Lesson Plan Overview

Course	Asylum Officer Basic Training
Lesson	***Asylum Eligibility Part IV: Burden of Proof, Standards of Proof, and Evidence***
Rev. Date	September 14, 2006
Lesson Description	This lesson describes the various standards of proof that are required in adjudicating affirmative asylum and credible fear cases. The lesson also explains the operation of the burden of proof in the affirmative asylum process.
Field Performance Objective	Given a request for asylum to adjudicate, the asylum officer will correctly apply the law to determine eligibility for asylum in the United States.
Academy Training Performance Objectives	Given written and roleplay scenarios, trainees will correctly identify which party bears the burden of proof and what standard of proof is required, and apply the law appropriately to determine eligibility for asylum in the United States.
Interim (Training) Performance Objectives	1. Distinguish the applicant's burden of proof from the standards of proof necessary to establish eligibility for asylum. 2. Identify the applicant's burden of proof to establish eligibility to apply for asylum. 3. Identify applicant's burden of proof to establish eligibility for asylum. 4. Identify types of evidence that may establish eligibility for asylum. 5. Identify DHS's burden of proof in asylum adjudication.
Instructional Methods	Lecture, Discussion
Student References	Participant Workbook
Method of Evaluation	Observed Lab exercise with critique from evaluator, practical exercise exam, Written test

CRITICAL TASKS

SOURCE: Asylum Officer Validation of Basic Training Final Report (Phase One), Oct. 2001

Task/ Skill #	Task Description
001	Read and apply all relevant laws, regulations, procedures, and policy guidance.
003	Adjudicate Application for Asylum and for Withholding of Removal (I-589).
019	Request/accept additional evidence.
SS 8	Ability to read and interpret statutes, precedent decisions and regulations.

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Presentation **References**

I. INTRODUCTION

This lesson plan provides guidance on an asylum applicant's burden of proof, the Department of Homeland Security's (DHS) burden of proof, and evidence that may be considered in evaluating eligibility for asylum in the affirmative asylum program. This lesson plan also discusses the various standards of proof asylum officers apply in adjudicating asylum applications and compares those standards with standards of proof applicable to other adjudications that asylum officers perform.

II. BURDEN OF PROOF

A. Definition

"Burden of proof" has been defined as "the necessity or duty of affirmatively proving a fact or facts in dispute in an issue raised between the parties in a cause."

Black's Law Dictionary, 178 (5th ed. 1979)

In the asylum context, the "dispute" in issue is whether the applicant is eligible for asylum. The "parties" are the applicant and DHS. The applicant has the obligation to provide enough evidence to establish eligibility for asylum. The asylum officer is in the unique position of being both a representative of one of the parties (DHS) and the adjudicator. How this plays out in the affirmative asylum process is discussed further below.

Burdens of production and persuasion:

The phrase "burden of proof" comprises two separate and distinct responsibilities of parties to an adjudication: the "burden of production" and the "burden of persuasion." In the asylum context, this means that the party who bears the burden of proof bears the burden to produce evidence with regard to the issue at hand, as well as the burden to persuade the adjudicator of argument being made. In addition, given the unique non-adversarial nature of the asylum adjudication, the asylum officer has a duty to develop a complete record of facts through eliciting testimony and researching country conditions.

Graham C. Lilly, *An Introduction to the Law of Evidence*, 3rd ed., § 3.1 (1996).

B. Special Consideration for Burden of Proof Requirements in the Asylum Context

The Board of Immigration Appeals (BIA) has recognized that, although the burden of proof is on the applicant, a "cooperative approach" is required in adjudicating asylum requests. The BIA explained that this is because the BIA, IJ's, and DHS "all bear the responsibility of ensuring that refugee protection is provided where such protection is warranted by the circumstances of an asylum applicant's claim."

Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997)

Although the applicant bears the burden of proof to establish eligibility for asylum, the asylum officer has an affirmative duty to elicit sufficient information and to research country conditions information to properly evaluate whether the applicant is eligible for protection.

8 C.F.R. § 208.9(b); *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997); *UNHCR Handbook, paras 196 and 205(b)(i)*. *See also* lessons, *Interviewing Part III, Eliciting Testimony*; and *Country Conditions Research and the Resource Information Center (RIC).*

C. Applicant's Burden

The burden of proof is on the applicant to establish that he or she (1) is eligible to apply for asylum, (2) is a refugee within the meaning of section 101(a)(42)(A) of the Act, and (3) merits asylum as a matter of discretion. Furthermore, if the evidence indicates that a ground for mandatory denial of asylum applies, the applicant shoulders the additional burden of demonstrating that the bar to asylum does not apply (i.e., that he or she is eligible to receive asylum).

INA §§ 208(a)(2); (b)(1)(B)(i); (b)(2)(A); 8 C.F.R. 208.13(a); 1240.8(d).

1. "The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."

INA § 208(b)(1)(B)(ii), as amended by section 101(a)(3) of the REAL ID Act of 2005, P.L. 109-13, Division B (hereinafter "REAL ID Act"). The amendments apply to applications for asylum, withholding or other relief from removal made (i.e., properly filed at a USCIS Service Center) on or after the date of enactment (May 11, 2005). See Section V, *Corroboration*, below.

Note that this standard derives from *Cardoza-Fonseca v. INS*: "Accordingly, if documentary evidence is not

Cardoza-Fonseca v. INS, 767 F.2d 1448, 1953 (9th

available, the applicant's testimony will suffice if it is credible, persuasive, and refers to '*specific* facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution on one of the specified grounds' listed in section 208(a)." (emphasis in original).

Cir. 1985), *aff'd*, 480 US 421 (1987), *citing to* Carvajal-Munoz, 743 F.2d 562, 574 (7th Cir. 1984).

To give effect to the plain meaning of the statute and each of the terms therein, an applicant's testimony must satisfy all three prongs of the "credible, persuasive, and … specific" test in order to establish his or her burden of proof without corroboration. Sub-section 208(b)(1)(B)(iii) of the INA added by the REAL ID Act addresses only the first prong of this test.

The terms "persuasive" and "specific facts" must have independent meaning above and beyond the first term "credibility."

"Specific facts" are distinct from statements of belief. When assessing the probative value of an applicant's testimony, the trier of fact must distinguish between fact and opinion testimony and determine how much weight to assign to the two forms of testimony.

See Carvaja-Munoz, 743 F.2d 562 (7th Cir. 1984) (emphasizing the term "specific," and explaining that "[s]tatements of belief are insufficient."), *citing* Pereira-Diaz v. INS, 551 F.2d 1149, 1154 (9th Cir. 1977); Khalil v. District Director, 457 F.2d 1276 (9th Cir. 1972) (describing petitioner's as "essentially undocumented statements of belief.")

2. "In determining whether the applicant has met [his or her] burden, the trier of fact may weigh the credible testimony along with other evidence of record."

INA § 208(b)(1)(B)(ii); *see also* Matter of Dass, 20 I&N Dec. 120, 124 (BIA 1989) ("[W]here there are significant, meaningful evidentiary gaps, applications will ordinarily have to be denied for failure of proof.").

Thus, an applicant may present generally credible testimony, but nonetheless fail to satisfy his or her burden of proof. "Other evidence of record" may demonstrate that the applicant, for example, does not have a well-founded fear of persecution because of improved country conditions or the existence of a reasonable internal relocation alternative.

These provisions, as well as the structure of INA § 208(b) as amended by the REAL ID Act, further clarify that credibility is but a component of burden, and not the end of the analysis. Thus, testimony that is generally deemed

See also Matter of Acosta, 19 I&N Dec. 211, 214-15 (BIA 1985) (finding that an asylum applicant must persuade and immigration

credible may nonetheless fail to satisfy an applicant's burden of proof that he or she is eligible for asylum and merits a favorable exercise of discretion to grant asylum.

judge that the claimed facts are true and that he or she is eligible for asylum under the INA); *Matter of S-M-J-*, 21I&N Dec. 722, 729 (BIA 1997) (finding that there may be instances where and IJ finds and applicant credible, but that he or she did not meet the required burden of proof) INA § 208(b)(1)(B)(ii); See Section V, *Corroboration*, below.

If the asylum officer "determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence."

Congress amended the statute to the above language in order to resolve conflicts between administrative and judicial tribunals with respect to, among other issues, the sufficiency of testimonial evidence to satisfy the applicant's burden of proof. The Conference Report explains that Congress amended the statute to reflect the BIA's corroborative evidence rule as set forth in *Matter of S-M-J-* over inconsistent federal court decisions.

The Conference Report No. 109-72 on H.R. 1268, May 3, 2005; *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997) ("Because the burden of proof is on the alien, an applicant should provide supporting evidence, both of general country conditions and of the specific facts sought to be relied on by the applicant, where such evidence is available. If such evidence is unavailable, the applicant must explain its unavailability, ..."); *see also* Section V, *Corroboration*, below.

3. The burden of proof is on the applicant to establish that he or she is a refugee within the meaning of INA Section 101(a)(42)(A) and that discretion should be exercised favorably to grant asylum.

INA § 208(b)(1)(B)(i); 8 C.F.R. § 208.13(a)

   a. In order to establish that the persecutor's motivation for persecuting the applicant falls within the scope of the refugee definition, "the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant."

INA § 208(b)(1)(B)(i); *see also*, lesson, *Asylum Eligibility III: Nexus* for a detailed discussion of the "at least one central reason" standard

   b. If the applicant establishes that he or she suffered past persecution on account of a protected characteristic, the applicant has met the burden of establishing that he or she is a refugee.

8 C.F.R. § 208.13(b)(1)

Matter of Villalta, 20 I&N Dec. 142, 147 (BIA 1990)

If the applicant claims to have suffered past persecution at the hands of a non-governmental actor, the applicant must also demonstrate that, at the time of the incident, the government of the country from which the applicant fled was unable or unwilling to control the entity that committed the harm.

(considering the inability of the Salvadoran government to control paramilitary death squads in evaluating whether the applicant suffered pas persecution)

c. If the applicant has not established past persecution on account of a protected characteristic, the applicant must establish a well-founded fear of future persecution on account of a protected characteristic to meet the burden of establishing that he or she is a refugee. This burden includes establishing that it would not be reasonable to expect the applicant to relocate within the country of feared persecution to avoid future persecution, unless the persecution is by a government or is government-sponsored (See section II.C.2., "Internal relocation," below).

8 C.F.R. §§ 208.13(b)(2)(ii); 208.13(b)(3)(i)
The standard of proof for well-founded fear is discussed in lesson, *Asylum Eligibility Part II, Well-Founded Fear* and in *Section III.B., Well-Founded Fear and Reasonable Fear*, below.

d. If an applicant who had established past persecution has been determined no longer to have a well-founded fear of persecution or to be able to reasonably relocate to avoid persecution (see section II.C.1., "Past persecution established," below), the applicant bears the burden to demonstrate that he or she should be granted asylum in the exercise of discretion:

8 CFR § 208.13(b)(1)(iii)

(i) owing to compelling reasons for being unable or unwilling to return to the country arising out of the severity of the past persecution; or

(ii) because there is a reasonability possibility that the applicant would suffer other serious harm upon removal to that country.

4. If the evidence indicates that a ground for mandatory denial of asylum (or "mandatory bar to asylum") applies, then the applicant must establish by a preponderance of the evidence that the ground for mandatory denial does not apply.

Evidence indicative of a possible asylum bar may be produced either by the applicant or by DHS, but once such evidence is part of the record, the applicant bears the burden of persuading (or, the risk of not persuading) the trier of fact that the bar does not apply.

8 C.F.R. § 208.13(c); *see 8 C.F.R. § 1240.8(d).* The "preponderance of evidence" standard of proof is discussed in Section III.A., *Preponderance of the Evidence*, below.
See, e.g., Abdille v. Ashcroft, 242 F.3d 477, 491 (3rd Cir. 2001); *but see Sall v. Gonzales*, 437 F.3d 229 (2d Cir. 2006); *Maharaj v. Gonzales*, 450 F. 3d 961 (9th Cir. 2006)

For example, if there is evidence that the applicant committed a terrorist act, the asylum officer would not have to establish that the applicant committed the act. Instead, the applicant would have to show, by a preponderance of the evidence, that he or she did not commit that act.

Mandatory grounds for denial are discussed in lessons, *Mandatory Bars to Asylum and Discretion* and *Bars to Asylum Relating to National Security*

D. Burden Shifts to DHS

While the burden of proof generally resides with the applicant to establish eligibility for asylum, the regulations provide for two circumstances in the adjudication (described below) where the burden shifts to DHS.

In the affirmative process, the asylum officer must both "produce" the evidence and evaluate it. In "producing" or gathering evidence, the asylum officer must elicit from the applicant all relevant information and conduct country conditions research. The asylum officer must then consider all available information, including the country conditions information and testimony.

In the defensive process, the Immigration and Customs Enforcement (ICE) Assistant Chief Counsel (formerly Trial Attorney) shoulders the burden of production and persuasion before the Immigration Judge in the following two scenarios.

1. Past persecution established

8 C.F.R. § 208.13(b)(1)(ii)
This is also discussed in lesson, *Asylum Eligibility Part II, Well-Founded Fear*.

   a. If an applicant establishes past persecution on account of a protected characteristic, the burden of proof shifts to DHS to show, by a preponderance of the evidence either that:

      (i) there has been a fundamental change in circumstances to such an extent that the applicant's fear of future persecution is no longer well founded, or

8 C.F.R.§ 208.13(b)(1)(i)(A)

      (ii) the applicant could avoid future persecution by relocating to another part of the country of feared persecution and, under all the circumstances, it would be reasonable for the applicant to do so.

8 C.F.R. § 208.13(b)(1)(i)(B)

   b. Therefore, an applicant who establishes that he or she suffered past persecution on account of a protected characteristic and is a refugee:

      (i) does not have the burden of establishing a well-founded fear of future persecution on the basis of the initial claim; and

(ii) does not have the burden of establishing that it would be unreasonable to relocate within his or her country to avoid future persecution.

2. Internal Relocation

The burden shifts to DHS to establish by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate within his or her country to avoid future persecution if:

8 C.F.R. § 208.13(b)(3)(ii)

a. the claimed persecutor is a government or is government sponsored or

b. the applicant has established past persecution on account of a protected characteristic (regardless of whether the government is the persecutor).

Beyond these two circumstances, the burden of proof does not shift to the government to disprove an applicant's assertions, even if the applicant's testimony is generally credible.

Matter of S-M-J-, 21 I&N Dec. 722, 730 n.11 (BIA 1997) ("[T]he burden of proof is on an applicant to establish her asylum claim. We do not intend our analysis regarding the roles of the Service and the Immigration Judge [in introducing background evidence] to shift this burden. If the Service and the Immigration Judge do not carry out their roles, the applicant does not prevail by default."), *overruled in part on other grounds by Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000)

III. STANDARDS OF PROOF – COMPARISON

The party who shoulders the burden of proof must persuade the trier of the existence of certain factual elements according to a specified "standard of proof" or degree of certainty. The standard of proof specifies how convincing or probative the evidence must be to meet the burden of proof.

Graham C. Lilly, *An Introduction to the Law of Evidence*, 3rd ed., § 3.1 (1996).

Asylum officers must evaluate information according to several standards of proof. Asylum Officers must distinguish among different standards of proof and know when each applies. It is important to understand that the standard of proof required to establish that testimony or other evidence constitutes a fact[s] (for purposes of the adjudication) should be distinguished from the standard of proof required to demonstrate eligibility. The eligibility

standards compared here are discussed in more detail in other lesson plans.

A. Preponderance of the Evidence

1. Standard

   A fact is established by a preponderance of the evidence, if the adjudicator finds, upon consideration of all the evidence, that it is more likely than not that the fact is true. In other words, there is a more than 50% chance that the fact is true. This is the standard of proof used in most civil cases. It is a lower standard of proof than that used in criminal trials, "beyond a reasonable doubt."

2. Quantity and quality of evidence

   Determination of whether a fact has been established "by a preponderance of the evidence" should not be based solely on the quantity of evidence presented. Rather, the quality of the evidence must be considered.

   Example: There may be several documents submitted to establish that an individual is a judge. However, if there is one reliable document showing that the other documents are false and that the individual was expelled from law school, then it may be found by a preponderance of the evidence that the individual is not a judge.

   In evaluating whether an applicant had met his burden of establishing the facts underlying his request for asylum, the BIA explained, "When considering a quantum of proof, generalized information is insufficient. Specific, detailed, and credible testimony or a combination of detailed testimony and corroborative background evidence is necessary to prove a case for asylum. We recognize that a case may arise in which there is some *ambiguity* regarding an aspect of an alien's claim, at which time we might consider giving the alien the 'benefit of the doubt.'"

Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998)

B. Well-Founded Fear (Asylum) and Reasonable Fear (Screening for Withholding of Removal Eligibility)

See lesson, *Asylum Eligibility Part II, Well-Founded Fear*; *See*, 8 C.F.R. § 208.13(b)(2)

A well-founded fear is established if a set of events and/or conditions, substantiated by a preponderance of the evidence, demonstrates that there is a ***reasonable possibility*** that the applicant would be persecuted.

The US Supreme Court decision in *Cardoza-Fonseca* emphasized that "[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place." The Court went on to favorably cite a leading authority:

INS v. Cardoza-Fonseca, 480 U.S. 421, 431, 440 107 S. Ct. 1207, 1213, 1217 (1987); citing A. Grahl-Madsen, *The Status of Refugees in International Law 180* (1966).

> "Let us ... presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp.... In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return."

The asylum officer should consider whether a reasonable person in the applicant's circumstances would fear persecution. To show that the fear is reasonable, the applicant must show by a preponderance of evidence that certain events occurred or conditions exist (those that gave rise to the fear).

Remember that if past persecution on account of a protected characteristic is established, the applicant has met his or her burden of establishing that the fear is well-founded. DHS must then consider whether a preponderance of the evidence establishes that the fear is not well-founded.

Example: Applicant testifies that she was threatened because she participated in a cooperative that the government viewed as subversive. The applicant would have to establish by a preponderance of the evidence (*that it is more likely than not*) that she was in a cooperative, that the government knew she was in a cooperative, that she was threatened because she was in the cooperative, and that the government viewed the cooperative as subversive. The asylum officer would then determine whether there is *a reasonable possibility* that the applicant would be persecuted.

Note that country conditions information available to the asylum officer may establish that the applicant's government views members of cooperatives as subversive. Information produced by the asylum officer thus would help the applicant meet his or her burden of proof on that issue. This illustrates the cooperative approach urged by the BIA in asylum adjudications. *Matter of S-M-J-*, 21 I&N Dec. 722, 726 (BIA 1997).

This is the same standard the asylum officer applies when evaluating whether an applicant has established a reasonable fear of persecution or torture when conducting reasonable fear screenings to determine whether an applicant should be referred to an immigration judge to apply for withholding or deferral of removal.

8 C.F.R. § 208.31; lesson, *Reasonable Fear of Persecution and Torture Determinations*

C. "More Likely Than Not" (Withholding of Removal)

8 C.F.R. § 208.16(b)(1); *INS v. Stevic*, 467 U.S. 407, 104

S. Ct. 2489 (1984)

To establish eligibility for withholding of removal under section 241(b)(3) of the Act and under the regulations that implement the Convention Against Torture, the applicant must establish a set of events and/or conditions, substantiated by a preponderance of evidence, that he or she ***would be*** persecuted or tortured in the country of removal. The Supreme Court has held that this means the applicant must establish that it is ***more likely than not*** (a greater than 50% chance) that he or she would be persecuted or tortured.

Note that in a withholding of removal determination, if the applicant establishes past persecution on account of a protected characteristic, the burden of proof shifts to DHS to establish that it is not more likely than not that the applicant would be persecuted. 8 C.F.R. § 208.16(b)(1)

D. Credible Fear (Expedited Removal)

See lesson, *Credible Fear*; INA § 235(b)(1)(B)(v); 8 CFR § 208.30

1. Definition of the credible fear standard

   A credible fear of persecution or torture is defined as a ***significant possibility*** that the applicant could establish eligibility for asylum or for withholding of removal or deferral of removal under the *Convention against Torture* in a full hearing before an immigration judge.

   See 142 Cong. Rec. S11491-02 (Sept. 27, 1996) (statement of Sen. Hatch).

   Neither the statute nor the immigration regulations define the "significant possibility" standard of proof, and the standard has not yet been discussed in immigration case law. The legislative history indicates that the standard "is intended to be a low screening standard for admission into the usual full asylum process." On the other hand, a claim that has "no possibility of success," or only a "minimal or mere possibility of success," would not meet the "significant possibility" standard.

   142 Cong. Rec. H11071-02 (Sept. 25, 1996) (statement of Rep. Hyde) (noting that the credible fear standard was "redrafted in the conference document to address fully concerns that the 'more probable than not' language in the original House version was too restrictive").

   While a mere possibility of success is insufficient to meet the credible fear standard, the "significant possibility of success" standard does not require the applicant to demonstrate that the chances of success are more likely than not. An applicant will be able to show a significant possibility that he or she could establish eligibility for asylum, withholding of removal, or protection under the Convention Against Torture if the evidence indicates that there is a substantial and realistic possibility of success on the merits before an immigration judge.

2. Satisfying the credible fear standard

   To meet the credible fear of persecution standard, the applicant must demonstrate that there is a ***significant possibility*** that he or she could establish in a full hearing

before an immigration judge that:

1) the applicant's testimony is credible; and

2) either that he or she was persecuted in the past on account of a protected ground, or

3) that there is a reasonable possibility that he or she will suffer his or her fear of future persecution on account of a protected ground is reasonable.

To satisfy the credible fear of torture standard, the applicant must demonstrate that there is a significant possibility that he or she could establish in a full hearing before an immigration judge that:

1) the applicant's testimony is credible;

2) he or she would be intentionally subjected to severe physical or mental harm in a country to which the applicant may be removed; and

3) that the person(s) the applicant fears is a government official, someone acting in an official capacity or someone who would act at the instigation of or with the consent or acquiescence of a government official or someone acting in an official capacity.

E. Clear and Convincing Evidence (Filed Within One-Year Period)

An applicant for asylum must demonstrate by ***clear and convincing evidence*** that the application has been filed within one year after the date of the applicant's arrival in the United States, unless the applicant establishes to the satisfaction of the asylum officer that an exception applies.

INA §§ 208(a)(2)(B) and (D); 8 C.F.R. § 208.4(a)(2)(i)

The "clear and convincing" standard has been defined as a degree of proof that will produce "a firm belief or conviction as to allegations sought to be established." It is higher than the preponderance standard used in civil cases, but lower than the "beyond a reasonable doubt" standard required in criminal cases.

See, *Black's Law Dictionary*, 5th Ed., and lesson, *One-Year Filing Deadline*

F. "To the Satisfaction of the Attorney General" (Exceptions to Certain Filing Requirements)

See lessons, *Mandatory Bars to Asylum and Discretion* and *One-Year Filing Deadline*

An asylum seeker cannot apply for asylum if he or she has previously applied for and been denied asylum by an

INA § 208(a)(2); 8 C.F.R. § 208.4(a)

immigration judge or the BIA, unless the asylum seeker demonstrates ***to the satisfaction of the Attorney General*** *or the Secretary of Homeland Security* changed circumstances that materially affect asylum eligibility. Similarly, an asylum seeker cannot apply for asylum more than one year after the date of arrival in the United States, unless the applicant demonstrates ***to the satisfaction of the Attorney General*** *or the Secretary of Homeland Security* changed circumstances that materially affect eligibility, or extraordinary circumstances relating to the delay in filing the application within the required time period.

The standard "to the satisfaction of the Attorney General" places the burden on the applicant to demonstrate that an exception applies. The applicant is not required to establish "beyond a reasonable doubt" or by "clear and convincing evidence" that the standard applies. Rather, this standard has been described in another immigration context as requiring the applicant to demonstrate that the exception applies through "credible evidence sufficiently persuasive to satisfy the Attorney General in the exercise of his reasonable judgment, considering the proof fairly and impartially."

See, Matter of Bufalino, 12 I&N Dec. 277, 282 (BIA 1967) (interpreting the "satisfaction of the Attorney General" standard as applied when adjudicating an exception to deportability for failure to notify the Service of a change of address)

This standard has also been interpreted in other immigration contexts to require a similar showing as the "preponderance of evidence" standard, requiring an individual to prove an issue

- "by a preponderance of evidence which is reasonable, substantial and probative," or
- "in his favor, just more than an even balance of the evidence."

See, Matter of Barreiros, 10 I&N Dec. 536, 538 (BIA 1964) (interpreting same standard for rescinding LPR status by establishing that applicant was not eligible for adjustment); *Matter of V-*, 7 I&N Dec. 460, 463 (BIA 1957) (interpreting standard for an alien to establish that a marriage was not contracted for the purpose of evading immigration laws)

IV. EVIDENCE

Evidence is any matter – verbal, written, or physical – that may be used to support the existence of a factual proposition. The following section describes types of evidence commonly utilized in asylum adjudications and explores how an adjudicator may properly evaluate such evidence to determine whether the applicant has established the existence of requisite factual elements according to the specified "standard of proof," and, ultimately whether the applicant has met his or her "burden of proof."

Graham C. Lilly, *An Introduction to the Law of Evidence*, 3rd ed., § 1.2 (1996).

The types of evidence discussed below may serve to establish the existence of a fact in the first instance or to corroborate a fact previously averred through the presentation of other evidence.

Section 101(a)(3) of the REAL ID Act of 2005, codified at INA § 208(b)(1)(B)(ii); *see also*

Because fact-finding in the asylum adjudication context generally focuses on events and conditions in other countries, in the past, and possibly not readily subject to independent verification by U.S. adjudicators, the corroborative function of evidence is often critical and is thus discussed in greater detail below.

section 101(h)(2); 8 C.F.R. § 208.13(a) (regulatory foundation for the BIA's corroborative evidence rule, prior to REAL ID)

Prior to the enactment of the REAL ID Act, federal court of appeals had adopted differing approaches to the evidentiary requirements in and asylum adjudication. Section 101(a)(3) of the REAL ID Act of 2005, codified at 208(b)(1)(B) of the INA and described herein, resolves some of the conflicts and applies to applications for asylum filed on or after the date of enactment (May 11, 2005). Unless otherwise indicated, all statutory references below incorporate REAL ID amendments.

Compare *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997) with *Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000); *Zheng v. Gonzales*, 409 F.3d 804 (7th Cir. 2005). However, even in the Seventh and Ninth Circuits, a failure to provide reasonably available corroboration can provide support for a negative credibility finding in cases where the testimony was otherwise unpersuasive or lacking for asylum cases filed prior to May 11, 2005. See *Sidhu v. INS*, 220 F.3d 1085, 1091 (9th Cir. 2000); *Uwase v. Ashcroft*, 349 F.3d 1039 (7th Cir. 2003)

NOTE: For applications filed before May 11, 2005, officers should apply existing BIA precedent, as adopted, modified, or superseded by federal court precedent controlling in the judicial circuit in which the asylum interview occurs. The primary distinction officers must keep in mind is that, in the 7th and 9th Circuits, corroborative evidence may not be required if an applicant's testimony has already been found credible.

A. Testimonial Evidence

1. Applicant's Testimony

Pursuant to the statute, "the testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."

INA § 208(b)(1)(B)(ii); *See* section V., "Corroboration," below, for a more detailed discussion of the corroboration requirement.

The most common form of evidence that informs asylum eligibility is the applicant's own testimony.

An applicant generally must testify in support of his or her asylum application.

Matter of Fefe, 20 I&N Dec. 116, 118 (BIA 1989), *overruled in part by Grava v. INS*, 205 F.3d 1177 (9th Cir. 2000) (neither *Fefe* nor the regulations allow the Board to reject, as a matter of law, testimony limited to an affirmation that the

application materials are true).

Section V., *Corroboration*, below explores the relationship between the applicant's testimonial evidence adduced to establish a fact and other evidence offered to corroborate such testimony.

2. Testimony of Witnesses

An asylum applicant may present witnesses at the asylum interview. The testimony of the witnesses is evidence to be considered and weighed along with all the other evidence presented in the case. The asylum officer has the authority to question any witnesses presented by the applicant.

8 C.F.R. § 208.9(b); 8 C.F.R. § 208.9(c)

Note that the applicant's interpreter cannot serve as a witness. 8 C.F.R. § 208.9(g)

3. Testimony of Other Asylum Applicants

Because of current limitations posed by the confidentiality regulation at 8 C.F.R. 208.6, the testimony given by one asylum applicant in support of his or her claim cannot readily be considered in evaluating the request for asylum of another asylum applicant. However, the testimony of an asylum applicant appearing as a witness for another asylum applicant would be evidence to consider. There are certain exceptions in the confidentiality regulation that you may want to explore with a supervisory asylum officer.

This limitation extends to the testimony of family members, even if the testimony may be conflicting. If questions arise in such cases, the supervisory asylum officer should contact Headquarters.

B. Documentary Evidence

1. Sources

a. country conditions information

The asylum officer is required to evaluate the applicant's claim in light of country conditions. This means that the asylum officer must conduct research and consider available country conditions information.

This is discussed in greater detail in lesson, *Country Conditions Research and the Resource Information Center (RIC)*.

In addition to information submitted by the applicant, the asylum officer may consider information obtained from:

8 C.F.R. § 208.12

Discussed in greater detail below

(i) the Department of State

(ii) USCIS Asylum Division Country of Origin Information researchers

(iii) the USCIS District Director for the district in which the applicant lives or seeks admission to the U.S.

(iv) international organizations

(v) private voluntary agencies

(vi) academic institutions

(vii) any other credible source

This may include reputable newspapers and magazines. For considerations regarding the reliability of sources, *see*, lesson, *Country Conditions Research and the RIC*

b. evidence submitted by the applicant

The applicant may submit country conditions information and a variety of other documentation specific to his or her claim.

The types of documentary evidence asylum applicants might submit include, but are not limited to, death certificates; baptismal certificates; prison records; arrest warrants; affidavits of or letters from government officials, friends, or family members; union membership cards; and political party cards.

The asylum officer should review the documents submitted by the applicant for authenticity and reliability. At the same time, the asylum officer should bear in mind that documents created in some developing countries may not look as polished as documents created in more developed countries.

If the authenticity of a document is in question and raises questions about the credibility of the claim, the asylum officer may, in some cases, send the document to the ICE Forensics Document Laboratory for an opinion (*see*, *Affirmative Asylum Procedures Manual*).

Basic elements to consider in reviewing documents for authenticity will be discussed further in a separate session.

c. Comments and country condition reports from the Department of State

The Department of State, Bureau of Democracy, Human Rights, and Labor publishes a detailed annual report on human rights practices in each country of the world. The Department of State also publishes annual reports on religious freedom in each country of the world. In addition, the Department of State may provide detailed country conditions information and may also comment on particular asylum applications. Asylum officers may also request specific information from the Department of State.

8 C.F.R. § 208.11

Asylum officers are not bound by any opinions issued by the Department of State. Rather, the opinions are a source of information to be considered along with credible testimony and other evidence available to the asylum officer. In making a credibility determination, the asylum officer can consider whether an applicant's testimony is consistent with "the reports of the Department of State on country conditions," along with other evidence in the record.

INA § 208(b)(1)(B)(iii)

2. Availability

Because of the circumstances that give rise to flight, asylum applicants often will not be able to provide documentary evidence.

The issue of evidence availability will be relevant in determining the reasonableness of a request for corroborating evidence and/or the explanation for failing to provide corroborating evidence in Section V., *Corroboration*, below.

Generally, persecutors do not provide evidence of their persecution or intentions. Additionally, the applicant may have been forced to flee without an opportunity to gather documents, or it may have been dangerous for the applicant to carry certain documents, such as a written threat or identification documents.

See e.g., *Aguilera-Cota v. INS*, 914 F.2d 1375 (9th Cir. 1990) ("The last thing a victim may want to do is carry around a threatening note with him.")

Human rights monitors and reporters may have difficulty documenting abuses in some refugee-producing countries that do not allow human rights monitors access to the country and maintain firm control over the press.

This is discussed in greater detail in lesson, *Country Conditions Research and the Resource Information Center (RIC)*.

When applicants do provide documents, they may not be

See, *Zavala-Bonilla v. INS*, 730 F.2d 562 (9th Cir. 1984)

able to establish the authenticity of the documents. If the asylum officer believes that the documents are genuine, the evidentiary value should not be discounted merely because the documents are not certified.

C. Administrative Notice

1. Definition of administrative notice

   Administrative notice is the recognition of the existence and truth of certain facts, without the production of evidence. Administrative notice can only be taken regarding facts that are generally accepted as true; that is, facts that reasonable people will not dispute.

2. Example

   It is an objective fact that elections occurred in Nicaragua in 1990. However, it is not an objective fact that the Sandinistas were no longer in power after those elections – reasonable people may still dispute the extent of the Sandinistas' authority in Nicaragua.

3. Use of administrative notice

   Because asylum officers have access to reliable country conditions information that can be cited, it is not necessary for asylum officers to take administrative notice. If circumstances arise in which an asylum officer feels it necessary to take administrative notice, the decision to take administrative notice would require Headquarters approval.

D. Asylum Officer's Personal Opinions

An asylum officer's personal opinions and views of a country or situation are ***not*** objective evidence to be considered. An asylum officer may have lived or traveled in another country, or have formed opinions about a country based on the experiences of friends or associates. Although knowledge gained from such experiences or contacts may be useful in developing lines of questioning during the interview or for gathering additional objective country conditions information, such knowledge is not evidence. The asylum decision cannot be based, in any way, on such personal opinions and views.

V. CORROBORATION

The issue of corroboration is also covered in the lesson *Credibility*.

As outlined above, an applicant's credible testimony may establish eligibility for asylum without corroborating documentation, "but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." This is because the nature of a refugee's circumstances can make it difficult, and sometimes impossible, for a refugee to provide corroboration of his or her claim.

INA § 208(b)(1)(B)(ii); 8 C.F.R. § 208.13(a); *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989); *Matter of S-M-J*, 21 I&N Dec. 722 (BIA 1997); *see*, *Senathirajah v. INS*, 157 F.3d 210, 216 (3rd Cir. 1998) (noting that "[c]ommon sense establishes that it is escape and flight, not litigation and corroboration, that is foremost in the mind of an alien who comes to these shores fleeing detention, torture and persecution.")

As Congress explained in its conference report on the REAL ID Act:

> [m]any aliens validly seeking asylum arrive in the United States with little or no evidence to corroborate their claims. This clause recognizes that a lack of extrinsic or corroborating evidence will not necessarily defeat an asylum claim where such evidence is not reasonably available to the applicant.

H.Rept. 109-72 at 165 (2005)

The statutory language above regarding burden of proof is consistent with the approach previously articulated by the BIA. The BIA has held that testimony alone, when it is the only evidence reasonably available, may be sufficient to meet the burden of proof, if it is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis" for the alleged fear.

Matter of Dass, 20 I & N Dec. 120 (BIA 1989); *Matter of S-M-J-*, 21 I&N Dec. 722, 724 (BIA 1997); *Matter of B-B-*, Int. Dec. 3367 (BIA 1998)

The BIA has also held that there may be some circumstances in which corroborating evidence, if available, should be provided. In subsequent circuit court decisions, some circuits upheld the BIA's corroboration rule, while others questioned or overruled the BIA's interpretation that corroborating evidence may be required even where the applicant's testimony was found credible.

See, *Diallo v. INS*, 232 F.3d 279 (2d Cir. 2000); *Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001); *El-Sheikh v. Ashcroft*, 388 F.3d 643, 647 (8th Cir. 2004). *But see*, *Sidhu v. INS*, 220 F.3d 1085 (9th Cir. 2000); *Ladha v. INS*, 215 F.3d 889 (9th Cir.2000); *Zheng v. Gonzales*, 409 F.3d 804 (7th Cir. 2005)

In section 101(a)(3) of the REAL ID Act, Congress resolved the conflict in the courts by requiring asylum applicants, to provide reasonably available corroborating evidence. The statute now provides that when:

> "…determining whether the applicant has met the applicant's burden, the trier of fact may weigh credible testimony along with other evidence. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence."

INA § 208(b)(1)(B)(ii), as added by Sec. 101(a)(3) of the REAL ID Act of 2005.

When Congress revised the asylum statute to include a corroboration standard, they indicated that the "provision is based upon the standard set forth in the BIA's decision in *Matter of S-M-J*" and that they "anticipate[d] that the standards in *Matter of S-M-J-*, including the BIA's conclusions on situations where corroborating evidence is or is not required, will guide the BIA and the courts in interpreting this clause."

H.Rept. 109-72 at 166.

Id.

In *Matter of S-M-J-*, the BIA explained that

> [b]ecause the burden of proof is on the [applicant], an applicant should provide supporting evidence, both of general country conditions and of the specific facts sought to be relied on by the applicant, where such evidence is available…. If such evidence is unavailable, the applicant must explain its unavailability, and the [adjudicator] must ensure that the applicant's explanation is included in the record.

Matter of S-M-J-, at 724 (citation omitted)

In outlining the standards for providing corroborating evidence, the BIA identified two categories of corroborating evidence:

1) general country conditions information; and

2) evidence that is specific to a particular applicant (either documentary or testimony of a witness)

A. General Country Conditions Information

> The BIA has recognized that general background information about a country, where available, must be included in the record as a foundation for an applicant's claim. Further explaining this requirement, the BIA stated that "when the basis of an asylum claim becomes less focused on specific events involving the [applicant] personally and instead is more directed to broad allegations regarding general conditions in the [applicant's] country of origin, corroborative background evidence that establishes a plausible context for the persecution claim (or an explanation for the absence of such evidence) may well be essential."

Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997)

Matter of S-M-J-, at 724, quoting *Matter of Dass*, 20 I&N Dec. 120, 124. (BIA 1989).

The BIA provided an example of a situation in which such general background information may be expected: If an applicant claims persecution based on his activities as a vice-president of a union during a two year period, there should be general information showing that union members in the country faced persecution. In *Matter of S-M-J-*, the BIA found that the applicant from Liberia failed to provide any background evidence to support central aspects of her asylum claim, such as the existence of the Vai tribe or evidence that others have targeted the Vai tribe or persons affiliated with her alleged relatives.

Matter of S-M-J-, at 726.

Id., at 730.

While there may be instances in the affirmative asylum process when the asylum officer determines that the applicant should provide general country conditions information that corroborates otherwise credible testimony in order to meet his or her burden of proof, in most situations the asylum officer is in a position to provide background country conditions information through sources such as *Refworld,* the USCIS intranet, the Asylum Division Virtual Library, and others.

This is discussed in detail in lesson, *Country Conditions Research and the Resource Information Center (RIC)*.

Given the context of a non-adversarial adjudication, when there is general country conditions information available to the asylum officer that corroborates aspects of the applicant's asylum claim and may be sufficient to meet the applicant's burden of proof, the asylum officer must consider the information when making a determination, even if that material was not presented by the applicant.

Yan Chen v. Gonzales, 417 F.3d 268, 272 (2d Cir. 2005); *Mukamusoni v. Ashcroft*, 390 F.3d 110, 124-25 (1st Cir.2004); *Zubeda v. Ashcroft*, 333 F.3d 463, 477-78 (3d Cir.2003).

Example: An applicant credibly testifies that he has been subjected to past abuses and fears further harm at the hands of the authorities for practicing Christianity in an unregistered church. It would be error for the adjudicator to find that the applicant failed to meet his burden of proof if the adjudicator failed to consider a DOS country report that states that members of unregistered churches have been subjected to interference, harassment, arrest, beatings and torture.

Chen, id.

If the asylum officer obtains and when reaching a decision relies on country condition information other than what the applicant submitted, the officer should cite the information in the assessment and, if not a generally accessible document, include a copy of it in the applicant's A-file.

B. Documentary Evidence Specific to the Applicant

The BIA outlined the standard for determining when corroborating evidence is required to support the specific facts of an applicant's particular claim as follows:

> [If] an applicant's claim relies primarily on personal experiences not reasonably subject to verification, corroborating documentary evidence of the asylum applicant's particular experience is not required. Unreasonable demands are not placed on an asylum applicant to present evidence to corroborate particular experiences (e.g., corroboration from the persecutor). However, *where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided… If the applicant does not provide such information, an explanation should be given as to why such information was not presented… The absence of such corroborating evidence can lead to a finding that an applicant has failed to meet [his or] her burden of proof.* [emphasis added]

Matter of S-M-J-, 21 I&N Dec. 722, 725 (BIA 1997); *See also*, UNHCR Handbook, para. 205(a)(ii)

1. Determining whether the applicant should provide evidence that corroborates otherwise credible testimony

   a. request must be reasonable

   When an asylum officer determines that an applicant should provide evidence to corroborate specific aspects of the asylum claim, the request must be reasonable. For such a request to be considered reasonable, the BIA has stated that the requested evidence "should provide documentary support for *material facts which are central to [the applicant's] claim and easily subject to verification*, such as evidence of his or her place of birth, media accounts of large demonstrations, evidence of publicly held office, or documentation of medical treatment." [emphasis added]

Dia v. Ashcroft, 353 F.3d 228, 253 (3rd Cir. 2003) (*en banc*) ("At most, an applicant must provide corroborating evidence only when it would be *reasonably* expected.")

Matter of S-M-J-, 21 I&N Dec. 722, 725 (BIA 1997)

   The BIA further stated that "specific documentary corroboration of an applicant's particular experiences is not required unless the supporting documentation is of the type that would *normally be created or available in the particular country and is accessible to the [applicant]*, such as through friends, relatives, or co-workers."

Id., at 726.

   In *Balogun v. Ashcroft*, the Seventh Circuit reiterated the reasonableness standard outlined by the BIA:

374 F.3d 492, 502-03 (7th Cir. 2004) (citing to the

> No matter what form of corroboration is at issue, the corroboration requirement should be employed reasonably. It is always possible to second-guess the petitioner as to what evidence would be most cogent, and, consequently, there is a distinct danger that, in practice, the corroboration requirement can slip into "could have-should have" speculation about what evidence the applicant could have brought in a text-book environment. [Adjudicators] need to take to heart the BIA's blunt admonition that corroboration should be required only as to "material facts" and only when the corroborative evidence is reasonably accessible.

BIA's decision in *Matter of S-M-J-*)

b. reasonableness of request must be explained

The asylum officer must take the facts of each case into consideration when determining whether it is reasonable in a particular case to expect the applicant to provide corroborating evidence to meet his or her burden of proof. When an asylum officer determines that corroborating evidence should be provided, the officer needs to

- identify the particular document or type of document that should be submitted and/or which aspects of the applicant's claim that would have been reasonable to corroborate, and
- explain how the request is reasonable in this particular case.

Alvarado-Carillo v. INS, 251 F.3d 44, 54 (2d Cir. 2001); *Abdulai v. Ashcroft*, 239 F.3d 542, 554 (3d Cir. 2001); *Dorosh v. Gonzales*, 398 F.3d 379, 382-83 (6th Cir. 2004); *Gontcharova v. Ashcroft*, 384 F.3d 873 (7th Cir. 2004); *Hussain v. Gonzales*, 424 F.3d 622 (7th Cir. 2005); *El-Sheik v. Ashcroft*, 388 F.3d 643, 647 (8th Cir 2004) (quoting *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000))

As explained by the Second Circuit, the adjudicator is required to outline the basis for the corroboration determination because

> [u]nless the [adjudicator] anchors [his or her] demands for corroboration to evidence which indicates what the [applicant] can reasonably be expected to provide, there is a serious risk that unreasonable demands will inadvertently be made. What is "reasonably available" differs among

Qiu v. Ashcroft, 329 F.3d 140, 153-54 (2nd Cir. 2003)

An adjudicator "must, of course, exercise great prudence in determining what can be expected of the [applicant] in the circumstances presented by the case. For instance, conditions in another country or the economic

> societies and, given the widely varied and sometimes terrifying circumstances under which refugees flee their homelands, from one asylum seeker to the next.…[The] requirement that the [adjudicator] back [his or her] demands for corroborative evidence with a reasoned explanation--an explanation that responds to evidence of actual conditions in the asylum-seeker's former country of residence-- constitutes one small, but crucial, defense against potentially mistaken, culturally based assumptions about the existence and availability of documents.

circumstances of the [applicant] may render unreasonable what might be considered very reasonable and therefore expected in typical domestic civil litigation." *Balogun*, at 502.

c. examples

(i) Request for corroboration found *not* reasonable:

Diallo v. INS, 232 F.3d 279 (2d Cir. 2000), *vacating* *Matter of M-D-*, 21 I&N Dec. 1180 (BIA 1998)

- The Second Circuit vacated a BIA decision that found an applicant had failed to meet his burden of proof in a very similar case from Mauritania. The circuit court did not believe that such documentation – proof of his or his family's presence in a Senegalese refugee camp, documentary evidence of Mauritanian citizenship, and letters/affidavits from family members corroborating events in Mauritania – was "easily accessible" to the applicant, given his "functional illiteracy" and the "circumstances of his departure." In addition, the BIA failed to explain why it was reasonable under such circumstances to expect the applicant to provide the specific documentary evidence.

Id., at 289

- The immigration judge expected the asylum applicant to provide a statement from an unidentified stranger who witnessed an ethnically-motivated assault on the applicant.

Smolniakova v. Gonzales, 422 F.3d 1037, 1047 (9th Cir. 2005).

- The immigration judge requested that applicant obtain documentation corroborating his detention and abuse from the same authorities responsible for allegedly subjecting him to persecution.

Durgac v. Gonzales, 2005 WL 3275790 (7th Cir. Dec. 2005).

(ii) Request for corroboration found reasonable:

Generally a request to obtain documentation or statements from individuals in the applicant's home country will be considered reasonable when the applicant claims regular contact with family or friends in the home country and those individuals are in a position to provide detailed information about a relevant element of the applicant's claim or send to the applicant the specific documents identified.

- The applicant was in contact with her mother and friends in Ukraine, but provided no affidavit from mother to corroborate the applicant's claimed mistreatment. She also and failed to retain and provide letters from friends that allegedly documented the danger she would face if she returned.

Dorosh, at 383

Hussain, at 629-30

- The applicant was in regular contact with family and friends, yet he failed to provide any affidavits or the supporting documentation that he claimed existed relating to his involvement with a religious organization in Pakistan, reports to the police, and medical care for injuries he endured.

Madjakpor v. Gonzales, 406 F.3d 1040, 1045 (8th Cir. 2005)

- The applicant was asked at preliminary hearing to undertake effort to obtain corroborating evidence or statements from a family member or eyewitness to the events surrounding his relatives' deaths and his political activities, but he failed to supply the requested information at his later hearings or show that he made any effort to obtain it.

Liti v. Gonzales, 411 F.3d 631, 640 (6th Cir. 2005)

- The applicants still had family members living in home country of Albania, and they were in frequent contact with a brother who was working as a journalist in the neighboring country of Greece, but they failed to provide any affidavits in support of their claim of persecution of anti-communists by members of the current government.

Xia Yue Chen v. Gonzales, 2005 WL 3545055 (3rd Cir. Dec. 2005)

- The applicant from China still had some contact with family members back home, but

she failed to provide documentation corroborating "(i) the authenticity and meaning of the purported abortion certificate;… (ii) the circumstances surrounding her residence in her aunt's home and her forced removal to the hospital (there was no affidavit from the aunt); (iii) her leave of absence from work during the period following the doctor's determination that she was pregnant (there were no documents indicating either a request for leave or the grant of such a request); (iv) details concerning the young man who impregnated her, including an identity card, and some form of employment verification…; (v) documentation of her residency in the factory dormitory where her relationship with her boyfriend developed, particularly since her asylum application made no reference to her living in the dormitory; and (vi) medical records of the doctor who diagnosed her pregnancy."

Albathani v. INS 318 F.3d 365, 373 (1st Cir. 2003).

- The applicant had family members in the United States and another country that could have been asked to provide corroborating statements regarding his claim that Hezbollah had visited his sister's house and threatened him, and that this visit led him to seek refuge in the United States, but he did not provide such evidence to support his case.

2. Providing the applicant the opportunity to provide corroborating evidence

   When it is determined that the applicant must provide reasonably available evidence that corroborates otherwise credible testimony in order to meet his or her burden of proof, the asylum officer shall

   - inform the applicant of the particular document or type of document that should be submitted and/or which aspects of the applicant's claim that would have been reasonable to corroborate, and

   - give the applicant the opportunity to provide the

See, Matter of Y-B-, 21 I&N Dec. 1136, 1139 (BIA 1998) (two continuances granted to allow applicant to document his stay in Senegalese refugee camp); *see also*, *Poradisova v. Gonzales*, 420 F.3d 70, 79 (2nd Cir. 2005) (recognizing "…the fundamental unfairness of penalizing applicants…for the lack of certain documents without first providing them with notice and the opportunity to

corroborating evidence.

remedy that lack."

For example, in a removal hearing an immigration judge noted that the applicant failed to submit documentary evidence of her husband's political affiliation or of his political activities in rejecting the applicant's testimony, even though the judge made no previous request for this particular type of corroborating evidence. In it's review of the immigration judge's decision in *Mulanga v.* Ashcroft, the Third Circuit held, "[e]ven assuming that country conditions were considered and the evidence was obtainable, the IJ erred by not alerting [the applicant] during the removal proceedings that the absence of corroboration of [her husband's political party] membership would lead to the denial of her application, thereby giving her an opportunity to explain her inability to corroborate."

Mulanga v. Ashcroft, 349 F.3d 123, 135-36 (3rd Cir. 2003)

It is important to be aware that an applicant may not understand which documents are relevant to his or her claim and may not have made efforts to obtain them. The asylum officer should ask the applicant if he or she has any relevant documents in his or her possession and not assume that the applicant does not have documents that might not have been initially offered.

Soumahoro v. Gonzales, 415 F.3d 732, 737 (7th Cir. 2005)

In the context of asylum reform, there generally is insufficient time for an applicant to provide any additional documentation that may take more than a short period of time to access (e.g., writing back to his or her country for evidence). Therefore, an asylum officer should request additional documentation not in the applicant's possession in the US at the time of the interview only if the asylum officer determines that the documentation is necessary to properly adjudicate the request for asylum. If the applicant's testimony is credible, is persuasive and refers to specific facts sufficient to demonstrate that the applicant is a refugee, then corroborating documents specific to the applicant's claim may not be necessary for the applicant to meet his or her burden of proof.

INA § 208 (b)(1)(B)(ii); *Matter of S-M-J-*; Matter of Y-B-

3. Determining whether an applicant cannot reasonably obtain requested corroborating evidence

The INA, as amended by the REAL ID Act, requires the applicant to produce evidence that corroborates his or her otherwise credible testimony, "unless the applicant does not have the evidence and cannot reasonably obtain the evidence."

INA § 208(b)(1)(B)(ii), as added by Sec. 101(a)(3) of the REAL ID Act of 2005.

The BIA has held that if the applicant fails to provide the reasonably available corroborating evidence requested by the asylum officer,

> an explanation should be given [by the asylum applicant] as to why such information was not presented…. The absence of such corroborating evidence can lead to a finding that an applicant has failed to meet [his or] her burden of proof.

Matter of S-M-J-, 21 I&N Dec. 722, 725-26 (BIA 1997)

Prior to concluding that the applicant has failed to meet his or her burden of proof as a result of a failure to provide reasonably available corroborating evidence, the asylum officer must do the following:

- give the applicant the opportunity to explain why the evidence was not submitted;
- ensure that the applicant's explanation is included in the record; and
- determine whether the applicant's explanation for failing to provide the documents was reasonable or not.

Alvarado-Carillo v. INS, 251 F.3d 44 (2d Cir. 2001).

Matter of S-M-J-, at 724.

Diallo v. INS, 232 F.3d 279, 289-290 (2d Cir. 2000), *vacating* *Matter of M-D-*, 21 I&N Dec. 1180 (BIA 1998); *Abdulai v. Ashcroft*, 239 F.3d 542, 554 (3d Cir. 2001)

In attempting to explain his or her failure to provide requested corroborating evidence, an applicant may note many of the same factors that an asylum officer should consider in determining whether corroborating evidence is reasonably available.

See, previous section, *Determining whether the applicant should provide evidence that corroborates otherwise credible testimony.*

As noted by the BIA, it will almost always be unreasonable to expect the applicant to obtain corroborating evidence from his or her persecutors.

Matter of S-M-J-, at 725.

a. Explanations for failing to provide corroborating evidence found reasonable:

(i) In *Diallo v. INS*, the Second Circuit not only found that the requested documents were not easily accessible (see above), the court also found that Diallo's explanations (that his identity documents were destroyed after he was arrested, that he communicated with his sister in Senegal only by telephone, that he had not been able to communicate with other family members since he left Senegal, and that he lost his refugee camp identity card) were reasonable.

Diallo v. INS, 232 F.3d 279, 289-290 (2d Cir. 2000), *vacating* *Matter of M-D-*, 21 I&N Dec. 1180 (BIA 1998).

(ii) In *Secaida-Rosales v. INS*, the applicant reasonably explained his failure to provide Guatemalan medical records from 1994 because he had to submit them to his employer in order to obtain disability leave. In addition, his explanation that he failed to provide corroborating medical evidence of the 1994 injuries from a doctor in the US because he was living in a shelter and lacked proficiency in English was also found to be a reasonable explanation.

Secaida-Rosales v. INS, 331 F.3d 297, 311 (2nd Cir. 2003).

(iii) Seventh Circuit found it unreasonable to reject the applicant's explanation for the delay in obtaining requested corroborating evidence when the applicant explained that the delay was the result of an intervening outbreak of civil war in his home country and the express package to the applicant containing the documents was incorrectly addressed by the sender.

Soumahoro v. Gonzales, 415 F.3d 732 (7th Cir. 2005)

b. Explanations for failing to provide corroborating evidence found insufficient:

(i) An applicant was in contact with mother and friends in Ukraine could reasonably be expected to provide an affidavit from her mother to corroborate applicant's claimed mistreatment and letters from friends that allegedly documented the danger she would face if she returned. Her explanations for failing to provide the evidence –that her letters did not reach her mother, her mother had no telephone and had to

Dorosh v. Gonzales, 398 F.3d 379, 383 (6th Cir. 2004)

go to the post office to call the applicant, and that any discussion of the applicant's case with her mother or contacting her friends could put them in danger – was found not reasonable.

(ii) In *Shkabari v. Gonzales*, the applicant explained that she was not able to provide documents corroborating her hospital visit after a June 1997 attack because the doctor had not been in Albania when she and her husband had documents sent to them from Albania. The IJ correctly questioned why she had been unable, in the intervening several months, to get medical records from the doctor or at least seek medical evidence from doctors in this country. Even if the doctor was still unavailable, the applicant failed to present any evidence in the forms of letters or envelopes that she had tried to retrieve her files in the intervening period.

Shkabari v. Gonzales, 427 F.3d 324 (6h Cir. 2005)

VI. SUMMARY

A. Burden of Proof

1. The burden of proof is on the applicant to establish that he or she is eligible to apply for asylum, is a refugee, and discretion should be excised favorably to grant asylum.

2. The asylum officer has the affirmative duty to elicit information and to research country conditions to ensure that all available evidence is considered, in order to properly adjudicate the asylum request.

3. If the applicant establishes past persecution on account of a protected characteristic, then he or she has met the burden of proof to establish that he or she is a refugee and also that any fear of future persecution based on the original claim is well-founded. The burden of proof then shifts to DHS to show, by a preponderance of the evidence, that the applicant's fear is no longer well-founded. This burden includes the burden of showing that it would be reasonable to expect the applicant to relocate to avoid future persecution.

4. If the applicant fears persecution by the government or that is government-sponsored, DHS bears the burden of proof in showing, by a preponderance of the evidence, that internal relocation to avoid future persecution is reasonable.

5. If there is evidence that a mandatory bar applies, the applicant must establish by a preponderance of the evidence that the bar does not apply.

B. Standards of Proof

1. A fact is established by a preponderance of the evidence if it is more likely than not that the fact is true (a more than 50% chance that the fact is true). The quality of the evidence, not the quantity of the evidence must be considered.

2. The well-founded fear standard used in asylum adjudication is established if a preponderance of the evidence shows that there is a reasonable possibility the applicant would be persecuted. A reasonable possibility may be found if there is as little as a one in ten chance of persecution. The asylum officer should make this determination based on whether a reasonable person in the applicant's circumstances would fear persecution.

   The same standard should be applied in evaluating whether an applicant has established a reasonable fear of persecution or torture, for purposes of evaluating whether the case should be referred to the immigration judge for a withholding of removal determination.

3. The standard of proof to establish eligibility for withholding of removal is "clear probability" or "more likely than not." The applicant must establish that there is a more than 50% chance that he or she would be persecuted in the country of feared persecution.

4. The credible fear standard of proof used in expedited removal is a significant possibility that the applicant could establish in a full hearing eligibility for asylum or eligibility for withholding of removal or deferral of removal under the *Convention against Torture*. This is substantially lower than the standard of proof required for asylum.

5. An asylum applicant must establish by clear and convincing evidence that he or she applied for asylum within one year after the date he or she arrived in the United States, unless an exception applies. This is a degree of proof that will produce "a firm belief or conviction as to allegations sought to be established," and is higher than the

preponderance of the evidence standard and lower than the "beyond a reasonable doubt standard."

6. If the applicant applied for asylum more than one year after arriving in the United States or previously was denied asylum by an immigration judge or the BIA, the applicant must demonstrate to the satisfaction of the Attorney General or the Secretary of Homeland Security, that an exception to the bar to applying for asylum exists in his or her case.

C. Evidence

The applicant's testimony may be sufficient to establish eligibility for asylum without corroborating evidence, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met his or her burden, the trier of fact may weigh the credible testimony along with other evidence of record. If the asylum officer determines that the applicant should provide evidence that corroborates otherwise credible testimony, the applicant has the burden to provide such evidence, unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

INA § 208(b)(1)(B)(ii)

Corroborating evidence will almost always include country conditions reports. Other evidence to consider may include affidavits, letters, official documents, opinions from the Department of State, and any other relevant documentation. The value of the documentation is to be weighed by the asylum officer.