

SUMMARY OF MATTER OF Y-L-

Matter of Y-L-, 24 I&N Dec. 151 (BIA 2007)

The Board formulated a four part test in making a frivolous finding: (1) notice of consequences of filing a frivolous application, (2) specific finding that the alien knowingly filed a frivolous application, (3) sufficient evidence that a material element was deliberately fabricated, and (4) an indication that the alien has been afforded sufficient opportunity to account for any discrepancies or implausible aspects of the claim.

Notice

The Board first found that “[t]he statute and regulation require that the Attorney General advise the alien at the time of filing asylum application of the consequences of filing a frivolous application.” Id. at 155. Although the Board did not articulate a specific standard, they 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 Respondent of the consequences of filing a frivolous application. Id. at 155-56. The Board later stated that “[t]he applicant’s signature establishes a presumption that the applicant is aware of the contents of the application.” Id. at 161 (quoting 8 C.F.R. § 1208.3(c)(2)).

Specific Finding

The Board next addressed the “specific finding” requirement in 8 C.F.R. § 1208.20. It stated that Immigration Judges must make “a specific finding that a respondent deliberately fabricated a material element of his asylum claim” and that they “must separately address the question of frivolousness, including a discussion of the evidence supporting a finding that the respondent deliberately fabricated a material element of the asylum claim.” Id. at 156.

Sufficient Evidence

In addressing the burden of proof, the Board found that because of the severe consequences that flow from a frivolous finding, “the preponderance of the evidence must support an Immigration Judge’s finding.” Id. at 157. While either the government attorney or the Immigration Judge might raise the issue in the course of the hearing, in addressing the evidence on the record, an “Immigration Judge must provide cogent and convincing reasons for finding by a preponderance of the evidence that an asylum application knowingly and deliberately fabricated material elements of the claim.” Id. at 158. While the Immigration Judge must find “proof that conduct was knowing or deliberate,” the finding need not be a direct finding of fraudulent documents and may be “demonstrated by circumstantial evidence.” Id. at 158. Further, on appeal, the Board reviews whether a fabrication was knowing or deliberate for clear error, as a factual question of intent; whether a fabrication was material is a mixed question of fact and law; and whether an Immigration Judge properly applied the regulatory framework is a question of law.

Specifically addressing what constitutes a deliberate fabrication of a material element, the Board found that an element is fabricated if it “misrepresents the truth.” Id. at 156 (quoting Black’s Law Dictionary 597 (8th ed. 2004)). Further, deliberate requires a “knowing and intentional misrepresentation of the truth.” Id. at 156.

Opportunity to Explain

Lastly, with regard to “sufficient opportunity to explain” the Board found that “it would be good practice for an Immigration Judge...to bring [the possibility of a frivolous finding] to the attention of the application prior to the conclusion of the proceedings.” Id. at 159-60. The respondent must be

given “ample opportunity during his hearing to address and account for any deliberate, material fabrications upon which the Immigration Judge may base a finding of frivolousness” *Id.* at 159 (quoting *Mingkid v. U.S. Att’y Gen.*, 468 F.3d 763, 769 (11th Cir. 2006)). However, the Board stated this with regard to instances where there is direct evidence of a deliberate fabrication:

There 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. See, e.g., *Barreto-Claro v. Att’y Gen.*, *supra* (finding that the respondent’s admissions that he stated falsely on his first asylum application that he had never before applied for refugee or asylum status and that he gave a fraudulent account of how he came to the United States established that he deliberately fabricated facts that were materially relevant to the question whether he had been firmly resettled in another country prior to arrival in the United States.

Id. at 160. After the respondent has given explanations for any inconsistencies or implausibilities, they should be “addressed and evaluated by the Immigration Judge.” *Id.* at 161.