



# Immigration Law Advisor

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## Changed Circumstances and Country Conditions with Respect to Asylum

*by Dina Sewell Finkel*

Three discrete areas in the Immigration and Nationality Act and its implementing regulations contain asylum eligibility provisions related to changed circumstances or to changed country conditions. The first is an exception to the requirement that an asylum applicant file an application within 1 year of entry. This exception applies if the applicant establishes "changed circumstances which materially affect the applicant's eligibility for asylum." Section 208(a)(2)(D) of the Act, 8 U.S.C. § 1158(a)(2)(D). The second is the exception to toll the time limitations for filing a motion to reopen if an asylum applicant can establish "changed country conditions arising in the country of nationality" or removal since the prior proceeding if the evidence is material and not previously available. Section 240(c)(7)(C)(ii) of the Act, 8 U.S.C. § 1229a(c)(7)(C)(ii). The third is the regulatory provision that an alien who establishes past persecution is entitled to a rebuttable presumption of a future fear of persecution unless the Department of Homeland Security ("DHS") establishes by a preponderance of the evidence that "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution." 8 C.F.R. § 1208.13(b)(1)(i)(A).

Although the language of only one of these provisions currently utilizes the phrase "changed country conditions," these three are easily conflated and all are sometimes referred to as involving "changed country conditions." However, each provision has separate requirements and burdens of proof. A survey of case law is instructive to elucidate how each area is analyzed.

### 1-Year Bar—Changed Circumstances

One permutation of the concept of changed country conditions or circumstances arises with respect to the 1-year bar for filing asylum claims. The Act requires an asylum applicant to "demonstrate[] by clear and convincing evidence that the application has been filed within 1 year

after the date of the alien's arrival in the United States." Section 208(a)(2)(B) of the Act. One of the two statutory exceptions to the 1-year requirement can be met if "the alien demonstrates to the satisfaction of the Attorney General . . . the existence of changed circumstances which materially affect the applicant's eligibility for asylum." Section 208(a)(2)(D) of the Act. As relevant here, the regulations provide a nonexhaustive list of what could constitute "changed circumstances":

(A) Changes in conditions in the applicant's country of nationality or, if the applicant is stateless, country of last habitual residence;

(B) Changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk.

8 C.F.R. § 1208.4(a)(4)(i).

Finally, the regulations require that the asylum application be filed "within a reasonable period given those 'changed circumstances.' If the applicant can establish that he or she did not become aware of the changed circumstances until after they occurred, such delayed awareness shall be taken into account in determining what constitutes a 'reasonable period.'" 8 C.F.R. § 1208.4(a)(4)(ii).

The Act contains a strict limitation that divests courts of jurisdiction to review any determination made under section 208(a)(2) of the Act, including on the issue of timeliness. See section 208(a)(3) of the Act. However, courts can review "constitutional claims or questions of law." Section 242(a)(2)(D) of the Act, 8 U.S.C. § 1252(a)(2)(D). In most jurisdictions, the circuit courts have declined to review findings that asylum applications were untimely and that no exception to the timeliness requirement was established. See, e.g., *El-Labaki v. Mukasey*, 544 F.3d 1, 5 (1st Cir. 2008); *Pan v. Gonzales*, 489 F.3d 80, 84 (1st Cir. 2007). Because of this limitation, scant precedential case law exists in which a court has evaluated whether a change in circumstances that materially affected eligibility had been sufficiently established by the asylum applicant. Instead, the relevant

case law consists primarily of the courts' assertion of a lack of jurisdiction to review this issue. See, e.g., *Chibwe v. Holder*, 569 F.3d 818, 820 (8th Cir. 2009).

The United States Court of Appeals for the Ninth Circuit provides an exception, however. In *Ramadan v. Gonzales*, 479 F.3d 646, 656 (9th Cir. 2007), the court held that under section 242(a)(2)(D) of the Act, it has jurisdiction to review a determination that an asylum applicant failed to show changed circumstances if the inquiry involves a "mixed question of law and fact." By this, the court was referring to situations involving "the application of statutes and regulations to undisputed historical facts." *Id.* at 654.

The Board has issued one precedent decision that provides a somewhat brief analysis of whether an asylum applicant had successfully established the existence of changed circumstances that materially affected his eligibility for asylum. See *Matter of A-M-*, 23 I&N Dec. 737 (BIA 2005). There, an Indonesian citizen entered the United States in January 2001; he filed an asylum application in March 2003 and posited that the nightclub bombing in Bali, Indonesia, in October 2002 was a sufficient change in circumstances to permit untimely filing. The Board disagreed and found that he "failed to demonstrate how this event *materially affected or advanced* his asylum claim." *Id.* at 738 (emphasis added). The Board made the following observations about the applicant: his asylum claim was "based on his Chinese ethnicity and Christian faith," he had lived on the island of Java and not the island of Bali, the majority of the bombing victims had been foreign tourists, and he had admitted that he delayed filing because he had been paying a debt. *Id.* at 738-39. Therefore, the Board concluded that "[w]hen considered in the context of his asylum claim, the respondent has failed to demonstrate that either the Bali incident or other recent developments have *materially affected* his eligibility for asylum." *Id.* at 739 (emphasis added).

Some extrapolations can be drawn from this short opinion. First, the Board highlighted that the change in circumstances must be "material." *Id.* at 738-39. Additionally, the change in circumstances must have some causal connection to the asylum applicant's claim for asylum, as underscored by the Board's refusal to find that the occurrence of a terrorist bombing that predominantly killed foreign tourists affected the claim of an ethnic Chinese Christian who hailed from a different island in Indonesia.

Additional guidance can be drawn from two Ninth Circuit cases. In *Ramadan*, the asylum applicant—an Egyptian woman who taught aerobics, dressed in Western attire, and was outspoken about women’s independence—had fled to the United States because of threats from Islamic men. *Ramadan*, 479 F.3d at 649. More than 1 year after her arrival, she expressed her views about women’s rights in Egypt at a meeting; thereafter, her parents and a friend were told that someone in Egypt had threatened her because of her participation in the meeting. She filed an asylum application and alleged changed circumstances on the basis that the past persecution had been based on her job and because she wore Western clothing, whereas her current fear was based on her political opinion espoused at the meeting. The Ninth Circuit found that the asylum applicant had not established changed circumstances, as her testimony revealed that both her original and her alleged new fear were on account of the same ground and from the same persecutors. *Id.* at 657-58. This case underscores that the asylum applicant cannot merely recast the nexus or the identity of the persecutors: there must be an actual and demonstrable change in circumstances. In another case, the Ninth Circuit held that an asylum applicant’s subjective intent to apply for asylum prior to the occurrence of the relevant change in circumstances does not negate the fact that the circumstances could warrant an exception to the 1-year requirement. *Fakhry v. Mukasey*, 524 F.3d 1057, 1063 (9th Cir. 2008) (“[T]here can be ‘changed circumstances which materially affect the applicant’s eligibility for asylum’ even if the alien always meant to apply for asylum and always feared persecution; a sudden ‘Eureka!’ state of mind is not necessary.”).

### **Motion to Reopen—Changed Country Conditions**

The second area in which the concept of changed country conditions or circumstances arises in asylum law relates to an exception to the requirement that a motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal. See section 240(c)(7)(C) of the Act. That time limitation may be waived, however, when reopening is requested to allow the applicant to file an asylum or withholding of removal claim “based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.” Section 240(c)(7)(C)(ii) of the Act; see also 8 C.F.R. §§ 1003.2(c)(3), 1003.23(b)(4)(i). The applicant bears

the burden of establishing changed country conditions. See *Raza v. Gonzales*, 484 F.3d 125, 127 (1st Cir. 2007). In contrast to the concept of “changed circumstances” related to the 1-year bar to asylum, and the “fundamental change[s] in circumstances” related to the rebuttable presumption of future persecution to be discussed next, this is the only provision that specifically limits the change in circumstances to “changed country conditions.”

This provision most frequently arises when an asylum applicant seeks to file a successive asylum application more than 90 days after a removal order was entered. These applicants can only succeed if they show “changed country conditions.” Section 240(c)(7)(C)(ii) of the Act. In contrast, outside the motion to reopen context, first-time asylum applicants who seek to overcome the 1-year bar need only establish materially changed circumstances, which can include circumstances other than changed country conditions, including changed personal circumstances. See section 208(a)(2)(D) of the Act.

The Board and circuit courts have clarified the tension between a successive asylum applicant who has missed the deadline for motions to reopen and an untimely first-time asylum applicant. In *Matter of C-W-L-*, 24 I&N Dec. 346 (2007), an applicant, whose original claim of feared sterilization because of the birth of two children in the United States was denied, filed a “Motion to File Successive Asylum Application pursuant to 8 C.F.R. § 208.4” based on a third child’s birth. He argued that he need not meet the requirement of “changed country conditions” at section 240(c)(7)(C)(ii) of the Act, but that he could rely on section 208(a)(2)(D) and merely show a change in circumstances that materially affected his eligibility for asylum. In rejecting his argument, the Board noted that section 208(a)(2)(D) of the Act was not a stand-alone provision. Moreover, once a removal order was issued and the deadline for motions to reopen had passed, to permit the filing of an asylum application not predicated on changed country conditions “would render section 240(c)(7)(C)(ii) . . . superfluous and would negate the effect of regulations granting jurisdiction to this Board and the Immigration Courts.” *Id.* at 351. The Board held that an asylum application filed by an alien under a final order of removal must satisfy the requirements of a motion to reopen. Therefore, an applicant with a previously denied asylum claim who seeks to file a second claim after the deadline for motions to reopen has passed must establish the requisite change in country conditions

rather than the broader changes permitted to negate the 1-year bar. *Accord Chen v. Mukasey*, 524 F.3d 1028 (9th Cir. 2008).

Under section 240(c)(7)(C)(ii) of the Act, an asylum applicant must show that there has been a change in country conditions, not merely that the same fear of harm on which the original application was based persists. Continuing fear predicated on a previously denied asylum claim is not a change in country conditions. *Betouche v. Ashcroft*, 357 F.3d 147, 152 (1st Cir. 2004); *Matter of J-J-*, 21 I&N Dec. 976, 980-82 (BIA 1997). In order to establish that a change in country conditions has occurred, there must be evidence in the record of what the country conditions were when the initial proceeding took place. *Zheng v. Mukasey*, 523 F.3d 893 (8th Cir. 2008). An applicant who alluded to an affidavit that stated that Chinese police were still looking for him because of his attendance at a Falun Gong rally had not met his burden because the rally was the basis of the original asylum claim. *See Zhao v. Gonzales*, 440 F.3d 405 (7th Cir. 2005). However, a changed country condition can compound the applicant's original fear of harm. An applicant who establishes that the potential persecutors have, since the original hearing, developed additional motives for persecution may meet the exception. *Kebe v. Gonzales*, 473 F.3d 855, 858 (7th Cir. 2007) (remanding for the Board to reevaluate whether changed country conditions were established where an increased governmental crackdown occurred as a result of elections revealing that opposition groups had gained political traction). Further, the reemergence of a political party that had previously persecuted the asylum applicant but that had not been in power at the time of the original hearing can constitute a change in country conditions. *Shardar v. Att'y Gen. of U.S.*, 503 F.3d 308, 314-16 (3d Cir. 2007). Finally, there is no requirement that the changed country condition relate to an entirely new fear of harm; the relevant inquiry is "whether the new information was unavailable or undiscoverable" previously. *Malty v. Ashcroft*, 381 F.3d 942, 945-46 (9th Cir. 2004).

The change in conditions for purposes of reopening cannot be a change in personal circumstances. The birth of additional children subsequent to the original asylum hearing constitutes changed personal circumstances rather than changed conditions in China. *See Wang v. Board of Immigration Appeals*, 437 F.3d 270, 273 (2d Cir. 2006); *Guan v. Board of Immigration Appeals*, 345 F.3d 47, 49

(2d Cir. 2003); *see also Zheng v. Mukasey*, 509 F.3d 869 (8th Cir. 2007). A change in conditions will be labeled as a change in personal circumstances if the change is self-induced. As reasoning for this categorization, the Second Circuit noted that "it would be ironic, indeed, if petitioners . . . , who have remained in the United States illegally following an order of deportation, were permitted to have a second and third bite at the apple simply because they managed to marry and have children while evading authorities." *Wang*, 437 F.3d at 274; *see also Liu v. Att'y Gen. of U.S.*, 555 F.3d 145, 151 (3d Cir. 2009); *Zhao*, 440 F.3d at 407. While the birth of two or more children in the United States will constitute a change in personal circumstances, increased enforcement of the one-child policy since the original asylum hearing can constitute a change in country conditions. *See Li v. U.S. Att'y Gen.*, 488 F.3d 1371, 1375 (11th Cir. 2007) (holding that "evidence of a recent campaign of forced sterilization in [the asylum applicant's] home village" that was consistent with recent State Department reports "was material and previously unavailable evidence of changed conditions in China").

Note, however, that even if the potential persecution would be self-induced by the asylum applicant, the increased ability of the potential persecutor to effectuate the persecution can constitute "changed country conditions." *See Larngar v. Holder*, 562 F.3d 71, 78 (1st Cir. 2009) (remanding after the Board denied reopening to an applicant who feared return to Liberia because a man he had once assaulted had lately come to a position of prominence in that country's Special Security Service and could therefore be able to exact vengeance through his official capacity).

### **Rebuttable Presumption—Fundamental Change in Circumstances**

A third area involving changed country conditions or circumstances relates to the rebuttable presumption that arises when an asylum applicant has established past persecution. Under the regulations, an applicant who establishes past persecution is entitled to a rebuttable presumption of a well-founded fear of future persecution on the basis of the original claim, unless the DHS establishes by a preponderance of the evidence that "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality."



8 C.F.R. § 1208.13(b)(1)(i)-(ii). Until 2000, the presumption was much narrower and could only be rebutted if “a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant’s *country of nationality* or last habitual residence have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return.” 8 C.F.R. § 208.13(b) (2000) (emphasis added). The expansion from a change in country conditions to a “fundamental change in circumstances” allows Immigration Judges to factor “other changes in the circumstances surrounding the asylum claim, including a fundamental change in personal circumstances . . . so long as those changes are fundamental in nature and go to the basis of the fear of persecution.” Asylum Procedures, 65 Fed. Reg. 76,121, 76,127 (Dec. 6, 2000) (Supplementary Information). The Board has characterized the regulatory presumption of future persecution as “an evidentiary presumption founded on the probability of a past event being indicative of a future event.” *Matter of N-M-A-*, 22 I&N Dec. 312, 317 (BIA 1998).

Once an asylum applicant has established past persecution, the burden shifts to the DHS to prove by a preponderance of the evidence that there has been a “fundamental change in circumstances.” 8 C.F.R. § 1208.13(b)(1)(i)-(ii). Failure to shift the burden to the DHS is error. *Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008); *see also Bace v. Ashcroft*, 352 F.3d 1133 (7th Cir. 2003). Generally, the term “fundamental change in circumstances” refers to changed political conditions in the country of persecution, but it may still apply to personal changes that affect the asylum applicant’s well-founded fear. *Ixtlilco-Morales v. Keisler*, 507 F.3d 651, 654-55 (8th Cir. 2007).

Generally, Immigration Judges and the Board rely on Department of State (“DOS”) country reports to determine whether the DHS has established that a fundamental change in circumstances occurred such that the asylum applicant no longer has a well-founded fear of return. For the most part, circuit courts have cautioned against unwavering reliance on the information contained in country reports. The efficacy of such general reports to determine specific changes for particular asylum applicants is the subject of debate. The Seventh Circuit noted that “[t]he advice of the State Department is not binding, either on the service or on the courts; there is perennial concern that the Department softpedals human

rights violations by countries that the United States wants to have good relations with.” *Gramatikov v. INS*, 128 F.3d 619, 620 (7th Cir. 1997). In a subsequent opinion, the Seventh Circuit added that “[t]he country report is evidence and sometimes the only evidence available, but the Board should treat it with a healthy skepticism, rather than, as is its tendency, as Holy Writ.” *Galina v. INS*, 213 F.3d 955, 959 (7th Cir. 2000). Similarly, the Second Circuit has stated that DOS country reports “often provide a ‘useful and informative overview of conditions in the applicant’s home country,’” but that adjudicators should not “‘place excessive reliance’ on them.” *Passi v. Mukasey*, 535 F.3d 98, 101 (2d Cir. 2008) (quoting *Tian-Yong Chen v. INS*, 359 F.3d 121, 130 (2d Cir. 2004)). Despite the potential for politically based biases, however, the Ninth Circuit has noted that the DOS country reports are often the best source because “this inquiry is directly within the expertise of the Department of State.” *Marcu v. INS*, 147 F.3d 1078, 1081 (9th Cir. 1998). In addition, the Fourth Circuit has proven somewhat more deferential to the DOS reports than some of the other circuits, stating that they are “highly probative” and that “[a]bsent powerful contradictory evidence, the existence of a State Department report supporting the BIA’s judgment will generally suffice to uphold the Board’s decision. Any other rule would invite courts to overturn the foreign affairs assessments of the executive branch.” *Gonahasa v. U.S. INS*, 181 F.3d 538, 542-43 (4th Cir. 1999).

Circuit courts have issued decisions regarding the weight DOS country reports should be afforded relative to the record as a whole. If the asylum applicant fails to submit any evidence contradicting the DOS country report other than conclusory assertions about continuing danger, the Immigration Judge may rely exclusively on the DOS country report. *Yatskin v. INS*, 255 F.3d 5, 10-11 (1st Cir. 2001). Sole reliance on the DOS country report is inappropriate, however, where the asylum applicant has submitted evidence that contradicts the DOS country report’s assertions, or where the Immigration Judge relied solely on general statements in the DOS country report. *Manzoor v. U.S. Dep’t of Justice*, 254 F.3d 342, 348-49 (1st Cir. 2001). The Immigration Judge need not favor an asylum applicant’s opinion testimony about current conditions: “An alien who has lived in this country for years and is not an expert on the politics of his native country will ordinarily have no credible basis for testifying about the secret power structure of that

*continued on page 13*

# FEDERAL COURT ACTIVITY

## CIRCUIT COURT DECISIONS FOR JULY 2009

*by John Guendelsberger*

The United States courts of appeals issued 590 decisions in July 2009 in cases appealed from the Board. The courts affirmed the Board in 530 cases and reversed or remanded in 60, for an overall reversal rate of 10.2% compared to last month's 11.1%. The Ninth Circuit issued 45% of the total decisions and 68% of the reversals. There were no reversals from the First and Tenth Circuits.

The chart below provides the results from each circuit for July 2009 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	8	8	0	0.0
2nd	196	191	5	2.6
3rd	24	19	5	20.8
4th	17	16	1	5.9
5th	17	16	1	5.9
6th	23	21	2	8.7
7th	5	4	1	20.0
8th	6	5	1	16.7
9th	264	223	41	15.5
10th	5	5	0	0.0
11th	25	22	3	12.0
<b>All:</b>	<b>590</b>	<b>530</b>	<b>60</b>	<b>10.2</b>

Of the 41 reversals in the Ninth Circuit, 24 involved asylum claims, 10 of which found fault with an adverse credibility determination. Other issues involved level of harm for past persecution (three cases); failure to address a "disfavored group" claim (three cases); the 1-year bar finding (two cases); particular social group; corroboration; and application of the presumption of continuing persecution after a finding of past persecution. Reversals not involving asylum included motions to reopen in a variety of contexts (six cases); failure to provide a continuance to complete fingerprints or background checks (four cases); adjustment of status (two cases); and criminal grounds for removal (two cases).

The Second Circuit reversed in five cases, including a remand to clarify the requirements for showing a pattern and practice of persecution; two cases in which the Board overlooked relevant evidence; a case in which it found that the Board engaged in impermissible fact-finding; and a motion to reopen for ineffective assistance.

The Third Circuit reversed or remanded in five cases. These included a remand for further explanation of reasons for denial of asylum; two remands for further discussion of country conditions evidence in support of a motion to reopen (both involving Yemen); a remand to separately address the request for protection under the Convention Against Torture; and a remand to further consider the denial of a continuance for adjustment of status based on a labor certification.

The chart below shows the combined numbers for the months of January through July 2009 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	%
9th	1201	978	223	18.6
3rd	167	138	29	17.4
7th	46	41	5	10.9
6th	111	100	11	9.9
8th	46	42	4	8.7
11th	188	175	13	6.9
2nd	863	817	46	5.3
5th	140	133	7	5.0
10th	26	25	1	3.8
1st	47	46	1	2.1
4th	109	107	2	1.8
<b>All:</b>	<b>2945</b>	<b>2603</b>	<b>342</b>	<b>11.6</b>

Last year at this point there were 2674 total decisions and 381 reversals for a 14.2% overall reversal rate.

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## **A Crummy Summer Rerun: Still More on Corroboration, Credibility, and the REAL ID Act**

*by Edward R. Grant*

Some readers will recall when television's summer reruns started in, well, summer. Take for example the "Classic 39" *Honeymooners* episodes from 1955-1956: a full nine To-Da-Moon's worth of original episodes, enough for September through May of that auspicious year. A decade later, would you believe there were 30 *Get Smarts* in its original season? (How about 20 and a couple of bonus tracks?) The numbers continued to dwindle, down to 22 in recent years. Thus, reruns of *Seinfeld* and *Friends* would start when their Gothamite characters were still donning their woolies and their wellies.

This month, the *Advisor* takes this trend to its absurd extreme: a summer rerun *of* a summer rerun. Yes, it was just weeks ago that we were all in Washington, D.C., and the lucky few patiently endured a lecture on the application of the REAL ID Act. For those of you who missed the original—or who simply cannot get enough of this stuff—I offer the following encore, complete with a few pertinent circuit court decisions issued since our August confab.

This discussion will be brief and will focus on four topics: (1) Does the REAL ID Act apply? (2) What does "totality of the circumstances" mean in assessing credibility? (3) Is lack of corroboration a factor in assessing credibility? (4) When can a claim be denied for lack of corroboration?

### **Does the REAL ID Act Apply?**

Sylvester Owino, a Kenyan, came to the attention of immigration authorities in November 2005 as he was completing service of a 3-year sentence for second-degree robbery in California. At subsequent removal proceedings, he applied for asylum, withholding of removal under both the Immigration and Nationality Act and the Convention Against Torture ("CAT"), and deferral of removal under the CAT. The Immigration Judge, concluding that his offense constituted a "particularly serious crime," found him ineligible for all forms of relief except CAT deferral. He denied CAT deferral, making an adverse credibility determination and citing the lack of corroborative evidence. The Board affirmed, stating disagreement with

the credibility determination but concluding that because of the generalized nature of the respondent's testimony, there was a greater need for corroborative evidence. *See Matter of Y-B-*, 21 I&N Dec. 1136, 1139 (BIA 1998).

Neither decision mentioned the REAL ID Act. *See* REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, 119 Stat. 231, 302 (effective May 11, 2005). Since Owino's applications were all filed after May 11, 2005, the amendments made by the REAL ID Act, particularly to sections 208(b)(1)(B)(ii) ("clause (ii)") and 208(b)(1)(B)(iii) ("clause (iii)") of the Act, governed the issues of credibility and corroboration. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006). The confusion extended to Owino himself, who argued to the Ninth Circuit that the Board erroneously required him to corroborate his credible testimony, citing *Karapetyan v. Mukasey*, 543 F.3d 1118 (9th Cir. 2008) (holding that, in a pre-REAL ID Act case, the Immigration Judge may not require corroboration of credible testimony).

Somewhat oddly, the Ninth Circuit chose to publish its decision granting the Government's motion to remand for application of the REAL ID standards. *Owino v. Holder*, \_\_F.3d\_\_, 2009 WL 2392992 (9th Cir. Aug. 4, 2009). Odd or not, the publication could set a clear standard: if the REAL ID Act governs but its standards are not cited or applied by the Immigration Judge or the Board, the case will come back for that to be done. In Owino's case, it is not difficult to determine why application of the REAL ID Act could make a real difference.

The case has been made in successive annual training conferences, and in these pages, that the REAL ID Act, in particular clause (ii) and clause (iii), represent more a codification than a change of *Board* precedent on issues of credibility and corroboration. *See Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998); *Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998); *Matter of T-M-B-*, 21 I&N Dec. 775 (BIA 1997); *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997). Thus, it is conceivable that a "REAL ID" case that is adjudicated without reference to its specific standards might pass muster because the failure to apply those standards would not have affected the outcome. Cases arising in the Ninth Circuit, however, constitute an exception—as the Ninth Circuit itself has recognized, the adoption of the REAL ID Act works a sea change in its jurisprudence. *See Jibril v. Gonzales*, 423 F.3d 1129 n.1

(9th Cir. 2005) (stating that the REAL ID amendments “will mean that in the future only the most extraordinary circumstances will justify overturning an adverse credibility determination”). *Owino* tactily recognizes this as well, simply noting that because clause (ii) of the REAL ID Act—permitting an Immigration Judge to require corroboration of otherwise credible testimony—applies, the rule in *Karapetyan v. Mukasey* and its antecedents do not. See *Kataria v. INS*, 232 F.3d 1107 (9th Cir. 2000).

The short lesson: scrutinize in all cases whether the REAL ID Act governs the respondent’s application for relief. Note that this does not extend only to applications for asylum and related relief, but to all forms of relief. See section 240(c)(4) of the Act. It is also helpful to include specific findings regarding the date that is used to calculate whether the REAL ID Act applies—this is at times a contested issue, as when the respondent claims to have sent an application to the former Immigration and Naturalization Service or the Department of Homeland Security, but the agency claims no record of the filing.

### **Assessing Credibility by the “Totality of the Circumstances”**

Clause (iii) of the REAL ID Act amendments may be referred to as the “credibility clause”: it both identifies the list of factors (demeanor, plausibility, consistency or inconsistency, country conditions evidence) that may be taken into account in making a credibility determination and specifies that any inconsistencies, inaccuracies, or falsehoods do not have to go to “the heart of the . . . claim” in order to support an adverse credibility determination. The “credibility clause” has two other significant aspects: it begins by stating that the “totality of the circumstances” should be considered in addressing credibility and concludes by stating that if no adverse credibility determination is “explicitly made,” the applicant enjoys a rebuttable presumption of credibility on appeal.

The case of one Lin Lin Tang, recently decided by the Eleventh Circuit, demonstrates how precisely the courts may analyze the relatively open-ended authority granted to Immigration Judges by clause (iii). *Tang v. U.S. Att’y Gen.*, \_\_\_F.3d\_\_\_, 2009 WL 2432054 (11th Cir. Aug. 11, 2009). In particular, *Tang* demonstrates that factors such as plausibility and demeanor, while inherently subjective, will nevertheless be assessed to determine if reliance upon them in making an adverse credibility determination was reasonable.

Before discussing *Tang*, it is worth noting the expectations of Congress in drafting clause (iii). It is well noted that Congress intended to “rein in” credibility rulings by the Ninth Circuit that conflicted with those of the Board and other circuits, and to establish a uniform standard for judicial deference to administrative findings on credibility. H.R. Rep. No. 109-72, at 167-68 (2005); *Mitondo v. Mukasey*, 523 F.3d 784, 787 (7th Cir. 2008) (noting that Congress was “dissatisfied with judicial reluctance to accept immigration judges’ credibility decisions”). It is less well known that Congress cautioned against Immigration Judges and the Board using their new toolkit on credibility too aggressively. Clause (iii) was designed so that “commonsense” standards could be used in identifying false and fraudulent claims. However, reliance on any of the specified factors in clause (iii) has to be “reasonable and take into consideration the individual circumstances” of the applicant. H.R. Rep. No. 109-72, at 167.

*Tang* does not cite these provisions of legislative history, but its reversal of the adverse credibility determination entered by the Immigration Judge and affirmed by the Board reflects the same themes. Ms. Tang, who was an “arriving alien,” stated during the course of her airport interview that she was a Christian who never went to church but worshiped at other people’s homes. At a subsequent credible fear interview, she testified in greater detail about her underground church, being arrested and detained twice, and being beaten to the point of requiring medical attention. The Immigration Judge found Tang not credible, stating in part that it was implausible that her mother (a family planning official) would pay bribes to get her daughter out of detention or assist her in leaving China illegally, or that Ms. Tang herself, as the daughter of a Government official, would be detained and beaten simply for attending a house church. The Immigration Judge also noted a discrepancy between Tang’s statements (in her airport and credible fear interviews, and in her asylum application) that she “never” went to church and had no religion prior to 2004, whereas she testified that her grandmother had brought her to the state-sponsored Catholic church in China while she was growing up. The Immigration Judge also relied on the respondent’s demeanor. (Other factors relied on by Immigration Judge were not affirmed by the Board, so are of no further concern.)

The Eleventh Circuit first criticized the Immigration Judge’s “plausibility” analysis, stating that



he “invented out of whole cloth” his conclusion “that Tang’s mother was a high ranking member of the Chinese government who could protect her from police brutality.” *Tang*, 2009 WL 2432054, at \*5. The court further stated that concluding the mother would not have violated the law to protect her daughter is “contrary to common sense.” *Id.* The court emphasized that a “plausibility” factor must be based on evidence, not “personal perceptions” or speculation regarding the reasonableness of a person’s actions. *Id.*

The court also faulted the Immigration Judge’s reliance on the airport interview for failing to consider, as called for in clause (iii), “the circumstances under which” prior inconsistent statements were made. *Id.* at \*6 (quoting clause (iii)).

We conclude that when an IJ “consider[s] the circumstances” of an airport interview, the IJ should keep in mind that an airport interview is not an application for asylum. An IJ may of course consider whether there are contradictions between the airport interview and later testimony. However, *when considering whether later testimony qualifies as a contradiction, as opposed to an elaboration, of an applicant’s airport interview statements*, an IJ should note that during an airport interview, unlike in a hearing with full due process accorded, the alien is not represented by counsel and may be markedly intimidated by official questioning, particularly if the alien has indeed been subject to government abuse in her country of origin.

*Id.* (emphasis added). The italicized portions here are critical—the court is emphasizing the distinction between (a) contradictions between an airport interview and later testimony and (b) omissions from the airport interview later elaborated upon in testimony. If only the latter are present, then the Immigration Judge should not “focus exclusively” on those omissions. *Id.*

The question, of course, is whether the failure to mention her attendance at the state-sponsored Catholic church—which occurred at the credible fear interview and in the asylum application—was a mere omission, or a clear contradiction, as the Immigration Judge saw it.

The answer, according to the court, is that the respondent had a reasonable explanation for the inconsistency—she never accepted the religion of the state-sponsored church and considered herself a Christian only after she joined the house church movement. The court concluded that Tang “said nothing that cannot be squared with her earlier statements.” *Id.* at \*7.

The court found the issue of demeanor more difficult to address. It stated that it could find no support in the record for the Immigration Judge’s conclusion that the respondent was unable to answer questions that were “posed differently” from her “rehearsed” direct examination. *Id.* “However, because we were not there to hear or see the testimony, we cannot reject this criticism out of hand.” *Id.* Finally, the court found that the Board erred in not considering corroboration of the respondent’s injuries from medical records that it mistakenly concluded had not been admitted into evidence.

While mindful not to draw too many conclusions from a single case, we can sense from *Tang* the boundaries on use of the more “subjective” factors such as demeanor and plausibility in making credibility determinations. If such reliance is based on speculation and conjecture or is conclusory, it will be subject to greater scrutiny. Likewise, if a court concludes that the “totality of the circumstances” have not been considered, producing a credibility ruling that does *not* seem grounded in common sense, the court may use the very tools granted to Immigration Judges and the Board by the REAL ID Act to revise or undo their handiwork.

### **Is Lack of Corroboration a Factor in Assessing Credibility?**

The best answer to this question has been a qualified “no.” The primary reason is that lack of corroboration is not among the credibility factors identified in clause (iii) of the REAL ID amendments. Congress instead treated corroboration as a separate factor in clause (ii), stating that even if an applicant’s testimony is considered credible, an Immigration Judge may require corroboration, if reasonably available. The phrasing suggests that a determination of credibility is a threshold to be crossed before considering the matter of corroboration. Several courts appear to agree. *See Zhao v. Holder*, 569 F.3d 238, 239-40 (6th Cir. 2009) (finding reliance on the absence of corroboration to be proper, especially where the alien’s testimony was

riddled with inconsistencies); *Khrystodorov v. Mukasey*, 551 F.3d 775, 782 (8th Cir. 2008) (“Credibility and the need for corroboration are intertwined *such that a denial of asylum based on a lack of corroboration must include an explicit ruling on the applicant’s credibility*, an explanation of why it is reasonable to expect additional corroboration, or an assessment of the sufficiency of the explanations for the absence of corroborating evidence.” (emphasis added)); *Rapheal v. Mukasey*, 533 F.3d 521, 528 (7th Cir. 2008) (finding that the Board should first address the Immigration Judge’s adverse credibility finding before ruling on the need for corroborative evidence). *But see Balachandran v. Holder*, 566 F.3d 269, 273 (1st Cir. 2009) (referring to the Board’s corroboration-based denial as an adverse credibility determination); *Ying Jin Lin v. Holder*, 561 F.3d 68, 73 (1st Cir. 2009) (noting that the lack of corroboration supported an adverse credibility determination that was also based on “myriad” other factors).

The “no” is qualified because the case law is not yet definitive. Also, questions regarding the very availability of corroboration, or the reliability of corroboration that has been provided, may raise credibility concerns separate from an applicant’s testimony regarding the events of his or her claim. With those disclaimers, as stated at the conference, the most advisable route is to address credibility first and independently of corroboration. The final case for discussion suggests why.

### **When Can a Claim Be Denied for Lack of Corroboration?**

The value of clear findings on credibility and corroboration, even when stated in the alternative, is demonstrated in a recent REAL ID Act case decided by the Second Circuit. *Liu v. Holder*, \_\_\_F.3d\_\_\_, 2009 WL 2382749 (2d Cir. Aug. 5, 2009). The Immigration Judge found the respondent not credible and then decided that even if he was credible, he had failed to corroborate his fear of persecution for engaging in pro-democracy activities. The respondent had experienced no persecution in China, and his fears were based on reports by his wife that security officials had visited their home. However, no letter or affidavit from the wife was submitted, and there was no corroboration of the pro-democracy activity, which had taken place in Hong Kong. The Board did not address the issue of credibility but affirmed the specific, alternate finding based on lack of corroboration.

The Second Circuit, relying on clause (ii) of the REAL ID amendments, as well as its own pre-REAL ID precedents and those of the Board, concluded that the REAL ID Act “codifies the rule that an IJ, weighing the evidence to determine if the alien has met his burden, may rely on the absence of corroborating evidence adduced by an otherwise credible applicant unless such evidence cannot be reasonably obtained.” *Id.* at \*3. The court also noted that pursuant to the REAL ID Act, its own review of the issue is limited: “No court shall reverse a determination . . . with respect to the availability of corroborating evidence . . . unless the court finds . . . that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.” *Id.* (quoting section 242(b)(4) of the Act).

The court concluded that the requirement for corroboration in this case was reasonable, and proceeded to hold that such requirements for corroboration do not have to be raised *prior* to the applicant’s testimony, or even prior to the disposition of the claim.

After all, [an Immigration Judge] may not be able to decide sufficiency of evidence until all the evidence has been presented; insufficiency cannot be determined while there is evidence to be introduced. Likewise, it is not easy to know when an explanation would be required for a lack of corroboration, because an IJ may not determine that corroboration is necessary until all the evidence is in, and the IJ has had an opportunity to weigh the evidence and prepare an opinion – steps that may not occur until days after the hearing. Accordingly, while we have sometimes remanded a case if the IJ failed to explain his reliance on a lack of corroborating evidence, the alien bears the ultimate burden of introducing such evidence without prompting from the IJ.

*Id.* at \*4.

*Liu* provides an apparent safe harbor for “corroboration denials.” But be wary again of reading too much into one case. As indicated, the Second Circuit has occasionally remanded such cases in the past and could well do so under the REAL ID Act if it concludes that the

reliance on lack of corroboration has not been sufficiently explained. As for the question of when an alien should be informed of the need to provide corroboration, some measure of “prompting,” while clearly not required under *Liu*, will at least make it clear on the record that an applicant has been informed of his or her burden.

### Conclusion

In time, and assuming no further legislative change, there will be no need for separate presentations or articles on the REAL ID Act. Its specific provisions on burden of proof, credibility, and corroboration will gradually fold into the general corpus of law applicable to virtually all cases before Immigration Judges and the Board. That transition will be smoother—and the need for further “re-runs” mandated by the courts minimized—if the tools provided by Congress in the Act are applied clearly and prudently.

*Edward R. Grant was appointed to the Board of Immigration Appeals in January 1998. He is grateful to attorney-advisor Andrea Cali for ongoing research assistance on this topic.*

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### RECENT COURT OPINIONS

#### **Second Circuit:**

*Rotimi v. Holder*, \_\_F.3d\_\_, 2009 WL 2476648 (2d Cir. Aug. 14, 2009): The Second Circuit afforded *Chevron* deference to the Board’s decision in *Matter of Rotimi*, which held that for purposes of establishing that an applicant “lawfully resided continuously” in the United States for not less than 7 years in order to qualify for a section 212(h) waiver, an alien may not count any period in which he or she could claim no legal status other than a pending application for asylum or adjustment of status. As a result, the petitioner was ineligible to apply for such a waiver, because a gap of 1 year and 8 months between the expiration of his B-2 visa and his adjustment of status (during which time he had applications pending for asylum and adjustment of status) rendered him unable to establish the requisite period of lawful continuous residence.

#### **Sixth Circuit:**

*Stolaj v. Holder*, \_\_F.3d\_\_, 2009 WL 2513608 (6th Cir. Aug. 19, 2009): The Sixth Circuit denied the respondents’ petition for review of a Board decision that affirmed the Immigration Judge’s order of removal. The

respondents were granted asylum by the DHS and later adjusted their status, but they were placed in removal proceedings after an investigation uncovered evidence that they obtained asylum through fraud. The court found that the Government was not time barred from initiating the proceedings, holding that the 5-year statute of limitation on rescission proceedings does not apply to removal proceedings. The court further affirmed the Board’s reliance on *Matter of Smriko* in finding no error in the Immigration Judge’s failure to first revoke their asylee status. The court further found that the record supported the Board’s determination that the respondents were removable because they had obtained immigration benefits by fraud and were inadmissible as immigrants with no valid visas or entry documents. Lastly, the court found no due process violation in the Immigration Judge’s denial of the respondents’ motion to subpoena material witnesses based on their failure to comply with agency procedures for obtaining a subpoena.

#### **Seventh Circuit:**

*Jan v. Holder*, \_\_F.3d\_\_, 2009 WL 2392872 (7th Cir. Aug. 6, 2009): The Seventh Circuit denied the respondent’s petition for review of the denial of his applications for asylum, withholding of removal, and CAT protection. The respondent’s asylum and withholding claims were based on his purported membership in a particular social group comprised of “Pakistanis who are threatened by government officials bribed to settle private disputes.” When the respondent was unable to pay substantial business debts, one of his creditors complained to Pakistan’s national law enforcement agency, whose agents (according to the respondent) are known to engage in human rights abuses and to take bribes to intimidate individuals to settle private disputes. The respondent also claimed that members of his family were ambushed by armed men demanding payment of his business debts and threatening to kill him should he fail to pay. The court found that the respondent failed to establish a likelihood of torture, as there was no evidence that the Pakistani Government was behind the ambush or threats, or that it had contacted the respondent or his family in the 10 years since those events occurred. The court further found the evidence of police corruption and abuse overly general and vague. Lastly, the court rejected the proposed social group, noting that the element of indebtedness was not an immutable characteristic and therefore did not satisfy the requirement for a social group.

*Lemus-Losa v. Holder*, \_\_F.3d\_\_, 2009 WL 2461353 (7th Cir. Aug. 13, 2009): The Seventh Circuit declined to grant deference to the Board's decision in *Matter of Lemus-Losa* and remanded for further proceedings. The respondent, an applicant for adjustment of status, had previously entered the United States without inspection, remained for 2 years, and departed. Some 2 years later, he reentered without inspection. In removal proceedings, the Immigration Judge found him ineligible to adjust his status under section 245(i) of the Act, because he was inadmissible under section 212(a)(9)(B)(i)(II) of the Act based on his prior period of unlawful status. On appeal, the Board agreed, finding the situation comparable to that in *Matter of Briones*, where it found that an alien who was inadmissible under section 212(a)(9)(C)(i)(I) was ineligible to adjust under section 245(i). The Seventh Circuit granted deference to the Board's decision in *Briones* but found that the Board overlooked an important distinction between the two grounds of inadmissibility involved, focusing on the fact that section 212(a)(9)(B)(i)(II) involves one who seeks lawful readmission (which the court analogized to an alien physically present in the United States without inspection, who is entitled to section 245(i) adjustment). The court noted that although section 245(i)(2)(A) requires that an applicant be admissible, clearly all applicants applying under that section are inadmissible, in that they entered without inspection. Reading the statute to exclude applicants who are inadmissible for any reason would negate the purpose of the statute, so the court held that there must be a line dividing inadmissible aliens who are nevertheless eligible to adjust under 245(i) from those who are ineligible to adjust.

*Chen v. Holder*, \_\_F.3d\_\_, 2009 WL 2514042 (7th Cir. Aug. 19, 2009): The court granted the respondent's petition for review of the Board's dismissal of his appeal in light of the Attorney General's decision in *Matter of J-S-*. Prior to the issuance of that decision, the respondent's asylum application (which was based on his claim that his wife was subjected to a forcible abortion) had been denied by the Immigration Judge, who did not find him credible. While his appeal was pending with the Board, *Matter of J-S-* was issued. Relying on the Seventh Circuit's decision in *Jin v. Holder*, the Board dismissed the appeal. The court found that the respondent was denied due process, as the Board's action precluded him from attempting to meet the new legal standard for asylum, which requires evidence of past or future persecution based on the husband's own

resistance to China's coercive family planning policy. The court distinguished its decision in *Jin* (which involved an applicant who was not legally married to the victim of the abortion) from the instant respondent, whose marriage was established.

#### ***Ninth Circuit:***

*Fregozo v. Holder*, \_\_F.3d\_\_, 2009 WL 2449673 (9th Cir. Aug. 12, 2009): The Board dismissed the respondent's appeal from the decision of an Immigration Judge denying his application for cancellation of removal on the grounds that he was convicted of an offense involving child abuse. The Ninth Circuit granted the respondent's petition for review, finding that his conviction for misdemeanor child endangerment under California Penal Code section 237a(b) was not categorically a conviction for a crime of "child abuse" under the Act, because the statute did not necessarily require actual injury to the child to support a conviction. The court further found that because the police reports were not incorporated by reference into either the respondent's nolo plea or the record of conviction, they could not be relied on by the Board or the circuit court in determining whether the conviction was for child abuse within the meaning of the Act. The record was remanded for the purpose of conducting a modified categorical analysis.

*Prakash v. Holder*, \_\_F.3d\_\_, 2009 WL 2605381 (9th Cir. Aug. 26, 2009): The court held that the California crimes of soliciting another to commit assault by means of force likely to produce great bodily injury with the intent that the crime be committed, and soliciting another to commit rape by force and violence with the intent that the crime be committed, are aggravated felony crimes of violence. The Immigration Judge found these crimes were aggravated felony crimes of violence under section 101(a)(43)(F) of the Act because they involved a substantial risk that physical force may be used against the person or property of another in the course of committing the offense, and the Board upheld that decision. The petitioner argued that his offenses did not involve a substantial risk that physical force may be used "in the course of committing the offense," because solicitation could be committed with the mere utterance of words, and any actual force would not come until after the solicitation offense had been completed. The court rejected that contention, finding that 18 U.S.C. § 16(b) turns on the risk of physical force as a consequence of the criminal conduct at issue, not on the timing of the force. The court also



distinguished its cases finding that solicitation to commit certain drug offenses do not qualify as aggravated felonies under section 101(a)(43)(B) of the Act, and it dismissed the petitioner's argument that solicitation offenses were not aggravated felonies because they were not included in section 101(a)(43)(U) (attempt or conspiracy to commit aggravated felony offenses). Finally, the court rejected the petitioner's argument that the existence of a distinct and separate Federal statute for solicitation crimes precluded his crimes from falling under section 101(a)(43)(F).

## REGULATORY UPDATE

### 74 Fed Reg 42909 (2009)

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

#### Notice of Postponement of H-2A and H-2B Temporary Worker Visa Exit Program Pilot

ACTION: General notice; postponement of commencement date.

SUMMARY: U.S. Customs and Border Protection (CBP) announces the postponement of the commencement date of the H-2A and H-2B Temporary Worker Visa Exit Program Pilot, originally set for August 1, 2009. The pilot program will require temporary workers within H-2A and H-2B nonimmigrant classifications that enter the United States at either the port of San Luis, Arizona or the port of Douglas, Arizona, to depart from one of those ports and to submit certain biographical and biometric information at one of the kiosks established for this purpose. A delay of the commencement date is necessary to ensure that the kiosks are fully operational.

DATES: The pilot program will commence December 8, 2009.

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### Changed Circumstances *continued*

country." *Gramatikov*, 128 F.3d at 620. If the applicant did submit evidence, the DOS country report can still be used to rebut the presumption if the Immigration Judge's opinion contains a detailed reference to how the report establishes a fundamental change in circumstances. See *Chheng v. Gonzales*, 471 F.3d 14, 22-23 (1st Cir. 2006).

Another line of cases suggests that DOS country reports of current conditions should not be read in isolation and that general pronouncements of improvement should not be interpreted as categorical proof of material change

without considering the asylum applicant's specific claim. The Seventh Circuit noted that the recent DOS country report should not be contrasted to the asylum applicant's testimony; instead, "the proper baseline for comparison is . . . an earlier country report." *Galina*, 213 F.3d at 959. The court remanded to the Board because the DOS country report for the period in which the asylum applicant was persecuted contained the same general platitudes on which the Immigration Judge relied in the later DOS country report to find that circumstances had changed. *Id.*; accord *Krastev v. INS*, 292 F.3d 1268, 1276 (10th Cir. 2002).

Both the circuit courts and the Board have held that neither the occurrence of dramatic political events nor a general improvement in country conditions will absolutely rebut the presumption of a well-founded fear of return. The Board, in *Matter of N-M-A-*, declined to establish a categorical rule that a change in regime would automatically rebut the presumption of a well-founded fear of future persecution. *Matter of N-M-A-*, 22 I&N Dec. at 320. To find that a change in government has rebutted the asylum applicant's presumed fear of return, "the record would have to reflect that circumstances had changed to such an extent that the applicant no longer has a well-founded fear of persecution." *Id.* at 321. *Matter of N-M-A-* was decided under the pre-2001 version of 8 C.F.R. § 208.13(b), which, as noted above, set out a standard for rebutting the presumption of future persecution that was more difficult for the DHS to meet, given that it had to show that *country conditions* had changed, as opposed to the more nebulous "circumstances." However, the general holding of *Matter of N-M-A-* has been echoed in circuit court decisions under the current regulations: The mere change in government in the country where the persecutory acts occurred will not be sufficient to rebut the presumption, especially if the asylum applicant submits materials to establish that the persecutors are still politically involved or that the protected group remains a target for persecution. See *Youkhana v. Gonzales*, 460 F.3d 927, 932 (7th Cir. 2006) (noting that "[t]he fact that the Ba'ath Party has been removed from power does not necessarily mean that conditions in Iraq have improved for Assyrian Christians"). The First Circuit declined to find that the presumption had been rebutted solely because the former Communist regime in Bulgaria was no longer in power: "A regime change does not necessarily eliminate the objective basis for an applicant's fear of persecution at the hands of his former oppressors, even if

those individuals were part of the old regime.” *Mihaylov v. Ashcroft*, 379 F.3d 15, 23 (1st Cir. 2004). In that case, the asylum applicant had provided documentary evidence that former Communist leaders had reemerged as part of the new Socialist government’s leadership.

Note, however, that the Fifth Circuit found that a complete change in power structure that included the total absence of the persecutors from the region sufficiently rebutted the presumption. There, the departure of Serbian paramilitary forces from Kosovo and the installation of the United Nations Interim Administrative Mission in Kosovo and the Provisional Institutions of Self Government established that the “identity of the current Kosovar government is . . . different from that of the past government that persecuted the [asylum applicants].” *Shehu v. Gonzales*, 443 F.3d 435, 437 (5th Cir. 2006).

Additionally, the presumption is not rebutted by merely showing that general conditions have improved in the asylum applicant’s country. Case law instructs that the DHS must still establish an individualized analysis of how the changed circumstances affect a particular asylum applicant in order to meet the burden. The Third Circuit noted a limitation on the inferences that may properly be made from the fact of improved or changed general conditions:

[E]vidence of changed country conditions can successfully rebut an alien’s fear of future persecution based on past persecution only if that evidence addresses the specific basis for the alien’s fear of future persecution; generalized improvements in country conditions will not suffice as rebuttals to credible testimony and other evidence establishing past persecution.

*Berishaj v. Ashcroft*, 378 F.3d 314, 327 (3d Cir. 2004).

Other cases illustrate this point as well. In *Passi v. Mukasey*, 535 F.3d 98, a citizen of the Republic of Congo established persecution by a militia loyal to Congo’s former president on the basis of his ethnicity and imputed political opinion. The Board found that the presumption of future persecution was rebutted based on a DOS country report that noted the end of civil unrest. That same report, however, indicated that the exact militia that had persecuted him now controlled Congo, and the

asylum applicant produced evidence of continued troubles in his home town. The Second Circuit found that the Board’s failure to conduct an individualized analysis was an impermissible inference. *Id.* at 103. Other circuits have reached similar conclusions. See *Chreng*, 471 F.3d at 21 (noting that, under First Circuit case law, dramatic changes in a country will likely rebut the presumption, but changes of a very general nature will not suffice unless the Immigration Judge accounts for the “individual’s particularized substantiated fear”); *Lopez v. Ashcroft*, 366 F.3d 799, 805 (9th Cir. 2004); *Krastev v. INS*, 292 F.3d at 1276-77. Therefore, courts have cautioned against viewing statements of improved general conditions in isolation without assessing the asylum applicant’s particularized fear of return.

The Board and circuit courts have reviewed whether the occurrence of two types of persecutory acts— involuntary sterilization and female genital mutilation (“FGM”)—serve to rebut the presumption of a well-founded fear of future persecution. In *Matter of Y-T-L-*, 23 I&N Dec. 601 (BIA 2003), the Board declined to find that an asylum applicant who had been forcibly sterilized lacked a well-founded fear of future persecution. The Board rejected the argument that because the procedure could not be repeated, no fear of future persecution existed. Noting that Congress had specifically amended the definition of a refugee to account for victims of coercive population control policies, the Board stated that “[c]oerced sterilization is better viewed as a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them.” *Id.* at 607. The Board has not been as absolute with respect to the occurrence of FGM. Initially, the Board held that a woman who had already been subjected to FGM could not establish a well-founded fear of persecution based on FGM because the procedure had already occurred. *Matter of A-T-*, 24 I&N Dec. 296 (BIA 2007). However, in *Matter of A-T-*, 24 I&N Dec. 617 (A.G. 2008), the Attorney General found error with “the Board’s legal conclusion that the past infliction of female genital mutilation by itself rebuts” the presumption of future persecution. The Board recently remanded the case for further proceedings under the Attorney General’s decision. *Matter of A-T-*, 25 I&N Dec. 4 (BIA 2009). Circuit courts have also faulted the original *Matter of A-T-* presumption that FGM can only occur once and have refused to find that the occurrence

of FGM rebuts the presumption of future persecution. *See, e.g., Bah v. Mukasey*, 529 F.3d 99, 111 (2d Cir. 2008) (holding that “under the governing regulations the fact that an applicant has undergone female genital mutilation in the past cannot, in and of itself, be used to rebut the presumption that her life or freedom will be threatened in the future”); *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007). Based on these cases, the occurrence of a seemingly one-time persecutory act likely does not, by itself, negate the asylum applicant’s well-founded fear of future persecution.

The review of case law reveals a conflict in the role Immigration Judges should play in assessing the impact of changed conditions. The Second Circuit has loosened the rule that an Immigration Judge must make particularized findings as to fundamental changes in a specific asylum applicant’s country of nationality for frequently asserted asylum claims and has stated that a “robotic incantation” of changes within the country is not required. *Hoxhallari v. Gonzales*, 468 F.3d 179, 187 (2d Cir. 2006). There, the court held that where “changed conditions evidently prevail in a country that is the subject of an appreciable proportion of asylum claims (and, as a result, we can safely assume that IJs have developed considerable expertise related to that country’s current conditions), an immigration judge need not enter specific findings premised on record evidence when making a finding of changed country conditions under the INA.” *Id.* The Second Circuit later noted, however, that this easing of the requirements for particularized findings is not appropriate when the change in conditions is not dramatic and there is no indication that the country involved “is the source

of an appreciable portion of asylum claims.” *Passi*, 535 F.3d at 103. *But see Banks v. Gonzales*, 453 F.3d 449, 453 (7th Cir. 2006) (warning that “[a]n IJ is not an expert on conditions in any given country, and *a priori* views about how authoritarian regimes conduct themselves are no substitute for evidence”).

## Conclusion

The preceding overview clarifies the requirements of each of the three statutory provisions related to changed circumstances and changed country conditions. As noted above, the following framework applies. First, with respect to untimely asylum applications, the applicant must establish a material change in circumstances related to the asylum claim. Second, applicants filing untimely motions to reopen face a higher burden, as they have to show changed country conditions, as opposed to the broader “changed circumstances” standard. Finally, in cases where the asylum applicant has established past persecution, the DHS bears the burden of establishing the occurrence of a fundamental change in circumstances that affects the applicant’s well-founded fear of persecution. In general, this requires a particularized finding as to how any changed circumstance affects the individual asylum applicant’s specific fear of return, rather than a reliance on general statements in a DOS country report of improved conditions, especially if the applicant has introduced evidence that contradicts the DOS country report.

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