

11-1-2007

## An Administrative "Death Sentence" for Asylum Seekers: Deprivation of Due Process under 8 U.S.C. § 1158(d)(6)'s Frivolousness Standard

E. Lea Johnston

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### Recommended Citation

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# AN ADMINISTRATIVE “DEATH SENTENCE” FOR ASYLUM SEEKERS: DEPRIVATION OF DUE PROCESS UNDER 8 U.S.C. § 1158(d)(6)’S FRIVOLOUSNESS STANDARD

E. Lea Johnston\*

*Abstract:* In 1996, Congress amended the Immigration and Nationality Act by providing a new sanction for asylum seekers: if an immigration judge makes a finding that a noncitizen has knowingly filed a fraudulent asylum application, then that person is permanently ineligible for immigration benefits. For eleven years, immigration judges, the Board of Immigration Appeals, and federal courts have imposed and reviewed this sanction without specifying a burden of proof. When it did act to fill the statutory gap in April 2007, the Board held that the government must prove the elements of the statute by a preponderance of the evidence. This Article argues that the Due Process Clause guarantees that the government must prove that a noncitizen knowingly filed a frivolous asylum application by clear and convincing evidence before rendering him permanently ineligible for benefits. It also proposes that immigration judges should consider only certain categories of evidence when determining whether the government has established elements of the statute by clear and convincing evidence, while other categories should be held ineligible as a matter of law.

|  |     |
|--|-----|
| INTRODUCTION.....  | 832 |
| I. LEGAL FRAMEWORK FOR FILING ASYLUM<br>APPLICATIONS.....  | 835 |
| A. Statutory and Regulatory Framework.....   | 836 |
| 1. Asylum Application Process.....   | 837 |
| 2. Sanction for Filing a Frivolous Asylum Application....  | 843 |
| 3. Appellate Procedures.....   | 846 |
| B. Judicial Framework for Application of § 1158(d)(6).....   | 848 |
| C. Board of Appeals’ Pronouncement on Applicable Burden<br>of Proof.....                                   | 853 |
| II. THE CONSTITUTIONAL DEFICIENCY OF THE<br>PREPONDERANCE STANDARD FOR FINDINGS UNDER<br>§ 1158(d)(6)..... | 855 |

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|   |     |
|---|-----|
| A. The Protected Interest Implicated by a Finding of Frivolousness .....  | 857 |
| B. Procedural Due Process Requirements of a Burden of Proof.....  | 859 |
| C. Application of the Mathews v. Eldridge Test .....  | 860 |
| 1. Affected Private Interests .....   | 861 |
| 2. Risk of Erroneous Deprivation and Value of Additional Procedural Safeguards.....   | 864 |
| 3. Governmental Interest in Maintaining Current Procedures .....  | 872 |
| D. The Case for a Clear and Convincing Burden of Proof for § 1158(d)(6) Findings .....  | 873 |
| 1. Preponderance of the Evidence .....  | 874 |
| 2. Beyond a Reasonable Doubt .....  | 875 |
| 3. Clear and Convincing Evidence .....  | 877 |
| III. EVIDENTIARY REQUIREMENTS TO SATISFY ELEMENTS OF § 1158(D)(6): A PROPOSAL .....   | 879 |
| A. Forged Documents Can Satisfy Elements of Fabrication and Intent .....  | 880 |
| B. Documents Produced by the Government Must Be Tested for Reliability Before Accepted as Support for a Frivolousness Finding.....                                    | 881 |
| C. An Admission of Falsehood Will Establish Fabrication But May Not Always Satisfy the Intent Element .....   | 883 |
| D. Only Testimonial Evidence that Directly Contradicts a Material, Intentionally False Statement in an Asylum Application Should Support a § 1158(d)(6) Finding ..... | 884 |
| E. Findings of Demeanor Should Be Legally Ineligible to Support a Determination Under § 1158(d)(6).....   | 890 |
| CONCLUSION .....  | 894 |

## INTRODUCTION

In 1996, prompted by national security and economic concerns perceived to be associated with illegal immigration,<sup>1</sup> Congress enacted a draconian<sup>2</sup> new sanction for any noncitizen found to have knowingly

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1. For a detailed description of the media's portrayal of the asylum problem in the 1990s and of Congress's response to this problem in 1994 and 1996, see Andrea Rogers, *Exploitation v. Expulsion: The Use of Expedited Removal in Asylum Cases As an Answer to a Compromised System*, 24 WM. MITCHELL L. REV. 785, 793-803 (1998).

2. See *Luciana v. Att'y Gen. of the U.S.*, No. 05-3544, 2007 WL 2696865, at \*11 (3d Cir. Sept.

filed a frivolous application for asylum. Congress amended section 208 of the Immigration and Nationality Act to provide that, if such an application is filed, the noncitizen “shall be permanently ineligible for any benefits” under United States immigration laws.<sup>3</sup> This sanction applies regardless of any future developments in the asylum applicant’s home country or personal life that would otherwise provide a basis for granting immigration benefits.<sup>4</sup> For example, if the noncitizen returns to his home country, leads a political movement, and fears persecution by the ruling class, he will not be eligible to seek refuge here.<sup>5</sup> Similarly, if, in waiting for the immigration process to run its course, an asylum seeker has married a United States citizen or given birth to children who are United States citizens, an asylum seeker’s family ties are of no accord; she is no longer eligible for adjustment of status.<sup>6</sup> The sanction is so sweeping in its scope and implications that it fully deserves its characterization by the courts as an administrative “death sentence” for asylum seekers.<sup>7</sup>

While the government has legitimate interests in rejecting and deterring frivolous asylum applications, any governmental action must comply with constitutional standards.<sup>8</sup> The frivolousness statutory

17, 2007) (referring to sanction under 8 U.S.C. § 1158(d)(6) as a “draconian penalty”).

3. See Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-694 (1996) (codified at 8 U.S.C. § 1158(d)(6) (2000)).

4. See *id.*; see also *Luciana*, 2007 WL 2696865, at \*11 (“By additionally issuing a frivolousness finding, the IJ [immigration judge] brought down on Petitioner a lifetime ban on all means of legally entering the United States.”); *Liu v. U.S. Dep’t of Justice*, 455 F.3d 106, 117 (2d Cir. 2006) (“A finding of frivolousness is a potential ‘death sentence’ for an alien’s *immigration* prospects.”).

5. See *Elias v. Gonzales*, 490 F.3d 444, 448 (6th Cir. 2007) (noting that an immigration judge found the petitioner’s asylum application frivolous, “thereby barring a grant of asylum to petitioner forever”).

6. See *Frango v. Gonzales*, 437 F.3d 726, 728 (8th Cir. 2006) (stating that a finding under 8 U.S.C. § 1158(d)(6) precludes an adjustment of a noncitizen’s status to permanent residence despite the noncitizen’s bona fide marriage to a United States citizen); see also *Tchuinga v. Gonzales*, 454 F.3d 54, 59 (1st Cir. 2006) (noting that the Board of Immigration Appeals, in declining to reopen the petitioner’s case, concluded that the noncitizen was barred from adjusting his status due to the frivolous asylum application bar).

7. See *Alexandrov v. Gonzales*, 442 F.3d 395, 397 n.1 (6th Cir. 2006); *Muhanna v. Gonzales*, 399 F.3d 582, 588 (3d Cir. 2005).

8. See, e.g., *Davis v. Passman*, 442 U.S. 228, 242 (1979) (quoting James Madison for the proposition that the judiciary, in interpreting and enforcing the Constitution, “will be an impenetrable bulwark against every assumption of power in the Legislative or Executive” and will “resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights”) (quoting James Madison, 1 *Annals of Cong.* 439 (1789)); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the

provision—codified at 8 U.S.C. § 1158(d)(6)—is constitutionally deficient as written and applied. Congress failed to specify which party bears the burden of proof and what degree of certainty is required to support a finding of frivolousness.<sup>9</sup> The Board of Immigration Appeals, charged with the responsibility of administering and interpreting immigration statutes,<sup>10</sup> waited eleven years to fill these statutory gaps. When it did act in April 2007, the Board—failing to acknowledge the constitutional implications of its decision—established that the government must prove that a noncitizen knowingly filed a frivolous asylum application by a preponderance of the evidence,<sup>11</sup> a burden of proof inconsistent with due process requirements.<sup>12</sup> The federal courts have yet to remedy this error. Because the federal government has failed to establish evidentiary standards that comport with due process, application of this statutory provision constitutes a violation of an asylum seeker’s constitutional rights. The deprivation of rights is amplified by the permanent and severe nature of the sanction, which may lead to the direst of consequences.

In the current political climate—amid post-9/11 national security concerns<sup>13</sup> and fears of illegal immigrants displacing American jobs<sup>14</sup>—detering and punishing noncitizens who attempt to enter our country through fraudulent means has become a matter of national importance<sup>15</sup>

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Due Process Clause of the Fifth or Fourteenth Amendment.”).

9. See 8 U.S.C. § 1158(d)(6) (2000).

10. See 8 C.F.R. § 1003.1(a), (d)(1) (2007).

11. See *In re Y-L-*, 24 I. & N. Dec. 151, 157–58 (B.I.A. 2007).

12. See *infra* Part II.

13. The 9/11 Commission noted that one “central player” in the attack on September 11, 2001, entered the United States with fraudulent documents and was granted political asylum. See THE NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 72 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf> (discussing Ramzi Yousef). Another coconspirator tried, and failed, to gain political asylum. *Id.* at 177–78 (discussing Ahmed Ressam). The Report found, “Looking back, we can also see that the routine operations of our immigration laws—that is, aspects of those laws not specifically aimed at protecting against terrorism—inevitably shaped al Qaeda’s planning and opportunities.” *Id.* at 384.

14. See, e.g., Lee Roop, *Is Commission Stacked Against Reform?*, HUNTSVILLE TIMES, Sept. 26, 2007, at 1B (“[P]eople say illegal immigrants aren’t just taking unskilled jobs now; they are climbing the skill ladder and doing, for less money, jobs Americans most definitely will do: framing, dry-walling and plumbing, for example.”); Jeremy Redmon, *Day Labor Dispute: Hiring Off the Curb? Not in Marietta; Critics Say Law Violates Key Rights*, ATLANTA J.-CONST., Sept. 20, 2007, at 1B; Letter, *Who Will Defend Our Borders?*, PROVIDENCE J. BULL., Sept. 5, 2007, at B-05.

15. On May 9, 2007, in the First Session of the 110th Congress, Senators Reid, Leahy, Kennedy, Menendez, and Salazar introduced Senate Bill 1348, which would impose significant new sanctions

and a priority of immigration judges evaluating asylum applications.<sup>16</sup> For an immigration judge’s finding of frivolousness to comply with the mandates of the Constitution, federal courts of appeals must reject the Board’s proscribed burden of proof and order immigration courts to provide procedural safeguards consistent with the dictates of *Mathews v. Eldridge*.<sup>17</sup>

This Article demonstrates that, to accord with constitutional guarantees, the government must prove by clear and convincing evidence that a noncitizen knowingly filed a fraudulent asylum application. This heightened evidentiary standard provides asylum seekers with a vital safeguard to protect their fundamental liberty interests and is generally consistent with the limited body of federal appellate case law that has developed in this area. Part I of the Article provides an overview of the asylum application process, the statutory and regulatory structure governing findings of frivolousness, and the judicial framework that has developed around § 1158(d)(6). Part II assesses the liberty interests at stake in determinations that a noncitizen has filed a frivolous asylum application, applies the balancing test of *Mathews v. Eldridge* to determine that increased procedural safeguards are necessary, and concludes that only the clear and convincing standard satisfies due process. Part III advocates that certain types of evidence should satisfy elements of § 1158(d)(6), while others should be held ineligible as a matter of law. It also evaluates the case law applying § 1158(d)(6) and measures the case law’s compatibility with a heightened evidentiary standard.

## I. LEGAL FRAMEWORK FOR FILING ASYLUM APPLICATIONS

Having a rudimentary understanding of the relevant legal framework governing asylum proceedings is useful in comprehending the import of

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on noncitizens who file fraudulent asylum applications. See Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_bills&docid=f:s1348pcs.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s1348pcs.txt.pdf).

16. The Second Circuit has noted that frivolousness determinations are possible in a high volume of cases. *Liu v. U.S. Dep’t of Justice*, 455 F.3d 106, 117 (2d Cir. 2006). And the Third Circuit has highlighted the proclivity of certain immigration judges to find applications frivolous under 8 U.S.C. § 1158(d)(6). See *Cham v. Att’y Gen. of the U.S.*, 445 F.3d 683, 690 n.5 (3d Cir. 2006) (“We cannot ignore the fact that Judge Ferlise typically finds asylum applications ‘frivolous,’ and the BIA typically reverses that finding.”).

17. 424 U.S. 319, 334 (1976).

frivolousness determinations.<sup>18</sup> This Part outlines the contours of the asylum application process, the statutory and regulatory structure underlying findings of frivolousness, and the nascent case law interpreting and applying § 1158(d)(6). Unlike the detailed legal structure governing asylum, the standards governing frivolousness are contained within a single sentence of statutory text and a paragraph in the *Code of Federal Regulations*.<sup>19</sup> Therefore, the Board and federal courts have had the responsibility of developing guidelines for the consistent and fair application of the statutory provision.

Until April 2007, neither Congress, nor the Board, nor any federal court had elucidated what evidentiary standards govern frivolousness determinations. The Board recently specified that the government must establish by a preponderance of the evidence that an alien knowingly filed a fraudulent asylum application.<sup>20</sup> The federal courts have yet to review the constitutionality of this standard. It appears that the constitutional sufficiency of the preponderance standard for frivolousness findings has not been raised by an asylum applicant on appeal to date.

### A. *Statutory and Regulatory Framework*

Congress and the Board of Immigration Appeals have provided an intricate burden-shifting framework for determining whether a noncitizen alleging persecution within his home country merits asylum.<sup>21</sup> Because a person fleeing persecution is unlikely to possess tangible proof of that persecution,<sup>22</sup> an immigration judge's assessment of

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18. For a detailed, yet concise, explanation of the legal framework of immigration control in the United States, see TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), SYRACUSE UNIV., TRAC IMMIGRATION REPORT: THE ASYLUM PROCESS, <http://trac.syr.edu/immigration/reports/159/> (last visited Oct. 19, 2007) [hereinafter TRAC ASYLUM PROCESS]. The TRAC website includes a helpful diagram to illustrate the decision-making process for affirmative and defensive methods of seeking asylum. *Id.* Other useful overviews of the asylum process include Chris Nwachukwu Okeke & James A.R. Nafziger, *United States Migration Law: Essentials for Comparison*, 54 AM. J. COMP. L. 531 (Supp. 2006); Anwen Hughes, *Asylum and Withholding of Removal—A Brief Overview of the Substantive Law*, in BASIC IMMIGRATION LAW 2006, at 289 (PLI Corp. Law & Practice, Course Handbook Series No. 1535, 2006) (providing an overview of asylum law before the enactment of the REAL ID Act).

19. See 8 C.F.R. § 208.20 (2007); *id.* § 1208.20.

20. *In re Y-L-*, 24 I. & N. Dec. 151, 158 (B.I.A. 2007).

21. See 8 U.S.C. § 1158 (2000 & Supp. V 2005); 8 C.F.R. § 1208.13.

22. See *Turcios v. INS*, 821 F.2d 1396, 1402 (9th Cir. 1987) (“Authentic refugees rarely are able to offer direct corroboration of specific threats or specific incidents of persecution.”).

whether an immigrant qualifies as a “refugee” often depends on subjective credibility determinations.<sup>23</sup> Since 1996, if an immigration judge believes that an alien has knowingly filed a fraudulent claim for asylum, he can impose a permanent bar on that alien’s receipt of future immigration benefits, in addition to denying the instant claim for refuge.<sup>24</sup> Appellate courts review a denial of asylum and the factual determinations underlying a frivolousness finding for substantial evidence, a highly deferential standard of review.<sup>25</sup>

### *1. Asylum Application Process*

Congress promulgated 8 U.S.C. § 1158, the portion of the United States Code that governs grants of asylum,<sup>26</sup> as a means of fulfilling its treaty obligations. In 1968, the United States acceded to the 1967 United Nations Protocol Relating to the Status of Refugees.<sup>27</sup> The Protocol adopted certain articles of the 1951 Convention Relating to the Status of Refugees.<sup>28</sup> The United States thus is bound by that Convention, including its requirement not to expel a person whose life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.<sup>29</sup> In

23. See *infra* Parts I.A.1, II.C.2.

24. See 8 U.S.C. § 1158(d)(6) (2000); see also *Aziz v. Gonzales*, 478 F.3d 854 (8th Cir. 2007); *Mingkid v. U.S. Att’y Gen.*, 468 F.3d 763 (11th Cir. 2006); *Kifleyesus v. Gonzales*, 462 F.3d 937 (8th Cir. 2006); *Liu v. U.S. Dep’t of Justice*, 455 F.3d 106 (2d Cir. 2006); *Chen v. Gonzales*, 447 F.3d 468 (6th Cir. 2006); *Scheerer v. U.S. Att’y Gen.*, 445 F.3d 1311 (11th Cir. 2006); *Alexandrov v. Gonzales*, 442 F.3d 395 (6th Cir. 2006); *Ignatova v. Gonzales*, 430 F.3d 1209 (8th Cir. 2005); *Selami v. Gonzales*, 423 F.3d 621 (6th Cir. 2005); *Muhanna v. Gonzales*, 399 F.3d 582 (3d Cir. 2005); *Farah v. Ashcroft*, 348 F.3d 1153 (9th Cir. 2003); *Efe v. Ashcroft*, 293 F.3d 899 (5th Cir. 2002); *Barreto-Claro v. U.S. Att’y Gen.*, 275 F.3d 1334 (11th Cir. 2001).

25. See *Kifleyesus*, 462 F.3d at 945; *Ignatova*, 430 F.3d at 1214. But see *Barreto-Claro*, 275 F.3d at 1338 (applying a *de novo* standard of review); *Scheerer*, 445 F.3d at 1317 (same).

26. See 8 U.S.C. § 1158(b)(1)(A) (2000 & Supp. V 2005) (eligibility for asylum); 8 U.S.C. § 1101(a)(42)(A) (2000) (definition of refugee).

27. KELLY JEFFERYS, OFFICE OF IMMIGRATION STATISTICS, DEP’T OF HOMELAND SEC., 2006 ANNUAL FLOW REPORT, REFUGEES AND ASYLEES: 2005 2, 4 (2006), [http://www.dhs.gov/xlibrary/assets/statistics/publications/Refugee\\_Asylee\\_5.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/Refugee_Asylee_5.pdf) (outlining the asylum and refugee process); see also *Okeke & Nafziger*, *supra* note 18, at 532–33.

28. See *Okeke & Nafziger*, *supra* note 18, at 532–33.

For the text of the Protocol, see Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (incorporating by reference the terms of the Convention). The parties to the Protocol agreed to apply Articles 2 through 34 of the 1951 Convention. *Id.*

29. Convention Relating to the Status of Refugees, art. 33, 11 (1951), available at [http://www.unhcr.ch/html/menu3/b/o\\_c\\_ref.htm](http://www.unhcr.ch/html/menu3/b/o_c_ref.htm).



addition, “[t]he expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law.”<sup>30</sup> Congress translated the requirements of the Convention into statutory law through the Refugee Act of 1980, which established a process for granting asylum.<sup>31</sup>

From 1980 to 2004, nearly 1.7 million individuals applied for asylum from within the United States.<sup>32</sup> Resident noncitizens may apply affirmatively for asylum through a United States Citizenship and Immigration Services (USCIS) asylum officer,<sup>33</sup> or, if apprehended, may apply defensively through an immigration judge as part of a removal hearing.<sup>34</sup> Immigration judges typically grant about twenty percent of asylum applications: in fiscal year 2005, immigration judges received 50,753 asylum applications and granted asylum in 10,164 instances.<sup>35</sup> More than forty percent of the individuals granted asylum were citizens of China, Columbia, or Haiti,<sup>36</sup> and nearly sixty percent were younger

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30. *Id.* at art. 32.

31. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.); see JEFFREYS, *supra* note 27, at 4.

32. Migration Policy Institute, Analyzing Asylum Applications, <http://www.migrationinformation.org/datahub/asylum.cfm> (select “[t]otal number of asylum applications submitted, by country of destination”).

33. To apply for asylum through an USCIS asylum officer, the alien must file a Form I-589—an Application for Asylum and for Withholding of Removal—within one year of the date she last arrived in the United States. JEFFREYS, *supra* note 27, at 4. If the USCIS denies the application for asylum, the applicant is referred to the Executive Office for Immigration Review (EOIR) for removal proceedings. *Id.*

A noncitizen also may request asylum at a port of entry. Jeanne Batalova, Migration Policy Institute, *Spotlight on Refugees and Asylees in the United States* (Aug. 2006), <http://www.migrationinformation.org/USfocus/display.cfm?ID=415>. An alien who requests asylum in this manner usually is referred to the USCIS for a “credible fear” interview to determine whether she is eligible to apply for asylum. *Id.*; see also JEFFREYS, *supra* note 27, at 4. If the USCIS determines that the alien has a credible fear of returning to her country of origin, then it refers the case to an immigration judge. Batalova, *supra*.

34. Batalova, *supra* note 33, at 2.

35. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (EOIR), U.S. DEP’T OF JUSTICE, IMMIGRATION COURTS FY 2005 ASYLUM STATISTICS 9 (2005), <http://www.usdoj.gov/eoir/efoia/FY05AsyStats.pdf>. In fiscal year 2004, immigration judges received 59,609 asylum applications and granted asylum in 10,839 cases. EOIR, U.S. DEP’T OF JUSTICE, IMMIGRATION COURTS FY 2004 ASYLUM STATISTICS 9 (2004), <http://www.usdoj.gov/eoir/efoia/FY04AsyStats.pdf>; see also Susan Kyle et al., *Statistical Report on Immigration Court Proceedings, FY 2000–2004* in REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME II: EXPERT REPORTS 383, 415–16 (2005), available at [http://www.uscirf.gov/countries/global/asylum\\_refugees/2005/february/immigrationCourtStats.pdf](http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/immigrationCourtStats.pdf) (reporting on immigration court proceedings for fiscal years 2000 to 2004).

36. JEFFREYS, *supra* note 27, at 5. Specifically, 3008 asylees were from China, 1150 from

than age thirty-five.<sup>37</sup> The few frivolousness findings that have been reviewed by circuit courts were made in the context of removal proceedings.

Immigration judges, who are trial-level adjudicators within the Executive Office for Immigration Review (EOIR) of the Department of Justice,<sup>38</sup> preside over removal proceedings.<sup>39</sup> The Department of Homeland Security assigns an attorney to represent the government’s interest.<sup>40</sup> The noncitizen has the privilege of representation by counsel of his choosing at no expense to the government<sup>41</sup> and must be afforded a reasonable opportunity to present witnesses and evidence,<sup>42</sup> examine evidence against him,<sup>43</sup> cross-examine witnesses presented by the government,<sup>44</sup> and receive assistance from an interpreter.<sup>45</sup>

Columbia, and 653 from Haiti. *Id.* (Table 8). In addition, 608 individuals were from Albania, 374 from Indonesia, 310 from India, 268 from Armenia, 264 from Ethiopia, 263 from Cameroon, and 257 from Guinea. *Id.* The 4582 additional asylees originated from various other countries. *Id.*

37. *Id.* (Table 9). Fifteen percent of asylees in 2005 were seventeen years or younger, thirteen percent were between ages eighteen and twenty-four, and twenty-nine percent were between ages twenty-five and thirty-four. *Id.* An additional twenty-seven percent of asylees were between ages thirty-five and forty-four, while eleven percent were between ages forty-five and fifty-four. *Id.*

38. See 8 C.F.R. § 1003.10 (2007). There are more than 200 immigration judges located in fifty-three immigration courts across the country. EOIR, FACT SHEET: FORMS OF RELIEF FROM REMOVAL 1 (2004), <http://www.usdoj.gov/eoir/press/04/ReliefFromRemoval.htm> [hereinafter FACT SHEET].

39. 8 U.S.C. § 1229a(a)(1), (b)(1) (2000). Immigration judges may handle as many as 20,000 cases a year. Nina Bernstein, *New York’s Immigration Courts Lurch Under a Growing Burden*, N.Y. TIMES, Oct. 8, 2006, at B2. In New York, judges schedule thirty to seventy cases at a time, hold four contested hearings a day, and decide more than fifteen cases a week. *Id.* An unpublished report in 2000 by a Justice Department evaluation team cautioned that New York judges were “reaching the point of exhaustion and burnout.” *Id.* In an April 2006 hearing before the Senate Judiciary Committee, the Chief Judge of the Second Circuit, John M. Walker, Jr., urged the Committee to double the number of immigration judges and testified, “I fail to see how immigration judges can be expected to make thorough and competent findings of fact and conclusions of law under these circumstances.” *Id.*

40. 8 C.F.R. § 1240.2 (service counsel) (2007); see also *id.* § 100.2 (organization and functions); *id.* § 1240.10(d) (removal hearing). In 2002, Congress abolished the Immigration and Naturalization Service (INS) and transferred its functions to the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified in scattered titles of the U.S. Code).

41. See 8 U.S.C. § 1229a(b)(4)(A); see also 8 C.F.R. § 1240.3; *id.* § 1240.10(a)(1), (2), (3).

42. 8 U.S.C. § 1229a(b)(4)(B); 8 C.F.R. § 1240.10(a)(4).

43. 8 U.S.C. § 1229a(b)(4)(B); 8 C.F.R. § 1240.10(a)(4).

44. 8 U.S.C. § 1229a(b)(4)(B); 8 C.F.R. § 1240.10(a)(4).

45. Noncitizens have a due process right to an accurate translation of removal proceedings. See, e.g., *Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000) (“It is long-settled that a competent translation is fundamental to a full and fair hearing. If an alien does not speak English, deportation

To establish that an individual should be removed, the government must demonstrate by clear and convincing evidence<sup>46</sup> that the person is not a citizen or national of the United States and that he is unlawfully present in the United States.<sup>47</sup> In most asylum cases, the alien concedes that he is removable and requests asylum as a form of discretionary relief.<sup>48</sup> Therefore, in such cases, when an immigration judge denies an application for asylum, the alien is removed on the basis of his admission that he meets the statutory criteria for removal.

The asylum seeker bears the burden of establishing by a preponderance of the evidence that she qualifies as a “refugee,” a person who is unable or unwilling to return to her native country because of persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion (“enumerated grounds”).<sup>49</sup> If an applicant establishes past persecution, then a rebuttable presumption arises that she has a well-founded fear of future persecution.<sup>50</sup> The government may rebut the presumption by demonstrating by a preponderance of the evidence that conditions in the applicant’s native country have changed such that she no longer has a well-founded fear of persecution or that the applicant could avoid persecution by relocating to another part of the country.<sup>51</sup> If

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proceedings must be translated into a language the alien understands. Moreover, an incorrect or incomplete translation is the functional equivalent of no translation: the alien must be able to understand the questions posed to him and to communicate his answers to the IJ.” (internal citations omitted)); *Matter of Tomas*, 19 I. & N. Dec. 464, 465–66 (B.I.A. 1987) (holding that, where the respondents cannot speak English fluently, the presence of a competent interpreter is essential for their meaningful participation in certain phases of the hearing). Immigration regulations also call for an accurate translation. *See* 8 C.F.R. § 1240.5 (2007) (“Any person acting as an interpreter in a hearing before an immigration judge under this part shall be sworn to interpret and translate accurately, unless the interpreter is an employee of the United States Government, in which event no such oath shall be required.”).

46. *Id.* § 1240.8 (burden of proof); *Woodby v. INS*, 385 U.S. 276, 286 (1966) (holding that the government bears the burden of establishing by clear, unequivocal, and convincing evidence that all facts alleged as grounds for deportation are true before a resident alien may be deported).

47. *See* 8 U.S.C. § 1182(a)(6)(A)(i) (2000).

48. *See* FACT SHEET, *supra* note 38, at 2–3 (describing forms of discretionary relief from removal, including grant of asylum).

49. *See* 8 U.S.C. § 1158(b)(1)(A) (2000 & Supp. V 2005) (eligibility for asylum); *id.* § 1158(b)(1)(B) (burden of proof); 8 U.S.C. § 1101(a)(42)(A) (2000) (definition of refugee). Though the statute does not specify a particular burden of proof, *see* 8 U.S.C. § 1158(b)(1)(B), the Board of Immigration Appeals (BIA) has held that an alien must establish eligibility for asylum by a preponderance of the evidence. *Matter of Acosta*, 19 I. & N. Dec. 211, 215 (B.I.A. 1985).

50. 8 C.F.R. § 1208.13(b)(1).

51. *Id.* § 1208.13(b)(1)(i), (ii).

the government rebuts the presumption, the noncitizen is not barred from a grant of asylum so long as she demonstrates compelling reasons for being unwilling to return to her native country due to the severity of past persecution or that there is a reasonable possibility that she may suffer other serious harm upon removal.<sup>52</sup>

Alternatively, a noncitizen may qualify for asylum by demonstrating a reasonable probability of future persecution on account of an enumerated ground.<sup>53</sup> The Supreme Court has held that as little as a ten percent chance of being “shot, tortured, or otherwise persecuted” may establish that an asylum applicant has a well-founded fear of future persecution.<sup>54</sup> To demonstrate a well-founded fear, an asylum applicant must establish that her fear of persecution is both subjectively genuine and objectively reasonable.<sup>55</sup> An applicant does not have a well-founded fear if she could avoid persecution by relocating to another part of her home country.<sup>56</sup> The noncitizen must provide evidence of a reasonable possibility that she would be singled out for persecution, unless she establishes that (1) there is a pattern or practice in her country of persecution of a group of persons similarly situated to her on account of an enumerated ground, and (2) she is included in, and identified with, that group of persons.<sup>57</sup>

In determining whether an asylum applicant has met her burden of proof, the immigration judge may weigh her credible testimony along

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52. *Id.* § 1208.13(b)(1)(iii).

53. *Id.* § 1208.13(b)(2).

54. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987). The Board of Immigration Appeals has found that the following conditions must be met to establish a well-founded fear of future persecution:

(1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.

*Matter of Mogharrabi*, 19 I. & N. Dec. 439, 446 (B.I.A. 1987) (quoting *Matter of Acosta*, 19 I. & N. Dec. 211, 212 (B.I.A. 1985)).

55. *See, e.g., Velarde v. INS*, 140 F.3d 1305, 1309 (9th Cir. 1998).

56. 8 C.F.R. § 1208.13(b)(2)(ii). If the persecutor is a government or is government-sponsored, or if the applicant has established past persecution, the immigration judge must presume that internal relocation would not be reasonable, unless the government establishes by a preponderance of the evidence that it would be reasonable for the applicant to relocate. *Id.* § 1208.13(b)(3)(ii). If the applicant has not established past persecution, then she bears the burden of establishing that it would not be reasonable for her to relocate, unless the persecution is by a government or is government-sponsored. *Id.* § 1208.13(b)(3)(i).

57. *Id.* § 1208.13(b)(2)(iii).

with other evidence of record.<sup>58</sup> Recognizing that a person fleeing persecution is unlikely to possess documents establishing that persecution,<sup>59</sup> asylum regulations provide that the testimony of an asylum applicant may suffice to sustain her burden of proof without corroboration, “but only if the applicant satisfies the trier of fact that [her] testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that [she] is a refugee.”<sup>60</sup>

An immigration judge may find an asylum applicant’s testimony not to be credible. Such an adverse credibility finding may be based

on the demeanor, candor, or responsiveness of the applicant . . . , the inherent plausibility of the applicant’s . . . account, the consistency between the applicant’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 . . . , 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.<sup>61</sup>

An adverse credibility determination must be supported by a specific, cogent reason in the record and cannot be based on speculation.<sup>62</sup> The reason supplied by the immigration judge “must be substantial and must

58. 8 U.S.C. § 1158(b)(1)(B)(ii) (2000 & Supp. V 2005).

59. *See Turcios v. INS*, 821 F.2d 1396, 1402 (9th Cir. 1987). The Ninth Circuit has explained that requiring corroboration would be unreasonable in light of the circumstances of refugees:

We recognize that omitting a corroboration requirement may invite those whose lives or freedom are not threatened to manufacture evidence of specific danger. But the imposition of such a requirement would result in the deportation of many people whose lives genuinely are in jeopardy. Authentic refugees rarely are able to offer direct corroboration of specific threats. It is difficult to imagine what other forms of testimony the petitioners could present other than their own statements. Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.

*Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) (internal alteration, quotation, and citations omitted).

60. 8 U.S.C. § 1158(b)(1)(B)(ii); *see also* 8 C.F.R. § 1208.13(a).

61. 8 U.S.C. § 1158(b)(1)(B)(iii). This standard was promulgated in the REAL ID Act of 2005, and applies to all asylum applications filed on or after May 11, 2005. *See* REAL ID Act of 2005 § 101(h)(2) Pub. L. No. 109-13, 119 Stat. 231 (2005).

62. *See Cordero-Trejo v. INS*, 40 F.3d 482, 487 (1st Cir. 1994); *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1256 (9th Cir. 1992) (“An [immigration judge]’s credibility findings are given substantial deference by the reviewing court, but must be supported by a ‘specific, cogent reason’ for the disbelief.” (quoting *Turcios v. INS*, 821 F.2d 1396, 1399 (9th Cir. 1987))).

bear a legitimate nexus to the finding.”<sup>63</sup> Minor inconsistencies that do not relate to the basis of the asylum applicant’s fear of persecution or go to the heart of her asylum claim are insufficient to support an adverse credibility finding.<sup>64</sup> So long as one of the grounds identified by the immigration judge as the basis for an adverse credibility determination is supported by substantial evidence, a reviewing court must accept it.<sup>65</sup> The immigration court must provide an asylum applicant with a reasonable opportunity to explain any perceived inconsistencies that form the basis of a denial of asylum.<sup>66</sup> An adverse credibility finding typically is fatal to a noncitizen’s application for relief from removal.

## 2. *Sanction for Filing a Frivolous Asylum Application*

In this statutory and regulatory context, Congress added a sanction for the filing of a frivolous asylum application. Section 1158(d)(6) of Title 8 of the United States Code provides:

If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.<sup>67</sup>

Accompanying regulations specify that “an asylum application is frivolous if any of its material elements is deliberately fabricated.”<sup>68</sup> Before an immigration judge may make a frivolousness finding, he must provide the asylum applicant with “sufficient opportunity to account for any discrepancies or implausible aspects of [his] claim.”<sup>69</sup>

63. *Aguilera-Cota v. INS*, 914 F.2d 1375, 1381 (9th Cir. 1990).

64. *See Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir. 2003).

65. *See Li v. Ashcroft*, 378 F.3d 959, 964 (9th Cir. 2004) (citing *Wang v. INS*, 352 F.3d 1250, 1259 (9th Cir. 2003)) (affirming a negative credibility finding even though some factors were factually unsupported or irrelevant).

66. *Chen v. Ashcroft*, 362 F.3d 611, 618 (9th Cir. 2004) (reversing a negative credibility finding in part because the alien was denied a reasonable opportunity to explain a perceived inconsistency); *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999) (reversing a negative credibility finding because the alien was denied a reasonable opportunity to explain a perceived inconsistency).

67. 8 U.S.C. § 1158(d)(6) (2000). Section 1158(d)(4)(A) states that, at the time of filing an application for asylum, the Attorney General shall “advise the alien of the privilege of being represented by counsel and of the consequences . . . of knowingly filing a frivolous application for asylum . . . .” *Id.* § 1158(d)(4)(A).

68. 8 C.F.R. § 208.20 (2007); *see also id.* § 1208.20.

69. 8 C.F.R. § 208.20; *see also id.* § 1208.20.

Neither the statute nor its implementing regulations provide which party bears the burden of proof or what evidentiary standard that party must satisfy to support a frivolousness finding under § 1158(d)(6).<sup>70</sup> The statutory and regulatory framework suggests that five elements must be established:<sup>71</sup> a noncitizen must have (1) deliberately (2) fabricated (3) a material element of his asylum application, and he must have received (4) a sufficient opportunity to address the perceived problems with his claim for asylum and (5) notice of the consequences of a finding under § 1158(d)(6).<sup>72</sup> A frivolousness finding, which may be made upon the government's motion, may also be made *sua sponte* by an immigration judge.<sup>73</sup> In each of the federal cases reviewing frivolousness findings, the immigration judge had determined that the alien was not a credible witness and had made an explicit adverse credibility finding.<sup>74</sup>

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70. The Supreme Court held that, when a statute does not include a specific burden of proof for an adjudicatory proceeding, courts must look to § 7 of the Administrative Procedure Act (APA). *Steadman v. SEC*, 450 U.S. 91, 96–97 (1981). Section 7(c) provides that “[a] sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C. § 556(d) (2000). The Supreme Court concluded that § 7(c) of the APA “was intended to establish a standard of proof and that the standard adopted is the traditional preponderance-of-the-evidence standard.” *Steadman*, 450 U.S. at 102.

However, Congress deliberately excluded deportation proceedings from the APA. See *Marcello v. Bonds*, 349 U.S. 302, 306–10 (1955) (holding that deportation proceedings are governed solely and exclusively by regulations promulgated under the Immigration and Naturalization Act, although the APA served as a model for such regulations); accord *Hashim v. INS*, 936 F.2d 711, 713 (2d Cir. 1991); *Escobar v. INS*, 935 F.2d 650, 651 (4th Cir. 1991). But see *Escobar Ruiz v. INS*, 838 F.2d 1020, 1023–25 (9th Cir. 1988) (en banc) (holding that exclusion and deportation proceedings are “adversary adjudications” within the meaning of the APA).

71. See *Liu v. U.S. Dep’t of Justice*, 455 F.3d 106, 112–13 (2d Cir. 2006) (listing three elements of a frivolousness finding).

72. See *id.* This Article focuses on the three elements of intent, fabrication, and materiality. It does not address the fourth element that requires an immigration judge to provide the alien with an opportunity to address the inconsistencies that underlie a frivolousness finding. See *Farah v. Ashcroft*, 348 F.3d 1153, 1158 (9th Cir. 2003) (holding that an alien must be provided an opportunity to account for all discrepancies before an immigration judge may impose a finding under § 1158(d)(6)). Nor does this Article address the additional requirement of 8 U.S.C. § 1158(d)(6) and 8 C.F.R. § 208.20 that the alien be provided notice of the consequences of a frivolousness finding.

73. See *In re Y-L-*, 24 I. & N. Dec. 151, 160 (B.I.A. 2007).

74. See *Luciana v. Att’y Gen. of the U.S.*, No. 05-3544, 2007 WL 2696865, at \*6 (3d Cir. Sept. 17, 2007) (framing the mixed credibility finding as hypothetical, since the asylum application was time-barred); *Biao Yang v. Gonzales*, 496 F.3d 268, 271–74 (2d Cir. 2007); *Aziz v. Gonzales*, 478 F.3d 854, 858 (8th Cir. 2007); *Mingkid v. U.S. Att’y Gen.*, 468 F.3d 763, 767 (11th Cir. 2006); *Kifleyesus v. Gonzales*, 462 F.3d 937, 942 (8th Cir. 2006); *Liu*, 455 F.3d at 109; *Chen v. Gonzales*, 447 F.3d 468, 471 (6th Cir. 2006); *Scheerer v. U.S. Att’y Gen.*, 445 F.3d 1311, 1318 (11th Cir. 2006); *Alexandrov v. Gonzales*, 442 F.3d 395, 403 (6th Cir. 2006); *Sterkaj v. Gonzales*, 439 F.3d

A finding that a noncitizen knowingly filed a frivolous asylum application imposes a permanent bar on the receipt of any future immigration benefits.<sup>75</sup> Typically, if a noncitizen is denied asylum, she may be eligible to apply for other forms of relief at the removal hearing,<sup>76</sup> such as voluntary departure,<sup>77</sup> cancellation of removal,<sup>78</sup> or adjustment of status.<sup>79</sup> In addition, a removed noncitizen may later apply for asylum<sup>80</sup> or other immigration benefits.<sup>81</sup> But, once a finding of

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273, 275–78 (6th Cir. 2006); *Ignatova v. Gonzales*, 430 F.3d 1209, 1212 (8th Cir. 2005); *Selami v. Gonzales*, 423 F.3d 621, 622, 624–25 (6th Cir. 2005); *Muhanna v. Gonzales*, 399 F.3d 582, 589 (3d Cir. 2005); *Farah*, 348 F.3d at 1156; *Efe v. Ashcroft*, 293 F.3d 899, 902 (5th Cir. 2002); *Barreto-Claro v. U.S. Att’y Gen.*, 275 F.3d 1334, 1337 (11th Cir. 2001); *see also* 8 U.S.C. § 1158(b)(1)(B)(iii) (2000 & Supp. V 2005) (credibility determination).

75. The alien may still be eligible for withholding of removal or similar temporary protections where a deportation would result in dire persecutions. 8 C.F.R. § 208.20 (2007) (“For purposes of this section, a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal.”). To establish eligibility for withholding of removal, an applicant must meet a more stringent standard of proof than for asylum. *Fedunyak v. Gonzales*, 477 F.3d 1126, 1130 (9th Cir. 2007) (citing *Navas v. INS*, 217 F.3d 646, 655 (9th Cir. 2000)). An applicant may qualify for withholding in two ways. First, the applicant may prove past persecution on the basis of an enumerated ground. 8 C.F.R. § 1208.16(b)(1). Second, the applicant may demonstrate that “it is more likely than not that he or she would be persecuted” upon removal. *Id.* § 1208.16(b)(2). A finding of frivolousness precludes all other forms of immigration relief. *See* 8 U.S.C. § 1158(d)(6) (2000).

76. *See* FACT SHEET, *supra* note 38, at 1–4 (describing forms of discretionary, administrative, and judicial relief from removal).

77. Voluntary departure is the most common form of relief from removal. *Id.* at 1. Voluntary departure allows an otherwise removable noncitizen to depart the United States at her expense. *Id.* at 1–2; 8 U.S.C. § 1229c(a)(1) (2000). Aliens granted voluntary departure must depart within the time specified by the immigration judge, which is usually 120 days if granted voluntary departure prior to the completion of removal proceedings, *see id.* § 1229c(a)(2)(A), or sixty days if granted relief at the conclusion of the proceedings. *See id.* § 1229c(b)(2); FACT SHEET, *supra* note 38, at 2.

78. Cancellation of removal may be granted if an alien (1) has been physically and continuously present in the United States for at least ten years, (2) has been a person of good moral character during such period, (3) has not been convicted of certain offenses, and (4) demonstrates that removal would result in exceptional and extremely unusual hardship to her immediate family members who are either United States citizens or lawful permanent residents. *See* 8 U.S.C. § 1229b(b)(1) (2000 & Supp. V 2005); FACT SHEET, *supra* note 38, at 1–2.

79. An alien may apply to an immigration judge to change his status from a non-immigrant to a lawful permanent resident through adjustment of status, if he satisfies certain conditions. *See* 8 U.S.C. § 1255(i), (j) (2000). In particular, the alien must be admissible for permanent residence, and an immigrant visa must be immediately available at the time of application. *Id.* Spouses (or other family members) or employers may petition for an alien’s adjustment of status. *See id.*; FACT SHEET, *supra* note 38, at 3.

80. An alien who previously has been denied asylum may not apply for asylum in the future unless she demonstrates the existence of changed circumstances that materially affect her eligibility for asylum. *See* 8 U.S.C. § 1158(a)(2)(D) (2000).

81. *See id.* § 1182(a)(9)(A), (B)(i)(II) (providing that an alien who has been removed may not



frivolousness has become final, the noncitizen is ineligible for any relief from removal or for other immigration benefits, during the removal process or in the future.<sup>82</sup>

### 3. *Appellate Procedures*

Once an immigration judge has found that a noncitizen knowingly filed a frivolous asylum application under § 1158(d)(6), the alien may appeal that finding to the Board of Immigration Appeals.<sup>83</sup> Like immigration judges, the Board is a part of the EOIR.<sup>84</sup> Under governing regulations, “[f]acts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.”<sup>85</sup> The Board reviews questions of law, discretion, and judgment *de novo*.<sup>86</sup> It may dismiss or sustain an appeal, remand the case to the immigration judge, or, in rare cases, refer the case to the Attorney General for a decision.<sup>87</sup> Precedent of the Board is binding on immigration judges and the Department of Homeland Security unless the Attorney General modifies the Board’s decision.<sup>88</sup>

In addition to serving an appellate function, the Board also comprises the highest administrative body with the authority to interpret immigration law.<sup>89</sup> The Board is charged with providing guidance to the Department of Homeland Security, immigration judges, and the general public on the proper application of immigration statutes.<sup>90</sup> It also has the obligation to fill any statutory gaps.<sup>91</sup> From the effective date of 8 U.S.C.

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apply for certain benefits within five or ten years of removal, depending on certain conditions); *id.* § 1182(a)(9)(B)(i)(I) (providing that an alien who voluntarily departs may reapply for benefits after three years).

82. 8 U.S.C. § 1158(d)(6) (2000).

83. 8 C.F.R. § 1003.38(a) (2007) (appeals to Board of Immigration Appeals); *id.* § 1240.15 (same); *see id.* § 1003.1(b)(3), (9) (appellate jurisdiction of Board of Immigration Appeals over orders of removal and asylum decisions).

84. *See id.* § 1003.1(a)(1). The Board is comprised of fifteen members. *Id.* § 1003.1(a)(1).

85. *Id.* § 1003.1(d)(3)(i).

86. *Id.* § 1003.1(d)(3)(ii).

87. FACT SHEET, *supra* note 38, at 3.

88. *Id.* at 3–4.

89. *Id.* at 3.

90. *See* 8 C.F.R. § 1003.1(d)(1).

91. Deference to the Board’s reasonable interpretation of an immigration statute is mandated by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844–45 (1984). *See also* Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676 (2007)

§ 1158(d)(6) in 1996 until late April 2007, the Board summarily affirmed or denied, without elucidation, the few findings of frivolous asylum applications that were challenged on appeal.<sup>92</sup>

When the Board affirms a frivolousness finding, the asylum seeker can appeal the decision to the federal court of appeals for the judicial circuit in which the immigration judge presided.<sup>93</sup> The Immigration and Nationality Act defines the scope and standard of an appellate court’s review of a removal order. The statute provides:

- (A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,
- (B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,
- (C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and
- (D) the Attorney General’s discretionary judgment whether to grant relief under section 1158(a) of this title [providing for asylum] shall be conclusive unless manifestly contrary to the law and an abuse of discretion.<sup>94</sup>

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(explaining problems with *Chevron* deference and advocating for its recasting as a judicial voting rule, which would make agency deference an aggregate property that arises from a set of votes, rather than an internal component of the decision rules used by individual judges); See generally Patrick M. Gany, *Accommodating the Administrative State: The Interrelationship between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921 (2006) (arguing that the evolution of the nondelegation doctrine essentially necessitates the *Chevron* doctrine).

92. The Board first clarified the evidentiary standards that govern frivolousness findings on April 25, 2007. See *In re Y-L-*, 24 I. & N. Dec. 151 (B.I.A. 2007). Before that time, the Board had provided no guidance to assist immigration judges or federal courts. See *Liu v. U.S. Dep’t of Justice*, 455 F.3d 106, 113 (2d Cir. 2006); see, e.g., *Mingkid v. U.S. Att’y Gen.*, 468 F.3d 763, 767, 769 (11th Cir. 2006); *Chen v. Gonzales*, 447 F.3d 468, 471 (6th Cir. 2006); *Alexandrov v. Gonzales*, 442 F.3d 395, 397 (6th Cir. 2006); *Muhanna v. Gonzalez*, 399 F.3d 582, 587 (3d Cir. 2005).

93. See 8 U.S.C. § 1252(b)(2) (2000) (venue); see also *id.* § 1252(a)(1) (providing judicial review from final orders of removal); 8 U.S.C. § 1252(a)(2)(B)(ii) (2000 & Supp. V 2005) (not precluding judicial review from denial of asylum); *id.* § 1252(a)(5) (“[A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter . . .”).

94. *Id.* § 1252(b)(4). These provisions apply unless the noncitizen claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the alien’s nationality is presented. In that case, the court will transfer the proceeding to the district court for the judicial district in which the noncitizen resides for a new hearing on the nationality claim. *Id.*

Appellate courts also review adverse credibility determinations under a highly deferential standard, known as the substantial evidence standard.<sup>95</sup> Like other factual findings, adverse credibility determinations “are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.”<sup>96</sup>

In sum, while Congress and executive agencies have issued detailed guidelines for granting asylum, the legislative and executive branches have provided only a skeletal framework for frivolousness findings under § 1158(d)(6). The statutory and regulatory structure invites immigration judges to exercise wide discretion in denying immigration relief and barring the future receipt of immigration benefits. While Congress has made clear that federal appellate courts may only review immigration judges’ factual findings under a substantial evidence standard, these courts still play an important role in reviewing immigration judges’ decisions and fleshing out the contours of the legal requirements under § 1158(d)(6).

### *B. Judicial Framework for Application of § 1158(d)(6)*

Prior to the Board’s pronouncement in April 2007 of the applicable burden of proof,<sup>97</sup> federal courts of appeals had reviewed fourteen cases involving findings that a noncitizen knowingly filed a frivolous asylum application under § 1158(d)(6).<sup>98</sup> Four circuits had vacated frivolousness

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§ 1252(b)(4); 8 U.S.C. § 1252(b)(5)(B) (2000).

95. *Id.* § 1252(b)(4)(B); *see, e.g.*, *Siewe v. Gonzales*, 480 F.3d 160, 166 (2d Cir. 2007) (“We review the [immigration judge’s] factual findings under the substantial evidence standard—the findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary. When a factual challenge pertains to a credibility finding[,] we afford particular deference in applying the substantial evidence standard, mindful that the law must entrust some official with responsibility to hear an applicant’s asylum claim, and the [immigration judge] has the unique advantage among all officials involved in the process of having heard directly from the applicant.”) (internal quotations omitted); *Mamana v. Gonzales*, 436 F.3d 966, 968 (8th Cir. 2006) (“[A]n [immigration judge]’s adverse credibility findings ‘are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.’”) (citing *Turay v. Ashcroft*, 405 F.3d 663, 668 (8th Cir. 2005)); *Singh v. Ashcroft*, 367 F.3d 1139, 1143 (9th Cir. 2004).

96. 8 U.S.C. § 1252(b)(4)(B).

97. *See In re Y-L-*, 24 I. & N. Dec. at 157.

98. *See Aziz v. Gonzales*, 478 F.3d 854 (8th Cir. 2007); *Mingkid v. U.S. Att’y Gen.*, 468 F.3d 763 (11th Cir. 2006); *Kifleyesus v. Gonzales*, 462 F.3d 937 (8th Cir. 2006); *Liu v. U.S. Dep’t of Justice*, 455 F.3d 106 (2d Cir. 2006); *Chen v. Gonzales*, 447 F.3d 468 (6th Cir. 2006); *Scheerer v. U.S. Att’y Gen.*, 445 F.3d 1311 (11th Cir. 2006); *Alexandrov v. Gonzales*, 442 F.3d 395 (6th Cir. 2006); *Sterkaj v. Gonzales*, 439 F.3d 273 (6th Cir. 2006); *Ignatova v. Gonzales*, 430 F.3d 1209 (8th Cir. 2005); *Selami v. Gonzales*, 423 F.3d 621 (6th Cir. 2005); *Muhanna v. Gonzales*, 399 F.3d 582

findings,<sup>99</sup> and four circuits had upheld them.<sup>100</sup> The circuit courts’ decisions reflect their recognition that § 1158(d)(6) carries severe consequences for asylum seekers and warrants careful review to ensure fair and reliable application. Courts have characterized a finding under § 1158(d)(6) as a “death sentence”<sup>101</sup>—not only because it permanently forecloses any administrative remedies from removal but also because, if imposed erroneously, it could potentially result in a loss of life. Section 1158(d)(6) constitutes “one of the most extreme provisions” in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), in that “the bar once imposed may not be waived under any circumstances.”<sup>102</sup>

Courts have recognized that asylum seekers possess procedural due process rights in the context of § 1158(d)(6).<sup>103</sup> The Second Circuit has gone so far as to opine (but not to hold) that

[r]equiring a more comprehensive opportunity to be heard in the frivolousness context makes sense in light of what is at stake in a frivolousness decision, for both the alien and the government. . . . [W]hat qualifies as a “sufficient opportunity” for the purposes of satisfying the agency regulations governing frivolousness findings would, we would think, have to be *more* ample than what suffices in the ordinary course of asylum proceedings.<sup>104</sup>

No court, however, has held that the application of § 1158(d)(6) in the absence of a specified burden of proof violated noncitizens’ due process rights. Indeed, no opinion indicates that the parties raised this argument or called the court’s attention to the lack of evidentiary standards governing the initial factfinding.<sup>105</sup>

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(3d Cir. 2005); *Farah v. Ashcroft*, 348 F.3d 1153 (9th Cir. 2003); *Efe v. Ashcroft*, 293 F.3d 899 (5th Cir. 2002); *Barreto-Claro v. U.S. Att’y Gen.*, 275 F.3d 1334 (11th Cir. 2001).

99. See *Mingkid*, 468 F.3d 763; *Chen*, 447 F.3d 468; *Scheerer*, 445 F.3d 1311; *Alexandrov*, 442 F.3d 395; *Muhanna*, 399 F.3d 582; *Farah*, 348 F.3d 1153.

100. See *Kifleyesus*, 462 F.3d 937; *Sierkaj*, 439 F.3d 273; *Ignatova*, 430 F.3d 1209; *Selami*, 423 F.3d 621; *Efe*, 293 F.3d 899; *Barreto-Claro*, 275 F.3d 1334.

101. See *Alexandrov*, 442 F.3d at 397 n.1; *Muhanna*, 399 F.3d at 588.

102. *Muhanna*, 399 F.3d at 588 (quoting AUSTIN T. FRAGOMEN, JR., ET AL, IMMIGRATION LEGISLATION HANDBOOK § 8:96 (database updated April 2004) (internal quotation marks omitted)).

103. See *Liu*, 455 F.3d at 114 n.3; *Alexandrov*, 442 F.3d at 404–05, 407; *Muhanna*, 399 F.3d at 589.

104. *Liu*, 455 F.3d at 114 n.3 (citations omitted).

105. The one possible exception is the Second Circuit’s decision in *Liu*. See *id.* at 113. The court noted that “we have no binding circuit law on, *inter alia*, who carries the burden of proof, what

Lacking guidance from the Board of Immigration Appeals, courts were forced to generate standards in the first instance to guide their review.<sup>106</sup> Some appellate courts opined on the standard of review applicable to an immigration judge's frivolousness determination,<sup>107</sup> how definitive the evidence of fabrication must be,<sup>108</sup> how "deliberate"<sup>109</sup> and "material"<sup>110</sup> a fabrication must be, and what constitutes a "sufficient opportunity" to address perceived problems with an asylum claim.<sup>111</sup> Several themes can be gleaned from these cases.

First, several courts interpreted the regulations implementing § 1158(d)(6) to require demonstrable proof of intentional fraud.<sup>112</sup> The decisions affirming frivolousness findings involved tangible evidence of fabrication, such as forged documents offered in support of the asylum seeker's claim of persecution<sup>113</sup> or an admission of falsehood.<sup>114</sup> Two cases vacated § 1158(d)(6) findings because the fraud was not supported

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degree of certainty is required, when an opportunity to be heard will be deemed sufficient, how 'deliberate' and 'material' a fabrication must be, and what deference the [Board] owes to an [immigration judge]'s finding in this context." *Id.*

106. *See id.* at 113–15 (surveying circuit court cases involving frivolousness determinations decided before July 2006).

107. *See Kifleyesus v. Gonzales*, 462 F.3d 937, 945 (8th Cir. 2006) (substantial evidence); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (substantial evidence); *Barreto-Claro v. U.S. Att'y Gen.*, 275 F.3d 1334, 1338–39 (11th Cir. 2001) (*de novo*).

108. *See Liu*, 455 F.3d at 114–15 (reviewing case law and suggesting that "concrete and conclusive evidence of fabrication is needed to warrant a ruling that renders an alien permanently ineligible for immigration benefits in the United States").

109. *See Kifleyesus*, 462 F.3d at 943, 945 (finding that, because the record did not compel an interpretation of petitioner's state of mind contrary to that adopted by the Board, the Board's finding that petitioner's fabrications were intentional sufficed to satisfy the "deliberateness" element of 8 C.F.R. § 208.20).

110. *See Chen v. Gonzales*, 447 F.3d 468, 474–76 (6th Cir. 2006) (dismissing "inconsistencies" in asylum applications as "of only background interest" and as not "germane to the crucial issue in this case").

111. *See Farah v. Ashcroft*, 348 F.3d 1153, 1158 (9th Cir. 2003) (holding that an asylum applicant must be afforded an opportunity to address all evidence of fabrication on which a frivolousness finding is based).

112. *See Liu*, 455 F.3d at 114–15; *Scheerer v. U.S. Att'y Gen.*, 445 F.3d 1311, 1317 (11th Cir. 2006) ("Because the consequences of a finding of frivolousness are so severe . . . [t]he [immigration judge] must first find material aspects of the alien's asylum application were demonstrably false and such fabrications were knowingly and deliberately made.")

113. *See Aziz v. Gonzales*, 478 F.3d 854, 856 & nn.1–2 (8th Cir. 2007); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005); *Selami v. Gonzales*, 423 F.3d 621, 624, 626 (6th Cir. 2005).

114. *See Aziz*, 478 F.3d at 856; *Kifleyesus*, 462 F.3d at 940; *Barreto-Claro v. U.S. Att'y Gen.*, 275 F.3d 1334, 1336–37 (11th Cir. 2001).

by substantial evidence.<sup>115</sup> After reviewing a subset of these cases, the Second Circuit posited that “arguably” the decisions could be read as suggesting that “concrete and conclusive evidence of fabrication is needed” to support a finding of frivolousness.<sup>116</sup> At least one decision, however, indicated that “concrete and conclusive evidence of fabrication”<sup>117</sup> is not requisite to a finding under § 1158(d)(6), but that inconsistencies between an applicant’s testimony and asylum application may suffice.<sup>118</sup>

Second, two circuits have held that an adverse credibility determination, standing alone, cannot support a finding of frivolousness.<sup>119</sup> In *Muhanna v. Gonzales*,<sup>120</sup> the Third Circuit held that

under 8 C.F.R. § 208.20 a finding of frivolousness does not flow automatically from an adverse credibility determination . . . . Inconsistencies between testimony and an asylum application, while certainly relevant to a credibility determination that may result in the denial of an applicant’s asylum claim, do not equate to a frivolousness finding under Section 1158(d)(6), which carries with it much greater consequences.<sup>121</sup>

The Eleventh Circuit followed the Third Circuit in adopting this holding.<sup>122</sup> However, not all courts have examined separately the inconsistencies underlying an adverse credibility determination and those supporting a frivolousness finding. The only opinion to affirm a

115. See *Chen*, 447 F.3d at 476; *Alexandrov v. Gonzales*, 442 F.3d 395, 408–09 (6th Cir. 2006).

116. *Liu*, 455 F.3d at 114 (citing *Efe v. Ashcroft*, 293 F.3d 899, 902 n.1 (5th Cir. 2002)); *Ignatova*, 430 F.3d at 1214; *Selami*, 423 F.3d at 624, 626; *Barreto-Claro*, 275 F.3d at 1339). The court concluded, “Looking at both those cases that have affirmed findings of frivolousness and those that have vacated them, it would not be unreasonable to conjecture that federal courts seem to require a heightened evidentiary standard in evaluating frivolousness.” *Liu*, 455 F.3d at 115. The court did not opine as to what that “heightened evidentiary standard” should be to satisfy due process. *Id.*

117. *Liu*, 455 F.3d at 114.

118. See *Efe*, 293 F.3d at 908 (“We affirm the determination that Efe filed a frivolous application for asylum. Efe has gone back and forth with the facts and misrepresented his case several times. He has also failed to take advantage of ample opportunity to clarify his contradictory testimony.”).

119. See *Mingkid v. U.S. Att’y Gen.*, 468 F.3d 763, 770 (11th Cir. 2006); *Scheerer v. U.S. Att’y Gen.*, 445 F.3d 1311, 1318 (11th Cir. 2006); *Muhanna v. Gonzales*, 399 F.3d 582, 589 (3d Cir. 2005).

120. 399 F.3d 582 (3d Cir. 2005).

121. *Id.* at 589.

122. See *Scheerer*, 445 F.3d at 1318.

frivolousness finding based primarily on testimonial inconsistencies<sup>123</sup> failed to differentiate between the two bodies of evidence.<sup>124</sup>

Finally, the circuits have reached different conclusions as to the proper standard of review for evaluating findings under § 1158(d)(6). Recognizing that an immigration judge's finding must satisfy statutory requirements, the Eleventh Circuit has applied a *de novo* standard of review.<sup>125</sup> The court's review is not without deference, but is tempered with deference to the immigration judge in accordance with *Chevron's* mandate that an agency's reasonable interpretation of a statutory provision it is charged with administering must stand.<sup>126</sup> On the other hand, the Eighth Circuit<sup>127</sup> and, to some degree, the Ninth Circuit<sup>128</sup> have held that the substantial evidence standard<sup>129</sup> governs their review of an immigration judge's findings of inconsistencies, implausibilities, and demeanor underlying a frivolousness determination.

In sum, the fourteen cases that reviewed frivolousness findings before April 2007 failed to produce a consistent or comprehensive body of case law to guide review of immigration judges' findings under § 1158(d)(6). These cases did not acknowledge that neither Congress nor the Board of

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123. See *Efe*, 293 F.3d at 908; cf. *Chen v. Gonzales*, 447 F.3d 468, 476 (6th Cir. 2006) (vacating the finding of frivolousness after rejecting inconsistencies and indicia of implausibility identified by the immigration judge because they were unsupported by substantial evidence, but not suggesting that, if these inconsistencies and implausibilities had been valid, they would have been insufficient as a matter of law to support a frivolousness determination); *Mingkid*, 468 F.3d at 769–70 (vacating a frivolousness finding because the immigration judge failed to find that the petitioner deliberately fabricated a material element of his asylum application, but not criticizing the fact that the frivolousness finding was based solely on inconsistencies in the petitioner's testimony).

124. See *Efe*, 293 F.3d 899. The court repeatedly alluded to the great deference accorded to an immigration judge's credibility determinations and declared that it "cannot replace the Board or [immigration judge]'s determinations concerning witness credibility or ultimate factual findings based on credibility determinations with its own determinations." *Id.* at 905.

125. See *Barreto-Claro v. U.S. Att'y Gen.*, 275 F.3d 1134, 1335, 1338 (11th Cir 2001); *Scheerer*, 445 F.3d at 1317.

126. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). In *Barreto-Claro*, the Eleventh Circuit explained that, under *de novo* review, "we give due deference to the Board's strict, no tolerance statutory interpretation, that applicants must tell the truth or be removed. This policy best supports the statute's underlying purpose, as implemented by the regulations, of discouraging frivolous applications." 275 F.3d at 1339.

127. See *Aziz v. Gonzales*, 478 F.3d 854, 857 (8th Cir. 2007); *Kifleyesus v. Gonzales*, 462 F.3d 937, 945 (8th Cir. 2006); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005).

128. See *Farah v. Ashcroft*, 348 F.3d 1153, 1156–58 (9th Cir. 2003) (implying, though not explicitly stating, that an appellate court must review an immigration judge's findings of inconsistencies identified as the basis of a frivolousness determination for substantial evidence).

129. See 8 U.S.C. § 1252(b)(4)(B) (2000).

Immigration Appeals had specified which party bears the burden of proof or what degree of certainty is required to support a finding that a noncitizen knowingly filed a frivolous asylum application. In April 2007, the Board filled some of the statutory gaps. However, the legal framework developed by the Board and the courts to date is wholly inadequate to protect asylum seekers’ fundamental liberty interests.

### C. *Board of Appeals’ Pronouncement on Applicable Burden of Proof*

From 1996 until April 2007, the Board provided no standards for applying or reviewing an immigration judge’s application of § 1158(d)(6). In July 2006, the Second Circuit, frustrated by the Board’s reticence to clarify this important area of the law, remanded a case involving a frivolousness finding and ordered the Board to “set down clear and explicit standards by which frivolousness decisions may be judged.”<sup>130</sup> On April 25, 2007, the Board responded by issuing its decision in *In re Y-L*.<sup>131</sup> There, the Board held that the government must establish by a preponderance of the evidence that an asylum applicant knowingly and deliberately fabricated material elements of his claim.<sup>132</sup>

The Board extrapolated the appropriate burden from existing regulatory standards.<sup>133</sup> It noted that regulations provide that an applicant for relief from removal carries the burden of demonstrating that he meets all requirements for eligibility.<sup>134</sup> Regulations also require that, “[i]f the evidence indicates that one or more of the grounds for

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130. See *Liu v. U.S. Dep’t of Justice*, 455 F.3d 106, 116 (2d Cir. 2006). The court encouraged the Board to consider not only the relevant statutes and regulations, but also the principles articulated by federal circuit courts. *Id.* As justification for its remand, the Second Circuit stressed considerations of national uniformity and statutory ambiguity. *Id.* at 116–17. The court stated:

In the frivolousness context, uniformity is not just uniquely possible, but is also of unusual importance. Since none of the circuit courts have, as yet, produced a substantial body of law with respect to frivolousness, there is a real opportunity for the [Board] to take the lead in the establishment of uniform national standards for deciding when a finding of frivolousness is appropriate. It is, of course, desirable for *all* asylum petitions to be handled in a consistent manner by the various circuits. But, the grave consequences of a frivolousness finding amplify the importance of ensuring that an applicant’s eligibility for asylum benefits in this country does not depend on the circuit that, by fortune or fate, reviewed the case.

*Id.* The court also cited language from § 1158(d) and the corresponding regulation that “arguably requires interpretation and clarification.” *Id.* at 117.

131. See *In re Y-L*, 24 I. & N. Dec. 151 (B.I.A. 2007).

132. *Id.* at 157.

133. See *id.*

134. *Id.* (citing 8 C.F.R. § 1240.8(d) (2006) (providing that the alien shall have “the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion”)).



mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.”<sup>135</sup> The Board acknowledged that this regulation does not apply to § 1158(d)(6), however, because a finding of frivolousness is not a ground for mandatory denial of asylum.<sup>136</sup> Rather, it “is a preemptive determination which, once made, forever bars an alien from any benefit under the Act.”<sup>137</sup> After this discussion of selective regulatory principles, the Board without further analysis held that, “[b]ecause of the severe consequences that flow from a frivolousness finding, the preponderance of the evidence must support an Immigration Judge’s finding that the respondent knowingly and deliberately fabricated material elements of the claim.”<sup>138</sup>

The Board dismissed the Second Circuit’s suggestion that “concrete and conclusive evidence of fabrication” is required to support a finding of frivolousness.<sup>139</sup> Further, the Board declined to follow the court’s instruction that it analyze the federal case law applying § 1158(d)(6) in determining the applicable burden of proof. Instead, the Board summarily rejected the Second Circuit’s proposed burden by noting that it “find[s] no indication in the statute or regulation that a frivolousness finding must be supported by ‘concrete or conclusive’ evidence of fabrication.”<sup>140</sup>

Three fundamental flaws permeate the Board’s analysis of what burden of proof must attend determinations under § 1158(d)(6). First, the Board failed to recognize that the burden of proof must comport with asylum seekers’ due process rights and neglected to conduct an analysis of what burden is compelled by the Due Process Clause.<sup>141</sup> Second, the Board neither squared its proposed burden with the Supreme Court’s mandate that the government establish elements of removal by clear and convincing evidence,<sup>142</sup> nor explored the implications of this mandate

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135. *Id.* (quoting 8 C.F.R. § 1240.8(d)).

136. *See id.*

137. *Id.*

138. *Id.* (citing 8 C.F.R. § 1208.20).

139. *Id.* at 158.

140. *Id.*

141. *See id.* at 157–59.

142. *See Woodby v. INS*, 385 U.S. 276, 286 (1966) (holding that the government bears the burden of establishing by clear, unequivocal, and convincing evidence that all facts alleged as grounds for deportation are true before a resident alien may be deported).

for what effectively amounts to a permanent order of removal.<sup>143</sup> Third, the Board failed to recognize that 8 C.F.R. § 1240.8(a),<sup>144</sup> which specifies that the government must establish an alien’s removability by clear and convincing evidence, provides a more relevant regulatory template for frivolousness determinations than does § 1240.8(d),<sup>145</sup> which governs relief from removal and mandatory grounds for denial of relief.<sup>146</sup> The Board offered no rationale for treating a frivolousness finding as anything other than a permanent order of removal.<sup>147</sup>

The Board’s holding that an immigration judge may make a finding under § 1158(d)(6)—and permanently deprive the asylum seeker of all current and future forms of immigration relief—upon a preponderance of the evidence violates principles of due process.<sup>148</sup> As of the date of this article, no federal court has analyzed the constitutionality of this burden of proof in the context of a frivolous finding.

## II. THE CONSTITUTIONAL DEFICIENCY OF THE PREPONDERANCE STANDARD FOR FINDINGS UNDER § 1158(d)(6)

The Due Process Clause prohibits the Government from “depriv[ing any person] of life, liberty, or property, without due process of law.”<sup>149</sup> For over a century, it has been settled that all aliens within the United States—regardless of the lawfulness or duration of their presence<sup>150</sup>—are “persons” entitled to the protection of procedural due process:<sup>151</sup>

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143. See *In re Y-L*, 24 I. & N. Dec. at 157–59.

144. 8 C.F.R. § 1240.8(a) (providing that an alien “shall be found to be removable if the [government] proves by clear and convincing evidence that the respondent is deportable as charged”).

145. *Id.* § 1240.8(d) (providing that an alien “shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion”); *id.* (“If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.”).

146. See *In re Y-L*, 24 I. & N. Dec. at 157–59.

147. See *id.*

148. See *infra* Part II.

149. U.S. CONST. amend. V.

150. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” (citations

There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.<sup>152</sup>

After entrance, aliens have a protected liberty interest in their right to be and remain in the United States,<sup>153</sup> and the Fifth Amendment entitles resident noncitizens to procedural due process in removal proceedings.<sup>154</sup> One component of procedural due process is that no removal order may issue unless the government proves the facts alleged as grounds for removal by clear and convincing evidence.<sup>155</sup> To determine the level of procedural due process that must attend

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omitted)); *cf.* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”).

151. *See Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 100–01 (1903) (holding that aliens in deportation proceedings are entitled to procedural due process); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that aliens are “persons” with respect to the Fifth Amendment); *see generally* Brian L. Rooney, Note, *Administrative Notice, Due Process, and the Adjudication of Asylum Claims in the United States*, 17 *FORDHAM INT’L L.J.* 955, 976–77 (1994) (discussing the scope of aliens’ due process rights); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 *AM. J. INT’L L.* 862, 862–68 (1989) (analyzing the source and extent of Congress’s power to regulate immigration).

152. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

153. *See Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950) (“A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself.”); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (“Here the liberty of an individual is at stake . . . . Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.”); *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1161 (9th Cir. 2004) (“An alien facing deportation confronts the loss of a significant liberty interest, as deportation ‘visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.’” (quoting *Bridges*, 326 U.S. at 154)).

154. *Reno v. Flores*, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.” (citing *Yamataya*, 189 U.S. at 100–101)).

155. *See Woodby v. INS*, 385 U.S. 276, 286 (1966). The Court did not frame its holding that clear, unequivocal, and convincing evidence must support a removal order as a product of due process. However, its decision was heavily guided by due process norms. *See Hiroshi Motomura, The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 *COLUM. L. REV.* 1625, 1645 (1992).

frivolousness findings, including the applicable burden of proof, courts must apply the balancing test of *Mathews v. Eldridge*.

*A. The Protected Interest Implicated by a Finding of Frivolousness*

Before a court applies the *Mathews* test, an individual must establish that the proceeding or sanction at issue deprives him of an interest protected by the Due Process Clause.<sup>156</sup> Essentially, a finding of frivolousness operates as a permanent order of removal.<sup>157</sup> When a § 1158(d)(6) finding is made within the context of a removal proceeding, the asylum seeker immediately becomes ineligible to seek relief from removal, both within the context of the hearing and forever thereafter.<sup>158</sup> Therefore, the same protected interest at stake in a removal proceeding—a resident alien’s right to be and remain in the United States—is threatened by a finding under § 1158(d)(6). Indeed, because a frivolousness finding imposes a more severe sanction than a one-time removal, proceedings in which a frivolousness determination may issue should provide heightened safeguards to satisfy due process concerns.<sup>159</sup>

In addition, asylum seekers are entitled to an adjudication of their claims that is consistent with due process.<sup>160</sup> The Supreme Court has

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156. See *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”).

157. See 8 U.S.C. § 1158(d)(6) (2000); *Liu v. U.S. Dep’t of Justice*, 455 F.3d 106, 117 (2d Cir. 2006) (“A finding of frivolousness is a potential ‘death sentence’ for an alien’s immigration prospects.”).

158. See 8 U.S.C. § 1158(d)(6); *Luciana v. Att’y Gen. of the U.S.*, No. 05-3544, 2007 WL 2696865, at \*11 (3d Cir. Sept. 17, 2007) (“By additionally issuing a frivolousness finding, the IJ brought down on Petitioner a lifetime ban on all means of legally entering the United States.”). The alien may still be eligible for withholding of removal or similar temporary protections where a deportation would result in dire persecutions. 8 C.F.R. § 208.20 (2007) (“For purposes of this section, a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal.”).

159. See *Martinez-de Bojorquez v. Ashcroft*, 365 F.3d 800, 805 (9th Cir. 2004) (“As to the first *Mathews* factor, we have previously noted that ‘the private liberty interests involved in deportation proceedings are among the most substantial.’” (quoting *Padilla-Agustin v. INS*, 21 F.3d 970, 974 (9th Cir. 1994)).

160. See *Rusu v. INS*, 296 F.3d 316, 321 n.8 (4th Cir. 2002) (recognizing that, while an illegal immigrant has no legally protected liberty interest in remaining in the United States, “an illegal alien possesses an identifiable liberty interest in being accorded ‘all opportunity to be heard upon the questions involving his right to be and remain in the United States’ before being deported,” which “remains a cognizable interest within the *Mathews v. Eldridge* framework” (citation omitted)); *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir. 1999) (acknowledging that “[n]umerous courts have recognized” that the Due Process Clause protects an alien’s liberty interest

found that the executive branch must enforce immigration policies in accordance with the procedural safeguards of due process.<sup>161</sup> Courts assume that, when Congress directs an agency to establish a procedure, Congress intends that procedure to be fair.<sup>162</sup> Because frivolousness findings necessarily involve assessment of the validity of noncitizens' claims for asylum, courts' holdings that asylum adjudications must comport with due process apply with equal force to frivolousness determinations. As the Third Circuit has held, "Congress instructed the Attorney General to establish an asylum procedure, and United States' treaty obligations and fairness mandate that the asylum procedure promulgated by the Attorney General provide the most basic of due process."<sup>163</sup> Allowing an immigration judge to find that an alien knowingly filed a frivolous asylum application upon a preponderance of the evidence offends basic principles of fundamental fairness and violates noncitizens' due process rights.

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in the "fundamental fairness" of a deportation proceeding (citation omitted)); *see, e.g.*, *Cham v. Att'y Gen. of the U.S.*, 445 F.3d 683, 690–91 (3d Cir. 2006) (holding that an asylum applicant should expect dignity, respect, courtesy, and fairness in a hearing before an immigration judge because an applicant is entitled, as matter of due process, to a full and fair hearing on his application); *Rodriguez Galicia v. Gonzales*, 422 F.3d 529, 539–40 (7th Cir. 2005) (holding that an alien was deprived of due process in an asylum proceeding, where the immigration judge frequently interrupted the alien's testimony and allowed her counsel to ask only a few questions in series, assumed the role of counsel for the government, and prevented the alien from presenting expert testimony); *Naw v. Gonzales*, 138 F. App'x 991, 992 (9th Cir. 2005) (holding that an immigration judge's failure to explain the standards upon which a pro se alien's application for asylum would be judged, failure to instruct the alien regarding her burden of proof or what she could do to substantiate her claim, and cursory examination of the alien before turning questioning over to the INS attorney deprived the alien of a full and fair hearing in violation of due process); *United States v. Aguirre-Tello*, 324 F.3d 1181, 1191–92 (10th Cir. 2003) (holding that a deportation hearing was rendered fundamentally unfair, in violation of the alien's due process rights, when the immigration judge implied that the alien would become eligible for a pardon and that bond was unavailable, and the alien was not advised of free legal services).

In addition, the Fifth Circuit has held that aliens have a protected interest in applying for asylum. *See Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1038 (5th Cir. 1982) (concluding "that Congress and the executive have created, at a minimum, a constitutionally protected right to petition our government for political asylum").

161. *See Galvan v. Press*, 347 U.S. 522, 531 (1954) ("In the enforcement of these [immigration] policies, the Executive Branch of the Government must respect the procedural safeguards of due process.").

162. *See Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996); *see also Califano v. Yamasaki*, 442 U.S. 682, 693 (1979) (assuming "a congressional solicitude for fair procedure, absent explicit statutory language to the contrary").

163. *Marincas*, 92 F.3d at 203.

*B. Procedural Due Process Requirements of a Burden of Proof*

Before the government can infringe upon a protected interest, it must provide procedural due process to the holder of that interest. Procedural due process requires that an identified party provide a specified amount of sufficiently reliable evidence to support a factfinder’s findings.<sup>164</sup> Litigants and the factfinder must know at the outset of a proceeding what quantum of evidence must be adduced and how the risk of error will be allocated.<sup>165</sup> As the Supreme Court stated in *Addington v. Texas*,<sup>166</sup>

[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” The standard serves . . . to indicate the relative importance attached to the ultimate decision.<sup>167</sup>

In cases involving individual rights, the standard of proof at a minimum reflects the value society places on individual liberty.<sup>168</sup>

Because the Board of Immigration Appeals is charged with providing guidance on the proper interpretation and administration of immigration statutes,<sup>169</sup> the federal courts were obligated to wait for the Board to determine in the first instance what standards Congress intended to govern findings under § 1158(d)(6).<sup>170</sup> The Supreme Court has made

164. See *Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 456 (1985) (holding that the requirements of due process are satisfied if some evidence supports the decision of a prison disciplinary board to revoke good time credits).

165. See *Santosky v. Kramer*, 455 U.S. 745, 757 (1982).

166. 441 U.S. 418 (1979).

167. *Id.* at 423 (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)); see also *Santosky*, 455 U.S. at 757 n.9 (“[T]he standard of proof instructs the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions he draws from that information.” (internal quotation marks and citation omitted)).

168. *Addington*, 441 U.S. at 425 (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971)).

169. 8 C.F.R. § 1003.1(d) (2007) (“[T]he Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.”).

170. An argument could be made that, in light of the judiciary’s expertise in resolving constitutional issues and the agency’s failure to address this deficit over the last eleven years, the judiciary should have proceeded to mandate the use of a clear and convincing evidentiary standard as a due process requirement without waiting for the Board to decide the issue. But, the Supreme Court recently rebuked the Ninth Circuit for providing an interpretation of an ambiguous statute before the agency had a chance to act. See *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet*

clear that, when Congress has entrusted an agency with the responsibility of interpreting and administering a statute, “it is for agencies, not courts, to fill statutory gaps.”<sup>171</sup> “*Chevron* established a ‘presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.’”<sup>172</sup>

Now that the Board has issued its guidance, federal courts of appeals must review the constitutional sufficiency of those evidentiary standards, including the preponderance of the evidence standard. Determining the proper degree of proof “is the kind of question which has traditionally been left to the judiciary to resolve, and its resolution is necessary in the interest of the evenhanded administration of the Immigration and Nationality Act.”<sup>173</sup> In reviewing the constitutional sufficiency of the Board’s proposed preponderance standard, the courts should apply the three-pronged test outlined in *Mathews v. Eldridge*.

### C. *Application of the Mathews v. Eldridge Test*

The constitutional sufficiency of procedures, including burdens of proof, afforded in an administrative hearing varies with the circumstances.<sup>174</sup> The Supreme Court has made clear that “due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances”<sup>175</sup> but “is flexible and calls for such procedural protections as the particular situation demands.”<sup>176</sup> In *Mathews v. Eldridge*, the Supreme Court established a

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Servs., 545 U.S. 967, 982 (2005). In *Brand X*, the FCC adopted an interpretation of provisions of the Communications Act that was at odds with an earlier Ninth Circuit interpretation, resulting in confusion in the provisions’ application. *Id.* The Supreme Court held that the circuit court’s interpretation could not override the agency’s reading of the Act. *Id.*

171. *Id.* (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984)).

172. *Id.* (quoting *Smiley v. Citibank*, 517 U.S. 735, 740–41 (1996)).

173. *Woodby v. INS*, 385 U.S. 276, 284 (1966) (citations omitted).

174. See *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (citing *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 24–25 (1981); *Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 12 (1979); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

175. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

176. *Id.* at 334 (quoting *Morrissey*, 408 U.S. at 481 (internal alteration omitted)).

tripartite test for evaluating the sufficiency of procedures to safeguard protected interests.<sup>177</sup> A court must review

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>178</sup>

This analysis comprises the general approach employed by the judiciary to determine what procedures due process requires whenever governmental action would infringe upon a protected interest,<sup>179</sup> including in the context of immigration.<sup>180</sup>

### 1. *Affected Private Interests*

Courts must consider the degree and length of potential deprivation that may follow a particular governmental decision in assessing the

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177. *Id.* at 334–35.

178. *Id.* at 335.

179. *Burns v. United States*, 501 U.S. 129, 148 (1991). Legal commentators have applied the *Mathews* test to evaluate procedural safeguards in a variety of contexts. *See generally* Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals’s Summary Affirmance Procedures*, 16 STAN. L. & POL’Y REV. 481 (2005) (arguing that the summary affirmance regulations of the Board compromise immigrants’ due process rights); Matthew R. Hall, Essay, *Procedural Due Process Meets National Security: The Problem of Classified Evidence in Immigration Proceedings*, 35 CORNELL INT’L L.J. 515 (2002) (proposing that an immigration judge confronted with classified evidence should assume an inquisitorial, rather than an adjudicative, role to comply with due process); Peter Gruman, *The Procedural Due Process Rights of Legalization Applicants Under the Immigration Reform and Control Act of 1986: These Are the Procedures that Try Men’s Souls*, 39 SYRACUSE L. REV. 1381 (1988) (discussing the constitutional inadequacy of legalization procedures); *see also* Stephen B. Brauerman, *Balancing the Burden: The Constitutional Justification for Requiring the Government to Prove the Absence of Mental Retardation Before Imposing the Death Penalty*, 54 AM. U. L. REV. 401 (2004) (arguing that the Due Process Clause requires the government to prove the absence of mental retardation to a jury beyond a reasonable doubt before the imposition of a death sentence); Frank LaSalle, Comment, *The Civil False Claims Act: The Need for a Heightened Burden of Proof as a Prerequisite for Forfeiture*, 28 AKRON L. REV. 497 (1995) (applying the *Mathews* test and arguing that the Due Process Clause requires more than a preponderance of the evidence standard to support imposition of the civil forfeiture provision of the False Claims Act); *see also* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986) (considering the question of what procedures are necessary to meet due process and arguing that participation of an independent adjudicator is one element of a minimum floor of procedural safeguards).

180. *See Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (applying the *Mathews* test to evaluate the constitutional sufficiency of procedures provided to the reentry of a resident alien).



sufficiency of an administrative decision-making process.<sup>181</sup> The Supreme Court has considered only one situation in which Congress failed to specify a burden of proof.<sup>182</sup> On multiple occasions, the Court identified losses of individual liberty sufficiently serious to warrant the imposition of an elevated burden of proof.<sup>183</sup> These determinations include state proceedings to sever parental rights,<sup>184</sup> proceedings to determine juvenile delinquency,<sup>185</sup> civil commitment,<sup>186</sup> deportation,<sup>187</sup> denaturalization,<sup>188</sup> and expatriation.<sup>189</sup> These cases demonstrate that, given the substantial liberty interests at stake, the Due Process Clause compels the government to adduce clear and convincing evidence that a noncitizen knowingly filed a frivolous asylum application to support a finding of frivolousness under § 1158(d)(6) and to justify the attendant sanction of a permanent bar on the ability to seek immigration benefits.

Removal from the United States implicates a fundamental liberty interest. The Supreme Court has held that an alien holds a substantial interest in a deportation proceeding:

This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification. In words apposite to the question before us, we have spoken of “the solidity of proof that is required for a judgment entailing the consequences of deportation . . . .”<sup>190</sup>

The Court has also recognized “the immediate hardship of deportation” especially on those aliens who have established family, social, and economic ties.<sup>191</sup>

In other circumstances, the Court has stressed that a complete and permanent severing of rights warrants heightened due process

181. *Mathews*, 424 U.S. at 341.

182. See *Woodby v. INS*, 385 U.S. 276, 284 (1966).

183. See *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982).

184. *Id.*

185. See generally *In re Winship*, 397 U.S. 358 (1970).

186. See generally *Addington v. Texas*, 441 U.S. 418 (1979).

187. See generally *Woodby v. INS*, 385 U.S. 276 (1966).

188. See *Chaunt v. United States*, 364 U.S. 350, 355 (1960); *Schneiderman v. United States*, 320 U.S. 118, 123 (1943).

189. See *Gonzales v. Landon*, 350 U.S. 920 (1955) (per curiam).

190. *Woodby*, 385 U.S. at 285 (quoting *Rowoldt v. Perfetto*, 355 U.S. 115, 120 (1957)).

191. *Id.* at 286.

safeguards.<sup>192</sup> In *Santosky v. Kramer*,<sup>193</sup> the Supreme Court determined what procedural safeguards should govern a proceeding to terminate parental rights. The Court reasoned that “[w]hether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss.”<sup>194</sup> The permanency of the severing of rights weighed heavily in the Court’s balancing of interests:

When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. “If the State prevails, it will have worked a unique kind of deprivation . . . . A parent’s interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.”<sup>195</sup>

Because the decision terminating parental rights is “*final* and irrevocable” once affirmed on appeal, the Court found that parents’ interests weighed heavily against the use of the preponderance standard at state-initiated permanent neglect proceedings.<sup>196</sup> The Court also emphasized the permanency and “overwhelming finality” of the decision to terminate life-sustaining treatment in justifying its approval of the state’s imposition of the clear and convincing burden of proof in *Cruzan v. Director, Missouri Department of Health*.<sup>197</sup>

As in *Santosky*, the first factor—the private interest affected—weighs heavily in favor of heightened procedural safeguards in the context of a frivolousness determination. Once a finding that an alien knowingly filed a fraudulent asylum application is affirmed on appeal, the individual is forever barred from seeking immigration relief in the United States, no matter what circumstances might befall or have

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192. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 758 (1982) (holding that, in parental rights termination proceedings, the preponderance of the evidence standard is inconsistent with due process where “the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight”).

193. 455 U.S. 745 (1982).

194. *Id.* at 758.

195. *Id.* at 759 (quoting *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981)).

196. *Id.*

197. 497 U.S. 261, 281, 283 (1990).

befallen him. As in the proceeding at issue in *Santosky*, “[f]ew forms of state action are both so severe and so irreversible.”<sup>198</sup>

## 2. *Risk of Erroneous Deprivation and Value of Additional Procedural Safeguards*

Under *Mathews*, the second consideration is the fairness and reliability of existing procedures and the probable value, if any, of additional procedural safeguards.<sup>199</sup> When a proceeding is rife with potential for an erroneous determination—and when an erroneous determination will infringe a substantial protected interest—the Due Process Clause calls for a heightened evidentiary standard.<sup>200</sup> This prong also militates against the application of the preponderance standard.

Numerous factors magnify the risk of an erroneous finding that an alien knowingly submitted a fraudulent asylum application. Persons fleeing persecution are unlikely to possess documentary evidence that corroborates their claims.<sup>201</sup> Therefore, whether an alien qualifies as a refugee will largely depend on her testimony, unsupported by physical evidence.<sup>202</sup> In addition, many aliens do not speak or read English.<sup>203</sup> Many are unable to complete their asylum applications themselves or to review such applications for accuracy or completeness.<sup>204</sup> While an alien who does not speak English has a due process right to a competent translation of removal proceedings,<sup>205</sup> translation errors—which create

198. *Santosky*, 455 U.S. at 759.

199. *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976).

200. See *Santosky*, 455 U.S. at 761–66.

201. In recognition of this fact, the Immigration and Nationality Act provides that the testimony of the applicant may suffice to sustain her burden without corroboration, so long as the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that she is a refugee. 8 U.S.C. § 1158(b)(1)(B)(ii) (2000 & Supp. V 2005).

202. See Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 357, 368 (2003) (“Since applicants can rarely corroborate their claims with specific independent evidence, establishing the facts in refugee cases usually depends on the value of applicants’ testimonies.”).

203. See, e.g., *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990) (“Forms are frequently filled out by poor, illiterate people who do not speak English and are unable to retain counsel.”); *Hartooni v. INS*, 21 F.3d 336, 342 n.1 (9th Cir. 1994).

204. See *Chen v. Gonzales*, 447 F.3d 468, 476 (6th Cir. 2006) (noting that the petitioner could not understand English, did not fill out his asylum application, and likely could not verify its accuracy).

205. See, e.g., *Amadou v. INS*, 226 F.3d 724, 726 (6th Cir. 2000); *Hartooni*, 21 F.3d at 340; *Augustin v. Sava*, 735 F.2d 32, 36–38 (2d Cir. 1984). Regulations also provide for a competent translation. See 8 C.F.R. § 1240.44 (2007) (“Any person acting as interpreter . . . shall . . . translate accurately.”); *id.* § 103.2.

the appearance of inconsistencies, evasiveness, or an inability to describe incidents of persecution in sufficient detail—are not uncommon.<sup>206</sup> A noncitizen has no absolute right to counsel in a removal proceeding; rather, he is guaranteed the opportunity to seek representation at no expense to the government.<sup>207</sup> Removal hearings are not strictly governed by the Federal Rules of Evidence,<sup>208</sup> and hearsay may be considered.<sup>209</sup>

In addition, frivolousness findings are intimately tied to issues of witness credibility and veracity.<sup>210</sup> Immigration judges are required to make judgments that are inherently subjective. Rejection of a noncitizen’s asylum claim, for instance, may be based on an immigration judge’s evaluation of an asylum seeker’s demeanor, a judgment that may be skewed by subconscious cultural norms and that is essentially unreviewable through a written record.<sup>211</sup>

Evidence suggests that immigration judges may base adverse credibility findings on inappropriate considerations.<sup>212</sup> In response to a series of scathing appellate court decisions and media accounts of apparently biased and bullying immigration judges,<sup>213</sup> the Attorney

206. *See, e.g.,* *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2002); *Perez-Lastor v. INS*, 208 F.3d 773, 780–82 (9th Cir. 2000).

207. *See* 8 U.S.C. § 1158(d)(4) (2000). The statute provides that, at the time of filing an application for asylum, the government must advise the alien of the privilege of being represented by counsel and provide him with a list of attorneys who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis. *Id.*

208. *See, e.g.,* *Lopez-Chavez v. INS*, 259 F.3d 1176, 1181 (9th Cir. 2001); *Maroon v. INS*, 364 F.2d 982, 986 (8th Cir. 1966); *Yiannopoulos v. Robinson*, 247 F.2d 655, 657 (7th Cir. 1957).

209. *See de Hernandez v. INS*, 498 F.2d 919, 921 (9th Cir. 1974); *United States ex rel. Impastato v. O’Rourke*, 211 F.2d 609, 611 (8th Cir. 1954); *see also* *Matter of Ponco*, 15 I. & N. Dec. 120, 123 (B.I.A. 1974) (“The hearsay nature of a given item of evidence may well have a substantial effect on the probative value of that evidence; however, if relevant, hearsay evidence is admissible in deportation proceedings.”).

210. *See Mathews v. Eldridge*, 424 U.S. 319, 343–44 (1976) (noting the problematic nature of determinations impacted by witness credibility).

211. *See, e.g.,* *Arulampalam v. Ashcroft*, 353 F.3d 679, 685 (9th Cir. 2003); *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 818 (9th Cir. 1994); *but see* *Singh-Kaur v. INS*, 183 F.3d 1147, 1151 (9th Cir. 1999).

212. Quick, and potentially pre-ordained, findings of credibility also may be immigration judges’ means of dealing with a staggering caseload. *See* *Bernstein*, *supra* note 39, at 1.

213. *See, e.g.,* Errol Louis, *It’s Time for U.S. to Bridle Unfair Judges*, N.Y. DAILY NEWS, Aug. 15, 2006, at 27 (“Of all the maddening miscarriages of justice that stain the land, few are more sickening than the abuses meted out by the incompetents, bigots and bullies among the nation’s 224 immigration judges. In far too many cases, immigrants facing deportation or seeking asylum in the United States end up staking their very lives on judges who either don’t know the law or don’t care about applying it fairly.”).

General in August 2006 ordered a national review of immigration courts and conceded that some immigration judges “can aptly be described as intemperate or even abusive and [their] work must improve.”<sup>214</sup> Perhaps he was referring to examples such as these from the immigration bench:

- A Boston immigration judge greeted a Ugandan woman seeking asylum by jeering, “Me Tarzan, you Jane.”<sup>215</sup>
- One immigration judge mishandled a political asylum claim asserted by an Albanian citizen based on testimony from a document expert, when that expert did not speak or read Albanian.<sup>216</sup>
- An immigration judge found that a Mexican citizen failed to demonstrate that her deportation would cause exceptional hardship to her five minor United States citizen children and her husband. The judge appeared to discount the hardship to her family because the couple continued to have children while her status was pending. The judge chastised the couple for “directly contribut[ing] to [the hardship] by their own actions” and for putting their children “in that predicament.”<sup>217</sup> She also reprimanded the husband for “mak[ing] their life a little bit more difficult by creating yet another child.”<sup>218</sup>
- A New York immigration judge was criticized by the Second Circuit for “pervasive bias and hostility,” “combative and insulting language,” and remarks “implying that any asylum claim based on China’s coercive family planning policies would be presumed incredible.”<sup>219</sup>
- The Third Circuit rebuked a Philadelphia immigration judge for repeated instances of “browbeating,” “belligerent questioning and a failure to consider relevant evidence.”<sup>220</sup> In

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214. See Pamela A. MacLean, *Wide Disparities Are Found in Granting Asylum*, NAT’L L. J., Aug. 14, 2006, at 5.

215. Louis, *supra* note 213, at 27. This judge, Thomas Ragno, was temporarily suspended but then rejoined the bench. *Id.*

216. See Richard B. Schmitt, *Bush Administration Moves to Improve Immigration Judges*, DAILY PRESS, Aug. 10, 2006, at A10.

217. *Cortez-Rivera v. Gonzales*, 226 F. App’x 744, 745 & n.1 (9th Cir. 2007) (unpublished).

218. *Id.*

219. Nina Bernstein, *Immigration Judge Is Reassigned to a Desk Job*, N.Y. TIMES, March 13, 2007, at B2. In March 2007, this immigration judge, Jeffrey S. Chase, was relieved of courtroom duties. *Id.* at B1.

220. Louis, *supra* note 213, at 27.

one case, he denied asylum to a Pakistani woman, whose father had been assassinated, because the court’s translator mistakenly translated “parents” as “parents in law.” The judge decried, “You’ve blown your cover. I see now her parents aren’t even dead.”<sup>221</sup>

A Department of Justice spokesman announced that, between June 2006 and March 2007, eleven of the nation’s roughly 215 immigration judges were temporarily suspended from courtroom duties “based on concerns about how they were conducting immigration proceedings.”<sup>222</sup> Some judges have since returned to the bench.<sup>223</sup>

A telling indicator of the lack of reliability in removal proceedings is the variance in asylum rulings among individual immigration judges. The February 2005 report of the United States Commission on International Religious Freedom (USCIRF), charged by Congress to study the degree of consistency and reliability of adjudicating asylum claims in removal proceedings, analyzed over 35,000 rulings of immigration judges over a period of three years.<sup>224</sup> It found that immigration judges, even within the same court, had “significantly different rates of granting or denying asylum claims.”<sup>225</sup> The rates that individual immigration judges granted asylum ranged from zero percent

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221. *Id.* This judge, Donald Ferlise, is no longer hearing cases. *Id.*

222. Bernstein, *supra* note 219, at B1.

223. *Id.*

224. The USCIRF, an independent government agency, was created by the International Religious Freedom Act of 1998 (IRFA). U.S. Comm’n on Int’l Religious Freedom, *Executive Summary in REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME I: FINDINGS AND RECOMMENDATIONS* 1, 3–4 (2005), available at [http://www.uscirf.gov/countries/global/asylum\\_refugees/2005/february/execsum.pdf](http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/execsum.pdf). IRFA charged the Commission with studying whether the 1996 changes to United States asylum law impeded America’s obligation to offer refuge to those suffering persecution. *Id.* at 1. The study focused on the effects of the procedure of expedited removal created by IIRIRA. *Id.* The study analyzed 36,800 rulings of 278 immigration judges from fourteen immigration courts between 2000 and 2003. See Patrick Baier, *Selected Statistical Analyses of Immigration Judge Rulings on Asylum Applications, FY 2000-2003*, in *REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME II: EXPERT REPORTS* 674, 678–79 (2005), available at [http://www.uscirf.gov/countries/global/asylum\\_refugees/2005/february/immigrationJudgeStats.pdf](http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/immigrationJudgeStats.pdf).

225. U.S. Comm’n on Int’l Religious Freedom, *supra* note 224, at 5. The average acceptance rate of immigration courts varied from 5.6% in the Krome Service Processing Center in southern Florida to 47.1% in San Francisco. Baier, *supra* note 224, at 681–82. The report found that acceptance rates for immigration judges within the same court varied the most for Atlanta, Elizabeth, southern Florida (the Krome Service Processing Center and Miami), and New York City. *Id.* at 694. The only immigration courts with consistent acceptance rates among immigration judges were Chicago, Houston, Guaynabo, and San Pedro. *Id.* at 694–95.

to eighty-one percent.<sup>226</sup> The study found that immigration judges frequently denied asylum claims based on adverse credibility determinations premised on unreliable or incomplete documents.<sup>227</sup> The report also detailed the dramatic effect of representation on the ultimate grant or denial of asylum seekers' claims: twenty-five percent of asylum seekers represented by lawyers were granted asylum, while only two percent of those who were unrepresented were awarded asylee status.<sup>228</sup>

An even more comprehensive study, released in August 2006, was conducted by the Transactional Records Access Clearinghouse at Syracuse University.<sup>229</sup> The study reviewed nearly 300,000 asylum cases from 208 immigration judges from fiscal years 1994 to 2005.<sup>230</sup> It found that the average immigration judge denied asylum claims sixty-five percent of the time.<sup>231</sup> Rates of granting asylum varied from approximately three percent by a Miami judge to approximately ninety

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226. Certain immigration judges in southern Florida, Los Angeles, Miami, and New York City never granted asylum during the period of the study. *Id.* at 689–90. Another immigration judge in New York City, on the other hand, granted asylum over eighty percent of the time. *See id.* at 690.

227. U.S. Comm'n on Int'l Religious Freedom, *supra* note 224, at 5, 7.

228. *See id.* at 4, 7; *see also* Susan Kyle et al., *supra* note 35, at 407–09; *see generally* Charles Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices in* REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME II: EXPERT REPORTS 232 (2004), *available at* [http://www.uscirf.gov/countries/global/asylum\\_refugees/2005/february/legalAssist.pdf](http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/legalAssist.pdf) (analyzing the impact of representation on asylum decisions by immigration office and surveying various approaches of providing representation to detained asylum seekers).

229. *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), SYRACUSE UNIV., TRAC IMMIGRATION REPORT: IMMIGRATION JUDGES, <http://trac.syr.edu/immigration/reports/160/> (last visited Oct. 19, 2007) [hereinafter TRAC IMMIGRATION JUDGES]; TRAC ASYLUM PROCESS, *supra* note 18; *see also* MacLean, *supra* note 214, at 5; Bernstein, *supra* note 39, at 1 (“Studies highlight stark disparities in judgment, like 90 percent of asylum cases granted by one judge and 9 percent down the hall.”).

The release of the study coincided with an announcement by the Attorney General that the EOIR would implement twenty-two measures “to enhance the performance of the Immigration Courts . . .” Press Release, Dep’t of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), [http://www.usdoj.gov/opa/pr/2006/August/06\\_ag\\_520.html](http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html). These reforms include establishing annual performance evaluations, increasing oversight to detect high reversal rates, requiring competency tests for new immigration judges, and improving procedures for handling complaints. *See id.*; DEP’T OF JUSTICE, MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS, <http://trac.syr.edu/tracatwork/detail/P104.pdf> (last visited Oct. 19, 2007) (describing the reforms); MacLean, *supra* note 214, at 5. As of March 13, 2007, EOIR had not begun to give performance evaluations. *See* Bernstein, *supra* note 219, at B1.

230. TRAC IMMIGRATION JUDGES, *supra* note 229.

231. *Id.*

percent by a judge in New York.<sup>232</sup> The study confirmed the USCIRF’s finding of the import of representation. It found that unrepresented asylum applicants were denied asylum ninety-three percent of the time, while represented applicants had a denial rate of sixty-four percent.<sup>233</sup>

Finally, the safeguards provided by § 1158(d)(6)—notice and an opportunity to explain inconsistencies—do not provide adequate protection against the risk of erroneous deprivation of an asylum seeker’s fundamental interests. While the statute provides that an alien must receive notice of the consequences of the filing of a frivolous asylum application,<sup>234</sup> its lack of specificity suggests that notice may take the form of a piece of paper provided with a blank asylum application.<sup>235</sup> Neither the Board nor any court has held that an immigration judge must explain the consequences of filing a frivolous application and receive confirmation from the alien that she understands the severity of the sanction.<sup>236</sup>

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232. *Id.* The TRAC report found that denial rates for the 208 judges ranged from a low of ten percent to a high of ninety-eight percent. *Id.* For a table with denial rates and individual rankings of the 208 immigration judges from fiscal year 2000 to 2005, see TRAC, Asylum Judge Denial Rates by Immigration Judge, FY 2000 – FY 2005, [http://trac.syr.edu/immigration/reports/160/include/judge\\_0005\\_name-r.html](http://trac.syr.edu/immigration/reports/160/include/judge_0005_name-r.html) (last visited Oct. 19, 2007). For denial rates and rankings from 1994 to 1999, see TRAC, Asylum Judge Denial Rates by Immigration Judge, FY 1994 – FY 1999, [http://trac.syr.edu/immigration/reports/160/include/judge\\_9499\\_name-r.html](http://trac.syr.edu/immigration/reports/160/include/judge_9499_name-r.html) (last visited Oct. 19, 2007). For detailed information on the backgrounds and decisions of individual immigration judges, see TRAC, Immigration Judge Reports-Asylum, <http://trac.syr.edu/immigration/reports/judgereports/> (last visited Oct. 19, 2007).

233. TRAC IMMIGRATION JUDGES, *supra* note 229.

234. See 8 U.S.C. § 1158(d)(4), (6) (2000).

235. See *In re Y-L-*, 24 I. & N. Dec. 151, 155 (B.I.A. 2007). The Board noted that Form I-589, the asylum application, contains a written warning that “[a]pplicants determined to have knowingly made a frivolous application for asylum will be permanently ineligible for any benefits under the Immigration and Nationality Act.” *Id.* But see *Biao Yang v. Gonzales*, 496 F.3d 268, 275 n.3 (2d Cir. 2007) (observing that *In re Y-L-* does not resolve whether the notice in Form I-589 suffices to satisfy the notice requirement of 8 U.S.C. § 1158(d)(6)). The Board did not adopt a requirement that the immigration judge ensure that the asylum seeker has heard, been relayed, or has understood the warning. See *In re Y-L-*, 24 I. & N. Dec. at 155.

236. Some appellate decisions note that immigration judges have chosen to provide oral notice and to secure an admission that the noncitizen understands the consequences of filing a frivolous asylum application. See, e.g., *Mingkid v. U.S. Att’y Gen.*, 468 F.3d 763, 766 (11th Cir. 2006) (noting that the immigration judge advised the petitioners of the consequences of filing a frivolous asylum application and secured an affirmation that they understood and did not need to change their applications); *Kifleyesus v. Gonzales*, 462 F.3d 937, 942 (8th Cir. 2006) (noting that the alien received warnings throughout the proceedings); *Ignatova v. Gonzales*, 430 F.3d 1209, 1211 (8th Cir. 2005) (recording that the alien received oral and written warnings); *Muhanna v. Gonzales*, 399 F.3d 582, 586 (3d Cir. 2005) (reporting that the immigration judge warned the alien of the



In addition, the opportunity to appeal an immigration judge's finding of frivolousness to the Board of Immigration Appeals is of limited value. The number of cases appealed to the Board has increased dramatically over the last few years.<sup>237</sup> Under recently mandated streamlining procedures,<sup>238</sup> all cases are assigned to a single Board member for disposition,<sup>239</sup> unless a screening panel determines that a case meets certain criteria for assignment to a three-member panel.<sup>240</sup> Single board members now issue around fifty decisions a day, typically one-sentence rulings affirming denials.<sup>241</sup> The 2005 USCIRF study found that, after regulations were changed to allow summary affirmances by the Board, the rate of reversal of an immigration judge's removal order dropped from twenty-four percent to approximately three percent.<sup>242</sup> The rate that the government was sustained during this latter period was much higher,

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consequences of filing a frivolous asylum application and allowed him to confer with counsel); *Barreto-Claro v. U.S. Att'y Gen.*, 275 F.3d 1334, 1337 n.5 (11th Cir. 2001) (noting that the alien received two written notices and that the immigration judge gave one or two oral warnings).

237. In 2004, the Board received and adjudicated fifty percent more appeals than in 2001. Kyle et al., *supra* note 35, at 413. In 2001, the Board received 27,900 new appeals and adjudicated 31,800. *Id.* at n.17. In 2004, the Board received 41,300 new cases and adjudicated 48,700. *Id.* Ninety-eight percent of appeals to the Board from 2002 to 2005 were filed by aliens. *Id.* at 413.

238. In 2002, the Attorney General reduced board membership from twenty-three to eleven members and set tight deadlines to reduce a large backlog. See Bernstein, *supra* note 39, at 11. On March 15, 2002, Board Chairman Lori Scialabba authorized the use of a single Board member's affirmance, without opinion, for asylum cases. See Kyle et al., *supra* note 35, at 414 & n.18. For an analysis of the 2002 reforms to streamline Board proceedings, see Susan Burkhardt, *The Contours of Conformity: Behavioral Decision Theory and the Pitfalls of the 2002 Reforms of Immigration Procedures*, 19 GEO. IMMIGR. L.J. 35 (2004) (discussing the procedural reforms and applying social science research to analyze the procedural reforms' adverse effect on administrative decision-making).

239. 8 C.F.R. § 1003.1(e) (2007) (case management system).

240. Under 8 C.F.R. § 1003.1(e)(6), a case may only be assigned to a three-judge panel if the case presents the following:

- (i) The need to settle inconsistencies among the rulings of different immigration judges;
- (ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;
- (iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents;
- (iv) The need to resolve a case or controversy of major national import;
- (v) The need to review a clearly erroneous factual determination by an immigration judge; or
- (vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 1003.1(e)(5) [where the reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation].

241. Bernstein, *supra* note 39 at 11; 8 C.F.R. § 1003.1(e)(4) (affirmance without opinion).

242. U.S. Comm'n on Int'l Religious Freedom, *supra* note 224, at 7; Kyle, et al., *supra* note 35, at 414-15.

at nineteen percent.<sup>243</sup> The study concludes that “[s]tatistically, it is highly unlikely that any asylum seeker denied by an immigration judge will find protection by appealing to the [Board of Immigration Appeals].”<sup>244</sup>

Noncitizens also face an uphill battle in appealing adverse decisions rendered by the Board to the federal courts of appeals.<sup>245</sup> The Immigration and Nationality Act mandates that circuit courts accept an immigration court’s factual findings unless the evidence in the record compels a contrary interpretation.<sup>246</sup> Since an alien is unlikely to possess corroborating evidence,<sup>247</sup> it is highly unlikely that the record ever will “compel” a determination contrary to that reached by the Board. And, at least one circuit has held in the context of § 1158(d)(6) that, when the noncitizen urges one interpretation of the evidence but the Board has adopted another, the reviewing court must adopt the Board’s interpretation unless the record compels the contrary result.<sup>248</sup> Given the substantial risk of an erroneous determination, procedural due process requires a more exacting burden of proof than the preponderance of the evidence standard.<sup>249</sup>

243. Kyle, et al., at 415. See also Richard B. Schmitt, *Bush Administration Moves to Improve Immigration Judges*, DAILY PRESS, Aug. 10, 2006, at A10 (reporting that, under the new streamlining procedures, Board members often render decisions within minutes and that the rate at which Board members rule against noncitizens has soared).

244. U.S. Comm’n on Int’l Religious Freedom, *supra* note 224, at 7.

245. The number of appeals in the United States Courts of Appeals increased forty-one percent between 1990 and 2002 and nineteen percent between 1998 and 2002. Admin. Office of the U.S. Courts, *Table 2.3: U.S. Courts of Appeals (Excludes Federal Circuit). Appeals Filed by Type of Appeal and Originating Agency*, (Mar. 31, 2006), <http://www.uscourts.gov/judicialfactsfigures/Table203.pdf>. This elevation was driven mostly by the increase in appeals from decisions of the Board of Immigration Appeals. *Id.* (“The increase in filings of administrative agency appeals began in February 2002, after the Attorney General ordered the Board of Immigration Appeals to clear its backlog of cases, stating that this action was required to help prevent terrorist attacks and enforce the nation’s immigration laws. 449 cases were appealed from the Board of Immigration Appeals. Admin. Office of the U.S. Courts, *Table B-3. U.S. Courts of Appeals—Sources of Appeals and Original Proceedings Commenced, by Circuit, During the 12-Month Periods Ending September 30, 2002 Through 2006*, at 115 (2006), <http://www.uscourts.gov/judbus2006/appendices/b3.pdf>).

246. See 8 U.S.C. § 1252(b)(4)(B) (2000).

247. *Turcios v. INS*, 821 F.2d 1396, 1402 (9th Cir. 1987).

248. See *Kifleyesus v. Gonzales*, 462 F.3d 937, 943, 945 (8th Cir. 2006).

249. In *Santosky v. Kramer*, 455 U.S. 745, 762 (1982) (citing *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 835 n.36 (1977)), the Supreme Court ordered a higher burden of proof based in part on the Court’s observation that permanent neglect proceedings left determinations vulnerable to the subjective values of the judge. The Court also noted that such proceedings are susceptible to judgments based on cultural or class bias, because parents subject to

### 3. *Governmental Interest in Maintaining Current Procedures*

The final consideration under *Mathews* involves weighing the governmental interests affected, including the function of the statutory provision and the fiscal and administrative burdens that a heightened burden of proof would impose.<sup>250</sup> At least four governmental interests are at stake in removal proceedings involving applications for asylum where an immigration judge may potentially make a finding under § 1158(d)(6): the government's interests in the efficient administration of immigration law,<sup>251</sup> in granting refuge to persecuted persons in compliance with treaty and statutory obligations, in punishing those who try to remain in the country through fraudulent means, and in deterring future attempts to monopolize judicial proceedings for fraudulent ends. A burden of proof more exacting than preponderance of the evidence is consistent with all of these interests. In particular, the government's goals of identifying fraudulent asylum applications, punishing the offending alien, and deterring others who would follow in his footsteps are served by procedures that promote an accurate determination of whether fraud has been committed.<sup>252</sup> A burden of proof more likely to yield an accurate finding would also further the government's additional interest in providing a just proceeding.<sup>253</sup>

Unlike a constitutional requirement to supply an additional or more elaborate hearing<sup>254</sup> or government-supplied counsel, finding that due

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termination proceedings are often poor, uneducated, or members of minority groups. *Id.* at 763.

250. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

251. See *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) ("The government's interest in efficient administration of the immigration laws at the border also is weighty. Further, it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature.").

252. See *Santosky*, 455 U.S. at 767.

253. See *Addington v. Texas*, 441 U.S. 418, 426 (1979) ("Under the [state statute], . . . the State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others. Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in such commitment proceedings.").

254. The Supreme Court has held that the Due Process Clause requires some kind of a hearing before the state may deprive a person of liberty or property. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (termination of employment); *Parham v. J.R.*, 442 U.S. 584, 606–07 (1979) (a state's confinement of a child in a mental hospital); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978) (termination of utility service); *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (a public school's suspension of a student); *Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974) (forfeiture of a prisoner's good-time credits); *Fuentes v. Shevin*, 407 U.S. 67, 80–84 (1972)

process requires an elevated burden of proof would reduce factual error without imposing substantial fiscal burdens upon the government.<sup>255</sup> Imposing an intermediate evidentiary standard also should not affect the flexibility or speed of the factfinding process.<sup>256</sup> And it should not create an additional administrative burden for immigration judges because they are already familiar with applying this burden of proof in removal proceedings.<sup>257</sup> For example, immigration judges currently must determine that the government has established an alien’s removability by clear and convincing evidence before issuing a removal order.<sup>258</sup> Since evaluating whether a body of evidence suffices to establish an alien’s removability by clear and convincing evidence is integral to immigration judges’ regular duties, applying this analytical framework to determine whether the evidence supports a finding that an alien has knowingly filed a frivolous asylum application should impose no great hardship upon the immigration court.

*D. The Case for a Clear and Convincing Burden of Proof for § 1158(d)(6) Findings*

Which burden of proof will satisfy due process depends upon the substantiality of the interests at stake. Given the instances in which the Supreme Court has held that due process concerns warrant a higher burden of proof,<sup>259</sup> it is manifest that the clear and convincing evidentiary standard should apply to findings under § 1158(d)(6). An analysis of the contexts in which the three traditional evidentiary standards apply demonstrates that only the intermediate standard is

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(issuance of a writ allowing repossession of property); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (termination of welfare benefits).

255. See *Santosky*, 455 U.S. at 767.

256. See *In re Winship*, 397 U.S. 359, 366 (1970).

257. See *Santosky*, 455 U.S. at 767 (finding that, because New York Family Court judges already were familiar with a higher evidentiary standard in other contexts, imposing the standard of clear and convincing evidence would not amount to a real administrative burden in a parental rights termination proceeding involving a charge of permanent neglect).

258. 8 U.S.C. § 1229a(c)(3)(A) (2000); *Woodby v. INS*, 385 U.S. 276, 286 (1966); see also *Zerrei v. Gonzales*, 471 F.3d 342, 345 (2d Cir. 2006); *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 679 (9th Cir. 2005); *Campos v. INS*, 961 F.2d 309, 312 (1st Cir. 1992).

259. See *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 282 (1990) (“This Court has mandated an intermediate standard of proof—‘clear and convincing evidence’—when the individual interests at stake in a state proceeding are both ‘particularly important’ and ‘more substantial than mere loss of money.’” (quoting *Santosky*, 455 U.S. at 756)).

mandated by the Due Process Clause and is appropriate for § 1158(d)(6) determinations.

### 1. *Preponderance of the Evidence*

The Board determined that findings under § 1158(d)(6) need only be supported by a preponderance of the evidence.<sup>260</sup> This standard is typically utilized in civil proceedings. In *Addington*, the Supreme Court summarized the rationale for this burden of proof in this way:

At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.<sup>261</sup>

While the Board apparently disagreed,<sup>262</sup> effecting permanent removal and prohibiting an alien from applying for immigration benefits—no matter how dire future circumstances may be, and regardless of the familial ties developed in the United States—constitutes a significant deprivation of liberty or property interests.<sup>263</sup> The judiciary should not deem the risk that a deserving alien may face a permanent bar on petitioning for immigration benefits as a minimal societal concern.

Weighing the risks of an erroneous decision also counsels against the preponderance standard in the context of a § 1158(d)(6) finding. The primary function of the burden of proof is to allocate the risk of an erroneous factfinding between the two parties.<sup>264</sup> If an alien files a fraudulent asylum application, and the immigration court does not determine the evidence of fraud sufficient to support a finding of frivolousness under § 1158(d)(6), the evidence may still be used to support an adverse credibility finding and, on that ground, to deny the asylum application. Thus, the efforts of the government will not have

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260. *In re Y-L-*, 24 I. & N. Dec. 151, 157–58 (B.I.A. 2007).

261. *Addington v. Texas*, 441 U.S. 418, 423 (1979).

262. The Board noted that a finding of frivolousness “is a preemptive determination which, once made, forever bars an alien from any benefit under the Act.” *In re Y-L-*, 24 I. & N. Dec. at 157. However, the Board did not deem these “severe consequences” to warrant an elevated burden of proof. *See id.* at 158.

263. *See Maldonado-Perez v. INS*, 865 F.2d 328, 332 (D.C. Cir. 1989); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1038 (5th Cir. 1982).

264. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 761 (1982).

been wasted. Without the frivolousness finding, the alien will be eligible to apply for adjustment of status, voluntary removal, or other benefits for which she may be eligible.<sup>265</sup> If the alien does not qualify for these benefits, then the Department of Homeland Security, or an immigration judge, may needlessly spend time processing an undeserving claim. The risk of an erroneous frivolousness finding to the asylum seeker, however, is profound. The individual alien should not be asked to share equally with society the risk of error, since the risk of injury to her—permanent removal and denial of the opportunity to apply for any immigration benefits for which she may become eligible in the future—is significantly greater than any possible harm to the government.<sup>266</sup>

In addition, the government has an obligation—imposed by the Constitution, statute, and treaties—not to deny access to our immigration laws without adequate justification. In the words of the Supreme Court in *Addington*, “[s]ince the preponderance standard creates the risk of increasing the number of individuals erroneously [denied opportunity to apply for benefits], it is at least unclear to what extent, if any, the state’s interests are furthered by using a preponderance standard.”<sup>267</sup>

## 2. *Beyond a Reasonable Doubt*

At the other end of the continuum is the “beyond a reasonable doubt” standard applicable in criminal cases. Society has considered this stringent standard to be appropriate when “the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.”<sup>268</sup> When it is incumbent upon the government to prove an element beyond a reasonable doubt, “society imposes almost the entire risk of error upon itself.”<sup>269</sup>

The Court’s analysis in *Addington* of whether the government must prove a person’s mental illness beyond a reasonable doubt in a civil commitment proceeding illustrates the inappropriateness of that standard for § 1158(d)(6) determinations.<sup>270</sup> In *Addington*, the Court found the

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265. See, e.g., 8 U.S.C. § 1229c(a)(1) (2000).

266. See *Addington*, 441 U.S. at 427.

267. *Id.* at 426.

268. *Id.* at 423.

269. *Id.* at 424.

270. *Id.* at 428–31.

“beyond a reasonable doubt” standard to be too stringent for a number of reasons, many of which apply to frivolousness findings within removal proceedings. First, the Court stressed that, in these civil proceedings, state power is not exercised in a punitive sense.<sup>271</sup> Second, the Court found that the “beyond a reasonable doubt” standard, heralded as “a critical part of the moral force of the criminal law,” historically has been reserved for criminal cases.<sup>272</sup> Third, the full force of the idea that the threat of error to the individual must be minimized even at the risk that some who are guilty may go free does not apply to civil commitment.<sup>273</sup> Fourth, while the primary evaluation in a criminal proceeding is intrinsically fact-based, the inquiry in a civil commitment proceeding turns on mental health experts’ discernment of the “*meaning* of the facts.”<sup>274</sup> The Court stressed its concern that, given the lack of certainty and the fallibility of psychiatric diagnoses, it is unclear whether a state could ever prove beyond a reasonable doubt that an individual is mentally ill and likely to be dangerous to society.<sup>275</sup>

Similarly, the “beyond a reasonable doubt” standard is likely too stringent for the context of a frivolousness determination under § 1158(d)(6). Removal is not criminal and historically has not been considered punitive in nature.<sup>276</sup> Determining whether an alien knowingly filed an asylum application with a fraudulent material element involves a simpler finding of fact than the decision to commit an individual for mental illness. Rarely are experts called to opine as to the “meaning” of any facts, so a less stringent burden of proof is not necessary for that reason. But the dearth of objective evidence refuting an asylum seeker’s claim means that a frivolousness finding often will be based on inconsistencies in the alien’s testimony and perhaps on a reading of the alien’s demeanor on the stand. Without objective, nearly conclusive evidence of fraud, it would be almost impossible for the government to establish a willful filing of a frivolous application beyond a reasonable doubt.<sup>277</sup>

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271. *Id.* at 428.

272. *Id.* (quoting *In re Winship*, 397 U.S. 358, 364 (1970) (internal quotation marks omitted)).

273. *Id.*

274. *Id.* at 429.

275. *Id.*

276. See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

277. In light of “the inescapable inability of the INS to demonstrate that the petitioner’s recital of

### 3. *Clear and Convincing Evidence*

A finding under § 1158(d)(6) permanently deprives an asylum seeker of any and all immigration benefits.<sup>278</sup> Given the seriousness and permanent character of this determination—made in a proceeding in which the subjective judgments of an immigration judge are required and the alien is not guaranteed representation by counsel—the Due Process Clause requires that clear and convincing evidence support the factual underpinnings of the finding. This intermediate standard

is less commonly used, but nonetheless “is no stranger to the civil law.” One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money[,] and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff’s burden of proof. Similarly, this Court has used the “clear, unequivocal and convincing” standard of proof to protect particularly important individual interests in various civil cases.<sup>279</sup>

Repeatedly, the Supreme Court has held that “due process places a heightened burden of proof on the State in civil proceedings in which the ‘individual interests at stake . . . are both particularly important and more substantial than mere loss of money.’”<sup>280</sup> Indeed, this level of proof—or an even higher one—has historically been imposed in cases involving much less significant (though still important) deprivations, including allegations of civil fraud, lost wills, and oral contracts of bequests.<sup>281</sup>

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past persecution is false,” the Ninth Circuit has interpreted the asylum statute to place on the asylum seeker the burden of persuading the immigration judge that her testimony is credible. *Mejia-Paiz v. INS*, 111 F.3d 720, 722 (9th Cir. 1997). The Supreme Court has recognized that practical considerations may limit a constitutionally-based burden of proof and that “due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility” of an erroneous decision. *Patterson v. New York*, 432 U.S. 197, 208 (1977).

278. See 8 U.S.C. § 1158(d)(6) (2000).

279. *Addington*, 441 U.S. at 424 (internal footnotes and citations omitted).

280. *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 757 (1982) (quoting *Addington*, 441 U.S. at 424) (second set of internal quotation marks omitted)); accord *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 282 (1990) (“This Court has mandated an intermediate standard of proof—‘clear and convincing evidence’—when the individual interests at stake in a state proceeding are both ‘particularly important’ and ‘more substantial than mere loss of money.’” (quoting *Santosky*, 455 U.S. at 756)).

281. *Cruzan*, 497 U.S. at 283 (quoting *Woodby v. INS*, 385 U.S. 276, 285 n.18 (1966))



In light of the interests held to require application of the clear and convincing standard, it is apparent that the Constitution requires the government to satisfy this intermediate burden of proof to support a finding under § 1158(d)(6). The Court has determined that this intermediate evidentiary standard is necessary in contexts similar to those in a removal proceeding where a frivolousness finding is made—in deportation proceedings,<sup>282</sup> denaturalization proceedings,<sup>283</sup> and expatriation determinations.<sup>284</sup> In *Woodby*, the Court ruled that, because deportation could lead to drastic deprivations, “it is impermissible for a person to be banished from this country upon no higher degree of proof than applies in a negligence case.”<sup>285</sup>

In sum, the Due Process Clause requires that clear and convincing evidence support a finding of frivolousness. A frivolousness finding implicates an asylum seeker’s liberty interests in remaining in the United States and in not being subject to arbitrary governmental procedures. The individual’s interest is particularly strong because of the complete and permanent nature of the sanction. The typical lack of documentary evidence to support an asylum applicant’s claim of persecution, the likely language barrier, the lack of an absolute right to counsel, and the weight accorded to immigration judges’ subjective judgments of witness credibility infuse asylum proceedings with a high risk of error. The great variance in immigration judges’ rates of granting asylum—even within the same court—demonstrate the fairly arbitrary nature of asylum proceedings. The deferential standard of review and the Board’s new streamlining procedure do not afford sufficient protection to an alien erroneously denied asylum. The governmental interests at stake in removal proceedings, while weighty, do not suffice to justify a lower burden of proof. These factors, on balance, weigh in favor of requiring the government to establish that an alien knowingly filed a fraudulent asylum application by clear and convincing evidence. Following the

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282. *Woodby*, 385 U.S. at 286.

283. *Chaunt v. United States*, 364 U.S. 350, 355 (1960); *Schneiderman v. United States*, 320 U.S. 118, 123 (1943).

284. *Gonzales v. Landon*, 350 U.S. 920, 921 (1955) (per curiam). The Court has also held that the government must meet an intermediate burden of proof in state proceedings to sever parental rights, *Santosky*, 455 U.S. at 766–68, and in civil commitment proceedings, *Addington*, 441 U.S. at 431–33.

285. *In re Winship*, 397 U.S. 358, 368 n.6 (quoting *Woodby*, 385 U.S. at 285 (internal quotation marks omitted)). In *Woodby*, the Supreme Court emphasized that the clear and convincing burden of proof was necessary for “all deportation cases, regardless of the length of time the alien has resided in this country.” *Woodby*, 385 U.S. at 286 n.19.

dictates of *Mathews*, the federal courts of appeals should reject the Board’s selection of a preponderance standard.

### III. EVIDENTIARY REQUIREMENTS TO SATISFY ELEMENTS OF § 1158(d)(6): A PROPOSAL

Once federal courts specify which burden of proof comports with due process, they must determine what kinds of evidence suffice to meet that burden under § 1158(d)(6). This Part surveys bodies of evidence that could support frivolousness determinations and advocates that only certain types of evidence are sufficiently probative to satisfy elements of § 1158(d)(6) under a clear and convincing standard. Consistent with the case law in this area, evidence of forged documents should satisfy elements of fabrication and intent. An immigrant’s admission of lying on his asylum application should satisfy the fabrication element, but, depending on the content of the admission and the surrounding context, may not satisfy the element of intent. Testimonial evidence that directly contradicts a material, intentionally false statement in an asylum application should support a frivolousness finding, but implausibilities and internal inconsistencies in an applicant’s testimony that do not contradict a statement in an application would not meet the regulatory requirements for frivolousness. Courts should interrogate the reliability of documents produced by the government before using them to support a finding under § 1158(d)(6). Finally, courts should reject demeanor-based findings as support for a frivolousness determination under a clear and convincing standard.

No court has fully explicated the case law’s holdings regarding which kinds of evidence are probative enough to support a frivolousness determination, and no court has applied these findings in the context of a burden of proof. This Part details the judicial opinions applying § 1158(d)(6) and argues that the force of the case law is consistent with the application of a heightened burden of proof and attendant evidentiary standards. Generally speaking, the case law reflects courts’ concern that the government produce highly probative evidence to support a finding under § 1158(d)(6) and justify the severe sanction of permanent removal. For example, the decisions upholding frivolousness determinations on the basis of forged documents<sup>286</sup> and admissions<sup>287</sup> are

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286. *Aziz v. Gonzales*, 478 F.3d 854, 857–858 (8th Cir. 2007); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005); *Selami v. Gonzales*, 423 F.3d 621, 626–27 (6th Cir. 2005).

287. *Aziz*, 478 F.3d at 857; *Kifleyesus v. Gonzales*, 462 F.3d 937, 943 (8th Cir. 2006); *Barreto-*

consistent with the conclusion that, to comply with due process, the government must prove that a noncitizen knowingly filed a frivolous asylum application by clear and convincing evidence. However, other aspects of the case law—in particular the use of testimonial inconsistencies and an assessment of an asylum seeker's demeanor as support for findings under § 1158(d)(6)—may be inconsistent with a heightened evidentiary standard.

*A. Forged Documents Can Satisfy Elements of Fabrication and Intent*

Forged documents offered by an alien to support a claim of persecution are sufficiently probative and reliable to support a frivolousness finding. *Aziz v. Gonzales*,<sup>288</sup> *Ignatova v. Gonzales*,<sup>289</sup> and *Selami v. Gonzales*<sup>290</sup> demonstrate that tangible evidence of fraud suffices to establish the elements of intent and fabrication under § 1158(d)(6). In *Aziz*, the Eighth Circuit upheld a frivolousness finding when the petitioner admitted that she had submitted fraudulent evidence,<sup>291</sup> including false medical documents, a fabricated marriage document, and seven fraudulent affidavits.<sup>292</sup> In *Ignatova*, the Eighth Circuit upheld a frivolousness finding where the immigration judge had concluded that a hospital record was demonstrably fraudulent.<sup>293</sup> The fraud was made plain by a letter from the issuing hospital, which represented that it had not treated Ignatova, that it did not employ the doctors who Ignatova said treated her, and that the stamps and seals on the counterfeit hospital records were not authentic.<sup>294</sup> Similarly, in *Selami*, the Sixth Circuit affirmed a frivolousness finding where the alien tried to prove his claim with a forged newspaper article.<sup>295</sup> The forgery was evident by the difference in the format and spacing in the suspect article from the rest of the newspaper<sup>296</sup> and was confirmed

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Claro v. U.S. Att'y Gen., 275 F.3d 1334, 1337, 1339 (11th Cir. 2001).

288. *Aziz*, 478 F.3d at 857–58.

289. 430 F.3d 1209, 1214 (8th Cir. 2005).

290. 423 F.3d 621, 626–27 (6th Cir. 2005).

291. *Aziz*, 478 F.3d at 857.

292. *Id.* at 856 nn.1, 2.

293. *Ignatova*, 430 F.3d at 1214.

294. *Id.*

295. *Selami*, 423 F.3d at 624, 626.

296. *Id.* at 624.

when an actual copy of that day’s paper showed that the dubious article was never printed.<sup>297</sup>

The strength of the evidence of fraud in these cases stems from the objective verification of the fabrication and the obvious lengths taken by the noncitizen to forge the documents. When a petitioner admits to submitting fraudulent documents or an independent source verifies the fraud, the element of fabrication is conclusively established. No deductions or extrapolations from muddled testimony that may weaken the reliability of the finding are necessary. The deliberateness of the fraud is clearly proven by the time, energy, planning, and resourcefulness inherent in the alien’s manufacture of the evidence.

While a requirement of objective verification of fraud would be too onerous a standard for the government to meet, the presence of independent verification of the fraudulent nature of documents should suffice to satisfy the “deliberate” and “fabrication” elements of § 1158(d)(6) by clear and convincing evidence. Assuming the immigration judge provides the asylum applicant with an opportunity to explain the counterfeit documents and advises him of the consequences of knowingly filing a frivolous application, the only additional inquiry is whether the alien submitted the documents to support a statement in the asylum application. If the fraudulent documents relate to a material element of the application, then all elements of § 1158(d)(6) will be established by clear and convincing evidence.

*B. Documents Produced by the Government Must Be Tested for Reliability Before Accepted as Support for a Frivolousness Finding*

Where the government produces documents that call into question the veracity of an asylum applicant’s claim, an immigration judge should ensure that the documents are sufficiently reliable and probative to support a finding under § 1158(d)(6). Asylum regulations provide that the Department of State receive every asylum application.<sup>298</sup> At its option, the Department may supply (1) detailed information on the conditions within the asylum applicant’s native country that the Department deems relevant to her eligibility for asylum,<sup>299</sup> (2) an assessment of the accuracy of the applicant’s assertions about conditions

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297. *Id.*

298. *See* 8 C.F.R. § 208.11(a) (2007).

299. *Id.*

in her native country and her particular likelihood of persecution;<sup>300</sup> (3) information about whether persons who are similarly situated to the asylum applicant are persecuted or tortured in that country and the frequency of such persecution or torture;<sup>301</sup> and (4) any other information that the Department considers relevant.<sup>302</sup> An immigration judge also has the option of requesting specific comments from the Department of State regarding individual cases or types of claims.<sup>303</sup> Therefore, an immigration judge often will need to assess the probative value, and ultimate effect on an asylum applicant's claim, of documents produced by the Department of State regarding the likelihood of persecution faced by the asylum seeker.

The Sixth Circuit's decision in *Alexandrov v. Gonzales*<sup>304</sup> is consistent with a requirement that the government demonstrate the reliability of hearsay evidence before using that evidence to support a frivolousness determination. There, the court held that reports supplied by the Department of State were inherently unreliable hearsay and did not constitute adequate support for a finding under § 1158(d)(6).<sup>305</sup> The court highlighted several factors necessary to demonstrate reliability: (1) the absence of errors in the document,<sup>306</sup> (2) knowledge of how the data in the document was compiled and how the document was prepared,<sup>307</sup> (3) knowledge of the identity and background of persons active in compiling or communicating the data,<sup>308</sup> and (4) possession of the means to ascertain and evaluate any bias inherent in a source of data.<sup>309</sup> Because the memoranda in *Alexandrov* did not possess sufficient indicia of reliability, the Sixth Circuit held that the immigration judge erred in relying on them as the sole support for a finding under § 1158(d)(6).<sup>310</sup>

Courts should limit the use of hearsay as support for a frivolousness finding to situations in which its reliability can be thoroughly tested. So long as the parties and the court possess the information listed above—

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300. *Id.* § 208.11(b)(1).

301. *Id.* § 208.11(b)(2).

302. *Id.* § 208.11(b)(3).

303. *Id.* § 208.11(c).

304. 442 F.3d 395 (6th Cir. 2006).

305. *Id.* at 407.

306. *See id.* at 400.

307. *See id.* at 401–03.

308. *See id.* at 400–03, 407.

309. *See id.* at 399.

310. *Id.* at 407.

assuming the asylum seeker is represented by a competent attorney, which is not guaranteed by § 1158—an asylum applicant presumably could identify deficiencies in the evidence, and a reviewing court could evaluate the reliability of the hearsay.<sup>311</sup> Future courts will need to grapple with whether hearsay may constitute sufficient evidence that an asylum applicant knowingly submitted a fraudulent application.

*C. An Admission of Falsehood Will Establish Fabrication But May Not Always Satisfy the Intent Element*

An admission of falsehood in an asylum application may be sufficiently probative to support a frivolousness finding. *Barreto-Claro v. U.S. Attorney General*<sup>312</sup> and *Kifleyesus v. Gonzales*<sup>313</sup> involved admissions of fraud.<sup>314</sup> In *Barreto-Claro*, the Eleventh Circuit found that the elements of deliberateness and fabrication were satisfied where the alien submitted two materially different asylum applications.<sup>315</sup> Similarly, in *Kifleyesus*, the Eighth Circuit affirmed a frivolousness finding where the alien admitted the falsity of some representations after the immigration judge received a letter from the alien’s ex-fiancé claiming that Kifleyesus had lied in her asylum application.<sup>316</sup> On their facts, *Barreto-Claro* and *Kifleyesus* are consistent with the application of a heightened evidentiary standard.

While an admission of falsehood will typically establish fabrication, not all admissions will satisfy the intent element of § 1158(d)(6) by clear and convincing evidence. Whether the element of deliberateness is met should turn upon the plausibility of the alien’s explanation for the misrepresentation. For instance, if Kifleyesus’s allegations of domestic violence and of being overborne by her husband’s will<sup>317</sup> had been credible, this explanation might have been adequate to repel a frivolousness finding. Similarly, if an alien explains that statements in her asylum application are false because a “notario” completed her

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311. *See id.* at 406.

312. 275 F.3d 1334 (11th Cir. 2001).

313. 462 F.3d 937 (8th Cir. 2006).

314. *Aziz v. Gonzales*, discussed above, also involved a petitioner’s admission of having lied on her asylum application and having submitted multiple fraudulent documents in support of her claims of persecution. *See* 478 F.3d 854, 856–57 (8th Cir. 2007).

315. *Barreto-Claro*, 275 F.3d at 1336–37.

316. *Kifleyesus*, 462 F.3d at 940.

317. *Id.* at 938 n.1, 942.

application and duped her into signing a form in English that she could not read,<sup>318</sup> that explanation may demonstrate a lack of intent to defraud the government.

In addition, immigration judges must ensure that any admission of falsehood actually relates to a substantial, material statement in the asylum application.<sup>319</sup> Recognizing the dubious circumstances under which many applications are prepared, courts have held that minor inconsistencies between an applicant's testimony and his asylum application cannot support an adverse credibility finding.<sup>320</sup> Given the probability that a noncitizen who may not speak English or be able to secure assistance by an attorney may submit an asylum application without fully understanding its content or importance, immigration judges and the judiciary should make certain that any statement made in an asylum application and later admitted to be false was clearly intended as a false statement at the time it was written.

*D. Only Testimonial Evidence that Directly Contradicts a Material, Intentionally False Statement in an Asylum Application Should Support a § 1158(d)(6) Finding*

Whether testimonial evidence—standing alone—should suffice to support a frivolousness finding is a more difficult issue than the adequacy of forged documents or admissions of falsehood. Theoretically, a frivolousness determination could rest on at least four types of testimonial findings: (1) a discrepancy between an alien's testimony and a statement in his asylum application, (2) an inconsistency

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318. See, e.g., Jim Morris, *EASY PREY/Operators Prey Upon Immigrants/Help with INS Sold by Rogue "Notarios"*, HOUSTON CHRON., March 27, 1995, at A1 (discussing problem of immigrants with valid asylum claims being tricked by fake lawyers who file false claims with the INS); Maria Puente, *A Tougher Line on Political Asylum: New System Will Take Aim at Fraud*, USA TODAY, Feb. 10, 1994, at 2A (reporting that asylum officers in certain cities receive as many as 300 fraudulent applications per month, prepared by self-styled "consultants"); Patrick J. McDonnell, *Couple Charged With Filing 2,601 Fraudulent Requests for Asylum*, L.A. TIMES, June 25, 1994, at 34 (reporting that couple tricked illegal immigrants into thinking they were applying for work permits but then submitted fraudulent applications for asylum).

319. See *infra* notes 322–339.

320. See, e.g., *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir. 2003) ("Minor inconsistencies in the record that do not relate to the basis of an applicant's alleged fear of persecution, go to the heart of the asylum claim, or reveal anything about an asylum applicant's fear for his safety are insufficient to support an adverse credibility finding."); *Garrovillas v. INS*, 156 F.3d 1010, 1014 (9th Cir. 1998) (holding that "inconsistencies of less than substantial importance for which a plausible explanation is offered" cannot serve as the sole basis for an adverse credibility finding).

inherent in an alien’s testimony that does not contradict a statement in his application, (3) a discrepancy between an alien’s testimony and that of a supporting witness or a document that does not contradict a statement in the alien’s application, and (4) an implausibility in an alien’s relation of events that does not contradict a statement in his application. To comply with 8 U.S.C. § 1158(d)(6) and 8 C.F.R. § 208.20, only the first of these testimonial inconsistencies should potentially suffice to support a frivolousness finding, because “an asylum application is frivolous [only] if *any of its material elements* is deliberately fabricated.”<sup>321</sup>

This conclusion is supported by the Third Circuit’s decision in *Muhanna*<sup>322</sup> and the Eleventh Circuit’s opinion in *Mingkid v. U.S. Attorney General*.<sup>323</sup> In *Muhanna*, the court stressed that, to support a finding of frivolousness, the fabrication must relate to a material element of the asylum application.<sup>324</sup>

[U]nder 8 C.F.R. § 208.20 a finding of frivolousness does not flow automatically from an adverse credibility determination. . . . *Inconsistencies between testimony and an asylum application*, while certainly relevant to a credibility determination that may result in the denial of an applicant’s asylum claim, do not equate to a frivolousness finding under Section 1158(d)(6), which carries with it much greater consequences.<sup>325</sup>

The Eleventh Circuit adopted this holding in *Mingkid*.<sup>326</sup>

Limiting eligible testimonial inconsistencies to those that directly contradict a material element of an asylum application is consistent with 8 C.F.R. § 208.20<sup>327</sup> and effectively limits the universe of possible findings that can support a frivolousness determination to those that actually show the application to be fraudulent. Under this interpretation of 8 C.F.R. § 208.20, internal inconsistencies in an alien’s testimony that do not directly contradict a statement on her asylum application cannot substantiate a frivolousness determination. The same principle should

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321. 8 C.F.R. § 208.20 (2007) (emphasis added).

322. See *Muhanna v. Gonzales*, 399 F.3d 582 (3d Cir. 2005).

323. See 468 F.3d 763, 770–71 (11th Cir. 2006).

324. See 399 F.3d at 589.

325. *Id.* (emphasis added).

326. See 468 F.3d at 770.

327. 8 C.F.R. § 208.20 (“For purposes of this section, an asylum application is frivolous if any of its material elements is deliberately fabricated.”).



disqualify, as support for a finding under § 1158(d)(6), any implausibilities in the alien's testimony, as well as any discrepancies between an alien's testimony and the testimony of other witnesses or documentary evidence that do not contradict a material element of the alien's asylum application. A noncitizen's testimony of details of persecution not relayed in her asylum application also should not support a frivolousness finding.<sup>328</sup>

If an alien's testimony contradicts a statement in her asylum application, then the immigration judge must determine the materiality of that statement to her claim for refuge. No federal court<sup>329</sup> has delineated a clear definition of materiality, but guidance may be derived from the Sixth Circuit's decision in *Chen v. Gonzales*<sup>330</sup> and the Eleventh Circuit's decision in *Mingkid*.<sup>331</sup> In *Chen*, the court held that testimonial inconsistencies that detract from an alien's claim of persecution or fail to call into question the primary incident of persecution for which the alien is seeking asylum cannot support a finding under § 1158(d)(6).<sup>332</sup> The court stressed that details "of only background interest"<sup>333</sup> and those not "germane to the crucial issue in this case"<sup>334</sup> do not strike the heart of an applicant's claim for refuge, and therefore they cannot form the basis for an adverse credibility finding. Citing the element of materiality in 8 C.F.R. § 208.20, the *Chen*

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328. See *Smolniakova v. Gonzales*, 422 F.3d 1037, 1045 (9th Cir. 2005) (finding that "asylum forms 'filled out by . . . people who . . . are unable to retain counsel' should be read charitably, especially when it comes to the absence of a comprehensive and thorough account of all past instances of persecution") (quoting *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990)); cf. *Lopez-Reyes v. INS*, 79 F.3d 908, 911 (9th Cir. 1996) ("It is well settled that an applicant's testimony is not per se lacking in credibility simply because it includes details that are not set forth in the asylum application.").

329. In *In re Y-L-*, the Board did not explicitly define materiality but did include a citation and parenthetical to *Monter v. Gonzales*, 430 F.3d 546, 553–54 (2d Cir. 2005), which stated that "a concealment or misrepresentation is material if it has 'a natural tendency to influence[,] or was capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *In re Y-L-*, 24 I. & N. Dec. 151, 159 (2007) (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988)). The Board also defined, by inference, "material fabrications" as "not mere incidental or tangential discrepancies or omissions." *Id.* The Board found that the element of materiality was met where the immigration judge found that information in an original asylum application was a "glaring inconsistency" when compared to the new claim in the amended application. *Id.*

330. 447 F.3d 468 (6th Cir. 2006).

331. 468 F.3d 763 (11th Cir. 2006).

332. *Chen*, 447 F.3d at 474–76.

333. *Id.* at 475.

334. *Id.*

court also found the inconsistencies not sufficiently material to support a finding under § 1158(d)(6).<sup>335</sup>

In *Mingkid*, the court suggested, but did not hold, that material discrepancies should go to the heart of the specific incidents for which the alien is claiming asylum.<sup>336</sup> On appeal, the *Mingkid* brothers conceded that their hearing testimony contained minor inconsistencies but argued that the discrepancies were too trivial to support a frivolousness determination.<sup>337</sup> The immigration judge admitted that many discrepancies did not “go directly to the specific incidents [the aliens] testified about as being the reason they were requesting asylum.”<sup>338</sup> Upon review, the Eleventh Circuit highlighted the seemingly trivial discrepancies between the brothers’ testimony but found it unnecessary to determine the materiality of the inconsistencies, because the immigration judge failed to satisfy other elements of the statute.<sup>339</sup>

If a noncitizen’s testimony contradicts a material aspect of her asylum application, then the immigration judge must determine whether clear and convincing evidence establishes that the inconsistency qualifies as a fabrication, and, if so, whether the fabrication was deliberate.<sup>340</sup> Whether a testimonial inconsistency should qualify as a deliberate fabrication may depend upon the number of inconsistencies, how central they are to the alien’s claim of persecution as set forth in the asylum application, the degree of consistency of the rest of the alien’s testimony, and whether the alien possesses any corroborating evidence. And, as referenced in the previous discussion about admissions of falsehoods,<sup>341</sup> a court also

335. *Id.* at 476–77.

336. *See Mingkid*, 468 F.3d at 770; *see also* *Kifleyesus v. Gonzales*, 462 F.3d 937, 945 (8th Cir. 2006) (finding that fabrications were material because they “relate[d] directly to the issue of past persecution and also to the issue of the likelihood of future persecution”); *Muhanna v. Gonzales*, 399 F.3d 582, 589 (3d Cir. 2005) (stressing that, under 8 C.F.R. § 208.20, the immigration judge must conduct a full review of an alien’s asylum application before concluding that any inconsistency is so material that it renders the application frivolous).

337. *Mingkid*, 468 F.3d at 769.

338. *Id.* at 770 (alteration omitted). The judge highlighted inconsistencies in the brothers’ testimony regarding their father’s occupation, their relationship to a cousin allegedly burned by Muslims, with whom the brothers lived in Indonesia, and where their grandparents resided. *Id.*

339. *Id.* (“Even assuming that the [immigration judge] believed all of the inconsistencies he noted to be ‘material’ for the purposes of the frivolity determination, the [judge] did not make the sufficiently specific findings required by 8 C.F.R. § 208.20 as to which material elements of the *Mingkids*’ applications for asylum were deliberately fabricated.”).

340. *See* 8 C.F.R. § 208.20 (2007).

341. *See supra* notes 312–318 and accompanying text.

should evaluate the plausibility of any explanation offered by the asylum applicant to explain the inconsistencies.

In *Muhanna*, the Third Circuit read 8 C.F.R. § 208.20 to require a judge to assess an asylum applicant's explanation for any discrepancy or implausibility.<sup>342</sup> The court found that

the explanation [the alien] offered for the inconsistent testimony appears plausible when viewed in light of the fact that Muhanna had no culpable motivation to make up the story about the street fight. After all, the incident as described in the asylum application and in his ultimate testimony was more helpful to his cause than his intermediate statements. For him to lie on his application and then to abandon that lie for a denial that any stabbing had occurred, and then for a story less helpful to his cause, appear to make far less sense than his explanation that the story on the application was true but that he was afraid of telling the truth at the hearing. Hence the inconsistency in his testimony does not necessarily support a finding that the application was false, but rather tends only to show that Muhanna was not credible at one point during the hearing.<sup>343</sup>

In evaluating the plausibility of the asylum applicant's explanation, the court appeared to review the record *de novo*, and not under the highly deferential standard of substantial evidence. This heightened standard of review appeared to be the court's attempt to ensure that the evidence was of a sufficiently high evidentiary quality to support the severity of the sanction—a function traditionally performed by an evidentiary burden of proof.<sup>344</sup>

It is not clear whether *Efe v. Ashcroft*,<sup>345</sup> a Fifth Circuit decision in which the court upheld a frivolous finding primarily on the basis of testimonial inconsistencies, is consistent with the proposition that only a testimonial inconsistency that directly contradicts an intentionally false, material element of an asylum application can support a finding under § 1158(d)(6).<sup>346</sup> The court reported that

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342. *Muhanna v. Gonzales*, 399 F.3d 582, 588 (3d Cir. 2005).

343. *Id.*

344. *See Addington v. Texas*, 441 U.S. 418, 423 (1979).

345. 293 F.3d 899 (5th Cir. 2002).

346. Later decisions have cited *Efe* for the proposition that tangible evidence of fraud is necessary to support a finding under § 1158(d)(6). *See Liu v. U.S. Dep't of Justice*, 455 F.3d 106, 114 (2d Cir. 2006); *Kifleyesus v. Gonzales*, 462 F.3d 937, 944–45 (8th Cir. 2006). These cases characterize *Efe* as turning on the presence of dental records that refuted *Efe's* allegations of his age when he entered

[t]he main thrust of Efe’s story [was] that he was involved in a political demonstration in Edo, Nigeria, in which he killed a police officer. Efe ran from the police for a number of months before boarding a ship that brought him to the U.S.<sup>347</sup>

Efe’s testimony included internal inconsistencies that went to the heart of his claim of persecution: he wavered as to his knowledge of the political party of which he allegedly was a member,<sup>348</sup> the reason he attended the demonstration at which he was allegedly beaten by a government official,<sup>349</sup> the injuries he suffered,<sup>350</sup> the number of officers who took part in or witnessed the event,<sup>351</sup> the identity of the officer who beat him,<sup>352</sup> the date he discovered that the officer died from the wound,<sup>353</sup> and his means of escape from the demonstration.<sup>354</sup> The court does not detail what Efe alleged in his asylum application. Therefore, it is impossible to determine with certainty whether Efe’s testimony directly contradicted a statement in his application or whether it merely was internally inconsistent. However, given that Efe’s claim for refuge

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the United States. *See id.* But the only discussion of the dental records occurs in reference to a December 1998 hearing, in which the immigration judge found that Efe was “generally credible regarding his version of the demonstration, stabbing of the officer, and flight”—the events that formed the basis of Efe’s claim for refuge—but noted that, “based on dental records and observations of Efe during the hearing, the [judge] explicitly questioned Efe’s claim that he was thirteen when he arrived in the U.S.” *Efe*, 293 F.3d at 901; *see also id.* at 902 n.1 (noting that, in contrast to Efe’s testimony, one dental report concluded that there was an 88.6% chance that Efe was eighteen years old or older when he entered the United States, and another report showed a 57.5% to 73% chance that he was over eighteen). While the immigration judge “attributed Efe’s vagueness about his age and birth date to attempts to mislead the court,” the judge apparently did not make an adverse credibility finding on this basis. *See id.* at 901. This interpretation of *Efe* is supported by the Board’s remand of the case to the immigration judge in June 2000 upon finding “previously unavailable material evidence [that] called into question the credibility of Efe’s story.” *Id.* at 902. The new evidence, a State Department telegram resulting from an investigation by the U.S. Embassy, was ultimately deemed to be of “limited probative value.” *See id.* at 902, 903. When the Fifth Circuit upheld the immigration judge’s frivolousness finding made at the August 2000 hearing, *id.* at 903, the court only noted that “Efe has gone back and forth with the facts and misrepresented his case several times.” *Id.* at 908. The court did not reference the dental records, so the surfacing of these records likely played a minor, if any, role in the court’s analysis under § 1158(d)(6). *See id.*

347. *Efe*, 293 F.3d at 901.

348. *Id.* at 905.

349. *Id.*

350. *Id.* at 901.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

apparently arose from one encounter with the Nigerian police, it is probable that his inconsistent testimony contradicted details of the event as described in his asylum application. If that assumption proves true, then the materiality of the inconsistencies—as well as the number of discrepancies and apparent dearth of consistent testimony central to his claim of persecution—may constitute clear and convincing evidence that Efe deliberately fabricated a material element of his asylum application.

*E. Findings of Demeanor Should Be Legally Ineligible to Support a Determination Under § 1158(d)(6)*

The case law does not squarely address whether an alien's demeanor, standing alone, may constitute adequate support for a finding under § 1158(d)(6). Demeanor-based findings stem from an immigration judge's subjective evaluation of an asylum seeker's manner while testifying. Demeanor, or non-verbal communication signals,<sup>355</sup> includes an alien's expression, tone of voice, level of emotion, speed of speech, degree of attentiveness, body movements such as fidgeting or shifting, and lack of eye contact.<sup>356</sup> Given the inherent subjectivity of findings of demeanor, courts should hold that immigration judges cannot rely upon an asylum seeker's demeanor to support a frivolousness finding.

*Efe* suggests that an immigration judge may consider an asylum applicant's demeanor in determining whether he knowingly filed a frivolous application for refuge.<sup>357</sup> The Fifth Circuit noted that the immigration judge's "observations of Efe during the hearing" led him to believe that Efe was attempting to mislead the court.<sup>358</sup> The judge also "pointed to Efe's demeanor in court" as evidence that he was lying.<sup>359</sup>

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355. See Kagan, *supra* note 202, at 378.

356. For instance, an immigration judge rested an adverse credibility finding on this string of observations in a 2002 case reviewed by the Ninth Circuit:

[T]here was an unnatural manner in [the asylum seeker's] delivery of her testimony without the occasional pauses one would expect while she stopped to remember the details of terrible experiences. There was no visible change in her countenance or signs of emotional upheaval except at one point later in the proceedings.

*Paramasamy v. Ashcroft*, 295 F.3d 1047, 1049 (9th Cir. 2002).

357. *Efe*, 293 F.3d at 901. *But cf.* *Muhanna v. Gonzales*, 399 F.3d 582, 588–99 (3d Cir. 2005) (holding that an adverse credibility determination, which included the demeanor-based finding that the alien was "someone who is not honest at all" was insufficient to support a frivolousness finding without the immigration judge's identification of which material element of the application had been fabricated).

358. *Efe*, 293 F.3d at 901.

359. See *id.* at 902 n.1.

While the court did not cite the judge’s findings of demeanor in affirming the frivolousness determination, it did not hold that such findings may not be considered as a matter of law.<sup>360</sup>

Evaluations of demeanor depend on the individual adjudicator’s perception and disposition. Demeanor-based findings often lack an articulated logic and are inherently unreviewable on appeal.<sup>361</sup> A determination that a person is not truthful may simply represent an immigration judge’s “gut feeling.”<sup>362</sup> Reviewing courts afford “special deference” to a judge’s demeanor-based findings in acknowledgment of the visual and auditory information available to the judge as an eye witness to the alien’s testimony.<sup>363</sup> While “special deference” does not denote a complete absence of judicial scrutiny, the reviewing court “certainly cannot expect that the factual basis for eyewitness observations always will find support in the hearing transcript.”<sup>364</sup> Therefore, an immigration judge’s evaluation of an asylum applicant’s non-verbal cues—as an indicator of the essential merit of her claim of persecution—is essentially unassailable on appeal.

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360. See *id.* at 908.

361. See generally Aubra Fletcher, *The Real ID Act: Furthering Gender Bias in U.S. Asylum Law*, 21 BERKELEY J. GENDER L. & JUST. 111, 121–22 (2006) (discussing the role of demeanor in credibility determinations); James C. Hathaway & William S. Hicks, *Is There a Subjective Element in the Refugee Convention’s Requirement of “Well-Founded Fear”?*, 26 MICH. J. INT’L L. 505, 517–34 (2005) (critiquing subjective, inconsistent demeanor-based judgments within the context of a well-founded fear inquiry); Guy Coffey, *The Credibility of Credibility Evidence at the Refugee Review Tribunal*, 15 INT’L J. REFUGEE L. 377, 387–88 (2003) (analyzing the role of demeanor in decisions of the Australian Refugee Review Tribunal, which reviews asylum decisions); Kagan, *supra* note 202, at 367 (analyzing principles from international refugee law that govern credibility assessments and proposing that appellate tribunals should review how first instance decision-makers make credibility assessments); Joanna Ruppel, *The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applicants*, 23 COLUM. HUM. RTS. L. REV. 1 (1991/92) (discussing factors leading to erroneous adverse credibility determinations and advocating for the United States to follow Canada’s lead in adopting a benefit of the doubt standard).

362. See Kagan, *supra* note 202, at 375–76 (discussing problems of subjective credibility assessments). One striking example of a “gut level” demeanor-based finding is this assertion by a United Nations Human Civil Rights officer in Kenya: “I can understand if someone is lying or not in the first minute of the interview.” *Id.* at 375. Guy S. Goodwin-Gill observes that “[d]ecision-makers commonly rely on instinct and a feel for credibility, but with inadequate attention to the problems of assessment, identification of material facts, the weight of the evidence, and standards of proof.” *Id.* at 377 (quoting GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 350 (2d ed. 1996)).

363. See, e.g., *Arulampalam v. Ashcroft*, 353 F.3d 679, 685 (9th Cir. 2003); *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 818 (9th Cir. 1994).

364. *Paredes-Urrestarazu*, 36 F.3d at 818.

Cultural misunderstandings and biases likely affect findings of demeanor. The application of Western norms of truthfulness is unlikely to yield an accurate assessment of credibility where the asylum applicant speaks through an interpreter, derives from a culture with different norms of verbal and non-verbal expression, and—potentially having been abused by authorities in the past—may fear or distrust the adjudicator.<sup>365</sup> As Aubra Fletcher persuasively argues,

[W]hen [immigration judges] base negative credibility determinations solely on demeanor, they ultimately privilege their individual ideas of how refugees should psychologically respond to persecution over evidentiary considerations. Not all people react the same way to experiences of rape, domestic violence, torture or any other harm, and responses can vary widely according to gender, culture, age, class, and other factors. Asylum cases often present unique combinations of cultural elements and post-trauma symptoms.<sup>366</sup>

More generally, “[u]nderstandable anxiety affects most claimants compelled to recount painful facts in a formal and foreign environment.”<sup>367</sup>

Finally, criminal justice and psychological research demonstrates that credibility assessments based on non-verbal cues are often wrong. Summarizing the findings of studies with law enforcement personnel, Michael Kagan reports:

[R]esearch with police officers has shown that only a minority can reliably detect lies in criminal suspects based on observing nonverbal cues alone, and those relying on body movements such as twitches, hand movements, and voice patterns are often the most inaccurate. In some studies, police performed little better than chance and no better than untrained subjects at detecting lies, although police had more confidence in their ability to detect lies.<sup>368</sup>

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365. See Coffey, *supra* note 361, at 387.

366. Fletcher, *supra* note 361, at 121.

367. Hathaway & Hicks, *supra* note 361, at 518 (quoting *Kopalapillai v. Minister for Immigr. and Multicultural Aff.*, [1997] F.C.A. 1510 (Fed. Ct. 1997) (Merkel, J.) (Austl.)).

368. Kagan, *supra* note 202, at 379 (discussing the study in Aldert Vrij & Samantha Mann, *Telling and Detecting Lies in a High-stake Situation: The Case of a Convicted Murderer*, 15 APPLIED COGNITIVE PSYCHOL. 187 (2001)).

Indeed, psychological studies confirm that most people cannot discern truth from falsehood through non-verbal signals.<sup>369</sup>

The severity of the sanction at issue in § 1158(d)(6) warrants disqualifying demeanor-based findings as the sole basis for a frivolousness finding. Even if the reliability of these findings was not called into question by social science, the inability of a reviewing court to evaluate the accuracy of a demeanor-based finding renders sole reliance on them inappropriate as a matter of law.<sup>370</sup>

In sum, the federal courts that have interpreted and applied § 1158(d)(6) have stressed the importance of probative, reliable evidence to support a finding of frivolousness. Most of the evidentiary standards developed in the case law are consistent with a burden of proof of clear and convincing evidence. My proposal for which kinds of evidence should satisfy the statutory elements of fabrication and intent, and which evidence should be rejected, is loosely consistent with courts’ reasoning. My proposal goes farther, however, in urging courts to hold that implausibilities and internal inconsistencies in an applicant’s testimony do not meet the criteria for frivolousness. In addition, courts should hold demeanor-based findings ineligible as a matter of law as support for a frivolousness determination under a clear and convincing standard.

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369. *Id.*; see also Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 INT’L J. REFUGEE L. 293, 308 (2001); Paul Ekman et al., *Who Can Catch a Liar?*, 46 AM. PSYCHOL. 913 (1991); Aldert Vrij, *Detecting the Liars*, 14 THE PSYCHOL. 596 (2001); Mark G. Frank, *Assessing Deception: Implications for the Courtroom*, 2 JUD. REV. 315. (1996); Gerald R. Miller & Judee K. Burgoon, *Factors Affecting Assessments of Witness Credibility*, in THE PSYCHOL. OF THE COURTROOM 169, 191 (Norbert L. Kerr & Robert M. Bray eds., 1982).

370. The disqualification of demeanor-based findings in other parts of the law should inform courts’ decision about whether these findings should be ineligible to support findings under § 1158(d).

For instance, a person’s failure to make eye contact cannot be considered as support for reasonable suspicion in the context of a *Terry* stop. See *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1446 (9th Cir. 1994) (“Neither the Supreme Court nor this court has ever upheld the legality of a detention based upon an officer’s unsupported intuition, and we refuse to do so now.” (internal alteration omitted) (quoting *United States v. Mallides*, 473 F.2d 859, 861 (9th Cir. 1973)). In *United States v. Lopez*, 564 F.2d 710, 711 (5th Cir. 1977), the Fifth Circuit explained that, where a factor and its opposite may both be used to justify a stop, the court should not give weight to either factor. A driver’s failure to look at a border patrol car is such a factor since the opposite reaction—a driver’s obvious attention to a border patrol vehicle—may also be used to justify reasonable suspicion. *Id.* The court found that to allow this type of justification to support a stop “would put the officers in a classic ‘heads I win, tails you lose’ position [and] the driver, of course, can only lose.” *Id.* at 712 (citation omitted). The court concluded that “[r]easonable suspicion should not turn on the ophthalmological reactions of the [driver].” *Id.* (citation omitted).



## CONCLUSION

In its decision of April 25, 2007, the Board of Immigration Appeals committed plain constitutional error. Noting that a finding under § 1158(d)(6) “is a preemptive determination which, once made, forever bars an alien from any benefit under the Act,” the Board did not deem these “severe consequences” to warrant an elevated burden of proof.<sup>371</sup> Instead, the Board held that the government must only establish that a noncitizen knowingly filed a frivolous asylum application by a preponderance of the evidence.<sup>372</sup> Its discussion of the applicable burden of proof was devoid of any constitutional analysis.

The Supreme Court has made clear that residents of the United States, even noncitizens, cannot be deprived of significant liberty or property interests without a showing of clear and convincing evidence. A determination under § 1158(d)(6) “involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself.”<sup>373</sup> Because the liberty interests at stake are so fundamental,<sup>374</sup> the Due Process Clause compels the government to prove that a noncitizen knowingly filed a frivolous asylum application by clear and convincing evidence before imposing such a sanction. An elevated burden of proof is particularly warranted in this context because determinations under § 1158(d)(6) have a high potential for error: the findings are made in adjudications in which subjective judgments are necessary and the asylum seeker is not guaranteed assistance of counsel.

Utilizing the three-pronged approach delineated in *Mathews v. Eldridge*—and informed by the Supreme Court’s consideration of the proper burden of proof in deportation proceedings,<sup>375</sup> denaturalization proceedings,<sup>376</sup> and expatriation determinations<sup>377</sup>—federal courts of

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371. *In re Y-L-*, 24 I. & N. Dec. 151, 157 (B.I.A. 2007).

372. *Id.* at 157–58.

373. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950).

374. *See Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 283 (1990); *see also Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (holding that the clear and convincing evidence standard is appropriate for safeguarding those interests “both ‘particularly important’ and ‘more substantial than mere loss of money’” (quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979))).

375. *Woodby v. INS*, 385 U.S. 276, 286 (1966).

376. *Chaunt v. United States*, 364 U.S. 350, 355 (1960); *Schneiderman v. United States*, 320 U.S. 118, 123 (1943).

377. *Gonzales v. Landon*, 350 U.S. 920, 921 (1955). The Court has also held that the government must meet an intermediate burden of proof in state proceedings to sever parental rights, *Santosky*,

appeals must reject the Board’s gap-filling measure and hold that the constitution compels that a finding under § 1158(d)(6) be supported by clear and convincing evidence. Concrete and demonstrable evidence of fraud should satisfy this standard, while an immigration judge’s observations of the asylum seeker’s demeanor and most testimonial inconsistencies should be held constitutionally inadequate given their inherent unreliability and inconsistency with regulatory criteria. These evidentiary standards are mandated by the principles enshrined in the Due Process Clause and are necessary to safeguard the fundamental, and fragile, liberty interests of noncitizens alleging persecution.<sup>378</sup>

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455 U.S. 745, and in civil commitment proceedings, *Addington*, 441 U.S. 418.

378. See *Santosky*, 455 U.S. at 769.

