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Corroboration Requirements Under the REAL ID Act: Notice and Reasonably Obtainable Evidence

by Margot Kniffin

Nearly a decade has passed since the REAL ID Act of 2005 sought to clarify the standards governing corroborative evidence for applicants seeking asylum. *See* REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, § 101(a)(3), 119 Stat. 231, 302-303 (codified as amended at section 208(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)). Pursuant to the REAL ID Act's directive, "the testimony of an applicant may be sufficient to sustain [his] burden" of demonstrating eligibility for such relief, "but only if the applicant satisfies the trier of fact that [his] testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." Section 208(b)(1)(B)(ii) of the Act. The provision continues by indicating that "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 it." *Id.*

In the years since the enactment of this REAL ID Act provision, the Board and circuit courts have interpreted its language in varying and often divergent ways. Specifically, in circumstances where the adjudicator concludes that the applicant should provide corroborative evidence for otherwise credible testimony, the courts are split over whether the adjudicator must notify the applicant of the need to provide this evidence, as well as provide a continuance to obtain it, before denying the applicant's claim. Additionally, courts have offered substantial guidance on the circumstances in which evidence is considered to be reasonably obtainable for the applicant.

This article will provide an overview of the varying positions that courts have taken on the issue of notice and corroboration in asylum proceedings. The article will first describe the Board's

position on the question of notice, as advanced in the recently published decision, *Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015). Next, it will describe the positions of the United States Courts of Appeals for the Second and Seventh Circuits, which align with that of the Board. The article will then describe the contrasting interpretations of the Third and Ninth Circuits. Finally, it will present a survey of circuit court cases that provide guidance on when an adjudicator may find that evidence is reasonably obtainable, pursuant to the language of section 208(b)(1)(B)(ii) of the Act.

Notice

The courts have taken inconsistent positions on whether section 208(b)(1)(B)(ii) of the Act requires that adjudicators provide additional notice to applicants regarding the need for corroborative evidence. While the Second and Seventh Circuits have found that the language of the Act itself places the applicant on notice, the Ninth and Third Circuits have concluded that Immigration Judges must notify the respondent of the need to provide the corroborative evidence and grant a continuance so that the respondent can obtain it.[1] Recently, the Board published *Matter of L-A-C-*, in which it clarified that its position is consistent with that of the Second and Seventh Circuits.

Matter of L-A-C-

In *Matter of L-A-C-*, the Board concluded that section 208(b)(1)(B)(ii) of the Act does not require that an Immigration Judge identify the specific evidence that an asylum or withholding of removal applicant must obtain in order to meet the applicant's burden of proof or provide an automatic continuance so that the applicant may obtain that evidence. 26 I&N Dec. 516. The applicant in *Matter of L-A-C-* claimed that he had been persecuted in his hometown in Guatemala on account of his political affiliation with the Democratic Christian Union political party. *Id.* at 524. The Immigration Judge denied his application, finding that the applicant was not a credible witness. Alternatively, the Immigration Judge found that, even if credible, the applicant failed to provide sufficient corroborative evidence to establish eligibility for relief. The applicant appealed to the Board, arguing that the Immigration Judge erred by failing to inform him of the specific corroborating evidence necessary and by failing to grant him a continuance to obtain the evidence. *Id.* at 517.

In addressing the issue, the Board first looked at the language of section 208(b)(1)(B)(ii) of the Act and determined that it does not have a "plain and unambiguous" meaning with regard to the issue of notice. *Id.* at 518. Namely, the Board determined that the language of the provision is ambiguous as to the steps that the Immigration Judge must take when the applicant has not provided the necessary corroborative evidence.

The Board therefore turned to the legislative history and the context of the statute as a whole for guidance. *Id.* According to the legislative history, Congress hoped to "bring clarity and consistency" to the issue of corroboration in asylum and withholding of removal proceedings through the enactment of this provision. H.R. Rep. No. 109-72, at 165 (2005), *reprinted in* 2005 U.S.C.C.A.N. 240, 290–91, 2005 WL 1848528 at *165–66. Further, Congress anticipated that standards previously set forth by the Board in *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997), "including the [Board's] conclusions on situations where corroborating evidence is or is not required, will guide the [Board] and the courts in interpreting this clause." *Id.* at 166. The Board thus concluded that an understanding of the requirements inherent in section 208(b)(1)(B)(ii) turns on an analysis of the standards the Board initially established in *Matter of S-M-J-*.

In *Matter of L-A-C-*, the Board emphasized that it had previously held that the asylum applicant has the burden of proof to establish eligibility for asylum. 26 I&N Dec. at 519 (citing *Matter of S-M-J-*, 21 I&N Dec. at 725). Further, even if the Immigration Judge finds the applicant credible, the Judge can require that the applicant provide reasonably available corroborating evidence to support certain facts material to his claim. *Id.* If the applicant is not able to obtain evidence, the Immigration Judge must provide the applicant an opportunity to explain its unavailability. *Id.* (citing *Matter of S-M-J-*, 21 I&N Dec. at 724).

However, the Board deduced that neither the framework set forth in *Matter of S-M-J-* nor the language of House Conference Report Number 109-72 indicates that the Immigration Judge must identify in advance specific pieces of corroborating evidence that the applicant must provide in order for the applicant to meet his burden. *Id.* at 520. The Board similarly concluded that section 208(b)(1)(B)(ii) does not require that the Immigration Judge provide an automatic continuance

to allow the applicant time to obtain the evidence. *Id.* On the contrary, Congress intended for the REAL ID Act provision to create "commonsense standards in assessing asylum claims without undue restrictions." *Id.* (citing H.R. Rep. No. 109-72, at 165–67). The Board emphasized that reading a notice and continuance requirement into the provision would create an "undue restriction," because it would require the Immigration Judge to conduct proceedings in a manner inconsistent with the normal structure of immigration proceedings. 26 I&N Dec. at 520–21. The Board therefore concluded that neither *Matter of S-M-J-* nor the legislative history of the REAL ID Act supports a finding that section 208(b)(1)(B)(ii) contains an inherent notice requirement.[2]

The Board then clarified that, although section 208(b)(1)(B)(ii) does not require an automatic continuance, the Immigration Judge must still provide the applicant with an opportunity to explain why he is unable to obtain the essential evidence. *Id.* at 521. The Board stated that this requirement is consistent with both the language of the REAL ID Act and the framework of *Matter of S-M-J-*. *Id.* at 521 n.4 (citing *Matter of S-M-J-*, 21 I&N Dec. at 725 ("If the applicant does not provide [corroborating evidence], an explanation should be given as to why such information was not presented.")). Additionally, the Immigration Judge must include in the record the applicant's explanation regarding the lack of evidence, as well as the Immigration Judge's opinion of whether the applicant's explanation is sufficient.

Finally, the Board indicated that the proper inquiry when the applicant requests a continuance to obtain corroborative evidence is whether the applicant has demonstrated good cause. *Id.* at 522 (citing *Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987); *Matter of Sibrun*, 18 I&N Dec. 354, 355–57 (BIA 1983); 8 C.F.R. §§ 1003.29, 1240.6 (2014)). The decision to grant or deny the applicant's request for a continuance therefore remains within the discretion of the Immigration Judge. Although there may be instances where it is appropriate for an Immigration Judge to grant a continuance so that the applicant may obtain additional evidence, there is no requirement to do so where the applicant has failed to demonstrate good cause.

The Board concluded by acknowledging the differing views that circuit courts have taken on the issue of notice. *Id.* at 523–24. It clarified that it disagrees with the approach that the Ninth Circuit took in *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011), *see infra at 11*, and instead applies an approach that is consistent with that applied in the Second and Seventh Circuits.

Circuit Courts Not Requiring Notice

The Second and Seventh Circuits published decisions prior to *Matter of L-A-C-* that are in line with the Board's reasoning and holding. Both of these circuits agree that Immigration Judges are not required to provide notice and an automatic continuance so that an applicant can obtain corroborative evidence. Further, like the Board, both courts support this conclusion by referencing the procedural difficulties inherent in such a requirement.

The Second Circuit's analysis regarding notice turns on its conclusion that the applicant bears the ultimate burden of establishing eligibility for relief. *See Liu v. Holder*, 575 F.3d 193, 198 (2d Cir. 2009).[3] In reaching its conclusion, the court first acknowledged its previous determination that the Immigration Judge must (1) identify the specific pieces of relevant evidence that are missing from the record; (2) state on the record the reasons that this evidence was reasonably available to the applicant; and (3) assess the applicant's explanation for not providing it. *Id.* (citing *Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 395 (2d Cir. 2005); *Jin Shui Qiu v. Ashcroft*, 329 F.3d 140, 153 (2d Cir. 2003); *Diallo v. INS*, 232 F.3d 279, 290 (2d Cir. 2000)).[4] The court pointed out, however, that the Immigration Judge is often not able to specify the missing evidence until all evidence has been submitted and the Immigration Judge has had the opportunity to weigh it in preparation for an opinion. Accordingly, the court determined that the Immigration Judge is not required to identify the missing points of corroborative evidence *prior* to the disposition of the applicant's claim. *Id.* Instead, the Immigration Judge may "specifically identif[y] the types of documents that might have adequately supplemented" an applicant's testimony in a written decision, allowing the applicant to then explain the unavailability of such evidence in a motion to reopen or an appeal to the Board. *Id.* at 199. The court justified this procedural analysis by emphasizing that the alien "bears the ultimate burden of submitting sufficient corroborating evidence without prompting" from the Immigration Judge.[5] *Id.* at 198.

The Seventh Circuit's determination regarding the notice inquiry also supports the Board's holding

in *Matter of L-A-C-*. *See Rapheal v. Mukasey*, 533 F.3d 521, 530 (7th Cir. 2008); *see also Abraham v. Holder*, 647 F.3d 626, 633 (7th Cir. 2011). Rather than focusing on the applicant's ultimate burden, however, the court framed its conclusion in the context of notice. Namely, the court concluded that the language of section 208(b)(1)(B)(ii) itself places the applicant on notice regarding the consequences of failing to provide such evidence because it explicitly indicates that corroborative evidence may be required. *Rapheal v. Mukasey*, 533 F.3d at 530. Following this determination, the court's analysis mirrored the Second Circuit in focusing on the latent procedural difficulties in requiring the Immigration Judge to notify the applicant of the need for corroborative evidence. The court found that this framework would necessitate a bifurcated hearing process—"the first [hearing] to decide whether such corroborating evidence is required and then a second [hearing] after a recess to allow the alien more time to collect such evidence." *Id.* The court concluded that such a requirement would unnecessarily burden the resources of the immigration courts and the Department of Homeland Security.

Both the Second and Seventh Circuits have issued decisions that are consonant with the Board's analysis of section 208(b)(1)(B)(ii). Although the Second Circuit supported its analysis by examining the applicant's ultimate burden, while the Seventh Circuit framed its conclusion around a notice inquiry, both courts highlighted ways in which a notice and continuance requirement would strain the Immigration Judge and the resources of the courts. The Board's holding in *Matter of L-A-C-* does not conflict with the law of these circuits.[6]

Circuit Courts Requiring Notice

The Third and the Ninth Circuits have adopted interpretations of section 208(b)(1)(B)(ii) that differ from the Board's analysis in *Matter of L-A-C-*. Determining that the provision imposes a notice requirement, both of these courts have outlined specific procedures that the Immigration Judge must follow in order to ensure that the applicant is aware of and has sufficient time to procure the evidence necessary to corroborate his claim. However, although the Third Circuit's analysis arises out of pre-REAL ID Act case law, the Ninth Circuit's interpretation is based on what it deems to be the plain language of the REAL ID Act and its perception of congressional intent in enacting this legislation.

The Third Circuit's framework for interpreting the corroboration standards for asylum and withholding of removal applicants stems from its analysis of the Board's holding in *Matter of S-M-J-*. In *Abdulai v. Ashcroft*, the court considered the applicant's challenge to the Board's conclusion that, pursuant to *Matter of S-M-J-*, the Immigration Judge may require that the applicant provide additional evidence to corroborate his otherwise credible testimony. 239 F.3d 542, 545 (3d Cir. 2001). Rejecting the applicant's claim that this rule is per se invalid, the court focused on whether the Board properly applied its own case law to the facts of the applicant's case. *Id.* at 554–55.

The court characterized the Board's holding in *Matter of S-M-J-* as obliging the Immigration Judge to engage in the following three-part inquiry: (1) identify the facts for which "it is reasonable to expect corroboration"; (2) inquire whether the applicant has provided information corroborating the relevant facts; and, if the applicant has not provided this evidence, (3) analyze whether the applicant has adequately explained his failure to do so. *Id.* at 554. Turning to the facts of the case, the court determined that the Board only focused on the second part of the inquiry—whether the applicant had provided sufficient evidence—without identifying which aspects of the applicant's claim he reasonably could have corroborated. *Id.* Without the Board's complete discussion of each of the three aspects of the inquiry, the court concluded that it was not able to determine whether it was reasonable to expect the applicant to provide the missing evidence.

Following *Abdulai v. Ashcroft*, the Third Circuit continued to apply its three-part inquiry, providing further guidance on the necessary steps that an Immigration Judge must take before denying an applicant's claim for lack of corroboration. In *Toure v. Att'y Gen. of U.S.*, the court clarified that the adjudicator must also offer the applicant "notice and an opportunity to present an explanation" for a failure to submit evidence. 443 F.3d 310, 324 (3d Cir. 2006). The court reasoned that, without this notice, the applicant is not given the opportunity to seek the evidence or provide an explanation for its absence. *Id.*; *see also Sandie v. Att'y Gen. of U.S.*, 562 F.3d 246, 253 (3d Cir. 2009) (concluding that the Immigration Judge "adequately worked through the three-part *Abdulai* inquiry, [and] put [the applicant] on notice of the

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CIRCUIT COURT DECISIONS FOR MARCH 2015

by John Guendelsberger

The United States courts of appeals issued 169 decisions in March 2015 in cases appealed from the Board. The courts affirmed the Board in 143 cases and reversed or remanded in 26, for an overall reversal rate of 15.4%, compared to last month's 8.0%. There were no reversals from the First, Second, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits.

The chart below shows the results from each circuit for March 2015 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	0	0	0	0.0
Second	19	19	0	0.0
Third	9	8	1	11.1
Fourth	9	9	0	0.0
Fifth	14	14	0	0.0
Sixth	11	10	1	9.1
Seventh	7	7	0	0.0
Eighth	6	6	0	0.0
Ninth	78	55	23	29.5
Tenth	11	10	1	9.1
Eleventh	5	5	0	0.0
All	169	143	26	15.4

The 169 decisions included 79 direct appeals from denials of asylum, withholding or protection under the Convention Against Torture; 53 direct appeals from denials of other forms of relief from removal or from findings of removal; and 37 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	79	63	16	20.3
Other Relief	53	47	6	11.3
Motions	37	33	4	10.8

The 16 reversals or remands in asylum cases were all from the Ninth Circuit and involved remand to further address particular social group (10 cases), nexus (3 cases), credibility (2 cases), and relocation. The six reversals or remands in the "other relief" category addressed removal grounds for "child abuse" and material misrepresentation, section 237(a)(1)(H) and section 212(c) waivers, the Federal First Offender Act, and a remand to address a due process claim. The motions cases involved changed country conditions (two cases), a section 212(h) waiver, and a sua sponte determination.

The chart below shows the combined numbers for January through March 2015 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Ninth	205	163	42	20.5
Second	43	37	6	14.0
Tenth	18	16	2	11.1
Sixth	22	20	2	9.1
Seventh	12	11	1	8.3
Eleventh	12	11	1	8.3
Third	25	23	2	8.0
Fourth	26	24	2	7.7
First	3	3	0	0.0
Eighth	13	13	0	0.0
Fifth	24	24	0	0.0
All	403	345	58	14.4

Last year's reversal rate at this point (January and March 2014) was 14.0%, with 591 total decisions and 83 reversals or remands.

The numbers by type of case on appeal for the first 3 months of 2015 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	202	165	37	18.3
Other Relief	114	100	14	12.3
Motions	87	80	7	8.0

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

Second Circuit:

Lugo v. Holder, No. 13-1484-ag, 2015 WL 1566761 (2d Cir. Apr. 9, 2015): The court vacated a Board decision that affirmed an Immigration Judge's determination that the petitioner was not eligible for cancellation of removal. Relying upon *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006), *rev'd*, *Robles-Urrea*, 678 F.3d 702 (9th Cir. 2012), the Immigration Judge had held that the petitioner's 2005 conviction for misprision of felony under 18 U.S.C. § 4 was a conviction for a crime involving moral turpitude ("CIMT"), thus ending the petitioner's period of continuous physical presence pursuant to section 240A(d)(1) of the Act. Because the petitioner had entered the United States in 1996, she was unable to show that she had been physically present in the United States for a continuous period of not less than 10 years. The Second Circuit noted that there is a circuit split as to whether misprision of felony is a CIMT. The court remanded the case to allow the Board to clarify its position on this issue. Assuming that the Board continued to adhere to a rule that misprision of felony is a CIMT, the court invited the Board to consider whether the application of that rule to the petitioner was impermissibly retroactive, given that *Matter of Robles* was decided after the petitioner had entered her guilty plea.

Third Circuit:

Chavez-Alvarez v. Att'y Gen. of U.S., No. 14-1630, 2015 WL 1727476 (3d Cir. Apr. 16, 2015): The court granted a petition for review of a Board decision affirming the determination that the petitioner was removable pursuant to sections 237(a)(2)(A)(iii) and 101(a)(43)(F) of the Act, as an alien convicted of a "crime of violence . . . for which the term of imprisonment [was] at least [1] year." The petitioner had pled guilty to violations of five specifications (counts) under the Uniform Code of Military Justice, including a sodomy charge. He was sentenced to confinement for a period of 18 months; however, his sentence was not apportioned among the five offenses. The Third Circuit did not determine whether the petitioner had been convicted of a "crime of violence" because, regardless of whether his sodomy conviction contained all of the elements of such a crime, the court found that he had not received a sentence for which the term of imprisonment was at least 1 year. The court noted that the military judge provided no means for the court to decipher the way in which the petitioner's general sentence applied to each of the charges. The court rejected several of the Board's and Government's rationales for attributing at least 1 year of the general sentence to the petitioner's sodomy offense, stating that it would not "legislate a presumption in favor of removing alien military members that is strikingly absent from the [Act] or relevant Supreme Court precedent."

Seventh Circuit:

Tie Xia Chen v. Holder, No. 14-2411, 2015 WL 1456591 (7th Cir. Apr. 1, 2015): The court granted a petition for review of the Board's denial of a motion to reopen removal proceedings. An Immigration Judge had denied the petitioner's applications for asylum and related relief based on findings that the petitioner's testimony was insufficiently persuasive and that his corroborative evidence was inconsistent or otherwise defective. In the motion to reopen, the petitioner attributed the inconsistencies and deficiencies in his testimony and evidence to his prior counsels' ineffectiveness. The Board had assumed that the attorneys performed ineffectively but concluded that the petitioner had not shown prejudice. Specifically, the Board noted that the petitioner had submitted documents that he knew or suspected were fraudulent and that went to the heart of his claim. Therefore, the Board reasoned that the petitioner's applications for relief would have been denied notwithstanding any other issues presented by the petitioner. The Seventh Circuit held that the Board ignored the petitioner's potentially meritorious argument. The alien had argued that his former attorneys had mishandled his case by not offering available evidence that would have resolved the deficiencies in his relief applications. The court found that the Board never considered whether the Immigration Judge would have required additional corroboration but for the failure of the petitioner's attorneys to resolve the inconsistencies in his testimony. Further, the Seventh Circuit held that the Board did not address the petitioner's other arguments pertaining to the sufficiency of his evidence apart from the suspect documents.

Eighth Circuit:

Martinez-Galarza v, Holder, No. 14-1436, 2015 WL 1566867 (8th Cir. Apr. 9, 2015): The court denied a petition for review of a Board decision affirming an Immigration Judge's denial of the petitioner's application for asylum. The petitioner claimed to have assisted U.S. Immigration and Customs Enforcement ("ICE") by providing it with information leading to the removal

of his nephew to Mexico. The petitioner asserted that he feared retaliation from his nephew on account of the petitioner's membership in the particular social group of "people who have provided information to [ICE] to enable that organization to remove individuals residing illegally in the [United States]," or, alternatively, "witnesses for ICE." The court agreed with the Board that the petitioner had not established that his nephew is motivated to harm him *on account of* his membership in one of the proposed particular social groups. Rather, the record indicated that the nephew is motivated solely by a desire for personal retribution against the petitioner for ending his "American dream." The court held that such personal animosity was not a valid basis for granting asylum. The court stated that it was possible to establish asylum eligibility by showing both personal and protected-ground motivations for any threatened harm. However, the record did not support such a finding in this case. The petitioner did not allege that his nephew wished to harm other ICE informants. Furthermore, the court found that that the other individuals targeted by the petitioner's nephew were closely related to the petitioner but outside of the proposed particular social group, suggesting a greater likelihood that the nephew's motivation was personal.

Ninth Circuit:

Carrillo v. Holder, 781 F.3d 1155 (9th Cir. 2015): The court denied a petition for review of a Board decision affirming an Immigration Judge's order of removal. The Immigration Judge found that the petitioner was removable under section 237(a)(2)(E)(i) of the Act based on his domestic violence conviction under section 273.5(a) of the California Penal Code. The petitioner argued that the state statute is too broad to constitute a categorical crime of domestic violence for immigration purposes. The court disagreed. The Ninth Circuit noted that it had previously held in *Banuelos-Ayon v. Holder*, 611 F.3d 1080, 1081 (9th Cir. 2010) that the California offense is categorically a crime of domestic violence. The court rejected the petitioner's argument that *Banuelos-Ayon v. Holder* was not binding because it focused on whether section 273.5 was a crime of violence, as opposed to whether it was a domestic violence crime. The court stated that "in context there was little reason for *Banuelos-Ayon* to be more explicit because it is apparent that section 273.5 is categorically a crime that is both domestic and violent in nature." The court compared the language of section 273.5(a) with the language of section 237(a)(2)(E)(i) of the Act and found that the statutes encompass substantially similar crimes. The Ninth Circuit noted that the phrase "as a spouse" appears in section 237(a)(2)(E)(i) of the Act, but not in section 273.5(a); however, this term has been found to be implicit in the state statute. The Ninth Circuit also found that *Morales-Garcia v. Holder*, 567 F.3d 1058, 1064–66 (9th Cir. 2009), which held that section 273.5 was not categorically a crime involving moral turpitude, was inapposite to the issues before it in this case.

A.G. PRECEDENT DECISION

In *Matter of Silva-Trevino*, 26 I&N Dec. 550 (A.G. 2015), the Attorney General vacated the prior opinion in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). The Attorney General observed that a circuit split has developed, with the majority of the courts of appeals disapproving of the third step of the framework originally set forth in *Silva-Trevino* for determining whether an alien has been convicted of a crime involving moral turpitude ("CIMT"). The Attorney General also concluded the vacatur is supported by recent Supreme Court decisions such as *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), where the Court held that uncharged conduct could not be considered to determine whether an alien had been "convicted of" an illicit drug trafficking aggravated felony, and *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), which held that the determination whether an alien had been "convicted of" a crime involving moral turpitude required a categorical approach.

The Attorney General noted that the vacatur did not indicate his disagreement with every aspect of the original decision. The Attorney General left the Board to address (1) how adjudicators are to determine whether an offense is a CIMT under the Act; (2) when, and to what extent, adjudicators may use a modified categorical inquiry and consider a record of conviction in determining whether an alien has been "convicted of . . . a crime involving moral turpitude" in applying section 212(a)(2) of the Act and similar provisions; and (3) whether an alien who seeks a favorable exercise of discretion under the Act after having engaged in criminal acts constituting the sexual abuse of a minor should be required to make a heightened evidentiary showing of hardship or other factors that would warrant a favorable exercise of discretion. The Attorney General also emphasized that this decision does not affect prior Board determinations

as to whether or not an offense constitutes a CIMT based on the presence or absence of "reprehensible conduct and some form of scienter."

BIA PRECEDENT DECISION

In *Matter of Montiel*, 26 I&N Dec. 555 (BIA 2015), the Board followed *Matter of Avetisyan,* 25 I&N Dec. 688 (BIA 2012), and decided that removal proceedings may be delayed, when warranted, pending the adjudication of a direct appeal of a criminal conviction. The Immigration Judge found the respondent removable under section 237(a)(2)(A)(iii) of the Act for having sustained an aggravated felony conviction for alien smuggling, as defined in section 101(a)(43)(N) of the Act. Since the respondent's direct appeal of the underlying conviction was pending, the parties sought administrative closure before the Board.

In *Matter of Avetisyan*, the Board identified relevant factors to be considered in an administrative closure determination: (1) the reason administrative closure is sought; (2) the basis for opposition to administrative closure; (3) the likelihood the petitioner will succeed on any petition, application, or other action he or she is pursuing outside the removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to the delay; and (6) the ultimate outcome of removal proceedings when the case is recalendared before the Immigration Judge or the appeal is reinstated before the Board.

The Board observed that the parties in the present case had jointly moved to administratively close the proceedings, that the respondent was convicted following a jury trial rather than through a guilty plea, and that the direct appeal focused on the validity of the conviction rather than the sentence imposed. Notwithstanding the controlling Ninth Circuit holding in *Planes v. Holder*, 622 F.3d 991, 996 (9th Cir. 2011), that finality is not required for a conviction to support a removability charge, the Board reasoned that if the respondent prevailed in his direct appeal, he would no longer be subject to removal on the basis of that criminal conviction. Considering the circumstances presented, the Board determined that administrative closure was appropriate.

AAO PRECEDENT DECISIONS

In *Matter of Leacheng International, Inc.*, 26 I&N Dec. 532 (AAO 2015), the Administrative Appeals Office ("AAO") determined that the definition of "doing business" as defined in 8 C.F.R. § 204.5(j)(2) does not require that a petitioner for a multinational manager or executive provide goods and/or services to an unaffiliated third party. A petitioner can establish that it is "doing business" by showing that it is providing goods and/or services in a regular, systematic, and continuous manner to related companies within its multinational organization.

The Texas Service Center Director had denied the petition to employ the beneficiary as a deputy general manager after finding that the petitioner did not demonstrate that it had been doing business for at least one year when the petition was filed. The petitioner had transitioned from direct import and sales of the clothing produced by its parent company to providing marketing, sales, and shipping services pursuant to a service agreement with a Hong Kong affiliate of the parent company. The Director posited that evidence of the shipment of goods from the Hong Kong affiliate did not establish that the petitioner was "doing business" with independent corporations or entities for a full year preceding the filing of the petition.

The AAO concluded that the Director had incorrectly interpreted the definition of "doing business" at 8 C.F.R. § 204.5(j)(2) to include a requirement that a petitioner must transact directly with an unaffiliated third party, a requirement that is not stated in the plain language of the provision or suggested by its regulatory history. It held that a petitioner can prove that it is "doing business" by demonstrating that it is providing goods and/or services in a regular, systematic, and continuous manner to related companies within its multinational organization. The AAO concluded that a petitioner who serves as an agent, representative, or liaison between a related foreign entity and its United States customers is not precluded from establishing that it is doing business as contemplated by the regulations. The AAO held that the petitioner established that it was "doing business" through the submission of the service agreement with the foreign affiliate, bills showing the petitioner's charges for

its services, and proof of payment of wages to its United States employees. The AAO ordered that the petitioner's appeal be sustained and the petition approved.

In *Matter of Christo's, Inc.*, 26 I&N Dec. 537 (AAO 2015), the AAO held that an alien who submits false documents representing a nonexistent or fictitious marriage, but who never either entered into or attempted or conspired to enter into a marriage, may have intended to evade the immigration laws but is not, by such act alone, considered to have "entered into" or "attempted or conspired to enter into" a marriage for purposes of the marriage fraud bar in section 204(c) of the Act. However, the AAO observed that misrepresentations about a nonexistent marriage may render a beneficiary inadmissible under section 212(a)(6)(C)(i) of the Act when his or her application for adjustment of status is adjudicated.

The beneficiary was the subject of an approved I-140 visa petition that was revoked when the Vermont Service Center Director determined that the beneficiary did not meet the requirements for the labor certification submitted by the petitioner. In adjudicating the petitioner's appeal of the I-140 approval revocation, the AAO initially affirmed the Director's determination that the beneficiary was unqualified. Additionally, the AAO independently concluded that the beneficiary was subject to the marriage fraud bar prescribed in section 204(c) of the Act because he admitted during an interview with the Boston District Office, in conjunction with an I-130 petition filed on his behalf, that a marriage certificate filed with the petition was fictitious and no marriage had occurred. Consequently, the AAO dismissed the appeal, concluding that approval of the I-140 petition must be revoked because substantial and probative evidence supported a reasonable inference that the beneficiary conspired to enter into a marriage to evade the immigration laws.

However, the AAO subsequently sua sponte reopened the proceedings to allow the petitioner to submit additional pleadings and evidence. Based on newly presented evidence, the AAO found that the petitioner had established that it is more likely than not that he possessed the education, training, and experience required for the I-140 visa preference classification, as provided in section 203(b)(3)(A)(i) of the Act.

Further, the AAO determined that the beneficiary was not subject to the section 204(c) marriage fraud bar because the Board previously had determined in *Matter of Anselmo*, 16 I&N Dec. 152, 153 (BIA 1977), and *Matter of Concepcion*, 16 I&N Dec. 10, 11 (BIA 1976), that the bar does not apply when an alien does not actually enter into a marriage but only falsifies documents to represent that a marriage exists. The AAO noted that section 204(c) had been revised pursuant to the Immigration Marriage Fraud Amendments of 1986 ("IMFA"), Pub. L. No. 99-639, § 4, 100 Stat. 3537, 3543, to include cases where an alien has attempted or conspired to enter into a marriage to skirt the immigration laws, but it reasoned that Board precedent remained valid in the absence of an attempt or conspiracy. Here, the beneficiary established that his purported marriage never occurred and that he did not conspire or attempt to enter into a marriage to evade the immigration laws. Thus, the AAO concluded that the petitioner had satisfied his burden of proving eligibility for the Form I-140 petition.

In *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015), the AAO held that when a beneficiary's place of employment changes to a geographical area requiring a corresponding Labor Condition Application for Nonimmigrant Workers ("LCA") to be certified to the Department of Homeland Security ("DHS"), the beneficiary's eligibility for H-1B status may be affected, constituting a material change for purposes of 8 C.F.R. § 214.2(h)(2)(i)(E) and (11)(i)(A). And in the event of a material change in the terms and conditions of employment, the petitioner must file an amended or new H-1B petition with the corresponding LCA.

The beneficiary was the subject of an approved Form I-129 Petition for a Nonimmigrant Worker and classified as an H-1B temporary nonimmigrant worker pursuant to section 101(a)(15)(H)(i)(b) of the Act. The petitioner described itself as an information technology services provider that would employ the beneficiary in-house at its Long Beach, California facility for a salary of $50,232. After 2 months of working for the petitioner, the beneficiary left the United States and applied for an H-1B visa at the U.S. Embassy in New Delhi, India. Following an interview at the embassy, the consular officer requested a letter from the petitioner's client addressing the work the beneficiary would perform. Rather than supplying the requested letter, the petitioner indicated that the beneficiary provided services to clients other than those identified in the approved petition.

That information triggered an investigation by the USCIS, which went to the Long Beach office specified in the H-1B visa petition and discovered that the petitioner had vacated the facility 2 months after the beneficiary's employment started. The investigators contacted the petitioner's director of operations and learned that the company, which employed 45 to 50 people, was operating out of an employee's home, and that the beneficiary was assigned to the Los Angeles office, where all employees either worked from home or from a client worksite.

The Director issued a Notice of Intent to Revoke approval of the petition. In response, the petitioner confirmed that the beneficiary no longer worked on the project specified in the original petition but, instead, worked for various clients either out of the Long Beach office or from his home. Additionally the petitioner provided a new LCA that identified two new worksites in California and New Jersey. The Director concluded that the change in the beneficiary's employment location constituted a material change to the terms and conditions of employment as stated in the original petition, so that an amended Form I-129, corresponding to a new LCA reflecting the changes, needed to be filed. When the petitioner failed to file an amended petition, the Director revoked the nonimmigrant visa petition.

Reviewing the statutory and regulatory scheme governing the LCA and H-1B visa petition process, the AAO observed that the LCA requires petitioners to specify the number of workers sought, the visa classification for such workers, their job title and occupational classification, the prevailing wage, the actual pay, and the place of employment. The employer must file an LCA and receive certification from the Department of Labor prior to submitting an H-1B petition with the USCIS, pursuant to 8 C.F.R. § 214.2(h)(4)(i)(B)(1) and 20 C.F.R. § 655.700(b)(2). If there is a material change to the terms and conditions of employment specified in the original petition, the petitioner must file an amended or new petition with the USCIS with a corresponding LCA, according to 8 C.F.R. § 214.2(h)(2)(i)(E). The petitioner must also immediately notify the USCIS of any changes to the terms and conditions of employment that may affect a beneficiary's eligibility for H-1B status and file an amended petition, if appropriate, in accordance with 8 C.F.R. § 214.2(h)(11)(i)(A). The regulations also specify that a change in a beneficiary's place of employment to a geographical area requiring that a corresponding LCA be certified to the DHS may affect eligibility for H-1B status. It is therefore a material change, triggering the requirement that a petitioner file an amended or new H-1B petition with the corresponding LCA. 8 C.F.R. § 214.2(h)(2)(i)(E), (11)(i)(A).

Since the petitioner initially submitted a Form I-129 and LCA identifying the beneficiary's work location and salary and the beneficiary was subsequently assigned to a different work location that required payment of a higher salary, the AAO concluded that those material changes affected his eligibility for a visa. The AAO noted that the material changes required the petitioner to immediately notify the USCIS and file an amended or new H-1B petition and corresponding LCA. As the petitioner failed to comply with the statutory and regulatory requirements, the AAO affirmed the Director's revocation of the approved Form 1-129 petition.

Corroboration Requirements Under the REAL ID Act: *continued*

allegations he needed to corroborate"); *Chukwu v. Att'y Gen. of U.S.*, 484 F.3d 185, 193 (3d Cir. 2007) (finding that the Immigration Judge failed to notify the applicant that he was required to corroborate the date he joined his political party). Thus, the court recognized a notice requirement in the Board's holding in *Matter of S-M-J-*.

Although the Third Circuit's three-part inquiry is based on its understanding of *Matter of S-M-J-*, which predated the REAL ID Act, the court has stated that it does not deem the enactment of section 208(b)(1)(B)(ii) to have impacted its conclusions. On the contrary, the court has stated that section 208(b)(1)(B)(ii) is "effectively indistinguishable" from the pre-REAL ID Act corroboration standards. *Li Hua Yuan v. Holder*, 642 F.3d 420, 425 n.9 (3d Cir. 2011). The court therefore considers current corroboration requirements as embodying those it set forth in *Abdulai v. Ashcroft*. *See Quao Lin Dong v. Att'y Gen. of U.S.*, 638 F.3d 223, 229 n.3 (3d Cir. 2011).

The Third Circuit's interpretation of section 208(b)(1)(B)(ii) stands in contrast to the position that the Board articulated in *Matter of L-A-C-*. Interestingly, however, the court and the Board concur that the provision effectively codified the Board's holding in *Matter of S-M-J-*. *See id.* at 229; *Matter of L-A-C-*, 26 I&N Dec. at 518–19. The Third Circuit and Board stances therefore diverge when addressing the requirements that *Matter of S-M-J-* has imposed on adjudicators. Whereas

the Board has concluded that *Matter of S-M-J-* does not require that the Immigration Judge grant an automatic continuance, the Third Circuit determined that adjudicators cannot implement *Matter of S-M-J-* without providing applicants sufficient notice and an opportunity to obtain evidence. The question of whether the Third Circuit will modify its approach in light of the Board's holding in *Matter of L-A-C-* remains open.

The Ninth Circuit has also recognized a notice requirement in section 208(b)(1)(B)(ii). However, the Ninth Circuit's approach diverges from that of the Third Circuit because it is based on the statutory language of section 208(b)(1)(B)(ii), rather than on Board precedent.

Prior to the enactment of the REAL ID Act, the Ninth Circuit found that an Immigration Judge could not demand independent corroborative evidence from an applicant who testified credibly. *Kataria v. INS*, 232 F.3d 1107, 1113 (9th Cir. 2000), *superseded by statute as stated in Aden v. Holder*, 589 F.3d 1040, 1044 (9th Cir. 2009). The court grounded its reasoning in three lines of pre-REAL ID Act cases. *See Ladha v. INS*, 215 F.3d 889, 899–901 (9th Cir. 2000), *overruled on other grounds by Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2008). These cases emphasized that (1) applicants could face difficulties obtaining evidence of persecution, (2) credible testimony alone could serve as the basis for an applicant's claim if corroborative evidence was unavailable, and (3) once an applicant had testified credibly, the only question to adjudicate was whether the testimony satisfied the statutory requirements of asylum. *See id.* Based on these cases, the Ninth Circuit rejected *Matter of S-M-J-* to the extent that it created a corroboration requirement for otherwise credible testimony. *Id*. at 901.

The Ninth Circuit shifted the direction of its analysis following the enactment of the REAL ID Act. Namely, the court found that the clause in section 208(b)(1)(B)(ii) stating that "the testimony of an applicant may be sufficient to sustain the applicant's burden" conversely implies that credible testimony alone may be insufficient. *Aden v. Holder*, 589 F.3d at 1044. The Ninth Circuit therefore determined that Congress abrogated the holdings of its pre-REAL ID Act case law and, as such, an adjudicator can require corroboration to support an applicant's otherwise credible testimony. *Id.*

The Ninth Circuit further developed its analysis of the notice requirement implicit in section 208(b)(1)(B)(ii) in *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011). In *Ren*, after hearing all testimony, the Immigration Judge decided that the applicant had not met his burden of proof under the REAL ID Act. 648 F.3d at 1090. The Immigration Judge identified the specific evidence that would serve to corroborate the applicant's claim and granted a 5-month continuance to allow the applicant an opportunity to procure it. *Id.* Following the continuance, the applicant neither submitted this evidence nor explained his inability to do so and, accordingly, the Immigration Judge found that the applicant failed to meet his burden of proof. *Id.*

In order to determine whether the Immigration Judge properly applied section 208(b)(1)(B)(ii), the Ninth Circuit turned to the language of the provision. Specifically, the court examined Congress's choice of verb tense and the provision's grammatical structure. The court emphasized the grammatical structure in the following three parts of 208(b)(1)(B)(ii), which indicate that (1) where the adjudicator "determines that the applicant should provide [corroborative] evidence," (2) the evidence "must be provided" (3) "unless the applicant does not have the evidence and cannot reasonably obtain the evidence." *Id.* at 1091. Based on the choice of verb tenses, the court concluded that a plain reading of the provision signifies a sequence of events in which the Immigration Judge's identification of the need for corroborative evidence precedes the duty of the applicant to obtain and submit the evidence.

The Ninth Circuit further determined that, even if the language of section 208(b)(1)(B)(ii) were ambiguous, the canon of constitutional avoidance supports its conclusion. *Id.* at 1092. Noting that this canon "requires a statute to be construed so as to avoid serious doubts as to the constitutionality of an alternate construction," the court found that the applicant would be deprived of serious due process protections if the Immigration Judge demanded that the applicant submit corroborative evidence simultaneously or prior to notifying him that the evidence is necessary. *Id.* at 1092–93 (quoting *Nadarajah v. Gonzalez*, 443 F.3d 1069, 1076 (9th Cir. 2006)) (internal quotation marks omitted). The court therefore determined that this canon supports its conclusion regarding the necessity of notice.

The Ninth Circuit has since applied its reasoning from *Ren v. Holder* in two cases in which the Immigration Judge relied on the lack of corroboration as part of an

overall adverse credibility determination. *Lai v. Holder*, 773 F.3d 966, 975–76 (9th Cir. 2014); *Ai Jun Zhi v. Holder*, 751 F.3d 1088, 1094–95 (9th Cir. 2014). In doing so, the court extended *Ren*'s holding, which had previously applied to the limited circumstances where the Immigration Judge conducted separate credibility and corroboration inquiries. *See Ren v. Holder*, 648 F.3d at 1093 ("To begin, the IJ must determine whether the applicant's *credible testimony* alone meets the applicant's burden of proof. . . . If a *credible applicant* has not yet met his burden of proof, then the IJ may require corroborative evidence." (emphasis added)). The Ninth Circuit concluded that when an Immigration Judge relies on a lack of corroboration as one factor in an adverse credibility finding and, on review, the court rejects all other reasons, then the applicant is, by default, "otherwise credible" as described in section 208(b)(1)(B)(ii). *See Lai v. Holder*, 773 F.3d at 975–76. As such, at that juncture, the applicant is entitled to the procedural protections outlined in *Ren* and the Ninth Circuit will remand so that the Immigration Judge can provide these protections. *See id.*

The Ninth Circuit's interpretation of section 208(b)(1)(B)(ii) differs from the Board's in three central aspects. First, unlike the Board, the court requires that the Immigration Judge identify the specific pieces of evidence that the applicant must submit to meet his burden. Second, the court concluded that the Immigration Judge must grant the applicant a continuance in order to give him the opportunity to obtain this evidence. Finally, the Board did not address whether an Immigration Judge can rely on a lack of corroborative evidence as one factor in an overall adverse credibility determination. In *Matter of L-A-C-*, the Board stated that it "disagreed" with the Ninth Circuit's reasoning, but did not stipulate that its holding supersedes the Ninth Circuit's interpretation pursuant to *National Cable & Telecommunications Ass'n v. Brand X Internet Services.*, 545 U.S. 967 (2005) (allowing agencies to offer an interpretation of a statute that differs from a circuit court decision where the underlying statute is ambiguous). *Matter of L-A-C-*, 26 I&N Dec. at 523.

Reasonably Obtainable Evidence

Section 208(b)(1)(B)(ii) of the Act indicates that an applicant for asylum or withholding of removal must provide reasonably obtainable evidence to corroborate the applicant's testimony in circumstances where the adjudicator requests it. *See* section 208(b)(1)(B)(ii) of the Act. In the years since this provision's enactment, courts have offered substantial guidance on the circumstances in which evidence is reasonably obtainable.

As previously discussed, the legislative history of section 208(b)(1)(B)(ii) of the Act reveals that Congress intended for the language of the provision to mirror the standards that the Board set forth in *Matter of S-M-J-*. *See* H.R. Rep. No. 109-72 at 166. With respect to what constitutes reasonably obtainable evidence, Congress cited the Board's description of the types of evidence that adjudicators can reasonably expect from applicants. *Id.* (citing *Matter of S-M-J-*, 21 I&N Dec. at 725–26). In *Matter of S-M-J-*, 21 I&N Dec. at 725–26, the Board stated that adjudicators cannot place "unreasonable demands" on applicants to present certain forms of evidence, such as corroboration from a persecutor. However, the Board concluded that it is reasonable for an adjudicator to expect an applicant to present "documentary support for material facts which are central to his or her claim and easily subject to verification." *Id.* These material facts include "place of birth, media accounts of large demonstrations, evidence of a publicly held office, or documentation of medical treatment." *Id.*

Circuit courts have taken various positions on what evidence an applicant may be expected to "reasonably obtain," as stated in section 208(b)(1)(B)(ii). Generally, the courts that have addressed the issue agree that witness testimony and affidavits are reasonably obtainable from family members, friends, and witnesses with whom the applicant has contact. Additionally, courts have found that it is reasonable to expect applicants to produce documentary evidence regarding identity, medical treatment, and party membership. However, courts generally look to the specific facts of the case to determine when the applicant's unique circumstances prevent him from obtaining the evidence. Courts have also highlighted additional factors that adjudicators may wish to consider when making this determination, such as the circumstances under which the applicant left his home country and the political conditions of the country itself.

Statements from Family Members and Friends

The courts that have addressed the topic of reasonably obtainable evidence have determined that affidavits from an applicant's family members and friends with whom the applicant has contact are generally

obtainable, regardless of the individuals' locations. For example, in *Singh v. Holder*, the Fourth Circuit agreed with the Immigration Judge's determination that it was reasonable for the applicant to produce corroboration from his sister who lived in the United States. 699 F.3d 321, 331–32 (4th Cir. 2012); *see also Abraham v. Holder*, 647 F.3d at 633 (noting that the applicant failed to provide the testimony of his relatives who lived in the United States); *Singh v. Holder,* 638 F.3d 1264, 1270–71 (9th Cir. 2011) (finding it reasonable to expect corroborating evidence from family members living with the applicant in California). Similarly, in *Shrestha v. Holder*, the Ninth Circuit determined that it was reasonable to expect the applicant to submit statements from his family members in Nepal with whom the applicant maintained contact. 590 F.3d 1034, 1048 (9th Cir. 2010). The Ninth Circuit noted that, although illiterate, the applicant's parents were not living in a remote village "accessible only by dirt roads," but instead were living in the capital city of Kathmandu. *Id.*; *see also Rui Yang v. Holder*, 664 F.3d 580, 587–88 (5th Cir. 2011) (finding that affidavits from family members in China were available because the applicant maintained communication with them over the phone);[7] *Krishnapillai v. Holder*, 563 F.3d 606, 619 (7th Cir. 2009) (noting that the applicant's wife had helped procure additional forms of evidence and could therefore be reasonably expected to provide a statement).

Courts have also acknowledged that applicants can be reasonably expected to obtain statements from relatives and friends living in third countries with safe conditions. In *Balachandran v. Holder*, the First Circuit concluded that the Immigration Judge reasonably expected the applicant, who was from Sri Lanka, to produce corroborating evidence from his family members living in Canada. 566 F.3d 269, 273 (1st Cir. 2009). In support of this contention, the court noted that the applicant was in contact with his Canadian relatives, that they had helped him secure his initial lawyer, and that his relatives were aware of his experiences in Sri Lanka. *Id.; see also Minghai Tian v. Holder*, 745 F.3d 822, 828 (7th Cir. 2014) (noting that the applicant failed to submit a statement from a fellow demonstrator who had fled to England); *Kanacevic v. INS*, 448 F.3d 129, 137 (2d Cir. 2006) (upholding the Immigration Judge's determination that the applicant could have produced corroborating statements from her relatives who lived in Australia); *Liti v. Gonzalez*, 411 F.3d 631, 640 (6th Cir. 2005) (finding that it was reasonable for the applicant to provide a statement from her brother, who lived in Greece).

Regardless, there are circumstances in which courts have found that adjudicators may not expect statements from family members or friends. Determinations in this respect may depend on the individuals' rapport with the applicant, age, and mental health. For example, in the Seventh Circuit it may not be reasonable to expect statements from family members who are hostile to the applicant or who have received threats from the applicant's persecutor. *See Sibanda v. Holder*, 778 F.3d 676, 679–80 (7th Cir. 2015); *see also Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006) (finding that an affidavit from an applicant's wife was unavailable where the applicant's wife had remarried and told the applicant not to contact her). Additionally, the Fourth Circuit has insinuated that it may not be reasonable to expect an applicant to procure the testimony of an individual who cannot engage in upsetting activities due to mental illness or trauma. *See Marynenka v. Holder,* 592 F.3d 594, 598–99 (4th Cir. 2010).

Statements from family members and friends with whom the applicant is in contact have generally been held to be reasonably obtainable, regardless of the location of these individuals. However, the availability of statments from such individuals may be affected by specific circumstances such as threats, hostility to the applicant, or mental illness.

Identity and Documentary Evidence

Courts have also found that it is generally reasonable for an applicant to obtain documentary evidence to support "material facts which are central to his or her claim." *Matter of S-M-J-*, 21 I&N Dec. at 725. These documents often include identity documents, party membership cards, hospital records, and police records. *See*, *e.g.*, *Liu v. Holder*, 575 F.3d at 199 n.7 (deferring to the Immigration Judge's determination that a letter from a political organization in Hong Kong and police and hospital records were reasonably obtainable). When making this determination, courts often consider the means of obtaining the evidence. For example, in *Chhay v. Mukasey*, the First Circuit determined that the applicant could have reasonably obtained her party membership cards because the applicant had testified that her mother, who remained in Cambodia, had possession of the cards. 540 F.3d 1, 7 (1st Cir. 2008). Similarly, in *Ntangsi v. Holder*, the Eighth Circuit found that the Immigration Judge did not err by requiring that the applicant submit a copy of a well-recognized and available anti-government

newspaper article that her uncle had allegedly written. 554 F.3d 1142, 1148–49 (8th Cir. 2009).

However, courts have acknowledged that temporal and administrative limitations to obtaining documents may exist in certain circumstances. The Second Circuit, for example, has acknowledged that it is not necessarily reasonable for applicants to procure official records long after the event in question. In *Balachova v. Mukasey*, the court found that the Immigration Judge should not have expected the applicant to produce authenticated medical records from a Russian hospital 14 years after a purported incident. 547 F.3d 374, 382 (2d Cir. 2008). Similarly, the Seventh Circuit has acknowledged that it may not be possible for applicants to obtain official documentation from governments that lack a structured administrative system. *Hor v. Gonzalez*, 421 F.3d 497, 501 (7th Cir. 2005) (rejecting the notion that "documentation is as regular, multicopied, and ubiquitous in disordered nations as in the United States").

Accordingly, although courts generally find that documentary evidence, such as identity documents, hospital records, and police records, is reasonably available, adjudicators may consider the means by which the applicant must obtain the evidence as a potential limitation. Specifically, documentation may no longer be available if many years have passed since the time of incident or if the applicant is attempting to obtain the documents from an unstable government with a "disordered" administrative system.

Unlawful Immigration Status

The Second Circuit has examined whether the conditions of a witness's immigration status can impact the determination of whether the applicant is reasonably able to obtain certain forms of evidence. Specifically, the court has considered whether it is reasonable for an adjudicator to expect the testimony of family members who live in the United States, but who lack lawful immigration status. The Second Circuit has acknowledged that potential witnesses who are "in peril of removal" to the applicant's home country may "understandably desire to keep a low profile." *Kyaw Zwar Tun v. INS*, 445 F.3d 554, 568–69 (2d Cir 2006). However, the court has also determined that a family member must provide corroborative testimony if he has a personal stake in the application being granted. *See Yan Juan Chen v. Holder*, 658 F.3d 246, 253 (2d Cir. 2011). As such, in *Yan Juan Chen v. Holder*, the court found that the desire of the applicant's husband to "keep a low profile" was not reasonable because he directly benefitted, as a derivative, from her asylum application. *Id.*

Circumstances of Departure and Conditions of Home Country

Regardless of the type of evidence requested, the Second Circuit has widely acknowledged that the specific circumstances of the applicant's departure from his or her home country should be taken into consideration. For example, in *Li Zu Guan v. INS*, the Second Circuit considered that the applicant was allegedly in hiding for a year in order to conceal her pregnancy from the Chinese Government before coming to the United States. 453 F.3d 129, 141 (2d Cir. 2006). Under these circumstances, the court found that it was less likely that the applicant preserved documents regarding this child's birth. *Id.* The Second Circuit has stated, "What is 'reasonably available' differs among societies and, given the widely varied and sometimes terrifying circumstances under which refugees flee their homelands, from one asylum seeker to the next." *Jin Shui Qiu v. Ashcroft*, 329 F.3d 140, 153 (2d Cir. 2003), *overruled on other grounds by Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007).

The Ninth Circuit has also determined that adjudicators must consider tumultuous political conditions in the applicant's home country. In support of this contention, the Ninth Circuit emphasized that it may be more difficult for an applicant to secure certain forms of evidence when "the country is in turmoil and the applicant is from a disfavored group or the corroboration would have to be from his persecutors." *Aden v. Holder*, 589 F.3d at 1045. For example, the Ninth Circuit determined that it would not be reasonable to expect an applicant to procure a police report detailing alleged torture from a tyrannical government. *Singh v. Holder*, 638 F.3d at 1270. Similarly, it would be counter-productive to require that an applicant put his family members in harm's way by attempting to acquire evidence from a hostile government. *See Ai Jun Zhi v. Holder*, 751 F.3d at 1095.

Conclusion

In the years since the enactment of the corroboration provision of the REAL ID Act, circuit courts and the Board have interpreted its latent requirements in many, often divergent, ways. Most recently, the Board aligned with the Second and Seventh Circuits in

determining that section 208(b)(1)(B)(ii) of the Act does not obligate an Immigration Judge to identify missing evidence and provide an automatic continuance so that the applicant can obtain such evidence. In contrast, the Third and Ninth Circuits have both laid out procedural steps that adjudicators must take to ensure that applicants are sufficiently aware of the evidence they need to provide. Courts have also offered substantial guidance on circumstances in which an Immigration Judge can find that evidence is reasonably available. Although these cases have filled in gaps regarding the correct statutory interpretation of section 208(b)(1)(B)(ii), further development in this area of the law seems likely.

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1. The First Circuit has also addressed the issue, but requested that the Board make a determination regarding the notice requirement in the first instance. *See Guta v. Holder*, 674 F.3d 57, 64 (1st Cir. 2012).

2. While concluding that section 208(b)(1)(B)(ii) of the Act does not contain a requirement that an Immigration Judge provide notice of the need to corroborate testimony, the Board noted that, "as a matter of good practice," an Immigration Judge should remind applicants, especially those appearing pro se, of their burden to establish eligibility for asylum and withholding of removal and the need to provide corroborative evidence where it is reasonable to do so. *Id.* at 521 n.3. This reminder may appropriately be made at a master calendar hearing. *Id.*

3. Because *Liu v. Holder* is a pre-REAL ID Act case, the Second Circuit was not construing the corroboration language provided in section 208(b)(1)(B)(ii) of the Act. To date, the court has not provided guidance on whether the language of section 208(b)(1)(B)(ii) changes its analysis regarding corroboration and notice.

4. These cases, which address applications for relief filed prior to the enactment of the REAL ID Act, review the Board's application of the holding in *Matter of S-M-J-*.

5. Interestingly, in *Yan Juan Chen v. Holder*, a REAL ID Act case, the Second Circuit noted in dicta that, "*importantly*, the IJ identified the type of corroborating evidence *nine months in advance of Chen's hearing*, allowing her an opportunity to secure her husband's testimony or explain why it was not available." 658 F.3d 246, 253 (2d Cir. 2011) (emphasis added). Regardless, the applicant did not contend that the Immigration Judge failed to provide her with adequate notice regarding the need for evidence. The issue before the court was instead whether the testimony of the applicant's husband was reasonably available. The court's statement regarding notice thus does not impact its earlier holding in *Liu v. Holder*.

6. In an unpublished decision, the Tenth Circuit also determined that the Immigration Judge does not have to provide affirmative notice regarding the need for corroboration. *Catchai v. Holder*, 591 Fed. App'x 665, 668 (10th Cir. 2014) (finding that the provision "does not affirmatively obligate the trier of fact to request corroborating evidence").

7. Although this case predates the enactment of the REAL ID Act, the Fifth Circuit relied on the Board's language from *Matter of S-M-J-* and therefore applied the same standard of reasonably obtainable evidence. *See Rui Yang v. Holder*, 664 F.3d at 587 (finding that the Board "reasonably interpreted" its regulations in *Matter of S-M-J-*). The Second and Sixth Circuits took the same approach. *Diallo v. INS*, 232 F.3d at 285 ("While consistent, detailed, and credible testimony may be sufficient to carry the alien's burden, evidence corroborating his story, or an explanation for its absence, may be required where it would reasonably be expected."); *Dorosh v. Ashcroft*, 398 F.3d 379, 382 (6th Cir. 2004) (citing *Matter of S-M-J-*, 21 I&N Dec. at 724–26). On the contrary, the Ninth Circuit applied the standard of "easily available" evidence prior to the passage of the REAL ID Act. *See Shrestha v. Holder*, 590 F.3d at 1047 (9th Cir. 2010) ("The REAL ID Act changed the standard governing when a trier of fact may require corroborating evidence from where the evidence is 'easily available' to where the evidence is 'reasonably obtainable.'").