Federal Bar Association
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CREDIBILITY

It's incredible how much you need to know!

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- **Credibility Findings – Part One**
- **What is Credibility and how do I establish it?**

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- believability, plausibility, plausibleness
- honesty, integrity, probity, truthfulness, veracity, verity
- honor, honorableness, incorruptibility, rectitude, righteousness, right-mindedness, scrupulosity, scrupulousness, uprightness
- artlessness, candidness, candor, forthrightness, frankness, good faith, guilelessness, ingenuousness, plainspokenness, sincerity, straightforwardness
- dependability, reliability, reliableness, trustability, trustiness, trustworthiness
- accuracy, objectivity
- authenticity, correctness, genuineness, truth

- implausibility, incredibility, incredibleness
- artifice, cozenage, crookedness, deception, dissembling, dissimulation, double-dealing, dupery, duplicity, fakery, falseness, falsity, fraudulentness, hypocrisy, insincerity, two-facedness
- beguilement, craftiness, cunning, cunningness, furtiveness, guile, indirection, insidiousness, oiliness, perfidy, slickness, slipperiness, slyness, smoothness, treacherousness, trickery, underhandedness, unscrupulousness, wiliness
- equivocation, prevarication
- exaggeration, inaccuracy
- deceit, deceitfulness, dishonesty, lying, mendaciousness, mendacity, untruthfulness

- Credibility is a factual determination by an Immigration Judge, 8 C.F.R. § 1003.1(d)(3)
- NO presumption of credibility where IJ does not rule, applicant enjoys a rebuttable presumption of credibility on appeal post REAL ID Act

- An IJ must make credibility determination in an asylum application considering the totality of the circumstances. INA § 208(b)(1)(B). Following factors are listed by statute:
  - Demeanor, candor, or responsiveness of the applicant/witness
  - Inherent plausibility of the applicant's account
  - Consistency between applicant's written or oral statements
  - Internal consistency of each statement
  - Consistency of statements with other evidence of record
  - Inaccuracies or falsehoods in statements, without regard to whether the inaccuracy goes to the heart of the claim

Examples:

- “Exhibited behavior which does not always seem reasonable”
- “Seemed rehearsed, lacking in spontaneity”
- “Applicant’s testimony was inconsistent with prior statements”
- “Couldn’t produce actual copies of documents”
- “Not rational”
- “Applicant did not cry”
- “Applicant has made such horrendous claims of abuse”
- “Applicant did not have a good foundation in Catholic teachings”

- Be consistent (but not if previous statements are inaccurate). *See Matter of J-C-H-F-*, 27 I&N Dec. 211 (BIA 2018).
- Be prepared (but not too prepared).
- Know apparently irrelevant details (was it snowing, what color clothes was the person wearing, what did they look like, what furniture was in the room).
- Have documents where possible, or a good explanation of why you don't have them.

- *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178–82 (2d Cir. 2004).
- (1) whether the record of the interview is verbatim or merely summarizes or paraphrases the alien's statements;
- (2) whether the questions asked are designed to elicit the details of a claim and the interviewer asks follow-up questions that would aid the alien in developing his or her account;
- (3) whether the alien appears to have been reluctant to reveal information to the interviewer because of prior interrogation sessions or other coercive experiences in his or her home country; and
- (4) whether the alien's answers to the questions posed suggest that he or she did not understand English or the interpreter's translations.

- Trauma, Mental Health & Credibility
- *Matter of J-R-R-A-*, 26 I&N Dec. 609 (BIA 2015)
- The Immigration Judge found that the respondent was not credible based on his demeanor and the inconsistencies in his testimony, which the Immigration Judge characterized generally as disjointed, confusing, and "self-serving." The Immigration Judge acknowledged counsel's concerns that the respondent may have cognitive difficulties, but he opined that such problems are "not a license to give incredible testimony."

- BIA:
- Where a mental health concern may be affecting the reliability of the applicant's testimony, the Immigration Judge should, as a safeguard, generally accept that the applicant believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim.
- Remanded

- *Matter of M-A-M-*, 25 I & N Dec. 474 (BIA 2011)
- Even if an alien has been deemed to be medically competent, there may be cases in which an Immigration Judge has good cause for concern about the ability to proceed, such as where the respondent has a long history of mental illness, has an acute illness, or was restored to competency, but there is reason to believe that the condition has changed. In such cases, Immigration Judges should apply appropriate safeguards.

- When to consider requesting safeguards or extenuating factors:
  - Youth
  - PTSD
  - Trauma
  - Severe emotional distress
  - Cognitive impairment
  - Memory loss
  - Education level
  - Cultural differences
- DOCUMENT IT!!!!

- Related concepts that are NOT to be confused with credibility, but often are:
- MERITORIOUS
- FRIVOLOUS

MERITORIOUS

- A meritorious claim is one that has merit.
- It can be a strong claim or a weak claim.
- Incredible testimony undermines merit.

FRIVOLOUS

- In order for a frivolous finding to be upheld, the preponderance of the evidence must demonstrate that the respondent knowingly filed an application with a deliberate misrepresentation of a material fact. *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007).

- For the (now hidden) IJ Benchbook discussion of credibility, check out:
- https://web.archive.org/web/20170429184107/https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Credibility_Outline.pdf
- Includes updates from Jeff Chase!!

Credibility Findings – Part Two
Challenging Credibility Findings Before the BIA

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#ImmigrationLaw #FBA

Background re the BIA

- Three panels
- All appeals first go to Panel 3 (Streamlining)
- Staff Attorneys may reject appeals that are too complex
- Rejected cases assigned to Merits Panels (1 and 2)

Know the standard of review

- BIA has two standards of review:
  - Questions of law reviewed de novo
  - Questions of fact reviewed for clear error
  - Mixed questions of fact and law reviewed de novo

"Clearly erroneous"

"[a] factfinding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder." *Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003). Rather, for a finding to be "clearly erroneous", the reviewing court on the entire evidence must be "left with the definite and firm conviction that a mistake has been committed."

In other words, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

"Clearly erroneous," continued

- Nevertheless, a high percentage of appeal briefs offer an alternative interpretation of the evidence to challenge an adverse credibility finding.
- Such approach will almost always result in a boilerplate dismissal.

8 Grounds for Challenging Adverse Credibility Findings

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1. Does the record support the adverse credibility finding?

- On occasion, the transcript does not support the cited discrepancy:
  - IJs hear so many cases
  - Witnesses/interpreters do not always speak clearly
  - documents sometimes clumsily translated
  - *E.g. Pang v. B.C.I.S.*, 448 F.3d 102 (BIA 2006): IJ claimed respondent had previously claimed his wife had been scheduled for IUD check-ups; but no mention of the word “scheduled” in the record.

2. Was the correct standard applied?

- Almost all cases now under the REAL ID Act
- But on occasion, an old reopened or remanded case predates the May 11, 2005 filing date
    - Pre-REAL ID standard more generous to the respondent

3. Did the IJ Decision contain an explicit credibility finding?

- If no adverse credibility made, applicant or witness has a rebuttable presumption of credibility - Sections 208(b)(1)(B)(iii), 240(c)(4)(C), I&N Act.
- Sometimes IJ decision finds parts of testimony "problematic," or questions its plausibility, without explicitly concluding that testimony was not credible.

4. Did the credibility finding cover all or only part of the testimony?

- *Siewe v. Gonzales*, 480 F.3d 160 (2d Cir. 2007):
  - When does "falsus in uno, falsus in omnibus" apply?
  - Five exceptions to "falsus in uno:"
    - evidence that is independently corroborated
    - false documents created to escape persecution
    - false evidence wholly ancillary to the claim (sometimes)
    - false statement at airport interview (sometimes)
    - false document that applicant does not know to be false
- 7th Cir. rejected "falsus in uno" as a "discredited doctrine."
  - *Kadia v. Gonzales*, 501 F.3d 817 (7th Cir. 2007).

5. Did the IJ engage in "bald" speculation?

- Did the IJ rely on permissible inference, or impermissible "bald" speculation?
- *Siewe v. Gonzales*: "An inference is not a suspicion or a guess."
- Must be tethered to the evidentiary record
  - "No real Christian wouldn't know that prayer"
    - *Lei Li v. Holder*, 629 F.3d 1154 (9th Cir. 2011): "An IJ's perception of a petitioner's ignorance of a religious doctrine is not a proper basis for an adverse credibility finding."
  - "The police would never leave a copy of the arrest warrant."
    - *Sok v. Mukasey*, 526 F.3d 48, 55-56: "Immigration Judge must endeavor not to allow preconceptions garnered from life in the United States to color their evaluation of events that took place in foreign lands."

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6. Did the IJ permissibly rely on an omission?

- *Gao v. Sessions* (2d Cir. 2018):
  - INA allows an IJ to rely on any inconsistency or omission
  - BUT statute "does not give an IJ free rein."
    - Not all omissions or inconsistencies deserve the same weight
    - asylum applicants not required to list every incident of persecution in the I-589
  - Omissions less probative of credibility than direct contradictions in evidence and testimony
  - Similar holdings in other circuits: *Cojocari v. Sessions*, 863 F.3d 616 (7th Cir. 2017); *Yongguo Lai v. Holder*, 773 F.3d 966 (9th Cir. 2014); *Abulashvili v. U.S. Att'y Gen.*, 663 F.3d 197 (3d Cir. 2011).

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7. Was the respondent provided the opportunity to explain the discrepancy?

- In some circuits, a respondent must be given a reasonable opportunity to explain any "non-dramatic" perceived discrepancy.
- *See Lei Li v. Holder*, 629 F.3d 1154, 1159 (9th Cir. 2011); Pang v. B.C.I.S., 448 F.3d 102, 109 (2d Cir. 2006).
- BUT *cf. Sankoh v. Mukasey*, 539 F.3d 456, 470 (7th Cir. 2008): Individuals make mistakes about immaterial points; relying on such mistakes "appears to be more of a game of 'gotcha' than an effort to critically evaluate the applicant's claim," but nevertheless declined to remand where IJ did not afford opportunity to explain.

8. Did the totality of the circumstances support the finding?

- IJ can't "cherry pick" trivial discrepancies
  - *e.g. Alimbaev v. Att'y Gen. of U.S.*, 872 F.3d 188 (3d Cir. 2017) (finding 2 inconsistencies relied on by the BIA to be too insignificant to justify an IJ adverse credibility finding).
- IJ need not credit explanation for discrepancy, but must present specific, cogent reasons for rejecting it. *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004).

Credibility Findings – Part Three
Credibility Findings in the U.S. Courts of Appeals

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This section will cover:

- **Standards of Review**
- **Scope of Review**
- **A Credible Approach**
- **Where Credibility May Not Matter**
- **Questions**

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Standards of Review

Before the BIA, credibility findings are factual findings, subject to clear error review. 8 C.F.R. § 1003.1(d)(3)(i). There may also be legal error, e.g., in how the findings are made and what factors are considered, subject to de novo review. Id. § 1003.1(d)(3)(ii).

Before the Courts of Appeals, credibility findings are also considered under the standard applied to findings of fact. See, e.g., Shrestha v. Holder, 590 F.3d 1034, 1039 (9th Cir. 2010); Tang v. U.S. Att'y Gen., 578 F.3d 1270, 1276-77 (11th Cir. 2009). Under the substantial evidence standard, the findings "are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B); see also INS v. Elias-Zacarias, 502 U.S. 478, 483-84 (1992). "'Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion.'" Ding v. Ashcroft, 387 F.3d 1131, 1136 (9th Cir. 2004) (quoting Berroteran-Melendez v. INS, 955 F.2d 1251, 1256 (9th Cir. 1991)).

Standards of Review

Moreover, although "agency credibility determinations deserve substantial deference, the REAL ID Act does not give a blank check to the IJ . . .. '[T]he IJ must provide a specific cogent reason for the adverse credibility finding.' This rule is not altered by the REAL ID Act and is warranted." Shrestha v. Holder, 590 F.3d 1034, 1042 (9th Cir. 2010) (quoting Gui v. INS, 280 F.3d 1217, 1225 (9th Cir. 2002)) (citation and internal quotation marks omitted); see also Ilunga v. Holder, 777 F.3d 199, 207 (4th Cir. 2015); Xiu Xia Lin v. Mukasey, 534 F.3d 162, 165 (2d Cir. 2008); Chen v. U.S. Att'y Gen., 463 F.3d 1228, 1230-32 (11th Cir. 2006); Hanaj v. Gonzales, 446 F.3d 694, 700 (7th Cir. 2006); Shah v. Att'y Gen. of U.S., 446 F.3d 429, 437 (3d Cir. 2006).

In addition, the legal questions underlying the agency's credibility analysis are reviewed de novo. Bhattarai v. Lynch, 835 F.3d 1037, 1042 (9th Cir. 2016).

Scope of Review: Reviewing the BIA's versus the IJ's decision

The court reviews the precise reasons that the agency articulated in its final order. See SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

As a general matter, where the BIA has rendered a decision, the court will review the BIA's decision.

However, where the BIA has deferred to the IJ's discretion; incorporated parts of the IJ's decision, including where it expressly applied Matter of Burbano, 20 I. & N. Dec. 872 (BIA 1994); or has summarily affirmed without an opinion, special rules apply. For example, where the BIA adopts and affirms the IJ's decision, citing Matter of Burbano, and also provides its own review of the evidence and the law, the court reviews both the IJ's and the BIA's decisions. See Ali v. Holder, 637 F.3d 1025, 1028-29 (9th Cir. 2011); Joseph v. Holder, 600 F.3d 1235, 1239-40 (9th Cir. 2010).

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Scope of Review: Reviewing the BIA's versus the IJ's decision, continued

With the apparent push towards affirmances without opinion, recall that, where the BIA summarily affirms the IJ's decision, the court reviews the IJ's decision as the final agency action. See Pagayon v. Holder, 675 F.3d 1182 (9th Cir. 2011); Reyes-Reyes v. Ashcroft, 384 F.3d 782 (9th Cir. 2004); Lanza v. Ashcroft, 389 F.3d 917 (9th Cir. 2004).

A renewed push towards additional AWOs would remove a layer of insulation from line adjudicators' adverse credibility findings, exposing them to direct circuit court scrutiny. See Reyes-Reyes v. Ashcroft, 384 F.3d 782, 786 (9th Cir. 2004) ("In effect, when the BIA invokes its summary affirmance procedures, it pays for the opacity of its decision by taking on the 'risk [of reversal] . . . in declining to articulate a different or alternate basis for the decision' should the 'reasoning proffered by the IJ [prove] faulty.'").

A Credible Approach

After identifying the agency's "decision," determine whether any credibility finding (including a bifurcated credibility finding) was explicitly made. If no credibility finding was explicitly made, if no credibility finding was made as to a discrete aspect of a claim, or if the BIA's decision is silent regarding credibility, the petitioner may be presumed credible on appeal. 8 U.S.C. §§ 1158(b)(1)(B)(iii), 1229a(c)(4)(C).

Determine whether the petitioner even had an opportunity to testify.*

A Credible Approach, continued

Confirm that "the alien has exhausted all administrative remedies available to the alien as of right," i.e., that the issue of credibility has been preserved before the agency. See 8 U.S.C. § 1252(d)(1). This generally requires only that the denial of the underlying form of relief or protection was challenged before the BIA. See Vizcarra-Ayala v. Mukasey, 514 F.3d 870, 873-74 (9th Cir. 2008); Zhang v. Ashcroft, 388 F.3d 713, 721 (9th Cir. 2004).

This is a very fact-intensive inquiry. Study the record. It may demonstrate the IJ and/or BIA made factual errors or did not make sufficient factual findings. The facts may dictate a reversal or remand and/or the record may not be ripe for appellate review.

A Credible Approach, continued

Determine whether the petitioner was provided with notice and an opportunity to be heard regarding the credibility factors relied on by the IJ and/or BIA, and whether the IJ and/or BIA provided a specific and cogent reason for rejecting the petitioner's reasonable and plausible explanation.

Determine whether the IJ requested additional evidence and whether the petitioner had the opportunity to provide or explain the absence of such evidence.

Determine whether the IJ and/or BIA conflated issues of credibility and corroboration.

A Credible Approach, continued

Determine whether the IJ and/or BIA considered the totality of the circumstances, as required by 8 U.S.C. §§ 1158(b)(1)(B)(ii), 1229a(c)(4)(C). See Ilunga v. Holder, 777 F.3d 199, 207 (4th Cir. 2015) (“The totality of the circumstances standard . . . . does not . . . permit a judge to ‘cherry pick’ facts or inconsistencies to support an adverse credibility finding that is unsupported by the record as a whole.”); Shrestha v. Holder, 590 F.3d 1034, 1044-45 (9th Cir. 2010) (“[T]he analysis on review must also take into account the totality of circumstances, and should recognize that the normal limits of human understanding and memory may make some inconsistencies or lack of recall present in any witness’s case..”); Hanaj v. Gonzales, 446 F.3d 694, 700 (7th Cir. 2006) ("The IJ cannot selectively examine evidence. . . ."); Shah v. Att'y Gen. of U.S., 446 F.3d 429, 437 (3d Cir. 2006) (same).

A Credible Approach, continued

Focus on the factors. Review pertinent circuit authority for the relevant factors, and organize your analysis/arguments by the relevant factors:

- Demeanor
- Responsiveness
- Specificity and Detail
- Inconsistencies: Minor Inconsistencies, Substantial Inconsistencies, and Mistranslation/Miscommunication
- Omissions
- Incomplete Asylum Application
- Sexual Abuse or Assault
- Airport Interviews
- Asylum Interview/Assessment to Refer
- Bond Hearing
- State Department and other Government Reports
- Speculation and Conjecture
- Implausible Testimony
- Counterfeit and Unauthenticated Documents
- Misrepresentations
- Classified Information
- Failure to Seek Asylum Elsewhere
- Cumulative Effect of Adverse Credibility Grounds
- Voluntary Return to Country

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Where Credibility May Not Matter

The IJ and the BIA are required to examine the objective evidence of record when considering asylum and withholding of removal, see Bromfield v. Mukasey, 543 F.3d 1071, 1077 (9th Cir. 2008), and protection under the CAT. See Kamalthas v. INS, 251 F.3d 1279, 1284 (9th Cir. 2001).

In the context of motions, "the BIA may not make adverse credibility determinations (including adverse credibility determinations based on the falsus maxim) in denying a motion to reopen," Yang v. Lynch, 822 F.3d 504, 509 (9th Cir. 2016), and facts presented in supporting affidavits must be accepted as true unless inherently unbelievable. *See* Bhasin v. Gonzales, 423 F.3d 977, 987 (9th Cir. 2005); Celis-Castellano v. Ashcroft, 298 F.3d 888, 892 (9th Cir. 2002); Limsico v. INS, 951 F.2d 210, 213 (9th Cir. 1991). See also Guo v. Ashcroft, 386 F. 3d 556 (3d Cir. 2004) (holding that a prior adverse credibility finding not relevant).

Where Credibility May Not Matter, continued

Circuit by circuit:

Aguilar-Escoto v. Sessions, 874 F.3d 334, 338 (1st Cir. 2017) ("[I]n the withholding context, the inquiry is a strictly objective one. Thus, even after discrediting Aguilar's testimony, . . . the BIA was nonetheless obliged to consider documentary evidence potentially capable of establishing her likelihood of suffering further abuse.") (internal citation omitted); Rasiah v. Holder, 589 F.3d 1, 6 (1st Cir. 2009) ("An adverse credibility finding by itself would not automatically doom a claim for asylum.").

Paul v. Gonzales, 444 F.3d 148, 156 (2d Cir. 2006) ("[A] withholding of removal claim . . ., premised exclusively on objective evidence of future persecution, may, in appropriate instances, be sustained even though an IJ, in the context of an asylum claim, has found not credible the applicant's testimony alleging past persecution.").

Where Credibility May Not Matter, continued

Camara v. Ashcroft, 378 F.3d 361, 374 (4th Cir. 2004) ("[W]hile we do not disturb the IJ's factual finding that Camara's recollections may not have been wholly trustworthy, we nevertheless conclude that the IJ erroneously overlooked Camara's other evidence in denying her application for asylum and for withholding of removal."); Anim v. Mukasey, 535 F.3d 243, 261 (4th Cir. 2008).

Iruegas-Valdez v. Yates, 846 F.3d 806, 811 (5th Cir. 2017) (reversing notwithstanding credibility determination).

Hossain v. Whitaker, 2019 U.S Lexis 2320 (6th Cir. Jan. 24, 2019) (holding that the petitioner could have, but had not, established that documentary evidence independently satisfied his burden of proof for asylum).

Where Credibility May Not Matter, continued

Adekpe v. Gonzales, 480 F.3d 525, 532 (7th Cir. 2007) ("Even if the IJ had properly considered Adekpe's testimony incredible on its own, other evidence, including these letters, could still bolster his story."); Mansour v. INS, 230 F.3d 902, 908-09 (7th Cir. 2000) (reversing on CAT protection, notwithstanding adverse credibility finding).

Bromfield v. Mukasey, 543 F.3d 1071, 1077 (9th Cir. 2008) ("Our review of the Country Report compels the conclusion that there exists in Jamaica a pattern or practice of persecution of gay men. It follows that if Bromfield had not been convicted of an aggravated felony, he would have been eligible for asylum."); Kamalthas v. INS, 251 F.3d 1279, 1280 (9th Cir. 2001) ("[W]e find that the Board abused its discretion in failing to recognize that country conditions alone can play a decisive role in granting relief under the Convention . . .").

Where Credibility May Not Matter, continued

Niang v. Gonzales, 422 F.3d 1187, 1198-2001 (10th Cir. 2005) (remanding notwithstanding adverse credibility finding).

Forgue v. United States Att'y Gen., 401 F.3d 1287 (11th Cir. 2005) ("[A]n adverse credibility determination does not alleviate the IJ's duty to consider other evidence produced by an asylum applicant. That is, the IJ must still consider all evidence introduced by the applicant."); see also Hua Wu Wu v. United States Att'y Gen., 687 F. App'x 793 (11th Cir. 2017).

Questions

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