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Finding Firm Ground: Exploring the Limits of Adverse Credibility

by Alexandra Fleszar

Many courts have weighed in on the multi-faceted issue of credibility decisions in asylum cases.[1] Over 10 years ago, Congress enacted the REAL ID Act of 2005, amending the Immigration and Nationality Act "in order to 'creat[e] . . . a uniform standard for credibility' determinations." *Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 165 (2d Cir. 2008) (alteration in original) (quoting H.R. Rep. 109-72, at 167 (2005)); *see* section 208(b)(1)(B)(iii) of the Act, 8 U.S.C. § 1158(b)(1)(B)(iii) (setting forth the credibility standard for asylum applications following the enactment of the REAL ID Act). In the intervening 12 years, the Board of Immigration Appeals and the Federal circuit courts of appeals have had the opportunity to delve into the contours of what renders an applicant's testimonial evidence incredible and also types and degrees of evidence upon which these decisions may be based. Assuming the reader's familiarity with the general standards established by and for the REAL ID Act, this article will explore specific credibility issues, including evidentiary standards and constitutional and statutory requirements regarding corroboration, notice, and the right to present evidence.[2]

Inconsistencies and the Doctrine of *Falsus in Uno*

With the abrupt change in credibility determination requirements and introduction of the seemingly wide-open field that the REAL ID Act produced for these determinations, courts have struggled with defining the floor of what might be impermissible criteria for an adverse credibility determination. *See*, *e.g.*, *Singh v. Holder*, 699 F.3d 321, 332 n.13 (4th Cir. 2012) (addressing the issue of "how small an inconsistency is sufficient to justify an adverse credibility finding"). Though all circuits explicitly state that an inconsistency need bear no relation to the alien's claim to support an adverse credibility decision, jurisprudence reveals that there exists some tension between this principle and the reality of how cases are analyzed. Some circuits recognize that just a single inconsistency

could render an alien's testimony incredible. *See Qin Wen Zheng v. Gonzales*, 500 F.3d 143, 147 (2d Cir. 2007); *see also Marikasi v. Lynch*, 840 F.3d 281, 287 n.1 (6th Cir. 2016); *Castañeda-Castillo v. Gonzales*, 488 F.3d 17, 23 n.6 (1st Cir. 2007) (en banc). Others espouse that something more than a trivial variance must exist despite the REAL ID Act's broadened standards. *See*, *e.g.*, *Kadia v. Gonzales*, 501 F.3d 817, 822 (7th Cir. 2007) (noting that under the REAL ID Act, which was not applied in the case, inaccuracies and falsehoods must be weighed under a totality of the circumstances analysis and an Immigration Judge "cannot discredit otherwise persuasive testimony because of a misspelling in the asylum application"); *see also Singh*, 699 F.3d at 332 n.13 (recognizing circuit court disagreement over the level of inconsistency required for an adverse credibility determination).

In exploring the lower bounds of REAL ID Act standards, several circuits have recognized the potential application of the legal doctrine of *falsus in uno*, *falsus in omnibus* (*"falsus in uno* doctrine" or "the doctrine"), or "false in one thing, false in everything."[3] The *falsus in uno* doctrine is a discretionary legal principle that allows a fact-finder to disbelieve the entirety of a witness' testimony based on the witness' falsehood in one aspect of testimony. *Enying Li v. Holder*, 738 F.3d 1160, 1163 (9th Cir. 2013).[4] With the passage of the REAL ID Act, the *falsus in uno* doctrine has seen a renaissance in certain circuits. The First, Second, and Ninth Circuits have held, either before or after the REAL ID Act's passage, that the principle of *falsus in uno*, *falsus in omnibus* is fair game in credibility determinations, though to varying degrees. *Wen Feng Liu v. Holder*, 714 F.3d 56, 61 (1st Cir. 2013); *Enying Li*, 738 F.3d at 1163–67; *Castañeda-Castillo*, 488 F.3d at 23 & n.6 (explicitly relying on the *falsus in uno* doctrine to describe a well-reasoned explanation of adverse credibility and recognizing that the REAL ID Act entitles fact-finders to draw inferences under the doctrine); *Siewe v. Gonzales*, 480 F.3d 160, 170-71 (2d Cir. 2007). The Ninth Circuit has interpreted the doctrine to apply to discredit the entirety of the witness' testimony only where the witness provided a "*material* and *conscious* falsehood in one aspect of testimony." *Enying Li*, 738 F.3d at 1163. In *Enying Li*, the Ninth Circuit explained that "[t]he maxim *falsus in uno*, *falsus in omnibus* should not be applied when the truthfulness of the witness has no bearing on the claim, as is the case when the claim is based on provable fact such as having two children or an undisputed ethnic classification." *Id.* at 1167.

Prior to passage of the REAL ID Act, the Second Circuit also recognized several limitations or exceptions to *falsus in uno, falsus in omnibus* as a maxim when assessing credibility, sorting the limitations into five categories. *Siewe*, 480 F.3d at 170–71. First, the Second Circuit found that the presentation of some piece of false evidence does not negate the assessment of evidence that is independently corroborated. *Id*. at 170. Second, fraudulent documents created to escape persecution may tend to support an alien's allegations. *Id*. Third, the *Siewe* court noted that false evidence wholly ancillary to the alien's claim may be insufficient to discount the remaining uncorroborated material as false, though not necessarily. *Id.* at 170–71. Fourth, "[a] false statement made during an airport interview, depending on the circumstances, may not be a sufficient ground for invoking *falsus in uno*," as the *Siewe* court recognized that initial airport interviews may be perceived as threatening by aliens fleeing from their governments. *Id.* at 171. Finally, the Second Circuit concluded that where an alien does not know, or has no reason to know, that submitted evidence is false, an Immigration Judge may not rely on the *falsus in uno* doctrine. *Id*. The court stated that these five circumstances could render inappropriate an Immigration Judge's reliance on the doctrine where an alien submitted false evidence. *Id.*

The First Circuit, on the other hand, has thus far consistently upheld the application of the *falsus in uno* doctrine, seemingly without qualification. *See Quezada-Caraballo v. Lynch*, 841 F.3d 32, 33 (1st Cir. 2016); *Weng Feng Lui,* 714 F.3d at 61; *Castañeda-Castillo*, 488 F.3d at 23 & n.6. In *Weng Feng Lui*, the First Circuit upheld the denial of a Chinese applicant's claim for religious asylum based on his lack of credibility regarding his wife's forced abortion. 714 F.3d at 61. The court explicitly held that the REAL ID Act provided the Immigration Judge with the discretion to doubt the applicant's newly raised Falun Gong claim where he lacked credibility in describing the events surroundings his wife's forced abortion. The First Circuit has observed that the *falsus in uno* doctrine did not become available to fact-finders based on *any* inconsistency until passage of the REAL ID Act. *Castañeda-Castillo*, 488 F.3d at 23 n.6. But the *Weng Feng Lui* court noted that the REAL ID Act actually confirmed a fact-finder's ability to apply the doctrine, as Immigration Judges could previously rely on it where an inconsistency went to a central aspect of an applicant's claim. 714 F.3d at 61.

However, there is a circuit split regarding whether the doctrine applies in the context of the REAL ID Act. In contrast to the First, Second, and Ninth Circuits, the Seventh Circuit has expressed a disinclination to apply the *falsus in uno* doctrine even given the broadened standards provided by the REAL ID Act. *See Kadia*, 501 F.3d at 821. The Seventh Circuit reads the REAL ID Act clause referring to the "totality of the circumstances" to provide for an analytical floor that prevents an Immigration Judge from discrediting the entirety of a witness' testimony based on any single perceived inconsistency or implausibility. *Id.* at 821–22 (expressing doubt as to the revival of the *falsus in uno* doctrine based on passage of the REAL ID Act). Though *Kadia* itself was not decided under REAL ID Act standards, the court stated in apparent reference to the REAL ID Act that "the mistakes that witnesses make in all innocence must be distinguished from slips that, *whether or not they go to the core of the witness's testimony*, show that the witness is a liar." *Id.* at 822 (emphasis added).

There is a further circuit split regarding whether the Board, in addition to Immigration Judges, may also use the *falsus in uno* doctrine in making credibility determinations regarding evidence presented to the Board. The Second Circuit defers to the Board to adopt the *falsus in uno* doctrine as applied by the Immigration Judge below when evaluating evidence supporting a motion to reopen. *See Qin Wen Zheng*, 500 F.3d at 147. In *Qin Wen Zheng*, the Board denied the respondent's second motion to reopen based on his failure to establish a change in country conditions, which in turn was based on the Board's refusal to credit new supporting evidence. *Id.* at 146–47. The Second Circuit relied on its decision in *Siewe* in holding that a single false document or instance of false testimony could support an adverse credibility finding. *Id.* at 147. The *Qin Wen Zheng* court determined that the Board appropriately relied on the Immigration Judge's unchallenged adverse credibility finding in declining to credit evidence supporting the motion to reopen. *Id*.

The Ninth Circuit explicitly rejected the Second Circuit's holding. *Shouchen Yang v. Lynch*, 822 F.3d 504, 508–09 (9th Cir. 2016). In *Shouchen Yang*, the Ninth Circuit held that the doctrine is not available to the Board when considering motions to reopen removal proceedings. After the applicant was denied relief based on an adverse credibility finding, he moved to reopen proceedings based on new evidence of his alleged conversion to Christianity and recent related persecution against his wife in China. The Board denied the applicant's motion, finding that he had not demonstrated why the Board should accept the statements in support of his motion as credible after an adverse credibility finding by the Immigration Judge. Recognizing a long line of precedent holding that credibility determinations in motions to reopen are inappropriate, the *Shouchen Yang* court held that the Board must credit evidence supporting a motion to reopen unless the evidence is "inherently unbelievable." *Id.* at 508 (quoting *Tadevosyan v. Holder*, 743 F.3d 1250, 1256 (9th Cir. 2014)). The Ninth Circuit held that only a fact-finder, rather than an appellate, judicial body is in a position to decide when a witness is lying versus when he or she is telling the truth. *Id.* The court noted that rendering a finding on the Board's own evaluation of the credibility of new evidence, when based on a prior decision by a fact-finding body, is in tension with the Board's "limited and deferential role" as a reviewing body, especially given that the Board does not have the ability to observe the witness' demeanor, candor, or other indicia of reliability. *Id*.

Despite the seeming rise of "wide-open" credibility decisions under the REAL ID Act and the corresponding doctrine of *falsus in uno*, *falsus in omnibus*, some circuits' limitations on the use of this discretionary adjudicative tool indicate that not all inconsistencies, implausibilities, or omissions are treated equally in credibility determinations. Though the Second Circuit has not taken the opportunity, post-REAL ID Act, to assess the validity of the limitations to the doctrine that were first identified in *Siewe*, jurisprudence in several circuits suggests that the application of at least one such limitation survives: caution against reliance on omissions from airport interviews as the basis for adverse credibility decisions, despite the discretion afforded to Immigration Judges under the REAL ID Act.

Omissions and Adverse Credibility: Is All Evidence Created Equal?

In the wake of the REAL ID Act, some courts have treated inconsistencies and omissions in the same manner. *See Xiu Xia Lin*, 534 F.3d at 166 n.3 ("An inconsistency and an omission are, for these purposes, functionally equivalent."). Omissions, however, can present trickier credibility considerations than inconsistencies depending on the evidentiary source.

Precedent from the Board and several circuits cautions that courts should use care in basing an adverse credibility determination on seeming "omissions" that result from elaboration of an asylum claim when information may not have been previously fully developed in statements, affidavits, or applications. These cases recognize that, despite the REAL ID Act's discretionary standard, initial interviews may be insufficiently rigorous and may not be reliable sources upon which to soundly base credibility decisions.[5]

Prior to the REAL ID Act, several circuit courts called into question the use of airport statements in finding adverse credibility based on omissions in such statements. *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004) ("The airport interview is an inherently limited forum for the alien to express the fear that will provide the basis for his or her asylum claim, and the [Board] must be cognizant of the interview's limitations when using its substance against an asylum applicant."); *Senathirajah v. INS*, 157 F.3d 210, 221 (3d Cir. 1998) ("We do not operate under any rule that prevents an asylum applicant from elaborating upon the circumstances underlying an asylum claim when given the opportunity to take the witness stand."); *Balasubramanrim v. INS*, 143 F.3d 157, 164 (3d Cir. 1998) ("That there were some inconsistencies between the airport statement and Balasubramanrim's testimony before the [I]mmigration [J]udge is not sufficient, standing alone, to support the Board's finding that Balasubramanrim was not credible."). Following passage of the REAL ID Act, several circuits have also concluded that omissions made during airport interviews are less reliable evidentiary sources upon which to base adverse credibility decisions. *See Qing Hua Lin v. Holder*, 736 F.3d 343, 352–53 (4th Cir. 2013) (noting that the circumstances under which airport interviews take place "caution against basing an adverse credibility determination solely on inconsistencies and, especially, omissions that arise out of statements made in such environments"); *Joseph v. Holder*, 600 F.3d 1235, 1243 (9th Cir. 2010) (affirming precedent devaluing the reliability of airport interviews post-passage of the REAL ID Act, but in a procedurally pre-REAL ID case); *Tang v. U.S. Att'y. Gen.*, 578 F.3d 1270, 1279 (11th Cir. 2009); *Moab v. Gonzales*, 500 F.3d 656, 660–61 (7th Cir. 2007).

In *Moab v. Gonzales*, the Seventh Circuit reversed an adverse credibility decision based on the applicant's elaboration of his claim for asylum where the Board concluded that his claims of persecution between his airport statement and testimony became "more egregious." 500 F.3d at 660–62. During the airport interview, the applicant described fear of returning to Liberia based on a familial land dispute and an ongoing civil war; at the time of testimony before the Immigration Court, he added that he also feared return based on his sexual orientation and described new acts of persecution based on this protected ground. *Id*. at 660–61. The Seventh Circuit concluded that the additional harms that the applicant described during testimony were reasonably withheld during an initial airport interview for fear of government mistreatment. *Id*.

In so holding, the *Moab* court approved of several factors used in considering the reliability of airport interviews that were first described by the Second Circuit in *Ramsameachire v. Ashcroft*, 357 F.3d 169, 180 (2d Cir. 2004). *See Moab*, 500 F.3d at 661. There, the Second Circuit stated that:

> First, a record of the interview that merely summarizes or paraphrases the alien's statements is inherently less reliable than a verbatim account or transcript. Second, similarly less reliable are interviews in which the questions asked are not designed to "elicit the details of an asylum claim," or the INS officer fails to ask follow-up questions that would aid the alien in developing his or her account. Third, an interview may be deemed less reliable if the alien appears to have been reluctant to reveal information to INS officials because of prior interrogation sessions or other coercive experiences in his or her home country. Finally, if the alien's answers to the questions posed suggest that the alien did not understand English or the translations provided by the interpreter, the alien's statements should be considered less reliable.

Ramsameachire, 357 F.3d at 180-81 (citations omitted) (concluding that, given the deliberate nature in which an airport interview was conducted, the applicant's inconsistent statements supported an adverse credibility determination). In reversing the Board's adverse credibility decision, the *Moab* court cited the shortened nature of the initial interview, evidence demonstrating potential translation issues during the airport interview, and the alien's reasonable fear of further persecution from

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CIRCUIT COURT DECISIONS FOR MARCH 2017

by John Guendelsberger

The United States courts of appeals issued 136 decisions in March 2017 in cases appealed from the Board. The courts affirmed the Board in 120 cases and reversed or remanded in 16, for an overall reversal rate of 11.8%, compared to last month's 8.5%. There were no reversals from the First, Fifth, Eighth, and Eleventh Circuits.

The chart below shows the results from each circuit for March 2017 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	0	0	0	0.0
Second	25	22	3	12.0
Third	9	8	1	11.1
Fourth	10	8	2	20.0
Fifth	9	9	0	0.0
Sixth	6	5	1	16.7
Seventh	3	2	1	33.3
Eighth	7	7	0	0.0
Ninth	59	52	7	11.9
Tenth	4	3	1	25.0
Eleventh	4	4	0	0.0
All	136	120	16	11.8

The 136 decisions included 60 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 45 direct appeals from denials of other forms of relief from removal or from findings of removal; and 31 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	60	53	7	11.7
Other Relief	45	39	6	13.3
Motions	31	28	3	9.7

The seven reversals or remands in asylum cases involved particular social group (three cases), credibility, the one-year bar for asylum eligibility, the "unable or unwilling to control" factor, and protection under the Convention Against Torture. The six reversals or remands in the "other relief" category addressed crimes involving moral turpitude (two cases), adjustment of status, (two cases), NACARA eligibility, and authenticity of DHS documents. The three motions cases involved changed country conditions, notice of hearing and in absentia order of removal, and application of the correct standard for likelihood of success on the merits in assessing a motion to reopen.

The chart below shows the combined numbers for January through March 2017 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	14	10	4	28.6
Tenth	5	4	1	20.0
Second	77	66	11	14.3
Fifth	31	27	4	12.9
Fourth	33	29	4	12.1
Ninth	174	158	16	9.2
Sixth	11	10	1	9.1
Eleventh	19	18	1	5.3
Third	21	20	1	4.8
First	5	5	0	0.0
Eighth	17	17	0	0.0
All	407	364	43	10.6

Last year's reversal rate at this point (January through March 2016) was 11.9%, with 611 total decisions and 73 reversals or remands.

The numbers by type of case on appeal for the first 3 months of 2017 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	186	166	20	10.8
Other Relief	122	106	16	13.1
Motions	99	92	7	7.1

CIRCUIT COURT DECISIONS FOR FEBRUARY 2017

by John Guendelsberger

The United States courts of appeals issued 141 decisions in February 2017 in cases appealed from the Board. The courts affirmed the Board in 129 cases and reversed or remanded in 12, for an overall reversal rate of 8.5%, compared to last month's 11.5%. There were no reversals from the First, Third, Sixth, Seventh, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for February 2017 based on electronic database reports of published and unpublished decisions

Circuit	Total	Affirmed	Reversed	% Reversed
First	2	2	0	0.0
Second	26	20	6	23.1
Third	5	5	0	0.0
Fourth	10	9	1	10.0
Fifth	11	10	1	9.0
Sixth	3	3	0	0.0
Seventh	4	4	0	0.0
Eighth	6	6	0	0.0
Ninth	66	63	3	4.5
Tenth	1	1	0	0.0
Eleventh	7	6	1	14.3
All	141	129	12	8.5

The 141 decisions included 57 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 37 direct appeals from denials of other forms of relief from removal or from findings of removal; and 47 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	57	51	6	10.5
Other Relief	37	34	3	8.1
Motions	47	44	3	6.4

The six reversals or remands in asylum cases involved protection under the Convention Against Torture (two cases), credibility, nexus, particular social group, and level of harm for past persecution. The three reversals or remands in the "other relief" category addressed application of the categorical approach to drug conviction cases, good faith marriage for removal of conditional resident status, and a remand for fact finding regarding duration of a RICO offense. The three motions cases involved equitable tolling, changed country conditions, and the departure bar.

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

RECENT COURT OPINIONS

First Circuit

Miranda v. Sessions, 853 F.3d 69 (1st Cir. 2017): The First Circuit held that the petitioner, who was born out of wedlock, did not meet the requirements for derivative U.S. citizenship upon naturalization of only his mother under repealed section 321(a) of the Act, 8 U.S.C. § 1432(a) (1996), because his paternity had been established by legitimation prior to his mother's naturalization.

Second Circuit

Gil v. Sessions, 851 F.3d 184 (2d Cir. 2017): The Second Circuit held that the petitioner had not derived U.S. citizenship from the naturalization of his father. At the time of the father's naturalization in 1980, the petitioner was not a "child" under section 101(c)(1) of the Act, 8 U.S.C. § 1101(c)(1), because he was born out of wedlock and was not legally legitimated until a change in Dominican Republic law in 1994, many years after he turned 16.

Third Circuit

Chavez-Alvarez v. Att'y Gen. of U.S., 850 F.3d 583 (3d Cir. 2017): The Third Circuit, joining the First, Fourth, Fifth, Seventh, and Tenth Circuits, affirmed as reasonable the Board's interpretation of a single scheme of criminal misconduct. However, the Third Circuit rejected the Board's holding in

Matter of Martinez-Zapata, 24 I&N Dec. 424 (BIA 2007), that a sentencing enhancement factor constitutes an element of a crime and therefore reversed the Board's determination that an aggravating sentencing factor established that the respondent was convicted of a crime involving moral turpitude.

Fourth Circuit

Cruz v. Sessions, 853 F.3d 122 (4th Cir. 2017): The Fourth Circuit held that the petitioner's familial relationship with her domestic partner was one central reason for the petitioner's persecution. The court held that the Board and Immigration Judge erred in focusing on the persecutor's articulated purpose of preventing the petitioner from contacting the police as a witness to her partner's disappearance, while discounting the familial relationship that prompted the petitioner to search for her domestic partner.

Upatcha v. Sessions, 849 F.3d 181 (4th Cir. 2017): The Fourth Circuit held that for the purposes of a "hardship waiver" under section 216(c)(4)(B) of the Act, 8 U.S.C. § 1186a(c)(4)(B), a determination as to whether the "good faith" marriage standard has been met is a mixed question of law and fact subject to a hybrid standard of review. While the Board properly reviewed the Immigration Judge's credibility determination for clear error, it erred in also applying clear error review to the Immigration Judge's legal judgement that the evidence was insufficient to satisfy the good faith marriage standard.

Fifth Circuit

United States v. Castillo-Rivera, 853 F.3d 218 (5th Cir. 2017) (en banc): In a sentencing case, the Fifth Circuit applied the "realistic probability" test and held that the petitioner's Texas felon-in-possession of a firearm conviction under Texas Penal Code § 46.04 was a match for the generic federal counterpart, even though the Texas statute applies to individuals convicted of a crime punishable by imprisonment for a year *or more*, while the federal statute applies to individuals convicted of crimes punishable by *more* than a year imprisonment. The Fifth Circuit also held that the petitioner had not demonstrated a realistic probability that Texas courts would apply the statute to offenses involving an "air gun." The decision contains multiple concurrences and dissents.

Sixth Circuit

Lopez v. Sessions, 851 F.3d 626 (6th Cir. 2017): The Sixth Circuit analyzed the requirement under NACARA special rule cancellation of removal that an individual show he or she has "not been apprehended at the time of entry," noting that the term "entry" requires that an individual be free from official restraint. The court held that Government surveillance of the entry may constitute "official restraint," but that it is the Government's burden to present evidence of such surveillance.

Seventh Circuit

United States v. Jenkins, 849 F.3d 390 (7th Cir. 2017): The Seventh Circuit held that a conviction for kidnapping, in violation of 18 U.S.C. § 1201(a), is not a crime of violence because it does not have as an element the use, attempted use, or threatened use of physical force. The court rejected the Government's argument that "hold[ing] for ransom or reward" necessarily requires at a minimum the threat of physical force.

Eighth Circuit

United States v. Irons, 849 F.3d 743 (8th Cir. 2017): The Eighth Circuit held that because a violation of Mo. Rev. Stat. § 217.385, subd. 1, is a predicate violent felony under the Armed Career Criminal Act, it also is a crime of violence under the United States Sentencing Guidelines.

United States v. McArthur, 850 F.3d 925 (8th Cir. 2017): In a sentencing case, the Eighth Circuit determined that Minnesota's third-degree burglary statute is indivisible and cannot constitute a generic burglary under *Taylor v. United States*, 495 U.S. 575 (1990), because the statute does not require that a defendant have formed the "intent to commit a crime" at the time of the nonconsensual entry, or remaining in, a building or other structure.

Dominguez-Herrera v. Sessions, 850 F.3d 411 (8th Cir. 2017): In following the Board's test provided in *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004), the Eighth Circuit held that a municipal conviction for theft under the Kansas UPOC § 6.1 (or the equivalent) is a conviction for immigration purposes because Kansas generally treats it as a criminal conviction (except in very narrow circumstances). The Eighth Circuit also held that UPOC § 6.1 describes a crime involving moral turpitude because it criminalizes only thefts with a permanent intent to deprive, even though there is a statutory list of situations where such intent may be inferred.

Ninth Circuit

Bringas-Rodriguez v. Sessions, 850 F.3d 1051 (9th Cir. 2017) (en banc): In holding that the petitioner is entitled to a presumption of a well-founded fear of future persecution, the Ninth Circuit held that the

petitioner's failure to report abuse to authorities neither creates a "gap" in the evidence nor imposes a heightened evidentiary requirement upon him, and that credible testimony, reports of similarly-situated individuals, and country condition reports can establish that the foreign government is "unable or unwilling to control" private persecutors.

United States v. Arriaga-Pinon, 852 F.3d 1195 (9th Cir. 2017): In a sentencing case, the court held that a Cal. Veh. Code § 10851(a) conviction is not categorically an aggravated felony theft offense under section 101(a)(43)(G) of the Act, but declined to address whether the divisibility analysis under *Duenas-Alvarez v. Holder*, 733 F.3d 812 (9th Cir. 2013), is still correct in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016).

Ramirez v. Brown, 852 F.3d 954 (9th Cir. 2017): The Ninth Circuit held that a grant of Temporary Protected Status ("TPS") satisfies the "inspected and admitted or paroled" requirement for adjustment of status under section 245(a) of the Act, 8 U.S.C. § 1255(a), since section 244(f)(4) of the Act, 8 U.S.C. § 1254a(f)(4), unambiguously treats aliens with TPS as being "admitted" for purposes of adjustment of status.

Tenth Circuit

Flores-Molina v. Sessions, 850 F.3d 1150 (10th Cir. 2017): The court held that the Board erred in determining that a Denver Municipal Code conviction for giving false information to a city official during an investigation is a crime involving moral turpitude because the minimum conduct proscribed by the ordinance does not require that the false information be material, or be given with the intent to mislead, or otherwise cause any harm to obtain a benefit. The Tenth Circuit distinguished the ordinance from those offenses discussed in three precedential Board decisions: *Matter of Pinzon*, 26 I&N Dec. 189 (BIA 2013), *Matter of Jurado-Delgado*, 24 I&N Dec. 29 (BIA 2006), and *Matter of Flores*, 17 I&N Dec. 225 (BIA 1980).

BIA PRECEDENT DECISIONS

In *Matter of Flores-Abarca*, 26 I&N Dec. 922 (BIA 2017), the Board held that the respondent's crime of transporting a loaded firearm in violation of title 21, section 1289.13 of the Oklahoma Statutes is categorically a firearms offense under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (2012), even though the term "transporting" is not expressly included in section 237(a)(2)(C).

The respondent argued that the crime of transporting a firearm does not include "possessing" or "carrying," which are described under section 237(a)(2)(C), and that Congress therefore did not intend that transportation of a loaded firearm be an offense within the scope of this section. In examining the statutory language of section 237(a)(2)(C), the Board noted that although the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arose, had not addressed the breadth of section 237(a)(2)(C), other Federal courts of appeals have expressed the view that "Congress intended the provision to apply broadly." The Board further noted that the terms "possessing" and "possess" in section 237(a)(2)(C) include constructive possession of a firearm. Noting that the jury instructions required that the offender be found to have "knowingly" and "willfully" transported a firearm, the Board determined that the respondent necessarily had constructive "possession" of the firearm for purposes of section 237(a)(2)(C). Further, the Board concluded that Congress intended the crime of transporting a loaded firearm to fall within the scope of section 237(a)(2)(C), as it would be illogical to hold that unlawful possession of a loaded firearm would fall within the scope of section 237(a)(2)(C), but that unlawfully transporting the same weapon would not.

The Board also examined the legislative history of section 237(a)(2)(C) and noted that, initially, only crimes of "possessing or carrying" a firearm were a basis for deportation, but subsequent legislation expanded the scope of deportable firearms offenses. In light of the "expansive text and history" of section 237(a)(2)(C), the Board concluded that transporting a loaded firearm under Oklahoma law is categorically a firearms offense under the Act and agreed with the Immigration Judge that the respondent's conviction rendered him ineligible for cancellation of removal under section 240A(b)(1)(C) of the Act. Accordingly, the appeal was dismissed.

In *Matter of Jimenez-Cedillo*, 27 I&N Dec. 1 (BIA 2017), the Board clarified its previous holding in *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016), and

concluded that a sexual offense in violation of a statute enacted to protect children is a crime involving moral turpitude where the victim is particularly young—that is, under the age of 14—or is under 16 and the age difference between the perpetrator and the victim is significant, or both. This is true even when the statute requires no culpable mental state as to the age of the child.

The Board reasoned that sexual offenses involving either particularly young victims or a significant age difference between a victim under 16 and the perpetrator are reprehensible offenses because they contravene society's interest in protecting children from sexual exploitation. It further noted that an offense becomes more reprehensible as the age gap between a victim under 16 and an older perpetrator increases. The Board found that in such cases the culpable mental element for crimes involving moral turpitude is implicitly satisfied by the commission of the proscribed act. The Board found instructive the Third Circuit's similar holding in *Mehboob v. Attorney General of the U.S.*, 549 F.3d 272 (3d Cir. 2008).

The Board applied its holding to the respondent's case and held that a conviction for sexual solicitation of a minor under section 3-324(b) of the Maryland Criminal Law with the intent to engage in an unlawful sexual offense (as defined under section 3-307 of the Maryland Criminal Law) is categorically a crime involving moral turpitude. It noted that moral turpitude inheres in all violations of section 3-307 because the provisions involve sexual contact with a lack of consent, sexual contact with a minor under the age of 14 where the offender is at least 4 years older, or sexual contact with a minor under the age of 16 where the offender is at least 6 years older. The Board distinguished its holding in *Matter of Silva-Trevino* by noting that the Texas statute at issue in that case criminalized contact between a minor who is 16 years old or younger and a perpetrator who is more than 3 years older.

Finally, the Board held that knowingly soliciting a law enforcement officer who is posing as a minor to engage in unlawful sexual activity is equivalent to an attempt to engage an actual minor in unlawful sexual activity. Thus, because the underlying offense is a crime involving moral turpitude, the attempt to commit the offense is as well.

In *Matter of Wu*, 27 I&N Dec. 8 (BIA 2017), the Board concluded that assault with a deadly weapon or force likely to produce great bodily injury under California law is categorically a crime involving moral turpitude. In doing so, it distinguished the Ninth Circuit's decision in *Ceron v. Holder*, 747 F.3d 773 (9th Cir. 2014) (en banc).

The Board acknowledged that a simple assault and battery committed with general intent, and requiring only an offensive touching and no resulting bodily injury, is not a crime involving moral turpitude. This general rule does not apply when the offense involves an aggravating factor—such as use of a deadly weapon—that significantly increases the perpetrator's culpability. In assessing whether a crime involves moral turpitude, the Board weighs the level of danger posed by the perpetrator's conduct along with his or her degree of mental culpability in committing the conduct.

The Board examined the mental state required for a conviction under section 245(a)(1) of the California Penal Code, looking to case law from the California Supreme Court and the Ninth Circuit. It noted that section 245(a)(1) requires that a perpetrator willfully commit a dangerous act and have knowledge of the facts that would lead a reasonable person to realize the act would result in a battery, even if he or she did not have subjective knowledge of the risk that a battery would result. The Board ultimately concluded that a violation of section 245(a)(1) necessarily requires a culpable mental state that falls within the definition of a crime involving moral turpitude.

The Board further concluded that a violation of section 245(a)(1) necessarily involves an aggravating factor that renders the offense reprehensible. It noted that the statute requires that the perpetrator willfully use either a deadly weapon or instrument, or force likely to produce great bodily injury, while being aware of the facts that make it likely that such conduct will cause at least great bodily injury to another person. After having weighed the dangerous conduct necessarily involved in a violation of the statute with the culpable mental state required for a conviction, the Board concluded that an assault under this statute is categorically a crime involving moral turpitude.

In *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017), the Board clarified *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), and held that the primary consideration for an Immigration Judge in evaluating whether to

administratively close or recalendar proceedings is whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits. The Board concluded that administrative closure, requested by the Department of Homeland Security ("DHS"), was inappropriate in this case where the respondent is applying for asylum.

While the Board recognized the Immigration Judge's concerns regarding administrative efficiency and limited court resources, it noted that such matters are secondary to a party's interest in having a case resolved on the merits, particularly because *Avetisyan* does not include court resources among the factors to consider in evaluating whether administrative closure is appropriate. In disagreeing with the Immigration Judge that the matter does not present an "actual case[] in dispute," the Board stated that the respondent has a right to a hearing on the merits of his claim, assuming that his asylum application was properly filed and that he is eligible for that relief. Moreover, the Board noted the fact that the DHS sought administrative closure in this case is not dispositive of whether the respondent's case is actually in dispute because, in considering administrative closure, an Immigration Judge cannot review whether an alien falls within the enforcement priorities of the DHS, which has exclusive jurisdiction over matters of prosecutorial discretion, or whether an alien will actually be removed from the United States.

After noting that the respondent's case presented a clear public interest in the finality of immigration proceedings, the Board concluded that recalendaring of the respondent's proceedings is appropriate because the respondent had provided a persuasive reason for his case to proceed and be resolved on the merits. Accordingly, the Board sustained the respondent's appeal, vacated the Immigration Judge's decision, and reinstated the removal proceedings.

Finding Firm Ground: *continued*

government authorities upon entering the United States. 500 F.3d at 661–62.

Similarly, the Eleventh Circuit in *Tang v. U.S. Att'y Gen.* also reversed an adverse credibility decision where the Immigration Judge relied in part on the alien's omission of her Christian faith during her airport interview. 578 F.3d at 1279. The *Tang* court noted that "if an alien's statements during an airport interview are less detailed than the alien's later testimony, the [Immigration Judge] should not focus exclusively on airport interview omissions, rather than contradictions, when determining whether the alien is credible." *Id.* As in *Moab*, the Eleventh Circuit explicitly relied on the pre-REAL ID Act cases of *Ramsameachire* and *Balasubramanrim* in a post-REAL ID Act case to hold that an Immigration Judge should consider an alien's lack of representation and potential fear of official questioning where he or she may have been subject to prior abuse. *Id.*

The Fourth Circuit's treatment of airport interviews in the post-REAL ID Act context initially appears to call into question whether the "heart of the claim" test is entirely dead, or whether the decreased reliance on omissions or inconsistencies from airport interviews may, in a way, revive this doctrine. In *Qing Hua Lin v. Holder*, the Fourth Circuit expressed its concern regarding the Board's reliance on airport interviews, stating that

> Most so-called "airport interviews" are brief affairs given in the hours immediately following long and often dangerous journeys into the United States. These circumstances caution against basing an adverse credibility determination solely on inconsistencies and, especially, omissions that arise out of statements made in such environments. As evidenced by the questions asked of Lin, the purpose of these interviews is to collect general identification and background information about the alien. The interviews are not part of the formal asylum process, and are conducted without legal representation and before most aliens are aware of the elements necessary to support a claim for asylum. Requiring precise evidentiary detail in such circumstances ignores the reality of the interview process and places an unduly onerous burden on an alien who later seeks asylum.

736 F.3d at 352–53 (citation omitted). The court went on to explicitly agree with several other circuits regarding concerns over the Board's reliance on statements made in airport interviews for adverse credibility decisions. *Id.* at 353 (citing *Moab*, 500 F.3d at 660–61; *Ramsameachire*, 357 F.3d at 179; *Joseph*, 600 F.3d at 1243; *Zubeda v. Ashcroft*, 333 F.3d 463, 477 (3d Cir. 2003)).

However, in finding that the applicant's airport omissions were sufficient to support an adverse credibility

finding, the *Qing Hua Lin* court found that it was the degree of the alien's omission that rendered her testimony incredible. The court stated that the applicant's omission of her forced abortion during the airport interview "is not a minor evidentiary detail whose absence can be overlooked, *it is the very core of her claim*." *Qing Hua Lin*, 736 F.3d at 353–54 (emphasis added). The dicta in *Qing Hua Lin* appears to suggest that the heart of the claim test may not be as dead as was once thought. *See id.*

At the very least, the criteria the *Ramsameachire* court developed to assess the reliability of airport interviews in credibility determinations remains applicable in at least some circuits' post-REAL ID Act cases, and may help to establish at least a partial floor for what is sufficiently substantial evidence on which to base an adverse credibility decision. *See Moab*, 500 F.3d at 661–62; *Tang*, 578 F.3d at 1279; *Qing Hua Lin*, 736 F.3d at 352–53. Thus, when evidence suggests an omission during an airport interview, adjudicators should take care to evaluate the reliability of the interview as an initial matter.

Due Process: Corroboration, Notice and the Opportunity to Respond, and the Right to Present Evidence

Adverse credibility determinations are generally fatal to asylum claims—however, an alien may still succeed where evidence corroborates a claim of persecution and credibility that is in doubt. Section 208(b)(1)(B)(iii) of the Act; *Qing Hua Lin*, 736 F.3d at 351–54; *see also Singh*, 699 F.3d at 331–32. When a case reaches issues of corroboration, it becomes easy to muddy the waters of credibility, where conflation of an alien's initial burden to present credible testimony and the ancillary burden to corroborate testimony can frequently occur. *See Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011). Though testimonial credibility and corroborative evidence are intimately tied, it is important to maintain the statutory delineation that allows aliens to meet the burden of proof with credible, uncorroborated testimony alone. *See* section 208(b)(1)(B)(ii) of the Act; 8 C.F.R. § 1208.13(a).

What types and degrees of corroborative evidence suffice to allay credibility concerns varies throughout the circuits; though the Board has relied on certain factors indicating a lack of corroboration, other circuit courts have called into question that reliance. *Compare Matter of J-Y-C-*, 24 I&N Dec. 260, 265 n.6 (BIA 2007) (discrediting an applicant's late proffer of a corroborating letter because the letter lacked any letterhead or authenticating details), *with Marynenka v. Holder*, 592 F.3d 594, 601 (4th Cir. 2010) (finding that relying on the lack of letterhead without any other evidence calling into question the legitimacy of the letter was insufficient for finding a failure in corroboration), *and Tabaku v. Gonzales*, 425 F.3d 417, 421–22 (7th Cir. 2005) (concluding that an inconsistency in newspaper articles alone is an insufficient basis to support an adverse credibility decision). The Fourth Circuit, for example, holds that corroborating evidence must be objective; thus, letters and affidavits from family and friends are insufficient for corroboration as they are evidence offered from interested parties. *Qing Hua Lin*, 736 F.3d at 351–52, 354.

Where a trier of fact determines that the applicant has not met his or her burden through testimony alone, corroborative evidence must be provided unless the evidence is unavailable and cannot reasonably be obtained. *Matter of J-Y-C-*, 24 I&N Dec. at 263 (citing REAL ID Act § 101(a)(3) (codified at section 208(b)(1)(B)(iii) of the Act)). This statutory phrase begs the question of when such evidence can or should be presented and to what extent aliens are entitled to know in advance of the need for corroboration. *See Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015). After all, the statute indicates that credible testimony may be sufficient by itself for an applicant to meet his or her burden. Section 208(b)(1)(B)(ii) of the Act. The issue thus arises as to whether an applicant would know their testimony or evidence is insufficient or incredible prior to receiving a decision. *See Ren*, 648 F.3d at 1091. These questions have become tied to the issue of whether an alien has received due process in the adjudicative process.[6] *Id.* at 1092–93 (discussing the due process concerns posed by demanding corroborating evidence on the day of the individual's merits hearing).

Following passage of the REAL ID Act, courts began to see due process challenges to adverse credibility decisions where Immigration Judges did not give advance notice about credibility concerns nor further opportunity to present corroborative evidence. *See Darinchuluun v. Lynch*, 804 F.3d 1208, 1216 (7th Cir. 2015); *Qing Hua Lin*, 736 F.3d at 353–54. Courts have frequently confronted the two issues of notice and the opportunity to present evidence, with varying outcomes.[7] Except for in the Ninth Circuit, and somewhat in the Second Circuit, there is no

requirement of notice of an inconsistency or the need for corroboration to satisfy due process, regardless of the degree of inconsistency, prior to basing a denial of relief on the inconsistencies or lack of evidence. *See Jin Ju Zhao v. Holder*, 322 F. App'x 437, 440 (6th Cir. 2009) ("We note that the prophylactic rule adopted by the Second Circuit in *Ming Shi Xue*—requiring an Immigration Judge to give notice of putative contradictions that are not self-evident before he or she may rely on them—has not been adopted in any other circuit."); *Sankoh v. Mukasey*, 539 F.3d 456, 469–70 (7th Cir. 2008) (also citing *Ming Shi Xue v. Bd. of Immigration Appeals*, 439 F.3d 111, 118 (2d Cir. 2006)).

The Second Circuit draws the line of whether an alien must be confronted with inconsistencies based on the degree of the inconsistency. In *Majidi v. Gonzales*, 430 F.3d 77, 81 (2d Cir. 2005), the Second Circuit held that Immigration Judges may rely on inconsistent testimony and evidence without first bringing the inconsistencies to the alien's attention. In *Ming Shi Xue*, however, the court held that notice was required where the inconsistency was not "dramatic." The court held that because the alleged inconsistencies were not so dramatic as to be self-evident, and since neither the Immigration Judge nor the government had identified the alleged inconsistencies prior to the Immigration Judge's reliance on them in the ruling, the alien was deprived of the opportunity to address and explain the contradictions, in contravention of basic principles of law. *Id*.

Therefore, under current Second Circuit precedent, where inconsistencies are "sufficiently conspicuous and central to an applicant's claim as to be self-evident," they need not be brought to the applicant's attention. *Id.* at 114; *see also Zhi Wei Pang v. Bureau of Citizenship and Immigration Servs.*, 448 F.3d 102, 109–10 (2d Cir. 2006). Where an inconsistency is not self-evident, however, an Immigration Judge may not rely on it to support an adverse credibility determination without first bringing the perceived discrepancy to the applicant's attention, providing him or her with notice and the opportunity to reconcile the differences in evidence. *Zhi Wei Pang*, 448 F.3d at 114–15 (Raggi, J., concurring).

The Ninth Circuit addressed the issues of notice and due process in the context of both credibility and the need for corroboration. *See Ren*, 648 F.3d at 1079. In *Ren*, the Ninth Circuit bifurcated the issues of the alien's credibility from that of corroborative evidence. The Immigration Judge in *Ren* denied the applicant asylum in the first instance based on the applicant's lack of credibility and, in the alternative, denied relief based on a lack of corroboration for the claim. *Id*. at 1083. The Immigration Judge had provided the applicant with notice of what corroborative evidence would be necessary to support his claim, as well as a 5-month continuance in order to produce the evidence at the next hearing. *Id.* at 1090.

Though the Ninth Circuit found that the inconsistencies noted were not sufficient to support an adverse credibility determination, the court affirmed the alternative denial based on lack of corroboration. *Id.* at 1094. The Ninth Circuit held that the applicant had failed to meet his burden of establishing his claim and had been afforded due process by way of notice and an opportunity to respond. *Id*. at 1093. In interpreting the REAL ID Act, the Ninth Circuit found that the statute requires that an alien be notified of the need for corroborative evidence and what specific evidence would suffice, and the alien must also be given an opportunity to provide the corroboration or explain why he or she cannot do so. *Id.* at 1092–93. Though not addressing the issue directly, the *Ren* court noted that the canon of constitutional avoidance required this outcome because demanding corroboration prior to notifying the alien would raise significant Fifth Amendment due process concerns. *Id*. Because the applicant had been provided notice of both the need for corroboration and what evidence would suffice, as well as a 5-month continuance to procure the evidence, the court held that due process was satisfied and the alternative denial was based on sufficiently substantial evidence. *Id*. at 1093–94.

As *Ren* recognized, the second facet of due process is whether the alien was provided the opportunity to present evidence. *Id*. at 1093. In *Qing Hua Lin*, though faced with a due process claim, the Fourth Circuit found that the alien received a full and fair hearing where the Immigration Judge set an additional deadline and held an additional hearing to allow new evidence to be presented and fully examined, as well as to allow the applicant to explain her prior statements. 736 F.3d at 354–55. Though finding that due process is satisfied under these conditions, the court did not address the issue of whether a new hearing *must* be provided in order to comply with due process standards under the REAL ID Act's provisions. The Board has since addressed that issue.

In *Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015), the Board addressed the statutory question of whether an alien was required to receive advance notice of the need to present corroborative evidence and a subsequent opportunity to present such evidence. Ultimately, finding that they were not bound by Ninth Circuit precedent in a case arising in the Fifth Circuit, the Board held that the REAL ID Act does not require advance notice of the need for specific corroborating evidence, nor does the statute provide for an automatic continuance to allow an alien to obtain the corroborating evidence following notice. *Id.* at 523–24. However, the Board did hold that where an alien has not provided reasonably available corroborating evidence, the Immigration Judge should first consider the explanations for the absence of evidence and determine whether good cause exists to continue the proceedings to allow the alien to obtain such evidence. *Id.* at 527.

Conclusion

"Anyone who has ever tried a case or presided as a judge at a trial knows that witnesses are prone to fudge, to fumble, to misspeak, to misstate, to exaggerate. If any such pratfall warranted disbelieving a witness's entire testimony, few trials would get all the way to judgment." *Kadia*, 501 F.3d at 821. A first reading of the REAL ID Act following its enactment in 2005 may have presented the reader with the impression of a bottomless credibility standard, allowing adjudicators free reign to rely on any inconsistency, missing piece of evidence, or discrepancy, no matter how minute. In the intervening 12 years, judicial interpretation has demonstrated that there remains a floor to credibility standards, bounded by evidentiary requirements and the desire to avoid triviality. Circuit court decisions regarding the law in many of these areas will likely continue to develop these standards in the years to come, providing adjudicators and litigants alike a more solid ground upon which to address credibility and corroboration.

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[1] *See*, *e.g.*, *Ren v. Holder*, 648 F.3d 1079, 1084–85 (9th Cir. 2011); *Rivas-Mira v. Holder*, 556 F.3d 1, 5–6 (1st Cir. 2009); *Kadia v. Gonzales*, 501 F.3d 817, 819–22 (7th Cir. 2007); *Siewe v. Gonzales*, 480 F.3d 160, 170–71 (2d Cir. 2007).

[2] The REAL ID Act amended the Immigration and Nationality Act to provide as follows:

> Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.

REAL ID Act of 2005, Pub. L. No. 109-13, § 101(a)(3), 119 Stat. 231, 303 (codified at section 208(b)(1)(B)(iii) of the Act, 8 U.S.C. § 1158(b)(1)(B)(iii)). The changes also afford the presumption of credibility for applicants on appeal where no adverse credibility decision is explicitly made. *Matter of J-Y-C-*, 24 I&N Dec. 260, 262 (BIA 2007) (citing section 208(b)(1)(B)(iii) of the Act). The statute provides that an applicant's testimony may be sufficient to sustain the burden of proof without corroboration where the testimony is sufficiently credible, persuasive, and probative of facts sufficient to meet the applicant's burden. *Id.* at 263. However, if the trier of fact determines that corroborative evidence should be produced, it must be provided unless the evidence is unavailable and cannot reasonably be obtained. *Id.*

[3] *See Castañeda-Castillo*, 488 F.3d at 23 n.6. *But see Kadia*, 501 F.3d at 821–22.

[4] Prior to passage of the REAL ID Act, the doctrine had been all but ruled out by most circuit courts of appeals as inapplicable to credibility determinations, given that only inconsistencies or implausibilities related to the heart of the matter could predicate an adverse credibility decision. *See Kadia*, 501 F.3d at 821.

5 *See, e.g.*, *Qing Hua Lin v. Holder*, 736 F.3d 343, 352–53 (4th Cir. 2013); *Tang v. U.S. Att'y Gen.*, 578 F.3d 1270, 1279 (11th Cir. 2009); *see also Yan Liu v. Holder*, 640 F.3d 918, 925–26 (9th Cir. 2011) (pre-REAL ID Act); *cf. Matter of J-Y-C-*, 24 I&N Dec. 260, 264 (BIA 2007) (finding in pre-REAL ID Act context that inconsistencies between airport interview and testimony supported an adverse credibility finding, but noting that the alien did not argue that the airport interview was unreliable and did not attempt to explain inconsistencies).

[6] Aliens are entitled to due process of law in deportation proceedings. *Demore v. Kim*, 538 U.S. 510, 523 (2003) (citation omitted); *Zadvydas v. Davis*, 533 U.S. 678, 693–94 (2001) (citation omitted). An applicant's due process rights are violated when an applicant does not receive a full and fair hearing on her claims. *Qing Hua Lin*, 736

F.3d at 354–55; *see also Dia v. Ashcroft*, 353 F.3d 228, 239 (3d Cir. 2003); *Nazarova v. INS*, 171 F.3d 478, 482–83 (7th Cir. 1999).

[7] The issue of notice of an alien's inconsistencies or omissions arose as an issue even prior to the REAL ID Act. *Soto-Olarte v. Holder*, 555 F.3d 1089, 1092 (9th Cir. 2009) (procedurally pre-REAL ID case); *Sankoh v. Mukasey*, 539 F.3d 456 (7th Cir. 2008) (same); *Zhi Wei Pang v. Bureau of Citizenship & Immigration Servs*, 448 F.3d 102 (2d Cir. 2006) (same); *Majidi v. Gonzales*, 430 F.3d 77, 81 (2d Cir. 2005) (same). Though almost all circuits held that notice and an opportunity to respond to alleged inconsistencies or insufficient corroboration was not required prior to making an adverse credibility finding, two circuits held that some degree of notice was required under the REAL ID Act. *See, e.g.*, *Ren*, 648 F.3d at 1090.