CHALLENGING AN IMMIGRATION JUDGE'S ADVERSE CREDIBILITY FINDING WITH THE BOARD OF IMMIGRATION APPEALS

Part Two

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I. Introduction

This is the second part of a two-part advisory. Please read this part in conjunction with Part One, as neither part is complete on its own.

In Part One, we looked at the definition of credibility and under what circumstances the Board of Immigration Appeals (BIA) may reverse an Immigration Judge's (IJ's) credibility determination. We further discussed how to address an IJ's failure to make a credibility finding, or when an IJ's findings regarding credibility are unclear. We ended Part One with a discussion on how to challenge an IJ's explicit adverse credibility finding that is supported by specific reasons. We looked at some common issues that come up, such as where the IJ based their decision on alleged inconsistencies and omissions, or a finding that the applicant's testimony lacked specificity and detail.

This second part will continue the discussion on how to effectively appeal an IJ's adverse credibility finding. We will look at additional common grounds for adverse credibility determinations and how to challenge them, including a witness's demeanor or responsiveness; findings that are based on the IJ's speculation and conjecture, particularly regarding the plausibility of a claim; and determinations regarding a respondent's corroborative evidence. Finally, we will flag special circumstances to look out for when appealing an IJ's adverse credibility finding.

II. Additional Challenges to an IJ's Adverse Credibility Finding

A. Demeanor

Adverse credibility determinations based on an IJ's observation of a witness's demeanor[1] are among the most difficult to challenge before the BIA. Because appellate bodies only have

[1] "[U]nder the REAL ID Act, all aspects of the witness's demeanor, including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication, may convince the

access to the written transcript on review, courts have held that IJs, who are present in the hearing to observe the witness in person, should be accorded "a high degree of deference" when they base an adverse credibility finding on the witness's demeanor."[2] However, the deference owed to an IJ's demeanor finding is not without limitations.[3] Where the IJ has based an adverse credibility finding on an observation about the witness's demeanor, there are a few arguments that can help the respondent prevail on appeal.

Is the IJ's demeanor finding bolstered by the IJ's other findings and the record before the BIA? An adverse demeanor finding will not generally be given deference if it is inconsistent with the other credibility factors and the rest of the record. For example, in one case, the IJ found a respondent lacked credibility where he did not look at the IJ while testifying, notwithstanding that the respondent had testified consistently throughout the proceedings and his account was plausible.[4] In rejecting the IJ's finding, the BIA found that the applicant's demeanor alone did not undermine the otherwise positive indicators of credibility.[5] But in another case, the BIA deferred to the IJ's finding that the respondent testified in a "very halting" and "hesitant" manner.[6] There, the BIA found that the respondent's testimony was also "marked by inconsistencies and omissions," and that it lacked specificity and detail, all of which provided "additional support for the reasonable conclusion that the respondent's testimonial demeanor called his credibility into doubt."[7]

Thus, where the IJ's adverse credibility determination is based largely or entirely on demeanor, you may challenge that finding where other credibility factors "indicat[e] the applicant's truthfulness" in the "context of the whole record."[8]

Is the witness's demeanor reasonably attributable to reasons other than a lack of credibility, such as cultural differences or the mental health of the witness? Courts have also been hesitant to defer to the IJ's demeanor finding where the IJ's observations are attributable to cultural differences or the witness's mental state. For example, in one case, where the IJ had

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observing trial judge that the witness is testifying truthfully or falsely." *Huang v. Holder*, 744 F.3d 1149, 1153 (9th Cir. 2014).

[2] *Matter of A-S-*, 21 I&N Dec. 1106, 1111 (BIA 1998). *See also Matter of A-H-*, 23 I&N Dec. 774, 786 (A.G. 2005) (stating that "[m]uch of the Immigration Judge's assessment of respondent's credibility related to his demeanor and sincerity as a witness," and that "such assessments of testimonial credibility are uniquely within the ken of the Immigration Judge"); *Matter of V-T-S-*, 21 I&N Dec. 792, 796 (BIA 1997) (noting the IJ's "advantage of observing the [noncitizen] as he testifies"); *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 818–21 (9th Cir. 1994) (holding that credibility findings based on demeanor deserve "special deference" when compared to those based on testimonial analysis).

[3] *Id.* ("This is not to say that demeanor findings are subject to no scrutiny or criticism by the Board. Under certain circumstances, for example, the Board has found insufficient evidence to indicate that the respondent's tendency to look at the wall or table, instead of at the Immigration Judge, necessarily indicates deception.").

[4] *Matter of B-*, 21 I&N Dec. 66, 70 (BIA 1995).

[5] *Id.*

[6] *Matter of A-S-*, 21 I&N Dec. at 1111.

[7] *Id.* at 1112. *See also Matter of J-Y-C-*, 24 I&N Dec. 260, 266 (BIA 2007) (deferring to IJ's demeanor finding that applicant testified in a "rapid manner," where the totality of the circumstances, including inconsistencies in the testimony, implausibility of the claim, and the lack of corroborating evidence," also indicated a lack of credibility).

[8] *Matter of B-*, 21 I&N Dec. at 70.

found that the applicant appeared "uncomfortable" and "non-responsive at times," the Fourth Circuit declined to defer to the IJ's finding and warned that "linguistic and cultural differences, combined with the effects of trauma, caution against normative determinations."[9] Other circuit courts have also warned against deference to demeanor findings that fail to consider a witness's cultural background or mental state, particularly the effects of past trauma.[10]

Was the IJ's ability to accurately assess the witness's demeanor compromised by the use of video teleconferencing or other technology during the hearing? Potential issues that can arise with all remote interactions include a lack of eye contact, inability to read body language and other nonverbal cues, distorted perceptions, difficulty empathizing over video conference, incongruous and informal settings, and poor connectivity.[11] "[C]ross-cultural dynamics with participants who may be unfamiliar with video platforms, the need to use interpreters to communicate, and applicants' emotional pleas for protection from persecution," make demeanor findings even less reliable in the context of immigration hearings where one or more parties are appearing remotely.[12] While courts have generally upheld the legality of using video teleconferencing for immigration proceedings, they have acknowledged that technical and other problems can undermine demeanor observations made during remote hearings.[13] It is imperative that practitioners raise these issues with the BIA where a hearing held by video teleconference resulted in an adverse finding regarding a witness's demeanor.

B. Responsiveness

Is the finding of unresponsiveness actually supported by the record? When an IJ finds that a witness was unresponsive or evasive to questioning, the IJ should identify specific questions

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[9] *Ilunga v. Holder*, 777 F.3d 199, 212 (4th Cir. 2015) (opining that the BIA's deference to the IJ's demeanor finding "manifests a basic misunderstanding of the human condition" where the record established that the applicant "was subjected to a pattern of vicious abuse, leaving both body and mind scarred by the experience").

[10] *Dia v. Ashcroft*, 353 F.3d 228, 274, 274 (3d Cir. 2003) (en banc) (McKee, J., concurring in part and dissenting in part) ("Fact finders who are unfamiliar with the mannerisms and subtleties of a witness's cultural tradition have no advantage in assessing credibility based upon demeanor. Moreover, to the extent that the customs of a witness's native land differ from the fact finder's, the fact finder may be at a substantial disadvantage because he/she may misinterpret subliminal clues that mean one thing in the fact finder's culture, but something entirely different in the witness's."); *Kadia v. Gonzales*, 501 F.3d 817, 819 (7th Cir. 2007) ("Immigration judges often lack the 'cultural competence' to base credibility determinations on an immigrant's demeanor.").

[11] Liz Bradley & Hillary Farber, "Virtually Incredible: Rethinking Deference to Demeanor When Assessing Credibility in Asylum Cases Conducted By Video Teleconference," Georgetown Immigration Law Journal, Vol 36:515 at 545 (2022).

[12] *Id.* at 545-46.

[13] *Rusu v. INS*, 296 F.3d 316, 318–19 (4th Cir. 2002) (finding that video hearing was "plagued by communication problems" and conducted in a truly "haphazard manner"); *Garza-Moreno v. Gonzales*, 489 F.3d 239, 241–42 (6th Cir. 2007) (acknowledging low volume of the video and noting sixty-seven notations of "indiscernible" in the transcript). *See also* AILA & American Immigration Council (AIC), *Policy Brief: Use of Virtual Hearings in Removal Proceedings* (May 3, 2022) ("When a factor like eye contact is available to IJs to make possibly life-or-death credibility decisions, the smallest distortion by technology can be outcome determinative.") available at https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-use-of-virtual-hearings-in-removal.

the witness failed to answer.[14] The IJ's failure to do so is, in itself, reversible error. Practitioners should also thoroughly read the transcript to confirm whether the IJ's finding of unresponsiveness is actually supported by the record.[15] Oftentimes, a review of the transcript will show that a witness's perceived unresponsiveness was actually attributable to communication or interpretation errors, or misinterpretation by the IJ.

C. Speculation, conjecture, and plausibility

Did the IJ rely on personal biases, speculation, and conjecture in their credibility assessment, particularly the plausibility of the respondent's claim? The IJ and BIA may not draw inferences that are wholly speculative and without support in the record.[16] For an IJ's finding of implausibility to be upheld, the IJ must not only identify which part of a claim they find implausible, but also justify why the claim is "inherently" implausible.[17] For example, in one

[14] *Singh v. Ashcroft*, 301 F.3d 1109, 1114 (9th Cir. 2002) ("To support an adverse credibility determination based on unresponsiveness, the BIA [and the IJ] must identify particular instances in the record where the petitioner refused to answer questions asked of him. A general statement that the petitioner was unresponsive to questions is insufficient; the BIA must articulate with specificity any inconsistencies or evasions it finds.") (internal quotations and citations omitted); *Cf.*, *Malkandi v. Mukasey*, 576 F.3d 906, 919 (9th Cir. 2009) (characterization of an applicant's testimony as "evasive" was appropriate where such characterization was based on "detailed findings supported by concrete examples).

[15] *See*, *e.g.*, *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 24 (1st Cir. 2007) (en banc) (finding IJ's and BIA's findings of evasiveness were not reflected in the applicant's testimony and at times, only reflected a lack of sophistication or miscommunication); *Caushi v. U.S. Att'y Gen.*, 436 F.3d 220, 227-28 (3d Cir. 2006) ("our review of Loreta's testimony reveals very few instances in which her statements were demonstrably inaccurate, vague, or nonresponsive. For the most part, her testimony was clear and consistent, and corroborated her brother's account"); *Jibril v. Gonzales*, 423 F.3d 1129, 1137 (9th Cir. 2005) ("Jibril's answers do not appear to be unduly evasive and, when they are more than a 'yes' or a 'no,' they usually provide useful information. They cannot, therefore, be fairly characterized as evasive or unresponsive on the basis of the transcript.").

[16] *Castaneda-Castillo v. Gonzales*, 488 F.3d at 33 ("The IJ found it 'incredible that although [Castañeda] reported back to his base and although he was debriefed, he was never aware that approximately 69 civilians were raped and murdered by the other two patrols that he claims were four or five miles away.' This is pure speculation by the IJ: there is no basis in the record for the IJ's conclusion that because Castañeda was debriefed following the operation, he would necessarily or even likely have been informed about a massacre committed by the head of another patrol."); *Gao v. BIA*, 482 F.3d 122, 127, 134 (2d Cir. 2007) (stating that "credibility findings are based upon neither a misstatement of the facts in the record nor bald speculation or caprice" and noting that any "inferential leap [must be] tethered to the evidentiary record") (internal quotation marks and citations omitted); *Gabuniya v. U.S. Att'y Gen.*, 463 F.3d 316 (3d Cir. 2006) (inferences or presumptions must be "reasonably grounded" in the record); *Castilho de Oliveira v. Holder*, 564 F.3d 892, 896 (7th Cir. 2009) (overturning an IJ's finding of implausibility where the IJ "strained to find difficulties with [the respondent's] testimony while ignoring evidence that corroborated it."); *Cosa v. Mukasey*, 543 F.3d 1066, 1070 (9th Cir. 2008) (stating that "non-evidence-based assumptions cannot support an adverse credibility determination").

[17] INA §§ 208(b)(1)(B)(iii) (asylum); 240(c)(4)(C) (all applications for relief from removal). See also, *Xiao Ji Chen v. U.S. Dept. of Justice*, 434 F.3d 144 (2d Cir. 2006) (stating that an IJ should explain why a witness's testimony is implausible, not just state that it is implausible); *Jishiashvili v. U.S. Att'y Gen.*, 402 F.3d 386, 393 (3d Cir. 2005) (an IJ's finding of implausibility must be "properly grounded" in the record and based upon conditions in the asylum applicant's home country); *Tewabe v. Gonzales*, 446 F.3d 533, 539 (4th Cir. 2006) (stating that IJ "attached the bare label 'implausible' to [the applicant's] testimony without providing

case, the BIA agreed with the IJ that it was inherently implausible for a respondent, whose asylum claim was based on his Christian faith, to not know that the Bible was the book of Christian teachings even though he had claimed that a friend had given him a Bible to read in the past.[18] In contrast, in another case, the circuit court rejected the IJ's conclusion of implausibility where the applicant, also seeking asylum based on her Christian faith, could not answer questions about specific Gospels or define "evangelism" to the IJ's satisfaction.[19] The court found that the IJ's adverse credibility finding was impermissibly based on speculation and his personal beliefs rather than on the record as a whole. But in making a determination regarding a claim's plausibility, the IJ should view the witness's testimony in light of the record as a whole, which can help provide context and plausibility to the claim.[20]

Did the IJ give undue weight to a State Department or other government report? It is generally not enough for an IJ to only point to general country conditions evidence, such as a U.S. State Department report, to find a respondent's claim implausible.[21] For instance, a general assertion about conditions of peace in India was found to be insufficient because it was based on conjecture and speculation.[22]

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specific and cogent reasons for doing so"); *Redd v. Mukasey*, 535 F.3d 838, 842 (8th Cir. 2008) ("a fact-finder may base an adverse credibility finding on the implausibility of an applicant's testimony, as long as the IJ explains her reasons for disbelief") (internal quotations and citations omitted).

[18] *Matter of J-Y-C-*, 24 I&N Dec. at 265. *See also Yan v. Mukasey*, 509 F. 3d 63, 67-68 (2d Cir. 2007) ("Any reasonable person would understand why the IJ here concluded that it is implausible that a man whose wife had just undergone the physical and emotional trauma of a forced abortion would, only days later, travel alone to another country to participate in a vacation with a tour group for no asserted purpose other than pleasure."). *But see Mousa v. Mukasey*, 530 F.3d 1025, 1027 (9th Cir. 2008) (rejecting IJ's finding that an asylum applicant's claimed years of resistance to joining the Ba'ath party in Iraq was implausible in light of the party's reputation for ruthless recruitment tactics); *Zuh v. Mukasey*, 547 F.3d 504, 509-10 (4th Cir. 2008) (IJ's finding that it was implausible for medical certificates from Cameroon, although prepared months apart, to be separated by only four digits was "mere speculation or conjecture" as was IJ's discrediting of a Cameroonian newspaper because of non-consecutive page numbers and seemingly mismatched paper); *Hong Zhang Cao v. Gonzales*, 442 F.3d 657, 660-61 (8th Cir. 2006) (IJ engaged in impermissible speculation in finding that village officials registering applicant's marriage would not have objected to wife's pregnancy); *Todorovic v. U.S. Attorney Gen.*, 621 F.3d 1318, 1325–26 (11th Cir. 2010) (IJ's adverse credibility determination, based on the fact that the witness claiming persecution for his sexuality did not appear "overtly gay," impermissibly relied on stereotypes as a substitute for substantial evidence).

[19] *Cosa v. Mukasey*, 543 F.3d at 1066 (IJ engaged in "speculation about the [applicant's] faith—on everything from how [the applicant] should dress and wear her hair to comport with her beliefs to what books of the Bible are most important").

[20] *See*, *e.g.*, *Adekpe v. Gonzales*, 480 F.3d 525, 533 (7th Cir. 2007) ("[W]hile the IJ was correct to conclude that the letters did not 'specifically corroborate' Adekpe's testimony in that way, she ignored a way in which the letters might make Adekpe's story more plausible without specifically corroborating its details: by revealing that the situation in Togo after his departure is consistent with the situation he says existed prior to his departure.").

[21] *Shah v. INS*, 220 F.3d 1062, 1069 (9th Cir. 2000) (stating that it is improper for the BIA to rely exclusively "on a factually unsupported assertion in a State Department report to deem [an applicant] not credible" and noting the "perennial concern that the [State] Department soft-pedals human rights violations by countries that the United States wants to have good relations with") (internal quotation marks omitted).

[22] *Id.*

D. Corroboration

The issue of corroboration comes up in two ways in removal proceedings. First is in the context of an applicant's burden of proving eligibility for relief. While credible testimony alone can be the basis for qualifying for asylum and other relief, an IJ can require corroboration where it is reasonably obtainable.[23] "If the evidence is unavailable, the Immigration Judge must afford the applicant an opportunity to explain its unavailability and ensure that the explanation is included in the record."[24] Where the IJ has faulted an applicant for failing to provide corroboration, applicants will typically challenge the IJ's findings by showing that the corroboration required by the IJ is not reasonably obtainable.[25]

The second context in which the issue of corroboration arises is where the absence or content of the corroborative evidence casts doubt on the applicant's credibility.[26] In these cases, it is

[23] INA §§ 208(b)(1)(B)(ii) (asylum); 240(c)(4)(B) (all applications for relief from removal); *Matter of L-A-C-*, 26 I&N Dec. 516, 518–19 (BIA 2015) (stating that "regardless of whether an applicant is deemed credible, he has the burden to corroborate the material elements of the claim where the evidence is reasonably obtainable"); *see also Ling Zhou v. Gonzales*, 437 F.3d 860, 866 (9th Cir. 2006) (affidavits from relatives or acquaintances living outside the United States are generally not considered to be easily available); *Solomon v. Gonzales*, 454 F.3d 1160, 1165 (10th Cir. 2006) (the asylum applicant's testimony that she lacked corroborating documents because she fled "emptyhanded" is consistent with court's recognition of the inherent difficulties a refugee may have in obtaining documentation). *But see*, *Unuakhaulu v. Gonzales*, 416 F.3d 931, 938 (9th Cir. 2005) (affidavits from family members in Nigeria readily available where applicant testified that he had continuous contact with them); *Chebchoub v. INS*, 257 F.3d 1038, 1043-45 (9th Cir. 2001 (affidavit from brother living in France easily available).

[24] *Matter of L-A-C-*, 26 I&N Dec. at 519; *see also Jin Shui Qiu v. Ashcroft*, 329 F.3d 140, 153 (2d Cir. 2003) ("Unless the BIA anchors its demands for corroboration to evidence which indicates what the petitioner can reasonably be expected to provide, there is a serious risk that unreasonable demands will inadvertently be made. 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."); *Mulanga v. Ashcroft*, 349 F.3d 123, 134 (3d Cir. 2003); *Hussain v. Gonzales*, 424 F.3d 622, 629-30 (7th Cir. 2005).

[25] For cases filed on or after May 11, 2005, the effective date of the REAL ID Act, corroboration may be required even where an applicant is credible. *Matter of J-Y-C-*, 24 I&N Dec. at 262-63 (discussing credibility standards under the REAL ID Act); Matter of S-B-, 24 I&N Dec. 42 (BIA 2006) (stating that applications filed on or after May 11, 2005, are subject to the credibility provisions of the REAL ID Act). For applications filed before May 11, 2005, there was no explicit statutory authority on whether an IJ could require corroborating evidence of credible testimony, but the BIA and circuit courts generally held that an IJ could require corroboration even where testimony was credible. *See Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997) (holding that where it is reasonable to expect corroborating documents, they should be provided or an explanation given for their absence). But the Ninth Circuit held that, for pre-REAL ID Act cases, corroboration could not be required where testimony was credible. *Ladha v. INS*, 215 F.3d 889, 898-01 (9th Cir. 2000) (disapproving of *Matter of S-M-J-*).

[26] *See Khrystotodorov v. Mukasey*, 551 F.3d 775, 783 (8th Cir. 2008) ("Credibility and the need for corroboration are intertwined such that a denial of asylum based on a lack of corroboration must include an explicit ruling on the applicant's credibility, an explanation of why it is reasonable to expect additional corroboration, or an assessment of the sufficiency of the explanations for the absence of corroborating evidence."); *Esaka v. Ashcroft*, 397 F.3d 1105, 1110 (8th Cir. 2005) ("An [IJ] can base a credibility determination on the lack of corroborating evidence if the judge also encounters inconsistencies in testimony, contradictory evidence, or inherently improbable testimony."); *Hoxha v. Gonzales*, 432 F.3d 919, 920 (8th Cir. 2006) ("Corroborative evidence is not required to support an asylum application; however,

crucial to challenge each such finding with the BIA, either on the merits of the finding or the IJ's failure to follow certain procedural requirements.

Did the IJ give the respondent notice and opportunity to submit corroborating evidence? The BIA and the majority of circuit courts have held that the IJ need not provide advance notice regarding the need for additional corroboration, before faulting the respondent for failure to provide such corroboration.[27] But the Third and Ninth Circuits have held that the IJ must give a respondent notice of the need for corroborating evidence and an opportunity to provide it, before the IJ renders a decision on a claim for relief.[28] In *Ren v. Holder*, the Ninth Circuit analyzed the language of INA section 208(b)(1)(B)(ii)[29] and concluded that "[a] plain reading of the statute's text makes clear that an IJ must provide an applicant with notice and an opportunity to either produce the evidence or explain why it is unavailable before ruling that the applicant has failed in his obligation to provide corroborative evidence and therefore failed to meet his burden of proof."[30] Additionally, the court concluded that "[a] requirement that something be provided even *before* notice is given would raise … due process concerns."[31]

Regardless of the circuit where a case arises, it is good practice to explore whether a respondent who was faulted for failing to provide certain corroborative evidence, had notice that the IJ would require such evidence.

If the applicant's testimony was credible, can the IJ still make an adverse credibility finding due to the lack of corroboration? As mentioned, failure to submit reasonably obtainable evidence can result in a finding that the applicant has not met their burden of proof. However, some courts take the approach that the lack of corroboration can in itself support an adverse credibility finding, even where the applicant's testimony was otherwise credible, with the lack of corroboration being more of a significant factor in cases where testimony was credible, but "weak."[32] However, before an IJ or the BIA can make an adverse credibility finding based on

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when corroborative evidence should be readily accessible to the [respondent], the failure to present such evidence is a reasoned factor for an [Immigration Judge] to consider in assessing the [respondent's] credibility."); *Solomon v. Gonzales*, 454 F.3d 1160, 1167-68 (10th Cir. 2006) (finding lack of corroboration in itself is not a basis for an adverse credibility finding).

[27] *Matter of L-A-C-*, 26 I&N Dec. 516, 523 (BIA 2015); *Liu v. Holder*, 575 F.3d 193, 198 (2d Cir. 2009); *Wambura v. Barr*, 980 F.3d 365, 376 (4th Cir. 2020); *Avelar-Oliva v. Barr*, 954 F.3d 757, 769-70 (5th Cir. 2020); *Gaye v. Lynch*, 788 F.3d 519, 529 (6th Cir. 2015); *Rapheal v. Mukasey*, 533 F.3d 521, 530 (7th Cir. 2008); *Uzodinma v. Barr*, 951 F.3d 960, 966 (8th Cir. 2020).

[28] *Saravia v. Atty. Gen. U.S.*, 905 F.3d 729, 731 (3d Cir. 2018); *Ren v. Holder*, 648 F.3d 1079, 1082 (9th Cir. 2011).

[29] The court analyzed INA § 208 since the case involved an asylum application. The statute contains an identical provision for all other applications for relief at INA § 240(c)(4)(B).

[30] *Ren*, 648 F.3d at 1090.

[31] *Id.* at 1092-93.

[32] *See Mukamusoni v. Ashcroft*, 390 F.3d 110, 120-121 (1st Cir. 2004) (finding that in pre-REAL ID Act asylum application, BIA erred in requiring corroborating evidence where testimony and evidence that was submitted was not "weak"), *citing* Matter of Y-B-, 21 I&N Dec. 1136, 1139 (BIA 1998); *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000) (finding that the "presence or absence of corroboration may properly be considered in determining credibility"); *Cao He Lin v. United States Dept. of Justice*, 428 F.3d 391, 401 (2d Cir. 2005) ("[W]here the applicant has furnished credible corroborating evidence to confirm his testimony, the [IJ] may not reject his testimony because he did not furnish additional evidence."); *Ezeagwu v. Mukasey*, 537 F.3d 836, 840 (8th Cir. 2008) (finding that it was permissible for BIA to conclude that applicant's failure to provide

the lack of corroboration, they must consider the applicant's explanation as to why the evidence was not reasonably obtainable.[33]

Regardless of where a case arises, practitioners should consider making these arguments where the respondent was not given notice and an opportunity to submit additional corroborative evidence. The argument should highlight the plain language of the statute and due process concerns, as well as the impossibility of meaningful review.

If the applicant's testimony was not credible, can the IJ automatically disregard corroborating evidence? Courts have generally held that when an applicant's testimony lacked credibility, the IJ and the BIA may disregard corroborative evidence where that evidence also may indicate a lack of credibility, such as due to inconsistencies or other suspect characteristics.[34] But if the evidence tends to corroborate the applicant's testimony, the IJ must consider that evidence in assessing whether the applicant has met their burden of proving eligibility for relief.[35] Additionally, if the IJ excluded certain corroborative evidence that the applicant offered, the IJ must explain that decision.[36] Where the testimony of an applicant was not credible, the IJ may

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"corroborating evidence, without a satisfactory explanation as to why he could not obtain such evidence, further supported" the IJ's adverse credibility finding).

[33] *See Diallo*, 232 F.3d at 287; *Sandie v. Att'y Gen.*, 562 F.3d 246, 253 (3d Cir. 2009); *Vasha v. Gonzales*, 410 F.3d 863, 872 n. 3 (6th Cir. 2005) (stating that an Immigration Judge cannot insist on the submission of corroborating evidence unless such evidence is "of the type that would normally be created or available in the particular country and is accessible to the [noncitizen], such as through friends, relatives or coworkers"), *quoting Dorosh v. Ashcroft*, 398 F.3d 379, 382-83 (6th Cir. 2004) (internal quotation marks omitted); *Eta-Ndu v. Gonzales*, 411 F.3d 977, 985 (8th Cir. 2005) (stating that IJs are not required to accept or believe an applicant's explanations for submitting corroborating evidence which lacks the indicia of authenticity but must state why the explanation is insufficient).

[34] *See Makalo v. Holder*, 612 F.3d 93, 97 (1st Cir. 2010) ("As we explained above, the IJ had good reason to doubt much of Makalo's supporting evidence. And Makalo failed to provide other, useful evidence. He did not submit birth certificates or affidavits from family members verifying his story. He had no evidence of when or how he received his documents (and indeed contradicted himself about how those documents were sent."); *Pilica v. Ashcroft*, 388 F.3d 941, 954 (6th Cir. 2004) (finding that IJ did not err in basing adverse credibility on applicant's failure to call his parents as witnesses, where applicant's testimony lacked credibility).

[35] *See Poradisova v. Gonzales*, 420 F.3d 70, 79 (2d Cir. 2005) ("[I]n determining whether the Poradisovs' claims were corroborated, the IJ should have taken into account, as apparently she did not, that the State Department reports in the record confirmed the Poradisovs' account of the general societal and political antisemitism in Belarus."); *Kourouma v. Holder*, 588 F.3d 234, 241 (4th Cir. 2009) (finding that the IJ "must take into account both the [applicant's] testimony and his or her corroborating evidence, whether documentary or testimonial … and thus may not deny asylum merely on the basis of incredible testimony without considering any corroborating evidence"); *Camara v. Ashcroft*, 378 F.3d 361, 369-70 (4th Cir. 2004) (finding that the IJ legally erred in ignoring independent documentation that supported claim of past persecution); *Diallo*, 381 F.3d at 695 ("An immigration judge may not simply ignore record evidence that favors the applicant's case."); *Aung v. Gonzales*, 495 F. 3d 742, 746 (7th Cir. 2007); *Ruiz v. U.S. Att'y Gen.*, 440 F.3d 1247, 1255 (11th Cir. 2006) ("an adverse credibility finding does not alleviate [the IJ's] duty to consider other evidence produced by an asylum applicant").

[36] *Xiu Ling Zhang v. Gonzales*, 405 F.3d 150, 155-56 (3d Cir. 2005); *Tun v. Gonzales*, 485 F.3d 1014, 1026-29 (8th Cir. 2007).

base an adverse credibility finding on both the lack of credible testimony and the lack of corroboration.[37]

Is the IJ's disregard for the corroborative evidence based on legitimate grounds or on speculation and conjecture? While the IJ may disregard corroboration that contradicts other evidence in the record, any doubt as to the authenticity of the corroborative evidence must be borne out by the record.[38] Also, for a fraudulent document to result in an adverse credibility finding, the applicant must have known that the document was fraudulent.[39] Where other evidence in the record, such as the State Department's case-specific opinion, indicates that there is no finding that a document lacked authenticity, the IJ is not free to ignore such evidence.[40] Additionally, the IJ may not require independent evidence that corroborative evidence is credible.[41]

PRACTICE TIP: Under the INA, IJs must make credibility determinations "[c]onsidering the totality of the circumstances."[42] When challenging an IJ's adverse credibility finding, it is important to scrutinize whether the IJ did, in fact, consider the totality of the circumstances rather than cherry-picking seemingly adverse information and ignoring information that tends to establish credibility. The appeal brief to the BIA should include an argument about why the IJ's adverse credibility finding is "clearly erroneous" under the "totality of the circumstances."

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[37] *See Ikharo v. Holder*, 614 F.3d 622, 634 (6th Cir. 2010) ("An IJ is permitted to rely on the failure of [a noncitizen] to present corroborating evidence when making a credibility determination and where there are also inconsistencies in the [noncitizen's] testimony."); *Ombongi v. Gonzales*, 417 F.3d 823, 826 (8th Cir. 2005) (finding the "dearth" of corroborating evidence, when combined with other credibility issues, cast substantial doubts on the applicant's overall credibility).

[38] *See Matter of O-D-*, 21 I&N Dec. 1079, 1084 (BIA 1998) (finding that fraudulent identification document discredits the critical elements of identity and nationality, and absent explanation or rebuttal may indicate an overall lack of credibility); *Jin Chen v. U.S. Dept. of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (IJ's finding that applicant's birth control certificates appeared fabricated was based on speculation and conjecture, where nothing in the record supported such a finding, the government had not made any attempt to determine their authenticity, and the applicant authenticated the documents through testimony); *Diallo v. Gonzales*, 439 F.3d 764, 766-67 (7th Cir. 2006) (finding that IJ's rejection of respondent's corroborating documents [arrest warrant and summons] due to grammatical errors and misspellings in the French language documents was error where IJ had no qualification in interpreting documents and IJ's conclusions were based on speculation).

[39] *See Yeimane-Berhe v. Ashcroft*, 393 F.3d 907, 911 (9th Cir. 2004).

[40] *Duan Ying Chen v. Gonzales*, 447 F.3d 468, 473-74 (6th Cir. 2006) (IJ erred in finding applicant not credible based on erroneous conclusions about birth certificates, without reference to the Department of State Country Report, that no field investigation regarding the accuracy of the information was conducted).

[41] *See Marynenka v. Holder*, 592 F.3d 594, 601-02 (4th Cir. 2009) (IJ erred in rejecting medical record submitted by the respondent because it was not written on clinic letterhead "under what the IJ appeared to regard as a general rule that corroborating evidence requires further corroboration").

[42] INA §§ 208(b)(1)(B)(iii) (asylum); 240(c)(4)(C) (all applications for relief from removal); *Matter of J-Y-C-*, 24 I&N Dec. at 266 ("The Immigration Judge considered the totality of the circumstances, including the discrepancies in the respondent's testimony, his demeanor, the implausibility of the claim, and the lack of corroborating evidence, in finding that the respondent failed to provide credible evidence in support of his asylum claim. We therefore conclude that the Immigration Judge did not commit clear error in his determination that the respondent lacked credibility.").

III. Special Circumstances

***Mental Health and Safeguards*:** IJs are required to provide safeguards in cases where a witness is mentally "incompetent or who ha[s] serious mental health or cognitive issues that may affect their testimony."[43] As the BIA has acknowledged, "the factors that would otherwise point to a lack of honesty in a witness—including inconsistencies, implausibility, inaccuracy of details, inappropriate demeanor, and non-responsiveness—may be reflective of a mental illness or disability, rather than an attempt to deceive the Immigration Judge."[44] In such cases, the IJ "should, as a safeguard, generally accept that the applicant believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim. The Immigration Judge should then focus on whether the applicant can meet his burden of proof based on the objective evidence of record and other relevant issues."[45]

In any case where the IJ, attorneys for the parties, witnesses, or documentary evidence indicate that a respondent may have mental health symptoms or a cognitive disability, practitioners should consider whether a competency hearing should have been conducted and whether the IJ should have provided safeguards that would have prevented a wrongful adverse credibility finding.

Sexual Abuse or Assault: An applicant's failure to relate details about sexual assault or abuse at the first opportunity "cannot reasonably be characterized as an inconsistency."[46] In cases where the applicant has experienced sexual abuse, practitioners should challenge an IJ's adverse credibility finding if it is based on inconsistencies or omissions relating to that abuse.

Two Similar Asylum Claims: An IJ may find an applicant's claim lacking in credibility, where the applicant's claim is similar to a claim made by a different applicant in separate proceedings. In *Matter of R-K-K-*, the BIA held that an IJ could consider "significant similarities" between statements submitted by applicants in different proceedings in making an adverse

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[43] *Matter of J-R-R-A-*, 26 I&N Dec. 609, 610 (BIA 2015). "Incompetence" is a slightly different concept than mental illness and a "a diagnosis of mental illness does not automatically equate to a lack of competency." *Matter of M-A-M-*, 25 I&N Dec. 474, 480 (BIA 2011). Incompetence refers to a respondent's inability to participate in immigration proceedings due to their lack of rational and factual understanding of the nature and object of the proceedings, inability to properly consult with their attorney or representative if there is one, and inability to reasonably examine and present evidence and cross-examine witnesses. *Id.* at 478-79. Where there are "indicia of incompetency," the IJ must conduct a competency hearing to determine whether the respondent needs special safeguards. *Id.* at 479-83. But even where the respondent is competent, safeguards may be necessary to prevent a wrongful adverse credibility finding.

[44] *Matter of J-R-R-A-*, 26 I&N Dec. at 611.

[45] *Id.* at 612.

[46] *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1053 (9th Cir. 2002) ("That a woman who has suffered sexual abuse at the hands of male officials does not spontaneously reveal the details of that abuse to a male interviewer does not constitute an inconsistency from which it could reasonably be inferred that she is lying."); *see also Juarez-Lopez v. Gonzales*, 235 Fed.Appx. 361 (7th Cir.2007) (concluding that an adverse credibility finding should not be based on an applicant's "understandable reluctance to divulge information about her rapes"). *But see*, *Clemente-Giron v. Holder*, 556 F.3d 658, 664 (8th Cir. 2009) ("an IJ is not compelled to accept testimony about sexual assault without corroboration in light of overall credibility problems").

credibility determination, as long as the IJ employs certain procedural steps to preserve the fairness of the proceedings."[47]

The BIA announced a three-part framework for IJs to use when relying on the similarities between two cases, in making their adverse credibility finding. The IJ must: (1) give the applicant meaningful notice of the similarities that are considered to be significant; (2) give the applicant a reasonable opportunity to explain the similarities; and (3) consider the totality of the circumstances in making a credibility determination. According to the BIA, this framework will permit IJs "to draw reasonable inferences of falsity from inter-proceeding similarities while establishing procedural safeguards to protect faultless applicants."[48] In any case where an IJ's adverse credibility finding was based on similarities between two applicants' claims, practitioners should ensure that the IJ followed the *Matter of R-K-K-* framework, and that the IJ's inferences were reasonable in light of the record as a whole.

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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.

[47] *Matter of R-K-K-*, 26 I&N Dec. 658, 659, 661 (BIA 2015).
[48] *Id.* at 661.