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## Measured Reliance: Evaluating the Authenticity of Foreign Documents in Removal Proceedings

by Suzanne M. DeBerry

### Introduction

In the immigration context, an adjudicator's determination of the reliability of a foreign document may be the legal cornerstone upon which an alien wins or loses his or her case. For asylum purposes, an alien may seek to introduce police reports, arrest warrants, records of fines paid, or political membership cards. He or she may seek to introduce marriage certificates or birth certificates to show a family relationship or national register or identification cards to prove identity. On the other hand, the Department of Homeland Security ("DHS") may also seek to introduce foreign documents, including foreign criminal conviction records or evidence of an alien's past involvement with antigovernmental groups or terrorist organizations, or it may submit consular reports rebutting the reliability of the alien's foreign documents.

Juxtaposed against the significance of a reliability determination is the difficulty with which an assessment is made. Lack of familiarity with similar foreign documents, language barriers, and cultural or economic differences can create an inherently difficult task of determining reliability, because expectations of what a reliable document should be like are unclear. See Yvon Loussouarn, *Explanatory Report on the 1961 Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*, in Acts and Documents of the Ninth Session (1960), tome II, Legalisation, available at website of Hague Conference on International Private Law ("HCCH"), [http://www.hcch.net/index\\_en.php](http://www.hcch.net/index_en.php) (last visited Sept. 30, 2010) [hereinafter Explanatory Report]; see also, e.g., *Pasha v. Gonzales*, 433 F.3d 530 (7th Cir. 2005) (finding that a forensic document expert's assessment was unreliable where he had concluded that the documents were fraudulent because they were printed with "expensive" color laser technology and lacked diacritical marks, although he did not speak or read the language in which it was written).

Because of the significant issues surrounding this reliability determination and the variety of ways in which circuits have addressed the issue, this article seeks to provide some clarity and evaluative considerations for adjudicators making these admissibility determinations.

### General Admissibility Standard

Generally, evidence will be admissible in removal proceedings if it is probative and its use is fundamentally fair so as not to deprive the alien of due process. *See, e.g., Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 268 (2d Cir. 2006); *Mendoza-Solis v. INS*, 36 F.3d 12, 14 (5th Cir. 1994); *Baliza v. INS*, 709 F.2d 1231, 1233 (9th Cir. 1983); *Tashnizi v. INS*, 585 F.2d 781, 782-83 (5th Cir. 1978); *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980); *Matter of Lam*, 14 I&N Dec. 168, 172 (BIA 1972). As a result, suppression of evidence is an exceptional remedy. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). Explaining the general standard for authentication of documents, the First Circuit has stated,

[A]uthentication requires nothing more than proof that a document or thing is what it purports to be and, even though the Federal Rules of Evidence spell out various options, the rules also stress that these options are not exclusive and the central condition can be proved in any way that makes sense in the circumstances.

*Yongo v. INS*, 355 F.3d 27, 30-31 (1st Cir. 2004) (citing Fed. R. Evid. 901-902; *United States v. McMahon*, 938 F.2d 1501, 1508-09 (1st Cir. 1991); 5 *Weinstein's Federal Evidence* § 901.03 (4th ed. 2003)).

After the party introducing the foreign document has shown that the document is generally what it purports to be for admissibility purposes, any lingering questions as to the reliability of the document may still affect its evidentiary weight. *See, e.g., Li v. Mukasey*, 529 F.3d 141, 149-150 (2d Cir. 2008) (differentiating between admissibility and weight concerning the lack of certification of a foreign document). *See generally Matter of Velasquez*, 19 I&N Dec. 377, 384 (BIA 1986) (stating that the fact that a pleading was made by counsel without his client's knowledge goes to the weight, rather than the admissibility, of the pleading); *Matter of Kwan*, 14 I&N Dec. 175, 177 (BIA 1972) (stating that the fact that a document contains hearsay affects only the weight it should be afforded, not its admissibility); *Matter of C-*,

5 I&N Dec. 370, 373 (BIA 1953) (stating that lack of personal knowledge by a document's entrant affects the weight given to the document, but not its admissibility).

### Foreign Public Documents

The regulations at 8 C.F.R. §§ 287.6 and 1287.6 [hereinafter referred to as 8 C.F.R. § 1287.6] specify certain means of authenticating foreign official records, using "official record" as a general term applying to all documents issued by a foreign public official, but distinguishing between documents purportedly issued by signatory and nonsignatory countries to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents ("Convention").<sup>1</sup>

#### Regulatory Requirements

##### Requirements under 8 C.F.R. § 1287.6(b)— Countries Not Signatory to the Convention

Under 8 C.F.R. § 1287.6(b)(1), an official record issued by a country not signatory to the Convention "shall be evidenced by an official publication thereof, or by a copy attested by an officer so authorized." Documents of nonsignatory countries which are not official publications must be certified by a United States foreign service officer who is stationed in the country where the record is kept and must include any foreign certificates. 8 C.F.R. § 1287.6(b)(2).

The foreign service officer must certify the genuineness of the signature and the official position of either: (1) the attesting officer, or (2) any foreign officer whose certification of genuineness of signature and official position relates directly to the attestation or is in a chain of certificates relating to the attestation. *Id.* If a chain of certificates is created (the signature and position of each attesting officer is certified by any other authorized foreign officer), the U.S. foreign service officer may certify any signature in the chain. 8 C.F.R. § 1287.6(b)(1).

##### Requirements under 8 C.F.R. § 1287.6(c)— Countries Signatory to the Convention<sup>2</sup>

The regulation at 8 C.F.R. § 1287.6(c) states that

a public document or entry therein, when admissible for any purpose, may be evidenced by an official publication, or by a copy properly certified under the

Convention. To be properly certified, the copy must be accompanied by a certificate in the form dictated by the Convention. This certificate must be signed by a foreign officer so authorized by the signatory country, and it must certify (i) the authenticity of the signature of the person signing the document; (ii) the capacity in which that person acted, and (iii) where appropriate, the identity of the seal or stamp which the document bears.

8 C.F.R. § 1287.6(c)(1); *see also* *Model of Certificate*, Annex to the Convention, *available at* <http://hcch.e-vision.nl/upload/apostille.pdf> (last visited Sept. 8, 2010). Unlike documents originating from nonsignatory countries, however, “[n]o certification is needed from an officer in the Foreign Service of public documents.” 8 C.F.R. § 1287.6(c)(2).

Using the Convention’s term, “public document,” rather than the more general term, “official record,” the regulations state that “public documents” include (1) documents issued by a state court; (2) administrative documents; (3) documents executed before a notary public; and (4) “official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date.” 8 C.F.R. § 1287.6(c)(3); *see also* Convention, *supra*, at Art. 1.<sup>3</sup> Documents executed by diplomatic or consular agents and administrative documents dealing directly with commercial or customs operations are excluded from the Convention’s application. 8 C.F.R. § 1287.6(c)(4); *see also, e.g.,* *Jiang v. Gonzales*, 474 F.3d 25, 29 (1st Cir. 2007) (finding that because the declaration of a priest contained a “mish-mash” of church records and narrative, it was not a public document under 8 C.F.R. § 1287.6). Despite these specific exclusions, however, the Convention notes explain that it was designed to be broadly applied. Explanatory Report, *supra*, at Art. 1.

#### Requirements under 8 C.F.R. § 1287.6(d)—Canada

Under 8 C.F.R. § 1287.6(d), an official record “issued by a Canadian governmental entity within the geographical boundaries of Canada, when admissible for any purpose, shall be evidenced by a certified copy of the original record attested by the official having

legal custody of the record or by an authorized deputy.” Although Canada is not a signatory to the Convention, *see Status Table*, HCCH, *supra* n.2, the regulations provided a streamlined authentication process similar to that of signatory countries, in which no signature of a U.S. foreign service officer or chain of certificates is required.

#### Exceptions

The majority of circuit courts, as well as the Board of Immigration Appeals, have held that the inability to certify foreign official records is not fatal to the admissibility of a document. *See Yan v. Gonzales*, 438 F.3d 1249, 1256 n.7 (10th Cir. 2006); *Shtaro v. Gonzales*, 435 F.3d 711, 717 (7th Cir. 2006); *Cao He Lin v. U.S. Dep’t of Justice*, 428 F.3d 391 (2d Cir. 2005); *Ding v. Ashcroft*, 387 F.3d 1131, 1135 n.4 (9th Cir. 2004); *Gui Cun Liu v. Ashcroft*, 372 F.3d 529 (3d Cir. 2004); *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 214 n.5 (BIA 2010).

The standard for determining when certification of foreign official records is not required is less clear, however. In *Leia v. Ashcroft*, 393 F.3d 427 (3d Cir. 2005), the court allowed a Ukrainian asylum applicant to admit into evidence an uncertified public foreign document when he provided evidence that obtaining certification would be an unreasonable or impossible burden, based on the political situation in the Ukraine. *Id.* at 434 n.7 (“We agree[] . . . that “asylum applicants can not always reasonably be expected to have an authenticated document from an alleged persecutor.”” (quoting *Gui Cun Liu*, 372 F.3d at 532 (quoting Government’s brief))); *see also* *Senathirajah v. INS*, 157 F.3d 210, 215 (3d Cir. 1998). However, as recently stated by the Board, “failure to attempt to prove the authenticity of a document through [certification] or any other means is significant.” *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 214 at n.5.

As a result, the general guidelines provide that certification under 8 C.F.R. § 1287.6 satisfies the authentication requirement for foreign public documents, but if the party seeking to introduce the evidence is unable to provide certification, he or she may still authenticate the document by other means.

#### *Circumstantial Evidence of Authentication*

In examining the authenticity of foreign documents, “the line between reasonable inference-drawing and impermissible speculation is necessarily imprecise.”

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# FEDERAL COURT ACTIVITY

## CIRCUIT COURT DECISIONS FOR AUGUST 2010

by John Guendelsberger

The United States courts of appeals issued 299 decisions in August 2010 in cases appealed from the Board. The courts affirmed the Board in 258 cases and reversed or remanded in 41, for an overall reversal rate of 13.7% compared to last month's 12%. There were no reversals from the Fourth, Eighth, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for August 2010 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% reversed
First	5	4	1	20.0
Second	91	89	2	2.2
Third	31	26	5	16.1
Fourth	8	8	0	0.0
Fifth	18	14	4	22.2
Sixth	21	17	4	19.0
Seventh	10	8	2	20.0
Eighth	11	11	0	0.0
Ninth	94	71	23	24.5
Tenth	2	2	0	0.0
Eleventh	8	8	0	0.0
All	299	258	41	13.7

The 299 decisions included 112 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 74 direct appeals from denials of other forms of relief from removal or from findings of removal; and 113 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	%
Asylum	112	92	20	17.9
Other Relief	74	59	15	20.3
Motions	113	107	6	5.3

The 20 reversals in asylum cases included 8 adverse credibility determinations (6 from the Ninth Circuit) and an assortment of other issues, including level of harm for past persecution, nexus, the 1-year bar, ineffective

assistance of counsel, frivolousness, and failure to address a Convention Against Torture claim.

Of the 15 reversals in the "other relief" category, 2 involved vacated convictions and several others addressed criminal grounds of removal. Five concerned issues of eligibility for cancellation of removal or section 212(c) relief. There were also four *Carachuri-Rosendo* remands from the Fifth Circuit. Four of the six motions to reopen involved ineffective assistance of counsel.

The chart below shows the combined numbers for the January 2010 through, arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% reversed
Seventh	46	36	10	21.7
Ninth	1294	1081	213	16.5
Fifth	105	92	13	12.4
Sixth	82	74	8	9.8
Third	320	289	31	9.7
Eleventh	159	146	13	8.2
Tenth	27	25	2	7.4
First	28	26	2	7.1
Eighth	48	45	3	6.3
Second	671	630	41	6.1
Fourth	98	93	5	5.1
All	2878	2537	341	11.8

Last year at this point there were 3365 total decisions and 376 reversals for an 11.2% overall reversal rate.

The numbers by type of case on appeal for the first 8 months of 2010 combined are indicated below.

	Total	Affirmed	Reversed	%
Asylum	1466	1286	180	12.3
Other Relief	604	515	89	14.7
Motions	808	736	72	8.9

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**“Did You Notify the Police?:  
Ninth Circuit Revisits the “Unable or  
Unwilling to Control” Standard**

*by Edward R. Grant and Patricia M. Allen*

“**D**id you notify the police?” This commonplace inquiry, heard everywhere from casual conversation to pesky insurance claim forms, takes on new meaning when posed in Immigration Court.

The question differs, of course, from “*Why* did you notify the police?”, as illustrated by the following dialogue from *The Godfather*:

*Bonasera*: I went to the police, like a good American. These two boys were brought to trial. The judge sentenced them to three years in prison, and suspended the sentence. Suspended sentence! They went free that very day! I stood in the courtroom like a fool, and those two bastards, they smiled at me. Then I said to my wife, “For justice, we must go to Don Corleone.”

*Don Corleone*: (with offended dignity) Why did you go to the police? Why didn’t you come to me first?

*Bonasera*: (muttering almost inaudibly) What do you want of me?

Perfunctory as they may be, such questions lie at the heart of the definition of a refugee—a person outside his or her country of nationality or last habitual residence who is “unable or unwilling to avail himself or herself of the protection” of that country. Section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A). From this language, adjudicators draw the doctrine that an applicant for asylum need not show that the government “condoned” persecution inflicted by private actors; he or she need only show that the government is unwilling or unable to control such parties. See *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998).

Although a call to police in this country can summon a phalanx of squad cars to something as minor as a dog bite, the response in many “sending countries” is often less diligent. *Matter of O-Z- & I-Z-* provides a case

in point. The respondents reported at least three of the multitudinous burglaries and assaults inflicted on them to Ukrainian police, who took no action other than writing a report. In other cases, police do act, but with results akin to the “suspended sentence” lamented by the eventually indebted Bonasera.

Thus, both the Board and the Federal courts of appeals have clarified that the “unable or unwilling” inquiry cannot turn solely on whether the applicant has reported the alleged harm or abuse to the police—particularly if it would be futile or could lead to further harm. See, e.g., *Lopez v. U.S. Att’y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007) (stating that failure to report to police does not automatically bar relief where an applicant can demonstrate that the authorities would have been unable or unwilling to protect her); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1057 (9th Cir. 2006) (stating that “we have never held . . . that reporting private persecution is a prerequisite for relief”); *Poradisova v. Gonzales*, 420 F.3d 70, 80 (2d Cir. 2005) (holding that it was wrong to give adverse weight to the applicants’ failure to file police reports where evidence showed that the police themselves are anti-Semitic); *Fiadjoe v. U.S. Att’y Gen.*, 411 F.3d 135, 161-62 (3d Cir. 2005) (finding that failure to fully inform the police of the extent of harm does not undercut a claim where the country reports and testimony “show how futile resort to the police would have been”); *Matter of S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000).

During the summer, the Ninth Circuit issued three decisions giving further contours to the “unable or unwilling” standard. See *Truong v. Holder*, 613 F.3d 938 (9th Cir. 2010); *Afriyie v. Holder*, 613 F.3d 924 (9th Cir. 2010); *Rahimzadeh v. Holder*, 613 F.3d 916 (9th Cir. 2010). Two are particularly notable because they involved claims from countries in Western Europe. To more fully understand the holdings in these cases, it is worth taking a peek back at *Ornelas-Chavez*, where a divided panel held that the Board had improperly made “the reporting of private persecution a sine qua non for the success of [the alien’s] withholding of removal claim.” *Ornelas-Chavez*, 458 F.3d at 1057. “With respect,” Judge O’Scannlain wrote in dissent, “[the Board] did no such thing.” *Id.* at 1061 (O’Scannlain, J., dissenting). The strong brew of dissent focused on the meaning of this sentence in the Board’s decision:

“Accordingly, where the respondent never reported his incidents of harm

to government authorities, *and where the background evidence in the record is inconclusive, the Immigration Judge properly found that the respondent did not prove that the Mexican government is unwilling or unable to control those who harmed or may harm him.*”

*Id.* (quoting unpublished Board decision).

The majority declared that the Board committed two legal errors in this sentence: first, holding that the petitioner, in order to show that the police were “unable or unwilling” to protect him, must demonstrate that he had reported the harm to the police; and second, that the background evidence of country conditions could be used to demonstrate that the mistreatment of Ornelas-Chavez did not occur. *Id.* at 1056-57. Addressing the first point, the majority stated:

We now make explicit what was implicit in . . . earlier cases: an applicant who seeks to establish eligibility for withholding of removal . . . on the basis of past persecution at the hands of private parties the government is unwilling or unable to control need not have reported that persecution to the authorities if he can convincingly establish that doing so would have been futile *or have subjected him to further abuse.*

*Id.* at 1058 (emphasis added). Addressing the second, the court declared that the petitioner’s credible testimony, including an account of the murder of two of his homosexual friends by Uruapan police, trumped the more general, and mixed, evidence regarding official protection of the rights of homosexuals and children subject to abuse.

Judge O’Scannlain disputed both points. The Board, he said, had not doubted the petitioner’s credibility, but rather his “preferred legal conclusion” that the authorities would not protect him. *Id.* at 1062. Seen in this light, Judge O’Scannlain asserted that the Board had not imposed a strict requirement of reporting to police—rather, it had considered the petitioner’s failure to do so in conjunction with the evidence of country conditions that showed a mixed response by authorities to protection

of homosexuals. *Id.* The reporting requirement was thus “of the majority’s own imagining,” a “creative invention . . . not appropriate to our role in reviewing the lawful adjudication of an administrative body.” *Id.* at 1063. The majority’s assessment of the country conditions evidence, in turn, failed under the “substantial evidence” standard to give appropriate deference to the Board.

*Ornelas-Chavez* truly left its readers “seeing through a glass, darkly.” The panel could not even agree on the rationale of the Board’s decision. Even if the majority’s interpretation was correct—that a strict “reporting requirement” had been imposed—the Board’s error was in not following its own precedents, which had imposed no such requirement. See *Matter of S-A-*, 22 I&N Dec. at 1335 (acknowledging that reporting to the police might have placed the applicant at greater risk of harm by her family). Left unanswered by *Ornelas-Chavez* was the more pivotal question: in the absence of reporting to the police, what evidence is sufficient to demonstrate that the authorities are unable or unwilling to control private actors engaged in persecution—or conversely, that they are willing and able to do so?

The trio of summer decisions indicates a deliberate effort by the Ninth Circuit to begin the process of clarification. The simultaneously issued decisions in *Rahimzadeh* and *Afriyie*, in fact, employ the standard pedagogical tool of reaching contrasting results on different factual records, first to establish a rule, and then to illustrate how it ought to be applied. Based on these decisions, it is now clear that country conditions reports play an important role in “filling the gap” left by lack of evidence that persecutory attacks or threats have been reported to the authorities. However, as emphasized in *Afriyie*, credible testimony of an applicant can override more general statements in country reports regarding a government’s willingness and ability to control such harm.

The petitioner in *Rahimzadeh*, an Iranian convert to Christianity, experienced a series of retaliatory attacks and threats by Muslim extremists in the Netherlands, where he had been granted asylum in 1996. He reported none of these incidents to the police, but at his hearing he submitted evidence of Islamic radicalism in the Netherlands, including death threats to converts from Islam. The DHS, in turn, submitted evidence that Dutch authorities at all levels took firm action against abuses of

freedom of religion by militant Islamic groups and were generally effective in doing so. The Immigration Judge granted withholding of removal to Iran but denied asylum and withholding of removal to the Netherlands, “due to [Rahimzadeh’s] failure to report incidents of harm to the police and evidence that the Dutch authorities are responsive to reports of religious extremism.” *Rahimzadeh*, 613 F.3d at 922 (quoting Immigration Judge’s decision). The Board affirmed.

The Ninth Circuit could have seized upon the Immigration Judge’s mention of the lack of police reports and, mirroring *Ornelas-Chavez*, reversed for legal error. Rather, the court clarified that while there is no absolute requirement to report harm to the police, the failure to do so

leaves a gap in proof about how the government would respond if asked, which the petitioner may attempt to fill by other methods. These methods, in addition to those already surveyed, might include showing that others have made reports of similar incidents to no avail, or establishing that private persecution of a particular sort is widespread and well-known but not controlled by the government.

*Id.* (citations omitted). Then, in a key pivot away from *Rahimzadeh*, the court rejected the petitioner’s argument that the Immigration Judge had imposed an absolute reporting requirement and, instead, considered what the Immigration Judge actually *meant*:

While the IJ could have crafted those sentences more artfully, in context it is clear that the IJ treated the failure to report the persecution as merely one factor in the assessment of the Dutch government’s willingness and ability to control private extremists, not as a per se bar to asylum. The IJ found that the reasons Rahimzadeh gave for not reporting the abuse, namely the private threat of retaliation and his perception of the Netherlands as being home to thousands of fanatical Muslims, did not independently satisfy his burden to establish that the Dutch authorities

would have been unable or unwilling to control his attackers, particularly in light of Rahimzadeh’s failure to provide other information about the record of the Dutch authorities in controlling private extremists.

*Id.*

Further details of the contrast between *Rahimzadeh* and *Ornelas-Chavez* bear scrutiny. The Board in *Ornelas-Chavez* described country reports as “inconclusive” on the level of protection offered by police; the Immigration Judge in *Rahimzadeh* treated the evidence of Dutch response to Islamic extremism as more definitive—which, in fairness, it is. Also, the petitioner in *Ornelas-Chavez* offered evidence that some Mexican police officers had themselves engaged in persecution of homosexuals, including the killing of two men known to the respondent. The Ninth Circuit seized upon this evidence as trumping the more general statements in the country reports of increased protection for the rights of homosexuals. *Ornelas-Chavez*, 458 F.3d at 1057.

Finally, *Rahimzadeh* clarified the rule that reporting to the police is not required if the asylum applicant can “convincingly establish” that doing so would “subject[] him to further abuse.” *Ornelas-Chavez*, 458 F.3d at 1058. Rejecting the petitioner’s claim that his failure to report should be excused because he feared retaliation by Muslim extremists, the court emphasized that “[i]n most cases of abuse by private actors, there will be at least an implicit threat of retaliation for recourse to the authorities.” *Rahimzadeh*, 613 F.3d at 923. Therefore, although the petitioner had established that fanatical Muslims had repeatedly threatened to kill him or harm his family members if he reported any of his encounters with them to the police, the court found that these “private threats of retaliation do[] not compel the conclusion that the Dutch government is unable or unwilling to control private persecution.” *Id.* at 923; *see also Adebisi v. INS*, 952 F.2d 910 (5th Cir. 1992) (discriminating between fear of retaliation by tribal elders and “specially oppressive” political or governmental conditions, and holding that the latter “would justify broader than normal consideration”). *Rahimzadeh* further stressed that although these private threats of retaliation may prove a basis for the petitioner’s failure to seek government protection, “the question in an asylum case is whether the police could and would provide protection.” *Rahimzadeh*, 613 F.3d at 923.

The apparent clarity of *Rahimzadeh* may appear muddled by the companion decision of *Afriyie*. But, in fact, *Afriyie* chiefly demonstrates the Ninth Circuit's preference to credit the specific credible testimony of an asylum applicant over the more general assertions set forth in country conditions reports, as well as its propensity to give such direct evidence greater weight when it is undisputed that acts of persecution have occurred. In sum, there is not much new here—except, importantly, an illustration of how these standard motifs in Ninth Circuit jurisprudence play out on the question of “unable or unwilling.”

The petitioner in *Afriyie*, a Baptist preacher (and convert from Islam) in a predominantly Muslim part of Ghana, was harassed, threatened, and beaten in retaliation for preaching in two villages; also, several members of his church were murdered. The petitioner reported the threats and beating to the police in the first village, and in the second (where the murders took place), he asked for police protection, which was not available because of a lack of resources. *Afriyie*, 613 F.3d at 927-28. The Board affirmed the denial of asylum, noting that most of the incidents of harm had not been reported to the police. Those that had been reported were written up by the police; and those that had not were committed by unknown assailants, thus calling into question what the police could have done even if they had been reported. The Board also cited a British Home Office report for the proposition that “internal security and police forces of Ghana operate effectively throughout the country, and that these forces effectively pursue and investigate claims of persecution at the hands of Muslims against Christians.” *Id.* at 930 (quoting unpublished Board decision).

The Ninth Circuit rejected this analysis. The evidence showed at best that the police were *willing* to follow up on a report of harm. Other evidence, including the failure to provide protection when asked (and, in fact, requesting bribes from the petitioner), tended to show that the police were not *able* to prevent or prosecute acts such as the murders of the respondent's followers.

Where, as here, an asylum applicant testifies to specific incidents in which individuals closely connected to the asylum applicant unsuccessfully sought police protection or investigation for crimes related to the ones against him,

such testimony is certainly pertinent and must be considered. Afriyie asserted that the group's religious proselytizing caused the murders of his sister, nephew, and group members, and that this activity was also the basis for the assault against Afriyie and his fear of persecution. That at least two of these murders were reported to the police, with no apparent progress in solving them, is highly relevant evidence to the question whether Ghanaian authorities were unable, even if willing, to protect Afriyie from a similar fate.

*Afriyie*, 613 F.3d at 932.

The court also concluded that while the Board “was entitled to rely on all relevant evidence in the record, including [country] reports,” the statements it cited did not support the conclusion that the Ghanaian Government was willing and able to protect the petitioner. *Id.* at 933-34. Significantly, the court found that the Home Office report's statement that there was “no evidence that Christians . . . are not able to seek and receive adequate protection from the state authorities,” did not consider evidence that Christians *do* obtain such protection. *Id.* at 934. Since the Home Office report did not refute any of the petitioner's credible testimony regarding the response of the authorities to his specific situation, a reasonable fact-finder would be “compelled to conclude” that the Ghanaian authorities were unable or unwilling to protect the respondent. *Id.*

*Truong*, the completion of our trilogy, was issued before *Rahimzadeh* and thus did not reflect its synthesis of the rule on “unwilling or unable.” As was the case in *Rahimzadeh*, the *Truong* petitioners had been granted asylum in Europe (in this case, Italy), after having fled their native country (Vietnam). As in *Afriyie*, the petitioners reported to police the alleged incidents of harm—in this case, threats from Vietnamese communists living in Italy and an incident of gunfire from unknown assailants. They also submitted evidence of harassment and discrimination against ethnic minorities in Italy.

The Ninth Circuit affirmed the Board's denial of asylum, rejecting the petitioners' argument that Italian authorities were complicit in or indifferent to the harm inflicted on them.



[T]he Truongs' professed belief that the Italian government was complicit in or unwilling to stop their harassment is undermined by the fact that the Truongs repeatedly sought assistance from the Italian police, who dutifully made reports after each incident and indicated that they would investigate. Without more, we are reluctant to infer government complicity or indifference from the mere fact that Italian police were unable to locate the Truongs' unknown assailants.

*Truong*, 613 F.3d at 941. While country reports indicate that "ethnic minorities and immigrants living in Italy face sporadic violence and discrimination[,] they do not suggest that the Italian government is complicit in or unwilling to combat such discrimination." *Id.*

Most asylum claims, of course, do not arise from the Netherlands or Italy; more typically, we see cases where the "unwilling or unable" issue is complicated by plausible assertions that alleged "private" persecutors have ties to at least some elements (even if only the corrupt ones) of a foreign legal or police system. *See, e.g., Bi Xia Qu v. Holder*, \_\_F.3d\_\_, 2010 WL 3362345 (6th Cir. 2010) (finding that the petitioner's testimony on her kidnapper's close relationship with the police and her family's inability to seek help while she was held captive constitutes circumstantial evidence that the government is unable or unwilling to control her aggressor); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1035-36 (8th Cir. 2008) (finding it error to disregard the petitioner's testimony that the police "do not do anything" to protect persons similarly situated to herself in light of country reports corroborating that assertion). Some courts, notably the First Circuit, appear to take a more strict approach in holding that it is reasonable to expect victims of harm to seek redress from police in their home country. *See Mejilla-Romero v. Holder*, 600 F.3d 63, 73 (1st Cir. 2010) (stating that "[f]ailure to inform law enforcement . . . is material to the rejection of claims of government participation or complicity in past persecution"), *vacated on other grounds on rehearing*, 614 F.3d 572 (1st Cir. 2010); *Dias Gomes v. Holder*, 566 F.3d 232, 233 (1st Cir. 2009) (holding that failure to inform police of threats from a gang "also severs the threats from any action or inaction of the government" (emphasis added)); *Castillo-Diaz v. Holder*, 562 F.3d 23, 27-28 (1st Cir. 2009) (finding that failure to report rape, while understandable, nevertheless undercut the asylum claim); *Galicia v. Ashcroft*, 396 F.3d

446, 448 (1st Cir. 2005) (noting that the petitioner "made no effort to contact the authorities or any other group in the country that might be able to help him"). However, the prevailing rule is that such a failure to report ought not be a dispositive factor—at least when evidence shows that it would be futile or risky to do so.

The bottom line here circles back to the top line—the fundamental notion that a refugee *is* a refugee precisely because he can no longer count on the protection of his home country against acts of persecution. The question "did you notify the police" may seem perfunctory, dull, or, in certain extreme cases, insipid. But while the Ninth Circuit has rejected the notion—if, indeed, the notion ever existed—that the answer to the question can be the end of the story, it has not ruled out the relevance of the question. In fact, in all the cases of our trilogy, the failure to make a report to police and, more significantly, the response of the police when such a report *was* made bore heavily on the outcome. Correct handling of this issue requires precision in assessing the factors identified by the Ninth Circuit and consideration of all evidence bearing on whether an applicant meets this most fundamental characteristic of being a "refugee."

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## RECENT COURT OPINIONS

### *Second Circuit:*

*Long v. Holder*, \_\_F.3d\_\_, 2010 WL 3583532 (2d Cir. Sept. 16, 2010): Deciding two cases heard in tandem involving the issue whether punishment under Chinese law for aiding North Korean refugees constitutes persecution on account of political opinion, the Second Circuit dismissed one appeal and granted the other. The court noted that nexus will not be found in the enforcement of a law of general application, "even if the offender objects to the law." However, a nexus would arise where such prosecution is shown to be merely a pretext for political persecution. In dismissing one appeal, the court observed that the applicant had shown little, if any, evidence of a political motive in aiding the refugee and had not argued that the authorities had imputed a political opinion to him. The court noted, however, that in the accompanying case, the Board had failed to consider several factors "that may support an inference that his arrest and detention were pretextual," including the applicant's claim that he was arrested on fabricated charges and was never formally charged or brought before a judge but was nevertheless subjected to prolonged detention and physical abuse. The record in that case was therefore remanded for further proceedings.

*Ganzhi v. Holder*, \_\_F.3d\_\_, 2010 WL 3465604 (2d Cir. Sept. 7, 2010): An Immigration Judge found the petitioner removable as an aggravated felon based on the petitioner's offense of sexual misconduct under New York Penal Law section 130.20. The Immigration Judge noted that the offense would not categorically constitute an aggravated felony because the statute was divisible. Applying the modified categorical approach, the Immigration Judge looked at the record of conviction and determined that based on the victim's age as stated in the complaint, the petitioner had been convicted of sexual abuse of a minor, an aggravated felony. The Board affirmed. The court rejected the petitioner's argument that the statute was not divisible, referencing its decision in *Dickson v. Ashcroft*, 346 F.3d 44 (2d Cir. 2003), and it further found no merit to the petitioner's claim that the Immigration Judge improperly considered evidence outside of the record.

### **Third Circuit:**

*Huang v. Att'y Gen. of U.S.*, \_\_F.3d\_\_, 2010 WL 3489543 (3d Cir. Sept. 8, 2010): The Third Circuit granted the petition for review of a Chinese national from the Board's denial of her asylum claim based on her fear of sterilization after giving birth to two U.S. citizen children. An Immigration Judge had granted asylum, finding that the petitioner established that her second child likely placed her in violation of her local family-planning regulations. On appeal, the Board reviewed the Immigration Judge's decision de novo and reversed it, finding no objectively reasonable fear of persecution. In its decision, the circuit court extended its holding in *Kaplun v. Att'y Gen.*, 602 F.3d 260 (3d Cir. 2010) (rejecting the Board's rationale in *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008), in an application for Convention Against Torture ("CAT") protection), to the asylum context, ruling that "the process of forecasting future events is a factual inquiry in an asylum case for the same reasons it is in a CAT case." The court concluded that the Board therefore applied an incorrect standard of review (i.e., de novo) and remanded for consideration under the proper standard (i.e., clearly erroneous).

### **Sixth Circuit:**

*Bi Xia Qu v. Holder*, \_\_F.3d\_\_, 2010 WL 3362345 (6th Cir. Aug. 27, 2010): The Sixth Circuit granted the petition for review of a female asylum applicant from China whose grant of asylum by an Immigration Judge had been reversed by the Board. The applicant claimed that after her father was unable to repay a business loan from an underworld "thug," she was kidnapped, detained, sexually

accosted, and threatened by the gangster, who sought to make her his wife. She was somehow able to escape and flee to the U.S. She thus claimed to fear persecution on account of her membership in a particular social group. The court noted that she seemed to have established her membership in the group of "women in China who have been subjected to forced marriage and involuntary servitude." It further observed that the petitioner appeared to have been targeted based on "mixed motives," both for the purpose of obtaining repayment of the loan and because she was a woman who could be forced into marriage. Concluding that in finding a solely economic motive the Board failed to fully consider the issue, the court remanded the matter for further consideration.

### **Seventh Circuit:**

*Kone v. Holder*, \_\_F.3d\_\_, 2010 WL 3398162 (7th Cir. Aug. 31, 2010): The Seventh Circuit granted the petition of an asylum seeker from Mali whose claim (based on her fear that her U.S.-born daughter would be subjected to female genital mutilation ("FGM") if the family were returned to their home country) was denied by an Immigration Judge as untimely. The Immigration Judge further denied withholding of removal and CAT protection based on two decisions of the Seventh Circuit holding that parents cannot establish derivative claims based on potential harm to their children. The court found that in affirming the Immigration Judge's decision, the Board failed to address the petitioner's claim that the daughter's subjection to FGM would constitute direct psychological persecution of her parents. The court further distinguished the facts in this case (in which both parents were subject to removal) from those in its earlier decisions, in which only one parent faced removal, thus holding out the possibility of the other parent retaining the child in the U.S. As the issue of timeliness was not challenged by the petitioner, the matter was remanded for consideration of the withholding and CAT claims.

### **Ninth Circuit:**

*Camacho-Cruz v. Holder*, \_\_F.3d\_\_, 2010 WL 3435379 (9th Cir. Sept. 2, 2010): The petitioner was convicted of assault with a deadly weapon under section 200.471 of the Nevada Revised Statutes. The DHS commenced removal proceedings, charging the petitioner as an aggravated felon based on his conviction for a crime of violence under 18 U.S.C. § 16, and the petitioner moved to terminate. The Immigration Judge denied the motion, finding that the petitioner was removable, and the Board affirmed. The court rejected the petitioner's argument that his offense

was not a crime of violence because the Nevada State law does not require actual harm or injury to the victim. The court pointed to its earlier decisions, in which it found that similar State offenses constituted crimes of violence where the threatened use of force against another was involved (*United States v. Ceron-Sanchez*, 222 F.3d 1169 (9th Cir. 2000), *overruled on other grounds*), or where the statute contained an element of threatened use of physical force against another, even where there was no intent to carry out the threat (*Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9th Cir. 2003)).

## BIA PRECEDENT DECISIONS

In *Matter of Casillas-Topete*, 25 I&N Dec. 317 (BIA 2010), the Board considered whether a finding of inadmissibility under section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C), requires the examining immigration officer to have “reason to believe” that the respondent was an illicit trafficker of controlled substances at the time of admission. The respondent was a lawful permanent resident who, subsequent to his adjustment, was convicted of facilitation of the unlawful transportation of marijuana for sale. He was placed in proceedings and was charged as having been convicted of a crime involving moral turpitude and a controlled substance violation. He left the country and was later admitted as a returning lawful permanent resident. The DHS withdrew the original charges and lodged a charge under section 237(a)(1)(A) of the Act, 8 U.S.C. § 1227(a)(1)(A), that the respondent was removable as an alien who was inadmissible at the time of entry under section 212(a)(2)(C).

The Immigration Judge applied *Matter of Rocha*, 20 I&N Dec. 944 (BIA 1995), which held that “the examining officer’s knowledge or suspicion that the alien is a trafficker must be contemporaneous with the alien’s application for admission.” The Board noted that after *Matter of Rocha* was decided, Congress revised section 212(a)(2)(C) in regard to who must have knowledge of the trafficking, striking “immigration officer” and inserting “the consular officer or the Attorney General.” Subsequent legislation broadened this to include the Secretary of Homeland Security. The Board reasoned that Congress cannot have required the Attorney General or the Secretary of Homeland Security to have personal knowledge; rather implementation of section 212(a)(2)(C) is delegated to the appropriate immigration officials. The Board concluded that it is not relevant that the inspecting officer did not have knowledge of the trafficking if that

information was known to an appropriate immigration official when the admission occurred. In this case, the DHS knew of the respondent’s controlled substance conviction, so the Immigration Judge could rely on it to deem the respondent a suspected trafficker at the time of his entry. The Board emphasized that the conduct must predate or occur contemporaneously with the alien’s admission and be demonstrably known or suspected by appropriate delegates of the Attorney General or the Secretary of Homeland Security.

In *Matter of X-M-C-*, 25 I&N Dec. 322 (BIA 2010), the Board considered whether a determination that an alien has filed a frivolous application for asylum can be made in the absence of a final decision on the merits of the application or in circumstances where the application has been withdrawn. The respondent filed an asylum application with the former Immigration and Naturalization Service in 1999. The application was referred to Immigration Court by an asylum officer. At the hearing, the respondent was advised by the Immigration Judge of the consequences of filing a frivolous application, and after consultation with her attorney, she stated that she wanted her application to be considered. Three months later, the respondent withdrew the asylum application and filed an application for adjustment of status. At the hearing on the adjustment request, the respondent testified that her asylum application contained materially false information and that she had submitted fraudulent documents in support of her false claim to asylum. The Immigration Judge denied adjustment under section 208(d)(6) of the Act, 8 U.S.C. § 1158(d)(6), which provides that an alien who has knowingly made a frivolous application for asylum is permanently ineligible for benefits under the Act, effective as of the date of “a final determination on such application.”

In affirming the Immigration Judge’s decision, the Board found that the Act and the regulations provide that an inquiry into whether an application is frivolous can be triggered once the application is “made” or “filed,” and the authority to make a finding of frivolousness is not limited to circumstances in which the Immigration Judge makes a final determination on the *merits* of the application. According to the Board, the phrase “a final determination on such application” in section 208(d)(6) of the Act includes a final order determining that an asylum application is frivolous, so a separate determination on the merits is unnecessary. Moreover, withdrawal of an asylum application does not render the



application moot and prevent a frivolousness finding, because to permit a withdrawal would undermine the language and policy of section 208(d)(6). The warnings amply protect an applicant and give the alien an opportunity to recant a statement or withdraw the application prior to acknowledging the frivolous application warnings. In this case, the respondent was given the warnings, and rather than withdraw the application either before the warnings or after being asked if she wished to proceed, she asked the Immigration Judge to consider her asylum application. Only later did she indicate that she wanted to withdraw her application.

In *Matter of Legaspi*, 25 I&N Dec. 328 (BIA), the Board considered whether the spouse of an alien who is “grandfathered” for purposes of section 245(i) of the Act, 8 U.S.C. § 1255(i), can independently adjust his or her status under that section. In this case, the respondent could not adjust under section 245(a) because he failed to maintain lawful status after entry. His wife was a derivative beneficiary of a 1987 visa petition filed by her paternal grandfather on her father’s behalf, so she was a “grandfathered” alien for purposes of section 245(i), and he sought to adjust under that section as her spouse. Although the respondent’s wife had adjusted her status via an employment-based visa petition, she remained a “grandfathered” alien. The Board reasoned that the respondent could not take advantage of his wife’s section 245(i) eligibility because the statute and regulations only extend eligibility for adjustment under that section to the principle beneficiary, in this case the respondent’s wife’s father, and the principle alien’s spouse and children. Because the respondent was not the spouse or child of the principal beneficiary, section 245(i) benefits could not be extended to him.

In *Matter of Garcia*, 25 I&N Dec. 332 (BIA 2010), the Board addressed the relationship between the petty offense exception and eligibility for cancellation of removal. The respondent was admitted to the United States in March 1999 as a lawful permanent resident. He was convicted on October 23, 2001, of misdemeanor assault and battery, domestic, in violation of Oklahoma law, for which the maximum penalty is confinement of 1 year, and for which he was sentenced to 3 years of probation. The respondent sought cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a). The Immigration Judge found that the respondent was unable to establish the 7 years of continuous residence

required by section 240A(a)(2), even though his crime involving moral turpitude qualified as a petty offense under section 212(a)(2)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii)(II). Specifically, the Immigration Judge determined that the respondent was convicted of an offense “referred to” in section 212(a)(2), the commission of which ends an alien’s continuous residence pursuant to the stop-time rule in section 240A(d)(1)(B).

The Board first noted that the stop-time rule contains two conditions that must be met to halt accrual of continuous residence and, in this case, it focused on the “referred to in section 212(a)(2)” language because the respondent clearly fell within the other condition relating to removability. Relying on its relevant prior precedent, the Board concluded that the phrase “an offense referred to in section 212(a)(2)” of the Act incorporates the petty offense exception for purposes of the stop-time rule. Consequently, the Board found that a conviction for a single crime involving moral turpitude that qualifies as a petty offense is not an offense referred to in section 212(a)(2) and therefore does not trigger the stop-time rule. Since one of the two conditions in section 240A(d)(1)(B) for halting accrual of continuous residence had not been met, the Board found that the respondent was not barred from establishing eligibility for cancellation of removal.

In *Matter of Anyelo*, 25 I&N Dec. 357 (BIA 2010), the Board addressed the notice required to authorize the entry of an in absentia order in cases within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. In *Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001), the Board held that entry of an in absentia order of removal is inappropriate where the record reflects that the alien did not receive, or could not be charged with receiving, the Notice to Appear that was served by mail at an address obtained from documents filed with the DHS several years earlier. Subsequently, without reference to the Board’s decision, the Eleventh Circuit found that aliens have an affirmative duty to notify the Government of a change of address, and because the DHS had provided notice to the most recent address provided by the alien in that case, she had received proper notice. *Dominguez v. U.S. Att’y Gen.*, 284 F.3d 1258 (11th Cir. 2002). The court held that an alien’s failure to provide a change of address will preclude the alien from claiming that the DHS did not provide proper notice.



The Board noted that it has consistently applied *Matter of G-Y-R* in every circuit except the Eleventh and concluded that it should also be applied in the Eleventh Circuit. In *Matter of G-Y-R*, the Board held that an Immigration Judge could exercise the authority to enter an in absentia order only if it was established that the written notice complied with section 239(a) of the Act, 8 U.S.C. § 1229(a), which requires the notice to contain warnings and advisals regarding an alien's change of address requirements. *Dominguez*, in contrast, primarily considered the issue of due process. The court did not consider the Board's holding that an address does not qualify as one provided under section 239(a)(1)(F) unless the notice with the necessary warnings and advisals was received at the most recent address provided. In this case, it was undisputed that the respondent received neither the Notice to Appear nor the notice of hearing, although both documents were sent to him through regular mail to the last address that he provided to the DHS. The Board found that the respondent could not be charged with receiving adequate notice under *Matter of G-Y-R* and therefore reopened and remanded for further proceedings.

In *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010), the Board found that the "one central reason" standard that applies to asylum applications pursuant to section 208(b)(1)(B)(i) of the Act, 8 U.S.C. § 1158(b)(1)(B)(i), also applies to applications for withholding of removal under section 241(b)(3)(A) of the Act, 8 U.S.C. § 1231(b)(3)(A). The amendments made by the REAL ID Act of 2005, Division B of Pub. L. No. 109-13, 119 Stat. 302, regarding credibility and corroboration were specifically incorporated into the withholding of removal provisions at section 241(b)(3)(C) of the Act. However, the REAL ID Act did not expressly state whether the nexus standard included in section 208(b)(1)(B)(i), which provides that the applicant must establish that a protected ground was or will be at least "one central reason" for the persecution, also applies in the context of withholding of removal. The Board considered the intent and purpose of the REAL ID Act, noting that Congress sought to clarify the "mixed motive" standard and provide a uniform standard for assessing motivation. Congress was dissatisfied with the approach to nexus taken by the Ninth Circuit Court of Appeals, and it would not make sense to resurrect that analysis in withholding of removal claims. Further, the Board noted that prior to the enactment of the REAL ID Act, it had applied the nexus requirement to withholding of removal cases in the same manner as in asylum cases,

and it found no indication that Congress intended to change this approach. The Board could discern no reason to treat withholding and asylum claims differently and considered that applying different standards would make adjudications more complex, unclear, and uncertain.

In this case, the Board found that the respondent did not meet his burden of establishing eligibility for withholding based on membership in a particular social group, namely public opponents of police violence and corruption in Brazil, and on his political opinion. Finding that the threats the respondent received were of a personal or retaliatory nature, the Board concluded that he did not show that one of the protected grounds was "at least one central reason" for the claimed incidents and dismissed his appeal.

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### Measured Reliance: *continued*

*Siewe v. Gonzales*, 480 F.3d 160, 168 (2d Cir. 2007) (quoting *Huang v. Gonzales*, 453 F.3d 142, 147 (2d Cir. 2006)). Authentication determinations are largely fact-specific and may depend on intrinsic and extrinsic evidence, including witness testimony, background materials, and forensic or consular reports. The document's consistency with other submitted evidence may also be considered. "Ultimately, each case must be decided on its own facts with regard to the sufficiency of the evidence provided." *Matter of May*, 18 I&N Dec. 381, 383 (BIA 1983).

Factors relating to authenticity include whether the document appears to be authentic on its face and whether it was discovered in a place where it would be expected to be found. See *United States v. Vidacak*, 553 F.3d 334, 350-51 (4th Cir. 2009). Testimony, including expert witness testimony, lay witness testimony, and testimony by the alien, may serve as corroborating evidence of the reliability or unreliability of the document in question. See, e.g., *Vatyan v. Mukasey*, 508 F.3d 1179, 1180 (9th Cir. 2007) (holding that the petitioner's own testimony is a proper method for authentication). The testimony need not be oral but may be in the form of a declaration. See, e.g., *United States v. Iribe*, 564 F.3d 1155, 1159 (9th Cir. 2009). Additional questions affecting a foreign document's authenticity are whether the document was created contemporaneously with the events in question, described its source of information, or was issued after reference to official records. See *Matter of May*, 18 I&N Dec. at 382; see also, e.g., *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 214 n.5 (comparing *Matter of Pineda*, 20 I&N Dec. 70, 73 (BIA 1989)).

Background materials, such as human rights reports or asylum profiles issued by the Department of State or statements from the United Nations, may also be used as evaluative factors. *See Gui Cun Liu*, 372 F.3d at 532-33 (declining to find that the Immigration Judge had based his negative credibility determination on country reports of China rather than the alien's inability to certify public documents under 8 C.F.R. § 1287.6); *see also Qin Wen Zheng v. Gonzales*, 500 F.3d 143, 147 (2d Cir. 2007).

The Ninth Circuit has stated that “[d]ocuments may be authenticated in immigration proceedings through any recognized procedure, such as those required by INS regulations or by the Federal Rules of Civil Procedure . . . including the procedures permitted under Federal Rule of Evidence 901.” *Vatyan*, 508 F.3d at 1182-83 (quoting *Khan v. INS*, 237 F.3d 1143, 1144 (9th Cir. 2001)). Relevant examples of extrinsic evidence of authentication under Federal Rule of Evidence 901 include the testimony of a witness with knowledge, nonexpert opinion on handwriting, comparison by trier or expert witness, distinctive characteristics, public records or reports, ancient documents, and other methods provided by statute or rule. Fed. R. Evid. 901(b); *see also* Advisory Committee's Notes, Rule 901 (explaining the illustrations). Rule 902 allows for self-authentication for certain documents, including certified foreign public documents, certified copies of public records, official publications, newspapers and periodicals, trade transcriptions, acknowledged documents, commercial paper, and certified foreign records of regularly conducted activity.

It is worth noting, however, that while persuasive, these rules are not binding in immigration proceedings. *See Dallo v. INS*, 765 F.2d 581, 586 (6th Cir. 1985) (finding that the Federal Rules of Evidence are not binding in immigration proceedings); *Baliza v. INS*, 709 F.2d 1231, 1233 (9th Cir. 1983); *Longoria-Castaneda v. INS*, 548 F.2d 233, 236 (8th Cir. 1977); *Matter of DeVera*, 16 I&N Dec. 266, 268 (BIA 1977). They are used only as illustrations of authentication methods. As with other circumstantial evidence, each document will depend on a totality of evaluative factors.

#### *Rebuttal Evidence*

#### Forensic Analysis

Depending on the type of foreign document, the DHS may send the document to the Forensic Document

Laboratory (“FDL”), which is the only Federal laboratory dedicated to the forensic examination of travel and identity documents. FDL, U.S. Immigration and Customs Enforcement, Dep’t of Homeland Security, *available at* <http://www.ice.gov/partners/investigations/services/forensiclab.htm> (last visited Sept. 9, 2010). In order to compare submitted foreign documents with known foreign documents, the FDL contains the world's largest depository of foreign travel documents, identity documents, and reference materials. *Id.* Forensic analysis includes the examination of fingerprints, document ink, handwriting, seals, stamps, printing, and typewriting. *Id.*; *see also, e.g., Eta-Ndu v. Gonzales*, 411 F.3d 977, 982 (8th Cir. 2005) (regarding a forensic document analyst who testified that two documents were typed on the same typewriter when they allegedly came from two different branches of an organization); Thomas W. Vastrick, *Is It Real? Proving (or Disproving) the Authenticity of Immigration Documents After Pasha, the Courts Crack Down on Speculation*, 42-JUL Tenn. Bar J. 17 (2006) (calling for careful scrutiny of forensics reports).

The testimony of a forensics analyst is unnecessary to find that his or her report is reliable. *See Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998) (rejecting the alien's argument that the forensics report was unreliable even though the analyst did not testify in proceedings). Additionally, there is no requirement that a forensic assessment be made on each document. *Kumar v. Gonzales*, 444 F.3d 1043, 1050 (9th Cir. 2006). However, the use of a forensic report, particularly if requested by the parties, may be necessary in certain circumstances to ensure that adjudicators are not engaging in speculation or conjecture. *See, e.g., Kumar*, 444 F.3d at 1050-51 (overturning an Immigration Judge's negative credibility determination as highly speculative where it was based solely on his own comparison of two number “4s” between a death certificate and the asylum application, and noting that he should have at least substantiated his conjectures by sending the certificate to the FDL); *Gjerazi v. Gonzales*, 435 F.3d 800, 810-11 (7th Cir. 2006) (finding that the Immigration Judge's exclusion of the alien's arrest warrant, neighbor's affidavit, certificates from police, an Albanian passport, and Democratic Party membership card was based on impermissible speculation where the Immigration Judge determined, without the assistance of an expert, that the documents were originals rather than copies and, without explanation, refused to allow them to be submitted to the FDL).

An inconclusive determination of authenticity by forensic experts, however, does not present a reasonable basis for concluding that the foreign document is fraudulent. See *Wang v. INS*, 352 F.3d 1250, 1254 (9th Cir. 2003); *Zahedi v. INS*, 222 F.3d 1157, 1165 (9th Cir. 2000). Minor discrepancies between documents or between a document and testimony may be credited to the mistakes of typists, clerks, or translators and may not be evidence of a lack of credibility. See *Zahedi*, 222 F.3d at 1166-67. In general, forensic reports must be utilized in conjunction with circumstantial and intrinsic evidence, erring on the side of caution before finding a document fraudulent based on a negative forensic report.

#### Consular Reports and Confidentiality Issues under 8 C.F.R. §§ 208.6 and 1208.6 in Asylum Proceedings

When appropriate, the DHS may also ask U.S. consular officers to carry out a consular investigation of a foreign document by requesting verification of a document or information from foreign officials. The investigator presents the information to the consulate who then writes a report for the DHS.

In asylum proceedings, however, investigators and other persons in contact with foreign officials must be careful not to abridge the confidentiality provisions found at 8 C.F.R. §§ 208.6 and 1208.6 [hereinafter referred to as 8 C.F.R. § 1208.6]. The regulations provide that during its investigations of asylum applications, confidentiality is “breached when information contained in or pertaining to an asylum application is disclosed to a third party . . . and the unauthorized disclosure is of a nature that allows the third party to link the identity of the applicant to: (1) the fact that the applicant has applied for asylum; (2) specific facts or allegations pertaining to the individual asylum claim . . . ; or (3) *facts or allegations that are sufficient to give rise to a reasonable inference that the applicant has applied for asylum.*” *Lin*, 459 F.3d at 263 (quoting U.S. Citizenship and Immigration Services, *Fact Sheet: Federal Regulations Protecting the Confidentiality of Asylum Applicants* 3 (June 3, 2005)).

There are exceptions to the confidentiality provisions of 8 C.F.R. § 1208.6. Asylum information may be disclosed to (1) a U.S. Government official who needs to know information in relation to the asylum application, (2) a U.S. court with a pending legal action relating to the asylum application, or (3) a U.S. Government official defending a legal action relating to an asylum application

in a U.S. court. 8 C.F.R. § 1208.6(c). Additionally, the disclosure of confidential information by a foreign government has no effect on the rights guaranteed to an alien in the United States. Further, there is no time limit on disclosure of information and no exception, even if the alien publicly discloses the information.

The relevant standard in determining if 8 C.F.R. § 1208.6 has been violated is whether the information disclosed, whether sensitive or not, was sufficient to give rise to a reasonable inference that the alien had applied for asylum in the United States or linked the alien’s identity with the facts of his case. *Lin*, 459 F.3d at 264-65 (finding a violation of 8 C.F.R. § 1208.6 where the document submitted to Chinese authorities contained the applicant’s full name, sex, age, prisoner number, former residency in China, and reason for imprisonment). Thus, disclosure of general information relating to nonasylum-related claims, such as birth certificates, marriage certificates, or some court records, may not fall under the regulation.

However, the circuit courts differ as to which party bears the burden of proving the legitimacy of an investigative report. The Second Circuit has found that a consular report bears no presumption of legitimacy; before introduction of the consular report into evidence, the DHS had the burden to show that confidentiality was preserved in the creation of the report. *Lin*, 459 F.3d at 262-63. In contrast, the Eighth Circuit has held that consular reports have a presumption of legitimacy and the burden is on the alien to overcome that presumption. *Averianova v. Mukasey*, 509 F.3d 890 (8th Cir. 2007). Combining these two standards, the Fourth Circuit has held that if the alien establishes an inference that confidentiality has been breached, then the burden transfers to the DHS to show that such a breach did not occur. *Anim v. Mukasey*, 535 F.3d 243 (4th Cir. 2008).

Additionally, a fact-finder must weigh the trustworthiness of the consular report, examining the reliability of the sources of information for bias or conjecture and examining not only the report’s conclusion, but how it was created. *Lin*, 459 F.3d at 268-70. A consular report, particularly one finding evidence of fraud, must be sufficiently detailed in that, at a minimum, it must contain (1) the name and title of the investigator; (2) a statement that the investigator [or the translator he or she used] is fluent in the relevant language(s); (3) any other statements of the competency of the investigator and the translator deemed appropriate under the circumstances;



(4) the specific objective of the investigation; (5) locations of any conversations or other searches conducted; (6) the name(s) and title(s) of the people spoken to in the course of the investigation; (7) the method used to verify the information; (8) the circumstances, content, and results of each relevant conversation or search; and (9) a statement that the investigator is aware of the confidentiality provisions found in 8 C.F.R. § 208.6. *Id.* at 271 (quoting Memorandum from Bo Cooper, INS General Counsel, to Jeffrey Weiss, INS Director of Int'l Affairs, Confidentiality in Asylum Applications and Overseas Verification of Documents and Application Information 6-7 (June 21, 2001), *available at* <http://judiciary.house.gov/legacy/82238.pdf>, app. at 39, 44-45 (last visited Sept. 8, 2010); *see also, e.g., Alexandrov v. Gonzales*, 442 F.3d 395 (6th Cir. 2006) (overturning the Immigration Judge's credibility determination as not based on "substantial evidence" where the consular report was conclusory and did not even contain the investigator's identity); *Ezeagwuna v. Ashcroft*, 325 F.3d 396 (3d Cir. 2003) (finding that the consular report contained multiple layers of hearsay and was insufficiently detailed as to how the information was obtained).

If confidentiality is a potential issue, investigators may redact identifying information before submitting it to the foreign government or "obtain a *written* waiver from the applicant," or, in "rare circumstances," the Attorney General may waive the requirements of 8 C.F.R. § 1208.6. *Lin*, 459 F.3d at 266-67. In general, if confidentiality is a concern, authentication of a foreign document through consular investigation should be a last resort. *Id.* at 266. Submission of the document to the FDL or other means of determining its validity should first be utilized. *Id.*

If, after considering the above factors, the trier of fact finds that confidentiality has been breached, then he or she must determine whether a new asylum claim has been created because of that breach. *See Corovic v. Mukasey*, 519 F.3d 90, 96 (2d Cir. 2008). However, a violation of the confidentiality regulation does not necessarily establish the reliability of the foreign document or require a vacatur of a removal order. *See Lin*, 459 F.3d at 267; *see also Johnson v. Ashcroft*, 378 F.3d 164, 171 n.9 (2d Cir. 2004). Whether such a decision is taken depends on the other evidence and circumstances surrounding the alien's claim and the foreign document in question.

## Immigration Consequences of a Fraudulent Finding

Submission of fraudulent documents and the failure to sufficiently explain the fraud can form the basis for an adverse credibility determination if the fraudulent documents address a material element of an alien's claim for relief.<sup>4</sup> *Matter of O-D-*, 21 I&N Dec. 1079; *see also Corovic*, 519 F.3d at 97. However, mere failure to authenticate a document, at least in the absence of evidence undermining its credibility, does not constitute a sufficient foundation for an adverse credibility finding. *See, e.g., Shtaro*, 435 F.3d at 717 (finding that a negative credibility determination was unreasonable where the Immigration Judge had insufficient evidence of fraudulence); *Wang*, 352 F.3d at 1254 (overturning a negative credibility finding where there was no evidence the documents were fraudulent beyond "minor inconsistencies" and the forensic report was inconclusive).

A negative credibility determination cannot be made solely on the basis of a fraudulent document without evidence that an alien knew or suspected that the document was fraudulent and did not have some explanation for submitting it. *See, e.g., Hanaj v. Gonzales*, 446 F.3d 694, 699-700 (7th Cir. 2006) (reversing an a negative credibility determination based solely on a fraudulent birth certificate, without evidence that the applicant knew or suspected the document was fraudulent); *Yeimane-Berhe v. Ashcroft*, 393 F.3d 907, 911-13 (9th Cir. 2004) (overturning an Immigration Judge's negative credibility determination because there was no evidence that the alien knew or suspected her medical certificate was a forgery and presented otherwise credible testimony); *Hoque v. Ashcroft*, 367 F.3d 1190, 1195-96 (9th Cir. 2004) (holding that the alteration of the date on a letter did not support a negative credibility finding where the applicant was never asked to explain the marking or to provide the history of its submission, and it did not aid the asylum claim); *Kourski v. Ashcroft*, 355 F.3d 1038 (7th Cir. 2004) (overturning the Immigration Judge's negative credibility determination because there was no evidence that the alien knew or suspected that his Russian birth certificate was a forgery).

The effect of a fraudulent document on a respondent's credibility also depends on the centrality of the document to his or her claim. *See, e.g., Selami v.*



*Gonzales*, 423 F.3d 621, 623-26 (6th Cir. 2005) (finding that the submission of a fraudulent newspaper article that supported a key element of the petitioner's Albanian asylum claim was sufficient to support an adverse credibility finding); *Hysi v. Gonzales*, 411 F.3d 847, 852-53 (7th Cir. 2005) (finding that where the FDL determined that the applicant's name as author of the newspaper articles had been inserted and where the applicant's claim rested on retaliation for the articles, the Immigration Judge's adverse credibility determination was upheld).

In sustaining the adverse credibility finding of a Cameroonian asylum applicant and the exclusion of his alleged arrest warrant, the Second Circuit noted that not all false documents would necessarily signify a lack of credibility. *Siewe*, 480 F.3d 170-71. It then specified five circumstances in which credibility could still be upheld despite the submission of a fraudulent document: (1) the evidence is independently corroborated; (2) the false document was used to escape persecution; (3) the false document is ancillary to the claim; (4) the false statements were made at an airport interview; or (5) the applicant did not know and did not have reason to know the document was false. *Id.* The court then found that none of the exceptions applied to the alien's case and denied the petition for review. *Id.*

As with a determination of authenticity, there are no bright line rules as to when a finding of fraudulence should lead to an adverse credibility determination, but courts have generally held that due process requires that the alien first be given an opportunity to explain the fraud and both parties be allowed to present evidence of their respective arguments.

### Conclusion

While 8 C.F.R. § 1287.6 provides a procedure for authentication of foreign documents, the adjudicator should be careful before deciding to exclude evidence for failure to comply with the regulatory methods of authentication. It is clear that other methods of authentication should be considered and evaluated in assessing both the admissibility and weight to be accorded a foreign document. Adjudicators should consider all intrinsic and extrinsic evidence offered in the proceeding to assess the reliability of the submitted document and whether its use and consideration in the proceeding would be fundamentally fair.

*Suzanne M. DeBerry was the Attorney Advisor at the San Antonio, Texas, Immigration Court.*

<sup>1</sup> Prior to the Convention, foreign public documents were authenticated through a "chain method" wherein a notary's signature and seal authenticated the original document, which was then serially authenticated by the signature and seal of each level of government until diplomatic channels passed the authentication chain from one country to another. T. David Hoyle, *Seal of Disapproval: International Implications of South Carolina's Notary Statute*, 3 S.C. J. Int'l L. & Bus. 1 (2006) (citing Explanatory Report, *supra*). Because of the laboriousness of this process, the Council of Europe requested the Hague Convention of Private International Law to draft a treaty streamlining the process. Explanatory Report, *supra*, at Introduction. The draft was later officially approved by the HCCH. *Id.*

To simplify the process, the Convention (a) created the "apostille," which substitutes a uniform certificate issued by a single authority in the country for the chain-certificate previously used, and (b) abolished the "diplomatic or consular authentication of that certificate." *United States: State of California Attorney General's Opinion on the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents*, reprinted in 21 I.L.M. 357, 362 (1982) (quoting Letter of Submittal, Dep't of State (Apr. 8, 1976)). Each certificate must be publicly numbered and registered, allowing third parties to check for fraud by simply consulting the register. Explanatory Report, *supra*, at Introduction. The Convention entered into force in the United States on October 15, 1981. See Convention done at The Hague October 5, 1961, 33 U.S.T. 883, T.I.A.S. No. 10072, 1981 WL 375769 (entered into force with respect to United States Oct. 15, 1981).

<sup>2</sup> There are currently 98 contracting states to the Convention. See *Status Table, Members of the Organisation*, HCCH, available at [http://hcch.e-vision.nl/index\\_en.php?act=conventions.status&cid=41](http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=41) (last visited Sept. 30, 2010).

<sup>3</sup> For more information on the origination of terminology in the Convention's legislative history, see Explanatory Report, *supra*, at Article I.

<sup>4</sup> In the asylum context, courts have not differentiated between pre- and post-REAL ID Act asylum applications in determining how a fraudulent document finding affects an alien's credibility. REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, 119 Stat. 302.

## REGULATORY UPDATE

**75 Fed. Reg. 47,699**

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

### Employment Authorization for Dependents of Foreign Officials

ACTION: Notice.

SUMMARY: The Department of Homeland Security (DHS) is amending its regulations governing the employment authorization for dependents of foreign officials classified as A-1, A-2, G-1, G-3, and G-4 nonimmigrants. This rule expands the list of dependents who are eligible for employment authorization from spouses, children, and qualifying sons and daughters of A or G foreign officials to include any other immediate family member who falls within a category of aliens designated by the Department of State as qualifying. This change to DHS regulations provides the Department of State with greater flexibility when entering into bilateral agreements and arrangements with other countries that would extend

employment authorization to immediate family members who are recognized as such by the Department of State.  
DATES: Effective date: This rule is effective August 9, 2010.

**75 Fed. Reg. 47,701**

DEPARTMENT OF HOMELAND SECURITY  
U.S. Customs and Border Protection, DHS

**Electronic System for Travel Authorization (ESTA):  
Travel Promotion Fee and Fee for Use of the System**

ACTION: Interim final rule; solicitation of comments.

SUMMARY: Nonimmigrant aliens who wish to enter the United States under the Visa Waiver Program at air or sea ports of entry must obtain a travel authorization electronically through the Electronic System for Travel Authorization (ESTA) from U.S. Customs and Border Protection prior to departing for the United States. This rule requires ESTA applicants to pay a congressionally mandated fee of \$14.00, which is the sum of two amounts: a \$10 travel promotion fee for an approved ESTA statutorily set by the Travel Promotion Act and a \$4.00 operational fee for the use of ESTA as set by the Secretary of Homeland Security to ensure recovery of the full costs of providing and administering the ESTA system.

DATES: This interim final rule is effective on September 8, 2010. Comments must be received on or before October 8, 2010, provide applicants more time to register for TPS.

**75 Fed. Reg. 53,732**

DEPARTMENT OF STATE

**In the Matter of the Designation of Tehrik-e Taliban Pakistan (TTP) also known as Tehrik-I-Taliban Pakistan also known as Tehrik-e-Taliban also known as Pakistani Taliban also known as Tehreek-e-Taliban as a Foreign Terrorist Organization pursuant to Section 219 of the Immigration and Nationality Act, as Amended**

Based upon a review of the Administrative Record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that there is a sufficient factual basis to find that the relevant circumstances described in section 219 of the Immigration and Nationality Act, as amended (hereinafter "INA") (8 U.S.C. 1189), exist with respect to Tehrik-e Taliban Pakistan (TTP), also known as Tehrik-I-Taliban Pakistan, also known as Tehrik-e-Taliban, also known as Pakistani Taliban, also known

as Tehreek-e-Taliban. Therefore, I hereby designate the aforementioned organization and its aliases as a foreign terrorist organization pursuant to section 219 of the INA. This determination shall be published in the Federal Register.

Dated: August 12, 2010.

**75 Fed. Reg. 53,732**

DEPARTMENT OF STATE

**In the Matter of the Designation of Wali Ur Rehman as a Specially Designated Global Terrorist Pursuant to Section 1(b) of Executive Order 13224, as Amended**

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the individual known as Wali Ur Rehman committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States. Consistent with the determination in section 10 of Executive Order 13224 that "prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously," I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the Federal Register.

Dated: August 12, 2010.

**EOIR Immigration Law Advisor**

**David L. Neal, Acting Chairman**  
*Board of Immigration Appeals*

**Brian M. O'Leary, Chief Immigration Judge**  
*Office of the Chief Immigration Judge*

**Jack H. Weil, Assistant Chief Immigration Judge**  
*Office of the Chief Immigration Judge*

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