FRIVOLOUS FINDING STANDARD LANGUAGE

In addition to an adverse credibility finding, the Court further concludes that the respondent's testimony in support of his asylum application was so inconsistent that it rises to the level of being knowingly frivolous within the meaning of section 208(d)(6) of the Act and 8 C.F.R. § 1208.20 (2005). The Court may enter a finding that the respondent has submitted a frivolous asylum application if it determines that the respondent deliberately fabricated any material elements of his asylum application. See 8 C.F.R. § 1208.20. The Board of Immigration Appeals ("Board") has formulated a four-part test to determine if a respondent has filed a frivolous application: (1) the respondent must receive notice of the consequences of filing a frivolous application; (2) the Immigration Judge must make a specific finding that the alien knowingly filed a frivolous application; (3) there must be sufficient evidence that a material element was deliberately fabricated; and (4) there must be an indication that the respondent has been afforded a sufficient opportunity to account for any discrepancies or implausible aspects of the claim. Matter of Y-L-, 24 I&N Dec. 151 (BIA 2007). A finding of submission of a frivolous application shall render the respondent permanently ineligible for any benefit under the Act, aside from withholding of removal. See INA § 208(d)(6); 8 C.F.R. § 1208.20. Relief under Article III of the Convention Against Torture is not barred by a frivolous finding because it is not a benefit under the Act.

A. Notice

Before a frivolous finding may be made, the Court must ensure that the respondent has received notice of the consequences of filing a frivolous claim. See INA § 208(d)(4). Although the Board has not articulated the standard for what degree of notice is required, an asylum applications contains warnings regarding frivolous applications and the regulations state that an "applicant's signature establishes a presumption that the applicant is aware of the contents of the application." 8 C.F.R. § 1208.3(c)(2). In Y-L-, 24 I&N Dec. at 155-56, the Board found that notice had been satisfied where the respondent signed his application which contained a warning; where he signed a "Notice of Privilege of Counsel and Consequences of Knowingly Filing a Frivolous Application for Asylum" in front of the Immigration Judge; and where there was an assurance by counsel that he had informed the respondent of the consequences of filing a frivolous application.

[Apply standard to facts of case]
- Signature on application
- Signed oath from Asylum Office
- Written advisal in Court
- Oral warning in Court

B. Deliberate Misrepresentation

In order for a frivolous finding to be upheld, the preponderance of the evidence must demonstrate that the respondent knowingly filed an application with a deliberate misrepresentation of a material fact. Y-L-, 24 I&N Dec. at 157. The Court "must provide cogent and convincing reasons for finding by a preponderance of the evidence that an asylum applicant knowingly and deliberately fabricated material elements of the claim." Id. at 158. The Board found that there is "no indication in the statute or regulation that a frivolousness finding must be supported by 'concrete or conclusive' evidence of fabrication." Id. Further, the Board noted that "[a]s a general rule, 'the law draws no distinction between direct and circumstantial evidence in requiring the government to carry its burden of proof." Id. (citing United States v. MacPherson, 424 F.3d 183, 190 (2d Cir. 2005)). While the IJ must find "proof that conduct was knowing or deliberate," this finding "may be demonstrated by circumstantial evidence." Id. at 158. However, the inconsistencies in the application must be a result of the respondent's deliberate fabrication, rather than the product of another's actions. See generally Yeimane-Berhe v. Ashcroft, 393 F.3d 907 (9th Cir. 2004)(reversing an adverse credibility finding where there was no evidence the petitioner knew the document her sister sent her was counterfeit).

[Apply standard to facts of case]
- Knowingly false

• Deliberately presented
• Direct evidence: admittedly false testimony, fraudulent documents
• Circumstantial evidence: general implausibility, major internal/external inconsistencies

C. Material

Materiality is not defined for purposes of the frivolous finding statutes or regulations, nor are there any published or unpublished cases that have spoken on its materiality requirement. However, in the context of determining excludability for having made a "material misrepresentation" under former section 212(a)(19) of the Act, Board has long held that a misrepresentation is material if the respondent is excludable on the true facts or the misrepresentation tends to shut off a line of inquiry relevant to the benefit that might have resulted in the alien's exclusion. See, e.g., Matter of Bosuego, 17 I&N Dec. 125, 130 (BIA 1980); Matter of S- and B-C-, 9 I&N Dec. 436, 447 (BIA 1960). The Ninth Circuit has adopted the Supreme Court's conclusion that a misrepresentation is material if it has a "natural tendency to influence the decisions of the [Government]." Forbes v. INS, 48 F.3d 439, 442 (9th Cir. 1995) (quoting Kungys v. United States, 485 U.S. 759, 772 (1988)). See also Matter of Tijam, 22 I&N Dec. 408, 425 (BIA 1998) (Chairman Rosenburg, concurring in part and dissenting in part). A misrepresentation can be said to have such a tendency "if honest representations would predictably have disclosed other facts relevant to [the alien's] qualification." Forbes, 48 F.3d at 442-43 (quoting Kungys, 485 U.S. at 783 (Brennan, J., concurring) (alteration in original, quotation marks omitted)).

[Apply standard to facts of case]
• Misrepresentation
• Relation of misrepresentation to material aspect of claim
• What makes it material? Heart of claim; past events which form basis of claim; entry date if one year bar issue?

D. Sufficient Opportunity to Explain

A frivolous finding shall only be made if the Court is satisfied that the applicant, during the course of the proceedings, had a sufficient opportunity to account for any discrepancies or implausibilities that form the basis of the frivolous finding. 8 C.F.R. § 1208.20; Farah v. Ashcroft, 348 F.3d 1153 (9th Cir. 2003). The Ninth Circuit has emphasized that the respondent must be given ample opportunity to address any perceived inconsistencies. See Farah, 348 F.3d at 1156. Indeed, the Board even suggests that the Immigration Judge bring the possibility of a frivolous finding to the attention of a respondent during the course of the hearing. Y-L-, 24 I&N Dec. at 159-60. In order to ensure that a respondent has been given a sufficient opportunity to explain any inconsistencies, the Court must "go through specific inconsistencies or implausible elements of [the] claim," and "give [the applicant] an opportunity to explain them." Id. at 160. However, depending on the degree of the fabrications, "[t]here may be situations in which the deliberate fabrication of a material aspect of the asylum claim is so clear on the record that a formal request for an explanation would be a needless exercise." Id.

[Apply standard to facts of case]
• Notification to the respondent that a frivolous finding may be made?
• Opportunity to explain each instance

E. Conclusion

Based on this analysis, the Court finds that, despite having been given notice of the consequence of filing a frivolous asylum claim, the respondent knowingly filed an asylum application with a deliberate misrepresentation of a material fact. The respondent has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim, but has failed to adequately explain them. The Court accordingly finds that under section 208(d)(6) of the Act, the respondent shall be permanently ineligible for any benefits under the Act, effective as of the date of this order.

[****PLEASE NOTE: Withholding of removal and CAT analysis must still be addressed****]

Add to Orders:

FURTHER ORDER: The respondent shall be permanently ineligible for any benefits under the INA for having knowingly presented a frivolous asylum application, in violation of section 208(d)(6) of the INA.