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Indicia of Reliability in the Information Age: An Overview of Internet Sources in Immigration Proceedings

by Edward Grodin

> [T]here is nothing "magical" about the admission of electronic evidence. . . . [W]hile electronic evidence may present some unique challenges to admissibility and complicate matters of establishing authenticity and foundation, it does not require the proponent to discard his knowledge of traditional evidentiary principles . . . .

Jonathan D. Frieden & Leigh M. Murray, *The Admissibility of Electronic Evidence Under the Federal Rules of Evidence*, 17 Rich. J.L. & Tech. 5, ¶ 2 (2010), http://jolt.richmond.edu/v17i2/article5.pdf. Surprising, then, that one federal court in 1999 referred to information on the internet as "voodoo." *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 775 (S.D. Tex. 1999). By 2013, another federal court had explicitly dismissed that view. *Qiu Yun Chen v. Holder*, 715 F.3d 207, 212 (7th Cir. 2013). Few would argue with the proposition that access to information, whether voodoo or not, has greatly expanded as a result of internet resources.[1]

Yet, with great power comes great responsibility—or peril. This article will provide an overview of the reception of internet sources in immigration proceedings. Specifically, this article will delve into the most significant topics pertaining to the use of internet evidence: authentication, open-source materials, credibility and corroboration issues, administrative notice of online materials, the persuasiveness of internet evidence for the merits of a case, and issues associated with web address citations and "link rot." As will be seen, some forms of internet evidence (such as online versions of official publications) have been treated more or less like any other piece of evidence, while other sources (such as Wikipedia) have generated heightened skepticism.

Overview of Evidentiary Standards in Immigration Proceedings

Federal courts applying the Federal Rules of Evidence have assessed internet evidence under the existing parameters of the Rules. As one court has held, in order for "electronically stored information" to be admissible, it must be (1) relevant; (2) authentic; (3) not hearsay or, if so, admissible under an exception to the rule barring hearsay evidence; (4) original or duplicate, or admissible as secondary evidence to prove its contents; and (5) sufficiently probative as to outweigh any prejudicial effect. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 538 (D. Md. 2007). Thus, for example, the Seventh Circuit in *United States v. Jackson* found that postings on an internet message board constituted hearsay under Federal Rule of Evidence 801. 208 F.3d 633, 637 (7th Cir. 2000). The court also rejected the defendant's attempt to frame the evidence as a regularly kept record of the internet service provider and therefore admissible under the business records exception. *Id.* Furthermore, the court affirmed the exclusion of the evidence under Rule 901's authentication requirements. *Id.* at 638. Similarly, in *United States v. Bansal*, the Third Circuit affirmed the District Court's admission of screenshots of the defendant's website from the Wayback Machine (which archives all websites through date-specific snapshots) as properly authenticated by an expert witness per Federal Rule of Evidence 901. 663 F.3d 634, 667 (3d Cir. 2011).

By contrast, Immigration Courts apply a broad standard of evidentiary admissibility, asking only "whether the evidence is probative and its admission is fundamentally fair." *Matter of D-R-*, 25 I&N Dec. 445, 458 (BIA 2011) (quoting *Espinoza v. INS,* 45 F.3d 308, 310 (9th Cir. 1995)) (internal quotation marks omitted); *see also Matter of J.R. Velasquez*, 25 I&N Dec. 680, 683 (BIA 2012); *Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999); *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980). The Federal Rules of Evidence are not binding in immigration proceedings, though they may "provide helpful guidance" in ascertaining whether the admission of particular evidence comports with due process. *Matter of D-R-*, 25 I&N Dec. at 458-59 & n.9; *see Fei Yan Zhu v. Att'y Gen. of U.S.*, 744 F.3d 268, 273–74 & n.8 (3d Cir. 2014). As such, evidence that would normally be inadmissible before a federal court, such as hearsay, may be admitted in Immigration Court. *See, e.g.*, *Matter of Stapleton*, 15 I&N Dec. 469, 470 (BIA 1975); *Matter of Ponco*, 15 I&N Dec. 120, 123 (BIA 1974) (citations omitted) ("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."). The regulations governing removal proceedings confirm the breadth of admissibility: "The immigration judge may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial." 8 C.F.R. § 1240.7(a).

Under the Immigration Court Practice Manual, internet evidence receives nearly the same treatment as any other material. Notwithstanding the digital existence of internet sources, the Manual states that "[a]ll documents should be submitted on standard 8.5" x 11" paper, in order to fit into the Record of Proceedings." Immigration Court Practice Manual, Chapter 3.3(c)(v) (Feb. 4, 2016). The only rule to directly address internet evidence—Rule 3.3(e)(iii)—simply notes that "[w]hen a party submits an internet publication as evidence, the party should follow the guidelines in subsection (ii)," which addresses the need to provide identifying information for the evidence, "as well as provide the complete internet address for the material."[2] *Id.*, Chap. 3.3(e)(iii). Moreover, the Manual's citation rules under Appendix J expressly call for citation to the website address for internet materials and also direct that a URL be provided for other sources (namely, State Department country reports) when available.[3] *Id.*, App. J at J-15.

Evidentiary Issues Pertaining to Internet Sources

Authentication

Courts often confront questions regarding the acceptable means of authenticating internet sources. As a general rule, "proper authentication requires some sort of proof that the document is what it purports to be."[4] *Velasquez*, 25 I&N Dec. at 684 (quoting *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1196 (9th Cir. 2006)); *see Vatyan v. Mukasey*, 508 F.3d 1179, 1182 (9th Cir. 2007) (allowing authentication through "any recognized procedure"); *Matter of D-R-*, 25 I&N Dec. at 458 (noting an Immigration Judge's broad discretion regarding authentication, and emphasizing that the method of authentication affects weight rather than admissibility). Authentication issues arise most frequently in the context of foreign documentation. The

authentication of foreign documents has been extensively discussed in a previous edition of the Immigration Law Advisor. Suzanne DeBerry, "Measured Reliance: Evaluating the Authenticity of Foreign Documents in Removal Proceedings," *Immigration Law Advisor*, Vol. 4, No. 8 (Sept. 2010).

In *Qiu Yun Chen v. Holder*, the Seventh Circuit was faced with a document posted on a Fujian (Chinese) government website. 715 F.3d at 212. Qiu Yun Chen, a mother of two boys born in the United States, sought asylum from China on the ground that the government would forcibly sterilize her. *Id.* at 208. The Immigration Judge and the Board of Immigration Appeals denied her claim, finding that she did not establish a well founded fear of forced sterilization. *Id.* Part of the Board's reasoning rested on the lack of authentication for certain Chinese government documents, including one (the Fujian website posting) which showed that violators of China's one-child policy were required to undergo sterilization. *Id.* at 212. The court itself cited to multiple internet sources throughout its decision and ultimately concluded that the Fujian website posting was authentic because of the Chinese government website domain name.[5] *Id.* In a subsequent Chinese sterilization decision, the Seventh Circuit even cited to the website from *Qiu Yun Chen* (including a URL to an English translation on an online translation service, Microsoft Translator) on its own. *Xue Juan Chen v. Holder*, 737 F.3d 1084, 1086 (7th Cir. 2013).

Addressing a similar Chinese sterilization claim and citing to the Seventh Circuit's reasoning, the Third Circuit noted that a government domain name can authenticate a document taken from the internet. *Fei Yan Zhu*, 744 F.3d at 273 (quoting *Qiu Yun Chen*, 715 F.3d at 212). The court remanded the case to the Board to determine whether the website printouts were authentic and reliable, especially in light of the Board's disregard for such evidence (which dealt with local and provincial policies) but acceptance of U.S. country reports which failed to discuss Zhu's home region. *Id.* at 275–76.

By contrast, the Board rejected internet articles in another Chinese sterilization asylum claim. *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010), *abrogated on other grounds by Hui Lin Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012). In *Matter of H-L-H- & Z-Y-Z-*, the Board emphasized the probative weight of the State Department country report while declining to give such weight to internet evidence of local sterilization policy. *Id.* at 214. Specifically, the Board stated that the internet documents were "unsigned and unauthenticated and fail[ed] to even identify the authors[,]" though the Board recognized the difficulty in procuring authenticated documents from a persecutor. *Id.* at 214–15 & n.5.

Open-Source: The Case of Wikipedia

Beyond the issue of authentication, the internet has opened a significant Pandora's box for legal proceedings: the possibility of ongoing, public modification or "open-source" editing. Open-source generally denotes a process of peer collaboration, which can lead to wildly divergent reliability depending on the verification methods in place. Perhaps the greatest symbol of so-called open-source information is Wikipedia, a free online encyclopedia with limited editorial regulation of its content. *See generally Wikipedia: About*, https://perma.cc/2M94-7PG6 (last visited Nov. 8, 2016). As one commentator has noted, "the rapid fluidity of information being posted and changed on Wikipedia means that when courts cite to a Wikipedia article, there is little guarantee that future readers of the opinion will find the exact same article." Michael Whiteman, *The Death of Twentieth-Century Authority*, 58 UCLA L. Rev. Discourse 27, 49 (2010). So how have courts reacted to Wikipedia?

To put it mildly, with extreme skepticism. *Badasa v. Mukasey* remains one of the most thorough (and negative) assessments of Wikipedia's role as evidence in immigration proceedings. 540 F.3d 909 (8th Cir. 2008). In *Badasa*, the Department of Homeland Security ("DHS") submitted documents, including a Wikipedia article, to rebut the legitimacy of a purported Ethiopian identity document called a *laissez-passer*. *Id.* The Immigration Judge and Board found that the *laissez-passer* did not establish the alien's identity and ultimately denied her application for asylum, though the Board expressed reluctance about the Immigration Judge's reliance on Wikipedia. *Id.* at 909–10. On review, the Eighth Circuit remanded the record to the Board to more fully explain its conclusion that the Immigration Judge's credibility determination did not contain clear error in light of the Immigration Judge's reliance on evidence from Wikipedia. *Id.* at 910. The court used Wikipedia's own statements about its open-source nature to conclude that "the [Board] presumably was concerned that Wikipedia is not

a sufficiently reliable source on which to rest the determination that an alien alleging a risk of future persecution is not entitled to asylum." *Id.*

In the same vein, the Fifth Circuit cited to *Badasa* in calling Wikipedia "an unreliable source of information" and concluded that the Immigration Judge's use of a Wikipedia article to justify an adverse credibility finding was "without merit." *Bing Shun Li v. Holder*, 400 F. App'x 854, 857 (5th Cir. 2010) (unpublished). In fact, the court disapproved of Wikipedia so strongly that, despite finding the Immigration Judge's use of the article to be harmless error, it wrote about the issue "only to express [the court's] disapproval of the [Immigration Judge's] reliance on Wikipedia and to warn against any improper reliance on it or similarly unreliable internet sources in the future." *Id.* at 858.

Recently, in *Matter of L-A-C-*, the Board definitively came down against the use of Wikipedia evidence. 26 I&N Dec. 516, 526–27 (BIA 2015). On appeal in withholding-only proceedings, the applicant submitted new evidence in the form of a Wikipedia article, which the Board construed as a motion to remand. *Id.* at 526. However, the Board denied the motion, commenting that such evidence was not previously unavailable and that "Wikipedia articles lack indicia of reliability and warrant very limited probative weight in immigration proceedings." *Id.* (citing *Badasa*, 540 F.3d at 910).

As in *L-A-C-*, other courts have assessed Wikipedia evidence beyond reliability concerns. In reviewing the Board's denial of a motion to reopen, the Seventh Circuit noted that the motion did not contain new information, as the accompanying Wikipedia article was undated. *Vahora v. Holder*, 707 F.3d 904, 911 (7th Cir. 2013). In an unpublished decision, the Eleventh Circuit discussed the Board's denial of a motion to reopen which had included Wikipedia and other internet evidence regarding changed country conditions in Kosovo. *Gashi v. U.S. Att'y Gen.*, 213 F. App'x 879, 881 (11th Cir. 2007) (unpublished). Without commenting on the propriety of the evidence, the court upheld the Board's denial of the motion because the evidence simply did not reflect a sufficient change in country conditions warranting asylum relief. *Id.* at 882–83. Interestingly, in the context of a review of the Board's denial of a motion to reopen, the Seventh Circuit seems to have taken administrative notice of a Wikipedia page on the Mexican drug war for the proposition that "[t]he existence of unrest in Mexico is well known . . . ." *Cruz-Mayaho v. Holder*, 698 F.3d 574, 578 (7th Cir. 2012).

Credibility and Corroboration

The REAL ID Act of 2005 set the current credibility and corroboration standards that an applicant for relief must meet. *See* REAL ID Act § 101(h)(2), Pub. L. No. 109-13, 119 Stat. 231 (2005). Under the REAL ID Act standards, the applicant bears the burden of proving that he or she satisfies the applicable eligibility requirements and merits a favorable exercise of discretion where applicable. Section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A). The Immigration Judge weighs the applicant's testimony along with the documentary evidence. Section 240(c)(4)(B) of the Act, 8 U.S.C. § 1229a(c)(4)(B). The Judge may require the applicant to provide corroborative evidence, unless the applicant demonstrates that such evidence cannot be reasonably obtained. *Id.* Consequently, in making a credibility determination, the Judge considers, *inter alia*, the consistency of the applicant's testimony with the other record evidence. Section 240(c)(4)(C) of the Act, 8 U.S.C. § 1229a(c)(4)(C).

Following these criteria, courts have used internet evidence to assess an applicant's credibility. For example, in *Tawuo v. Lynch*, the Seventh Circuit affirmed an Immigration Judge's adverse credibility finding premised partly on plagiarism concerns relating to two internet articles. 799 F.3d 725, 727–28 (7th Cir. 2015). Specifically, the Immigration Judge accused the applicant of lifting text "nearly verbatim" from articles on the Wikinews website and placing it in his affidavit. *Id.* at 727. When confronted with the similarity, the applicant indicated that he "personally wrote articles about the events he described in his affidavit, and he speculated that somebody might have used this information in the Wikinews article." *Id.* at 728 (internal quotation marks omitted). The Immigration Judge noted that the applicant produced no evidence that he had authored any articles. *Id.* Ultimately, the court concluded that the Immigration Judge's adverse credibility finding was reasonable based on the applicant's "apparent plagiarism . . . , along with his weak explanation for it . . . ." *Id.*

Compare *Tawuo* to the Second Circuit's decision in *Li v. Mukasey*, 529 F.3d 141 (2d Cir. 2008).

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CIRCUIT COURT DECISIONS FOR OCTOBER 2016

by John Guendelsberger

The United States courts of appeals issued 96 decisions in October 2016 in cases appealed from the Board. The courts affirmed the Board in 83 cases and reversed or remanded in 13, for an overall reversal rate of 13.5%, compared to last month's 8.8%. There were no reversals from the Second, Fourth, Fifth, Sixth, Seventh, and Tenth Circuits.

The chart below shows the results from each circuit for October 2016 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	7	6	1	14.3
Second	18	18	0	0.0
Third	5	2	3	60.0
Fourth	6	6	0	0.0
Fifth	12	12	0	0.0
Sixth	1	1	0	0.0
Seventh	0	0	0	0.0
Eighth	3	2	1	33.0
Ninth	38	32	6	15.8
Tenth	0	0	0	0.0
Eleventh	6	4	2	33.3
All	96	83	13	13.5

The 96 decisions included 37 direct appeals from denials of asylum, withholding of removal, or protection under the Convention Against Torture; 25 direct appeals from denials of other forms of relief from removal or from findings of removal; and 34 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	37	32	5	13.5
Other Relief	25	21	4	16.0
Motions	34	30	4	11.8

The five reversals or remands in asylum cases involved corroboration (two cases), the Convention Against Torture (two cases), and credibility. The four reversals or remands in the "other relief" category addressed divisibility of a statute regulating drug possession, obstruction of justice as a section 101(a)(43)(S) aggravated felony, a theft offense as a section 101(a)(43)(G) aggravated felony, and administrative closure. The four motions cases involved an in absentia order of removal, changed country conditions, ineffective assistance of counsel, and eligibility for relief under the Violence Against Women Act.

The chart below shows the combined numbers for January through October 2016 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	35	26	9	25.7
Tenth	29	23	6	20.7
Sixth	42	35	7	16.7
Ninth	851	731	120	14.1
Third	74	65	9	12.2
Eleventh	43	39	4	9.3
First	37	34	3	8.1
Fifth	123	114	9	7.3
Eighth	56	52	4	7.1
Second	292	276	16	5.5
Fourth	77	74	3	3.9
All	1,659	1,469	190	11.5

Last year's reversal rate at this point (January through October 2015) was 13.4%, with 1,497 total decisions and 201 reversals or remands.

The numbers by type of case on appeal for the first 10 months of 2016 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	893	803	90	10.1
Other Relief	404	331	73	18.1
Motions	362	335	27	7.5

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RECENT COURT OPINIONS

***First Circuit*:**

Giraldo-Pabon v. Lynch, --- F.3d ----, No. 16-1260, 2016 WL 6135245 (1st Cir. Oct. 21, 2016): The First Circuit affirmed the Board's denial of the alien's motion to reopen as untimely, finding that the Board did not err because the alien could not establish prima facie eligibility for asylum and thus did not qualify for any time-bar exception. The First Circuit noted that the alien did not establish a prima facie case for relief because she did not sufficiently satisfy the nexus requirement for asylum and withholding.

Quezada-Caraballo v. Lynch, --- F.3d ---, No. 15-2563, 2016 WL 6407375 (1st Cir. Oct. 31, 2016): The First Circuit affirmed the agency's denial of a "good faith marriage" waiver, observing that: (1) the REAL ID Act gives the adjudicator discretion to draw a *falsus in uno*, *falsus in omnibus* inference; (2) the alien's misrepresentations about both the duration and scope of her cohabitation with her ex-husband were directly material to her good-faith marriage claim; and (3) the alien was not just dishonest about one thing, but made repeated misrepresentations, including submitting misleading affidavits and fabricating evidence of cohabitation.

Third Circuit:

Singh v. Att'y Gen. of U.S., 839 F.3d 273 (3d Cir. 2016): Addressing the intersection of the illicit trafficking aggravated felony definition in section 101(a)(43)(B) of the Act and a Pennsylvania controlled substance statute, the Third Circuit concluded that the Board must conduct a modified categorical examination of the record of conviction to ascertain which substance was implicated. Because 35 P.S. § 780–113(a)(30) proscribes the trafficking of substances that are not listed on the federal schedule, the statute is broader than the generic federal trafficking definition.

Baptiste v. Att'y Gen. of U.S., --- F.3d ---, No. 14-4476, 2016 WL 6595943 (3d Cir. Nov. 8, 2016): Addressing a New Jersey assault statute, the Third Circuit vacated the determination that the offense qualifies as a crime of violence, concluding that the language of 18 U.S.C. § 16(b) is unconstitutionally vague. In so doing, the court joined the Sixth, Seventh, Ninth, and Tenth Circuits. However, the court found that the offense categorically constitutes a crime involving moral turpitude based on the degree of harm inflicted where the offense may be committed recklessly but with "extreme indifference to the value of human life."

Fifth Circuit:

Flores-Larrazola v. Lynch, 840 F.3d 234 (5th Cir. 2016): The Fifth Circuit adopted the Board's definition of "illicit trafficking" to include any state conviction that penalizes the unlawful trading or dealing of any substance that is controlled by federal law, with the exception of a "small amount" of marijuana. Addressing the petitioner's case, the court held that 10 pounds of marijuana could not be considered a "small amount" and that it would not matter if the offense was committed recklessly. The petitioner's conviction thus qualified as an aggravated felony under section 101(a)(43)(B) of the Act.

United States v. Uribe, 838 F.3d 667 (5th Cir. 2016): In a sentencing case, the Fifth Circuit concluded that a Texas burglary statute is divisible based on different elements that must be satisfied; the statute is thus not an indivisible statute of the type that may be violated through different "means" as discussed in *Mathis v. United States*, 136 S. Ct. 2243 (2016). The court concluded that the petitioner's burglary of a habitation in violation of Tex. Penal Code § 30.02(a)(1) constitutes a "generic burglary" under the Federal Sentencing Guidelines.

Eighth Circuit:

United States v. Bell, --- F.3d ---, No. 15-3506, 2016 WL 6311084 (8th Cir. Oct. 28, 2016): In a sentencing case, the Eighth Circuit held that a conviction for second-degree robbery under Missouri Rev. Stat. §§ 569.030.1, 569.010(1) is not a "crime of violence" since there is a "realistic probability" that conviction under this indivisible statute includes robberies that do not necessarily require "violent force" capable of causing physical pain or injury.

Gonzalez-Vega v. Lynch, --- F.3d ---, 839 F.3d 738 (8th Cir. 2016): The Eighth Circuit granted the petition for review where the petitioner argued that the Board erred in not considering his motion for administrative closure. The court observed that in *Matter of Avetisyan,* 25 I&N Dec. 688 (BIA 2012), the Board created a "meaningful standard" under which the grant or denial of administrative closure can be reviewed, and the circuit court therefore has jurisdiction to review such cases for

abuse of discretion. Since the Board had not analyzed the Immigration Judge's decision to deny the motion for administrative closure, the circuit court remanded.

Ninth Circuit:

United States v. Benally, --- F.3d ---, No. 14-10452, 2016 WL 6574490 (9th Cir. Aug. 1, 2016), as amended (Nov. 7, 2016): In a sentencing case, the Ninth Circuit determined that involuntary manslaughter under 18 U.S.C. § 1112, which only requires a mental state of gross negligence, is not a crime of violence. In its amended decision, the Ninth Circuit denied rehearing even after the Supreme Court decided in *Voisine v. United States,* 136 S. Ct. 2272 (2016), that "reckless conduct indeed can constitute a crime of violence" in the sentencing context. The Ninth Circuit concluded that it need not "resolve any tension regarding the inclusion of reckless conduct in this case" because the statute at issue only required a mental state of gross negligence, which the parties agreed cannot satisfy the mens rea requirement for a crime of violence.

Mendez-Garcia v. Lynch, --- F.3d ---, Nos. 15-71931, 13-72924, 2016 WL 6122777 (9th Cir. Oct. 20, 2016): The petitioner challenged the agency's determination that he did not have a qualifying relative for cancellation of removal pursuant to section 240A(b)(1)(D) of the Act because the qualifying relative had turned 21 before the Immigration Judge adjudicated the application for relief. The Ninth Circuit denied the petition for review, according deference to the Board's decision in *Matter of Isidro-Zamorano,* 25 I&N Dec. 829, 830-31 (BIA 2012), and held that a "child" who turns 21 prior to the Immigration Judge's adjudication of an application for cancellation of removal is not a qualifying relative for purposes of section 240A(b)(1)(D) of the Act.

Eleventh Circuit:

United States v. Vail-Bailon, 838 F.3d 1091 (11th Cir. 2016): In a sentencing case, the Eleventh Circuit vacated the petitioner's sentence, finding that a conviction for felony battery under Fla. Stat. Ann. § 784.041 is not a "crime of violence" because an offender can commit this offense by mere touching. The court observed that the statute is divisible and conviction thereunder could constitute a crime of violence if the record of conviction demonstrates "felony battery for striking another, as opposed to mere touching of another."

BIA PRECEDENT DECISIONS

In *Matter of Tima*, 26 I&N Dec. 839 (BIA 2016), the Board held that the fraud waiver provision in section 237(a)(1)(H) of the Act, 8 U.S.C. § 1227(a)(1)(H), cannot waive an alien's removability under section 237(a)(2)(A)(i) for having sustained a conviction for a crime involving moral turpitude ("CIMT"), even where the crime is based on fraud.

The respondent, a conditional permanent resident, was convicted under 18 U.S.C. § 1001 for making materially false statements regarding the marriage that led to his adjustment of status. Of relevance here, he was charged with being removable under section 237(a)(2)(A)(i) of the Act as an alien who was convicted of a crime involving moral turpitude.

The Board observed that the requested waiver applies to removability under section 237(a)(1) of the Act, while section 237(a)(2)(A)(i) defines a ground of removability that is legally distinct from the removal grounds included in section 237(a)(1). Thus, even though the respondent's CIMT removability charge is based on a fraud conviction, his removability under section 237(a)(2)(A)(i) of the Act cannot be waived by section 237(a)(1)(H).

The Board noted that section 237(a)(2)(A)(i) of the Act encompasses all CIMT convictions, not just those that are fraud-based. Thus, under the respondent's proposed construction of the fraud waiver provision, an Immigration Judge would be required to examine the alien's actual conduct to see if it was fraud-based. Such an examination contravenes the Supreme Court's directive in *Mathis v. United States*, 136 S. Ct. 2243 (2016), *Descamps v. United States*, 133 S. Ct. 2276 (2013), and *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).

The respondent had also sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). However, pursuant to the holding in *Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013), and the regulation contained at 8 C.F.R. § 1245.1(f), this waiver is only available to an arriving alien who seeks to waive a ground of inadmissibility or an alien in removal proceedings who is seeking to waive inadmissibility in conjunction with an application for adjustment of status. The respondent's appeal was dismissed.

In *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016), the Board revisited its long-standing jurisprudence regarding theft offenses as crimes involving moral turpitude. The Board held that a theft offense qualifies as a CIMT where an owner's property rights are substantially eroded, even if the statute does not require that the taking be permanent.

Examining Arizona Revised Statutes § 13-1805(A), the shoplifting statute at issue in this appeal, the Board announced that it was updating its existing jurisprudence and holding that the statute defines a categorical CIMT despite the absence of a requirement that a perpetrator intend a literally permanent taking.

In explaining its holding, the Board noted that developments in criminal law have rendered the distinction between permanent and temporary takings anachronistic. The Board observed that the Model Penal Code presently defines "deprive" to include withholding property permanently or for so extended a period of time that its economic value is appropriated. This definition has been adopted by 45 states either through statute or case law. While the issue of whether a taking is "de minimis" may still be relevant in a CIMT determination, developments in criminal law have allayed prior concerns that a temporary, de minimis taking will result in a theft conviction.

In a companion case to *Matter of Diaz-Lizarraga*, the Board held in *Matter of Obeya*, 26 I&N Dec. 856 (BIA 2016), that petit larceny in violation of New York Penal Law § 155.25 is categorically a CIMT. Noting that the statute essentially tracks the Model Penal Code formulation, the Board pointed out that § 155.25 requires both the intent to deprive another of property and the appropriation of the property. New York Penal Law defines "deprive" and "appropriate" in similar terms to entail the withholding or exercise of control over another's property permanently or for such a period of time as the owner is deprived of the major portion of its economic value or benefit. Further, New York's highest court held in *People v. Medina*, 960 N.E.2d 377 (N.Y. 2011), that a larceny conviction requires proof that the defendant intend "to exert permanent or virtually permanent control over the property taken, or to cause permanent or virtually permanent loss to the owner of the possession and use thereof." Applying the holding in *Matter of Diaz-Lizarraga*, the Board concluded that the respondent had been convicted of a categorical crime involving moral turpitude.

An Overview of Internet Sources *continued*

In *Li*, the court found that the Immigration Judge's adverse credibility finding, based in part on the Judge's consideration of "information downloaded from a website[,]" was unreasonable. *Id.* at 148. In particular, the court held that "the website statement cannot fairly be construed to contradict [the alien's] testimony[,]" and in fact the internet evidence corroborated elements of her claim.[6] *Id.* at 149. The court avoided the larger issue of "the reliability foundation appropriate to evaluation of information published on the Internet in proceedings not strictly controlled by the Federal Rules of Evidence" because the parties agreed to the admission of the internet evidence. *Id.* at 148 n.6 (citations omitted).

In addition, despite the general ease of internet access, courts may demand corroborative evidence that is reasonably available on the internet. Recall, for example, the earlier discussion of parallel citation to the URL for a State Department country report. Such evidence can illustrate changed country conditions for a motion to reopen. However, the regulations require the party seeking to reopen proceedings to support the motion with "affidavits or other evidentiary material." 8 C.F.R. § 1003.2(c)(1). Citing to that regulation, the First Circuit in *Yang Zhao-Cheng v. Holder* rejected the movant's contention that the Board erred in refusing to take administrative notice of State Department country reports on China from 1997 to 2009. 721 F.3d 25, 28 (1st Cir. 2013). The court noted, "That these reports are available on the Internet does not relieve [the movant] of his burden to submit to the [Board] evidence supporting his claim." *Id.* As such, the court denied the petition for review. *Id.* at 29.

Administrative Notice

The pervasiveness of internet access not only affects litigants—it can also impact the Immigration Court's work. Administrative notice entails the court's recognition of "commonly known facts" without the admission of such evidence by a party. *See, e.g.*, *Matter of R-R-*, 20 I&N Dec. 547, 551 n.3 (BIA 1992) (internal citations omitted)

("It is well established that administrative agencies and the courts may take judicial (or administrative) notice of commonly known facts. Therefore, this Board may properly take administrative notice of changes in foreign governments."); *see also Matter of S-E-G-*, 24 I&N Dec. 579, 587 n.4 (BIA 2008) (taking administrative notice of the most recent State Department country report). In this way, administrative notice of internet sources represents one method of "promoting accuracy and efficiency in the judicial process." Erin G. Godwin, *Judicial Notice and the Internet: Defining A Source Whose Accuracy Cannot Reasonably Be Questioned*, 46 Cumb. L. Rev. 219, 220 (2016). *See generally* Layne S. Keele, *When the Mountain Goes to Mohammed: The Internet and Judicial Decision-Making*, 45 N.M. L. Rev. 125 (2014) (examining the use of judicial internet research and exploring ways to minimize the potential risks). Previous editions of the *Immigration Law Advisor* have delved further into the topic of administrative notice. Robyn Brown & Vivian Carballo, "Beyond the Record: Administrative Notice and the Opportunity To Respond," *Immigration Law Advisor*, Vol. 9, No. 8 (Sept. 2015); Audra E. Santucci & Judith K. Hines, "'World, Take Good Notice': The Circuits' View of Administrative Notice," *Immigration Law Advisor*, Vol. 1, No. 11 (Nov. 2007).

Multiple circuit courts have had occasion to review judicial internet research that has turned into administratively noticed facts. For instance, in *Caushi v. Attorney General of the United States*, the Third Circuit faced a situation where the Immigration Judge questioned an asylum applicant about the contents of two internet articles the Judge had obtained *sua sponte*. 436 F.3d 220, 223 (3d Cir. 2006). Specifically, the Judge asked the applicant whether the articles accurately reflected a demonstration in which the applicant had taken part. *Id.* After the Judge denied the application for relief, the applicant argued before the Board that the Judge's reliance on non-record internet evidence was erroneous; the Board affirmed the Judge's decision. *Id.* at 224. On review, the court remanded the record on grounds unrelated to the administratively noticed internet evidence but warned in a footnote against taking *sua sponte* notice without placing such evidence in the record:

> We also note that, although an IJ may introduce evidence into the record, [when] the Immigration Judge relies on the country conditions in adjudicating the alien's case, the source of the Immigration Judge's knowledge of the particular country must be made part of the record. Here, the IJ relied on Internet articles from CNN and the BBC as evidence of the events that took place in Tirana on September 13, 1998. Although the IJ may introduce evidence *sua sponte*, and therefore the IJ's reliance on these articles was not error, we agree with Caushi that the IJ inappropriately neglected to place the complete articles in the record. If, upon remand, the immigration court wishes to rely on these articles or any other evidence, such evidence must be placed in the record.

Id. at 231 n.7 (internal citations and quotation marks omitted) (alteration in original). Yet, in a subsequent decision, the Third Circuit suggested that the Immigration Judge's use of non-record internet articles to question an asylum applicant about the "gay scene" in Turkey constituted harmless error because the Judge did not rest his decision on the articles, despite failing to admit the articles into the record. *Ozmen v. Att'y Gen. of U.S.*, 219 F. App'x 125, 128 (3d Cir. 2007) (unpublished).

In *Ogayonne v. Mukasey*, the Immigration Judge had *sua sponte* introduced internet materials related to country conditions for an asylum claim and proceeded to question the applicant about the materials (as well as give the applicant's attorney an opportunity to ask questions about the documents). 530 F.3d 514, 518 (7th Cir. 2008). The Immigration Judge denied the asylum application, and the Board affirmed. *Id.* The Seventh Circuit observed that the admission of the documents was proper because (1) they "merely stated commonly acknowledged facts that were amenable to official notice[,]" (2) the Judge gave the parties an opportunity to respond, (3) the applicant's attorney did not object to the evidence or allege any prejudice, and (4) other record evidence corroborated the information therein. *Id.* at 520. The petitioner did not challenge the documents' admission but argued that the Judge wrongly engaged in "adversarial" questioning premised on the internet articles, thereby depriving him of due process. *Id.* at 522. However, the court disposed of that argument, finding that the Judge's line of questioning did not evince any sort of prejudice and was based on properly admitted evidence. *Id.* at 522–23.

Similarly, the Second Circuit dealt with the Board's administrative notice of internet sources in *Chhetry v. U.S. Dep't of Justice*. 490 F.3d 196 (2d Cir. 2007). In adjudicating an alien's motion to reopen based on changed country conditions, the Board denied the motion solely on administratively noticed facts from websites that supposedly detailed certain events that had occurred after the filing of the motion. *Id.* at 198–99. First, the court held that "the [Board] did not err in taking administrative notice of changed country conditions based on news articles found on yahoo.com, or the websites of CNN and BBC News." *Id.* at 199. Importantly, the court emphasized that "[t]he particular source relied upon . . . matters only to the question of accuracy or verifiability." *Id.* at 200. Because the internet evidence derived from well-known, reputable news organizations and the movant did not challenge the accuracy of the information, the court considered the facts "commonly known and undisputed." *Id.* However, the court found that the Board exceeded its discretion by failing to afford the movant an opportunity to rebut the Board's (dispositive) inferences stemming from those facts.[7] *Id.*

Circuit courts have also pointed to non-record internet evidence to justify their own decisions. For example, in *Ahmed v. Holder*, the Ninth Circuit held that the Immigration Judge abused her discretion in denying a continuance to an alien in the midst of his appeal of a visa petition denial; in so holding, the court relied in part on the estimated processing time for such an appeal as reflected on the website of United States Citizenship and Immigration Services. 569 F.3d 1009, 1014 (9th Cir. 2009). In another case, within the context of reviewing the Board's determination that the asylum applicant posed a danger to the security of the United States, the Third Circuit took judicial notice of the "About Us" page for a website that hosted certain videos found on a computer in the applicant's apartment. *Yusupov v. Att'y Gen. of U.S.*, 650 F.3d 968, 985 n.23 (3d Cir. 2011).

Merits

As discussed at the beginning of this article, internet sources are neither magic nor voodoo—they are evidence like any other. As a result, once internet evidence has cleared the hurdles described in the previous sections, its sole purpose is to help a party meet its burden of proof. Therefore, this article will provide a sample of the ways in which internet evidence has affected the merits of various cases.

One of the best examples of the merits impact of internet evidence at the Board level is *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011). In that case, the Board discussed the firm resettlement bar to asylum relief. After providing a framework within which to assess firm resettlement issues, the Board applied the framework to the applicant. The Board stated that the DHS's "indirect evidence" that the applicant could acquire Senegalese residence through his spouse established a prima facie showing of an offer of firm resettlement. *Id.* at 504–05. The applicant attempted to rebut the DHS's showing by submitting a pertinent provision of Senegalese law, which did not explicitly indicate that a foreign man could obtain citizenship through a female Senegalese citizen. *Id.* at 505. One of the DHS's pieces of evidence referenced an official Senegalese government website which allegedly addressed such a scenario; however, the DHS did not provide a copy and translation of the website, and the applicant's attorney could not locate the website. *Id.* Consequently, "[i]n light of the conflicting and incomplete evidence in the record," the Board remanded the record to the Immigration Judge for further fact-finding. *Id.*

Internet evidence can play a large role in whether or not an asylum applicant meets his or her burden of proof in other ways. In *Makhoul v. Ashcroft*, the First Circuit found that a Lebanese man who feared Syrian soldiers serving as occupation forces in Lebanon did not enunciate a well founded fear of persecution. 387 F.3d 75, 82 (1st Cir. 2004). He based his fear on the fact that he "had posted anti-Syrian political statements on an Internet chat site and had downloaded provocative political material." *Id.* at 78. The court used the anonymity of the internet against him: "As far as anyone can tell, both he and his activities in cyberspace have gone unnoticed. This is not the stuff of which objectively reasonable fears of future persecution are constructed." *Id.* at 82. The Second Circuit employed similar reasoning against a Chinese asylum applicant who feared retribution from Chinese authorities for her pro-democracy internet publication:

> [E]ven if we accept Y.C.'s suggestion that the Chinese government is aware of every anti-Communist or pro-democracy piece of commentary published online—which

> seems to us to be most unlikely—her claim that the government would have discovered a single article published on the Internet more than eight years ago is pure speculation.

Y.C. v. Holder, 741 F.3d 324, 334 (2d Cir. 2013). The court even took a moment of self-reflection to dissect the particular risks of "pro-democracy claims":

> What makes cases like this one particularly thorny is that pro-democracy claims may be especially easy to manufacture. Any Chinese alien who writes something supportive of democracy (or pays for such writing to be published in his or her name) and publishes it in print or on the Internet may in some cases do so principally in order to assert that he or she fears persecution. And, because Internet postings in particular may become accessible anywhere, the applicant can argue that the Chinese government is aware or likely to become aware of his or her pro-democracy stance.

Id. at 338.

The internet also serves as an important vehicle for uncovering up-to-the-minute country conditions. In *Raza v. Gonzales*, the First Circuit affirmed the Board's denial of an untimely motion to reopen based on changed conditions where a Pakistani man converted from Sunni to Shia Islam. 484 F.3d 125 (1st Cir. 2007). He sought to prove a recent escalation in violence against Shiite Muslims in Pakistan through various internet articles. *Id.* at 126–27. The court found that he had not shown prima facie entitlement to asylum, as would permit reopening. *Id.* at 129. The court reasoned that the internet articles did not demonstrate widespread violence in Pakistan and did show that "most of Pakistan's Sunnis and Shiites reside peacefully together." *Id.* Likewise, in an unpublished decision, the Sixth Circuit held that the DHS's evidence of changed country conditions (composed of internet news articles from "an international organization, the UN Office for the Coordination of Humanitarian Affairs[,] and BBC News") sufficiently rebutted the asylum applicant's fear of persecution in Mauritania. *Sy v. Mukasey*, 278 F. App'x 473, 476 (6th Cir. 2008) (unpublished). Although the applicant characterized the evidence as "internet gossip," the court emphasized "the broad array of evidence permitted in immigration courts . . . ." *Id.*

Web Address Citations and "Link Rot"

A seemingly innocuous but critical issue with internet evidence involves the very use of a web address citation. As noted above, Appendix J requires that a URL accompany the citation to a State Department country report and that a URL be provided for an internet publication. The Board has cited to internet sources directly or in parallel many times in its decisions.[8]

However, URLs can cause a unique set of problems. For one, URLs can be notoriously unwieldy; this has led to special citation rules for URLs. The Bluebook: A Uniform System of Citation R. 18.2.2(d) (Columbia Law Review Ass'n et al. eds., 20th ed. 2015) (citation to the root URL is appropriate where the full URL is excessively long or contains many non-textual characters or where submission of a form or query is needed to obtain the information). In such circumstances, a URL shortening service may also alleviate unnecessary clutter. *See, e.g.*, *Utah v. Strieff*, 136 S. Ct. 2056, 2073 (2016) (Kagan, J., dissenting) (citing to a URL processed through the Google URL Shortener). Additionally, URLs suffer from a digital disease commonly referred to as "link rot." Through this phenomenon, URL hyperlinks become useless due to the disappearance or alteration of the underlying source and its specific web address at a given point in time. *See generally* Raizel Liebler & June Liebert, *Something Rotten in the State of Legal Citation: The Life Span of a United States Supreme Court Citation Containing an Internet Link (1996–2010)*, 15 Yale J.L. & Tech. 273 (2013). One study in 2013 found that 29% of the URLs in U.S. Supreme Court opinions between 1996 and 2010 were invalid. *Id* at 306–07. Unsurprisingly, some of the links contained in the Board's decisions have succumbed to this fate. *E.g.*, *Matter of J-E-*, 23 I&N Dec. 291, 293 (BIA 2002) (State Department Background Note); *Matter of Kao*, 23 I&N Dec. 45, 53 (BIA 2001) (State Department country report); *Matter of R-A-*, 22 I&N Dec. 906, 920 n.2, 926, 935 (BIA 1999) (United Kingdom House of Lords decision), *vacated*, 22 I&N Dec. 906 (A.G. 2001), *remanded*, 23 I&N Dec. 694 (AG 2005), *remanded and stay lifted*, 24 I&N Dec. 629 (A.G. 2008). To counter link rot, some courts have begun to incorporate the use of web archiving tools, such as Perma, to essentially generate

a permanent copy of the internet source. *See, e.g.*, *United States v. DE L'Isle*, 825 F.3d 426, 436 (8th Cir. 2016); *United States ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 644 (7th Cir. 2016).

Conclusion

The internet has unlocked the potential for litigants and courts to use and abuse electronically stored information. However, one thing is clear: the internet is here to stay. Accordingly, parties and adjudicators must do their best to follow basic evidentiary principles where the internet source fits neatly within the existing rules (such as online versions of official publications) and to adapt where the source presents unique challenges (such as Wikipedia). New technologies will further test the limits of evidentiary acceptance in immigration proceedings. However, if the past is any indication, courts will be up to the task of tackling even the most difficult internet materials.

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1. It will therefore come as no surprise to learn that home internet use has risen from 18% in 1997 to 74.4% in 2013, according to U.S. Census Bureau statistics. Thom File & Camille Ryan, U.S. Census Bureau, *Computer and Internet Use in the United States: 2013* at 4 (2014), https://perma.cc/H3RN-563C.

2. Chapter 3.3(e)(ii), which governs publications as evidence, provides as follows:

> When a party submits published material as evidence, that material must be clearly marked with identifying information, including the precise title, date, and page numbers. If the publication is difficult to locate, the submitting party should identify where the publication can be found and authenticated.
>
> In all cases, the party should submit title pages containing identifying information for published material (e.g., author, year of publication). Where a title page is not available, identifying information should appear on the first page of the document. For example, when a newspaper article is submitted, the front page of the newspaper, including the name of the newspaper and date of publication, should be submitted where available, and the page on which the article appears should be identified. If the front page is not available, the name of the newspaper and the publication date should be identified on the first page of the submission. Copies of State Department Country Reports on Human Rights Practices, as well as the State Department Annual Report on International Religious Freedom, must indicate the year of the particular report.

3. In fact, the Manual implies that for certain legislative history evidence, a citation to a website's URL alone would suffice to identify a source. *See* Practice Manual, App. J at J-12 (emphasis added) ("If a source is difficult to locate, include a copy of the source with your filing (*or an Internet address for it*) and make clear reference to that source in your filing.").

4. Certain types of documents have specified methods of authentication. *See, e.g.*, 8 C.F.R. §§ 1003.41 (authenticating conviction documents), 1287.6 (authenticating domestic and foreign official records).

5. Interestingly, the court appears to have performed its own internet research in determining that "gov.cn is 'The Chinese Central Government's Official Web Portal,' as explained in 'The Central People's Government of the People's Republic of China,' http://english.gov.cn/ . . . ." *Qiu Yun Chen,* 715 F.3d at 212.

6. Specifically, the court determined that the Immigration Judge misinterpreted the evidence as going against the alien's claim of her Falun Gong leadership position; whereas the Immigration Judge read the website to proclaim that "there are no leaders" within Falun Gong, the court construed the statement as "there is no leader[,]" which contextually referred to Falun Gong not being a "cult, religion, or sect." *Li*, 529 F.3d at 148.

7. The court did not state how the Board should have afforded the movant an opportunity to rebut. Rather, the court expressed doubt, without deciding, that the ability to file a subsequent motion to reopen would cure a lack of notice. *Chhetry*, 490 F.3d at 201. However, in its order, the court remanded the case to the Board "for further proceedings, including, if additional factual development is appropriate, further proceedings before the Immigration Judge." *Id.* In a later case where the administratively noticed facts constituted the sole basis for reversing a grant of asylum, the court determined that the availability of a motion to reopen did not afford the movant due process. *Burger v. Gonzales*, 498 F.3d 131, 135 (2d Cir. 2007). The Ninth Circuit has suggested that the Board could allow the parties to "move[] for leave to supplement their briefs, supplement the evidence, withdraw their applications for asylum, or seek other relief." *Castillo-Villagra v. INS*, 972 F.2d 1017, 1029 (9th Cir. 1992).

8. *Matter of Khan*, 26 I&N Dec. 797, 801 (BIA 2016) (Form I-192); *Matter of A-R-C-G-*, 26 I&N Dec. 388, 393, 394 (BIA 2014) (Committees on Foreign Relations and Foreign Affairs country report, State Department country report, and a Canadian news article); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 230, 235, 250 (BIA

2014) (Convention and Protocol Relating to the Status of Refugees, two United Nations High Commissioner for Refugees guidance documents, an Australian High Court decision, and a European Union directive); *Matter of W-G-R-*, 26 I&N Dec. 208, 211, 220–21, 222 (BIA 2014) (Convention and Protocol Relating to the Status of Refugees, a European Union directive, and a State Department country report); *Matter of Eac, Inc.*, 24 I&N Dec. 556, 557, 561 (BIA 2008) (Executive Office for Immigration Review's roster of recognized organizations and their accredited representatives, as well as various immigration law resources); *Matter of J-E-*, 23 I&N Dec. 291, 293, 298, 299–300, 302, 306 (BIA 2002) (State Department Background Note, European Convention for the Protection of Human Rights and Fundamental Freedoms, State Department country report, and a State Department report to the United Nations Committee on Torture); *Matter of Yanez-Garcia*, 23 I&N Dec. 390, 414 n.11 (BIA 2002) (Justice Department's Virtual Law Library); *Matter of Kao*, 23 I&N Dec. 45, 52 n.6, 53 (BIA 2001) (State Department country report, and Statistical Analysis Report from the National Center for Education Statistics); *Matter of R-A-*, 22 I&N Dec. 906, 920 n.2, 926, 935 (BIA 1999) (United Kingdom House of Lords decision), *vacated*, 22 I&N Dec. 906 (AG 2001), *remanded*, 23 I&N Dec. 694 (AG 2005), *remanded and stay lifted*, 24 I&N Dec. 629 (AG 2008).

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