No. 08-70434

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NIRMAL SINGH,
PETITIONER,

v.
MICHAEL MUKASEY., ATTORNEY GENERAL,
RESPONDENT.

PETITION FOR REVIEW

BRIEF *AMICUS CURIAE* OF NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF PETITIONER

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November 4, 2010

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The National Immigrant Justice Center (NIJC) has moved to appear as amicus curiae in this case. NIJC is a Program of Heartland Human Care Services, a 501(c)(3) non-profit corporation located in Chicago, Illinois. Heartland Human Care Service has a parent corporation, the Heartland Alliance for Human Needs and Human Rights, also a 501(c)(3) non-profit corporation located in Chicago, Illinois. Neither NIJC, Heartland Human Care Services, or the Heartland Alliance is publicly held, and no person or corporation owns any percentage of NIJC, Heartland Human Care Services, or the Heartland Alliance. No other publicly held corporation or entity has a direct financial interest in the outcome of this litigation. The case does not arise out of a bankruptcy proceeding.

/s Charles Roth
Charles Roth
Counsel for Amicus Curiae National Immigrant Justice Center

INTEREST OF *AMICUS CURIAE*

Amicus Heartland Alliance's National Immigrant Justice Center ("NIJC") is a non-profit organization accredited by the Board of Immigration Appeals to provide immigration assistance since 1980. NIJC promotes human rights and access to justice for immigrants, refugees, and asylum seekers through legal services, policy reform, impact litigation, and public education. NIJC provides legal education and representation to low-income immigrants, including asylum seekers, refugees, survivors of domestic violence and victims of crimes, human trafficking victims, detained adults and children, and other non-citizens facing removal and family separation. In fiscal year 2010, NIJC provided legal services to more than 10,000 non-citizens, more than 2000 of whom were detained at the time. NIJC commonly handles asylum cases by placing them with *pro bono* attorneys at major law firms; NIJC *pro bono* attorneys currently represent more than 250 asylum applicants.

SUMMARY OF THE ARGUMENT

Congress did not intend to impose an onerously high burden on asylum seekers when it expressly permitted the agency to require

corroboration where appropriate and reasonable. A generalized statutory notice that corroboration may be necessary does not provide non-citizens with adequate notice and direction of what is required, which will tend to result in denials for reasons unrelated to the merits of the actual asylum claims. Amicus writes separately to explain the practical effects of the rule adopted by the Panel, and to urge the adoption of a rule requiring adequate notice to an asylum seeker before denial of an application on corroboration grounds.

Further, Amicus submits that alternate mechanisms such as Motions to Reopen are inadequate to protect applicants' interests or to protect the nation's interest in accurately deciding when to send people back to potential persecution, torture, or death.

ARGUMENT

It is uncontested that Congress permits the Board of Immigration Appeals ("Board") to require corroboration where corroboration is reasonable and possible. The question presented by this case is whether the statute requires the Board and Immigration Judges to give specific notice to asylum applicants regarding the need for corroborating evidence prior to a denial based on the failure to present such

corroborating evidence. Amicus believes that generalized notice is insufficient, and that *post hoc* resolution mechanisms such as motions to reopen are inadequate to protect the interests at stake.

I. GIVEN THE OFTEN COMPLICATED CIRCUMSTANCES OF ASYLUM CASES APPLICANTS SHOULD BE PROVIDED SPECIFIC NOTICE BEFORE DENIAL FOR FAILURE TO PROVIDE CORROBORATING EVIDENCE.

The Immigration and Nationality Act (INA) puts asylum applicants on general notice that the Board may require corroboration for factual claims. 8 U.S.C. § 1158(b)(1)(B). The frequent difficulty in obtaining corroborating evidence for asylum cases and the nearly limitless universe of factual issues in asylum cases counsel for something more than generalized notice to provide asylum applicants reasonable opportunity to obtain additional corroboration for particular points in the case.

A. General notice in the statute or regulations that corroboration should be presented is not sufficient notice as to particular corroboration issues.

The principal problem with an unlimited and freestanding duty to corroborate is that asylum claims often turn on minor factual issues, often far afield from the logically central issue of the likelihood of

persecution on one of the five protected grounds. The nature of asylum corroboration makes generalized notice insufficient for applicants.

Because "[a]uthentic refugees rarely are able to offer direct corroboration" of their claims, *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1285 (9th Cir. 1984), the case often comes down to whether the applicant can show credibility. See, David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1280-82 (1990). To weed out potential fraud, the agency looks carefully at each factual claim to discern whether the applicant is likely telling the truth; any factual inconsistency (or perceived factual inconsistency) may undercut credibility. *See, e.g., Xiu Xia Lin v. Mukasey*, 534 F.3d 162 (2d Cir. 2008) (reasoning from various small inconsistencies that claim might be false); *Don v. Gonzales*, 476 F.3d 738 (9th Cir. 2007) (asylum claim undercut by inconsistency about date of hiring of cook, inconsistencies on business license); *cf. Kadia v. Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007) (rejecting "falsus in omnibus" test as "discredited" and "primitive").

Every fact in someone's life tends to corroborate or undercut their claim about who they are and how they have lived: are they truly a

religious believer, were they truly afraid of persecution, might there be another potential reason for flight? The corollary to this is that corroboration for any fact in an applicant's life might be seen as useful to their claim, helping to bolster credibility. An unwisely applied corroboration rule could require corroboration of nearly every aspect of a person's life. It hardly an exaggeration to say that, looking prospectively before the asylum hearing, nearly an infinite number of issues may trigger doubts about an applicant's credibility, any one of which may trigger an additional expectation of corroboration.[1]

To be clear, Amicus does not argue against corroboration as such; but emphasizes that any agency requirement for additional corroboration to a given point in an otherwise credible claim ought to be disclosed to the applicant before denial of the claim.

For instance, an applicant might think that their identity is not at issue, having been issued a charging document alleging removability to one particular country, but production of a government identification

[1] It would presumably not be reasonable for a judge to expect an infinite amount of corroboration in a case, but looking *prospectively*, prior to an asylum hearing, the universe of *potential* doubts, and *potential* perceived corroboration gaps, cannot be limited by an applicant or counsel.

form does not always resolve doubts about a person's identity. An Immigration Judge might nonetheless come to doubt one's identity or the identity documents produced. *See*, *e.g.*, *Singh v. Gonzales*, 439 F.3d 1100, 1109 (9th Cir. 2006) (doubting applicant's identity documents); *Lin v. Gonzales*, 434 F.3d 1158, 1163 (9th Cir. 2006) (same).[2] That may trigger an Immigration Judge to believe something "more" needs to be produced to corroborate one's identity. Under these circumstances, unless the Immigration Judge indicates his or her doubt, how is one to know corroborating evidence is necessary? Governments and private actors produce various types of identity documents in the modern world: birth certificates, passports, driver's licenses, government identification, refugee documents, etc. These may be more or less easily obtained and occasionally only through family members placing themselves in considerable danger in order to obtain them. *See In re S-M-J-*, 1997 WL 80984, 21 I. & N. Dec. 722, 737-38 (1997) (Rosenberger, concurring). Even applicants who realize the need to corroborate identity might be

[2] Asylum applicants often hail from parts of the world where identity documents are produced by less than formal means. *See e.g., Niang v. Mukasey*, 511 F.3d 138, 143 (2d Cir. 2007) (Mauritanian child in Senagalese refugee camp carried document in his pocket, camp director later appended new photograph).

caught off-guard by a request to produce additional identity documents. *See, Marcos v. Gonzales*, 410 F.3d 1112, 1118 at n.6 (9th Cir. 2005) (on day of hearing, Immigration Judge demanded that applicant produce Red Cross employee identification document).

Even assuming an applicant suspects that corroborating evidence might be necessary, it is likely to be difficult to ascertain what evidence would be sufficient without some indication from the Immigration Judge. For example, applicants are asked to produce corroboration of events such as the death of family members, but there are various means by which to corroborate such events. In *Shah v. I.N.S.*, 220 F.3d 1062 (9th Cir. 2000), for instance, the applicant produced a death certificate labeled "abstract" of death, along with various affidavits. The Board (in a ruling rejected by this Court) found this corroboration insufficient, reasoning that if the document was an "abstract" of death, that a more complete certificate must be available. *Id*. at 1070.

Similarly, an Immigration Judge might have doubts about an applicant's marriage, *see Lin v. Gonzales*, 434 F.3d 1158 (9th Cir. 2006), or other biographic information. An applicant who testifies to religious membership may find that the Immigration Judge wishes to confirm

that membership or church attendance, *Zolotukhin v. Gonzales*, 417 F.3d 1073, 1076 n.4 (9th Cir. 2005) (noting judge's sua sponte phone call to the church of applicant's mother to confirm church attendance), or perhaps their religious involvement while abroad. *See, Muhur v. Ashcroft*, 355 F.3d 958 (7th Cir. 2004) (no corroboration from leader of Ethiopian Jehovah's Witnesses). Minor details such as the dates on affidavits and letters may trigger doubts in the Judge's mind, and thus, need for more corroboration. *Gui v. I.N.S.*, 280 F.3d 1217, 1227 (9th Cir. 2002).

Applicants are well-advised to produce evidence going directly to their claimed persecution; but even then, it is always possible to hypothesize about additional evidence which could have been presented. *See Salaam v. I.N.S.*, 229 F.3d 1234 (9th Cir. 2000) (Board erroneously faulted applicant who produced substantial evidence corroborating claim for not producing political pamphlets, evidence of political party membership, or medical evidence).

The statutory definition of a refugee includes five basic elements: (a) nationality, (b) inability or unwillingness to return, (c) due to past persecution or a well-founded fear of future persecution, (d) by a

government or a group the government cannot or will not control, (e) on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(43). However, even individuals fitting the refugee definition may be ineligible for asylum; the statute bars various classes from asylum eligibility for reasons unrelated to the refugee definition. Failure to file within one year of entry generally renders an individual ineligible; likewise, individuals who could be removed to a safe third country, who have previously filed for asylum, were convicted of a particularly serious crime, were firmly resettled in a foreign country, are thought to be a danger to the security of the country, participated in persecution of others, or are inadmissible due to involvement with designed or non-designated terrorist groups. See, 8 U.S.C. §§ 1158(a)(2)(A), (C); 1158(a)(2)(B)(2)(A), The regulations put the burden on the applicant to disprove the applicability of such bars whenever "the evidence indicates" that such a bar might apply. 8 C.F.R. § 208.13(c)(2)(ii). One might conceivably seek to preemptively disprove that they had ever joined any terrorist organization; but attempting to corroborate the non-existence of such a fact could be quite burdensome.

Amicus does not suggest that corroboration should not be provided but the Court should be cognizant that the universe of potential corroboration requests in any case is extremely large. While any one particular document might be "reasonably obtainable," 8 U.S.C. § 1158(b)(1)(B)(ii), the applicant is being asked to simultaneously corroborate his claims, to respond preemptively to potential doubts about credibility, to disprove the applicability of bars, and more, in every case. Requiring an applicant to accurately guess which evidence will turn out to be required, on pain of removal, is not the rule Congress intended, and indeed, would be inconsistent with the general statutory and constitutional requirement that applicants be given a "reasonable" opportunity to present evidence. See 8 U.S.C. § 1229a(b)(4)(B).[3]

[3] Asylum requests also implicate U.S. treaty obligations. See 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 268 (Jan. 31, 1967); *INS v. Stevic*, 467 U.S. 407, 416 (1984); Resolution of Ratification of Convention Against Torture, 136 Cong. Rec. 10091-02, 1990 WL 100492 (July 19, 1990). The national commitment to protecting those facing torture or persecution if deported is another factor supporting a notice requirement of greater specificity.

B. Onerous and less than transparent corroboration requirements would be particularly inappropriate for asylum applicants, who tend to have limited resources and no easy access to corroborating evidence.

Adopting the panel's corroboration rule would also impose significant costs on asylum applicants, a class of individuals uniquely unable to bear such a burden.

It is evident that asylum-seekers are on average of extremely limited means. *See generally*, Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 Fordham L. Rev. 541, 548 (Nov. 2009). Many asylum applicants come before the court *pro se*; others are represented by *pro bono* counsel, or by paid counsel (of varying quality[4]).

Regardless of whether an asylum-applicant is *pro se*, represented by *pro bono* counsel, or represented by paid private counsel, the burdens imposed by a corroboration rule that imposes denial as a penalty for any evidentiary gap ultimately end up falling on asylum-seekers. Paid

[4] *See, e.g.*, *Morales Apolinar v. Mukasey*, 514 F.3d 893, 897 (9th Cir. 2008); *Aris v. Mukasey*, 517 F.3d 595, 601 (2d Cir. 2008) ("[w]hen lawyers representing immigrants fail to live up to their professional obligations, it is all too often the immigrants they represent who suffer the consequences").

counsel would pass on additional costs to their clients, or (assuming ethical practice) would leave the deportation defense field if the costs of competent representation became unaffordable. See, e.g., id., at 548-49 (noting the "strong financial disincentives for reputable private immigration attorneys to focus their practices on providing removal defense representation"). *Pro bono* counsel would absorb the additional costs, but these costs (particularly when borne by nonprofit agencies such as Amicus) ultimately permit representation of fewer asylum-seekers. *Pro se* individuals suffer the consequences directly.

Amicus would stress that this is problematic even where particularly poor quality representation is not at issue.

C. In the absence of a rule, the Immigration Court system will generally not put applicants on notice as to likely corroboration issues in their cases.

While the Immigration Court system involves adversarial counsel and an impartial adjudicator, those proceedings do not currently tend to provide any kind of predictable guide or notice as to which documents will be found necessary in a given case. First, preliminary hearings in the Immigration Court system rarely put litigants on notice for the issues likely to be contested in the hearing. Second, great variations

between Immigration Courts and between individual Immigration Judges, together with deferential review from the Board, gives even experienced immigration attorneys little ability to predict particular corroboration needs in a given case. Third, the uniquely fact-bound nature of asylum cases makes it difficult to compare between one individual case and another, meaning that corroboration rulings in prior cases before the same Immigration Judge do not serve as good predictors of future corroboration requirements. Finally, lack of resources in the Immigration Court system, together with the absence of court procedures for handling corroboration, leads to "shortcuts" and an unwillingness to continue cases even when fundamental procedural fairness requires that the applicant be given some kind of notice before denial.

The case at bar appears to be a good example of how asylum hearings function. Less than two months passed between the "master calendar hearing" of April 10, 2006, and the final hearing on May 23, 2006, and the parties engaged in no apparent communications during that time period. While Pretrial hearings are authorized by regulation, 8 C.F.R. § 1003.21, they rarely occur. *Assembly Line Injustice*,

Appleseed, at 16-18 (May 2009), *available at* http://chicagoappleseed.org/programs/immigration_court_reform (last accessed October 25, 2010) (hereinafter *ALI*). Indeed, the Department of Homeland Security does not generally assign an attorney to the case more than one month before the hearing; where an applicant's attorney seeks to speak with opposing counsel to determine the likely issues in the case, there is no one with whom to speak. *Id.* at 18.[5] The upshot, for an applicant, is that going into the hearing, one cannot know whether the government will contest issues such as identity, marital status, legal status, date of entry, whether supporting documents are legitimate, whether country conditions have improved, and so on.

Moreover, Immigration Judges' handling of asylum cases differs greatly from court to court. It is now well-documented that approval rates between Immigration Courts and Immigration Judges differ remarkably.[6] Likewise, particular Immigration Judges will find

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[5] This may be due to a lack of resources by DHS attorneys, who reportedly "had only about 20 minutes to prepare each case, leaving them with little time to respond even to routine questions." *ALI* at 16.

[6] Jaya Ramji-Nogales, Andrew I. Schoenholtz, Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan.L.Rev. 295, 329-330 (Nov. 2007) ("a Chinese asylum seeker unlucky enough to have her case heard before the Atlanta Immigration Court had a 7% chance of

different levels of corroboration to be appropriate, sometimes unreasonably so. *See, e.g., Smolniakova v. Gonzales*, 422 F.3d 1037 (9th Cir. 2005) (denying asylum claim for failure to obtain letter or declaration from unknown stranger who witnessed 1991 killing, and failure to offer death certificate in addition to newspaper reports of killing). Even an experienced immigration practitioner might fail to properly estimate whether a particular Immigration Judge would likely deny a claim for failure to obtain a particular document.[7]

Nor will it often be possible to extrapolate from one asylum case to another; "Each asylum application is different, and factors that are

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success on her asylum claim, as compared to 47% nationwide. Moreover, if this same asylum seeker had presented her claim 400 miles to the south, before the Orlando Immigration Court, she would have had a 76% chance of winning asylum, over ten times the Atlanta grant rate.... Why is an individual fleeing persecution in China 986% more likely to win her asylum claim in one venue than in another? Why is the average national grant rate for Chinese asylum claims 571% higher than the Atlanta court's grant rate?")

[7] Amicus agrees with Petitioner's observation about poor-quality counsel in removal proceedings, Petitioner's Supplemental Brief at 16, but would note that the possibility of reopening for ineffective assistance offers some remedy for applicants in that circumstance. *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988); *Iturribarria v. INS*, 321 F.3d 889, 900 (9th Cir.2003). Lesser, non-culpable failures to corroborate (such as failures caused by strategic decisions about where to focus scarce resources) are actually less-remediable under the Board's current scheme.

probative in one context may not be in others." *Kalubi v. Ashcroft*, 364 F.3d 1134, 1139 (9th Cir. 2004). Each asylum applicant will have a different family situation, greater or lesser ability to reach family or friends in their home country, a claim susceptible to more direct proof or more circumstantial evidence, and more or less time, money, and resources with which to pursue the claim. The fact-specific nature of asylum claims makes it particularly difficult to properly estimate whether a particular Immigration Judge will find it reasonable to require a particular type of corroboration, what efforts to seek the documentation will be found sufficient, or how much danger one might reasonably cause to one's relatives or friends abroad in the quest of corroboration.

Finally, the problem is exacerbated by the pressures felt by the Immigration Court system. Setting to one side the problem of poor adjudicators, see Michele Benedetto, *Crisis on the Immigration Bench*, 73 BROOK. L. REV. 467, 469 (2008), the pressures of the system invite shortcuts and make Immigration Judges loathe to grant continuances even where fairness so requires. *See Cruz Rendon v. Holder*, 603 F.3d 1104, 1111 (9th Cir. 2010) ("A further continuance would not have

inconvenienced the court, except to the extent that the IJ wanted the case off her docket."). Caseload pressures explain why a rule such as that advocated in the dissent is required. The alternative puts all of the risk on the asylum applicant; but "[a]sylum seekers should not bear the entire burden of adjudicative inadequacy at the administrative level." *Guchshenkov v. Ashcroft*, 366 F.3d 554, 560 (7th Cir. 2004) (Posner, J.). An adverse ruling on a motion to reopen can result in severe consequences to the individual immigrant or asylum-seeker, "in loss of both property and life, or of all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) (Brandeis, J.); see also *Bridges* v. *Wixon*, 326 U.S. 135, 147 (1945).

Moreover, the form instructions provide even less assistance to an applicant. They instruct the applicant that they "must submit reasonably available corroborative evidence showing (1) the general conditions in the country from which you are seeking asylum, and (2) the specific facts on which you are relying to support your claim." Instructions: I-589, Application for Asylum and Withholding of Removal, at 8, found at <http://www.uscis.gov/files/form/i-589instr.pdf> (last accessed, Nov. 4, 2010). It is highly unlikely that a *pro se*

applicant would understand "the specific facts… to support your claim" as encompassing the date of admission; to the contrary, the fact of a timely filing does not "support" an asylum claim, but simply shows the non-application of a bar to eligibility. Moreover, while the form instructs the applicant to apply within a year of entry, *id.* at 2, it does not suggest that the applicant provide any corroboration of their date of entry.

Amicus is not without sympathy for the panel's objective of "mak[ing] immigration litigation more like other litigation," *Singh v. Holder*, 602 F.3d 982, 989 (9th Cir. 2010), but when the proceedings lack pretrial procedures, when there is no known opposing counsel until the trial, when the resources for applicants are utterly incommensurate with the obligations placed upon them, and when the stakes are so high, Amicus submits that a comparison to other litigation suggests an outcome different from the panel's approach.

II. MECHANISMS SUCH AS REOPENING CANNOT OBVIATE THE NEED FOR SPECIFIC NOTICE.

The Panel Opinion in this case suggested that other mechanisms such as reopening or continuances could provide some remedy for unforeseen corroboration-based denials. *Singh*, 602 F.3d at 991 n.13.

Amicus submits that without stretching the regulatory language very far, indeed, reopening will generally be unavailable for most failures to corroborate; and that the reopening provisions were not designed for this purpose. Amicus agrees that continuance requests are often appropriate and should often be made by applicants; and submits that some notice of an impending corroboration finding would help avoid unnecessary litigation precisely by helping litigants to make timely continuance requests and to permit them an opportunity to show good cause for the continuance.

A. Under the regulations, reopening is available only for evidence that was not "previously available"; further, it is discretionary and does not stay removal or toll relevant appeal deadlines.

Reopening will generally be unavailable to remedy a failure to obtain corroboration, if the evidence "could" have been obtained previously; thus, it would play only a limited role in remedying denials for failure to offer unforeseen corroboration documents. Moreover, the reopening mechanism is not adequate, inasmuch as it is discretionary and does not stay removal or toll relevant appeal deadlines.

Under the regulations, reopening is barred if the evidence could have been previously obtained: "A motion to reopen proceedings shall

not be granted unless it appears to the Board that evidence sought to be offered … was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.2(c)(1) (emphasis added). This requirement of prior unavailability is an "independent ground[] on which the BIA may deny a motion to reopen." *INS v. Abudu*, 485 U.S. 94, 104-05 (1988). Where an asylum applicant is denied asylum for, e.g., failing to corroborate her age, the regulations would not authorize reopening to present corroboration evidence, unless she could show that the prior evidence "could not have been discovered or presented" at the earlier hearing. *See, e.g.*, *Goel v. Gonzales*, 490 F.3d 735 (9th Cir. 2007).

Amicus' concern is that in light of the entire universe of asylum facts which could be corroborated, at least circumstantially, there is a high probability that applicants will be denied for evidentiary gaps which would not be obvious to an applicant until the denial. While ineffective assistance of counsel might suffice to permit reopening, *see Iturribarria v. INS*, 321 F.3d 889, 900 (9th Cir.2003), reopening will not help other applicants, such as those whose counsel simply made a poor strategic decision (perhaps focusing on corroboration evidence going to

the heart of their claim such as past persecution, rather than potential bars to eligibility). *See, e.g., Ezeagwu v. Mukasey*, 537 F.3d 836, 839 (8th Cir. 2008) (refusing to remand to permit corroboration, finding counsel had not been "grossly ineffective").

Amicus would also note that reopening is discretionary and may be denied, e.g., for failure to convince an Immigration Judge that the evidence would "alter the result." See, 8 C.F.R. § 1003.2(c)(1); *Shao v. Mukasey*, 546 F.3d 138, 168 (2d Cir. 2008); *see also*, *Chen* v. *U.S. Att'y Gen.*, 262 F. App'x 984, 984-85 (11th Cir. 2008) (Board erroneously found medical corroboration insufficient to justify reopening because it was "indecisive"). This has the potential to be circular; failure to corroborate may feed doubts about credibility, *Hoxha v. Gonzales*, 432 F.3d 919, 920 (8th Cir. 2006), and an adverse credibility finding may lead to denial of reopening for related claims. *See, Paul v. Gonzales*, 444 F.3d 148, 154 (2d Cir.2006); *Rasiah v. Holder*, 589 F.3d 1, 6 (1st Cir. 2009). Moreover, reopening does not stay removal, 8 C.F.R. § 1003.2(f), nor does it toll the period for the filing of an appeal. *Stone v. INS*, 514 U.S. 386 (1995).

In sum, reopening it at best an imperfect vehicle for remedying denials for failure to corroborate. Amicus submits that the better course would be to afford applicants a notice and opportunity to respond to intended corroboration findings, prior to denial, rather than attempting to respond to a denial after the fact.

B. Continuance motions will be appropriate in some cases, but notice of a perceived corroboration problems is essential to put applicants on notice.

The Panel also suggested that an applicant might avoid denial of asylum by seeking a continuance in appropriate cases. *Singh*, 602 F.3d at 991 n.13 (citing *Chhay v. Mukasey*, 540 F.3d 1, 7, n.2 (1st Cir.2008)). This is true; but specific notice to an applicant as to a perceived corroboration flaw is essential for that process to function smoothly.

In the often harried atmosphere of an Immigration Court, particularly where a particular claim involves so many distinct factual and legal inquiries, clear and specific notice is needed to give the applicant reasonable notice prior to denial. This is not an impossible standard, and many Immigration Judges already follow that salutary practice. For instance, in *Toure v. Holder*, __ F.3d __, 2010 WL 3928694, *8 (7th Cir. Oct. 8, 2010), the Immigration Judge went on the

record to note a need for corroboration as to date of entry, and directly explained the gap to the applicant with the help of a French interpreter.

Direct and clear notice as to perceived corroboration gaps will permit an applicant to provide a more detailed explanation for why the evidentiary gap exists, and to note the efforts that the applicant has already made to remedy it. The explanation might be accompanied by offers of proof, or limited additional testimony, and the Immigration Judge might ultimately find a continuance unnecessary precisely because the applicant has sufficiently explained the gap. In other cases, it may be necessary to produce a detailed description of all efforts made to obtain the requested evidence. In other cases the judge's finding would trigger a renewed attempt by the applicant to obtain the new evidence, which, if obtained, could result in asylum being granted and an appeal avoided. Where the perceived corroboration gap may not be immediately explained or filled, notice will permit the applicant to request a continuance, explaining why good cause exists to continue the proceedings. 8 C.F.R. § 1240.6.

Such a process, while it would place some additional burdens on Immigration Judges, would not do so unreasonably, *see Guchshenkov*,

366 F.3d at 560; and would likely result in overall efficiency savings by avoiding some unnecessary appeals and clarifying contested issues in other cases.

CONCLUSION

For these reasons, and those stated in petitioner's brief, Amicus Curiae respectfully urges the Court to find that some notice of perceived corroboration flaws is necessary prior to a corroboration-based denial of an application for asylum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2010, I caused the foregoing MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF PETITIONER MOTION FOR LEAVE TO FILE OUT OF TIME to be served on the following individuals by electronic service, via the ECF system:

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CERTIFICATE OF COMPLIANCE WITH FORMAT

I, Charles Roth, certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 29-2(c)(3), that this amicus brief is double spaced, using a proportionally spaced typeface of 14 characters per inch and contains 4869 words (not including the table of contents, table of authorities, certificate of service, and certificate of compliance).

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