevent misquotation, or relied upon false documentation for some purpose. Real life is full of attorneys who fail to provide complete service to their clients – and particularly to impoverished asylum clients. And everyone has friends or relatives who see things a little differently than they do. Any one of these real-life conditions could become a death sentence for an asylum seeker under the proposed law.

c. Section 101 assumes the worst about America's best-qualified judges, while it assumes the best about some of America's lowest-paid judges. Section 101 vests complete and unreviewable discretion in administrative judges, who serve for limited terms and are subject to appointment, reassignment and dismissal by politicians in the executive branch. At the same time, it presumes that Article III judges, who have been appointed by the President and the Senate pursuant to the Constitution for a lifetime of judicial service, are unfit to review the decisions of these same administrative judges.

The analysis that follows is organized around the actual text of the REAL ID Act of 2005. The text has been divided into 21 segments which are analyzed separately and compared with current law. The authors hope that this memo will shed light on the radical, undesirable and unnecessary changes that the REAL ID Act would bring to asylum law in the United States.

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19. "CREDIBILITY DETERMINATION. – The immigration judge should consider all relevant factors and may, in the judge's discretion, base the judge's credibility determination on any such factor, including the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not made under oath), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim. There is no presumption of credibility." – RID sec. 101(c), adding new INA section 240(c)(4)(C). 24

20. "No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 208(b)(1)(B), 240(c)(4)(B), or 241(b)(3)(C), unless the court finds that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable."-- RID Sec. 101(d), amending INA section 242(b)(4)(D). 25

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REAL ID ACT OUTLINE AND APPLICABLE LAW

1. *PROPOSED CHANGE:* "**(B) BURDEN OF PROOF. – (i) IN GENERAL. – The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A).**" – RID sec. 101(a)(3), adding new INA section 208(b)(1)(B)(i).

   a. ***Critique:*** *This language is unnecessary since the burden of proof is clearly set forth in current law, which is uniformly applied across the judicial circuits.*

   b. ***Analysis of Current Law:***

      i. 8 C.F.R. sec. 208.13(a): "Burden of proof. The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. ..." *See* 8 C.F.R. sec. 1208.13(a) (to same effect).

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2. *PROPOSED CHANGE:* "**To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be a central reason for persecuting the applicant**." – RID sec. 101(a)(3), adding new INA section 208(b)(1)(B)(i).

   a. ***Critique:*** *This amendment would add a "centrality" requirement to the asylum and withholding provisions that is inconsistent with international treaties, legal precedent of the Board of Immigration Appeals and all judicial circuits, and real-world refugee situations.*

   b. ***Analysis of Current Law:*** "The statutory establishment of a central reason standard appears to be a modification to the mixed motives standard in some case precedents." Garcia, Lee & Tatelman, Immigration: Analysis of the Major Provisions of H. R. 418, The REAL ID Act of 2005 6 (Congressional Research Service, Feb. 2, 2005) ("CRS Report").

   c. *Current law:* INS v. Elias-Zacarias, 502 U.S. 478, 482, 112 S.Ct. 812, 816 (1992) with respect to political asylum, the Court was clear in stating that the burden is on the alien seeking asylum to prove that his persecution is specifically "on account of" his political views; simply establishing one belongs to a particular political party or faction is not sufficient under current law. However, the Court did not require that the central reason for the persecution must be the person's political views.

   d. "The failure of the persecutor to place his or her identity and motivations in writing does not undercut the applicant's credibility and cannot be the basis for an IJ denial because it does not rest on the "legitimate nexus required in credibility findings." *Secaida-Rosales v. INS*, 331 F.3d 297, 311 (2d Cir. 2003) . . .." Kurzban's Immigration Law Sourcebook 410 (AILF 9th Ed. 2004).

   e. "Evidence about proof of intent and motive would be particularly hard to provide because both involve proof of a persecutor's state of mind." Canas-Segovia v. INS, 902 F.2d 717, 727 (9th Cir.), *aff'd on alternative grounds after remand*, 970 F.2d 599 (9th Cir. 1992).

f. Eduard v. Ashcroft, 379 F.3d 182, 189 - 191 (5th Cir. 2004) ("Petitioners contend that the IJ applied erroneous law to conclude that Petitioners' feared persecution was not based on race or religion. The IJ concluded that Petitioners did not satisfy 8 C.F.R. ' 208.13(b)(2)(i)(A), which requires that a fear of persecution be "on account of" a protected belief or characteristic. Although the IJ recognized that Petitioners' fears were partially due to their Christianity, [FN6] the IJ held that such fear was not "on account of" their religion because Indonesia is rife with civil uprisings and violence which are not specific to Christian or Chinese inhabitants. [FN7] The IJ supported this legal conclusion by citing *Matter of Mogharrabi*, 19 I & N Dec. 439, 447 (BIA 1987) *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647 (9th Cir.1997). Respondent cites *Hallman v. INS*, 879 F.2d 1244 (5th Cir.1989), and *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir.1987), to further support the IJ's conclusion. None of these cases, however, holds that a fear of persecution based on a protected belief or characteristic is negated simply because the applicant also fears general civil violence and disorder. These cases hold that an applicant's fear of persecution cannot be based solely on general violence and civil disorder. None of these cases, however, supports the IJ's proposition that fear based on a protected belief or characteristic is negated simply because of general violence and civil disorder. Congress no doubt anticipated that citizens of countries rife with general violence and civil disorder would seek asylum in the United States. If it had intended to deny refugee status to applicants from such countries, who also feared persecution based on one of the five statutorily protected beliefs and characteristics, it would have presumably stated so.

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3. *PROPOSED CHANGE:* "**(ii) SUSTAINING BURDEN. – The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."** – RID sec. 101(a)(3), adding new INA section 208(b)(1)(B)(ii).

a. ***Critique:*** *The language setting the substantive standard for the burden of proof e is unnecessary, since the proposed standard is already applied uniformly by the BIA and in all circuits. However, requiring satisfaction of the "trier of fact" threatens to eliminate review of such decisions by the BIA as well as by the courts.*

b. ***Analysis of Current Law:***

c. *Current law:* Where other evidence is not available, an applicant for asylum may prevail on the basis of his own testimony, standing alone.

i. 8 C.F.R. secs. 208.13(a), 208.16(b), 1208.13(a), 1208.16(b).

ii. Uncorroborated testimony is sufficient to establish a claim for asylum so long as it is credible, persuasive and specific. See Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647 (9th Cir.1997).

(1) Debab v. INS, 163 F.3d 21, 26 (1st Cir. 1998) ("*Mogharrabi* also establishes that an asylum applicant's own testimony may suffice to support an asylum claim. *See Mogharrabi*, 19 I. & N. Dec. at 445. But *Mogharrabi* instructs that such testimony must be "sufficiently detailed to provide a plausible and coherent account of the basis for [the alien's] fear." *Id."*)

(2) Secaida-Rosales v. INS, 331 F.3d 297, 311 (2d Cir. 2003) (reversing BIA decision relying on IJ credibility finding based in part upon failure to provide documents); Sotelo-Aquije v. Slattery, 17 F.3d 33, 36 (2d Cir. 1994)

(3) Senathirajah v. INS 157 F.3d 210, 216 (3d Cir. 1998) ("Common sense establishes that it is escape and flight, not litigation and corroboration, that is foremost in the mind of an alien who comes to these shores fleeing detention, torture and persecution. Accordingly, corroboration is not required to establish credibility.")

(4) Getahun v. INS, 181 F.3d 88, 1999 WL 333173, **3 (4th Cir. 1999) ("Corroborative, documentary evidence is not necessary for the asylum applicant to sustain her burden of proof where the applicant's testimony is sufficiently consistent, specific, and credible. *See Matter of Mogharrabi*, 19 I. & N. Dec. 439, 444-45 (BIA 1987)". ...The IJ and the Board expressed a number of reasons to question Getahun's credibility. "In light of these inconsistencies and the lack of explanation, we agree with the Board that the IJ properly required some corroborative, documentary evidence to sustain Getahun's burden of proof. *See Mogharrabi*, 19 I. & N. Dec. at 444. Absent that, we find that the immigration judge and the Board provided "specific, cogent reason[s]" for discrediting Getahun's testimony.")

(5) Ljucovic v INS, 76 F.3d 379 (Table), 1996 WL 34906 (6th Cir. 1996)(unpublished opinion) ("Clearly, *Mogharrabi* was concerned about situations in which the alien's allegations, though truthful and deserving of a grant of asylum, are not of such a nature that the alien could be expected to produce corroborating evidence; the court stated, "we recognize, as have the courts, the difficulties faced by many aliens in obtaining documentary or other corroborative evidence to support their claims of persecution." *Id.* at 445. Petitioner's case is not one envisioned by *Mogharrabi*, in which no corroborating evidence is necessary, because corroborating evidence of the events to which he testified should be readily available, and because Petitioner's testimony was not "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear."")

(6) Georgis v. Ashcroft, 328 F.3d 962, 969 (7th Cir. 2003) ("it is not necessary for an asylum applicant to submit corroborating evidence in order to sustain her burden of proof."); Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984) ("Sometimes . . . the applicant's own testimony will be all that is available regarding past persecution or the reasonable possibility of

persecution. In these situations, the applicant's uncorroborated testimony will be insufficient to meet the evidentiary burden unless it is credible, persuasive, and points to specific facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution on one of the specified grounds, or, alternatively or in addition thereto, must show through testimony and corroborative objective evidence that he or she has good reason to fear persecution on one of the specified grounds.") (fn. omitted).

(7) Ladha v. INS, 215 F.3d 889, 901 (9th Cir. 2000) (alien's testimony was not persuasive and was contradicted by evidence introduced at hearing); Mendoza-Perez v. INS, 902 F.2d 760 (9th Cir. 1990) (testimony concerning letter threat supported asylum without production of letter); Aguilera-Cota v INS, 914 F.2d 1375, 1380-81 (9th Cir. 1990) (same; unsigned note not produced); Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984) ("we cannot agree with the Immigration Judge that Bolanos must present independent corroborative evidence of the specific threat to his life. *Cf. Reyes v. INS*, 673 F.2d 1087, 1090 (9th Cir.1982) (requirement of corroborating affidavits to support claim of extreme hardship made in motion to reopen deportation proceedings imposes an unnecessarily heavy evidentiary burden). We recognize that omitting a corroboration requirement may invite those whose lives or freedom are not threatened to manufacture evidence of specific danger. But the imposition of such a requirement would result in the deportation of many people whose lives genuinely are in jeopardy. Authentic refugees rarely are able to offer direct corroboration of specific threats. "[I]t is difficult to imagine what other forms of testimony the petitioner[s] could present other than [their] own statement[s]." *McMullen*, 658 F.2d at 1319; *accord Zavala-Bonilla*, 730 F.2d 565. (Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.").

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4. *PROPOSED CHANGE:* – "**In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record.**" – RID sec. 101(a)(3), adding new INA section 208(b)(1)(B)(ii).

a. ***Critique:*** *The proposed change would alter current adjudicatory standards set by BIA and judicial precedent. The use of "may" rather than "shall" would authorize the Immigration Judge to ignore any evidence other than the "credible testimony" presented. Conversely, it appears to make the consideration of "credible testimony" optional if the Immigration Judge prefers to focus, instead upon any "other evidence of record." This would tend to make asylum decisions less, not more, uniform and less, not more, predictable prior to the assignment of the Immigration Judge. Any change that would make the outcome of a particular case even more likely to depend on the identity of the adjudicator assigned to the case would be inconsistent with the fundamental precept that laws apply uniformly to all persons.*

b. ***Analysis of Current Law:***

c. *Current law:* Board must consider all meaningful facts.

i. Luna v. INS, 709 F.2d 126 (1st Cir. 1983) (failure to consider meaningful facts reversible);

ii. An alien's right to due process depends upon his receiving a "full and fair hearing." Ahmed v. Gonzalez, Nos. 03-3374/3375/3376/3377, __ F.3d __, 2005 WL 415261 slip op. Jan. 25, 2005, as amended, Feb. 23, 2005, 2005 U.S. App. LEXIS 1285 (6th Cir.) ("It is undisputed that petitioners in such proceedings are entitled to an unbiased arbiter who has not prejudged their claims. See, e.g., *Kaoru Yamataya v. Fisher (a.k.a. Japanese Immigrant Case)*, 189 U.S.86, 101(1903) . . . *Mikhailevitch v. INS*, 146 F.3d 384, 391 (6th Cir. 1998). . . . [I]t should also be noted that "the administrative findings of fact [of an immigration judge] are conclusive unless any reasonable adjudicator would be compelled to find to the contrary." 8 U.S.C. sec. 1252(b)(4)(B); *see also INS v. Elias-Zacarias*, 502 U.S. 478, 481, 117 L. Ed. 2d 38, 112 S. Ct. 812 (1992). Therefore, ensuring due process at a hearing before an immigration judge may be particularly important in immigration cases given such a high presumption of correctness on appeal.");

iii. Opoka v. INS, 94 F.3d 392 (7th Cir. 1996) (suspension case);

iv. Figueroa-Rincon v. INS, 770 F.2d 766 (9th Cir. 1985) (Board must consider new evidence with totality of previous evidence);

v. Chookhae v. INS. 756 F.2d 1350 (9th Cir. 1985) (Board should have considered facts not as they existed in 1977 but as it had case before it in 1982);

vi. Gonzalez-Batoon v. INS, 767 F.2d 1302, n. 2 (9th Cir. 1985), *aff'd en banc* 791 F.2d 681 (9th Cir. 1986) (Board reversed where it failed to consider psychiatric evaluations properly).

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5. *PROPOSED CHANGE:* "**Where the trier of fact determines, in the trier of fact's discretion, that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot obtain the evidence without departing the United States."** – RID sec. 101(a)(3), adding new INA section 208(b)(1)(B)(ii).

a. ***Critique:*** *This amendment would change the law that applies in all judicial circuits, to restrict judicial review of the legal question of what quantum of evidence is needed to prove particular elements of a persecution claim (see Section 20 infra). It appears to deprive the asylum applicant of an opportunity to explain the failure to produce corroborative evidence for any reason except being unable to obtain it without leaving the country. It clearly contradicts established law as expressed in Section 3 of this memorandum, supra, which will cause confusion and conflicting decisions. It may also abrogate the power of the BIA to oversee IJ determinations with respect to the necessity for corroborative evidence. As a result, each case will become a law unto itself,*

uniformity of adjudication will be sacrificed to administrative convenience, and each Immigration Judge will potentially demand a different level of corroboration in order to establish an applicant's "credibility" notwithstanding the applicant's credible and persuasive testimony to specific facts that demonstrate the applicant's status as a refugee.

b. ***Analysis of Current Law:***

c. *Current Rule:* The Board of Immigration Appeals currently has power to oversee the discretionary determinations of Immigration Judges. 8 C.F.R. Sec. 1003.1(d)(3)(ii) ("The Board may review questions of law, discretion, and judgment and all other issue in appeals from decisions of immigration judges de novo.") *See* Senathirajah v. INS 157 F.3d 210, 215-216 (3d Cir. 1998). However, the BIA's power to review IJ determinations as to credibility is severely restricted under current regulations at 8 C.F.R. Sec. 1003.1(d)(3)(i) ("The Board will not engage in de novo review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.").

d. *Current BIA Rule:* Even where alien is credible, alien may need to produce corroborating evidence in asylum case where reasonable to expect, or to provide explanation for absence of such evidence.

i. Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997); Matter of Dass, 20 I&N Dec. 120 (BIA 1989).

(1) "Where the record contains general country condition information, and an applicant's claim relies primarily on personal experiences not reasonably subject to verification, corroborating documentary evidence of the asylum applicant's particular experience is not required. Unreasonable demands are not placed on an asylum applicant to present evidence to corroborate particular experiences (e.g., corroboration from the persecutor). However, where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided....[A]n asylum applicant should provide documentary support for material facts which are central to his or her claim and easily subject to verification, such as evidence of his or her place of birth, media accounts of large demonstrations, evidence of a publicly held office, or documentation of medical treatment. If the applicant does not provide such information, an explanation should be given as to why such information was not presented. .... The absence of such corroborating evidence can lead to a finding that an applicant has failed to meet her burden of proof." Matter of S-M-J-, 21 I&N Dec. 722, 725-26 (BIA 1997).

ii. *Current Rule* "Generally, an adverse credibility ruling may be based in part but not solely on an applicant's failure to provide corroboration." CRS Report 3. The weaker the applicant's testimony, the greater the need for corroborative evidence. Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998).

iii. Secaida-Rosales v. INS, 331 F.3d 297, 311 (2d Cir. 2003) (reversing BIA decision

relying on IJ credibility finding based in part upon failure to provide documents) (noting existence of different 9th Circuit rule).

iv. Dia v. Ashcroft, 353 F.3d 228, 252-253 (3d Cir. 2003) ("As for the IJ's reference to a lack of "supporting documentation" in the record that "members of the Guinean police are actively looking for" Dia, the IJ failed to explain what type of "documentation in the Record" she expected or required. We cannot imagine how Dia could have provided documentary support for the fact that the military (or the police as the IJ stated) was after him. At most, an applicant must provide corroborating evidence only when it would be reasonably expected. *See In re S-M-J-* (Interim Decision), 21 I. & N. Dec. 722, 1997 WL 80984 (BIA 1997).")

v. Huaman-Cornelia v Board of Immigration Appeals, 979 F.2d 995, 1000 (4th Cir. 1992) ("Petitioner offers nothing but his own barebones statement ....")

vi. Bhatt v. Reno, 172 F.3d 978 (7th Cir. 1999) (Hindu alleging religious persecution from Hindu radicals for his support of Muslims provided no corroboration of his claim to have been beaten by them); *but see* Uwase v. Ashcroft, 349 F.3d 1039, 1044-45 (7th Cir. 2003) (failure of sister to testify to corroborate claim cannot be basis to deny claim where sister's testimony in light of their separation was of little value).

vii. Matter of M - D -, 21 I&N Dec. 1180 (BIA 1998), *reversed*, Diallo v. INS, 232 F.3d 279 (2d Cir. 2000) (upholding Matter of M - D - determination that the introduction of supporting evidence is not purely an option and corroborating evidence should be presented where available, but reversed the denial where it was not reasonable to expect corroborative evidence); Qiu v. Ashcroft, 329 F.3d 140, 153-54 (2d Cir. 2003) (reversed BIA under the Diallo and Alvarado-Carillo standard because the BIA did not point to the specific pieces of missing information that the applicant should have produced and did not demonstrate that the corroborative documentation was reasonably available to the applicant.)

e. *Current Opposing Rule:*

i. Applicant does not need to produce corroborating documentation, if the applicant's testimony is credible, persuasive and specific.

ii. Ladha v. INS, 215 F.3d 889, 899 (9th Cir. 2000) ("We are not free to consider as an open question whether the BIA has hit upon a permissible interpretation of the INA, for the law we must follow is already set out for us: "this court does not require corroborative evidence," *Cordon-Garcia v. INS*, 204 F.3d 985, 992 (9th Cir.2000), from applicants for asylum and withholding of deportation who have testified credibly. "This court recognizes the serious difficulty with which asylum applicants are faced in their attempts to prove persecution, and has adjusted the evidentiary requirements accordingly." *Id.* at 992-93 (citation omitted). Moreover, as we have noted, "[t]hat ... objective facts are established through credible and persuasive testimony of the applicant does not make those fears less objective." *Aguilera-Cota v. U.S. INS*, 914 F.2d 1375, 1378 (9th Cir.1990) (quoting *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir.1984)

(internal quotation marks omitted)). The rule established in the BIA's cases, and applied to the Ladhas, is unequivocally contrary to the rule in this circuit. *See Singh*, 63 F.3d at 1508 ("A federal agency is obligated to follow circuit precedent in cases originating within that circuit.").")

(1) Kataria v. INS, 232 F.3d 1107 (9th Cir. 2000) (rejects BIA standard from Matter of Y-B- and finds that absent a determination that a person is not credible his testimony alone is sufficient); Mendoza-Perez v. INS, 902 F.2d 760 (9th Cir. 1990) (testimony concerning letter threat without production of letter); Aguilera-Cota v INS, 914 F.2d 1375, 1380-81 (9th Cir. 1990) (unsigned note not produced); Velarde v. INS, 140 F.3d 1305 (9th Cir. 1998) (abuse of discretion for BIA to insist upon corraborative evidence under facts of case); *but see* Guo v. Ashcroft, 361 F.3d 1194, 1201 (9th Cir. 2004) (where applicant's credibility is in question, corroborative evidence should be produced but only where it is "easily available" and it is inappropriate to make an adverse credibility finding for failure to produce affidavits from relatives or acquaintances living outside the U.S.).

(2) "Some types of particular evidentiary burdens "would be too great for an alien who has fled his native country and cannot obtain information through official governmental sources." *Gomez-Saballos v. INS*, 79 F.3d 912, 916 (9th Cir. 1996) [Need not obtain testimony about treatment of subsequent prison directors]." Kurzban's Immigration Law Sourcebook 410 (AILF 9th ed. 2004).

f. *UNHCR Handbook:* "197. The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant."

g. UNHCR Handbook paras.203-204:

i. "203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196), it is hardly possible for a refugee to "prove" every part of this case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt."

ii. "204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts."

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6. *PROPOSED CHANGE:* "**The inability to obtain corroborating evidence does not excuse the applicant from meeting the applicant's burden of proof.**" – RID sec. 101(a)(3), adding new INA section 208(b)(1)(B)(ii).

   a. ***Critique:*** *This language is unnecessary surplusage, because the law of the BIA and the judicial circuits uniformly requires the applicant to meet his or her burden of proof. However, since courts tend to construe language as if it is not surplusage, they might look to the apparent conflict between this section and the provision explored in Section 5 of this memorandum, supra, to suggest that even the inability to obtain a document may undermine an applicant's credibility, which is contrary to well-established principles of law.*

   b. ***Analysis of Current Law:***

      i. 8 C.F.R. sec. 208.13(a): "Burden of proof. The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. ..." *See* 8 C.F.R. sec. 1208.13(a) (to same effect).

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7. *PROPOSED CHANGE:* "**(iii) CREDIBILITY DETERMINATION. – The trier of fact should consider all relevant factors and may, in the trier of fact's discretion, base the trier of fact's credibility determination on any such factor ...**" – RID sec. 101(a)(3), adding new INA section 208(b)(1)(B)(iii).

   a. ***Critique:*** *This amendment would abrogate rules established by the Board of Immigration Appeals and all judicial circuits and encourage Immigration Judges to make unfair and arbitrary decisions that are inconsistent with the weight of evidence in any case.*

      i. The amendment would change "credibility" from an objective fact of adjudication to a subjective determination of the Immigration Judge. Given the inconsistency in adjudications among Immigration Judges, the likely "credibility" of the testimony of applicants and witnesses would become predictable in advance based not on their own characteristics, but on the Immigration Judge assigned to decide their cases.

      ii. The use of the word "should" instead of the word "shall" means that an Immigration Judge would no longer be required even to "consider all relevant factors" in adjudicating a case.

      iii. The use of the language "may ... base the ... determination on any ... factor" authorizes the Immigration Judge to ignore any favorable or unfavorable evidence in a case, no matter how strong or extensive.

      iv. The language "in the trier of fact's discretion" means that, pursuant to INA Sec. 242(a)(2)(B)(ii), no Article III judge, including Supreme Court justices, would

have power to review, under any standard of law, whether any Immigration Judge correctly or fairly ignored the great weight of evidence in a case to find an applicant or witness to be "credible" or "incredible." Since the BIA's current procedures provide little effective appellate review, in most cases the "credibility" decisions of the several hundred Immigration Judges could never be challenged, even if the evidence not only supports a contrary conclusion, "but compels it," (INS v. Zacarias-Elias, 112 S. Ct. 812, 815 n. 1 (1992), interpreting INA Sec. 242(b)(4)(B)), and even if the decisions were "manifestly contrary to law and an abuse of discretion" (see INA Sec. 242(b)(4)(D)).

b. ***Analysis of Current Law:***

c. *Current law:* Credibility determinations must be fairly supported by the record.

i. Martinez-Sanchez v. INS, 794 F.2d 1396, 1400 (9th Cir. 1986) ("In his oral opinion, the IJ stated in passing that Martinez-Sanchez's credibility had not been established, but he did not indicate why. The BIA stated that the IJ had determined that petitioner was not a credible witness "on the basis of his demeanor as well as the inconsistencies in the record." The IJ mentioned neither of these factors. The record indicates nothing about petitioner's demeanor. Moreover, the few inconsistencies we can find in the record are minor indeed.");

ii. Matter of B-, 21 I & N Dec. 66, 70 (BIA 1995) ("The Immigration Judge determined that the applicant's testimony lacked credibility. After carefully reviewing the record, we conclude that there is an inadequate basis for finding the applicant's testimony incredible. The primary problem with the applicant's testimony discussed by the Immigration Judge involved an aspect of the applicant's demeanor, his tendency during his testimony to look down at the table or at the wall behind the interpreter instead of at the Immigration Judge. Although, of course, we have not been able to observe this behavior by the applicant, we do not find that it necessarily indicates deception. Instead, it may indicate the applicant's concentration on the questions being asked of him through the interpreter. . . . Moreover, when we view the demeanor problem within the context of the whole record before us, we are impressed with the indications of the applicant's truthfulness.").

iii. Georgis v. Ashcroft, 328 F.3d 962 (7th Cir. 2003) (Although the Court of Appeals's review of the immigration judge's credibility determinations is highly deferential, it will not automatically yield to the IJ's conclusions when they are drawn from insufficient or incomplete evidence.)

d. *Current law:* A credibility determination that is not supported by the record must be reversed.

i. Matter of S-A-, 22 I & N Dec. 1328 (BIA 2000).

e. *Current law:* Board must consider all meaningful facts.

i. Luna v. INS, 709 F.2d 126 (1st Cir. 1983);

(1) Abuse of discretion can occur by courts "neglecting to consider a significant factor that appropriately bears on the discretionary decision, by attaching weight to a factor that does not appropriately bear on the decision, or by assaying all the proper factors and no improper ones, but nonetheless making a clear judgmental error in weighing them." Henry v. INS, 74 F.3d 1, 4 (1st Cir. 1996) (rejecting abuse argument in adjustment of status case).

ii. Rodriguez-Gutierrez v. INS, 59 F.3d 504 (5th Cir. 1995) (BIA failed to consider positive factors and mischaracterized negative ones)

iii. Opoka v. INS, 94 F.3d 392 (7th Cir. 1996) (suspension);

iv. Chookhae v. INS. 756 F.2d 1350 (9th Cir. 1985) (Board should have considered facts not as they existed in 1977 but as it had case before it in 1982);

(1) Figueroa-Rincon v. INS, 770 F.2d 766 (9th Cir. 1985) (Board must consider new evidence with totality of previous evidence);

(2) Abuse of discretion where the agency inexplicably departs from prior precedent, departs from its own regulations, fails to consider all relevant factors, or considers irrelevant factors. Lal v. INS, 255 F.3d 998, 1006-07 (9th Cir. 2001); Arrozal v. INS, 159 F.3d 429, 433-34 (9th Cir. 1998) (failure to consider all factors when it superficially mentions them in denial of motion to reopen for suspension);

f. *Current law:* IJ may not base decision on unreasonable inferences and presumptions

i. Dia v. Ashcroft, 353 F.3d 228, 250 (3d Cir. 2003) ("perhaps because of the difficult nature of these types of cases, and the critical importance of resolving them properly--for the stakes are very high indeed--the soundness of the basis of the decision making, even if experiential or logical in nature, must be apparent. The process of drawing inferences cannot be left to whim, but must withstand scrutiny.");

ii. Espinoza v. INS, 991 F.2d 1294 (7th Cir. 1993) (denial of former 212(c) waiver based on speculation unsupported by record vacated by court);

iii. Aguilera-Cota v INS, 914 F.2d 1375, 1380-81 (9th Cir. 1990) (IJ may not base adverse inference on facts that note was unsigned and that applicant did not retain it)

g. *Current law:* If an immigration judge rejects testimony for lack of credibility, he must give "specific, cogent" reasons for the rejection

i. Secaida-Rosales v. INS, 331 F.3d 297, 307 (2d Cir. 2003)

ii. Malek v. INS , 198 F.3d 1016 (7th Cir. 2000) (Lebanese Christian's claim was not credible and asylum denied where the BIA offered cogent reasons for its adverse credibility determination)

iii. Vilorio-Lopez v. INS, 852 F.2d 1137, 1141 (9th Cir. 1988).

h. *Current law:* An IJ's finding of lack of credibility that is the product solely of "faulty logic" cannot stand.

i. Nasseri v. Maschorak, 34 F. 3d 723, 726 (9th Cir. 1994), overruled on other grounds, Fisher v. INS, 79 F.3d 955 (9th Cir. 1996).

ii. Secaida-Rosales v. INS, 331 F.3d 297 (2d Cir. 2003)

i. *UNHCR Handbook:* "201. Very frequently the fact-finding process will not be complete until a wide range of circumstances has been ascertained. Taking isolated incidents out of context may be misleading. The cumulative effect of the applicant's experience must be taken into account. ..."

j. Carvajal-Munoz v. INS, 743 F.2d 562 (7th Cir. 1984) – Grant of asylum is discretionary, and ordinarily such a decision will be upheld unless it is found to be arbitrary, or capricious, or an abuse of discretion; however, exercise of that discretion comes into play only after there has been a preliminary appraisal of refugee status, a finding which must be supported by substantial evidence.

k. *Problems in Practice:* At times reviewing courts are so incensed by the shoddy work product of the Immigration Judges in reviewing credibility determinations and related matters that they call attention to the judge's intellectual deficiencies, or state that due process requires that the matter be remanded to another judge entirely. Courts are not changing current law or making it easier for fraud to occur in those case, rather, they are demanding that IJs and the BIA comply with current law and this should not be an unreasonable expectation.

i. Ahmed v. Gonzalez, Nos. 03-3374/3375/3376/3377, __ F.3d __, 2005 WL 415261 slip op. Jan. 25, 2005, as amended, Feb. 23, 2005, 2005 U.S. App. LEXIS 1285 (6th Cir.) ("The proper remedy for this due process violation is to give the Ahmeds an opportunity to have their case heard fairly. See, e.g. Amadou, 226 F.3d at 728. We therefore GRANT the petition for review, VACATE the decision of the BIA and REMAND this case with instructions that the Ahmeds be provided with a new hearing before a different immigration judge.")

ii. Niam v. Ashcroft, 354 F.3d 652, 653-54, 660-61 (7th Cir. 2004) ("The petitions raise different issues, but are related in suggesting, together with other recent cases in this and other circuits, *see, e.g. Georgis v. Ashcroft*, 328 F.3d 962, 968-70 (7th Cir.2003); *Kerciku v. INS*, 314 F.3d 913, 918-19 (7th Cir.2003) (*per curiam*); *Begzatowski v. INS*, 278 F.3d 665, 670-71 (7th Cir.2002); *Mansour v. INS*, 230 F.3d 902, 908-09 (7th Cir.2000); *Vujisic v. INS*, 224 F.3d 578, 581 (7th Cir.2000); *Chitay-Pirir v. INS*, 169 F.3d 1079, 1081 (7th Cir.1999); *Secaida-Rosales v. INS*, 331 F.3d 297, 312 (2d Cir.2003); *Hernandez v. Reno*, 258 F.3d 806, 813-14 (8th Cir.2001); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1008 (9th Cir.2003), a pattern of serious misapplications by the board and the immigration

judges of elementary principles of adjudication. In *Galina v. INS*, 213 F.3d 955, 958 (7th Cir.2000), we stated forthrightly: "the Board's analysis was woefully inadequate, indicating that it has not taken to heart previous judicial criticisms of its performance in asylum cases [citing cases]. The elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases." ... In view of the performance of these immigration judges and the criticisms of them that we have felt obligated to make, we urge the service to refer the cases to different immigration judges. *Georgis v.Ashcroft*, supra, 328 F.3d at 970; *Kerciku v. INS, supra*, 314 F.3d at 919.")

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8. <u>*PROPOSED CHANGE:*</u> "**... including the demeanor, candor or responsiveness of the applicant or witness ....**" – RID sec. 101(a)(3), adding new INA section 208(b)(1)(B)(iii).

a. ***Critique:*** *It is unnecessary to amend the INA to refer to demeanor, candor and responsiveness because the precedents of the BIA and all judicial circuits authorize IJs to rely on these factors in evaluating the credibility of an applicant or witness. However, in context, the proposed amendment abrogates all current standards to allow an IJ to isolate any single factor as a permissible basis for making a credibility determination, regardless of its context. By eliminating current standards for decision-making, the new law would vest the IJ with complete and standardless discretionary power over asylum applicants. Such a power would be particularly inappropriate when applied to categories of evidence such as "demeanor, candor or responsiveness." In these categories, the eye of the beholder often imposes its own preconceptions in place of accurate observation, and some form of administrative and judicial accountability is essential to maintain fairness and due process.*

b. ***Analysis of Current Law:***

c. The courts are extremely deferential to credibility determinations, especially those that are based on observations concerning demeanor.

i. Singh-Kaur v. INS, 183 F.3d 1147, 1149-1151 (9th Cir. 1999).

d. Where an IJ's findings on demeanor rest on the respondent's testimony which is ascertainable but are not supported by the record, the demeanor findings will not be credited. <u>Arulampalam v. Ashcroft</u>, 353 F.3d 679, 685-87 (9th Cir. 2003)

e. IJs do not always perceive correctly whether an applicant or witness is being responsive to questions, or candid. <u>Gao v. Ashcroft,</u> 299 F.3d 266, 278 (2d Cir. 2002) ("The IJ also found Gao unresponsive when asked about her escape. The record, however, indicates that far from being unresponsive, Gao gave specific and detailed answers to the question, even working through the translator. She did not avoid answering the question as much as she attempted to explain her answer, as we report in the margin.")

f. Adverse credibility finding that are based upon boilerplate demeanor

determinations must be reversed.

i. Paramasamy v. Ashcroft, 295 F.3d 1047, 1048 (9th Cir. 2002) (where IJ made adverse credibility determinations in three asylum cases based upon identical demeanor findings and the BIA cited the boilerplate demeanor language as evidence of individualized determinations, court reversed, stating "Cookie cutter credibility findings are the antithesis of the individualized determination required in asylum cases. The integrity of the adjudicative process depends on judges reviewing each case on its merits. That integrity is called into question when boilerplate findings masquerade as individualized credibility determinations."

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9. *PROPOSED CHANGE:* " **... the inherent plausibility of the applicant's or witness's account ...**" – RID sec. 101(a)(3), adding new INA section 208(b)(1)(B)(iii).

a. ***Critique:*** *It is unnecessary to amend the INA to refer to this factor because the precedents of the BIA and all judicial circuits authorize IJs to rely on the inherent plausibility of testimony in evaluating the credibility of an applicant or witness. However, in context, the proposed amendment abrogates all current standards to allow an IJ to isolate any single factor as a permissible basis for making a credibility determination, regardless of its context. By eliminating current standards for decision-making, the new law would vest the IJ with complete and standardless discretionary power over asylum applicants. Such a power would be particularly inappropriate when applied to the analysis of whether or not testimony is "inherently implausible." In this category, the prejudices of the IJ often take the place of sound and valid reasoning, and some form of administrative and judicial accountability is essential to maintain fairness and due process.*

b. ***Analysis of Current Law:***

c. *Current law:* Secaida-Rosales v. INS, 331 F.3d 297 (2d Cir. 2003) ("With respect to the implausibilities concerning Secaida's employment and identification card, the IJ relied on flawed reasoning that failed to take account of conditions in Guatemala as detailed in Secaida's background materials, and on a standard regarding documentation that is at odds with at least one later BIA decision. The IJ questioned the plausibility of the proposition that Secaida could continue to work at his municipal job without any attempts being made on his life there. But she failed to acknowledge the description of the situation in Guatemala found in the background materials, which indicated that groups like the death squads operate underground and in a shadow manner that avoids intersection with legitimate governmental institutions. *Cf. id.* [*Gao v. Ashcroft*, 299 F.3d 266 (2d Cir. 2002)] at 278 (noting IJ's finding of implausibility was based on "his own unsupported opinion as to how an authoritarian government operates"); *see also Cordero-Trejo*, 40 F.3d at 488 (noting that Guatemalan death squads are "clandestine").")

d. *Current law:* Secaida-Rosales v. INS, 331 F.3d 297 (2d Cir. 2003) ("As the First Circuit has observed, "to infer that an asylum applicant is unlikely to be persecuted because he ... w[as] not killed during attempts to terrorize [him] leads to the absurd result of denying asylum to those who have actually experienced persecution and were fortunate enough to

survive." *Cordero-Trejo*, 40 F.3d at 489 (internal quotation omitted). The IJ's reasoning here leads to just such a result, and, further, is at odds with the record evidence regarding conditions in Guatemala. Consequently, Secaida's continued employment and possession of a new identity card do not form a valid, cogent reason for a negative credibility finding.")

e. *Current law:* Dia v. Ashcroft, 353 F.3d 228, 250, n. 21 (3d Cir. 2003) ("We also agree with Judge Alito that an IJ is free to assess plausibility. Yet the very law review article that he uses to support the permissibility of drawing inferences is skeptical of plausibility, noting that it is "a highly uncertain standard. 'Sure, that makes sense' ... [is] hardly [a] reaction[ ] by which a complex patchwork of past events may be stitched together with confidence." H. Richard Uviller, Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale, 42 Duke L.J. 776, 784 (1993). This skepticism surely applies when the reaction is "that doesn't make sense." We must be vigilant to ensure that when an IJ's conclusion is based on the implausibility of testimony, the IJ provides at least some insight into why he or she finds that testimony implausible.")

f. *Current law:* Espinoza v. INS, 991 F.2d 1294 (7th Cir. 1993) (denial of former 212(c) waiver based on speculation unsupported by record vacated by court);

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10. *PROPOSED CHANGE:* "**... the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not made under oath) ..."** – RID sec. 101(a)(3), adding new INA section 208(b)(1)(B)(iii).

a. ***Critique:*** *It is unnecessary to amend the INA to refer to this factor because the precedents of the BIA and all judicial circuits authorize IJs to rely on the consistency of statements made by an applicant or witness in evaluating his or her credibility. However, in context, the proposed amendment abrogates all current standards by giving an IJ carte blanche to rely upon any inconsistency in a person's statements as a permissible basis for making a credibility determination, regardless of its context or the nature of the statement. By eliminating current standards for decision-making, the new law would vest the IJ with complete and standardless discretionary power over asylum applicants. In the refugee context, to insist too strictly on consistency between statements would be particularly inappropriate, because of all "legitimate" immigrants the refugee is the one most likely to make false statements upon entry, and in other situations, out of distrust of authority and a fear of return.*

b. ***Analysis of Current Law:***

c. *UNHCR Handbook:*

i. "198. A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-a-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case."

ii. "199. While an initial interview should normally suffice to bring an applicant's

story to light, it may be necessary for the examiner to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts. Untrue statements by themselves are not a reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case."

d. *Current law:* Dia v. Ashcroft, 353 F.3d 228, 257 (3d Cir. 2003). "(W)e are generally skeptical of reliance on reports of airport interviews. In *Balasubramanrim v. INS*, we stated that the airport interview is usually not "valid grounds upon which to base a finding that an applicant is not credible." 143 F.3d 157, 164 (3d Cir.1998) (citation and internal quotation marks omitted). We noted: 'We do not know how the interview was conducted or how the document was prepared. We do not know whether the questions and answers were recorded verbatim, summarized, or paraphrased. We cannot tell from the document the extent to which [the petitioner] had difficulty comprehending the questions, whether questions had to be repeated, or when and how sign language was used. Nor does the document reveal whether [the petitioner's] responses actually correspond to those recorded or whether the examiner recorded some distilled or summary version based on his best estimation of the response.' *Id*. at 162; *see also Mulanga*, 349 F.3d at 137-38 (refusing to rely too heavily on the content of an airport interview and noting that "immaterial discrepancies between airport interviews and subsequent testimony should not be used to make adverse credibility determinations"); *Zubeda*, 333 F.3d at 477 (stating that "[c]aution is required" when considering what weight to give even to an asylum affidavit); *Senathirajah*, 157 F.3d at 216 (warning against placing too much reliance on an airport interview)."

e. *Current law:* Chen v. INS, 344 F.3d 272 (2d Cir. 2003) Ex post explanations of discrepancies are not sufficient to overcome the substantial evidence standard supporting the BIA's lack of credibility finding,

f. *Current law:* Secaida-Rosales v. INS, 331 F.3d 297, 308 (2d Cir. 2003):

i. "When measuring whether an omission is "substantial," we take note of the fact that the circumstances surrounding the application process do not often lend themselves to a perfectly complete and comprehensive recitation of an applicant's claim to asylum or withholding, and that holding applicants to such a standard is not only unrealistic but also unfair. For example, the form utilized by the INS for applications for asylum and withholding provides half a page for the applicant to explain why he or she is seeking asylum, and no more than two inches to recount mistreatment or threats against the applicant or the applicant's family by the government or other groups. Although the application invites the applicant to attach additional pages, we think the small space on the form itself would hardly indicate to an applicant that the failure to include every detail regarding the basis for asylum could later lead to an adverse credibility finding when the applicant elaborates on them in the course of a deportation hearing. "

g. *Current practical problems:* According to a study published in February, 2005 by the U.S. Commission for International Religious Freedom, 15.6 percent of aliens who were asked to sign airport screening statements in secondary inspection were

not told that by signing, they were confirming the truth of the statements. Keller, Rasmussen, Reeves & Rosenfeld, Evaluation of Credible Fear Referral in Expedited Removal at Ports of Entry in the United States 18 (USCIRF 2005), *available at* http://www.uscirf.gov/reports/ERSrpt/evalCredibleFear.pdf In only 28.2 percent of cases were aliens observed actually reading the statements before signing them, *id.* at 18-19.

h. The same study noted troubling inconsistencies between the behavior observed by researchers in credible fear interviews and the official records that resulted from those interviews: "The lack of congruence between the observations of our research assistants and the official records prepared by the investigating officers (A files) suggests that the asylum process itself may be compromised by the use of these documents as official transcripts. We found that when CBP officials failed to ask the relevant fear questions, the official record frequently indicated that these questions had been asked and answered, typically containing just the word "no" in response to fear questions that had not been asked. Likewise, on some occasions the A-files did not indicate that the relevant questions had been asked (i.e., were left blank) when our observers noted that they had been, or contained only a portion of the information that had been disclosed in response to a given question. ... [T]hese data show that A-files do not necessarily present an accurate record of Secondary Inspection interviews, despite the temptation to assume their accuracy. This issue is particularly important given ... that the content of A-files is relied upon during the Credible Fear interview and subsequent Asylum hearings. Officials may present statements from the Secondary Inspection interview as evidence to impeach an aliens' [sic] testimony, citing contradictions between their statements and the official records as evidence of a changing story ... when the "evidence" is an erroneous official record." *Id.* at 30.

i. *Current practical problems:* Translation difficulties not infrequently cause misunderstandings of an applicant's testimony, causing the IJ to believe that testimony is riddled with contradictions that, however, reflect difficulties of language, not of truth-telling. *See, e.g.,* Amadou v. INS, 226 F.3d 724 (6th Cir. 2000)

j. *Current practical problems:* IJs may also leap to the conclusion that testimony which they have failed to understand, whether through language difficulties or for other reasons, reflects contradictions, when no significant or material contradictions exist in reality. *See, e.g.* Ahmed v. Gonzalez, Nos. 03-3374/3375/3376/3377, __ F.3d __, 2005 WL 415261 slip op. Jan. 25, 2005, as amended, Feb. 23, 2005, 2005 U.S. App. LEXIS 1285 (6th Cir.)

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11. *PROPOSED CHANGE:* "**... the internal consistency of each such statement ...**" – RID sec. 101(a)(3), adding new INA section 208(b)(1)(B)(iii).

a. ***Critique:*** *It is unnecessary to amend the INA to refer to this factor because the precedents of the BIA and all judicial circuits authorize IJs to rely on the consistency of statements made by an applicant or witness in evaluating his or her credibility. However, in context,*

the proposed amendment abrogates all current standards by giving an IJ carte blanche to rely upon any inconsistency in a person's statements as a permissible basis for making a credibility determination, regardless of its context or the nature of the statement. By eliminating current standards for decision-making, the new law would vest the IJ with complete and standardless discretionary power over asylum applicants.

b. ***Analysis of Current Law:*** See section 10, supra, at pages 17-20.

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12. *PROPOSED CHANGE:* "**... the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions) ...**" – RID sec. 101(a)(3), adding new INA section 208(b)(1)(B)(iii).

a. ***Critique:*** *It is unnecessary to amend the INA to refer to this factor because the precedents of the BIA and all judicial circuits authorize IJs to rely on the consistency of statements with other evidence of record, including State Department reports, in evaluating the credibility of testimony. However, in context, the proposed amendment abrogates all current standards by giving an IJ carte blanche to rely upon any inconsistency between a person's statements and other evidence of record as a permissible basis for making a credibility determination, regardless of its context or the nature of the statement or other evidence. By eliminating current standards for decision-making, the new law would vest the IJ with complete and standardless discretionary power over asylum applicants. Since every factual scenario has its complexities, the proposed standard would authorize an IJ to deny virtually any case because a lawyer can always discover at least a hint of inconsistency or contradiction.*

b. ***Analysis of Current Law:***

c. Niam v. Ashcroft, 354 F.3d 652, 657 - 658 (7th Cir. 2004) ("We and other courts have expressed concern about the immigration service's chronic overreliance on [State Department country condition] reports. The State Department naturally is reluctant to level harsh criticisms against regimes with which the United States has friendly relations. *Galina v. INS, supra*, 213 F.3d at 958; *Gramatikov v. INS*, *supra,* 128 F.3d at 620; *Vaduva v. INS, supra*, 131 F.3d at 691; *Manzoor v. United States Dept. of Justice*, 254 F.3d 342, 348 (1st Cir.2001); *Shah v. INS*, 220 F.3d 1062, 1069-70 (9th Cir.2000).

d. *Current law:* Zavala-Bonilla v. INS, 730 F.2d 562, 567 (9th Cir. 1984) (Recognizing "the fact that "a frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world." *Kasravi v. INS*, 400 F.2d 675, 677 n. 1 (9th Cir.1968)

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13. *PROPOSED CHANGE:* "**... and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim.**" – RID sec. 101(a)(3), adding new INA section 208(b)(1)(B)(iii).

a. ***Critique:*** *This change would overturn precedent established by the Board of Immigration Appeals and all judicial circuits and ignore authoritative international guidelines for refugee adjudications. It requires an unrealistic degree of perfection for refugees that is demanded of no other class of persons under United States law.*

b. ***Analysis of Current Law:***

c. Board of Immigration Appeals: "We ... will generally defer to an adverse credibility determination based on inconsistencies and omissions regarding events central to an alien's asylum claim where a review of the record reveals that (1) the discrepancies and omissions described by the Immigration Judge are actually present in the record; (2) such discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; and (3) the alien has failed to provide a convincing explanation for the discrepancies and omissions. *Id*. at 1109; *see also, e.g., Paredes-Urrestarazu v. INS*, 36 F.3d 801 (9th Cir. 1994) …; *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1256 (9th Cir. 1992) (citing *Turcios v. INS*, 821 F.2d 1396, 1399 (9th Cir. 1987)); *Damaize-Job v. INS*, 787 F.2d 1332, 1338 (9th Cir. 1986) (holding that a trier of fact who rejects a witness's positive testimony because, in his or her judgment, it lacks credibility should offer specific, cogent reasons for such disbelief); *Chen v. Slattery*, 862 F. Supp. 814, 823 (E.D.N.Y. 1994) (relying on *Vilorio-Lopez v. INS*, 852 F.2d 1137, 1141 (9th Cir. 1988), for the proposition that an Immigration Judge must underpin adverse credibility findings with "a specific, cogent reason"')." Matter of S-A-, 22 I&N Dec. 1328, 1331 (BIA 2000).

d. Current law: "Generally, minor inconsistencies and minor admissions that "reveal nothing about an asylum applicant's fear for his safety are not an adequate basis for an adverse credibility finding." Vilorio-Lopez v. INS, 852 F.2d 1137, 1142 (9th Cir.1988). The discrepancies must involve the "heart of the asylum claim." *Ceballos-Castillo v. INS*, 904 F.2d 519, 520 (9th Cir.1990)." Gao v. Ashcroft, 299 F.3d 266, 271 (2d Cir. 2002).

e. Current law: Conduct by the alien that shows a continuing disregard for the truth in the immigration process may be considered by the BIA in evaluating an alien's credibility. Aguilar-Solis v. INS, 168 F.3d 565, 570-71 (1st Cir. 1999)

f. Current law: Where an applicant submits corroborative ID documents in an immigration court proceeding that are fraudulent, it indicates an overall lack of credibility regarding his claim absent an explanation of rebuttal. Matter of O-D-, 21 I&N Dec. 1079 (BIA 1998); but see Akinmade v. INS, 196 F.3d 951, 955-56 (9th Cir. 1999) (distinguishing for purposes of credibility, false statements made to establish an asylum claim, which do affect credibility, and false statements made to evade INS officials (such as a false passport or material misrepresentation made at inspection), which do not affect credibility).

g. Current law: Trivial errors, such as inconsistencies in dates, which cannot be viewed as attempts by the asylum applicant to enhance his claims of persecution, do not justify an adverse credibility finding.

   i. Damaize-Job v. INS, 787 F.2d 1332, 1337 (9th Cir. 1986)

   ii. Gao v. Ashcroft, 299 F.3d 266, 271 (2d Cir. 2002)

h. *Current law:* Board cannot rely on irrelevant facts,

i. Ng v. INS, 804 F.2d 534 (9th Cir. 1986)

ii. Martinez-Sanchez v. INS, 794 F.2d 1396, 400 (9th Cir. 1986).

i. *UNHCR Handbook:*

i. "198. A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-a-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case."

ii. "199. While an initial interview should normally suffice to bring an applicant's story to light, it may be necessary for the examiner to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts. Untrue statements by themselves are not a reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances in the case."

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14. *PROPOSED CHANGE:* "**There is no presumption of credibility.**" – RID sec. 101(a)(3), adding new INA section 208(b)(1)(B)(iii).

a. ***Critique:*** *Since courts currently presume credibility only in the absence of a BIA or IJ credibility determination, this provision seems intended to require courts to remand to the BIA any case where the BIA or IJ has not made an express credibility determination with respect to any material evidence, thereby delaying the final adjudication of any case affected by the change. Moreover, removing this presumption will be interpreted as abrogating current precedent requiring adjudicators to give generally credible asylum applicants "the benefit of the doubt."*

b. ***Analysis of Current Law:***

c. *Current law:* In the absence of BIA or IJ credibility determination, the court will presume credibility. Canjura-Flores v INS, 784 F.2d 885 (9th Cir. 1985).

d. *Current law:* In evaluating consistent explanations supplied by aliens claiming asylum, the BIA is required to give them "the benefit of the doubt." Zavala-Bonilla v. INS, 730 F.2d 562, 567 (9th Cir. 1984).

e. *UNHCR Handbook* paras.203-204:

i. "203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196), it is hardly possible for a refugee to "prove" every part of this case and, indeed, if this were a requirement the majority of refugees would not be

recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt."

ii. "204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts."

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15. *PROPOSED CHANGE:* "**(C) SUSTAINING BURDEN OF PROOF; CREDIBILITY DETERMINATIONS. – In determining whether or not an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 208(b)(1)(B)."** – RID sec. 101(b), adding new INA section 241(b)(3)(C).

a. ***Critique:*** *The proposed changes would cause the United States to violate its treaty obligation not to return refugees to a country where they "would be" persecuted. They would have this effect by adding discretionary, and therefore subjective, elements to the current objective standard of adjudicating "withholding of removal" claims under INA Sec. 241(b)(3).*

b. ***Analysis of Current Law:***

i. Under Section 2 of the 1967 Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, the United States undertook "to apply articles 2 to 34 inclusive of the Convention [relating to the Status of Refugees, 189 U.N.T.S. 137,] to refugees as hereinafter defined." However, "[t]he United States is not a signatory to the Convention itself." INS v. Stevic, 467 U.S. 407, 416 n. 9 (1984).

ii. Article 33 of the Refugee Convention provides as follows:

(1) "1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

(2) "2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

iii. The legislative history for the Refugee Act of 1980 shows that the enactment of the provision for withholding of removal (formerly section 243(h) of the INA), was made for the purpose of conforming US law, which previously gave the Attorney General discretionary power to withhold an alien's deportation, to mandatory US treaty obligations:

(1) "Withholding of Deportation.--Related to Article 33 is the implementation of section 243(h) of the Immigration and Nationality Act . . . [T]he Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention. This legislation does so by prohibiting, with certain exceptions, the deportation of an alien to any country if the Attorney General determines that the alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.... As with the asylum provision, the Committee feels that the proposed change in section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements." [H.R.Rep. No. 96-608 (1979)], at 17-18." (Quoted in INS v. Stevic, 467 U.S. 407, 426 (1984).)

iv. According to the United States Supreme Court in INS v. Stevic, 467 U.S. 407, 426 (1984), "Congress distinguished between discretionary grants of refugee admission or asylum and the entitlement to a withholding of deportation if the § 243(h) standard was met."

(1) The Supreme Court explained this point further in INS v. Cardoza-Fonseca, 480 U.S. 421, 430 (1987): "To begin with, the language Congress used to describe the two standards conveys very different meanings. The "would be threatened" language of § 243(h) has no subjective component, but instead requires the alien to establish by objective evidence that it is more likely than not that he or she will be subject to persecution upon deportation."

(2) While the Supreme Court was referring to the subjective feelings of the applicant in the foregoing passage, which are irrelevant to the determination of the applicant's eligibility for withholding of removal, *a fortiori* the subjective impressions of the Immigration Judge do not, under current law, form a part of the determination.

v. Convention Against Torture: Another U. S. treaty would also be violated: the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *reprinted in* 23 I.L.M. 1027 (1984), *modified in* 24 I.L.M. 535 (1985).

(1) Article 3(1) of the Convention Against Torture states "No State Party shall expel, return ("refouler") or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture."

(2) In making the determination pursuant to Article 3(1) of the Convention Against Torture, the U.S. "Shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights." Art. 3(2).

(3) Regulations set forth at 8 C.F.R. secs. 208.16(c)(3) and 1208.16(c)(3) set forth the evidence which the adjudicator must consider in deciding requests for relief from removal under the Convention Against Torture. *Inter alia*, those regulations require that "[i]n assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered ...."

(4) "Because there is no subjective component for granting relief under the CAT, the adverse credibility determination on which the IJ relied to deny Camara's asylum claim would not necessarily defeat her CAT claim. ... Thus, we agree with Camara that the IJ's adverse credibility determination was insufficient to support the legal conclusion that Camara was ineligible for relief under the CAT." Camara v .Ashcroft, 378 F.3d 361 (4th Cir. 2004).

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16. *PROPOSED CHANGE:* "**(4) APPLICATIONS FOR RELIEF FROM REMOVAL. – (A) IN GENERAL. – An alien applying for relief or protection from removal has the burden of proof to establish that the alien – (i) satisfies the applicable eligibility requirements; and (ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion."** – RID sec. 101(c), adding new INA section 240(c)(4)(A).

a. ***Critique:*** *The proposed language is unnecessary because it adds nothing to existing law.*

b. ***Analysis of Current Law:*** Each statutory section providing for a form of relief or protection from removal already sets forth separately its requirements for eligibility, and current law provides that it is the alien's burden to show that he or she merits a favorable exercise of discretion.

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17. *PROPOSED CHANGE:* "**(B) SUSTAINING BURDEN. – The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form."** – RID sec. 101(c), adding new INA section 240(c)(4)(B).

a. ***Critique:*** *Unlike other proposed changes in the REAL ID Act, this change appears designed to limit the power of Immigration Judges and the BIA to decide whether or not any particular item of information or documentation is material or necessary in granting a request for relief. Since applicants for relief already have the burden of complying with requirements set forth in law, regulation, and in instructions to forms, the proposed change is unnecessary unless Congress finds that Immigration Judges or the BIA too frequently waive material requirements calling for documentation or information.*

b. ***Analysis of Current Law:*** Each statutory section providing for a form of relief or protection from removal already sets forth separately its requirements for eligibility, and the forms that are published from time to time already set forth the documentation that is necessary to qualify for relief or protection. The proponents of the pending legislation have provided no reason to believe that the IJs, the BIA and the courts are not respecting these requirements.

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18. *PROPOSED CHANGE:* "**In evaluating the testimony of the applicant or witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines in the judge's discretion that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence without departing from the United States. The inability to obtain corroborating evidence does not excuse the applicant from meeting the burden of proof."** – RID sec. 101(c), adding new INA section 240(c)(4)(B).

a. ***Critique:*** *This language repeats language that is analyzed separately supra, and applies it all remedies and forms of protection, including withholding of removal. See separate analyses and critiques, supra. Moreover, the final two sentences contradict each other inherently, so that the final sentence seems to cancel the exception provided in the prior sentence.*

b. ***Analysis of Current Law:*** See separate sections involving segments of the proposed text, supra.

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19. *PROPOSED CHANGE:* "**CREDIBILITY DETERMINATION – The immigration judge should consider all relevant factors and may, in the judge's discretion, base the judge's credibility determination on any such factor, including the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not made under oath), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim. There is no presumption of credibility."** – RID sec. 101(c), adding new INA section 240(c)(4)(C).

a. ***Critique:*** *This proposed amendment would add a subjective, and unreviewable, discretionary element to otherwise objective factual determinations made in the course of all applications for relief from removal. Thus, like Section 101(b) of the REAL ID Act, this proposed change would change the determination of the withholding of removal remedy under Section 241(b)(3) from a purely objective process, which should be the same no matter which Immigration Judge is assigned, to a largely subjective process in which the Immigration Judge's view of reality would determine the applicant's rights. This would mark a radical change from current law and violate important US treaty obligations.*

b. ***Analysis of Current Law:*** See analysis in section 15, supra.

c. Convention Against Torture: "Because there is no subjective component for granting relief under the CAT, the adverse credibility determination on which the IJ relied to deny Camara's asylum claim would not necessarily defeat her CAT claim. ... Thus, we agree with Camara that the IJ's adverse credibility determination was insufficient to support the legal conclusion that Camara was ineligible for relief under the CAT." Camara v .Ashcroft, 378 F.3d 361 (4th Cir. 2004).

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20. *PROPOSED CHANGE:* "**No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 208(b)(1)(B), 240(c)(4)(B), or 241(b)(3)(C), unless the court finds that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.**" – RID sec. 101(d), amending INA section 242(b)(4)(D).

a. ***Critique:*** *the proposed amendment would abrogate existing precedents of the BIA and all judicial circuits, by ending judicial review of the legal question of whether any, or any additional, corroborating evidence is necessary in the context of a given asylum claim. Thus, the absence of an "available" item of evidence would stand as an unchallengeable bar to establishment of an applicant's credibility, no matter what the quantum or credibility of the other evidence and testimony provided at trial, and without regard to whether the additional item of evidence would normally be considered merely "cumulative." In many cases, the imposition of an obligation to collect and produce every scrap of available evidence would be impossible or unreasonable; and if the trial attorney could identify some overlooked item of evidence not produced, or a news article cited in a law review that was overlooked or omitted from the applicant's documentary packet, the case could be denied without effective appeal. Such a rule would cause unnecessary duplication of evidence in asylum files without providing any greater assurance of an applicant's true credibility.*

b. ***Analysis of Current Law:***

c. *Current law:* Substantial evidence test

i. Applicable by statute to review removal decisions. INA sec. 242(b)(4)(B), 8 U.S.C. sec. 1252(b)(4)(B): "The administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"... .

ii. Supreme Court has stated that this test means that a decision to grant or withhold asylum may be reversed only where the reviewing court finds that the evidence not only supports a contrary conclusion, "but compels it." INS v. Zacarias-Elias, 112 S. Ct. 812, 815 n.1 (1992).

iii. Ex post explanations of discrepancies are not sufficient to overcome the substantial evidence standard supporting the BIA's lack of credibility finding, Chen v. INS, 344 F.3d 272 (2d Cir. 2003)

iv. Secaida-Rosales v. INS, 331 F.3d 297, 307 (2d Cir. 2003) ("When a decision of

the BIA, or that of an IJ, is before this court on appeal, we review factual findings under the substantial evidence standard. *See Alvarado-Carillo*, 251 F.3d at 49. Under this standard, a finding will stand if it is supported by "reasonable, substantial, and probative" evidence in the record when considered as a whole. *Diallo*, 232 F.3d at 287 (internal quotation omitted); *see also Qiu*, 329 F.3d at 148-49 (noting substantial evidence standard is slightly stricter than review for clear error). As we noted in *Diallo*, however, "when review involves mixed questions of law and fact, the standard of review is far less deferential." 232 F.3d at 287. Thus, if the issue on appeal involves the proper application of legal principles to the facts and circumstances of the individual case at hand, our review has been de novo. . . . Specifically, when a case, like this one, rises and falls purely on an IJ's credibility finding, courts have been particularly concerned that the decision-maker carefully detail the reasoning leading to the adverse finding. *See Ahmad*, 163 F.3d at 461; *Senathirajah v. INS*, 157 F.3d 210, 216 (3d Cir.1998); *Aguilera-Cota*, 914 F.2d at 1381. An IJ cannot completely insulate her decision from review simply by dismissing all of an applicant's testimony on credibility grounds. *See Metzen v. United States*, 19 F.3d 795, 798 (2d Cir.1994). As the Ninth Circuit has noted, "[t]he fact that an IJ considers a petitioner not to be credible constitutes the beginning not the end of our inquiry." *Aguilera-Cota,* 914 F.2d at 1381."

d. *Current law:* Manifestly contrary to law standard

i. INS sec. 242(b)(4) says that an AG discretionary judgment to grant or deny relief "shall be conclusive unless manifestly contrary to law and an abuse of discretion"

ii. Stoyanov v. INS, 149 F.3d 1226 (9th Cir. 1998)

iii. Velarde v. INS, 140 F.3d 1305 (9th Cir. 1998)

e. *Current law:* Abuse of discretion standard

i. When determining whether or not an agency's action was arbitrary, irrational or not in accordance with law the courts "engage in a substantial inquiry ... a thorough probing, in-depth review of [the] discretionary agency action." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1972), *overruled on other grounds,* Califano v. Sanders, 430 U.S. 99, 105 (1977); Diaz-Resendez v. INS, 960 F.2d 493, 495 (5th Cir. 1992).

ii. Wong Wing Hang v. INS, 360 F.2d 715, 718-719 (2d Cir. 1966), an action is an abuse of discretion "[i]f it was made without a rational explanation, inexplicably departed from established procedures, or rested on an impermissible basis such as an invidious discrimination against a particular race or group or other considerations that Congress could not have intended to make relevant ...."

iii. Abuse of discretion can occur by courts "neglecting to consider a significant factor that appropriately bears on the discretionary decision, by attaching weight to a factor that does not appropriately bear on the decision, or by assaying all the proper factors and no improper ones, but nonetheless making a clear judgmental error in weighing them." Henry v. INS, 74 F.3d 1, 4 (1st Cir. 1996)

iv. Abuse of discretion where the agency inexplicably departs from prior precedent, departs from its own regulations, fails to consider all relevant factors, or considers irrelevant factors. Lal v. INS, 255 F.3d 998, 1006-07 (9th Cir. 2001); Arrozal v. INS, 159 F.3d 429, 433-34 (9th Cir. 1998) (failure to consider all factors when it superficially mentions them in denial of motion to reopen for suspension); Urbina-Osejo v. INS, 124 F.3d 1314, 1318-19 (9th Cir. 1997) (BIA failed to consider all factors in denying suspension); Urban v. INS, 123 F.3d 644 (7th Cir. 1997) (same); Watkins v. INS, 63 F.3d 844, 850 (9th Cir. 1993) (reversed denial of motion to reopen for suspension for failing to consider all relevant factors and the cumulative effect of the factors and recognized that the INS abuses its discretion "no less by arriving at plausible decisions in an arbitrary fashion than by reaching unreasonable results."); Rodriguez-Gutierrez v. INS, 59 F.3d 504 (5th Cir. 1995) (BIA failed to consider positive factors and mischaracterized negative ones); see other decisions cited at Kurzban 8th at 799ff.; Espinoza v. INS, 991 F.2d 1294 (7th Cir. 1993) (denial of former 212(c) waiver based on speculation unsupported by record vacated by court);

f. *Historical perspective:* "State judges, holding their offices during pleasure, of from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws. And if there was a necessity for confiding the original cognisance of causes arising under those laws to them, there would be a correspondent necessity for leaving the door of appeal as wide as possible. In proportion to the grounds of confidence in, or distrust of, the subordinate tribunals, ought to be the facility or difficulty of appeals." A. Hamilton, The Federalist, No. LXXXI, in Hamilton, Jay & Madison, The Federalist 414-415 (E. P. Dutton & Co., New York, Everyman's Library ed. 1911).

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21. *PROPOSED CHANGE:* "**... and regardless of whether the judgment, decision or action is made in removal proceedings ...**" – RID sec. 101(e), amending INA section 242(a)(2)(B).

a. ***Critique:*** *This change is potentially the most widely-effective provision in the proposed legislation. It would bar from judicial review any discretionary determination made by the Department of Homeland Security and the Attorney General under the immigration laws of the United States. Thus, decisions affecting adjustments of status, in particular, and any other discretionary benefit or action would be immune from judicial challenge in any court. This would radically change the immigration laws, and would restrict the rights of United States citizens to obtain redress for injustices committed by the Attorney General and the Department of Homeland Security. Such an amendment has no conceivable relation to fighting terrorism; it is an opportunistic attempt to use the current atmosphere of crisis to increase the power of the federal government at the expense of its citizens.*

b. ***Current law:*** There is currently a split of opinion among the courts as to whether or not judicial review of discretionary decisions made outside the context removal proceedings has already been stripped by Congress.

i. Traditional rule: Discretionary decisions outside the removal context may be

reviewed by the courts.

(1) Henry v. INS, 74 F.3d 1, 7 (1st Cir. 1996)

(2) Gouvea v. INS, 980 F.2d 814, 818 (1st Cir. 1992) ("We review the Board's discretionary decisions respectfully. Unless the final outcome strikes us as "arbitrary, capricious, or an abuse of discretion," we will not interfere. . . . . In short, a decision to deny a section 212(c) waiver will be upheld "unless it was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis."")

(3) Abboud v. INS, 140 F.3d 843 (9th Cir. 1998) (applying traditional rules, *see* Spencer Enterprises v. U.S., 345 F.3d 683, 692 n.5 (9th Cir. 2003)).

ii. Decisions adhering to traditional rule: Discretionary decisions outside removal proceedings may still be challenged in court.

(1) Evangelical Lutheran Church in America v. INS, 288 F. Supp. 2d 32 (D.D.C. 2003)

(2) Calexico Warehouse, Inc. v. Neufeld, 259 F. Supp.2d 1067, 1072-75 (S.D. Cal.2002).

(3) Nyaga v. Ashcroft, 186 F. Supp.2d 1244, 1249 (N.D.Ga.2002), *vacated on other grounds*, 323 F.3d 906 (11th Cir.2003).

(4) Mart v. Beebe, 94 F. Supp. 2d 1120, 1124 (D. Or. 2000)

(5) Shanti, Inc. v. Reno, 36 F. Supp. 2d 1151, 1158 (D. Minn. 1999)

(6) Burger v. McElroy, 1999 WL 203353, at *4 (S.D.N.Y. Apr.12, 1999)

(7) Dominance Indus., Inc. v. INS, 1998 WL 874904, at *1-2 (W.D.Tex. Nov.24, 1998)

iii. Decisions departing partially from traditional rule: Jurisdiction may be barred over some, but not all, discretionary decisions outside the removal context

(1) Spencer Enterprises v. U.S., 345 F.3d 683, 689-90 (9th Cir. 2003)

(2) ANA International, Inc. v. Way, 393 F. 3d 886, 892 (9th Cir. 2004)

(3) Soltane v. U.S. Department of Justice, 381 F.3d 143, 146ff. (3d Cir. 2004).

(4) Shokeh v. Thompson, 369 F.3d 865, 867 (5th Cir. 2004), *vacated as moot*, 375 F.3d 351 (5th Cir. 2004).

(5) The M.D. Management Company, L.L.C. v. United States Department of Homeland Security, 2005 WL 91307 (D.Mass. Jan. 18, 2005)

iv. Decisions departing from traditional rule: Discretionary decisions on adjustment of status, employment authorization, waivers, travel documents, and all other topics are immune from judicial review.

(1) El-Khader v. Monica, 366 F.3d 562, 566 (7th Cir.2004).

(2) CDI Information Services, Inc. v. Reno, 278 F.3d 616 (6th Cir. 2002)

(3) Van Dinh v. Reno, 197 F.3d 427, 432 (10th Cir. 1999).

(4) Systronics Corp. v. INS, 153 F. Supp. 2d 7, 10-11 (D.D.C. 2001).

(5) Saccoh v. INS, 24 F. Supp. 2d 406, 409-10 (E.D. Pa. 1998).