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The Quality That Makes Something Worthy of Belief: REAL ID Credibility Standards and the Parameters of Plausibility Findings

by Michele D. Frangella

Introduction

Black's Law Dictionary defines credibility as "[t]he quality that makes something . . . worthy of belief." *Black's Law Dictionary* 423 (9th ed. 2009). Credibility determinations turn on particular indicia of truthfulness, including the internal and external consistency of an applicant's account, demeanor, candor, responsiveness to questioning, and now with the amendments of the REAL ID Act of 2005, Division B of Pub. L. No. 109-13, 119 Stat. 302 ("REAL ID Act"), the "inherent plausibility of the applicant's or witness's account." Section 208(b)(1)(B)(iii) of the Act, 8 U.S.C. § 1158(b)(1)(B)(iii). In drafting these amendments, Congress intended to create a "uniform standard for credibility." H.R. Rep. No. 109-72, at 167 (2005) (Conf. Rep.), *reprinted in* 2005 U.S.C.C.A.N. 240, 292, 2005 WL 1848528. Although an adverse credibility determination may be based on any one of the enumerated factors, such a determination must be reasonable and premised upon "the individual circumstances of the specific witness and/or applicant." *Id.* Congress intended for triers of fact to utilize "commonsense standards" when ferreting out truthful accounts from fraudulent ones. *Id.*

Adjudicators should be guided by common sense and reasonableness in examining the "inherent plausibility" of an applicant's account. An account may be plausible when it is "seemingly or apparently valid, likely, or acceptable." *Webster's II New Riverside University Dictionary* 901 (1994). Reviewing courts are likely to uphold an adverse credibility determination based upon the inherent implausibility of an applicant's account where the trier of fact bases such a determination on permissible inferences, rather than prohibited speculation. This article examines the differences between credibility and plausibility and the imprecise boundary between reasonable inferences and speculation in plausibility findings.

Credibility vs. Plausibility

Although often used interchangeably, credibility and plausibility are not synonymous. A credibility finding is a determination regarding the overall truthfulness of an applicant or witness. Such a determination must be based on any or all of the eight enumerated components in the REAL ID Act or "any other relevant factor" that an Immigration Judge or asylum officer finds illuminating. Section 208(b)(1)(B)(iii) of the Act. The "inherent plausibility" of an account is but one of many factors upon which a credibility determination may be made. A trier of fact may find that only certain aspects of an applicant's or witness's account are implausible. By contrast, an adjudicator must find an applicant or witness to be either credible or not credible, but not both. *Id.*

A court may find that some of an applicant's factual claims with regard to the time, date, or sequence of events are implausible. In *Teng v. Gonzales*, 516 F.3d 12 (1st Cir. 2008), the Immigration Judge questioned the respondent's assertion that he went into hiding in a Cambodian temple in March 1997 on account of his recent political activity but felt safe enough to emerge from the temple and go to work at the government post office until May 1997. He also felt safe enough to travel to and from the country in July 1997 using his Cambodian passport. The First Circuit upheld the Immigration Judge's adverse credibility finding, noting the "oddity of Teng's core story as to on and off concealments." *Id*. at 17. The implausibility of the alien's narrative, coupled with other inconsistencies on the record, supported the adverse credibility finding.

An Immigration Judge or asylum officer may also find that the nature of a respondent's claim based on a protected ground is inherently implausible. For example, in *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007), the Board of Immigration Appeals examined an Immigration Judge's opinion as to the inherent plausibility of a respondent's entire claim based upon religious persecution. The respondent, a native of China, arrived in the United States in August 2005. Upon arrival, he indicated that he had suffered past persecution in China on account of his Christian faith. During the interview at the airport, the respondent was unable to identify the principle book of Christian teachings (the Bible), despite testifying that a friend gave him a Bible and instructed him to read it. The Immigration Judge found that the respondent's inability to name the Bible as a text of Christian teachings cast serious doubt on the substance of the respondent's Christian faith. For this reason, the Immigration Judge considered the respondent's claim that he had been persecuted on account of such faith inherently implausible. The Board upheld the Immigration Judge's adverse credibility determination, noting, however, that it was based not only on the implausibility of the entire claim, but also on other discrepancies in the record, the demeanor of the respondent while testifying, and the lack of corroborating evidence.

Similarly, in *Ying Li v. BCIS*, 529 F.3d 79 (2d Cir. 2008), the alien sought refugee protection based on her fear of religious persecution in China for promoting Falun Gong. The Immigration Judge found that it was implausible that a student would promote Falun Gong at school to the point where she would fear persecution because of it, but that she herself was not a practicing member. *Id*. at 82. The Immigration Judge further found it implausible that the respondent openly met with a Falun Gong leader, but neither individual was ever arrested, and that the respondent was able to depart China using her own passport despite widespread claims of persecution of Falun Gong members. In upholding the Immigration Judge's decision, the Second Circuit held that while possible explanations could exist, the "overall implausibility" of the alien's claim supported the Immigration Judge's finding.

The inherent implausibility of an applicant's account may also relate to how a persecutor would act in a given situation. In *Mamana v. Gonzales*, 436 F.3d 966, 967 (8th Cir. 2006), the alien stated that he was a rank-and-file member of the Union Forces for Change, an opposition group in Togo. During his removal proceedings, he testified that on two separate occasions, representatives of the Prime Minister contacted him and asked him to give a public speech in support of the Government. He testified that he then went into hiding until his flight to the United States. The Immigration Judge found the respondent's claims to be inherently implausible because there was no support in the record to suggest that the respondent, a man with no "public reputation," would be contacted by the Government to play a pivotal role in the election process. *Id*. The Eighth Circuit upheld the Immigration Judge's determination, finding that no reasonable adjudicator would be compelled to find to the contrary, particularly in the absence of corroborating evidence. *Id*. at 968-69.

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Objective Plausibility

In *Chen v. BIA*, 435 F.3d 141 (2d Cir. 2006), the Second Circuit recognized the difficulty in creating clearly demarcated lines between accounts that are plausible and those that are not. The court noted that "[t]he point at which a finding that testimony is implausible ceases to be sustainable as reasonable and, instead, is justifiably labeled 'speculation,' in the absence of an IJ's adequate explanation, cannot be located with precision." *Id*. at 145. Struggling with the seemingly subjective nature of these determinations, reviewing courts have emphasized the importance of providing objective reasoning that is valid, cogent, and specific when making an adverse credibility determination based on the inherent plausibility of an account. *See generally Tewabe v. Gonzales*, 446 F.3d 533, 538 (4th Cir. 2006); *Dia v. Ashcroft*, 353 F.3d 228, 250 (3d Cir. 2003).

Reasoning is valid, cogent, and specific when it is based on permissible inferences. Permissible inferences are those which are drawn from and tethered to a properly developed record. *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989) (stating that a full examination of an applicant is "essential"). In *Li v. Mukasey*, 529 F.3d 141 (2d Cir. 2008), the alien claimed that she was persecuted in China on account of being a practitioner of Falun Gong. Although the Immigration Judge found the respondent's testimony to be "extremely vague and general," neither the court nor counsel for the Government elicited further testimony from the respondent to fill in the factual gaps. The Second Circuit held that vague testimony alone cannot support an adverse credibility finding unless an attempt is made to solicit further detail from the applicant.

Similarly, in *Musollari v. Mukasey*, 545 F.3d 505 (7th Cir. 2008), the alien claimed that as an election observer in Albania in 2000, he was targeted for persecution because of his political activities. The Immigration Judge concluded that the respondent's account was implausible based in part on the fact that, in the Judge's experience, approximately 90 percent of Albanian asylum seekers claim to have been election observers. Addressing this portion of the Immigration Judge's conclusion, the Seventh Circuit stated that "[t]he IJ was entitled, based on his experience adjudicating these claims, to question Musollari further on the details of his appointment and service as an election observer—and should have done so—but this in itself is an insufficient ground on which to rest an adverse credibility finding." *Id*. at 509; *cf. Debab v. INS*, 163 F.3d 21, 26 (1st Cir. 1998) (rejecting the argument that the Immigration Judge erred by not inquiring regarding gaps in the alien's case).

Plausibility findings should be grounded in inferences informed by country conditions and other contextual factors. In *Banks v. Gonzales*, 453 F.3d 449, 454 (7th Cir. 2006), the Seventh Circuit compared the necessity of country-specific information in immigration proceedings with the importance of medical evidence in Social Security disability claims. The court concluded that such evidence would provide the appropriate benchmark against which an Immigration Judge may evaluate the plausibility of an applicant's claim. Although in *Banks*, the Seventh Circuit criticized the Department of State reports as being too generalized, the Board recently held that Department of State reports on country conditions are "highly probative evidence and are usually the best source of information on conditions in foreign nations." *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 213 (BIA 2010). Evidence on country conditions may also include testimony or affidavits from expert witnesses and reports authored by international nongovernmental organizations.

Speculation and Conjecture

A reviewing court must determine if an Immigration Judge's credibility determination is supported by substantial evidence. *Tang v. Att'y Gen. of U.S.*, 578 F.3d 1270, 1276-77 (11th Cir. 2009) (stating that post-REAL ID Act reversal of credibility determinations come under the substantial evidence standard). The Immigration Judge's determination will remain conclusive unless any reasonable adjudicator would be compelled to conclude otherwise. Section 242(b)(4)(B) of the Act, 8 U.S.C. § 1252(b)(4)(B). Although this standard affords great deference to an Immigration Judge's credibility determination, it is not unassailable, and deference will not be afforded to those determinations based upon speculation or conjecture. *See, e.g.*, *Toure v. Att'y Gen. of U.S.*, 443 F.3d 310, 316, 327 (3d Cir. 2006) (vacating the Immigration Judge's implausibility finding where it was "based on nothing more than speculation and conjecture"). Speculation is defined as "[t]he act or practice of theorizing about matters over which there is no certain knowledge." *Blacks Law Dictionary*, *supra*, at 529. Personal beliefs or perceived common knowledge regarding how a person or particular people should act, dress, or appear in public exemplifies the sort of unfounded speculation reviewing courts have criticized.

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CIRCUIT COURT DECISIONS FOR JUNE 2011

by John Guendelsberger

The United States courts of appeals issued 378 decisions in June 2011 in cases appealed from the Board. The courts affirmed the Board in 312 cases and reversed or remanded in 66, for an overall reversal rate of 17.5% compared to last month's 16.7%. There were no reversals from the First, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for June 2011 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	0	0	0	0.0
Second	25	24	1	4.0
Third	22	21	1	4.5
Fourth	8	7	1	12.5
Fifth	10	10	0	0.0
Sixth	10	10	0	0.0
Seventh	3	3	0	0.0
Eighth	3	2	1	33.3
Ninth	255	193	62	24.3
Tenth	7	7	0	0.0
Eleventh	35	35	0	0.0
All	378	312	66	17.5

The 378 decisions included 175 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 78 direct appeals from denials of other forms of relief from removal or from findings of removal; and 125 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	175	134	41	23.4
Other Relief	78	73	5	6.4
Motions	125	105	20	16.0

Of the 41 reversals or remands in asylum cases, 38 were from the Ninth Circuit. These cases involved credibility (nine cases); failure to apply "disfavored group" analysis (nine cases); past persecution (seven cases); nexus (five cases); 1-year filing bar (two cases); internal relocation (two cases); Convention Against Torture (one case); and frivolousness (one case).

There were only five reversals or remands in the "other relief" category. These involved application of the categorical approach in determining whether an offense was a crime of violence, imputation of a parent's permanent resident status for cancellation of removal, a continuance request, and the appropriate standard for determining prejudice.

The 20 reversals in motions cases were all from the Ninth Circuit. These included claims of ineffective assistance of counsel (eight cases), rescission of an in absentia order of removal for lack of notice (five cases), rescission of an in absentia order of removal for exceptional circumstances (one case), changed country conditions (one case), the departure bar (one case), reissuance of a Board order (one case), and a remand to address sua sponte reopening.

The chart below shows the combined numbers from January through June 2011 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
First	10	8	2	20.0
Ninth	1065	860	205	19.2
Tenth	23	20	3	13.0
Eighth	18	16	2	11.1
Third	178	162	16	9.0
Seventh	25	23	2	8.0
Sixth	54	50	4	7.4
Fourth	66	62	4	6.1
Eleventh	124	117	7	5.6
Second	324	208	16	4.9
Fifth	83	80	3	3.6
All	1970	1606	264	13.4

Last year's reversal rate at this point (January through June 2010) was 11.5%, with 2113 total decisions and 244 reversals.

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The numbers by type of case on appeal for the first 6 months of 2011 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	967	836	131	13.5
Other Relief	414	345	69	16.7
Motions	589	525	64	10.9

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

Fifth Circuit:

Robertson-Dewar v. Holder, No. 09-60847, 2011 WL 2652442 (5th Cir. July 8, 2011): The Fifth Circuit denied the petition for review from an Immigration Judge's order of removal, which was affirmed by the Board. The petitioner was born in Jamaica in 1980 and was admitted to the United States as a lawful permanent resident ("LPR") in 1993. His father naturalized that same year and filed an application for a certificate of naturalization on the petitioner's behalf in 1996. In 2002, the petitioner was convicted of several counts of sexual abuse of children. In December 2006, the petitioner was placed into removal proceedings. Several days later, the USCIS denied his citizenship application, which had been pending for nearly 11 years. Although the DHS agreed to terminate proceedings without prejudice to allow the petitioner to apply for citizenship, it reinstated proceedings in November 2007. The DHS would not agree to termination again, and in January 2009 the Immigration Judge entered an order of removal, finding that such an order was not precluded by res judicata. The petitioner both appealed the Immigration Judge's decision to the Board and filed a mandamus action in district court to compel the DHS to naturalize him.

The district court held that because the applicable statute required the petitioner to be under the age of 18 both at the time the petition was filed and at the time of naturalization, the petitioner was no longer eligible. The district court also found that the DHS's denial of the petition was barred by statute because removal proceedings against the petitioner were pending at the time. Lastly, the district court determined that it had no authority to order the DHS to adjudicate the citizenship application nunc pro tunc because removal proceedings were still pending. Shortly thereafter, the Board remanded the proceedings to the Immigration Judge, who again issued an order of removal. This second order was upheld by the Board, which declined to rule on the DHS's delay in adjudicating the citizenship petition or its interpretation of the applicable status, because the Board found that it lacked jurisdiction over naturalization applications.

The petitioner sought review of this decision by the circuit court and also filed a motion to reconsider with the Board, which was denied. The court rejected the petitioner's request for equitable estoppel against the DHS. The court noted that the rarity of such remedy being granted against the Government meant that the burden on the petitioner was extremely high, and it concluded that the petitioner had not met this burden. The court found that the petitioner had failed to demonstrate Government misconduct beyond mere negligence or delay and, further, did not establish his reasonable reliance on such conduct. The court also refused to upset the Board's ruling that it lacked jurisdiction to terminate removal proceedings to allow the petitioner to pursue naturalization. The court cited *Matter of Hidalgo*, 24 I&N Dec. 103 (BIA 2007), in support of the Board's determination. It also held that it lacked authority to grant nunc pro tunc relief for the remedy being sought.

Seventh Cirtuit:

Arobelidze v. Holder, No. 10-2986, 2011 WL 3132459 (7th Cir. July 27, 2011): The petitioner challenged the Board's decision that her status as a derivative child of her mother's employment-based visa application was not preserved under the Child Status Protection Act ("CSPA"). The petitioner came to the United States in 1998 at the age of 14. Four years later, she was included as a beneficiary in a visa petition filed on behalf of her mother, a biomedical researcher. The mother's visa application was denied because she had worked after the expiration of her nonimmigrant visa, which she rectified by traveling back to her country (Georgia), obtaining a new nonimmigrant visa, returning to the United States, and filing a new adjustment application. The mother was granted LPR status, but the petitioner was denied because by then she had turned 21 years of age. Both the Immigration Judge and the Board determined that the CSPA was meant to apply to children who age out during the pendency of their application. However, they found that it did not apply in cases where a new application was subsequently filed following the denial of the timely filed application on other grounds. Following a remand from the circuit court, the Board again denied the application, from which the present appeal followed. The court rejected the Government's argument that the statutory language is unambiguous, noting that the Board had

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previously opined to the contrary in its precedent decision in *Matter of Avila-Perez*, 24 I&N Dec. 78 (BIA 2007). The court next overruled its prior decision in *Gutnik v. Gonzales*, 469 F.3d 683 (7th Cir. 2006), by holding that nonprecedent Board decisions that do not rely on binding Board precedent are not entitled to *Chevron* deference. The court found the Board's interpretation of the applicable statutory language unpersuasive and held that, in fact, the CSPA applies to the petitioner. The record was remanded to the Board to determine whether this holding would allow the petitioner to obtain permanent residence.

Ninth Circuit:

Hernandez-Cruz v. Holder, No. 08-73805, 2011 WL 2652461 (9th Cir. July 8, 2011): The Ninth Circuit granted a petition for review challenging the Board's order of removal of a petitioner who was twice convicted of second-degree commercial burglary under section 459 of the California Penal Code. The Board applied the modified categorical approach to conclude that the petitioner was removable, both as an alien convicted of an aggravated felony based on an attempted theft offense under sections 101(a)(43)(G) and (U) of the Act, and as an alien who had committed two or more crimes involving moral turpitude under section 237(a)(2)(A)(ii) of the Act. For both convictions, the petitioner had pled guilty as part of a plea agreement to a single count, which alleged that he entered a commercial building "with the intent to commit larceny and any felony," and a second count was withdrawn under the agreement.

As noted by the Ninth Circuit, the elements of section 459 of the California Penal Code are entry into any building or certain other structures or vehicles "with the intent to commit larceny or any felony." The court thus concluded that the crime does not categorically constitute a theft offense because one can be convicted under the statute for entering a building to commit a felony other than theft. The court noted in a footnote that the Board erred in concluding that by pleading to the count as worded ("larceny *and* any felony"), the petitioner had admitted to the intent to commit both a theft offense (i.e., larceny) and another felony. However, the court stated that under California law, the admission is viewed as relating to one such intention ("larceny" or "any other felony") but not necessarily both.

The court continued that in addition to intent, under Federal law attempted theft requires "an overt act constituting a substantial step towards the commission of the offense." The court noted that regarding the petitioner's admission, no determination was made regarding the "substantial step" requirement. The issue was not relevant because the petitioner was not pleading to an attempted theft offense. The court held that the Board erred in concluding that the petitioner's admission to having entered the building with the intent to purloin items satisfied the "substantial step" test. The court acknowledged the distinction between "mere preparation" to commit a crime and actions that unequivocally demonstrate that a crime will take place unless interrupted by independent circumstances. The court found that, unlike breaking into a vehicle, the act of entering a building is insufficient to signal that a crime will take place.

Examining the second ground of removability, the court found insufficient the Board's brief conclusion that both convictions involved crimes involving moral turpitude. The court distinguished the facts surrounding the petitioner's two convictions (in which he entered a commercial building and was convicted under a statute that did not require such entry to be illegal) from crimes involving moral turpitude involving similar, but critically distinguishable facts (i.e., cases involving an *illegal* entry of a *residence* to commit a theft). The court also mentioned the societal benefit of encouraging potential criminals to change their minds up until the last moment. Finally, the court rejecteded the Government's argument that it should look beyond the actual plea to the underlying facts of the case. Determining a remand to be unnecessary, the court vacated the Board's decision.

Perez-Ramirez v. Holder, No. 07-70114, 2011 WL 2652458 (9th Cir. July 8, 2011): The Ninth Circuit reversed the decision of the Board denying asylum and protection under the Convention Against Torture ("CAT") to an employee of a state agency in Mexico who had uncovered and reported corruption to his superiors. The court found that the Board erred in concluding that the petitioner's failure to expose the corruption to an outside agency precluded him from qualifying as a whistleblower. The court held that the petitioner's exposure of government corruption to his supervisor, and his subsequent refusal to accede to a subsequent supervisor's corrupt demands, constituted political activity and qualified the petitioner as a whistleblower. Because the petitioner was subjected to severe retaliation for his actions, including eight arrests, detention, and torture, the court concluded that

he suffered past persecution on account of his political opinion. Therefore the court remanded for the Board to determine whether the DHS met its burden of rebutting the presumption that the petitioner has a well-founded fear of persecution. Regarding the application for CAT protection, the court held that the Board erred in placing the burden on the petitioner to prove that he could not safely relocate within Mexico. The court stated that upon a showing of past torture, the Government bears the burden of proving the possibility of internal relocation. The court further found that the Board failed to apply the presumption that such threat exists nationwide where the torture feared is at the hands of the foreign government.

Nunez-Reyes v. Holder, No. 05-74350, 2011 WL 2714159 (9th Cir. July 14, 2011) (en banc): The Ninth Circuit overruled its prior decision in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). In *Lujan-Armendariz*, the court had held that because a Federal conviction later expunged under the Federal First Offender Act could not be considered a conviction for immigration purposes, the constitutional guarantee of equal protection prevented an expunged State conviction for a simple-possession drug crime from being treated differently. In *Nunez-Reyes*, the court noted that eight other circuits and the Board (in *Matter of Salazar*, 23 I&N Dec. 223 (BIA 2002)) disagreed with its holding in *Lujan-Armendariz*. The Ninth Circuit acknowledged that it had erred in failing to previously consider whether Congress had a rational basis for distinguishing between expungements of Federal convictions and State convictions. At the time it heard arguments in *Lujan-Armendariz*, the court stated that INS counsel failed to put forth such a reason. However, the court now acknowledged that while Congress may have felt confident that an alien who benefited from a Federal court expungement did not present a danger to society, it may have been insufficiently familiar with State court systems to grant State expungements the same weight. The court also noted that because not all States allow expungement, Congress may reasonably have decided in the interest of uniformity to accept no State expungements rather than adopt a piecemeal approach. However, the majority of the full court concluded that its decision should be applied prospectively only and found that its decision satisfied the requirements set out in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), for prospective application. The majority concluded that such prospective application meant that the instant petition would be decided under the *Lujan-Armendariz* holding. The court nevertheless denied the petition. The court noted that its post-*Lujan-Armendariz* case law held that a second conviction for a lesser offense than simple possession would not constitute a conviction for immigration purposes. However, in the instant case, the petitioner's second conviction was for being under the influence of methamphetamine. The court held that this was not a lesser crime than simple possession, since being under the influence created an immediate risk of dangerous behavior, as opposed to, for example, foolishly agreeing to hide drugs for a friend, which created no such immediate risk. The court therefore found that the Board did not err. Three judges joined in a brief opinion concurring in part, dissenting in part, and concurring in the judgment.

BIA PRECEDENT DECISIONS

In *Matter of Salomon*, 25 I&N Dec. 559 (BIA 2011), the Board addressed attorney discipline. The United States Court of Appeals for the Second Circuit issued an order suspending the respondent from the practice of law for 3 months. The Disciplinary Counsel for the Executive Office for Immigration Review ("EOIR") and the Department of Homeland Security ("DHS") petitioned for the respondent's immediate suspension from practice before the Immigration Courts, the Board, and the DHS, proposing a nonidentical reciprocal discipline of 6 months' suspension. The respondent objected, arguing that the imposition of a 6-month suspension would result in a "grave injustice" and requesting a 3-month suspension instead. The Board found that the proposed nonidentical reciprocal discipline was justified under the totality of the circumstances. The respondent had been subject to disciplinary proceedings for wide-ranging misconduct in three different jurisdictions, and the EOIR Disciplinary Counsel presented evidence that the respondent also violated the Board's immediate suspension order. The Board was not convinced that the sentence was a "grave injustice" and therefore suspended the respondent from practice before the Board, the Immigration Courts, and the DHS for a period of 6 months.

In *Matter of Bustamante*, 25 I&N Dec. 564 (BIA 2011), the Board found that the bar to cancellation of removal in section 240A(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1)(C), may not be overcome by a waiver under section 212(h) of the Act, 8 U.S.C. § 1182. The respondent, who entered the United States without having been admitted or paroled,

was convicted in 2008 of possession of not more than 20 grams of marijuana. The DHS argued that the respondent was not eligible for cancellation of removal because of his controlled substance conviction, and the respondent requested a section 212(h) waiver to overcome the bar. The respondent argued that because cancellation of removal is a form of adjustment of status, a section 212(h) waiver should remove the legal effect of his conviction in the same way it waives a ground of inadmissibility in the adjustment of status context under section 245 of the Act, 8 U.S.C. § 1255.

The Board noted that section 240A(b)(1)(C) of the Act specifically refers to actual convictions for offenses included in section 212(a)(2), without any mention of the fact that such offenses give rise to inadmissibility. Section 212(h) provides for a waiver of the "application of" section 212(a)(2), notable because inadmissibility may be based not just on convictions, but also on admissions to the commission of crime, as well as other actions that do not require a conviction. Therefore, section 212(h) does not waive the fact of a conviction but waives only grounds of inadmissibility arising from a conviction. The bar in section 240A(b)(1)(C), in contrast, does not depend on inadmissibility; it only references convictions. The Board affirmed the Immigration Judge's finding that the respondent was not eligible for cancellation of removal because he was barred by his marijuana conviction.

In *Matter of Ramon Martinez*, 25 I&N Dec. 571 (BIA 2011), the Board found that a violation of section 220 of the California Penal Code, which prohibits assault with intent to commit a felony, including rape and other specified sexual offenses, is categorically a crime of violence under 18 U.S.C. § 16(a) and (b). The respondent was convicted under section 220 of the California Penal Code, but the conviction records did not establish which of the predicate offenses enumerated in section 220 he intended to commit. The Board considered, however, that under California law, one who violates section 220 must specifically intend to use whatever degree of physical force, including violent force, that is necessary to complete the object offense against the will of the victim. None of the offenses could be accomplished with the "consent" of the victim. While some victims may not be able to resist the offender, resulting in no violence actually being used, every violation requires at least the attempted or threatened use of such force. The Board found that this met the definition of a crime of violence under both sections 16(a) and (b). Therefore the Board concluded that the respondent's conviction was for an aggravated felony, which barred him from the requested relief from removal.

REGULATORY UPDATE

76 Fed. Reg. 33,777 (June 9, 2011)
DEPARTMENT OF HOMELAND SECURITY
8 CFR Part 212

Western Hemisphere Travel Initiative: Designation of an Approved Native American Tribal Card Issued by the Pascua Yaqui Tribe as an Acceptable Document To Denote Identity and Citizenship

SUMMARY: This notice announces that the Commissioner of U.S. Customs and Border Protection is designating an approved Native American Tribal Card issued by the Pascua Yaqui Tribe to U.S. citizens as an acceptable travel document for purposes of the Western Hemisphere Travel Initiative. The approved card may be used to denote identity and U.S. citizenship of Pascua Yaqui members entering the United States from contiguous territory or adjacent islands at land and sea ports of entry.

DATES: This designation will become effective on June 9, 2011.

76 Fed. Reg. 33,971 (June 10, 2011)
DEPARTMENT OF HOMELAND SECURITY
8 CFR Part 214

Employment Authorization for Libyan F–1 Nonimmigrant Students Experiencing Severe Economic Hardship as a Direct Result of Civil Unrest in Libya Since February 2011

SUMMARY: This notice informs the public of the suspension of certain regulatory requirements for F–1 nonimmigrant students whose country of citizenship is Libya and who are experiencing severe economic hardship as a direct result of the civil unrest in Libya since February 2011. The Department of Homeland Security (DHS) is taking action to provide relief to these F–1 students so they may obtain employment authorization, work an increased number of hours while school is in session, and reduce their course load while continuing to maintain their F–1 student status. F–1 students who are granted employment authorization by means of this notice will be deemed to be engaged in a "full course of study" for the duration of their employment authorization, provided that they satisfy the minimum course load requirement described in this notice. This suspension of certain regulatory requirements will automatically terminate on December 31, 2011, without further notice.

DATES: This notice is effective June 10, 2011 and will remain in effect until December 31, 2011.

For example, claims regarding the perception of homosexuals in foreign countries have been susceptible to impermissible conjecture. In 2008, the Second Circuit examined the claim of an alien who claimed he feared return to Guyana because of his homosexuality. *Ali v. Mukasey*, 529 F.3d 478 (2d Cir. 2008). In drawing an adverse credibility determination, the Immigration Judge found it implausible that the respondent would be perceived as a homosexual in Guyana. He stated that unless the respondent was walking down the street with a boyfriend, he would be unlikely to "demonstrate" his homosexuality. *Id.* at 492. The Immigration Judge further stated that "it's not clear that [he] will, in fact, be likely to form a strong or close homosexual relationship whether in Guyana or the United States," thereby decreasing the likelihood that his homosexuality would be noticed. *Id.* In overturning the Immigration Judge's decision, the Second Circuit explicitly stated that this "impermissible reliance on preconceived assumptions about homosexuality" could not form the basis for a proper credibility determination. *Id.*

In *Razkane v. Holder*, 562 F.3d 1283 (10th Cir. 2009), the Tenth Circuit reviewed the propriety of an Immigration Judge's credibility determination with regard to an alien's fear of persecution in Morocco based on his homosexuality. During the removal proceedings, repeated questions were asked as to whether or not the respondent "looked gay," culminating in a finding that he did not warrant protection because his "appearance does not have anything about it that would designate [him] as being gay. [He] does not dress in an effeminate manner or affect any effeminate mannerisms." *Id.* at 1286. The Tenth Circuit rejected the Immigration Judge's findings, stating that they were premised on the Judge's own views about how a gay person should appear and behave. This credibility finding impermissibly "elevated stereotypical assumptions" to the plane of evidence and, being "unhinged" from the legal requirements regarding credibility determinations set forth in the Act, precluded meaningful review by the court. *Id.* at 1288.

Similarly, the Ninth Circuit reviewed the claim of a Millenist who said that she had been persecuted because of her religious beliefs. *Cosa v. Mukasey*, 543 F.3d 1006 (9th Cir. 2008). In this case, the Immigration Judge found that the respondent's "severe" clothing, hair style and mannerisms did not "emote that type of lifestyle or approach that most attracted [her] into this religion." *Id.* at 1068. In rejecting this credibility determination, the Ninth Circuit found that the "IJ's conjectural view of how a Millenist should act and think" is not evidence upon which a valid credibility determination may be made. *Id.*

Conclusion

The "inherent plausibility" of an applicant's or witness's account is just one of the indicia of credibility set forth in the REAL ID Act of 2005. The Act provides that reasonableness and common sense must serve as the goal posts for credibility determinations. However, reasonableness and common sense do not provide license for triers of fact to supplant their "a priori" world views for evidence in the record. *Banks*, 453 F.3d at 453. In examining the propriety of a credibility determination based on the inherent plausibility of an account, reviewing courts apply a deferential standard of review. That deference notwithstanding, plausibility findings are most likely to withstand appellate review when they are based upon a fully developed record containing contextual evidence on country conditions.

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