

# Just Take My Word for It: Creating a Workable Test to Ensure Reliability in Overseas Document Verification Reports for Asylum Proceedings

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*ABSTRACT: This Note addresses the practice of Overseas Document Verification, an investigatory process through which employees of the U.S. Department of State attempt to verify the authenticity of documents submitted as evidence with asylum applications. The investigators' reports following these investigations sometimes contain few details regarding the methods used to reach their conclusions. This Note examines the use of these Overseas Document Verification reports in asylum proceedings and whether courts should require the reports to include a minimum level of detail about how the investigation was carried out. It compares the rationales of the circuits that have required this minimum detail threshold with those of the circuit that came to the opposite conclusion. Finally, it suggests an administrative rule to impose a minimum detail standard.*

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## I. INTRODUCTION

This Note examines the evidentiary standards—or lack thereof—that decision makers apply to reports created by the Department of State for asylum proceedings to determine whether part or all of an asylum-seeker’s application is fraudulent. Asylum represents a unique component of the immigration system. In offering asylum, the United States opens its doors and offers safe-haven to those fleeing persecution or violence.<sup>1</sup> This grant of protection is open to all who might reach the United States and prove their eligibility; there is no annual or per-country limitation on how many individuals can earn asylum.<sup>2</sup> A successful applicant (an “asylee”) immediately gains the right to work in the United States and is later able to gain a “green card” and eventually citizenship.<sup>3</sup>

A successful asylum application promises great reward, and because one’s claim could theoretically succeed on one’s word alone,<sup>4</sup> the potential

1. See *infra* Part II.A–B.

2. Jie Zong & Jeanne Batalova, *Refugees and Asylees in the United States*, MIGRATION POL’Y INST. (Oct. 28, 2015), <http://www.migrationpolicy.org/article/refugees-and-asylees-united-states>.

3. These benefits apply not only to principal applicants, but also derivatively to eligible spouses and children. See *infra* note 33 and accompanying text.

4. See Immigration and Nationality Act § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii) (2012) (“The testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.”); see also *infra* notes 41–44 and accompanying text (explaining what evidence is required as part of an asylum application).

incentives to file a fraudulent application for asylum are obvious.<sup>5</sup> Indeed, national news stories about groups of unscrupulous consultants and attorneys running asylum fraud rings suggest the problem of asylum fraud is not isolated.<sup>6</sup> Especially following the terrorist attacks in Paris in November 2015, public and political concern grew around the possibility of terrorists taking advantage of the U.S.–Syrian refugee resettlement program to enter the country to perpetrate attacks.<sup>7</sup> While refugees enter and gain permission to stay permanently through a different mechanism than asylum applicants, such fears represent a very real concern that anytime the United States opens its doors to immigrants, it risks that generosity being taken advantage of. As Hipolito M. Acosta, the former District Director of U.S. Citizenship & Immigration Services (“USCIS”), testified before the House Subcommittee on Immigration and Border Security, any opportunity of asylum relief will always attract some fraudulent applicants.<sup>8</sup>

The United Nations High Commissioner for Refugees (“UNHCR”) estimates that in 2013 the European Union, Australia, Canada, Japan, New Zealand, South Korea, and the United States received upwards of 600,000

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5. See *infra* Part II.C.

6. See Press Release, U.S. Citizenship & Immigration Servs., Immigration Consultants Sentenced for Filing Bogus Asylum Applications (May 7, 2014), <http://www.uscis.gov/news/newsreleases/immigration-consultants-sentenced-filing-bogus-asylum-applications> (regarding the sentencing of owner and employee of immigration consulting firm who were responsible for “a long-running scheme to prepare and file fraudulent asylum applications that made phony claims of religious persecution on behalf of hundreds of Chinese nationals”); Kirk Semple et al., *Asylum Fraud in Chinatown: An Industry of Lies*, N.Y. TIMES (Feb. 22, 2014), [http://www.nytimes.com/2014/02/23/nyregion/asylum-fraud-in-chinatown-industry-of-lies.html?\\_r=1](http://www.nytimes.com/2014/02/23/nyregion/asylum-fraud-in-chinatown-industry-of-lies.html?_r=1) (discussing a New York investigation into an asylum fraud ring that “has led to the prosecution of at least 30 people . . . accused of coaching asylum applicants in basic tenets of Christianity . . . All were charged with helping hundreds of Chinese immigrants apply for asylum using false tales of persecution.”).

7. See, e.g., Thomas Kaplan & Wilson Andrews, *Presidential Candidates on Allowing Syrian Refugees in the United States*, N.Y. TIMES (Nov. 17, 2015), <http://www.nytimes.com/interactive/2015/11/17/us/politics/presidential-candidates-on-syrian-refugees.html> (providing an overview of the 2016 presidential candidates’ positions on whether the United States should accept refugees from Syria); HOUSE HOMELAND SEC. COMM., SYRIAN REFUGEE FLOWS: SECURITY RISKS AND COUNTERTERRORISM CHALLENGES 9 (2015), [https://homeland.house.gov/wp-content/uploads/2015/11/HomelandSecurityCommittee\\_Syrian\\_Refugee\\_Report.pdf](https://homeland.house.gov/wp-content/uploads/2015/11/HomelandSecurityCommittee_Syrian_Refugee_Report.pdf) (recommending “[i]mmediate action . . . to temporarily suspend the admission of Syrian refugees into the United States” on the basis of security threats).

8. *Asylum Fraud: Abusing America’s Compassion?: Hearing Before the Subcomm. on Immigration and Border Sec. of the H. Comm. on the Judiciary*, 113th Cong. 27 (2014) (statement of Hipolito M. Acosta, former District Director, United States Citizenship and Immigration Services (“USCIS”) and Immigration and Naturalization Service (“INS”)) (“In sum, my experience in this field and our history will show that a policy that includes the possibility of being [legally allowed to remain in the country] upon making a credible fear claim at our ports of entry or being granted relief while already inside the country is a huge magnet for aliens who would normally not qualify for other immigration benefits. This also provides a golden opportunity for individuals or organizations who want to profit from this activity, whether human smuggling or in assisting applicants with false claims.”).

new applications for asylum.<sup>9</sup> Of these, applications to the United States alone represented an estimated 88,400 individuals.<sup>10</sup> In that same year, the United States granted over 25,000 individuals asylum;<sup>11</sup> an additional 13,000 out-of-country family members of successful asylum applicants were granted derivative asylum status—a total of more than 38,000 individuals who gained some sort of asylum relief in the United States in 2013.<sup>12</sup>

Given the incredibly high number of applications and the risk of fraud, decision makers reviewing applications rely heavily on reports referred to as Overseas Document Verifications (“ODVs”) to determine the authenticity of documentary evidence submitted to support an applicant’s story. These reports are prepared by U.S. officials or local employees of the U.S. Department of State working overseas for the U.S. Consular Services, and investigators use them to determine whether documentary evidence submitted by an asylum-seeker is authentic.<sup>13</sup> ODVs contain the conclusions of the investigation, but frequently have few other details regarding the investigator’s identity, qualifications, or methods. Over the last decade, several circuits have held that if decision makers are going to rely on ODVs in making asylum decisions, ODVs must include a minimum level of detail about the investigation.<sup>14</sup> However, the Ninth Circuit recently held that no such level of detail is necessary,<sup>15</sup> leaving open the question of what level of specificity courts will require from ODVs in asylum proceedings.

This Note proceeds in three parts. First, it briefly explores the history and sources of asylum law, as well as current asylum procedure and the role of ODVs.<sup>16</sup> Second, it discusses circuit court decisions that have required ODV

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9. OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR REFUGEES, UNHCR ASYLUM TRENDS 2013: LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES 5 (2014), <http://www.unhcr.org/5329b15a9.html>. Though the UNHCR has released new global data for 2014, as of the time of writing this Note, the U.S. Department of Homeland Security had not released its 2014 data to compare.

10. *Id.* at 8. This number refers to the number of UNCHR’s estimation of total *individuals* included in asylum applications, as applications may include spouses and children. *See infra* note 34 and accompanying text. In 2013, there were 45,370 new affirmative asylum cases filed as well as an estimated 26,830 defensive asylum requests. UNHCR ASYLUM TRENDS 2013: LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES, *supra* note 9, at 8 n.14.

11. This number reflects both “principal” applicants and included spouses and children. DANIEL C. MARTIN & JAMES E. YANKAY, U.S. DEP’T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2013, at 1 n.3 (2014), [https://www.dhs.gov/sites/default/files/publications/ois\\_rfa\\_fr\\_2013.pdf](https://www.dhs.gov/sites/default/files/publications/ois_rfa_fr_2013.pdf).

12. *Id.* at 1. Derivative asylum status is conferred on “following-to-join” beneficiaries, qualifying spouses and children who are not already in the United States at the time asylum is granted, but will join the primary applicant. *See id.* at 4; *see also Family of Refugees & Asylees*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/family/family-refugees-asylees> (last updated May 5, 2016) (explaining eligibility requirements for derivative family members and the petition process for those located outside the United States at the time of the asylum grant).

13. *See infra* notes 71–73 and accompanying text.

14. *See infra* Part III.A–B.

15. *See infra* Part III.C.

16. *See infra* Part II.

reports to meet a threshold level of detail, and contrasts them with the reasoning in the Ninth Circuit where the court came to the opposite conclusion.<sup>17</sup> Next, it argues for adopting a new balancing test to determine the reliability of ODVs.<sup>18</sup> Finally, it identifies and recommends the most efficient and expeditious method through which to introduce this balancing test to decision makers and investigators.<sup>19</sup>

## II. BACKGROUND

### A. DEVELOPMENT OF ASYLUM LAW IN THE UNITED STATES

Asylum law represents a unique portion of modern immigration law in the United States because, unlike the rest of the immigration system, our current regime of asylum and refugee protections has its roots in international law.<sup>20</sup> In 1951, in the wake of World War II, the United Nations adopted the United Nations Convention Relating to the Status of Refugees (“1951 Convention”), a comprehensive instrument that defined refugees and their rights.<sup>21</sup> A later amendment to the 1951 Convention, the 1967 Protocol Relating to the Status of Refugees (“1967 Protocol”), eliminated some of the original limitations of the 1951 Convention and guaranteed protection to a broader range of people.<sup>22</sup> The United States adopted the 1967 Protocol in 1968<sup>23</sup> and later passed the Refugee Act of 1980,<sup>24</sup> bringing the country officially into compliance with the requirements of the treaty.<sup>25</sup> Today, these protections are incorporated in the Immigration and Nationality Act (“INA”).

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17. See *infra* Part III.

18. See *infra* Part IV.A.

19. See *infra* Part IV.B.

20. REGINA GERMAIN, ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 1 (6th ed. 2010).

21. OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR REFUGEES, CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 2–3 (2010), <http://www.unhcr.org/3b66c2aa10.html>.

22. *Id.* at 2. The 1951 Convention was predicated by the effects of World War II, thus its provisions originally applied only to individuals who would have qualified under other named wartime conventions or agreements that existed at the time and whose fear of persecution was a result of events prior to 1951. *Id.* at 14. The 1967 Protocol removed these restrictions. *Id.* at 46–47. Both conventions also included provisions on *nonrefoulement*, a principle which “provides that no one shall expel or return (*‘refouler’*) a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom.” *Id.* at 3. This is a secondary guarantee of safety that essentially prohibits a country from sending someone back to a country where they fear persecution regardless of whether that country will grant asylum. While an interesting addition to the academic consideration of asylum law, *nonrefoulement* is outside the scope of this Note.

23. See Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; see also GERMAIN, *supra* note 20, at 1.

24. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C. ch. 12). The Refugee Act of 1980 is now contained within various sections of the Immigration and Nationality Act (“INA”). See Immigration and Nationality Act, 8 U.S.C. ch. 12 (2012).

25. ANDREW I. SCHOENHOLTZ ET AL., LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE

In 1996, Congress modified various portions of the INA, including those pertaining to refugees and asylum, through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRAIRA”).<sup>26</sup> IIRAIRA broadened protection in some ways, such as extending refugee status to those affected by “coercive population control” measures.<sup>27</sup> However, it also added restrictions that rendered an applicant ineligible for asylum in certain situations, including when: (1) an undocumented applicant could be removed to a safe “third” country; (2) an applicant failed to file an application within one year of entry into the United States; or (3) an applicant had previously been denied asylum.<sup>28</sup>

Following the terrorist attacks on September 11, 2001, Congress further restricted the asylum program through the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (“USA PATRIOT Act”), which included numerous changes to the INA and added specific bars to asylum for individuals connected to a variety of terrorism-related activity.<sup>29</sup> The most recent legislative change to asylum law came in 2005, when the REAL ID Act added statutory language to make clear the asylum applicant has the burden of proof to prove his or her membership in a protected class and credible fear of persecution.<sup>30</sup>

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DEPARTMENT OF HOMELAND SECURITY 7 (2014).

26. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C. ch. 12); GERMAIN, *supra* note 20, at 11.

27. See Immigration and Nationality Act § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (2012) (referring specifically to those who have been “forced to abort a pregnancy or to undergo involuntary sterilization” or who face persecution for resisting “coercive population control program[s]”).

28. GERMAIN, *supra* note 20, at 13. The INA provides exceptions or qualifications to each of these bars. See Immigration and Nationality Act § 208(a)(2)(A)–(C), 8 U.S.C. § 1158(a)(2)(A)–(C).

29. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT) of 2001, Pub. L. No. 107-56, 115 Stat. 272; see also Immigration and Nationality Act § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B); GERMAIN, *supra* note 20, at 13–14. The terrorism-related grounds for denying admissibility for immigrants (not just asylees) are incredibly wide-reaching, including anyone who “affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit . . . to a terrorist organization.” Immigration and Nationality Act § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). The broad language is of concern to immigrant rights groups, who argue, for instance, that one may be coerced into providing material support. See generally *The Terrorism Bars to Asylum*, NAT’L IMMIGRANT JUST. CTR., <http://immigrantjustice.org/terrorism-bars-asylum> (last visited May 15, 2016) (arguing that regulations intended to prevent terrorists from immigrating are overly broad).

30. REAL ID Act of 2005, Pub. Law No. 109-13 § 101(a)(3), 119 Stat. 302, 303 (amending); see Immigration and Nationality Act § 208(b)(1)(B), 8 U.S.C. § 1158(b)(1)(B); GERMAIN, *supra* note 20, at 14.

*B. CURRENT ASYLUM LAW AND APPLICATION PROCESS*

Despite the extensive overhauls to other areas of immigration law since the 1960s, asylum eligibility standards in the United States today are much the same as those originally enumerated in the United Nations 1951 Convention as amended by the 1967 Protocol.<sup>31</sup> Applicants for asylum must establish that they qualify under the INA as a refugee—specifically, that they are unable or unwilling to return to their home or previous country due to a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>32</sup> If the application is successful, the applicant, as well as the applicant’s spouse and any children included on the application, are immediately granted the right to work and obtain a Social Security card; after one year in the United States they may apply for permanent residence—in other words, a “green card”—and eventually citizenship.<sup>33</sup>

The affirmative asylum process<sup>34</sup> involves three general steps on the part of the applicant: (1) arriving in the United States;<sup>35</sup> (2) submitting a completed Form I-589 Application for Asylum and Withholding of Removal to USCIS that describes a basis for the asylum claim; and (3) completing a personal interview with an asylum officer.<sup>36</sup>

The many steps in the asylum process can be complex and time-consuming, especially for those who attempt to navigate the application process without the aid of legal counsel.<sup>37</sup> The current Form I-589, the official asylum application, is 12 pages long, requires detailed background

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31. *Compare* Immigration and Nationality Act § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i), *with* CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES, *supra* note 21, at 14.

32. Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42); *see also id.* § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i).

33. *Benefits and Responsibilities of Asylees*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/benefits-and-responsibilities-asylees> (last updated July 14, 2015).

34. An individual may also apply for asylum defensively during removal proceedings. Both forms of relief require a showing of persecution based upon the same set of factors; however, those seeking withholding of removal must show a clear probability of such persecution, rather than just a well-founded fear. *See* GERMAIN, *supra* note 20, at 25–26; *see also* Immigration and Nationality Act § 241(b)(3), 8 U.S.C. § 1231(b)(3).

35. Unlike many other forms of immigration relief, asylum relief is not barred to individuals that enter the country illegally. However, applicants for asylum must apply from within the United States (or when stopped at a port of entry). *Questions and Answers: Asylum Eligibility and Applications*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-and-answers-asylum-eligibility-and-applications> (last updated Sept. 3, 2009).

36. *The Affirmative Asylum Process*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process> (last updated Feb. 23, 2016).

37. *See* Yunie Hong & Timothy Griffiths, *A Matter of Life and Death: Asylum Seekers' Lack of Access to Competent Legal Representation*, LEGAL SERVS. N. CAL., <http://equity.lsn.net/a-matter-of-life-and-death-asylum-seekers-lack-of-access-to-competent-legal-representation> (last visited May 15, 2016).

information (for example, work and education history, relatives' names and birthplaces, etc.), and asks for comprehensive accounts of the incidents or circumstances that qualify the applicant for asylum.<sup>38</sup> Applicants must attach documentary evidence of either "general conditions in the country" or "specific facts" related to their claims.<sup>39</sup> If applicants are unable to provide this evidence, they must explain why it is not available.<sup>40</sup>

The application includes an additional 13 pages of instructions, which explain how much detail the application must include and what kind of documentary evidence is required.<sup>41</sup> For instance, applicants are asked to attach multiple copies of official documents used to verify marriages, divorces, and children's birthdates.<sup>42</sup> Additionally, applicants must attach supporting evidence of the events and circumstances underlying the claim of persecution, such as "newspaper articles, affidavits of witnesses or experts, medical and/or psychological records, doctors' statements, periodicals, journals, books, photographs, official documents, or personal statements or live testimony from witnesses or experts."<sup>43</sup> If unable to provide this sort of evidence, applicants must explain why it is not available.<sup>44</sup>

The interview portion of the application process is critical, as it allows the asylum officer to verify the information in the application—including the identity of the applicant and included family members—and to determine the credibility of both the applicant and his or her claims.<sup>45</sup> Though the interview is non-adversarial, the "officer has the affirmative duty 'to elicit all relevant and useful information bearing on the applicant's eligibility' for the form of relief sought."<sup>46</sup> If the applicant cannot conduct the interview in English, he

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38. U.S. CITIZENSHIP & IMMIGRATION SERVS., I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL 2-6 (2014), <https://www.uscis.gov/sites/default/files/files/form/i-589.pdf>.

39. *Id.* at 5.

40. *Id.*

41. U.S. CITIZENSHIP & IMMIGRATION SERVS., I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL: INSTRUCTIONS (2014), <https://www.uscis.gov/sites/default/files/files/form/i-589instr.pdf>.

42. *Id.* The government requires this information both to help verify the information in the application and because qualifying relations may be conferred asylum relief derivatively if the main application is approved.

43. *Id.* at 7-8.

44. *Id.* at 7.

45. U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE: INTERVIEWING PART I: OVERVIEW 5 (2006), <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Interview%20Part-Overview-Nonadversarial-Asylum-Interview-31aug10.pdf>. The Asylum Officer Basic Training Course is a five week course that all asylum officers are required to attend before beginning asylum adjudication. For a more detailed description of the course and complete training materials, see *Asylum Division Training Programs*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs> (last updated Mar. 5, 2012).

46. ASYLUM OFFICER BASIC TRAINING COURSE: INTERVIEWING PART I: OVERVIEW, *supra* note 45, at 5 (quoting 8 C.F.R. § 208.9(b) (2015)).

or she is required to provide—at his or her own expense—an acceptable translator who is fluent both in the applicant’s native language and English.<sup>47</sup>

If the asylum officer believes the applicant is credible and has a well-founded fear of persecution based on one of the protected grounds,<sup>48</sup> the officer will either grant asylum immediately or recommend it conditionally upon the satisfactory results of outstanding security checks.<sup>49</sup> If the applicant is otherwise legally allowed to be in the United States but the asylum officer determines the applicant has not met the burden of proof in the asylum application, the officer will send the applicant a Notice of Intent to Deny.<sup>50</sup> At that point, the applicant must follow up with additional evidence or argument in a timely manner or receive a Final Denial.<sup>51</sup> If an undocumented applicant does not meet the burden of proof, the asylum officer will deny the application and refer the applicant to the immigration court for removal proceedings.<sup>52</sup>

Eight regional asylum offices throughout the country initially adjudicate asylum claims.<sup>53</sup> The location where an applicant files an application, not the applicant’s country of origin or last residence, determines which asylum office adjudicates a claim.<sup>54</sup> If the initial asylum officer does not find the claim or applicant credible, the officer will then refer the applicant to the applicable immigration court for removal procedures. Individual immigration courts are governed by the law of the federal circuits in which they reside.<sup>55</sup>

The immigration court will conduct a *de novo* review of the entire asylum application, now through the lens of a *defensive* asylum claim.<sup>56</sup> During immigration court proceedings, if the immigration judge (“IJ”) finds the applicant is ineligible for asylum, the IJ must consider whether the applicant

47. 8 C.F.R. § 208.9(g) (2015) (explaining that the applicant must provide a suitable interpreter who is at least 18 years old, and not the applicant’s attorney or representative, or a witness testifying in the interview).

48. *See* Immigration and Nationality Act § 208(b)(1)(B)(i)–(ii), 8 U.S.C. § 1158(b)(1)(B)(i)–(ii) (2012) (“The burden of proof is on the applicant to establish . . . that the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. . . . [T]he trier of fact may weigh the credible testimony along with other evidence of record.”).

49. *Types of Asylum Decisions*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/types-asylum-decisions> (last updated June 16, 2015).

50. *Id.*

51. *Id.*

52. *Id.*

53. JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 12 (2009).

54. *The Affirmative Asylum Process*, *supra* note 36.

55. GERMAIN, *supra* note 20, at 277.

56. *See Types of Asylum Decisions*, *supra* note 49 (“If we are unable to approve your asylum application and you are in the United States illegally, we will forward (or refer) your asylum case to the Immigration Court. . . . The Immigration Judge will evaluate your asylum claim independently and is not required to rely on or follow the decision made by USCIS.”).

qualifies for other relief—either “withholding of removal” under INA § 241(b) or relief under the Convention Against Torture (“CAT”).<sup>57</sup> Withholding of removal and CAT relief, like asylum, are predicated on a showing of risk of persecution or torture and, if granted, prevent the government from sending the applicant back to his or her home country.<sup>58</sup> However, because both carry a higher burden of proof than asylum and do not include benefits like work authorization or a path to U.S. citizenship, they are less attractive forms of relief.<sup>59</sup> If the IJ denies asylum and other relief, the applicant may appeal the decision to the Bureau of Immigration Appeals (“BIA”), who then performs another *de novo* review of issues of “law, discretion, and judgment.”<sup>60</sup> Negative determinations by the BIA are appealable to the federal courts of appeal.<sup>61</sup>

The applicant has the duty to demonstrate through the application, documentary evidence, and the testimony at the interview that he or she has the requisite well-founded fear of persecution.<sup>62</sup> If the asylum officer finds that the facts present a *prima facie* case for well-founded fear, the officer must then determine whether the applicant is credible.<sup>63</sup> The INA prescribes a “totality of the circumstances” test for making the credibility determination, encouraging asylum officers to consider such factors as internal consistency, plausibility of claims, and demeanor.<sup>64</sup> The asylum officer will carefully consider the application and issue a decision based upon the application, its credibility, and applicable law.<sup>65</sup>

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57. U.S. DEP’T OF JUSTICE: EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FACT SHEET: ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS 4-7 (2009), <http://www.justice.gov/coir/press/og/AsylumWithholdingCATProtections.pdf>.

58. *Id.*

59. *Id.* at 6-7. While asylum claims require an applicant to show only a “reasonable fear” of persecution if returned to her home country, both withholding of removal and CAT relief require a showing that persecution or torture, respectively, are more likely than not if the applicant is returned home. *Id.* at 4-7.

60. GERMAIN, *supra* note 20, at 149, 199.

61. *Id.* at 199. Appeals of BIA decisions are brought in the Federal Court of Appeals in the circuit in which the initial immigration court that adjudicated the claim is located. *Id.* at 277.

62. See Immigration and Nationality Act § 208(b)(1)(B), 8 U.S.C. § 1158(b)(1)(B) (2012).

63. U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE: MAKING AN ASYLUM DECISION 7-8 (2002), <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTTC%20Lesson%20Plans/AOBT-Making-an-Asylum-Decision-3aug10.pdf>.

64. See Immigration and Nationality Act § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii); see also U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 63, at 4-5 (listing acceptable factors to consider in making a credibility decision including, among others, identified inconsistencies and explanations thereof, possible impact of trauma on testimony, “applicant’s ability to communicate,” possible interpretation errors, and “evaluation of the amount of detail an individual in the applicant’s situation reasonably can be expected to provide”).

65. ASYLUM OFFICER BASIC TRAINING COURSE: MAKING AN ASYLUM DECISION, *supra* note 63, at 16-17; see also *supra* note 49 and accompanying text.

## C. FRAUD IN THE ASYLUM SYSTEM

For the asylee, the outcomes of a successful asylum application are significant—those granted asylum are immediately eligible to work and participate in certain government programs; they eventually may become Lawful Permanent Residents (“LPRs”), putting them on track to possibly become U.S. citizens.<sup>66</sup> Unlike other legal forms of immigration (for example, work- and family-based visas), asylum is not subject to the yearly quotas and country caps that often cause visa applicants in other categories to wait years or decades for a visa, even after their application has been approved.<sup>67</sup> Moreover, unlike work- and family-based visas, an asylum application can succeed based solely on the word of the applicant, without any additional documentation or evidence.<sup>68</sup> These considerations—relative speed and perceived ease of success—make the possibility of fraudulent asylum claims a major concern of the U.S. government.<sup>69</sup>

Asylum officers have access to a variety of fraud-detection processes and systems.<sup>70</sup> Among other methods, asylum officers use ODV reports to help identify fraudulent asylum applications.<sup>71</sup> Given the various degrees of

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66. See *supra* note 49 and accompanying text.

67. *Visa Availability and Priority Dates*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-priority-dates> (last updated Nov. 5, 2015) (“[F]amily-sponsored preference visas are limited to 226,000 visas per year and employment based preference visas are limited to 140,000 visas per year. . . . In addition, there are limits to the percentage of visas that can be allotted based on an immigrant’s country of chargeability (usually the country of birth).”). The Bureau of Consular Affairs publishes monthly bulletins that provide information regarding the availability of certain types of visas. For countries or visa types with waiting lists, the bulletin provides the initial application date of individuals receiving that type of visa in the prior month, giving an idea of the length of the current wait. Due to the quota system described in INA § 201, the wait times for some categories can stretch years, sometimes even over a decade. See *Visa Bulletin for October 2014*, U.S. DEP’T OF ST. (Sept. 8, 2014), <http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-october-2014.html> (showing that, while generally those receiving F2A visas in September 2014 had only been waiting since February 2013, those receiving F1 visas from Mexico had been waiting since June 1994 and those receiving F4 visas from the Philippines had initially applied in April 1991).

68. See *supra* notes 41–44 and accompanying text.

69. See generally *Asylum Fraud: Abusing America’s Compassion?: Hearing Before the Subcomm. on Immigration and Border Security of the H. Comm. on the Judiciary*, *supra* note 8 (including testimony from various stakeholders regarding the extent and seriousness of fraud in the asylum system).

70. In 2004, USCIS created a specific internal group, Fraud Detection and National Security Directorate (“FDNS”), to assist in resolving discrepancies in a wide variety of immigration benefit applications, including asylum applications. *Fraud Detection and National Security Directorate*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/fraud-detection-and-national-security-directorate> (last updated Nov. 18, 2011).

71. FRAUD DETECTION & NAT’L SEC. DIV., U.S. CITIZENSHIP & IMMIGRATION SERV., I-589 ASYLUM BENEFIT FRAUD AND COMPLIANCE ASSESSMENT REPORT 17–20 (2009), [http://www.fairus.org/DocServer/amnesty\\_2014\\_debate/Asylum\\_Fraud\\_DraftReport.pdf](http://www.fairus.org/DocServer/amnesty_2014_debate/Asylum_Fraud_DraftReport.pdf) (discussing the ODV process). Given the draft nature of the report cited above, it is cited only for background purposes regarding the

bureaucratic and documentary sophistication among foreign governments, an asylum officer working in the United States may not be able to easily ascertain the legitimacy of documents such as birth certificates, education and employment documents, membership certificates, and arrest warrants. In such a circumstance, the asylum officer may request to have U.S. employees (generally officials with the Consular Bureau of the Department of State) in the foreign country attempt to verify these documents—an ODV.<sup>72</sup> If the results of the ODV suggest a document is fraudulent, it may affect the asylum officer's credibility determination and the officer's decision whether to deny the application entirely.<sup>73</sup>

#### D. THE ODV INVESTIGATION PROCESS

There is little documentation detailing the ODV process, perhaps because it is only a fraction of a consular officer's official duties or perhaps because the ODV process varies greatly depending on the document and country involved. Similarly, the reports that Department of State officials send to asylum officers or IJs in response to ODV requests are frequently brief in nature, conclusory in fact, and offer few details regarding who performed the investigation and what methods the officials used to reach their conclusions.<sup>74</sup> This lack of transparency leaves asylum officers, IJs, and asylum applicants hard-pressed to get a clear picture of exactly what the ODV investigation entailed in a given case. It also makes it especially hard for those outside the system to conceptualize what an ODV investigation really looks like in practice.

However, regardless of what an ODV investigation involves in practice, internal regulations and communications may provide a good basis for inferring what these investigations *should* look like. For instance, the Department of Homeland Security ("DHS") has administrative rules that strictly regulate the limited circumstances in which information contained in an asylum application or record can be disclosed.<sup>75</sup> These regulations allow confidential information contained in an asylum application to be shared with U.S. government officials for the purposes of adjudicating the asylum claim.<sup>76</sup> The same rule strictly limits the ability of U.S. officials to disclose applicant or application-specific information to third parties—including, for instance, foreign government officials or contacts in foreign countries with whom U.S. officials might consult during an ODV investigation.<sup>77</sup>

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ODV process without any reliance on the stated findings regarding the effectiveness of the process.

72. *Id.* at 18. While these requests are generally handled by the Department of State, a few countries have a USCIS presence that handles requests in those countries. *Id.* at 18 n.22.

73. *Id.* at 18.

74. *See infra* notes 95, 128, 138 and accompanying text.

75. 8 C.F.R. § 208.6(a) (2015).

76. *Id.* § 208.6(c)(1).

77. *Id.* § 208.6(a) ("Information contained in or pertaining to any asylum application,

In 2001, Immigration and Naturalization Service (“INS”) General Counsel Bo Cooper provided guidance and interpretation of this confidentiality rule in an influential internal memorandum titled “Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information” (the “Cooper Memo”).<sup>78</sup> The Cooper Memo noted that the rule “prohibits INS personnel from commenting to any third party on the nature or even the existence of individual applications for asylum,” and provided specific guidance “to help interpret these requirements and guide . . . overseas personnel as they undertake verifications of evidence submitted in support of asylum applications.”<sup>79</sup>

The Cooper Memo recognized that proper investigatory methods will vary, especially when the investigation includes verification of documentary evidence.<sup>80</sup> Regarding ODV reports, the Cooper Memo explained that thorough and detailed reports are necessary to enable decision makers to readily determine the reliability of the investigation and conclusions.<sup>81</sup> It also provided a comprehensive list of the information an investigator should include in the investigative report to the requesting USCIS officer, including: (1) the identity, credentials, and local connections of the investigator; (2) the goal of the investigation and summary of investigative methods used; and (3) specifics of each relevant conversation or search during the course of the investigation.<sup>82</sup>

Considering the confidentiality protections in DHS rules, it is clear that some standards bind investigators during the process of their investigations.<sup>83</sup>

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records pertaining to any credible fear determination conducted pursuant to § 208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 208.31, shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General.”)

78. Memorandum from Bo Cooper, Gen. Counsel, INS, to Jeffrey Weiss, Dir., Office of Int’l Affairs (June 21, 2001), in *Immigration and Naturalization Service’s (INS’S) Interactions with Hesham Mohamed Ali Hedayet: Hearing Before the Subcomm. on Immigration, Border Sec., and Claims of the H. Comm. on the Judiciary*, 107th Cong. 39 (2002) [hereinafter Cooper Memo].

79. *Id.* at 40–41. Though the Cooper Memo was originally drafted for INS officials, INS disbanded in 2002 and passed responsibilities to the newly formed DHS. *See infra* note 163 and accompanying text.

80. Cooper Memo, *supra* note 78, at 43–44.

81. *Id.* at 44. The Cooper Memo specifically explains the need for detailed reports:

The content of the investigative report is critical if it is to effectively convey information to the adjudicating official. . . . [F]or example, the quality of the investigative report can determine the report’s admissibility as evidence and . . . the weight the [decision maker] will accord to it. A report that is simply a short statement that an investigator has determined an application to be fraudulent is of little benefit.

*Id.*

82. *Id.* at 44–45.

83. *See* 8 C.F.R. § 208.6(a)–(b) (2015) (setting out confidentiality requirements for DHS,

The Cooper Memo paints a clearer picture of what the government expects in investigators' reports.<sup>84</sup> Unfortunately, these expectations are not legally binding requirements, leaving decision makers with the task of evaluating and weighing ODV reports that do not meet the standards outlined in the Memo. As appeals by asylum applicants have reached various federal courts of appeals, several circuits have expressed concern in the brevity and vagueness of some ODV reports.<sup>85</sup> The Ninth Circuit departed from this trend in December 2013, holding that even vague ODV reports or those based on multiple levels of hearsay are admissible because they are prepared by Department of State officials who are entitled to a presumption of regularity and competence.<sup>86</sup>

### III. OVERSEAS DOCUMENT VERIFICATION REPORTS IN ASYLUM CASES

Since 2002, six circuits have directly addressed challenges to ODV reports. These circuits have considered the issue of whether there is either a statutory or constitutional basis for requiring ODV reports to include a threshold level of detail before they can be used as the basis for determining credibility or denying asylum applications.<sup>87</sup> It is unclear whether this growing number of cases merely represents a shift in courts' willingness to consider such challenges, or whether it indicates an increase in worrisomely vague and perfunctory ODV reports. First, Subpart A addresses the Second Circuit's determination that vague ODV reports are not sufficient to meet the INA's substantial evidence requirement. Next, Subpart B addresses the Third, Fourth, Sixth, and Eighth Circuits' reasoning that reliance on such ODV reports violates due process. Finally, Subpart C discusses the Ninth Circuit's decision that ODV reports need not meet a minimum threshold of detail to be the basis of an asylum denial.

#### A. THE SECOND CIRCUIT'S APPROACH: ODV REPORTS MUST INCLUDE A MINIMUM LEVEL OF DETAIL IN ORDER TO MEET THE SUBSTANTIAL EVIDENCE REQUIREMENT

While not the first case to address a challenge to a vague ODV report, the 2006 case of *Zhen Nan Lin v. United States* provides a useful analytical starting point for two reasons. First, unlike the other circuits that have upheld a

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DOJ, and the Department of State).

84. See *supra* note 81 and accompanying text.

85. See *Banat v. Holder*, 557 F.3d 886, 890–92 (8th Cir. 2009); *Anim v. Mukasey*, 535 F.3d 243, 256–58 (4th Cir. 2008); *Alexandrov v. Gonzales*, 442 F.3d 395, 404–05 (6th Cir. 2006); *Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 268–72 (2d Cir. 2006); *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405–08 (3d Cir. 2002).

86. *Angov v. Holder*, 736 F.3d 1263, 1276–77 (9th Cir. 2013), *reh'g denied sub nom.* *Angov v. Lynch*, 788 F.3d 893 (9th Cir. 2015), *cert. denied* 136 S. Ct. 896 (2016) (mem.).

87. See *id.*; *Banat*, 557 F.3d at 890–92; *Anim*, 535 F.3d at 256–58; *Alexandrov*, 442 F.3d at 404–05; *Lin*, 459 F.3d 268–72; *Ezeagwuna*, 325 F.3d 405–08.

minimum threshold of specificity,<sup>88</sup> the *Lin* court did not base its decision on constitutional grounds, but rather on the evidentiary standards that BIA decisions are required to meet.<sup>89</sup> Because the Supreme Court has consistently held that immigrants have fewer constitutional protections than U.S. citizens,<sup>90</sup> the Court's constitutional avoidance may provide an important alternative legal theory for future decision makers.<sup>91</sup> Second, the *Lin* court articulated a three-factor framework for deciding whether ODV reports provide enough detail for decision makers to rely upon them, a test which provides a useful analytical framework.<sup>92</sup>

In *Lin*, the applicant was a citizen of China who sought asylum defensively, claiming fear of persecution due to his involvement in pro-democracy demonstrations and activism.<sup>93</sup> Following a request for authentication, the U.S. Consul in Guangzhou concluded that the prison-release certificate that Lin had provided with his application was fraudulent.<sup>94</sup> The brief ODV report consisted of two documents: a two-sentence fax from the Chinese Prison Bureau to the Consulate and a summary letter by the lead INS investigator, Susanna Liu (the "Liu Letter").<sup>95</sup> Following an initial asylum

88. See *infra* Part III.B.

89. *Lin*, 459 F.3d at 269 ("Like any other adverse factual finding, the BIA's conclusion that an applicant has filed a forged document must be supported by substantial evidence." (citing *Borovikova v. U.S. Dep't of Justice*, 435 F.3d 151, 156–57 (2d Cir. 2006))).

90. Although courts have traditionally not awarded full constitutional rights to noncitizens, those who have been admitted to the country are generally afforded greater rights (though still not full constitutional protections). Compare *Ekiu v. United States*, 142 U.S. 651 (1892) (holding, as to an excluded and detained alien, that due process did not require any more than the questioning that led to the executive officer's original decision, and thus that decision was not reviewable), and *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."), with *United States ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103, 106 (1927) ("Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process . . ."), and *Landon v. Plasencia*, 459 U.S. 21 (1982) (holding that a legal permanent resident excluded at the border upon returning is entitled to the same due process she would have if the government was seeking deportation instead of exclusion).

91. The theory of constitutional avoidance dictates that courts address constitutional questions only if the case cannot be decided on other grounds. See generally *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341–56 (1936) (Brandeis, J., concurring).

92. *Lin*, 459 F.3d at 271.

93. *Id.* at 259.

94. *Id.* at 260.

95. *Id.* The fax says in relevant part: "We have received your inquiry for verification of the authenticity . . . Through investigation, LIN, Zhen Nan's Certificate of Release . . . is counterfeit and invalid." *Id.* The Letter from Liu says in its entirety:

Predication of investigation:

The investigation was predicated on receipt of a letter from [Assistant District Counsel] Meagen R. Sleeper requesting verification of documents submitted to support a claim for benefits. The documents included a Certificate of Release issued by Guangzhou No. 7 Prison on September 3, 1994.

denial by an asylum officer, an IJ considered both Lin's asylum claim and whether he otherwise qualified for withholding of removal. Despite the ODV report's conclusion, the IJ found Lin eligible for both forms of relief.<sup>96</sup> The IJ specifically noted that the report was unreliable—especially in light of credible testimony at the hearing—because a Chinese official may have reason to provide incomplete or inaccurate information when questioned about human rights abuses.<sup>97</sup> On appeal, the BIA held that the IJ had erred in disregarding the ODV report. Based primarily on the findings outline in the report, the BIA overturned the IJ's rulings.<sup>98</sup>

The Second Circuit ultimately decided that it did not need to reach the question of whether the BIA's reliance on the consular report violated Lin's right to due process because the BIA had not properly administered the statutory scheme at issue.<sup>99</sup> The court noted—as the IJ had initially—that the report appeared to be based entirely upon the word of Chinese government officials, who had obvious reason to not be truthful.<sup>100</sup> In fact, a recent Department of State Country Report had specifically explained that the Chinese government “den[ie]d holding any political prisoners, . . . [h]owever, the authorities continued to confine citizens for political and religious reasons.”<sup>101</sup> Here, the court found that the ODV report was unreliable evidence, and thus unable to meet the substantial evidence standard required of the BIA for adverse findings of fact.<sup>102</sup>

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Results:

A call from Prison Affairs Section of Prison Administration Bureau of Guangdong Province certifies that the Certificate of Release was fabricated. There is no No. 7 Prison in Guangzhou at all.

*Id.*

96. *Id.* at 261. The IJ also found that the government had not taken proper precautions to protect Lin's identity and thus had possibly put him or his acquaintances at greater risk of harm. *Id.*; see also 8 C.F.R. § 208.6(a)–(b) (2015).

97. *Lin*, 459 F.3d at 261 (“China has consistently denied abusing its citizens' human rights, and that, therefore, ‘it would not be unreasonable to conclude that the Chinese government's response [to the U.S. requests for information] could have been intended to frustrate the respondent's asylum claim by denying [the] authenticity of his documents.’”).

98. *Id.*

99. *Id.* at 269 (“Administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.” (quoting 8 U.S.C. § 1252(b)(4)(B) (2012))).

100. *Id.* at 269.

101. *Id.* at 270 (first alteration in original) (quoting U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA 2000 (2001), <http://www.state.gov/j/drl/rls/hrrpt/2000/eap/684.htm>).

102. *Id.* at 269 (citing *Borovikova v. U.S. Dep't of Justice*, 435 F.3d 151, 156–57 (2d Cir. 2006); *Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 157 (2d Cir. 2006); and *Zhang v. INS*, 386 F.3d 66 (2d Cir. 2004)); see also *Ramsameachire v. Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004) (holding that the BIA may only rely on airport interviews of asylum-seekers if those interviews are reliable, in that the record of the interview “presents an accurate record of the alien's statements, and [establishes] that it was not conducted under coercive or misleading circumstances.”).

The court noted that, while ODV reports played an important role in asylum proceedings, reports originating from overseas officials must contain enough information for the decision makers to assess their reliability.<sup>103</sup> Using the Cooper Memo as a guide, the court identified three factors to use when evaluating the reliability of an ODV report—whether the report includes: (1) “the identity and qualifications of the investigator(s);” (2) “the objective and extent of the investigation;” and (3) “the methods used to verify the information discovered.”<sup>104</sup> Because the Liu Letter did not even provide the name of the investigator<sup>105</sup>—let alone details of who the investigator spoke to in the Chinese government or how that information was verified—the court had no way of determining its reliability. Therefore, the court held that the BIA erred in relying upon it.<sup>106</sup> Subsequent courts have referred to the Second Circuit’s analytical framework as the “*Lin* Factors.”<sup>107</sup>

*B. THE THIRD, FOURTH, SIXTH, AND EIGHTH CIRCUITS’ APPROACH: ODV REPORTS MUST INCLUDE A MINIMUM LEVEL OF DETAIL IN ORDER TO ENSURE CONSTITUTIONAL DUE PROCESS RIGHTS*

Despite the doctrine of constitutional avoidance, the Second Circuit is the outlier in finding a *statutory* basis for rejecting vague ODV reports. Since 2003, four other circuits have determined that the BIA’s reliance on consular

103. *Lin*, 459 F.3d at 270.

104. *Id.* at 271. The Cooper Memo’s requirements are much more stringent:

- (i) the name and title of the investigator;
- (ii) a statement that the investigator is fluent in the relevant language(s) or that he or she used a translator who is fluent in the relevant language(s);
- (iii) any other statements of the competency of the investigator and the translator deemed appropriate under the circumstances (such as education, years of experience in the field, familiarity with the geographic terrain, etc.);
- (iv) the specific objective of the investigation;
- (v) the locations of any conversations or other searches conducted;
- (vi) the name(s) and title(s) of the people spoken to in the course of the investigation;
- (vii) the method used to verify the information;
- (viii) the circumstances, content, and results of each relevant conversation or search[ ]; and
- (ix) a statement that the Service investigator is aware of the confidentiality provisions found in 8 C.F.R. § 208.6.

*Id.* (citing Cooper Memo, *supra* note 78, at 39–45).

105. While Susanna Liu wrote the Letter in question, the court notes that it has no way of knowing whether she had any part in the investigation. *Id.* at 271 n.10; *see also infra* note 123 and accompanying text.

106. *Lin*, 459 F.3d at 271–72.

107. *See Angov v. Holder*, 736 F.3d 1263, 1284 (9th Cir. 2013); *Banat v. Holder*, 557 F.3d 886, 891 (8th Cir. 2009).

reports with insufficient details regarding methods of investigation and verification raises due process concerns.<sup>108</sup> These courts focused on three main lines of reasoning. First, similar to the court in *Lin*, the courts found the lack of detail about investigators or their methods necessarily led to a lack of reliability, making it difficult for decision makers and reviewing courts to determine how much weight to give the reports.<sup>109</sup> Second, specifically in the context of due process, the courts found the reports fundamentally unfair because the applicants had no opportunity to meaningfully rebut the reports.<sup>110</sup> Finally, the courts expressed concern that decision makers may rely too heavily on the prestige of the Department of State as a guarantee of reliability instead of looking to details in individual reports that would allow the decision maker to determine the reliability of each report and the evidence to which the report applies.<sup>111</sup>

In 2003, before *Lin*, the Third Circuit addressed the case of a citizen of Cameroon in *Ezeagwuna v. Ashcroft*.<sup>112</sup> The applicant had initially submitted a large amount of documentary evidence to support her claim that she had been, and would be, subject to persecution based on the language she spoke and her involvement in anti-government political groups.<sup>113</sup> Five of those documents were sent to the U.S. Consulate in Yaoundé, Cameroon for verification; the resulting ODV report summarily stated that all five documents were fraudulent.<sup>114</sup> Due to concerns regarding the authenticity of the original letter containing the consulate investigator's conclusions, the Department of State provided a follow-up letter from Marc J. Susser, the Director of the Office of Country Reports and Asylum Affairs ("Susser Letter"), reiterating the substantive information from the original letter.<sup>115</sup> The IJ found Ezeagwuna had not established a well-founded fear of persecution, and the accompanying adverse credibility determination was based on: (1) the IJ's conclusion that Ezeagwuna's testimony at the hearing

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108. See generally *Banat*, 557 F.3d at 886; *Anim v. Mukasey*, 535 F.3d 243 (4th Cir. 2008); *Alexandrov v. Gonzales*, 442 F.3d 395 (6th Cir. 2006); *Ezeagwuna v. Ashcroft*, 325 F.3d 396 (3d Cir. 2003).

109. See, e.g., *Banat*, 557 F.3d at 890–91; *Anim*, 535 F.3d at 256–57; *Alexandrov*, 442 F.3d at 407; *Ezeagwuna*, 325 F.3d at 406.

110. See *Alexandrov*, 442 F.3d at 406–07; *Ezeagwuna*, 325 F.3d at 405–06.

111. See, e.g., *Banat*, 557 F.3d at 890; *Anim*, 535 F.3d at 258; *Ezeagwuna*, 325 F.3d at 407.

112. *Ezeagwuna*, 325 F.3d at 398.

113. Ms. Ezeagwuna was a native English speaker and therefore a minority in the primarily French-speaking Cameroon. Her political activities were with groups that supported the English-speaking minority. *Id.* at 399.

114. *Id.* at 401.

115. *Id.* at 402. The court was not entirely clear why it admitted the Susser Letter into evidence other than the fact that DHS had not been able to procure an original copy of the first letter from the Consulate. *Id.* Regardless, the court made it clear that the Susser Letter did not provide any substantively different or more detailed information regarding the investigation and who carried it out. *Id.* at 407. The entirety of the Susser Letter is reproduced in the appendix to the opinion. *Id.* app. at 411.

had been “exaggerated and rehearsed;” (2) the IJ’s feelings “that details of her testimony ‘simply did not add up;” and (3) the adverse authenticity findings for some of the documents submitted.<sup>116</sup> The BIA rejected the first two grounds for the IJ’s adverse credibility finding, but nonetheless upheld the decision.<sup>117</sup>

The Third Circuit found that the BIA had violated Ezeagwuna’s right to due process because the Susser Letter did “not satisfy [the court’s] standards of reliability and trustworthiness.”<sup>118</sup> The court noted that while hearsay is technically allowed in immigration court, it is still “inherently untrustworthy” because the original speaker is unavailable for testimony; the court found this especially worrisome considering the multiple levels of hearsay involved in the Susser Letter.<sup>119</sup> The court also emphasized that the INS could not rely upon “the State Department letterhead to make its case and give credibility to the letter[.]”<sup>120</sup> Ultimately, the court declared “that the complete dearth of information about the investigator or the investigation undermine[d] the Susser letter as not only untrustworthy, but also unhelpful” and therefore found the BIA violated Ezeagwuna’s right to due process by relying upon the Susser Letter for its determination.<sup>121</sup> Although this case was decided before *Lin*, the court critiqued the letter because it lacked the very same information the *Lin* Factors would later analyze.<sup>122</sup>

Several years later, the Sixth Circuit took up the case of *Alexandrov v. Gonzales*, a case involving a Bulgarian citizen who sought asylum defensively during removal proceedings.<sup>123</sup> Alexandrov’s persecution claims centered

116. *Id.* at 403. Two other reports in the record attempted to address the authenticity of Ms. Ezeagwuna’s claim and her evidence—a forensic report from the Forensic Document Laboratory at the INS and a report from the political party Ms. Ezeagwuna claimed to be a part of discussing false membership claims. *Id.* These reports were not the focus of the court’s opinion.

117. *Id.* at 404–05 (“Despite the fact that we do not agree with all aspects of the Immigration Judge’s decision, we see no reason to disturb the adverse credibility determination.” (quoting the BIA’s decision)); *see also id.* at 404 (“Consequently, to the extent that the Immigration Judge’s decision is based upon finding these accounts of the respondent incredible solely based upon their implausibility and/or the manner in which the testimony was provided, we disagree with the Immigration Judge.” (quoting the BIA’s decision)).

118. *Id.* at 406. The court notes that noncitizens are entitled to due process protection in removal proceedings, and that the test for whether that right has been violated depends on the reliability and trustworthiness of the evidence considered. *Id.* at 405 (citing *Chong v. Dist. Dir., INS*, 264 F.3d 378, 386 (3d Cir. 2001); and *Felczerek v. INS*, 75 F.3d 112, 115 (2d Cir. 1996)).

119. *Id.* at 406–07 (quoting *United States v. Reilly*, 33 F.3d 1396, 1409 (3d Cir. 1994)).

120. *Id.* at 407–08.

121. *Id.* at 408.

122. *Compare id.* (“[W]e have absolutely no information about what the ‘investigation’ consisted of, or how the investigation was conducted in this case. . . . [H]ere, the nature of the purported ‘investigation’ is a matter of pure conjecture . . .”), with *Lin v. U.S. Dep’t of Justice*, 459 F.3d 255, 271 (2d Cir. 2006) (explaining the report at issue in that case was “woefully insufficient” because it did not include enough information to glean how the investigation had been performed).

123. *Alexandrov v. Gonzales*, 442 F.3d 395, 397 (6th Cir. 2006).

around his membership in a disfavored political party, beatings and harassment by the police, and a conviction in absentia for which he had been sentenced to five years in prison.<sup>124</sup> The record included two letters from the Consular Section of the U.S. Embassy in Sofia, Bulgaria—an initial letter from Vice Consul Grecnik (“Grecnik Letter”) and a follow-up letter from Vice Consul Hazel (“Hazel Letter”) correcting factual errors made in the original Grecnik investigation. Despite the investigator errors in the initial investigation, both letters alleged that all of the documents Alexandrov submitted were fraudulent.<sup>125</sup>

At Alexandrov’s removal hearing in immigration court, an acting officer of the Office of Asylum Affairs with the Department of State testified regarding the letters and investigations.<sup>126</sup> Though this official claimed to have spoken to Hazel the morning of the hearing, the official had no direct knowledge as to how the investigation was undertaken or who performed the investigative work.<sup>127</sup> The official testified that, while the investigation may have been performed by an unknown U.S. employee or even a “local national[] who [was a] former policem[a]n or former investigator[],” what mattered in the normal workings of the Department of State was which official was willing to sign their name to the document, and in so doing, certify the contents of the document.<sup>128</sup> Despite this lack of personal knowledge of either investigation, the testifying official did clarify that such reports were “collected in the ordinary course of the business” and were “relied upon by the State Department.”<sup>129</sup> The IJ concluded that Alexandrov’s documentary evidence was fraudulent and therefore found his asylum application frivolous, denying relief on the basis of the ODV letters, the official’s testimony, and the IJ’s own opinion that some of Alexandrov’s testimony was “inherently incredible.”<sup>130</sup> The BIA adopted the findings of the immigration court without additional comment.<sup>131</sup>

Directly citing *Ezeagwuna* as the leading case on the topic, the Sixth Circuit found many of the same concerning factors in the consular letters in

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124. *Id.* at 399. The court does not explicitly address for what crime Alexandrov claimed to have been convicted in absentia.

125. *Id.* at 399–400.

126. *Id.* at 400 n.4.

127. *Id.* at 401.

128. *Id.* at 401–02; *see also id.* at 402 (“I don’t know. I’ve never talked with [Grecnik]. She has taken responsibility for that statement. And whether it’s her conclusion or her accepting of a conclusion from others, I do not know.”).

129. *Id.* at 403. Though the Federal Rules of Evidence do not apply in immigration proceedings, this line of questions from the INS counsel seem to suggest the document may be relied upon for the same reasons that business records are exempted from standard hearsay rules. *See* FED. R. EVID. 803(6).

130. *Alexandrov*, 442 F.3d at 403.

131. *Id.* at 404.

*Alexandrov* that the *Ezeagwuna* court had noted.<sup>132</sup> The *Alexandrov* court cautioned against “excessive reliance” on Department of State reports, noting that asylum applicants are entitled to due process that could be undermined if decision makers too easily accept government-produced evidence.<sup>133</sup> The court noted that, although the Department of State had produced two letters in this case, they were “even less reliable than the letter in *Ezeagwuna*” because neither letter detailed who provided the information to the investigator.<sup>134</sup>

While not notably different in overall reasoning, a brief discussion of the 2009 Eighth Circuit case, *Banat v. Holder*, provides some additional nuance about what courts may require from ODV reports. The ODV report at issue in *Banat* cited the source of its information as a confidential informant within a Palestinian activist group.<sup>135</sup> Though the court found the ODV report ultimately too vague to be reliable, it reasoned that there would be some circumstances—such as when consular officers must have the ability to maintain secret contacts within governments or political groups—in which revealing too many details might put further investigations at risk.<sup>136</sup> The *Banat* court suggested that in such a circumstance, the investigator should still provide information regarding the report’s reliability by, for instance, explaining how long the informant had been a source for the Embassy, what the informant’s track record had been for providing accurate information, and whether the Embassy considered the source to be well informed.<sup>137</sup>

C. THE NINTH CIRCUIT’S APPROACH: NO MINIMUM LEVEL OF DETAIL IS  
REQUIRED TO ESTABLISH CREDIBILITY

The Ninth Circuit made a distinct departure from ten years of general consensus among the circuits on this issue when it decided *Angov v. Holder* in 2013. The asylum applicant in *Angov* was a Bulgarian citizen of Roma descent.<sup>138</sup> *Angov* claimed the Bulgarian police had subjected him to beatings,

132. *Id.* at 405–06.

133. *Id.* at 405–07.

134. *Id.* at 407.

135. *Banat v. Holder*, 557 F.3d 886, 891 (8th Cir. 2009).

136. *Id.* at 892 (“We fully recognize that divulging more information concerning the particulars of the investigations undertaken may, in some cases, run the very real risk of compromising and jeopardizing the physical safety of the clandestine sources, confidential contacts, and investigators . . .”).

137. *Id.* at 893.

138. *Angov v. Holder*, 736 F.3d 1263, 1266 (9th Cir. 2008). The court refers to Mr. Angov as either “Roma” or “gypsy” interchangeably. *Id.* at n.1. In light of the fact that the latter term is sometimes used derogatorily, this Note will not use it unless directly quoting language from the court’s opinion. See *Their Name: Roma? Sinto? Gypsy?*, USC SHOAH FOUND., <http://sfi.usc.edu/education/roma-sinti/en/conosciamo-i-roma-e-i-sinti/chi-sono/da-dove-vengono-il-nome/il-nome-rom-sinto-zingaro.php> (last visited May 15, 2016) (explaining the term “is a derogatory, disparaging term[—]for many an insult[—]used by the majority population to define the Roma people” and giving the history of the term’s use).

arrests, and general harassment because of his ethnicity.<sup>139</sup> The results of the ODV investigation were summarized in a brief letter from Cynthia Bunton, Director of Department of State's Office of Country Reports and Asylum Affairs ("Bunton Letter"), concluding that the documents sent for verification were fraudulent and some of the places, names, and phone numbers Angov referenced in his application did not exist.<sup>140</sup> The IJ issued an adverse credibility finding and ultimately denied relief based upon the Bunton Letter's findings; the BIA affirmed without additional comment.<sup>141</sup>

The Ninth Circuit saw no merit in Angov's argument that the admission of the Bunton Letter violated either statutory evidentiary requirements or his due process rights.<sup>142</sup> Instead, the court focused on the gravity of the problem of asylum fraud and the difficulty faced by U.S. officials attempting to ferret out that fraud.<sup>143</sup> In the view of the *Angov* court, officials' limited ability to discover fraud combined with the "minor" consequences of being caught—the only consequence to an unsuccessful claim, according to the court, is merely being put back where one started—creates a moral hazard that encourages rampant fraud in the asylum system.<sup>144</sup>

Approaching the question with a more defensive position against potential fraud, the *Angov* court started its reasoning with a "reality check" — that the Supreme Court rarely holds that admitting evidence constitutes a violation of due process.<sup>145</sup> Instead, the *Angov* court reasoned, such evidence should be admitted and addressed "via the adversary system."<sup>146</sup> The court worried that ruling that admitting evidence could violate the due process rights of noncitizens would necessarily open up other areas of the law to similar challenges.<sup>147</sup>

The Ninth Circuit relied on the seminal *Mathews v. Eldridge* balancing test for determining how much process is due in administrative proceedings—

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139. *Angov*, 736 F.3d at 1266.

140. *Id.*

141. *Id.* at 1267.

142. *Id.* at 1268.

143. *Id.* at 1268–69.

144. *Id.* at 1269. The court's portrayal of asylum fraud leaves little middle ground, seemingly lumping asylum applicants into two categories—either completely legitimate or completely fraudulent. The court's throwaway statement, "[a]nd if they do get sent back—at our expense—what's lost? They wind up where they started[.]" seems to suggest the court does not envision the possibility that someone might forge documents to bolster a legitimate claim. *See id.* Such an individual would undoubtedly have more to lose than just ending up "where they started." *See id.*

145. *Id.* at 1270–71.

146. *Id.* at 1272 (citing *Perry v. New Hampshire*, 132 S. Ct. 716, 728–29 (2012)). The court goes on to list "the ability to confront witnesses, the assistance of counsel, jury instructions, the burden of proof and the right to introduce contrary evidence" as hallmarks of the adversarial system. *Id.* While immigration court is adversarial in nature, as noted previously, these proceedings do not ensure all of the safeguards associated with criminal trials. *See supra* note 90 and accompanying text.

147. *Angov*, 736 F.3d at 1272.

balancing the interest of the asylum seeker, the risk of an erroneous decision with the current procedures, the chances that additional safeguards will decrease that risk, and the government's interest in efficiency and resource conservation.<sup>148</sup> The court reasoned that *Angov* had ample opportunity to provide counterevidence to the claims in the Bunton Letter; therefore, the risk of prejudice to his case was limited.<sup>149</sup> The government, on the other hand, worked with “scant resources.”<sup>150</sup> To hold that the Bunton Letter violated due process would “cripple the government’s ability to detect fraud in the asylum process.”<sup>151</sup> Directly citing the *Lin* Factors, the court stated that requiring such information would “transform[] a process that is swift, efficient and informal into one that’s ponderous, time-consuming and expensive.”<sup>152</sup>

Instead, the *Angov* court suggested that the Bunton Letter—and ODV reports in general—are inherently reliable because the government officials tasked with creating them are cloaked in the “presumption of regularity that attaches to all government actors.”<sup>153</sup> Regardless of who actually carried out the investigation, courts should rely on such reports because U.S. officials personally certify them. Courts can trust that those officials are relying on individuals who are otherwise “subject to discipline or prosecution for incompetence or corruption” and thus trustworthy.<sup>154</sup> Finding otherwise, the court warned, would encourage “the canny, the dishonest, [and] the brazen” to seek asylum and eventually lead Congress to eliminate asylum protection all together.<sup>155</sup>

#### IV. RESOLVING CIRCUIT DISAGREEMENT AND ENSURING GREATER CONSISTENCY BY REQUIRING A THRESHOLD LEVEL OF DETAIL AND SPECIFICITY IN ODV REPORTS

While the *Angov* court sought to ease the burden on the understaffed and overworked U.S. Consulate offices abroad,<sup>156</sup> *Angov* is unlikely to change consular officers’ processes in completing their ODV reports so long as five circuits require ODV reports to meet a threshold level of detail.<sup>157</sup> Due to the impossibility of knowing which asylum office will receive an asylum claim from any specific country in any given year, a single U.S. Embassy or Consulate

148. *Id.* at 1274; *see also* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

149. *See Angov*, 736 F.3d at 1274–75.

150. *Id.* at 1277.

151. *Id.*

152. *Id.*

153. *Id.* at 1280.

154. *Id.*

155. *Id.* at 1281.

156. *Id.* at 1269 (“All told, there are fewer than 6000 consular officials in embassies and consulates spread out across more than 170 countries.” (citing 1 U.S. SEC’Y OF STATE, CONGRESSIONAL BUDGET JUSTIFICATION: DEPARTMENT OF STATE OPERATIONS, FISCAL YEAR 2013, at 227–311 (2012), <http://www.state.gov/documents/organization/181061.pdf>)).

157. *See supra* note 85 and accompanying text.

Office could handle ODV requests from multiple asylum offices working under the laws of different federal circuits.<sup>158</sup> Given the brevity of some ODV reports and the limited resources the Department of State has at its disposal,<sup>159</sup> U.S. Department of State officials may not take the time to look up the court-articulated requirements for the specific circuit that may one day see a particular case on appeal, likely years down the road.<sup>160</sup>

Instead, the current state of circuit decisions is more likely to confuse U.S. consulate officials and investigators. While some courts have found fault with reports for being too sparse on details, another has firmly rejected the principle that reports need to meet a minimum standard of thoroughness. Even those courts that have demanded a threshold level of detail have not provided a bright-line test, but rather a nebulous set of factors, with no two courts ever directly adopting another's test or framework.<sup>161</sup> Meanwhile, the Cooper Memo demands a significantly higher standard than any court has required for the type of information that must be included in ODV reports. Thus, even if a consular officer or investigator wanted to ensure his report included the threshold level of detail, it would not be clear where that threshold lies. Similarly, given the vague standards articulated by various circuits, asylum officers and IJs do not necessarily have a clear test to determine whether the reports submitted by U.S. consulate offices meet the standards of the applicable circuit.

This ambiguity should be addressed to ease the burden on all parties involved in the asylum process. Resolving this issue by following the Ninth Circuit's approach of imposing no threshold level of detail would provide no real clarity; asylum officers, IJs, and courts would still be faced with the question of how to measure the credibility and reliability of each individual ODV report. In contrast, the approach adopted by the majority of the circuits—to require a minimum threshold level of detail—clarifies expectations for investigators and allows decision makers to give the proper weight to ODV reports in each case.

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158. This is especially true considering that some countries produce far more asylum applicants than others. See MARTIN & YANKAY, *supra* note 11, at 6 tbl.6 (showing Chinese nationals represented 34.5%, 34.5%, and 34.1% of total *successful* asylum applicants in 2011, 2012, and 2013 respectively).

159. See *Angou*, 736 F.3d, at 1277 (detailing the distinct lack of overseas resources at the Department of State's disposal).

160. For an explanation of the potential appeals that can follow a denial, see Ilona Bray, *How Many Times You Can Appeal an Asylum Denial*, NOLO, <http://www.nolo.com/legal-encyclopedia/how-many-times-you-can-appeal-asylum-denial.html> (last visited May 15, 2016).

161. See *Banat v. Holder*, 557 F.3d 886, 891 (8th Cir. 2009) (granting that the need for ensuring confidentiality of informants and explaining how alternate information could have been provided to help reviewers ensure reliability); *Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 271 (2d Cir. 2006) (referring to the factors as "non-exhaustive" while "provid[ing] an analytical framework").

A. USING THE LIN FACTORS TO SHAPE A WORKABLE RELIABILITY TEST

The Cooper Memo, while initially attractive because it was drafted internally by the agency that requests and receives ODV reports, is not an ideal basis for developing a workable reliability test for several reasons. First, the INS was officially disbanded and the Department of Homeland Security took over immigration enforcement following the Homeland Security Act of 2002, casting doubt on the Memo's persuasiveness.<sup>162</sup> More importantly, the Cooper Memo suggests nine specific types of information that must be included, the breadth of which might make compliance overly burdensome for busy Department of State employees.<sup>163</sup> Finally, as an internal communication, the Cooper Memo lacks the weight of a regulation.

Though the *Lin* court did not address these concerns directly, the court declined to directly impose the factors laid out in the Cooper Memo, using them instead as a guide to create a more succinct and distilled three-factor test, which would evaluate whether the report includes information regarding: (1) the investigator's identify and qualification; (2) the extent and ultimate objective of the investigation; and (3) whether the investigator attempted to verify the information learned and through what methods.<sup>164</sup> These factors provide a much more manageable test to apply to a given ODV report.<sup>165</sup>

However, the *Lin* court did not discuss how much of the information articulated in its framework could be missing before a report would be considered unreliable. The Eighth Circuit briefly addressed this possibility in *Banat*, suggesting that if, for instance, the identity of the investigator or source could not be revealed without putting the individuals or relationship at risk, the Embassy or Consulate Office could compensate by providing information regarding whether it had relied upon that individual in the past and whether it is the office's opinion that the individual is well-informed.<sup>166</sup> However, even the *Banat* court did not directly address the problem of how decision makers should handle reports that do not provide the information prescribed by the *Lin* Factors, but *also* do not provide any explanation or alternative information supporting reliability.

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162. U.S. CITIZENSHIP & IMMIGRATION SERVS., OVERVIEW OF INS HISTORY 11 (2012), <http://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf>.

163. See Cooper Memo, *supra* note 78, at 44-45. For instance, the requirement to detail "the circumstances, content and results of each relevant conversation or search[]" may lead to arduously long reports in some instances where the results of some conversations could otherwise be summarized or condensed. *Id.* at 45.

164. *Lin*, 459 F.3d at 271.

165. The *Lin* court is able to perform its analysis of the report at issue in just several short paragraphs. See *id.*

166. *Banat*, 557 F.3d at 893 (8th Cir. 2009); see also *supra* notes 137-38 and accompanying text.

With these limitations in mind, the *Lin* Factors should become the basis of a balancing test to determine whether a consular report is reliable: (1) to what extent the report in question satisfies the *Lin* Factors; (2) to what extent the author explains any gaps in *Lin* Factor information; (3) whether the report includes additional information to bolster reliability; and (4) to what extent the report's findings seem to fall in line with (i) other forms of credible evidence present (for example, Department of State Country Reports<sup>167</sup> or findings of certified medical doctors or other professionals); (ii) the decision maker's impressions of the credibility of the applicant's testimony; and (iii) any rebuttal evidence or testimony provided.

This approach easily satisfies the *Mathews v. Eldridge* test relied upon by the *Angov* court<sup>168</sup> because the benefits to applicants would more than offset the burden imposed on the Department of State. The applicant's interests are advanced because the chances of an erroneous denial are decreased. This safeguard helps to ensure that applicants will not be denied asylum based on unreliable evidence. Meanwhile, the imposition of the additional requirement that the report meet a threshold level of detail as assurance of credibility is minimal given the low threshold required by the *Lin* Factors.<sup>169</sup>

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167. Various acts of Congress require the Department of State to submit yearly country reports analyzing countries' track records on specific issues of concern to the U.S. government. These include, for instance, reports on human rights and international religious freedom. See *Human Rights Reports*, U.S. DEP'T OF ST., <http://www.state.gov/j/drl/rls/hrrpt> (last visited May 15, 2016); *International Religious Freedom*, U.S. DEP'T OF ST., <http://www.state.gov/j/drl/rls/irf> (last visited Apr. 1, 2016).

168. *Mathews v. Eldridge*, 424 U.S. 319 (1976); see also *supra* note 149 and accompanying text. For an additional discussion of *Mathews* within the contexts of immigration law and due process, see 1 NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE § 10:24, Westlaw (database updated Mar. 2016).

169. The *Angov* court took the consular letter at issue in the case and imagined how it would need to be amended to meet the standards imposed by the other circuits, essentially, the *Lin* Factors. The resulting report was only 135 words long. Even accounting for time to consider wording and what information needed to be included, it is hard to imagine drafting such a report would be an incredible imposition when investigators are already drafting brief letters or reports:

Agent Michael Smith, a foreign service agent with seventeen years of field experience who is fluent in Bulgarian, ordered Vladimir Popov, a foreign service national in the Embassy's employ, to visit the 5th Police District station in Sofia in order to seek authentication of the two subpoenas. FSN Popov is a lifelong resident of Sofia and has worked for the Embassy for two years. He is fluent in Bulgarian and speaks conversational English.

FSN Popov traveled to the station and, once there, spoke to Ludmilla Bogdanovich, who is the supervisor of personnel records at the station. FSN Popov considers Ms. Bogdanovich a trustworthy source. After she consulted the relevant records, Ms. Bogdanovich told FSN Popov that Captain Donkov, Lieutenant Slavkov and Investigator Vutov have never worked for the 5th Police District. Ms. Bogdanovich also told FSN Popov that the case numbers on the subpoenas were not correct, there was no room 4 on the second floor and no room 5 on the first floor and that the telephone numbers on the subpoenas were incorrect. While at the station, FSN Popov asked Ms. Bogdanovich for an imprint of the police station seal, which he brought back to the consulate. Agent Smith compared it to the seal

Thus, the proposed test and the requirements imposed on investigators by its adoption represent an ideal additional safeguard in the asylum process.

While establishing this standard will impose a small additional amount of administrative work in each investigation (writing a slightly longer report, keeping more detailed notes during the investigation, etc.), this relatively small inconvenience is far outweighed by the benefits accrued to the system as a whole. Investigators benefit from having clear and standardized expectations regarding the contents of their reports and how to handle specific situations in which they are unable to provide this information. Asylum officers, IJs, the BIA, and reviewing courts also benefit from an inclusive framework that determines how much weight to give consular reports within the totality of the circumstances test for determining credibility.<sup>170</sup> Government counsel opposing asylum claimants would have a test in which to fit ODV reports they seek to admit. Asylum applicants would benefit because additional details in ODV reports would allow applicants to provide additional evidence to combat the report's conclusions. Finally, the broader immigration system would benefit from more consistent outcomes.<sup>171</sup>

#### B. ENACTING THE LIN FACTOR BALANCING TEST

Merely developing a workable test is meaningless unless it can be effectively implemented in some way. Such a test could be imposed through adoption by the Supreme Court, through statutory changes by Congress, or through changes to the applicable regulatory structure. Congress, however, has made little progress in the last decade in the realm of immigration law.<sup>172</sup> While the Supreme Court could certainly have imposed such a standard, it declined to review *Angou*.<sup>173</sup>

In this case, adopting a new rule through administrative rulemaking may provide the most efficient method of introduction. Administrative

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on the two subpoenas and found the official seal to be much larger.

After hearing FSN Popov's oral report of his meeting with Ms. Bogdanovich, Agent Smith transmitted the information to the author of this letter by encrypted email.

*Angou v. Holder*, 736 F.3d 1263, 1278 (9th Cir. 2013).

170. See *supra* note 81 and accompanying text.

171. Approval rates of asylum claims vary vastly both based upon factors dependent on the applicant (for example, age, gender, or marital status) and upon which asylum office and specific asylum officer initially adjudicates the application. See generally RAMJI-NOGALES ET AL., *supra* note 53 (discussing asylum approval rates based upon deciding office and officer); SCHOENHOLTZ ET AL., *supra* note 25 (discussing asylum approval rates based upon variations in applicants).

172. See Audrey Singer, *The GOP Fails (Again) to Engage on Immigration Reform*, BROOKINGS: FIXGOV (Feb. 7, 2014, 4:39 PM), <http://www.brookings.edu/blogs/fixgov/posts/2014/02/07-republicans-immigration-reform-singer-mann> (examining possible reasons immigration reform did not move forward in 2014); Rachel Weiner, *How Immigration Reform Failed, Over and Over*, WASH. POST: THE FIX (Jan. 30, 2013), <http://www.washingtonpost.com/news/the-fix/wp/2013/01/30/how-immigration-reform-failed-over-and-over> (documenting years of failed attempts by congress to push through immigration reform).

173. *Angou v. Lynch*, 136 S. Ct. 896 (2016) (mem.).

rulemaking is generally less politically contentious than congressional action, and provides a clear path forward in the face of the Supreme Court's decision not to hear the case. Rulemaking would provide all interested parties (for example, lawyers, immigrants' rights groups, or various governmental entities) a say in the final regulation, hopefully leading to a clear and effective regulation.<sup>174</sup>

Title 8, Part 208 of the Code of Federal Regulations covers administrative rules regarding Procedures for Asylum and Withholding of Removal.<sup>175</sup> It includes provisions regarding both the confidentiality of asylum applicants and the ability of USCIS to elicit comments and information from the Department of State.<sup>176</sup> The Department of Homeland Security could promulgate a rule to adopt in either of those two sections, or add an additional section, specifically outlining the duties of the investigators and decision makers in creating and reviewing consular reports.<sup>177</sup>

The proposed rule could read as follows:

xx.x(a) To be considered reliable evidence within asylum adjudication, any report or letter provided by the Department of State to USCIS, or any other governmental entity adjudicating an applicant's claim for asylum, in response to a request for verification of documentary authenticity or other verification of factual claims shall include:

- (1) a brief statement identifying the investigator and explaining his or her credentials;
- (2) a brief statement regarding the objectives of the investigation and the extent or thoroughness of the investigation. Attention shall be paid, whenever possible, to including specifics regarding individuals spoken to, places visited, information gained, and what information about the applicant was provided to outside sources; and
- (3) a brief statement explaining what methods, if any, the investigator used to verify the information they gathered.

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174. See OFFICE OF THE FED. REGISTER, A GUIDE TO THE RULEMAKING PROCESS 6 (2011) [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) ("At the end of the process, the agency must base its reasoning and conclusions on the rulemaking record, consisting of the comments, scientific data, expert opinions, and facts accumulated during the pre-rule and proposed rule stages.").

175. See generally 8 C.F.R. pt. 208 (2015).

176. 8 C.F.R. §§ 208.6, 208.11.

177. The section on Comments from the Department of State already includes language regarding the Department of State providing opinions on an applicant's "particular situation" and that "the applicant shall be provided an opportunity to review and respond to such comments." 8 C.F.R. § 208.11(b)(2), (c). The proposed language would therefore likely fit best in this section, but the eventual location is ultimately of little consequence.

xx.x(b) If the report does not include the information outlined in xx.x(a), it can still be considered if it includes:

- (1) an explanation of why that information may not be disclosed, and
- (2) other sufficient indicia of reliability of the sources used within the course of the investigation such as past use of this confidential informant by the Department of State, or belief of the investigator as to why a particular source is well-informed or trustworthy as a source of information for their investigation.

xx.x(c) When evaluating the reliability of an investigative report, USCIS or any other governmental entity adjudicating an applicant's asylum claim will consider:

- (1) the extent to which the report adequately conforms to the requirements in subsection (a);
- (2) if information fundamental to the requirements in subsection (a) is not included, the extent to which the report explains why this information was not included and how disclosure of that information would have been detrimental to the safety or interests of the U.S. Government, the investigator, sources or informants, and/or future diplomatic and governmental relations;
- (3) whether the report includes additional or alternate forms of reliability as described in subsection (b)(2); and
- (4) to what extent the report's findings seem to fall in line with:
  - (i) other forms of credible evidence presented by any party in proceedings;
  - (ii) the decision maker's impressions of the credibility of the applicant's testimony;
  - (iii) any rebuttal evidence or testimony provided.

xx.x(d) No report that does not fully meet the requirements of subsection (a) or provide adequate explanation and alternate basis for reliability as explained in subsection (b) shall be considered independently substantial evidence to support denial of relief or adverse credibility determination.

xx.x(e) Nothing within this section shall be construed to create a duty for Department of State officials or employees.

This language is only one example of what a rule from the Department of Homeland Security could look like if it attempted to implement the proposed balancing test. While the particulars of the rule's language and requirements would undoubtedly be debated and altered before adoption, the rulemaking

process described within the Administrative Procedure Act would help ensure a final standard that is workable and responsive to the needs of all parties involved.

## V. CONCLUSION

As long as the United States offers asylum, there will be individuals who seek to exploit this grant of humanitarian aid as a fast-track to admission by fabricating stories of persecution and fear. However, the chance of fraud is no reason to base adverse decisions on reports of questionable reliability; after all, even those with valid claims often have trouble providing documentary evidence of harms that happened thousands of miles away and perhaps years in the past.

Several federal circuits have recognized the need to ensure that asylum claims are not decided based upon brief and vague reports of unnamed investigators. These courts have implemented a nebulous list of expectations and factors to consider when weighing a report's reliability. The Ninth Circuit, however, broke from this precedent by declaring that to require even a minimum level of detail to establish credibility was unduly burdensome and categorically out of line. This break in circuit consensus opens the door for the Department of Homeland Security to act and decide what standards should govern ODV reports in asylum cases. In keeping with the majority of the circuits and to provide the most clarity and consistency for all the parties involved in the asylum process, this regulation should require ODV reports to meet a threshold level of detail.

While there are certainly questions of government and judicial efficiency to be weighed whenever regulations are proposed, the stakes are simply too high in asylum cases not to require some minimum showing of reliability. Without some way for decision makers to evaluate the credibility of the investigation or its conclusions, individuals with valid asylum claims may be sent back into harm's way on flimsy or questionable fraud determinations. As the Ninth Circuit explained nearly 15 years ago,

Courts of appeals spend countless hours of consideration on capital cases arising in this country. Here where Congress has provided that a helpless alien does not have to be sent back to face death if he is eligible for asylum, the process as it is revealed in this case is one of haste, carelessness and ineptitude. The State Department, the Board [of Immigration Appeals], and the Immigration Service need to improve their standards.<sup>178</sup>

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178. *Montecino v. INS*, 915 F.2d 518, 521 (9th Cir. 1990). The *Montecino* court repeatedly admonished the Department of State for writing, and INS/BIA for relying upon, a form letter stating "[the State] saw no basis for granting asylum." *Id.* at 519. The case is an interesting juxtaposition to the tone and outcome of the *Angov* case 13 years later.