No. 07-74963

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NIKOLAY IVANOV ANGOV,
Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General
Respondent.

Upon Petition for Review of an Order
of the Board of Immigration Appeals
Agency No. A043-433-249

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

The American Immigration Lawyers Association; Central American Resource Center (CARECEN), Los Angeles; East Bay Community Law Center; Esperanza Immigrant Rights Project, Catholic Charities of Los Angeles, Inc.; Public Counsel; Human Rights First; and Public Law Center (PLC) (collectively, "amici") are all non-profit entities that do not issue stock or have parent corporations.

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INTEREST OF AMICI CURIAE

Amici are non-profit organizations that provide legal services to persons seeking asylum in the United States and have extensive experience with the issues on appeal. Descriptions of amici and their interests are presented in the accompanying motion for leave to file this brief.[1]

SUMMARY OF ARGUMENT

In a divided decision, the panel majority held that reliance on a State Department letter—describing an investigation supervised by an unnamed official and conducted by unnamed persons who spoke to unnamed sources—to deny petitioner asylum did not violate his statutory or due process rights. It reached this conclusion notwithstanding the letter's multiple layers of anonymous hearsay and the government's refusal to produce the hearsay declarants for cross-examination.

This published decision—contrary to the reasoned consensus of five other circuits—reflects legal error that requires en banc correction. It also reflects a skewed understanding of asylum proceedings.

In reaching its erroneous holding, the panel majority purported to conduct a "reality check." Slip. op. 14. But this "reality check" is not supported by evidence in the record or even empirical data, but rather the personal views of two judges.

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[1] Petitioner consented to the filing of this brief; the government did not. No party's counsel authored any part of this brief, and no party, counsel, or other person contributed money to fund the preparation or filing of this brief.

Based on these views, the majority opinion ridicules the consensus of five other circuits, insisting they have "lost their way" with "absurd" decisions. Slip. op. 14.

But there is nothing "absurd" in requiring the denial of asylum to be supported by evidence more reliable than an investigative report containing layers of anonymous hearsay yet none of the details that the government itself requires. Nor is it "absurd" to afford asylum applicants their statutory right to cross-examine the government employees who author such investigative reports.

Amici and their volunteer attorneys represent thousands of asylum seekers each year. Amici and their clients have a deep interest in the integrity of the asylum system. But the asylum system in which amici have worked—for many decades—is vastly different than the system described by the panel majority.

The asylum system is filled with applicants who have little or no resources, and no right to counsel, struggling to corroborate their claims with evidence from the distant countries where they suffered persecution. Their claims are considered in an adjudicative system that is severely underfunded. While this system—like any other delivering a valuable benefit—is subject to abuse, the solution is not to strip asylum seekers of the few procedural rights they do have.

Indeed, the right to confront adverse hearsay declarants is critical to ensuring that the adjudication of asylum claims is based on substantial evidence, rather than

conjecture. The majority opinion's holding thwarts this overarching goal of the asylum system, as this case so aptly illustrates.

Because petitioner was not permitted to cross-examine anonymous hearsay declarants, an immigration judge necessarily had to speculate as to the reliability of an investigation conducted by unnamed persons with unknown experience through unidentified methods. This speculation caused the judge to assume the anonymous declarants were credible, the petitioner was not, and then to deny asylum.

Fraud can and should be deterred—but not by denying important statutory rights. Contrary to the majority's assumption, the government has other tools to address fraud, and uses them. Stripping asylum applicants of rights is unnecessary.

Amici respectfully request that the Court rehear this case en banc.

ARGUMENT

I. Reliance on Anonymous Hearsay in State Department Reports Not Subject to Cross-Examination Will Invite Adjudication of Asylum Claims Based on Speculation Rather Than Substantial Evidence.

The majority opinion suggests that State Department investigations are necessary to combat fraud and forgery in immigration proceedings. Slip op. 27-28. But cursory investigative reports that do not follow the government's own guidelines are a poor tool for doing so, as they provide immigration judges with little—if any—information necessary to determine credibility based on substantial evidence. Take this case, for example.

Responding to a request from government counsel, the State Department provided comments on petitioner's asylum claim. In its response, the "Bunton Letter" stated that an unidentified "U.S. Embassy Official" supervised an investigation. Certified Administrative Record ("AR") 484.

As part of the investigation, an unnamed employee in an unidentified position at the U.S. Embassy in Bulgaria contacted an unnamed woman in a police district in Sofia to confirm the authenticity of two subpoenas. AR484. This unidentified woman "believed" the subpoenas were never issued. *Id.* She also claimed that the officers identified in the subpoenas had never worked in the district. *Id.* But her basis for believing all this is not explained.

The Bunton Letter also states that the embassy obtained the police district's "official seal," which was larger than the seal in petitioner's subpoenas. AR484. But this seal was not provided for comparison. The Bunton Letter further states that unnamed persons were unable to locate petitioner's prior residences. AR485. But it does not state what steps were taken to locate the addresses. Lastly, the Bunton Letter estimates the percentage of Roma (gypsies) residing in petitioner's former neighborhood. *Id.* But it does not state who made this estimate or how.

Just how all this information was transmitted from the embassy to the State Department is also unknown; no communications between the two were ever

disclosed. Indeed, when asked to do so, the State Department refused to provide any "additional information" concerning its "investigation." AR427.

In considering credibility based on such a cryptic report, "[t]here is not much that [a judge can] know aside from the apparent conclusions of the mysterious investigation." *Alexandrov v. Gonzales*, 442 F.3d 395, 407(6th Cir. 2006). These conclusions cannot aid immigration judges in deciding credibility based on "specific, cogent reasons," *Zahedi v. INS*, 222 F.3d 1157, 1165 (9th Cir. 2000), rather than conjecture. *See Shah v. INS*, 220 F.3d 1062, 1071 (9th Cir. 2000).

The majority opinion suggests petitioner could have easily rebutted the State Department's conclusions if he was telling the truth. Slip op. 8. But how can one rebut the conclusions of an investigation without any "specific information" (Slip op. 6) concerning the nature of the investigation?

And how can one effectively impeach hearsay evidence without the ability to cross-examine the hearsay declarants? While the panel majority "presume[d]" that those conducting the investigation were "trained," (Slip op. 34), "[c]onjecture and speculation" have no place in deciding asylum claims. *Bandari v. INS*, 227 F.3d 1160, 1167 (9th Cir. 1999). The only way to determine if the nameless declarants were actually trained is to cross-examine them.

Ultimately the panel majority concludes that to investigate asylum claims with limited government resources, the "best we can do is to have consular

personnel check basic facts" of an asylum claim. Slip op. 11. But not even the government suggests that this is the "best" it can do—or that it is even adequate.

In 2001, an INS memo identified nine threshold requirements for the admissibility and persuasiveness of consular investigative reports, such as identifying the investigator's name, title, and basis for competency; persons consulted; and the "content and results" of any conversation or search. *See* Memorandum from Bo Cooper, Gen. Counsel, INS, to Jeffrey Weiss, Dir. Of Int'l Affairs, INS, Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information at 6-7 (June 21, 2001).

If the government insists that investigative reports include such details, providing them cannot be deemed unduly "ponderous, time-consuming and expensive." Slip op. 28. Nor is there a valid basis to conclude that providing such basic information will make it impossible to verify asylum claims. Slip op. 13-14.

Moreover, exclusion of conclusory investigative reports will not result in the exclusion of *all* Country Reports on Human Rights Practices, as the majority suggests. Slip op. 25-26. A two-paragraph summary specific to one person's claim is a far cry from comprehensive Country Reports "based on information available from a wide variety of sources, including U.S. and foreign government officials; victims of human rights abuse; academic and congressional studies; and reports from the press, international organizations, and nongovernmental

organizations." Bureau of Democracy, Human Rights & Labor, U.S. Dep't of State, Country Reports on Human Practices for 2013: Appendix A: Notes on Preparation of Reports, at 1 (2013).

Conclusory State Department reports lacking details the government itself requires, and that are not subject to cross-examination, do not assist immigration judges in deciding asylum claims based on substantial evidence but only invite impermissible speculation and conjecture.

II. The Majority Opinion Fails to Appreciate the Substantial Challenges Faced by Asylum Seekers Trying to Prove Their Claims.

The majority opinion suggests that obtaining evidence to refute the Bunton Letter would have been easy if petitioner was truthful. Slip op. 8 (noting petitioner was "given ample time to produce substantial evidence to rebut" the letter). But the panel majority misapprehends the reality faced by asylum seekers.

Persons persecuted in their homelands do not flee armed with affidavits or other documentation to support a possible asylum claim; it "is escape and flight … that is foremost in the mind of an alien … fleeing detention, torture and persecution." *Senathirajah v. INS*, 157 F.3d 210, 215-16 (3d Cir. 1998). Yet asylum seekers—even those found to be credible—are required by the Real ID Act of 2005 to provide corroborating evidence. *See* 8 U.S.C. § 1158(b)(1)(B)(ii).

But even once safely in the United States, it is difficult for asylum applicants to develop evidence in the countries they fled. Among other reasons, it may

endanger family or friends, or subject the applicants to retaliatory measures if denied asylum and repatriated. It is these risks that make protecting confidentiality during overseas investigations so critical. *See* U.S. Citizenship & Immigration Servs. ("USCIS"), U.S. Dep't of Homeland Sec., *Fact Sheet: Federal Regulations Protecting the Confidentiality of Asylum Applicants* (June 3, 2005), *available at* http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/fctsheetconf061505.pdf.

Although here, the Bunton Letter states that the "official responsible for the investigation [was] aware of the confidentiality provisions of U.S. asylum law," (AR484), there is no indication that the unnamed investigators were aware of or complied with confidentiality requirements. This is particularly disturbing in a case where the embassy apparently spoke to agents of the same government alleged to have persecuted petitioner. *Id.*

Contrary to the majority's view, the petitioner could not simply demand "a roster of the names of police officials" in the same police department alleged to have harmed him. Slip op. 24. Not even in the United States could such information be obtained on demand. *See, e.g.*, 5 U.S.C. § 552(b)(7); *Nunez v. DEA*, 497 F. Supp. 209, 212 (S.D.N.Y. 1980).

Moreover, unlike in civil cases, formal discovery is not permitted in immigration court. Asylum seekers must prove their claims thousands of miles

from where key evidence is located. They must substantiate their claims without jeopardizing family, friends, or themselves. They must do so without the right to appointed counsel in a complex area of law, often without understanding any English and with minimal, if any, financial resources.[2] *See, e.g.* Peter Afrasiabi, *Show Trials: How Property Gets More Legal Protection than People in Our Failed Immigration System*, at 31-33, 197-208 (Envelope Books Ltd. 2012) (detailing dissonance between the robust protections afforded property in Article III courts and the process for adjudicating life-liberty interests in immigration courts).

The reality is that proving asylum claims is difficult, even for experienced attorneys. Developing evidence to rebut a State Department Investigation is not so easy as the majority opinion suggests. Protecting the statutory right to cross-examine adverse hearsay declarants will not give asylum applicants an unfair advantage in a process that affords them only minimal procedural protections.

III. The Majority Opinion Discounts the Gravity of Removal Proceedings and Excuses the Violation of Statutory Rights Based on Unfounded Assumptions About Asylum Applicants.

A. Asylum Proceedings *Do* Implicate Life and Liberty.

The majority opinion states that asylum does not implicate "life or property." Slip op. 20. Not so—asylum claims implicate both life and property.

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[2] Almost half of asylum applicants in removal proceedings are unrepresented. *See* http://www.legalactioncenter.org/sites/default/files/docs/lac/Behind Closed Doors 5-13-12.pdf**.**

Although "deportation is not technically a criminal proceeding," it "cannot be doubted" that "deportation is a penalty -- at times a most serious one. *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). "A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death." *Id.* at 164 (Murphy, J., concurring).

The panel majority also suggests that asylum applicants have no right "to a particular quality of the evidence" presented against them. Slip op. 21. This, too, is incorrect. Agency decisions on asylum applications must be supported by "reasonable, substantial, and probative evidence." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

Asylum applicants also have the right to cross-examine witnesses. Except in narrow instances, this right is mandatory; applicants "*shall* have a reasonable opportunity … to cross-examine witnesses presented by the Government." 8 U.S.C. § 1229a(b)(4)(B) (emphasis added). While the circumstances of the examination, such as time, place or manner, are subject to a reasonableness requirement, the opportunity to cross-examine is not.

Even if the right to cross-examine government witnesses was subject to a reasonableness requirement contrary to the statute's mandatory language, the government's refusal to produce its witnesses here was not reasonable. The majority found that the government made "a reasonable effort to obtain a witness

from the State Department." Slip op. 9. No such thing. It simply refused to produce witnesses by invoking its *own* policy of refusing to provide "additional information or follow-up inquiries" on investigations. AR425-27.

This is not a basis for the government to avoid its statutory duties. "'[O]ne under investigation with a view to deportation is legally entitled to insist upon the observance of rules' ... [f]or these rules are designed as safeguards against essentially unfair procedures." *Bridges*, 326 U.S. at 153.

B. The Panel Majority's Assumption That Fraud Is Pervasive and Tolerated Is Unsubstantiated.

Instead of correcting the agency's statutory violation, the majority offers several reasons for excusing the infraction. Principal among them is the suggestion that immigration cases are unique in that fraud, forgery, and fabrication are commonplace and "routinely tolerated." Slip op. 10. But there is no evidence cited to support that "immigration fraud is rampant" or "distressingly common," as suggested. Slip. op. 12-13. Certainly there is no credible evidence cited that fraud is more commonplace in immigration cases than in other civil or administrative proceedings. Citing to eleven appeals involving fraud in the last six years—among the *many thousands* of immigration appeals adjudicated in that time—certainly does not prove the majority's point that fraud is commonplace. Slip. op. 13.

The majority opinion speculates that for every instance of detected fraud, "there are doubtless scores of others where the petitioner gets away with it." Slip.

op. 13. But the panel majority offers no basis for this assumption. Moreover, while any government system offering a benefit is subject to abuse, the experience of amici is that cases initially appearing to present credibility problems often reflect systemic flaws—such as poor lawyering, notario malfeasance, or overburdened immigration judges—rather than fraud on the applicant's part.

These problems are well-known to the Court. *See, e.g.*, *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 535 (9th Cir. 2012) ("Our court has joined the chorus of circuit courts lamenting frequent errors by Immigration Judges and the Board of Immigration Appeals in the handling of these important cases."); *Avagyan v. Holder*, 646 F.3d 672, 682 (9th Cir. 2011) ("Many, many immigrants fall victim to incompetent or fraudulent counsel who extract large sums of money but perform inadequately, or not at all.").

It is incorrect to suggest that the right to live legally in the United States compels persons to lie or forge documents. The suggestion that "billions … would come here tomorrow if they could" (Slip op. 10) contravenes the reality of the refugee experience. Amici have represented successful politicians, authors, journalists, actors, doctors, and other persons—prominent or not—who fled their homes with great reluctance, and would have preferred to remain safely in their homeland. The panel majority fails to appreciate the tremendous social,

psychological, familial, and professional upheaval wreaked by leaving one's family, friends, career, and home to start over in an unfamiliar land.

The panel majority's flawed logic also suggests that any person in any courtroom will lie and falsify evidence if the "prize" is sufficiently high. Indeed, permeating and infecting the majority opinion is the apparent belief that all asylum seekers are potential "charlatans" who "will stray" from the truth if investigative reports are no longer available to the government. Slip op. 29.

But the law does not presume that litigants will abuse the judicial process in other areas of law—even when plaintiffs bear the burden of proof and the stakes are high. Instead, the law assumes claims are made in good faith and imposes steep burdens on those alleging otherwise. *See, e.g.*, *Handgards, Inc. v. Ethicon, Inc*., 601 F.2d 986, 996 (9th Cir. 1979) (applying the *Noerr-Pennington* doctrine in finding that "a patentee's infringement suit is presumptively in good faith and that this presumption can be rebutted only by clear and convincing evidence").

The majority opinion suggests that while "Americans galore [may] wind up in prison every year" for fraud on government forms or bank loan applications, "nothing very bad" happens to asylum applicants caught lying. Slip op. 11, 13. But this is not correct. Fraudulent asylum claims *do* result in prosecution and conviction. *See, e.g.*, *United States v. Jawara*, 462 F.3d 1173 (9th Cir. 2006); *Noriega-Perez v. United States*, 179 F.3d 1166, 1169 (9th Cir. 1999).

And beyond the possibility of criminal punishment, a finding of fraud permanently bars all future immigration relief. *See* 8 U.S.C. § 1158(d)(6). Such a draconian bar does not simply send an asylum applicant back to square one, as the panel majority suggests. Slip op. 12 ("And if they do get sent back … what's lost? They wind up where they started.").

C. Enforcing the Statutory Right to Cross-Examination Will Not Unduly Burden the Government.

In further trying to excuse the violation of petitioner's right to cross-examine adverse government witnesses, the panel majority suggests that allowing cross-examination of hearsay declarants in investigative reports would impermissibly burden the government or undermine its ability to ferret out fraud. Slip op. 27-29.

But the statute explicitly contemplates the government bearing the burden of producing its witnesses; an applicant "shall have a reasonable opportunity … to cross-examine [government] witnesses. 8 U.S.C. § 1229a(b)(4)(B).

Moreover, the experience of amici is that the government can and does produce its witnesses for cross-examination when it so chooses. Technological advances have also made video testimony possible. *See* Aaron Haas, Videoconferencing in Immigration Proceedings, 5 Pierce L. Rev. 63 (2006).

In those cases where fraud can only be established through an overseas investigation, providing basic details in an investigative report, along with telephonic or video testimony by the report's declarants, will enable the

government to prove fraud without impinging on critically important rights. It is not unreasonable to insist the government make its hearsay declarants available for cross-examination—even if just by phone—when they have lodged accusations of fraud against an asylum applicant.

Had the government done so in 2004, as required by statute, this Court would not need to address whether reliance on an investigative report a decade ago violated petitioner's rights. Instead, it would have a full evidentiary record on which to decide whether substantial evidence supported the denial of his claim.

The reality is that immigration fraud occurs, and must be addressed. But the tool sanctioned by the majority not only violates statutory and due process rights, but cannot meaningfully address a multi-faceted problem with no simple solutions.

It also overlooks the many other tools available to the government, including prosecution of attorneys engaged in systemic fraud; mandatory biographical and biometric checks against multiple government databases; and Fraud Detection and National Security teams within USCIS that monitor asylum cases for fraud, train asylum officers in fraud detection, liaise with law enforcement agencies, and refer cases of suspected fraud for investigation and possible prosecution.

Moreover, the Executive Office for Immigration Review "has a robust and active program for identifying and referring claims of fraud encountered by immigration judges and the BIA." *Border Security Oversight, Part III: Border*

Crossing Cards and B1/B2 Visas: Hearing Before the Subcomm. on Nat'l Sec. of the H. Comm. on Oversight & Gov't Reform, 113th Cong. (2013) (statement of Juan P. Osuna, Dir., EOIR), *available at* http://oversight.house.gov/wp-content/uploads/2013/11/DOJ-Juan-Osuna-Testimony.pdf.

The government can protect the integrity of the asylum system without stripping asylum seekers of the few rights they have.

IV. The Majority Opinion Invites Even Broader Statutory Violations.

The panel majority's holding—that reliance on the Bunton Letter to deny asylum did not violate petitioner's due process or statutory rights—may be narrow. But the analyses underpinning this holding—that the statutory rights to be judged by substantial evidence and to cross-examine adverse witnesses—can be dispensed with if the government decides they are too burdensome—have significant implications for the litigation of asylum claims.

If the Ninth Circuit allows the Government to avoid its statutory obligation to produce witnesses for cross-examination by invoking its own informal policies, it is easy to imagine the government asserting that it need not produce witnesses to prove smuggling or other removal charges—contrary to longstanding law. *See, e.g.*, *Saidane v. INS*, 129 F.3d 1063 (9th Cir. 1997) (finding denial of due process in admitting hearsay to prove smuggling charges without opportunity for cross-examination). The government may instead seek to rely on anonymous hearsay

evidence no more reliable than that permitted here—at least in this Circuit where half of the nation's asylum appeals are adjudicated.

The error in the majority opinion is of great significance for immigration proceedings generally, and should be corrected by en banc review.

CONCLUSION

The panel majority purported to conduct a "reality check" and, based on their subjective reality, fashioned a new evidentiary rule—contrary to petitioner's statutory rights, contrary to internal agency requirements, and contrary to the uniform judgment of five other circuits. The majority's holding—that petitioner's statutory rights were not violated by reliance on a conclusory report filled with anonymous hearsay without an opportunity for cross-examination—invites even further erosion of a critical statutory safeguard in future asylum hearings.

This issue is critically important to asylum seekers who submit evidence corroborating their claims. State Department reports can be dispositive, as here. AR308. Yet without the disclosure of even basic facts, the reports are impossible to rebut even with the benefit of experienced counsel and evidence contradicting the report, as this case also bears out.

When it comes to procedural requirements enacted by Congress to ensure fair process in immigration proceedings, the Supreme Court has demanded strict compliance by the government; this Court should demand no less.

> Here the liberty of an individual is at stake. Highly incriminating statements are used against him – statements … which under the governing regulations are inadmissible. We are dealing here with procedural requirements prescribed for the protection of the alien. … Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

Bridges, 326 U.S. at 154.

En banc review is necessary not only to correct the statutory and due process violations that occurred in this case, but also to ensure that the many other asylum seekers in this Circuit are not deprived of their statutory rights or liberty through procedures that fall short of essential standards of fairness.

Dated: April 8, 2014

Respectfully submitted,

By /s/ Laura A. Wytsma
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Circuit Rule 29-2(c)(2) because it contains 4131 words, excluding parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

I further certify that the text of this brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a) because it is set in Times New Roman and is proportionately spaced with a typeface of 14 points or more.

Dated: April 8, 2014 /s/ Laura A. Wytsma

ADDENDUM

U.S. Department of Justice
Immigration and Naturalization Service

HQCOU120/12.8

Office of the General Counsel

425 I Street NW
Washington, DC 20536

JUN 21 2001

MEMORANDUM FOR JEFFREY WEISS
DIRECTOR, OFFICE OF INTERNATIONAL AFFAIRS

FROM: Bo Cooper
General Counsel

SUBJECT: Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information

This memorandum discusses the confidentiality requirements that apply to information contained in or pertaining to asylum applications and gives guidance to Immigration and Naturalization Service (INS) overseas personnel conducting verifications of documents and facts contained in asylum applications. Overseas verification of documents or facts submitted in support of asylum applications is essential to combat fraud in the asylum process and ensure the integrity of the asylum program. INS attorneys are grateful for the invaluable assistance that your offices have provided and continue to provide in furtherance of these goals. The following guidance is intended to assist in the accomplishment of these goals while minimizing the risk of confidentiality breaches. This memo supercedes all prior guidance provided by this office on this topic.

LEGAL FRAMEWORK

The regulation governing the confidentiality of asylum applications is found at 8 C.F.R. § 208.6 (2000), as amended at 65 Federal Register 76121, 76133 (Dec. 6, 2000). This regulation contains mandatory language and is binding on all INS personnel. The regulation provides:

> (a) Information contained in or pertaining to any asylum application, records pertaining to any credible fear determination conducted pursuant to § 208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 208.31, shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General.

(b) The confidentiality of other records kept by the Service and the Executive Office for Immigration Review that indicate that a specific alien has applied for asylum, received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure. The Service will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.

(c) This section shall not apply to any disclosure to:

(1) Any United States Government official or contractor having a need to examine information in connection with:

(i) The adjudication of asylum applications;

(ii) The consideration of a request for a credible fear or reasonable fear interview, or a credible fear or reasonable fear review;

(iii) The defense of any legal action arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear determination or reasonable fear determination under § 208.30 or § 208.31;

(iv) The defense of any legal action of which the asylum application, credible fear determination, or reasonable fear determination is a part; or

(iv) Any United States Government investigation concerning any criminal or civil matter; or

(2) Any Federal, state, or local court in the United States considering any legal action:

(i) Arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear or reasonable fear determination under § 208.30 or § 208.31; or

(ii) Arising from the proceedings of which the asylum application, credible fear determination, or reasonable fear determination is a part.

8 C.F.R. § 208.6.

As a general matter, the regulation prohibits INS personnel from commenting to any third party on the nature or even the existence of individual applications for asylum, and requires that the INS maintain the confidentiality of any INS records that indicate that an alien has applied for asylum or withholding of removal. See 8 C.F.R. § 208.6(b). The regulations, however, enumerate several exceptions to the general rule. First, the records may be disclosed at the discretion of the Attorney General. See 8 C.F.R. § 208.6(a). The INS has interpreted the

Attorney General's discretion under this provision as not extending to INS personnal. Pursuant to his discretion, however, the Attorney General has set up specific guidelines for the release of asylum information to the Federal Bureau of Investigation and he may issue further guidelines for the release of such information to specific entities such as the Department of Health and Human Services. Second, the records may be disclosed to any United States Government official or contractor having a need to examine information in connection with the adjudication of the application, the defense of any legal action arising from the application, or any United States Government investigation concerning any criminal or civil matter. See 8 C.F.R. § 208.6(c)(1)(i)-(iv). Third, the records may be disclosed to any Federal, state, or local court in the United States considering any legal action arising from the adjudication or failure to adjudicate the asylum application or arising from the proceedings of which the asylum application is a part. See 8 C.F.R. § 208.6(c)(2)(i)-(ii). Thus, while the Attorney General has limitless discretion to disclose information in asylum files to third parties, INS employees, as well as any other government official, are limited to disclosing information in asylum files to United States government officials or contractors, or courts in a limited number of circumstances that are specifically defined by the regulations. Disclosure is prohibited to all other persons.

The regulatory provisions do not offer specific guidance on how to proceed with an investigation of a claim. The propriety of an investigative procedure will vary in many instances from post to post, and the method of compliance with the regulation will primarily depend on how the investigation is performed. The following guidance is offered to help interpret these requirements and guide INS overseas personnel as they undertake verifications of evidence submitted in support of asylum applications.

CONFIDENTIALITY GUIDELINES

Preserving the confidentiality of asylum applications must always be a primary consideration in processing requests for investigations. The following guidelines will assist in the interpretation of 8 C.F.R. § 208.6 and help INS overseas personnel preserve the confidentiality of applications. In order to ensure consistency in evidentiary submissions to immigration courts, these guidelines are intended to be similar and, in some cases, identical to those issued, after consultation with this office, by the Department of State's Office of Asylum Affairs to their consular officers performing investigations of asylum applications. A copy of the cable is attached.

(1) If an investigation cannot be accomplished without compromising the confidentiality of the application, the investigation should be abandoned and the investigator should inform the requestor of the investigation of this fact.

(2) Generally, confidentiality of an asylum application is breached when information contained therein or pertaining thereto is disclosed to a third party, and the 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 contained in an asylum application; or (3) facts or allegations that are sufficient to give rise to a reasonable inference that the applicant has applied for asylum. If one or the other part of this link is missing, then no breach has occurred.

The propriety of an investigative procedure will vary in many instances from post to post, and successful compliance with the regulation will primarily depend upon the type of information to be verified and upon how the investigation is performed. An INS investigator may request information from the host government or third parties concerning an applicant for asylum or application information, so long as the investigator does not disclose information that would allow a third party to link the identity of the applicant to either the fact that the applicant has applied for asylum, to specific facts or allegations contained in the asylum application or to facts or allegations that are sufficient to give rise to a reasonable inference that the applicant has applied for asylum.

Disclosure of the applicant's identity might be permissible if the request for information is made where similar requests for information are routinely made by the United States government for other purposes – e.g., for visa applicants, prospective employees, etc. – and there is no mention of asylum. Many aspects of an asylum claim – including the occurrence of events central to the claim, the addresses and locations of such events, etc. – could be verified or disproved without disclosing the identity of the applicant or any details of his or her claim to anyone. If possible, such an approach is preferable. In particularly sensitive cases, or where similar requests for information are not routinely made, it may not be prudent to approach the host government or third parties at all.

Overseas verification of documents presented in support of asylum applications may present unique difficulties. For example, if an Assistant District Counsel sends a birth certificate included by an asylum applicant in his or her asylum application to the overseas OIC for verification of the ethnic status listed thereon, the birth certificate could be verified in a number of ways, some of which would breach the confidentiality of the application, while others would not. If the OIC provides the birth certificate directly to foreign government officials for verification of its contents, this would be a breach because the birth certificate discloses both the applicant's identity and information - indeed, an actual document - contained in the asylum application. In addition, the possession and investigation of certain personal documents by the US government might be sufficient to give rise to a reasonable inference that the applicant submitted the document to the US government to buttress an asylum claim. This would be especially true if a document submitted directly to a foreign government were the type of document – such as a PRC hospital record pertaining to coercive family planning measures – that evidences events commonly known to form the basis of asylum claims in the United States.

On the other hand, if the OIC only sent the name of the applicant to the foreign government authorities with a request that they inspect their birth records for information

on the applicant, confidentiality would probably not be breached if such an inquiry is routinely conducted for reasons unrelated to an asylum application, such as for an employment application or a visa application. Such an inquiry, although it divulges the applicant's identity, does not disclose specific facts or allegations contained in the asylum application, nor does it disclose facts sufficient to give rise to a reasonable inference that the applicant has applied for asylum. The only fact divulged is that the United States government is interested in the birth records of the alien. In a similar vein, if the OIC personally inspects the logs in which birth certificates would be contained, the confidentiality of the asylum application would remain intact. This last approach, resources permitting, is the preferable approach from the standpoint of maintaining confidentiality.

(3) Material that identifies an applicant and discloses that he or she has applied for asylum may only be transmitted to INS posts in other countries or between foreign posts by official and reliable means. This includes unclassified government telegrams, official fax and approved DOJ / INS electronic mail. Within the United States, material may be transmitted by mail, regular fax, or the approved DOJ / INS electronic mail. Specific asylum cases should never be discussed over personal electronic mail accounts.

(4) Foreign service national (FSN) employees of the INS may be allowed access to information contained in or pertaining to asylum applications at the discretion of the District Director having jurisdiction over the INS overseas District Office or Sub-Office in which they are employed. In exercising this discretion, the District Director should consider any factor which may affect the likelihood that asylum information may be improperly disclosed at a given INS overseas post or by a given FSN employee including, but not limited to: (1) the integrity and competence of a given FSN employee; (2) whether there is a history or practice of corruption, impropriety or unauthorized disclosure of protected information at a given post; and (3) the ties between FSN employees at a given post and the host government.

(5) INS overseas personnel may disclose information contained in or pertaining to asylum applications to employees of the Department of State (DOS) with the need to know. The regulations specifically contemplate such a disclosure for the purpose of conducting an overseas investigation. See 8 C.F.R. § 208.6(b). As noted above, the DOS has issued a cable to its overseas posts governing the confidentiality of asylum applications. If an INS officer transmits such information to a DOS employee with a need to know, the INS officer must inform the DOS employee of the requirements of 8 C.F.R. § 208.6. Overseas INS personnel may also disclose an asylum application to any United States government official or contractor having need to examine the information in connection with any of the situations described in 8 C.F.R. § 208.6(c)(1)(i)-(iv). Any such government official or contractor should be apprised of the confidentially requirements of § 208.6.

(6) All INS overseas personnel who handle information contained in or pertaining to asylum applications must be instructed on the confidentiality requirements found in 8 C.F.R. § 208.6.

(7) In the event of a general disclosure of the asylum application – for example, if the applicant holds a press conference to discuss his claim – an INS response that discusses the claim *may* be appropriate in some circumstances. Before preparing any such response, however, INS employees must receive approval from the INS Office of International Affairs, which will consult with the Office of the General Counsel.

(8) In responding to requests for information or for verification of documents or factual information, overseas officers should include, at a minimum:

(i) the applicant's name;
(ii) the applicant's A-number;
(iii) name and address of the requesting officer (either INS or EOIR);
(iv) name of responding officer and title; and
(v) an investigative report as outlined in number (9) below.

(9) The content of the investigative report is critical if it is to effectively convey information to the adjudicating official, be it an asylum officer or an immigration judge. In proceedings before an immigration judge, for example, the quality of the investigative report can determine the report's admissibility as evidence and, if admitted, the weight the immigration judge will accord to it. A report that is simply a short statement that an investigator has determined an application to be fraudulent is of little benefit. Instead, the reports should lay a proper foundation for its conclusion by reciting those factual steps taken by the investigator that caused the investigator to reach his or her conclusion. In addition, the conclusion of the investigator should be stated in neutral and unbiased language. In the case of a fraudulent document, a comprehensive and, therefore, effective report will lead the adjudicator down the path taken by the investigator, and hopefully help the adjudicator reach the same conclusion. Such a report must contain, at a minimum:

(i) the name and title of the investigator;
(ii) a statement that the investigator is fluent in the relevant language(s) or that he or she used a translator who is fluent in the relevant languages(s);
(iii) any other statements of the competency of the investigator and the translator deemed appropriate under the circumstances (such as education, years of experience in the field, familiarity with the geographic terrain, etc.);
(iv) the specific objective of the investigation;
(v) the location(s) of any conversations or other searches conducted;
(vi) the name(s) and title(s) of the people spoken to in the course of the investigation;

(vii) the method used to verify the information;
(viii) the circumstances, content and results of each relevant conversation or searches; and
(ix) a statement that the Service investigator is aware of the confidentiality provisions found in 8 C.F.R. § 208.6.

CONCLUSION

This memorandum is intended to assist overseas INS personnel conducting verifications of documents and facts contained in asylum applications. We hope the recommended steps simply reflect those already taken by the investigators, and will not be overly burdensome. While anti-fraud initiatives are imperative to maintain the integrity of the asylum application process, such initiatives must always maintain the confidentiality of the application. Compliance with the regulation will primarily depend on how the investigation is performed and the propriety of an investigative procedure will vary from post to post. This memo is intended to provide guidance of general applicability to assist the INS personnel who perform such investigations. If you have any questions regarding this memorandum, please contact Ron Whitney at the Office of the General Counsel at (202) 514-9699.

cc: Regional Directors
Regional Counsel

United States Department of State

Washington, D.C. 20520

Bureau of Democracy,
Human Rights and Labor

April 21, 2004

Megan Schirn, ACC
Office of Chief Counsel, U.S. DHS
606 South Olive Street, 8th Floor
Los Angeles, CA 90014

RE: Request for Verification of Documents and Addressees

NAME: Nikolay Ivanov Angov
A # : 96-227-355
COUNTRY: Bulgaria

Dear Ms. Schirn,

We are writing in response to your request for comments regarding the above applicant. These comments are intended for use in conjunction with the Department of State's *Country Reports on Human Rights Practices*, which are available at www.state.gov. The U.S. Embassy official responsible for the investigation is aware of the confidentiality provisions of U.S. asylum law and did not reveal or imply the existence of an asylum application on the part of the applicant.

On March 8, 2003, you requested authentication of the documents labeled 'Subpoena re. Case 28030/2002' and 'Subpoena re. Case 16451/2001'. The Embassy contacted an official in the Archive Department at the 5th Police District in Sofia requesting authentication of the two subpoenas. The Bulgarian official stated that the 5th Police District never issued the documents and that she believed they were forged. She stated that officers Captain Donkov, Lieutenant Slavkov, and Investigator Vutov have never worked for the 5th Police District. She also told the Embassy that the case numbers on the subpoenas were not correct, there was no room 4 on the second floor and no room 5 on the first floor, and that the telephone numbers on the subpoenas were incorrect. The Embassy also obtained an imprint of the 5th Police District's official seal, which is much larger than the one on these two subpoenas.

You additionally requested address verification. The Embassy located 3005 Street Sofia, Bulgaria but was unable to locate number 9. The Embassy stated that 3005 Street is very short with both old houses and a few newly built blocks of flats. Only one house had a number (#1) on its wall (see Attachment A). The Embassy was not able to locate 175 Evropa Boulevard Sofia, Bulgaria. The Embassy stated that Evropa Boulevard is the main thoroughfare to Serbia and that #175 appears to be a huge empty space (See Attachment B). Both neighborhoods are located in the Ljulin district which is one of the largest and poorest residential districts in Sofia. The Embassy estimated that approximately twenty to thirty percent of Ljulin's residents are Roma.

I hope that this information will be useful to you.

Sincerely,

Cynthia Bunton
Director, Office of
Country Reports and Asylum
Affairs

United States Department of State

Washington, D.C. 20520
www.state.gov

Attorney Megan Schirn
Assistant Chief Counsel
Department of Homeland Security
26 Federal Plaza, Room 1130
New York, NY 10278

June 6, 2005

NAME: Nikolay Ivanov Angov
COUNTRY: Bulgaria
A NUMBER: A96-227-355

Dear Ms. Schirn:

The Department of State's Bureau of Democracy, Human Rights and Labor, Office of Country Reports and Asylum Affairs (DRL/CRA) has considered the Respondent counsel's request that a Department of State employee testify about the preparation of the advisory opinion letter, dated 5/5/05, regarding Respondent's documents. While we are unable to meet this request, we can provide you with the following information regarding our advisory process.

Under federal regulations 8 CFR 208.11 and 8 CFR 1208.11, the Department of State is to receive copies of all applications for asylum and may, at its discretion, comment on applications to Department of Homeland Security, Citizenship and Immigration Services (CIS) asylum officers or immigration judges who are deciding the cases. Additionally, asylum officers and immigration judges may request specific comments from the Department of State regarding individual cases or types of claims under consideration, or such other information as they deem appropriate. These requests for information are designed to assist CIS asylum officers, ICE trial attorneys, and immigration judges who wish to ask embassies and consulates without a CIS or ICE officer present to investigate the validity of documents and factual statements made in support of applications for asylum.

DRL/CRA is responsible for reviewing these applications and providing the Department's comments. DRL/CRA receives an application or request for information, contacts the relevant post, and, based on the results of an investigation, composes the comment or response to the DHS officer or immigration judge. Because of the large volume of requests for information, the Department of State employs foreign service nationals ("FSNs") at some posts to conduct local investigations. FSN investigators may be used to inquire about documents submitted or claims made in support of an asylum application, provided they are not given information which would lead them to believe that the request is being made in connection with an asylum application. Preserving the

confidentiality of asylum applications is always a consideration in processing requests for investigations.

Pursuant to Department of State policy, DRL/CRA generally does not provide additional information or follow-up inquiries to DHS officers or immigration judges regarding the results of an investigation. Such additional demands are further burdens on Consular Officers in the performance of their regular responsibilities and are particularly onerous for FSNs who may be subject to local reprisal. As noted above, these investigations are conducted for the benefit of DHS officers and immigration judges to aid them in the adjudication process.

We hope this information is of use to you. Please review the 2004 Country Reports on Human Rights Practices for Bulgaria for additional information.

Sincerely,

Nadia Tongour
Direction, Country Reports
and Asylum Affairs

CERTIFICATE OF SERVICE

I certify that all participants in the case are registered CM/ECF users and that, on April 8, 2014, this motion and brief were served electronically via the Court's CM/ECF system upon all counsel of record.

Dated: April 8, 2014 /s/ Laura A. Wytsma