**No.**

# In the Supreme Court of the United States

NIKOLAY IVANOV ANGOV,

*Petitioner*,

v.

LORETTA E. LYNCH, ATTORNEY GENERAL,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

In this case, petitioner, a Bulgarian gypsy, seeks asylum in the United States, declaring that he was subjected to physical and other abuse in Bulgaria on account of his ethnicity. In response to petitioner's asylum application, the government submitted a State Department report that, in relevant part, offers an anonymous and uncorroborated double-hearsay statement, originating with an unnamed employee of the Bulgarian police precinct where petitioner says that he was beaten, which asserts that evidence provided by petitioner in support of his claim is fraudulent. Relying exclusively on that report, the immigration judge held that petitioner's account lacked credibility and, for that reason alone, denied petitioner's asylum application. In acknowledged conflict with the Second Circuit, a divided panel of the Ninth Circuit affirmed, holding that the State Department report amounted to "substantial evidence" supporting the immigration judge's adverse credibility finding.

The question presented is:

Whether a State Department report that does no more in substance than convey double-hearsay statements made by unnamed officials of the foreign government alleged to have persecuted an asylum applicant constitutes "substantial evidence" sufficient to support an agency finding that the applicant should be denied asylum.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes and Regulation**

**Miscellaneous**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Nikolay Ivanov Angov respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-45a) is reported at 788 F.3d 893. The decisions of the Board of Immigration Appeals (App., *infra*, 94a-97a) and of the Immigration Judge (*id.* at 99a-134a) are unreported.

## JURISDICTION

The initial judgment of the Ninth Circuit was entered on December 4, 2013. The Ninth Circuit issued an amended petition on rehearing on June 8, 2015. On August 27, 2015, Justice Kennedy extended the time for filing the petition for a writ of certiorari to October 8, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

8 U.S.C. § 1252(b) provides in relevant part:

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based, [and]

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary * * *.

## STATEMENT

This case presents a recurring question of tremendous practical importance to the many thousands of people who each year seek asylum in this country from overseas persecution: whether uncorroborated, anonymous hearsay evidence provided by officials of the very foreign government said to be responsible for the applicant's persecution may form the *sole* basis for denying the applicant asylum. In a divided decision, the Ninth Circuit held that such a statement may constitute the "substantial evidence" necessary to uphold the agency's denial of asylum.

Unsurprisingly, other courts of appeals have reached a contrary conclusion. As the court below itself acknowledged, the Second Circuit has held that documents like the one relied upon here are "'inherently unreliable'" and therefore "categorically 'cannot support [an] adverse credibility finding.'" App., *infra*, 12a (quoting *Lin* v. *U.S. Dep't of Justice*, 459 F.3d 255, 272 (2d Cir. 2006)). But the Ninth Circuit expressly "reject[ed] this approach" and "depart[ed] from the holding of a sister circuit—one with the second-largest immigration docket in the country." *Ibid*. Four other circuits likewise have held that materially identical State Department documents are so "glaringly deficient" (*Banat* v. *Holder*, 557 F.3d 886, 893 (8th Cir. 2009)), "markedly insufficient" (*Anim* v. *Mukasey*, 535 F.3d 243, 257 (4th Cir. 2008)), lacking in basic "standards of trustworthiness" (*Alexandrov* v. *Gonzales*, 442 F.3d 395, 405 (6th Cir. 2006)), and "untrustworthy" and "unhelpful" (*Ezeagwuna* v. *Ashcroft*, 325 F.3d 396, 408 (3d Cir. 2003)) as to make reliance upon them inconsistent with due process guarantees; the analysis used below cannot be reconciled with these holdings.

In all, the Ninth Circuit's decision has distorted the Nation's immigration laws and is upsetting their uniform administration. That holding imposes burdens on asylum applicants that are inconsistent with the rules mandated by Congress. And it has confused the guidance provided by this Court on the nature of the judicial review required in these circumstances. Further consideration of the case by this Court therefore is imperative.

### A. Statutory and Regulatory Background

1. Persons fleeing overseas persecution may seek asylum in the United States. Congress has provided that "[t]he Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum * * * if [one of those officers] determines that such alien is a refugee" (8 U.S.C. § 1158(b)(1)(A)), which is defined as someone who is unable or unwilling to return to their home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.*§ 1101(a)(42)(A). See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992). The asylum applicant bears the burden of proof in showing that he or she has suffered past persecution or has a reasonable fear of future persecution. 8 C.F.R § 1208.13(a).

Congress also has enacted a number of procedural requirements to ensure that proceedings that could lead to a noncitizen's removal from the United States are fundamentally fair. Two are relevant here. *First*, reversal of an immigration judge's ("IJ's") findings of fact that bear on removal is required when, on the record, "any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B).

The courts uniformly agree that, under this standard, an IJ's findings must be set aside if not supported by "substantial evidence." *Guo* v. *Ashcroft*, 361 F.3d 1194, 1199 (9th Cir. 2004). Accord, *e.g. Alexandrov*, 442 F.3d at 404; *Lin*, 459 F.3d at 269 & n.9. *Second*, in removal proceedings an "alien shall have a reasonable opportunity to examine the evidence against the alien" and "to cross-examine witnesses presented by the Government." 8 U.S.C. § 1229a(b)(4)(B).

2. In assessing the claims of asylum applicants, the government often seeks the assistance of U.S. consulates abroad to investigate factual claims. See 8 U.S.C. § 1202(f); 9 U.S. Department of State Foreign Affairs Manual ("FAM") 40.4 N2(2). Consular reports submitted in response to such requests ordinarily must be supported by the sworn, written statements of those who participated in the investigation. 9 FAM 40.4 N10.3. An internal directive prepared by the then-general counsel of the Immigration and Naturalization Service, Bo Cooper, dictates that consular investigation reports also "must contain" certain basic details, including: "the name and title of the investigator"; a statement concerning "the competency of the investigator," including "education" and "years of experience in the field"; "the name(s) and title(s) of the people spoken to in the course of the investigation"; "the circumstances, content and results of each relevant conversation or search[]"; and the "methods used to verify" information obtained in any interviews. App., *infra*, 135a-147a. "[A] short statement that an investigator has determined an application to be fraudulent," without more, is insufficient. *Id.* at 145a.

International norms reflect similar standards. The United Nations High Commissioner for Refugees, for example, generally condemns the use of "anonymous

evidence" in asylum proceedings and directs that details similar to those mandated by the Cooper memo be disclosed in investigative reports. *See* UNHCR, Country of Origin Information ¶¶ 32-34, 37 (Feb. 2004), http://tinyurl.com/Angov1.

**B. Proceedings Below**

1. Petitioner, a native and citizen of Bulgaria, claims to have been repeatedly harassed, arrested, and beaten by Bulgarian police officers because of his gypsy ethnicity.[1] After the beatings left him barely able to walk, petitioner fled his home, turned himself into United States border authorities, and requested asylum. App., *infra*, 99a-100a, 108a-113a.[2] He passed a "credible fear" interview (*id.* at 92a), was placed into removal proceedings (*id.* at 99a), and was paroled into this country pending determination of his eligibility for asylum. *Id.* at 99a-100a.

Petitioner testified at length before the IJ on his persecution in Bulgaria. He also offered as evidence of his persecution two subpoenas summoning him to a Bulgarian police precinct. U.S. Immigration and Customs Enforcement officials then asked the State Department to investigate petitioner's case. App., *infra*, 100a. An official in Washington D.C., Cynthia Bunton, the director of the State Department's Office of Country Reports and Asylum Affairs, responded with a three-paragraph letter. *Id.* at 148a-149a. The letter relayed the unsworn, double-hearsay conclusions

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[1] The pleadings and decisions below referred interchangeably to petitioner's background as "Roma" or "gypsy."

[2] Petitioner also sought withholding of removal under 8 U.S.C. § 1231(b)(3) and relief under the Convention Against Torture. See App., *infra*, 94a. Those claims have no separate bearing on the issue presented here and are not separately addressed below.

of anonymous foreign witnesses that: (1) the subpoenas submitted by petitioner were forged; and (2) the police officers whom petitioner identified as his tormenters never worked at the police station.

In relevant part, the letter stated in its entirety:

> On March 8, 2003, you requested authentication of the documents labeled 'Subpoena re. Case 28010/2002' and 'Subpoena re. Case 16451/2001'. The Embassy contacted an official in the Archive Department at the 5th Police District in Sofia requesting authentication of the two subpoenas. The Bulgarian official stated that the 5th Police District never issued the documents and that she believed they were forged. She stated that officers Captain Donkov, Lieutenant Slavkov, and Investigator Vutov have never worked for the 5th Police District. She also told the Embassy 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. The Embassy also obtained an imprint of the 5th Police District's official seal, which is much larger than the one on these two subpoenas.

*Ibid.*[3]

Petitioner objected to use of the Bunton letter on both statutory and constitutional grounds, contending

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[3] The Bunton letter also reported that the embassy was unable to verify certain addresses provided by petitioner. App., *infra*, 149a. That information ultimately was not used to support the agency's factual determination in this case, however, and is therefore immaterial here. See *id.* at 96a-97a.

that it was unreliable and nonprobative. See App., *infra*, 101a-102a. He requested production of the documents obtained in the course of the State Department investigation, the names of the witnesses interviewed, the identities of the investigators, and an opportunity to cross-examine Ms. Bunton and the sources of the information in Bulgaria by telephone. Cert. Admin. Record ("CAR") CAR 319-321, 332-334, 456.

In response, the government submitted a letter from Ms. Bunton's successor, Nadia Tongour. This letter provided no additional information specific to petitioner's case, instead stating that, "[p]ursuant to State Department policy," the Department "generally does not provide * * * follow-up inquiries to [Department of Homeland Security] officers or immigration judges regarding the results of an investigation." App., *infra*, 151. For this reason, the government reported, it was "unable to meet [petitioner's] request" that "a Department of State employee testify about the preparation of the [Bunton] letter * * * regarding [petitioner's] documents." App., *infra*, 150a.

2. An IJ denied petitioner asylum request. App., *infra*, 98a-134a. Although the IJ recognized that, "in the absence of [the Bunton] report, [petitioner] is otherwise credible" (CAR308), the IJ concluded—based entirely on the Bunton letter—that "the subpoenas submitted by [petitioner] are fraudulent * * * and that this fraud goes to the heart of his claim because it concerns his alleged past persecution." App., *infra*, 128a. Accordingly, the IJ found that "the subpoenas submitted by [petitioner] cast serious doubts regarding his overall credibility" and that, "with the subpoenas adjudged fraudulent, the Court is left with an unclear picture of what, if any, harm befell [petitioner]." *Id*. at 130a. In also rejecting petitioner's cross-examination

argument, the IJ reasoned that, because it was not "the usual practice" for the State Department to produce witnesses for cross-examination, the requested witness was simply "unavailable." *Ibid*.

The Board of Immigration Appeals (BIA) affirmed, in relevant part adopting the IJ's findings as its own. App., *infra*, 94a-97a. The BIA found "no adequate basis to disturb the Immigration Judge's finding that the Bunton letter calls into question the legitimacy of the subpoenas that [petitioner] submitted as evidence of the past persecution he alleged to have suffered at the hands of Bulgarian authorities on account of his ethnic status as a gypsy. * * * Moreover, the submission of fraudulent documents related to a material element of a claim of persecution support[s] an adverse credibility finding." *Id*. at 96a.[4]

3. Petitioner sought review of the BIA's decision in the court of appeals, contending that a double hearsay report originating in the office of foreign officials alleged to have persecuted an asylum applicant does not provide substantial evidence justifying the denial of an asylum claim and that, in addition, basing denial of an asylum claim on such evidence denies the

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[4] The IJ also relied in part for his adverse credibility determination on discrepancies between petitioner's descriptions of places he had lived in Bulgaria and statements in the Bunton letter indicating that embassy investigators were not able to locate those addresses. App., *infra*, 149a. The BIA discounted that part of the IJ's opinion because "[t]he record is unclear as to whether the locations cited in the Bunton letter and shown in the respondent's exhibits are actually the same areas." *Id*. at 96a. But even accepting respondent's testimony on this point as truthful, the BIA held that "this truthful testimony is not sufficient to overcome the indicia of incredibility stemming from the fraudulent documents." *Id*. at 96a-97a.

applicant due process. A divided panel of the Ninth Circuit denied the petition for review. App., *infra*, 46a-93a (initial decision); *id*. at 1a-45a (decision on rehearing).

In its initial decision, the panel majority began its opinion by stating: "Five other circuits have held that an immigration judge violates due process or the immigration laws by relying on a State Department investigation of an asylum applicant's claim. Do we fall in line?" App., *infra*, 48a. The court declined to do so, labeling the holdings of these five circuits "absurd" and opining that "[t]he other circuits have simply lost their way; they've overlooked some key precedents and misconstrued others." *Id*. at 58a. In particular, the court "quickly dispatched" petitioner's statutory arguments, observing simply that petitioner "was allowed to examine the Bunton Letter" and that "[t]he government here *did* make a reasonable effort," as required by 8 U.S.C. § 1229a(b)(4)(B), to make Ms. Bunton available, "but was prevented from doing so by State's policy of not" producing such witnesses. App., *infra*, 52a-53a. Concerning petitioner's constitutional argument, the majority concluded that petitioner has no due process rights (*id*. at 62a-66a) and that, even if he did, they were not violated here because providing additional safeguards to improve the reliability of the government's evidence would burden the government and add little to the probative value of the evidence. *Id*. at 66a-89a.

4. After a delay of eighteen months, the panel, still divided 2-1, substantially revised its opinion in the course of denying petitioner's request for rehearing. App., *infra*, 1a-45a.

Although the court's initial decision had addressed itself principally to petitioner's constitutional argu-

ment, the amended opinion disposed of that argument in two paragraphs and a footnote, opining that petitioner has no "constitutional right to procedural due process" because "[h]e is an alien who has never formally entered the United States." App., *infra*, 8a. The court thus dismissed as immaterial the rulings of the "four circuits [that] have held that reliance on documents like the Bunton letter in asylum proceedings violates due process." *Id.* at 9a n.3.

The court then turned to petitioner's statutory argument, which—although "quickly dispatched" in the initial opinion—the panel addressed at length. App., *infra*, 9a-33a. It first rejected petitioner's contention that he was denied his statutory right to cross-examine witnesses presented by the government. Here, the panel explained that the government's refusal to make Ms. Bunton available for cross-examination was supportable because it followed from "State's policy of not releasing follow-up information regarding its overseas investigations." *Id.* at 10a. Because this refusal "was made pursuant to a coordinate department's reasonable policy governing the secrecy and safety of its officers," petitioner's "statutory rights were not violated." *Id.* at 11a.

The court devoted the bulk of its analysis to its holding that "the IJ's adverse credibility finding was supported by substantial evidence" (App., *infra*, 11a; see also *id.* at 32a), rejecting petitioner's argument that a submission like the Bunton letter, composed entirely of anonymous hearsay from a self-interested foreign source, is too unreliable to serve as the sole ground on which to deny an otherwise credible asylum application. Here, the court began its discussion by observing:

> Surprisingly, [petitioner's] radical proposal accords with the view of the Second Circuit, which has held that a document akin to the Bunton Letter was "inherently unreliable" because it didn't reveal the qualifications of the investigator, the extent of the investigation or the methods used to verify the information. *Lin* v. *U.S. Dep't of Justice*, 459 F.3d 255, 271-72 (2d Cir. 2006). Under Second Circuit law therefore, documents like the Bunton Letter categorically "cannot support [an] adverse credibility finding." *Id.* at 272. We reject this approach.

*Id.* at 12a. The court below added: "In light of our departure from the holding of a sister circuit—one with the second-largest immigration docket in the country—we offer a thorough explanation for our rationale." App., *infra*, 12a.

On this, the court initially made clear that its holding was substantially affected by its view that, in immigration cases, "[f]raud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated." App, *infra*, 13a. The court added that "[t]he schizophrenic way we administer our immigration laws creates an environment where lying and forgery are difficult to disprove, richly rewarded if successful and rarely punished if unsuccessful." *Ibid.* See *id.* at 13a-17a. The court went on: "The Second Circuit has given this already shaky system a swift kick in the gut. * * * Perhaps the Supreme Court or Congress will intervene and decide who's right." *Id.* at 16a-17a.

Turning to its legal analysis, the court "acknowledge[d] the Bunton Letter lacks certain indicia of reliability," but nevertheless declined to hold "that its

use alone constitutes grounds on which to reverse the IJ's adverse credibility determination." App., *infra*, 17a. That is because the Bunton letter "describes facts in the real world, so it's possible to rebut Bunton by presenting proof that those facts are not as the Bunton Letter describes them." *Id*. at 19a. The court added that holding the Bunton letter unreliable would "be casting doubt on a multitude of country reports that have no better support for their demographic estimates." *Id*. at 21a. And it believed that the Bunton letter, as "the unified work product of a U.S. government agency carrying out governmental responsibilities," is "clothed with a presumption of regularity." *Id*. at 21a-22a.

Finally, the court opined that there is "no reason to believe" that insistence on additional safeguards will lead to "more comprehensive and reliable State Department investigations." App., *infra*, 24a. Instead, it suggested that "[i]nsisting on these procedures would paralyze the process" as consular officers become "too busy filling in all the jots and tittles our sister circuit enshrines as pre-requisites for a document's admission." *Id*. at 25a. And, the court added, "[r]equiring the Department of State to disclose more details will neither materially enhance the reliability of the resulting report nor do very much to help asylum applicants." *Id*. at 26a. Accordingly, the Ninth Circuit concluded, the Second Circuit's approach "favors the canny, the dishonest, the brazen and those who have the means and connections to purchase or create fraudulent documents." *Id*. at 32a.

Chief Judge Thomas dissented. In his view, "[u]nsworn, unauthenticated hearsay letters" that are "prepared for litigation by the government and not subject to any form of cross-examination" cannot form the sole

basis for denying asylum to an otherwise qualified applicant. App. *infra* 35a.

Chief Judge Thomas noted that "[f]ive of our sister circuits" have reached this conclusion, four holding that reliance on such letters "violates the applicant's procedural due process rights" and one (the Second) holding that "such letters, standing alone, could not provide a basis for denying asylum under the substantial evidence standard because they lacked sufficient evidence of reliability and trustworthiness." App., *infra*, 35a. Although Chief Judge Thomas noted that he "would resolve the present case purely on statutory grounds, as the Second Circuit did," he added that "the cases decided by our other sister circuits also provide useful guidance here." *Id.* at 35a-36a. He thus explained that the constitutional cases, some relying on the Second Circuit's statutory holding in *Lin*, found reliance on consular documents like the Bunton letter to be fundamentally unfair because they are unreliable and nonprobative. *Id.* at 36a-40a (citing cases).

Chief Judge Thomas also took issue with the majority's holding that petitioner was properly denied his statutory right to cross-examination. He explained that "allowing one executive branch agency to rely on another executive branch agency's blanket policy of refusing to provide certain information" "cannot be sufficient to satisfy the government's burden under the statute." App., *infra*, 41a. He added that, "whatever logistical obstacles might have once justified the State Department's blanket refusal to produce overseas government witnesses for removal proceedings, those obstacles surely can be overcome in an age of video conferencing." *Id.* at 42a.

In all, Chief Judge Thomas concluded that "it is not unfair or unduly burdensome to require the govern-

ment to identify basic, rudimentary information about its sources when it challenges corroborating evidence so that the IJ can properly weigh it," especially when the government's evidence consists of "anonymous hearsay" that was "produced by the very foreign government actors the asylum-seeker accuses of prosecution." App., *infra*, 45. He concluded: "We should be wary of relying on 'secret informers, whisperers and talebearers to decide legal rights in this context.'" *Id.* at 45a (citation omitted).

**REASONS FOR GRANTING THE PETITION**

There is no denying the acknowledged conflict in the circuits here. Nor is there any denying that resolution of the conflict is essential. As the Second Circuit has recognized, the government's approach in this case departs from the plain congressional purpose; both the Second Circuit and other courts have found that documents like the Bunton letter are "woefully insufficient" (*Lin*, 459 F.3d at 271) as a basis for the denial of relief to otherwise credible persons who are fleeing persecution. Moreover, the issue here arises with great frequency and, when it does, the cases invariably involve matters of the greatest practical importance to the affected individuals facing removal from this country. And as matters now stand, identically situated persons are being treated differently, based solely on the accident of geography.

The court below, recognizing both this conflict and the importance of the issue presented, suggested that "[p]erhaps the Supreme Court * * * will intervene and decide who's right." App., *infra*, 17a. It would be appropriate for this Court to do just that.

### A. The Circuits Are In Conflict On Whether Unsworn, Uncorroborated Hearsay Statements Like The Bunton Letter Constitute Substantial Evidence Sufficient To Support An Adverse Credibility Finding.

1. At the outset, there can be no dispute that the circuits are in conflict on whether anonymous, hearsay statements of the sort at issue in this case provide substantial evidence justifying denial of an otherwise credible asylum application. The Ninth Circuit recognized that the Second Circuit understood such documents to be "'inherently unreliable'" and that, under the Second Circuit's rule, "documents like the Bunton Letter categorically 'cannot support [an] adverse credibility finding.'" App., *infra*, 12a (quoting *Lin*, 459 F.3d at 272). The Ninth Circuit expressly "reject[ed] this approach" and, indeed, explained its rationale in detail precisely because its ruling constituted a "departure from the holding of a sister circuit." *Ibid*.

The Ninth Circuit was correct in this regard: its holding is flatly inconsistent with that of the Second Circuit in *Lin*. That case was identical to this one in all material respects. Lin, an asylum applicant from China, submitted a government document (there, a certificate of release from prison) in support of his application. 459 F.3d at 258, 260. Based on the hearsay assertions of anonymous foreign government officials, a consular report labeled the certificate fraudulent. *Id*. at 260-61. Relying entirely on this report, the BIA concluded that Lin was not credible and denied his asylum application. *Id*. at 261.

The Second Circuit reversed, holding that, under the substantial evidence test, such consular letters are too unreliable to support an adverse credibility finding and denial of an asylum application. 459 F.3d at 268-

73. Although the court noted that "[o]ther circuits have found due process violations where the IJ's or BIA's reliance on investigative reports was fundamentally unfair because the documents were unreliable," and "[a]lthough we find the logic of those cases persuasive," the Second Circuit did not reach the constitutional question "because the *statutory* standard of review requires vacatur." *Id.* at 269. As the court explained, "[e]vidence that is unreliable cannot provide the substantial support necessary to sustain the agency's finding," and "we find the Consular Report to be highly unreliable and therefore insufficient to satisfy the substantial evidence standard." *Ibid.*

The Second Circuit pointed to several considerations in support of this conclusion. "[T]he Consular Report is entirely based on the opinions of Chinese government officials who appear to have powerful incentives to be less than candid on the subject of their government's persecution of political dissidents": "Asking the [Chinese] Prison Bureau to authenticate a document that on its face corroborates an alien's claim of persecution is tantamount to asking whether its country engages in human rights violations." 459 F.3d at 269-70. The court also found that "the Consular Report is insufficiently detailed to permit a reviewing court to assess its reliability." *Id.* at 270. On this latter point, the court, pointing to the Cooper Memo, noted that "[t]he Department of Justice itself has recognized the need for a detailed report," distilling from the Cooper Memo "three useful factors" that bear on a report's reliability: "(i) the identity and qualifications of the investigator(s); (ii) the objective and extent of the investigation; and (iii) the methods used to verify the information discovered." *Id.* at 271.

Looking to these considerations, the Second Circuit found the consular letter in *Lin* "woefully insufficient to support on its own the conclusion that the Certificate of Release is a forgery." 459 F.3d at 271. The government offered "no information regarding the[] competency or qualifications" of the persons who conducted the investigation. *Ibid*. "The Consular Report fails to indicate where or when the phone call from the Prison Bureau [labeling the documents fraudulent] was received," or "state the names or titles of the people spoken to at the Prison Bureau." *Id*. at 272. And "the Consular Report does not discuss the methods used to verify the information from the Prison Bureau." *Ibid*. It also "contains multiple hearsay statements that further degrade its reliability." *Ibid*. Accordingly, the court held "that the Consular Report is inherently unreliable and cannot support the BIA's adverse credibility finding." *Ibid*. As Chief Judge Thomas noted below, the Second Circuit subsequently reaffirmed and applied the approach taken in *Lin*. App., *infra*, 39a (quoting *Balachova* v. *Mukasey*, 547 F.3d 374, 382-83 (2d Cir. 2008)).

As Chief Judge Thomas also explained—and as the majority below likewise candidly recognized, in accusing the Second Circuit's approach of giving the immigration system "a swift kick in the gut" (App., *infra*, 16a—"[o]ur case cannot be distinguished from *Lin* or *Balachova*." *Id*. at 39a. The Bunton letter is in all material respects identical to the consular report at issue in *Lin*, and like all letters of this kind suffers from the same defects:

> The [agency] relied on a short, unsworn letter from a State Department official to support [its] finding that [petitioner] forged part of his asylum application. The letter was devoid of

> any information concerning the methodology employed in the investigation or the qualifications of the investigators. Instead, it was based on the unauthenticated, hearsay statements of an unidentified Bulgarian police official who worked at the police station where [petitioner] claims to have been severely beaten. Like the government officials in *Lin*, that police official—whose department had been accused of ethnically motivated brutality—had a strong incentive to be "less than candid." 459 F.3d at 269.

*Ibid*. The Second Circuit held that a government submission with these qualities does not amount to substantial evidence supporting an adverse credibility finding and denial of an asylum application; the Ninth Circuit held that it does.

This Court should resolve this conflict, which concerns a very important and frequently litigated question. The court below, which has the largest immigration docket of any federal court of appeals, expressly rejected the approach taken by the Second Circuit, which has the second-largest. See App., *infra*, 12a. There is no doubt that the differing approaches are leading to identical cases being decided differently in different circuits: The consular letter submitted in this case would have been disregarded as unreliable in the Second Circuit, meaning that petitioner would have been granted asylum had he presented himself to immigration officials in New York rather than San Ysidro.

That sort of inconsistency, on a matter of such importance, is intolerable. And that is particularly so because it is well recognized that the need for "[n]ational uniformity in the immigration and natural-

ization laws is paramount." *Rosendo-Ramirez* v. *INS*, 32 F.3d 1085, 1091 (7th Cir. 1994).

2. Moreover, although the conflict between the Second and Ninth Circuits is reason enough for the Court to grant review, the approach taken below is also irreconcilable with the treatment accorded materially identical consular letters by four other circuits. As the majority below recognized, those courts "have held that reliance on documents like the Bunton Letter in asylum proceedings violates due process." App., *infra*, 9a n.3; accord App., *infra*, 35a (Thomas, C.J., dissenting). Although the Ninth Circuit decided this case on statutory rather than constitutional grounds, Chief Judge Thomas correctly observed below that the decisions of these other courts "provide useful guidance here." *Id.* at 36a. These courts, some relying on the Second Circuit's analysis in *Lin*, found constitutional violations precisely because consular letters of this sort are inherently unreliable and nonprobative—the same conclusion that renders them insufficient to support an adverse credibility finding under the substantial evidence standard and that was rejected by the majority below.[5]

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[5] We also note that the Ninth Circuit's rationale for rejecting petitioner's constitutional claim was incorrect. The court reasoned that, although petitioner was physically present in the United States, he was not "technically" in this country because, having presented himself at the San Ysidro port of entry, he was allowed to remain here only pending resolution of his asylum application; noncitizens in that procedural posture, the court believed, have no constitutional rights at all. App., *infra*, 8a-9a. At least in the circumstances here, however, that reasoning—which accords a noncitizen who illegally sneaks across the border the full panoply of constitutional protections, but accords none of those rights to the noncitizen who presents lawfully at a port of entry—is insupportable.

Thus, in *Banat*, 557 F.3d at 889-890, an IJ rejected an asylum claim upon finding that a document submitted by the applicant was fabricated; that finding rested entirely on a consular letter. To challenge this determination on due process grounds, the Eighth Circuit explained, the applicant "must show that the State Department letter was unreliable and untrustworthy." *Id*. at 890. Relying on *Lin*, the court continued: "Reliance on reports of investigations that do not provide sufficient information about how the investigation was conducted are fundamentally unfair because, without that information, it is nearly impossible for the immigration court to assess the report's probative value and the asylum applicant is not allowed a meaningful opportunity to rebut the investigator's allegations." *Id*. at 891.

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Noncitizens who are deemed to have "a credible fear of persecution" are guaranteed "further consideration of [their] application[s] for asylum" *by statute*. 8 U.S.C. § 1225(b)(1)(B)(ii). That creates a constitutionally protected liberty interest in two respects. *First*, "[w]hen Congress directs an agency to establish a procedure," due process requires the "procedure to be a fair one." *Marincas* v. *Lewis*, 92 F.3d 195, 203 (3d Cir. 1996). Thus, when noncitizens are "found by the governmental officials to have a credible fear of persecution," their "status is changed," and they become "entitled to due process." *Haitian Ctrs. Council* v. *McNary*, 969 F.2d 1326, 1345 (2d Cir. 1992), vacated as moot, 509 U.S. 918 (1993). And *second*, both statute and treaty forbid repatriation to a country where a noncitizen's life or freedom would be threatened. *See* 8 U.S.C. § 1231(b)(3)(A); Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, art. 33(1) (1968). Once the government initially determines that a noncitizen has a credible fear of persecution, those laws confer a constitutionally "protectable interest" in not being returned arbitrarily. *Yiu Sing Chun* v. *Sava*, 708 F.2d 869, 877 (2d Cir. 1983). Thus, both "treaty obligations and fairness mandate that the asylum procedure promulgated by the Attorney General provide the most basic of due process." *Marincas*, 92 F.3d at 203.

Those defects precluded reliance on the consular report in *Banat*:

> [T]he investigator is not identified. All the report conveys is that the unidentified investigator showed the [foreign document] to an unidentified contact. There is no indication of the qualifications or experience of either the investigator or the contact. The extent of the investigation included merely showing the letter to the unidentified contact. And there is no indication that any attempt was made to verify the claims made by the unidentified contact.

557 F.3d at 891. Such a letter, which "also includes multiple layers of hearsay," "was glaringly deficient in providing the most basic indicia of its circumstantial probability or reliability." *Id*. at 892, 893.

The Fourth Circuit addressed precisely the same set of circumstances, and reached the same conclusion, in *Amin* v. *Mukasey*, 535 F.3d 243 (4th Cir. 2008). The asylum applicant presented foreign government documents in support of her application. *Id*. at 248, 249. Our government responded with a letter, authored by Ms. Bunton (the author of the letter at issue in this case) indicating that a foreign government official identified the documents as forgeries. *Id*. at 250. The IJ and BIA denied the asylum claim. *Id*. at 251-52. The Fourth Circuit reversed, holding that "the Bunton letter contains insufficient indicia of reliability and, as a result, its use was fundamentally unfair." *Id*. at 256.

Relying on *Lin*, the Fourth Circuit noted that "[m]ultiple hearsay, where the declarant is steps removed from the original speaker, is particularly problematic because the declarant in all likelihood has been unable to evaluate the trustworthiness of the original speaker." 535 F.3d at 257. Those "concerns

about a report's reliability are amplified when the 'report was prepared with the assistance of someone from the government from which [the applicant] is fleeing.'" *Ibid*. In all, the court concluded:

> The Bunton Letter does not meet even the minimum standards prescribed by DHS, and it lacks the clarity and content necessary to provide fair or probative evidence in an immigration proceeding. The letter does not reveal the identity of the fraud investigator. It does not contain information about the anonymous investigator's qualifications (other than language ability). And it is silent about the methods that the investigator used and the circumstances of the inquiries that were made.

*Id*. at 258. These defects—all also present here—"make it practically impossible to assess the letter's reliability." *Ibid*.

Addressing indistinguishable State Department letters opining that documents offered by asylum applicants were fraudulent, the Third and Sixth Circuits likewise found them utterly unreliable and nonprobative. See *Ezeagwuna*, 325 F.3d at 405, 408 (3d Cir.) (letter is "neither reliable nor trustworthy"); *Alexandov*, 442 F.3d at 407 (6th Cir.) (such reports "do not meet our standards of trustworthiness and reliability and therefore were improperly relied upon by the immigration court").

The analysis that led the Ninth Circuit to its holding in this case simply cannot be reconciled with the conclusions of these other courts that, when a State Department letter has the defects that infect the Bunton letter, "it is nearly impossible for the immigration court to assess the report's probative value and the asylum applicant is not allowed a meaningful

opportunity to rebut the investigation's allegations." *Banat*, 557 F.3d at 891. The court below, in contrast, found substantial evidence in this case because it believed that the opacity of the Bunton letter "doesn't deprive the opposing party of any and all means of rebutting the hearsay declarant's assertions" (App., *infra*, 18a) and because consular letters "are clothed with a presumption of regularity." App., *infra*, 22a. The holdings of the Third, Fourth, Sixth, and Eighth Circuits, albeit constitutional rather than statutory, therefore strongly support the approach of the Second Circuit and confirm the aberrational nature of the Ninth Circuit's rule.

Indeed, the analysis of the majority below *itself* demonstrates that virtually identical factors govern the statutory and constitutional arguments in this context: the majority moved virtually verbatim the bulk of its lengthy treatment of petitioner's constitutional argument, as that analysis appeared in the majority's initial decision, into the majority's treatment of petitioner's statutory claim, as it appeared in its amended opinion. Compare App., *infra*, 53a-58a, 67a-79a (constitutional decision) with *id.* at 13a-17a, 18a-32a (statutory decision). In these circumstances, the need for this Court's intervention is manifest.

### B. Documents Like The Bunton Letter Do Not Provide Substantial Evidence Supporting Denial Of An Asylum Application.

The holding below does more than depart from the decisions of other courts; it is wrong on the merits. To justify the BIA's ruling, the Bunton letter must be sufficiently reliable to satisfy 8 U.S.C. §1252(b)(4)(B), which the courts have understood to mean in this context that the IJ's findings must be supported by "substantial evidence." See page 4, *supra*. Here, the

Ninth Circuit believed that standard satisfied by a document presenting double hearsay, resting on the uncorroborated assertions of an unnamed foreign employee of the police precinct alleged to have abused petitioner, presented to and at the request of unnamed and possibly foreign-national employees of the U.S. embassy in Bulgaria[6]. That holding is insupportable: it is settled that a statement "does not constitute substantial evidence" when it is "[m]ere uncorroborated hearsay" lacking "rational probative force." *Richardson* v. *Perales*, 402 U.S. 389, 407 (1971). That is true of documents like the Bunton Letter.

1. To be sure, "hearsay can be admitted in asylum cases under certain circumstances" (*Ezeagwuna*, 325 F.3d at 406), and there is no per se rule that precludes hearsay from constituting substantial evidence. But this Court has identified factors that bear on the analysis. Among them are:

1. whether the hearsay declarant is an "independent" and impartial "adjudicator" or instead a partisan "advocate or adversary";
2. whether the document is based on "personal consultation and personal examination";
3. whether the document reflects the result of a "typical," "routine," or "standard" investigation, revealing "a patient and careful endeavor by the state agency and the examiner to ascertain the truth";

[6] The Tongour Letter submitted in this case reported that "the Department of State employs foreign service nationals ('FSNs') at some posts to conduct local investigations." App., *infra*, 151a.

4. whether past practice demonstrates "traditional and ready acceptance" of such hearsay documents in administrative proceedings; and
5. whether the "administrative burden" of excluding hearsay and requiring cross-examination "would be a substantial drain" on limited resources.

*Perales*, 402 U.S. at 402-406. Documents like the Bunton letter fall short with respect to each of these factors.

*First*, the witnesses interviewed as part of the consular investigation—foreign police officials accused of ethnic bias by petitioner himself—are a far cry from the impartial physicians whose statements were relied upon in *Perales*. Compare 402 U.S. at 408. There certainly is no objective basis for believing that these foreign officials are more akin to independent adjudicators than to self-interested partisans. To the contrary, the "Consular Report is entirely based on the opinions of [Bulgarian] government officials who appear to have powerful incentives to be less than candid on the subject of their government's persecution of [Roma]." *Lin*, 459 F.3d at 269-70.

*Second*, Ms. Bunton had no personal role in the investigation; she was simply a conduit for information of dubious provenance that originated with foreign, and likely biased, officials.

*Third*, the Bunton letter assuredly is not a standard report reflecting a careful endeavor to ascertain the truth. As we have noted, State Department policy requires that, when information is gathered "for use in petition cases and other proceedings," oral statements "must, whenever possible, be reduced to writing and sworn to before a consular officer." 9 FAM 40.4 N10.3. That was not done here. Moreover, *none* of the details

required by the Cooper memo is present: There is no indication of "the name and title of the investigator" or of that person's qualifications, the identities "of the people spoken to in the course of the investigation," or "the circumstances, content and results of each relevant conversation or search[]." App., *infra*, 145a-146a. Thus, as in the other cases involving similarly deficient reports, "[t]he Bunton letter does not meet even the minimum standards prescribed by DHS." *Anim*, 535 F.3d at, 258.

*Fourth*, as we have shown, the other courts of appeals uniformly have rejected uncorroborated, anonymous, double-hearsay reports like the Bunton letter as "glaringly deficient" (*Banat*, 557 F.3d at 893), "markedly insufficient" (*Anim*, 535 F.3d at 257), "inherently unreliable" (*Lin*, 459 F.3d at 272), not meeting basic "standards of trustworthiness" (*Alexandrov*, 442 F.3d at 407), and "untrustworthy" (*Ezeagwuna*, 325 F.3d at 406-408).

*Finally*, the court below based its contrary conclusion, in substantial part, on its view that the Second Circuit's insistence on minimum standards of reliability "makes it pretty much impossible for the immigration authorities to carry out even the little bit of fact checking they now manage to do," and "smothers the State Department's informal process of checking up on asylum petitions in layers of procedural complexity that will prove impossible to administer in practice." App., *infra*, 16a-17a; see *id.* at 25a-26a.

That, however, demonstrably is not so: the administrative burden of furnishing the information that petitioner requested, and of providing an opportunity for telephonic cross-examination, hardly would "para-

lyze the process." App., *infra*, 25a.[7] After all, the government's own procedures *already* direct investigators to provide the requested information in detailed reports, supported by sworn statements. Not only do those procedures reflect what the government *itself* judges to be reasonably manageable—a judgment entitled to some deference—but "an executive agency must be rigorously held" to its own "defined procedure[s]" (*Clemente* v. *United States*, 766 F.2d 1358, 1365 n.10 (9th Cir. 1985)), especially "[w]here the rights of individuals are affected" (*Morton* v. *Ruiz*, 415 U.S. 199, 235 (1974)). Adding a simple telephonic interview to the kind of detailed report that the government already prescribes for itself is not unreasonably burdensome. As we show in detail below, that point is proved by actual experience; the immigration process assuredly has not been hobbled or unduly burdened in the Second and other circuits that, for years, have insisted on a minimum showing that the evidence used to deny asylum claims actually is probative. See pages 32-34, *infra*.

2. In response to all this, the only real legal basis offered by the majority below to support its holding is the suggestion that government reports like the Bunton letter are presumptively reliable because they "are clothed with a presumption of regularity" (App., *infra*, 22a) and that, in any event, "[r]equiring the Department of State to disclose more details will [not] materially enhance the reliability of the resulting report." *Id*. at 26a. That is doubly incorrect.

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[7] There is no reason to doubt the availability of video conferencing in this case. See generally 8 U.S.C. § 1229a(b)(2)(A) (IJ may conduct entire hearing via telephone or video conference).

*First*, the regularity doctrine is not a "rule of evidence," but the "general working principle" that official acts of public officers are presumed legitimate, and not "negligent[]" or "improper[]." *Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004). The question here is not whether Ms. Bunton "properly discharged [her] official duties." *Brown* v. *Plata*, 131 S. Ct. 1910, 1965 (2011). It is, instead, whether the anonymous, double-hearsay declarations contained in her letter are reliable *as an evidentiary matter*.

*Second*, there is good reason to think that the Bunton letter is *not* reliable, even aside from *Perales*. There is no dispute, for example, that the anonymous investigator spoke with officials from the same police precinct accused of persecuting petitioner. It goes without saying that such officials "'have powerful incentives to be less than candid'" (*Amin*, 535 F.3d at 257 (quoting *Lin*, 459 F.3d at 269-270)), and that relying on their statements therefore is "particularly dangerous" (*Alexandrov*, 442 F.3d at 405 n.7).

Without further details, the IJ could only speculate concerning the reliability of the investigation. There was no way to know, for example, whether the unidentified Bulgarian police official who was the source of the fraud allegation ("Ludmilla Bogdanovich," in the Ninth Circuit's imagining (App., *infra*, 27a)) was newly hired and unlikely to know former officers, had been accused of perjury, or had committed hate crimes against Roma Bulgarians. There also was no way to know "whether the 'investigator' was experienced or had any particular training in conducting such investigations" (*Banat*, 557 F.3d at 893), "whether (or how) the investigator attempted to verify [his or her] conclusions" (*Anim*, 535 F.3d at 258), or whether Ms. Bunton had any personal basis for "judg[ing] the

credibility of the investigator" (*Ezeagwuna*, 325 F.3d at 406). Petitioner's counsel could have investigated these matters—but only with access to the "jots and tittles" (App., *infra*, 25a) that the court below puzzlingly dismissed as unhelpful.[8]

Of course, an investigation might have revealed that the Bunton letter is accurate and trustworthy. But either way, with no more than anonymous double-hearsay—contained in a terse letter, prepared for litigation, by an adverse party, in a manner inconsistent with government policies—the reliability of the letter was a matter of pure speculation. And it should be obvious that speculation may not replace substantial evidence as the basis for an adverse credibility finding.

3. The Ninth Circuit's willingness to endorse an administrative decision that was premised on evidence lacking any indicia of reliability is especially troubling because Congress itself recognized the importance of cross-examination in assuring the reliability of evidence bearing on a noncitizen's eligibility to remain in this country. Congress thus specifically provided that every person in removal proceedings "shall have a

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[8] Casting a skeptical eye on a document like the Bunton letter will not preclude any consideration of State Department Country Reports, as the court below suggested (App., *infra*, 21a). The Bunton letter is based on a statement from a single anonymous, self-interested foreign source; comprehensive Country Reports are "based on information available from a wide range of sources, including U.S. and foreign government officials; victims of human rights abuse; academic and congressional studies; and reports from the press, international organizations, and nongovernmental organizations." Bureau of Democracy, Human Rights & Labor, U.S. Dep't of State, Country Reports on Human Rights Practices for 2013: Appendix A: Notes on Preparation of Reports, at 1 (2013).

reasonable opportunity * * * to cross-examine witnesses presented by the Government." 8 U.S.C. § 1229a-(b)(4)(B). But the majority below held that obligation satisfied by the government's boilerplate invocation of a blanket policy *not* to respond to requests for additional information relating to consular investigations. App., *infra*, 10a-11a. Thus, in response to petitioner's request to cross-examine the witnesses against him, the government submitted the Tongour letter (*id*. at 150a-152a), which declared, with commendable candor, that the State Department simply does not make officers who conduct overseas investigations (or even those who merely summarize the results of such investigations from an office in Washington, D.C.) available for cross-examination. In the majority's view (*id*. at 10a), that position is "reasonable."

In fact, the opposite is true. The government does not meet its obligation to make witnesses reasonably available by adopting a blanket policy that anyone involved in a consular investigation overseas is categorically *un*available. Yet, apart from the generic Tongour letter, the government has offered no explanation why Ms. Bunton could not have answered a telephone call. By holding that this policy satisfies the requirements of Section 1229a(b)(4)(B), the court below vitiated a statutory safeguard that was designed to address the concerns that make evidence like that in this case unreliable and insufficient under the governing standard of review.

### C. The Question Presented Here Is A Recurring One Of Great Practical Importance.

Finally, the division in the courts of appeals and the error committed by the court below are matters of enormous significance, for several reasons.

*First*, there are a great number of asylum claims. The court below itself noted that almost 74,000 are filed annually. App., *infra*, 26a. A substantial number of these claims are affected by the issue in this case; as the reported cases illustrate, it is a matter of routine for immigration authorities to request State Department letters like the one at issue here, which (the decisions also reveal) characteristically resemble, and suffer from the same flaws as, the Bunton letter. It is essential that the rules governing the asylum applications of thousands of people be clear and settled.

That is especially so because of the profound importance of the interests at stake in each of these cases. As a general matter, removal from the United States "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom," requiring courts to exercise "[m]eticulous care * * * lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945). And that hardship is heightened in the asylum context, where an individual's "interest in avoiding torture or mistreatment by a foreign nation is [a] 'matter of serious concern.'" *Kiyemba* v. *Obama*, 561 F.3d 509, 518 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

*Second*, although the court below believed that there is nothing to be gained from precluding reliance on kangaroo court documents like the Bunton letter, just the opposite is true. Ensuring that there are basic procedural checks on arbitrary government action is critical in the context of asylum proceedings, not only because the stakes are so high for those fleeing persecution, but also because the immigration adjudication system otherwise is so flawed. Federal courts

have repeatedly questioned the BIA's ability to meet even basic standards of fairness, observing that the administrative process addressing immigration cases "has fallen below the minimum standards of legal justice." *Benslimane* v. *Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005). Immigration adjudicators routinely make "significant mistake[s]," are "not aware of the most basic facts," have "gaping hole[s] in [their] reasoning," and are unduly influenced by "prejudgment, personal speculation, bias and conjecture." *Id.* at 829 (collecting cases). Asylum-seekers thus have a weighty interest in faithful adherence to rules that reduce the risk of error and protect against arbitrary denials of relief.

And the value of the commonsense safeguards we advocate—prohibiting denials of relief based exclusively on anonymous hearsay evidence originating with a biased party, and guaranteeing a meaningful opportunity for cross-examination—is obvious. As we already have shown, with nothing to go on but anonymous compound hearsay, it was impossible for the IJ to assess the Bunton letter's probative value. Use of the Bunton letter alone, without offering petitioner a meaningful "opportunity to show that [its conclusions were] untrue," was especially problematic because, as is often the case, "the evidence consist[ed] of the testimony" of witnesses who *themselves* may have been "motivated by * * * intolerance [and] prejudice." *Greene* v. *McElroy*, 360 U.S. 474, 496 (1959).

*Third*, on the other side of the scale, the administrative burden of the rule adopted by the five circuits that preclude exclusive reliance on documents like the Bunton letter is slight. That rule simply establishes that consular reports with the characteristics of the Bunton letter may not serve as the sole basis for

denying relief to an asylum applicant unless they furnish basic details that allow asylum-seekers a reasonable opportunity to investigate and rebut the report's conclusions. Again, that is what the government's own policies already require.

The Ninth Circuit nevertheless worried that precluding IJs from relying exclusively on uncorroborated, anonymous, double-hearsay evidence to deny asylum to otherwise deserving individuals would "require the government to fight an uphill battle on a slippery slope with one leg and both arms tied behind its back, while its adversary gets to use cleats and brass knuckles," "hobble[] the government's ability to detect and combat fraud" (App., *infra*, 31a), and "giv[e] charlatans a free pass into the United States." *Id.* at 26a. That is demonstrably wrong: In the years during which five other circuits have adopted the rule we advocate, the number of individuals receiving asylum has *fallen* by 13%. See Office of Immigration Statistics, 2011 Yearbook of Immigration Statistics at 42 tbl. 16, http://perma.cc/ZLW3-KEKH (table 16). Although that is a national figure, those circuits handle one-third of the Nation's asylum cases. See Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication,* 60 Stan. L. Rev. 295, 362 tbl. 2 (2007).

And there is no reason to think that our rule will render asylum proceedings "ponderous, time-consuming and expensive" (App., *infra*, 25a), either. Similar data show that IJs—including those in the Second, Third, Fourth, Sixth, and Eighth Circuits—have been processing asylum applications at a speedy clip, disposing of more applications in 2012 (for example) than were filed that year. *See* See Office for Immigration Review, FY 2012 Statistical Year Book at 13 tbl. 7 (Feb. 2013), http://perma.cc/5XBJ-EU9B.

Nor is there any indication that, if forced to conform consular reports with basic standards of reliability, "the State Department may stop writing them." App., *infra*, 26a. On the contrary, the government is having little trouble in other circuits providing "[t]he level of detail" necessary to "lay[] a proper foundation for [the] conclusion[s]" it reports in consular letters, allowing IJs to determine whether the underlying investigations were "conducted in a reliable manner." *Shah* v. *BIA*, 314 F.App'x 326, 327 (2d Cir. 2008). See also, *e.g.*, *Huang* v. *Holder*, 493 F.App'x 220, 222 (2d Cir. 2012) (report included "the identity and qualifications of the investigator" and "the methods the investigator used"); *Huang* v. *Attorney General*, 376 F. App'x 253, 256 (3d Cir. 2010) (non-hearsay report); *Karim* v. *Holder*, 596 F.3d 893, 897-898 (8th Cir. 2010) (corroborating evidence).

The issue here is ripe for review; it has been carefully considered by courts across the country; it is squarely presented in this case. This Court should resolve the question now.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2015

* The representation of petitioner by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

# APPENDICES

**APPENDIX A**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

NILOLAY IVANOV ANGOV,
*Petitioner*,
v.
LORETTA E. LYNCH,
Attorney General,
*Respondent*.

No. 07-74963

Agency No. A096-227-355

ORDER AND AMENDED OPINION

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted
June 5, 2012—Pasadena, California

Filed December 4, 2013
Amended June 8, 2015

Before: Sidney R. Thomas, Chief Judge,
Alex Kozinski and Stephen S. Trott, Circuit Judges.

Opinion by Judge Kozinski;
Dissent by Chief Judge Thomas

**SUMMARY**[*]

**Immigration**

The panel withdrew its prior opinion and dissent, filed an amended opinion and dissent, denied a petition for panel rehearing, and denied on behalf of the court a petition for rehearing en banc in a case in

[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

which the Board of Immigration Appeals denied an application for asylum and related relief on adverse credibility grounds based on a State Department overseas investigation indicating that petitioner had submitted fraudulent evidence.

The panel held that, on the record, the immigration judge acted within his discretion in admitting into evidence a letter prepared by the Director of Department of State's Office of Country Reports and Asylum Affairs in Bulgaria ("Bunton Letter"), and in relying on it to find that police subpoenas petitioner submitted were fraudulent.

The panel held that as an alien who never formally entered the United States, petitioner had no constitutional right to procedural due process, and thus the IJ's reliance on the Bunton Letter could not violate procedural due process. The panel held that the IJ did not violate petitioner's statutory rights to examine evidence or cross-examine witnesses by admitting the letter.

The panel also held that the IJ's adverse credibility finding based on the fraudulent subpoenas was supported by substantial evidence and went to the heart of petitioner's claim of persecution by the Bulgarian police, and that he failed to present other evidence to meet his burden of proof.

Dissenting, Chief Judge Thomas would hold that unsworn, unauthenticated, hearsay letters—prepared for litigation by the government and not subject to any form of cross-examination—cannot form the sole basis for denying asylum to an otherwise qualified applicant.

## COUNSEL

Nicolette Glazer (argued), Law Offices of Larry R. Glazer, Century City, California, for Petitioner.

Gregory G. Katsas, Assistant Attorney General, Barry J. Pettinato, Assistant Director, Jesse Lloyd Busen (argued) and Charles E. Canter, Attorneys, United States Department of Justice, Civil Division, Washington, D.C., for Respondent.

## ORDER

The opinion and dissent filed on December 4, 2013, and published at 736 F.3d 1263, are hereby withdrawn and replaced by the amended opinion and dissent filed concurrently with this order. With these amendments, Judges Kozinski and Trott have voted to deny the petition for panel rehearing, Judge Kozinski has voted to deny the petition for rehearing en banc and Judge Trott has so recommended. Chief Judge Thomas has voted to grant the petition for panel rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for panel rehearing and rehearing en banc are denied. No further petitions for panel rehearing or rehearing en banc will be entertained.

## OPINION

KOZINSKI, Circuit Judge:

Does an immigration judge err by relying on a State Department investigation of an asylum petitioner's claim?

### I. BACKGROUND

Nikolay Angov, a Bulgarian citizen, claims he was persecuted by the Bulgarian government be-

cause he is Roma.[1] He alleges repeated abuse at the hands of the Bulgarian police, including beatings, false accusations of crimes and illegitimate arrests. After three years of this treatment, he fled Bulgaria and sought asylum in the United States.

An IJ conducted asylum hearings in early 2004, during which Angov presented several documents, including two Bulgarian subpoenas that ordered him to appear at a Sofia police station. The immigration judge ("IJ") allowed the government to obtain a State Department investigation of Angov's allegations. *See* 8 C.F.R. § 208.11. The investigation was conducted by our consulate in Sofia, and the results were summarized in a letter signed by Cynthia Bunton, Director of Department of State's Office of Country Reports and Asylum Affairs.

The IJ admitted the Bunton Letter, which stated that the Embassy had contacted "an official in the Archive Department at the 5th Police District in Sofia." The official found a number of errors in the subpoenas, suggesting that they were forgeries: (1) Three officers named in the subpoena—Captain Donkov, Lieutenant Slavkov and Investigator Vutov—never worked for the police department; (2) the case and telephone numbers were wrong; and (3) although the subpoenas mentioned room 4 on the second floor of the department and room 5 on the first floor, there are no rooms by those numbers. The official also explained (4) that the seal on the subpoena was too small.

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[1] Angov's brief refers to him as "Roma" or "gypsy" interchangeably. So do we.

Bunton also stated that the embassy investigator (5) was unable to locate Angov's claimed past residences; and (6) that the neighborhood where Angov lived was only twenty to thirty percent Roma, though Angov claimed that he lived in a "gypsy neighborhood." Attached to the letter were five photographs of the places the investigator had visited while trying to verify the addresses.

Angov's industrious lawyer submitted a plethora of rebuttal evidence, including photos, maps, an article about Angov's neighborhood and a letter apparently signed by someone named Daniela Mihaylova, who identified herself as the legal programs director of a Roma human rights organization in Bulgaria. Angov also argued that, without the opportunity to cross-examine the investigator, the admission of the Bunton Letter would violate his statutory and constitutional rights.

In response to Angov's objection, the government attorney asked the State Department to produce an employee to testify about the investigation. State responded with a letter authored by Nadia Tongour, Bunton's successor. The Tongour Letter provided some general background information on State's investigation procedures, but explained that it's State's policy to refrain from providing further specific information about an overseas investigation.

Based on the Bunton Letter, the IJ made an adverse credibility finding and denied Angov's applications for asylum, withholding of removal and relief under the Convention Against Torture. The Board of Immigration Appeals ("BIA") adopted and affirmed the IJ's ruling denying relief, and his determination that the subpoenas are fraudulent. The BIA also denied Angov's motion to supplement the record with a

recent Sixth Circuit opinion that Angov claimed constituted new evidence of a "pattern and practice" of law-breaking by officials in the Sofia consulate. *See Alexandrov* v. *Gonzales*, 442 F.3d 395 (6th Cir. 2006).

## II. ANALYSIS

### A. Motion To Remand

Angov claims the BIA abused its discretion by denying his motion. *See Movsisian* v. *Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005). His brief before the BIA spent just two sentences explaining this argument:

> Respondent respectfully submits a copy of *Alexandrov* v. *Gonzales* to supplement the record in this case. The document is submitted to document a pattern and practice of procedural and substantive violations of the law and applicable regulations by the consulate in Sofia during overseas investigations and in divulging the identity of asylum applicants to the authorities in Bulgaria in violation of C.F.R. 208.6 [sic].

"Since a motion to remand is so similar to a motion to reopen, the motion to remand should be drafted in conformity with the regulations pertinent to motions to reopen . . . ." *Rodriguez* v. *INS*, 841 F.2d 865, 867 (9th Cir. 1988) (internal quotation marks omitted). The applicable regulation provides that a motion to reopen shall state "the new facts that will be proven at a hearing to be held if the motion is granted" and be supported by affidavits or other "evidentiary material." 8 C.F.R. § 1003.2(c)(1). But Angov didn't provide any evidence supporting his motion nor did he even explain why he believed that

section 208.6 had been violated.[2] The BIA did not abuse its discretion in denying Angov's motion to remand.

**B Admission of the Bunton Letter**

Angov claims that the admission of, and the IJ's and BIA's reliance on, the Bunton Letter violated his statutory and constitutional rights. *See* 8 U.S.C. § 1229a(b)(4)(B); 8 C.F.R. § 1240.10(a)(4); *Cinapian* v. *Holder*, 567 F.3d 1067, 1074–75 (9th Cir. 2009). In considering Angov's argument, we review the IJ's decision, except for the portion that the BIA didn't clearly adopt—here, the IJ's conclusion that the Department of State's inability to verify Angov's addresses supported an adverse credibility finding. *See Joseph* v. *Holder*, 600 F.3d 1235, 1239–40 (9th Cir. 2010). On that issue, we review the BIA's decision.

While we review legal questions de novo, "[t]he BIA's interpretation and application of the immigration laws are generally entitled to deference." *Hernandez-Mancilla* v. *Holder*, 633 F.3d 1182, 1184 (9th Cir. 2011); *Zetino* v. *Holder*, 622 F.3d 1007, 1011–12 (9th Cir. 2010). The agency's factual findings—such as its adverse credibility determination—are reviewed for substantial evidence and can be reversed only if the evidence "compels" a contrary conclusion.

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[2] 8 C.F.R. § 208.6(a) provides that "[i]nformation contained in or pertaining to any asylum application . . . shall not be disclosed without the written consent of the applicant." Angov argues that *Alexandrov* "exposed the improprieties that have riddled overseas investigations in the Sofia consulate," including that investigations were often conducted by foreign service nationals, that someone other than a consular officer could have authored embassy reports and that consular officials often signed reports written by others. None of these arguments were presented to the BIA.

*See Rizk* v. *Holder*, 629 F.3d 1083, 1087–88 (9th Cir. 2011) (emphasis omitted).

**(i) Due Process**

Angov claims that the IJ's reliance on the Bunton Letter violated his constitutional right to procedural due process. But Angov has no such right. He is an alien who has never formally entered the United States. He presented himself at the San Ysidro port of entry without valid entry documents and sought asylum. "[A]n alien seeking admission has not 'entered' the United States, even if [he] is in fact physically present." *Kwai Fun Wong* v. *United States*, 373 F.3d 952, 971 (9th Cir. 2004). "[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry." *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958). Aliens "who have once passed through our gates, even illegally," are afforded the full panoply of procedural due process protections, and "may be expelled only after proceedings conforming to traditional standards of fairness." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). But those, like Angov, who have never technically "entered" the United States have no such rights. *Id*. For Angov, procedural due process is simply "[w]hatever the procedure authorized by Congress" happens to be. *Id*. (internal quotation marks omitted); *see also Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) ("[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application . . . .").

Angov's claim of a procedural due process violation simply can't be squared with the Supreme Court's teachings in *Mezei* and *Landon*, nor with our

circuit's settled precedent. *See Barrera-Echavarria* v. *Rison*, 44 F.3d 1441, 1449 (9th Cir. 1995) ("[E]xcludable aliens have no procedural due process rights in the admission process . . . .").[3]

**(ii) Statutory Rights**

Angov's challenge to the admission of the Bunton Letter is therefore purely statutory. In assessing such a challenge, we must first ask whether the IJ made legal error by denying Angov any of his statutory rights. Angov claims that he was denied his right to examine evidence against him. *See* 8 U.S.C. § 1229a(b)(4)(B). But the record tells a different story. He was allowed to examine the Bunton Letter, and given ample time to produce substantial evidence to rebut it. *See* p. 5 *supra; cf. Cinapian*, 567 F.3d at 1076 (had the government given petitioners a chance

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[3] We note that four circuits have held that reliance on documents like the Bunton Letter in asylum proceedings violates due process. *See Banat* v. *Holder*, 557 F.3d 886, 892–93 (8th Cir. 2009); *Anim* v. *Mukasey*, 535 F.3d 243, 256–58 (4th Cir. 2008); *Alexandrov*, 442 F.3d at 407; *Ezeagwuna* v. *Ashcroft*, 325 F.3d 396, 405–08 (3d Cir. 2003). Because Angov does not have a constitutional right to procedural due process, that question is not before us. We also note that two other circuits have held that asylum applicants like Angov are entitled to certain "minimum due process" rights in the application of their statutory rights. *See Marincas* v. *Lewis*, 92 F.3d 195, 203–04 (3d Cir. 1996); *Augustin* v. *Sava*, 735 F.2d 32, 37 (2d Cir. 1984); *see also Meachum* v. *Fano*, 427 U.S. 215, 226 (1976). Whether asylum applicants are owed such "minimum due process" is an open question in our circuit, but it is not one we need to resolve here. Angov was clearly given fair access to all his statutory rights. What he asks for instead are due process protections that go beyond those which Congress has provided him. But, as an alien who has never entered the United States, those protections are unavailable to him.

to examine forensic reports before hearing, they may have been able to produce rebuttal evidence).

Angov also argues that he was denied his statutory right to cross-examine the witnesses against him. We've held that, before hearsay statements made by an absent witness can be admitted into an immigration hearing, "'the government must make a reasonable effort . . . to afford the alien a reasonable opportunity to confront the witnesses against him or her.'" *Hernandez-Guadarrama* v. *Ashcroft*, 394 F.3d 674, 681 (9th Cir. 2005) (quoting *Saidane* v. *INS*, 129 F.3d 1063, 1065 (9th Cir. 1997)); *see also* § 1229a(b)(4)(B); *Baliza* v. *INS*, 709 F.2d 1231, 1234 (9th Cir. 1983).

The government is, of course, not required to produce Bulgarian police officials at an immigration hearing in the United States. Such a requirement would make it virtually impossible for the government to introduce evidence rebutting an alien's claims relating to conduct abroad. Instead Angov, and the dissent, claim that the immigration authorities should have obtained a witness from the Department of State to verify the letter's contents. But hauling State Department officials into court wouldn't ameliorate the dissent's concerns, because the letters they author inescapably rely on foreign officials who aren't amenable to cross-examination.

In any event, the government here *did* make a reasonable effort to obtain a State Department witness, but was prevented from doing so by State's policy of not releasing follow-up information regarding its overseas investigations. The dissent claims that "allowing one executive branch agency to rely on another executive branch agency's blanket policy of refusing to provide certain information is tantamount

to granting the government the kind of unfettered discretion we repudiated in *Baliza*." But *Baliza* offers no support to the dissent's position. There the government relied on the affidavit of an alien's ex-wife as the basis for a fraudulent marriage charge while barely even *trying* to investigate her whereabouts. The declarant was not a government official and the government gave no justification for failing to find her. By contrast, the declarant here is a government official speaking in her official capacity. And the immigration authorities' decision not to present her in person was made pursuant to a coordinate department's reasonable policy governing the secrecy and safety of its officers. Because neither the immigration authorities nor the State Department acted unreasonably in failing to compel Bunton to testify, Angov's statutory rights were not violated.

**(iii) Substantial Evidence**

Because the IJ did not erroneously deny Angov a statutory right, our review is limited to whether the IJ's adverse credibility finding was supported by substantial evidence. "This strict standard bars a reviewing court from independently weighing the evidence," and requires us to "deny the Petition unless Petitioner [has] presented evidence so compelling that no reasonable factfinder could find that Petitioner" was not credible. *Singh* v. *INS*, 134 F.3d 962, 966 (9th Cir. 1998) (internal quotation marks omitted).

Despite the generally flexible—and highly deferential—nature of substantial evidence review, Angov appears to argue for a per se rule under which immigration judges must blind themselves to the findings of a State Department letter, unless it provides particular information regarding how an investigation

was conducted. Surprisingly, Angov's radical proposal accords with the view of the Second Circuit, which has held that a document akin to the Bunton Letter was "inherently unreliable" because it didn't reveal the qualifications of the investigator, the extent of the investigation or the methods used to verify the information. *Lin* v. *U.S. Dep't of Justice*, 459 F.3d 255, 271–72 (2d Cir. 2006). Under Second Circuit law, therefore, documents like the Bunton Letter categorically "cannot support [an] adverse credibility finding." *Id*. at 272. We reject this approach. Substantial evidence review requires an appellate court to consider the reasonableness of an agency's conclusions; it does not empower us to craft quasi-statutory criteria governing the admissibility of evidence in agency proceedings. In light of our departure from the holding of a sister circuit—one with the second-largest immigration docket in the country—we offer a thorough explanation for our rationale.

**1.** Congress and the Attorney General have accorded aliens like Angov a variety of procedural rights, including the right to be present at the hearing; to be represented by counsel; to examine the evidence against him and present counter-evidence; to cross-examine witnesses; and to have a written record kept of the proceedings. 8 U.S.C. § 1229a(b)(4). But neither the statute nor the regulations give the asylum applicant a right to a particular *quality* of the evidence presented against him. Instead, he is given the right to have an impartial adjudicator assess the evidence. When exercising grace towards individuals entitled *no* procedural rights under the constitution, Congress can set the precise limits of what it grants and what it withholds. That then defines the process an asylum seeker like Angov is due.

With that in mind, let's put Angov's claims into some context. The IJ found that Angov presented forged documents. This is a serious matter that, if true, should not merely result in the immediate termination of Angov's asylum petition, but also in criminal prosecution for immigration fraud. But the IJ wasn't fazed by discovery of the fraud; he went on to decide whether Angov's asylum claim could be sustained despite the forgeries. No other adjudicator in the United States would react with such equanimity to finding that a party had tried to bamboozle it.

This points to an unfortunate reality that makes immigration cases so different from all other American adjudications: Fraud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated. Our circuit is no exception. *See Abovian* v. *INS*, 257 F.3d 971 (9th Cir. 2001) (Kozinski, J., dissental).

The reason for this deplorable state of affairs is not difficult to figure out. The schizophrenic way we administer our immigration laws creates an environment where lying and forgery are difficult to disprove, richly rewarded if successful and rarely punished if unsuccessful. This toxic combination creates a moral hazard to which many asylum applicants fall prey.

First, the reward: the opportunity to be lawfully admitted into the United States. Those born with U.S. citizenship cannot imagine what this is worth to the world's poor and oppressed billions, most of whom would come here tomorrow if they could. Gaining a lawful foothold in America is an incalculable benefit. It sets an immigrant on the path to a peaceful life in a free society, economic prosperity, citizenship and the opportunity to bring family members in

due course. A prize like this is worth a great deal of expense and risk. Telling an elaborate lie, and coming up with forged documents and mendacious witnesses to back it up, is nothing at all when the stakes are so high.

And the risk of getting caught is low. As eight members of this court pointed out in *Abovian*:

> The specific facts supporting a petitioner's asylum claim—when, where, why and by whom he was allegedly persecuted—are peculiarly within the petitioner's grasp. By definition, they will have happened at some time in the past—often many years ago—in a foreign country. In order for the INS to present evidence "refuting or in any way contradicting" petitioner's testimony, it would have to conduct a costly and often fruitless investigation abroad, trying to prove a negative—that the incidents petitioner alleges did not happen.

257 F.3d at 976. There's very little the United States can do to investigate obscure incidents that allegedly occurred in countries on the other side of the globe. Even if it were economically feasible, we can't send the FBI into a foreign country to conduct a full field investigation. The best we can do is to have consular personnel check basic facts, in addition to the many other functions they perform. And we have very few U.S. consular personnel on the ground in most countries; in all of Bulgaria, there are fewer than two dozen. *See* U.S. Sec'y of State, 1 *Congressional Budget Justification, Department of State Operations, Fiscal Year 2013*, at 306 (2012). All told, there are fewer than 6000 consular officials in embassies and consu-

lates spread out across more than 170 countries. *Id.* at 227–311.

Finally, if an alien does get caught lying or committing fraud, nothing very bad happens to him. Sure, he may be ordered removed, but most aliens who aren't in custody remain here long after their removal orders become final. *See, e.g.*, Office of the Inspector Gen., U.S. Dep't of Justice, *The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders* iii (2003) (reporting that "the INS removed only 3 percent of nondetained asylum seekers with final removal orders"); *see also* Mark Hamblett, *Circuit Sets Policy for Removal Cases Deemed Low Priority by U.S.*, N.Y. L.J., Oct. 18, 2012 (discussing policy that calls for "the exercise of prosecutorial discretion to focus removal efforts on the most high-priority cases"). And if they do get sent back—at our expense—what's lost? They wind up where they started. Would-be immigrants almost never get prosecuted for presenting forged documents in support of asylum petitions, unless they commit some additional misconduct. *See, e.g.*, *United States* v. *Jawara*, 474 F.3d 565, 570 (9th Cir. 2007) (defendant charged with document fraud *and* conspiracy to commit marriage fraud). Consequently, immigration fraud is rampant.

Take, for instance, Angov's compatriot, Pavel Pavlov. Pavlov sought asylum as a persecuted gypsy, just like Angov. They even have the same lawyer. But Pavlov's story took a different turn when his wife gained U.S. citizenship and he sought adjustment of status. In the process, he had to disclose that his asylum application was a tissue of lies. Specifically, Pavlov admitted that he wasn't persecuted in Bulgaria. In fact, he's not even a gypsy.

Americans galore wind up in federal prison every year for far less significant lies on government forms or bank loan applications. *See*, *e.g.*, *United States* v. *Prince*, 647 F.3d 1257, 1260–61, 1265 (10th Cir. 2011); *United States* v. *Sandlin*, 589 F.3d 749, 751–53 (5th Cir. 2009); *United States* v. *Jack*, 216 F. App'x 840, 841–43 (11th Cir. 2007). So was Pavlov appealing his criminal conviction? Certainly not. The BIA barred Pavlov from obtaining any relief under our immigration laws because he had filed a frivolous (read: fraudulent) asylum petition—a decision he had the chutzpah to appeal. *See Pavlov* v. *Holder*, 697 F.3d 616 (7th Cir. 2012).

Cases involving fraudulent asylum claims are distressingly common. *See*, *e.g.*, *Cheema* v. *Holder*, 693 F.3d 1045, 1046–47 (9th Cir. 2012); *Dol* v. *Holder*, 492 F. App'x 774, 775 (9th Cir. 2012); *Zheng* v. *Holder*, 672 F.3d 178, 180–81 (2d Cir. 2012); *Fernandes* v. *Holder*, 619 F.3d 1069, 1074–76 (9th Cir. 2010); *Ghazali* v. *Holder*, 585 F.3d 289, 290–91 (6th Cir. 2009); *Ribas* v. *Mukasey*, 545 F.3d 922, 925–26 (10th Cir. 2008); *Siddique* v. *Mukasey*, 547 F.3d 814, 815–16 (7th Cir. 2008); *Rafiyev* v. *Mukasey*, 536 F.3d 853, 855–57 (8th Cir. 2008); *Dhital* v. *Mukasey*, 532 F.3d 1044, 1047–48 (9th Cir. 2008) (per curiam); *Chen* v. *Mukasey*, 527 F.3d 935, 938–39 (9th Cir. 2008); *Ahir* v. *Mukasey*, 527 F.3d 912, 914–16 (9th Cir. 2008). And for every case where the fraud is discovered or admitted, there are doubtless scores of others where the petitioner gets away with it because our government didn't have the resources to expose the lie.

The Second Circuit has given this already shaky system a swift kick in the gut. As we explain further below, its ruling makes it pretty much impossible for

the immigration authorities to carry out even the little bit of fact checking they now manage to do. Its decision smothers the State Department's informal process of checking up on asylum petitions in layers of procedural complexity that will prove impossible to administer in practice. Perhaps the Supreme Court or Congress will intervene and decide who's right.

**2.** The basic question that confronts us is this: In a system where there are pervasive, structural incentives for fraud, are we to disable our triers of fact from considering certain evidence—which may be essential to weeding out fraudulent claims—when that evidence lacks particular details that may bear on its reliability? Remember, the Second Circuit regards documents like the Bunton Letter as *inherently* unreliable. We need not—and do not—conclude that such letters will always lead to adverse credibility findings; we simply disclaim the conclusion that they must be excluded from an immigration judge's consideration when they fail to provide sufficient identifying detail.

We acknowledge the Bunton Letter lacks certain indicia of reliability, but we cannot say, under our "extremely deferential" review, that its use alone constitutes grounds to reverse the IJ's adverse credibility determination. *Wang* v. *INS.*, 352 F.3d 1250, 1257 (9th Cir. 2003). First of all, Angov has the burden of proving his eligibility for asylum. *See* 8 C.F.R. § 1208.13(a). The government has no burden; it can present evidence solely to rebut or impeach petitioner's case. The IJ and the BIA could reasonably conclude that the Bunton Letter is at least sufficient to cast doubt on Angov's evidence and force him to come up with more solid proof to support his claim.

Angov finds fault with the Bunton Letter because it "provides no information as to who conducted the investigation; who obtained, stored and verified the information underlying the conclusion expressed in the document [or] when and under what authority the investigation was conducted." He notes that the Bunton Letter offers no explanation for many of its conclusions—for example, that both the case numbers and the telephone numbers listed on the fraudulent subpoenas were incorrect. These are all interesting points to raise at the hearing, and the absence of a satisfactory response from the government might well convince the trier of fact to disregard the letter. But in this instance, the IJ, in his discretion, chose to credit the letter. That was his prerogative, and our review is limited to whether that decision is *permissible* in light of the evidence.

The doubts as to the letter's reliability flow from the fact that the rules of evidence, and the hearsay rules in particular, don't apply to administrative proceedings. *See Richardson* v. *Perales*, 402 U.S. 389, 400–02 (1971); *Hernandez-Guadarrama* v. *Ashcroft*, 394 F.3d 674, 681 (9th Cir. 2005). This inevitably leaves some uncertainty that would be eliminated if this were a formal trial subject to the rules of evidence. But it doesn't deprive the opposing party of any and all means of rebutting the hearsay declarant's assertions.

The Bunton Letter does come to certain factual conclusions: that the addresses identified by Angov in his asylum petition don't exist; that the officers—Captain Donkov, Lieutenant Slavkov and Investigator Vutov—and room numbers specified in the subpoenas presented by Angov don't exist; that the seals on the subpoenas are the wrong size; and that the

part of the city where Angov claimed to live was only twenty to thirty percent Roma. Each of these assertions describes facts in the real world, so it's possible to rebut Bunton by presenting proof that those facts are not as the Bunton Letter describes them.

In fact, Angov did precisely that with respect to the two addresses. He presented a letter from someone in Bulgaria, who explained that the Bunton Letter's conclusions about the addresses are wrong. *See* p. 5 *supra*; Appendix. And the BIA seems to have been swayed, as it noted that the "record is unclear" about whether Angov was telling the truth about the addresses.

Angov was free to present similar evidence to undermine the Bunton Letter's statements about the subpoenas. He could have had Ms. Mihaylova from the human rights organization or some other friend in Sofia visit the police station and try to find out whether the rooms referenced in the Bunton Letter do or don't exist. He might also have been able to obtain a roster of the names of police officials in Sofia and shown that it contains the names of the officers referenced in the subpoenas.

The Bunton Letter also asserts that the phone numbers in the subpoenas aren't correct. Angov or one of his friends could have called the numbers and asked whether he'd reached the police station—and then submitted an affidavit to that effect. The same is true about the seals: Angov or his friends might have tried to obtain an official copy of the police seal from the Bulgarian government and introduced it into evidence. He did none of these things, perhaps because he knew that the subpoenas were forged.

Where the petitioner has the burden of proof, there's nothing unfair about having a U.S. government agent check out some of his basic facts and inform the IJ of possible discrepancies. This forces the petitioner to obtain further evidence supporting the challenged claims. There might be situations where obtaining further evidence is impossible, such as where the petitioner has fled from a closed society and can find no one willing or able to obtain the evidence he needs. In such cases, we don't hold the petitioner's failure to present evidence against him. *See Singh* v. *Holder*, 638 F.3d 1264, 1270–71 (9th Cir. 2011). But Angov has never claimed that he couldn't get more evidence; indeed he has resources in Bulgaria with which to do so. Based on the almost complete absence of rebuttal evidence on Angov's part, the IJ was not unreasonable to credit the allegations in the Bunton Letter.

**3.** There's nothing particularly exotic about assessing an asylum applicant's credibility by comparison with an extrinsic source. For example, the Bunton Letter's estimate that Angov comes from a community that is only twenty to thirty percent Roma is similar to the kind of demographic estimates made by the State Department in its country reports, on which we and the BIA rely all the time. *See, e.g.*, *Dhillon* v. *Holder*, 485 Fed. App'x 252, 253 (9th Cir. 2012); *Patel* v. *Holder*, 474 F. App'x 584, 585 (9th Cir. 2012); *Sesay* v. *Holder*, 469 F. App'x 617, 617 (9th Cir. 2012); *see also Sowe* v. *Mukasey*, 538 F.3d 1281, 1285 (9th Cir. 2008) ("U.S. Department of State country reports are the most appropriate and perhaps the best resource for information on political situations in foreign nations." (internal quotation marks omitted)); *cf.* 8 U.S.C. § 1158(b)(1)(B)(iii).

Were we to hold that we can't rely on this estimate in the Bunton Letter, we'd be casting doubt on a multitude of country reports that have no better support for their demographic estimates than the Bunton Letter. The country reports are, after all, prepared by the very same consular officials, using some of the same methods, as the Bunton Letter. *See* Bureau of Democracy, Human Rights & Labor, U.S. Dep't of State, *Country Reports on Human Rights Practices for 2012: Appendix A: Notes on Preparation of Reports*, at 1 (2012). Indeed, Cynthia Bunton's title when she wrote her letter was director of the Department of State's "Office of *Country Reports* and Asylum Affairs." (emphasis added). Nadia Tongour is her successor. Adopting Angov's objection to the findings in the Bunton Letter could render country reports inadmissible in immigration proceedings.

Angov complains that the Bunton Letter might have relied on reports from foreign service nationals (FSNs). *See Ezeagwuna*, 325 F.3d at 406. What if it did? Our embassy in Sofia, as elsewhere, employs roughly the same number of FSNs and Americans. U.S. Sec'y of State, 1 *Congressional Budget Justification, Department of State Operations, Fiscal Year 2013*, at 306 (2012). Our short-staffed consular offices no doubt use FSNs, who are fluent in the local language and familiar with local conditions, to do some of the legwork. We see nothing wrong with that. Whether the investigation was conducted by U.S. citizens, FSNs or Hercule Poirot, it resulted in certain factual conclusions that can be refuted.

Submissions such as the Bunton Letter and the various country reports on which we routinely rely aren't just a collection of statements by disconnected individuals. Rather, they are the unified work prod-

uct of a U.S. government agency carrying out governmental responsibilities. As such, the report itself, and the acts of the various individuals who helped prepare it, are clothed with a presumption of regularity. *See Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004); *see also Kohli* v. *Gonzales*, 473 F.3d 1061, 1068 (9th Cir. 2007). "[I]n the absence of clear evidence to the contrary, courts presume that [these individuals] have properly discharged their official duties." *Favish*, 541 U.S. at 174 (quoting *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996)).

The presumption of regularity has been applied far and wide to many functions performed by government officials. *See, e.g.*, *U.S. Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001) (Post Office disciplinary procedures); *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (prosecutorial decision making); *FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965) (FCC's decision making process); *cf. INS* v. *Miranda*, 459 U.S. 14, 16–18 (1982) (per curiam) (processing of visa application).

The Bunton Letter is entitled to the presumption that those who participated in its preparation, be they FSNs, consular officers or officials at the State Department in Washington, did their jobs fairly, conscientiously and thoroughly; that each officer in the chain relied on the work of someone down the chain in whom he had confidence; that no one had a personal stake in the substance of the report; and that no one lied or fabricated evidence. Without this presumption, country reports would be no more useful than the Farmers' Almanac or Perezhilton.com.

The dissent argues that the presumption of regularity doesn't apply here because "[t]he key hearsay

statement in the Bunton Letter comes from a Bulgarian police employee, not a U.S. government official." But that would remain true, even with the procedural protections the Second Circuit advocates. Those protections don't prevent Bulgarian police officers from lying, they simply make it easier for an IJ to assess the quality of investigation conducted by *our* consular officials—the very officials we presume reliable. As with a country report, the information in a consular letter may be based, in part, on hard-to-verify statements made by local officials. That's a reason to take the information contained in such letters with a grain of salt—as an IJ is entitled to do—not a reason to deem them inadmissible in their entirety.

The similarities between the Bunton Letter and the litany of documents used, and accepted, in everyday asylum adjudications speaks to a fundamental misapprehension on the part of the Second Circuit and the dissent. Immigration adjudication necessarily requires consideration of all manner of imperfect sources. But we do neither immigrants nor the immigration authorities a service by cabining the range of permissible documents on which a trier of fact can rely in making his decision. In assessing whether an incident occurred years ago in a faraway country with an unfamiliar culture and political system, an immigration judge must be able to read, assess and weigh as much information as possible. True, dismissing a petition in reliance on an unsworn letter might seem harsh; but so is dismissing a petition based on relatively minor testimonial inconsistencies in the convoluted story of an immigrant who may have only a weak command of English and a hazy memory of his flight from terror. Harshness is endemic to any asylum system. Here, the IJ came to

the conclusion that the unrefuted contents of the Bunton Letter cast doubt on the subpoenas Angov presented as evidence. Do we really better serve justice, or the immigration process more generally, by compelling the IJ to either accept the dubious subpoenas as genuine, or base his review solely on his instincts as to what a Bulgarian subpoena "should" look like?

An implicit assumption of the Second Circuit's approach is that the exclusion of documents such as the Bunton Letter will lead, not to reliance on capricious information, but to the proliferation of more comprehensive and reliable State Department investigations. There's no reason to believe that will happen. The asylum unit of the Department of State's Office of Country Reports and Asylum Affairs "has suffered from long standing resource problems." Office of the Inspector Gen., U.S. Dep't of State, *Report of Inspection: Bureau of Democracy, Human Rights and Labor* 23 (2003). Many of its staffers are interns, and even its regular employees are often "pressed into service to work" on the Office's other main responsibility: country reports. *Id.* at 23–24. And the consular officers tasked with verifying asylum applicants' claims are also overworked and understaffed. The Tongour Letter expresses the government's position on providing additional information about the results of an overseas investigation: "Such additional demands are further burdens on Consular Officers in the performance of their regular responsibilities and are particularly onerous for FSNs who may be subject to local reprisal." The State Department tells us it's doing the best it can with the scant resources allocated to it and our consular corps abroad.

Demanding that the reports contain a multitude of additional details, such as "the identity and qualifications of the investigator(s)," "the objective and extent of the investigation" and "the methods used to verify the information discovered," *see Lin*, 459 F.3d at 271, transforms a process that is swift, efficient and informal into one that's ponderous, time-consuming and expensive.

Insisting on these procedures would paralyze the process, making it impossible for our consular officers to do many of these investigations because they're too busy filling in all the jots and tittles our sister circuit enshrines as pre-requisites for a document's admission. Complying with such requirements considerably lengthens the time it takes to write most reports, and may make it impossible to write others for fear of disclosing sensitive information that could compromise sources or impair relations with local officials.

Nor is it realistic for the government to produce such information in camera. These reports are prepared by Department of State officials stationed in foreign countries, and are then turned over to another agency in another department, which then releases them to an adverse party. These disclosures are made in the context of immigration court proceedings, not in district court, and the immigration court, despite its name, is an executive branch agency. It has no contempt powers and can't have anyone arrested for violating its orders, including confidentiality orders. *See* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 Duke L.J. 1635, 1674, 1714 (2010); Dana Leigh Marks, *Still a Legal "Cinderella"? Why the Immigration Courts Remain an Ill-Treated Stepchild Today*, 59 Fed. Law., Mar. 2012,

25, at 30. There's a good chance the information will fall into the hands of people who have little regard for U.S. law and find themselves repatriated with a motive for revenge. Consular officials forced to disclose sensitive information in these circumstances would probably leave the information out of the report rather than risk burning their sources, offending local officials or losing their lives.

If we make the job of compiling these reports substantially more risky and onerous, the State Department may stop writing them. The United States gets close to 74,000 asylum cases a year, far more than any other industrialized nation. *See* United Nations High Comm'r for Refugees, *Asylum Levels and Trends in Industrialized Countries* 3, 8 & n.14 (2011). (That's more than three times the number of Social Security cases the Supreme Court considered massive in *Perales*). The use of reports from consular officials gives the government the ability to check facts and puts at least *some* constraint on how far from the truth asylum applicants will stray. Knocking out even this most basic check on fraud and fabrication would subvert the asylum process, giving charlatans a free pass into the United States.

**4.** In any event, even if the Second Circuit's approach were to encourage more detailed State Department letters, such "faith in procedural choreography" as a truth-seeking device is "fundamentally flawed." *United States* v. *Balough*, 820 F.2d 1485, 1491 (9th Cir. 1987) (Kozinski, J., concurring). Requiring the Department of State to disclose more details will neither materially enhance the reliability of the resulting report nor do very much to help asylum applicants.

We test this proposition by modifying a portion of the Bunton Letter to comply with the requirements that would (presumably) satisfy the Second Circuit; new or modified language is italicized:

> *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. Bogdanovic*h 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 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.*

Best we can tell, this revised letter would comply with the requirements imposed by the Second Circuit, but would it be much more valuable than what we already have? We'd know a bit more about Agent Smith, and we'd know the identity of the person who did the legwork, but how would that help us? We'd also have a name of someone who purportedly provided the information from the Bulgarians, but how would *that* be of any use? Angov could still complain that the IJ was unable to assess the Bulgarian official's credibility, or even the credibility of any of the later links in the chain. We'd also know that it was Agent Smith who visually compared the seal on the subpoenas with the station's official seal, but how does that bring us closer to the truth?

At this point, we would be faced with a whole new set of questions: How do we know Popov really went to the police station instead of stopping off in a bar to chug rakia? How did Popov know whether Bogdanovich was really the supervisor of personnel records at the police station? Did he check her identification papers? How did Popov assess Bogdanovich to be trustworthy, and how can we be sure he's right? Did Popov look at the personnel records himself, or did he take Bogdanovich's word that the three officers never worked there? Can we be sure that Bogdanovich checked all the relevant records? Can we be sure the purported personnel records were accurate and complete? How do we know Popov didn't falsify important details because he was afraid of reprisal or because he hates gypsies? And how can we

be sure Smith is telling the truth if we can't cross-examine him? Did Smith have a full-sized copy of the subpoena when he compared the seals or a shrunken photocopy?

These difficulties are inherent in trying to prove up facts related to events that occurred years past and thousands of miles away from where the IJ is holding his hearing. Short of transporting all the declarants and their underlying records to the United States for a hearing before an IJ, there will inevitably be gaps that can be bridged only by multiple levels of hearsay.

This is not a problem that plagues only the government. Almost every piece of evidence asylum petitioners present in support of their cases would be inadmissible if subjected to the rules of evidence, especially those pertaining to hearsay: threats they claim to have been subjected to; racist comments by the police; reports of strange people looking for them; letters from family members and others. A brief scan of our caselaw shows it's pretty much impossible to build an asylum case without relying on evidence that would be laughed out of court if presented in a domestic trial. *See, e.g., Meza-Vallejos* v. *Holder*, 669 F.3d 920, 922 (9th Cir. 2012); *Haile* v. *Holder*, 658 F.3d 1122, 1124–25 (9th Cir. 2011); *Singh* v. *Holder*, 656 F.3d 1047, 1049–50 (9th Cir. 2011); *Hu* v. *Holder*, 652 F.3d 1011, 1013–15 (9th Cir. 2011); *Kumar* v. *Gonzales*, 444 F.3d 1043, 1047–48 (9th Cir. 2006).

Take, as a small example, the letter from Daniela Mihaylova that Angov presented to rebut some of the information in the Bunton Letter. This is a two-page, typed document, with a small emblem and a typed address by way of letterhead. (We reproduce it in the Appendix.) It is addressed "To: Whom it may con-

cern" and references Angov's case. The letter represents that the "Romani Baht Foundation is a leading Bulgarian non-profit organization for protection of Roma/Gypsies human rights, founded in 1996 and legally registered with Bulgarian court." Mihaylova purports to be the legal programs' director of the Foundation.

The BIA took this letter seriously and modified some of the IJ's findings based on it and other evidence presented by Angov. But there is absolutely no evidence in the record that there *is* any such person as Daniela Mihaylova and, if there is, how she went about obtaining the information detailed in her letter. For all we know, Angov could have printed the letter using his computer and standard word processing software.

Compared to this letter—and the remaining evidence presented by Angov—the Bunton Letter seems a paragon of reliability. It was prepared by government officials trained to perform this kind of investigation; who have nothing to gain by giving false information; and whose conduct is clothed with the presumption of regularity that attaches to all government actors. *Cf. Perales*, 402 U.S. at 402–06. The Bunton Letter encloses five photographs depicting locations mentioned in Angov's asylum petition, which confirms that someone from our consulate traveled to those locations and made a personal inspection.

The Bunton Letter also gives specific reasons for doubting the authenticity of the addresses and points to several problems with the subpoenas. It is not an unsupported assertion that Angov is a liar; it is a rational, apparently objective recital of observed facts. At the very least, we can be sure that there *is* a

Bunton and a Tongour, and that they can be disciplined or prosecuted if they negligently or deliberately falsified their reports. And we can reasonably presume that, in preparing their reports, Bunton and Tongour relied on trained State Department officers and agents who are themselves subject to discipline or prosecution for incompetence or corruption.

Compare this to the letter from Mihaylova (assuming there even *is* a Mihaylova): It comes from someone who cannot be disciplined or prosecuted in case of a lie, and who has not been screened for competence, honesty or reliability. It encloses no pictures or other documentary evidence. It doesn't explain how the facts asserted were gathered or by whom. It doesn't even claim to be based on first-hand knowledge, rather than hearsay or rumor. The letter simply makes a series of bald factual assertions without any support. Even assuming the letter is genuine (in the sense that it was actually written by its purported signatory in Bulgaria), the IJ and the BIA have absolutely no way to evaluate how accurate or objective it is.

In an environment where it's pretty much impossible to obtain first-hand accounts of most of the relevant facts, should we require the government to fight an uphill battle on a slippery slope with one leg and both arms tied behind its back, while its adversary gets to use cleats and brass knuckles? Of course not. It would be the height of cognitive dissonance to hold the United States to standards of proof derived from domestic litigation while allowing petitioners to present anything and everything that doesn't bear the watermark "Forgery Purchased on the Black Market."

Furthermore, contrary to what the dissent and the Second Circuit might believe, the consequence of a rule excluding the consideration of documents such as the Bunton Letter will not be to allow more of the world's oppressed into the land of the free. Rather, it favors the canny, the dishonest, the brazen and those who have the means and connections to purchase or create fraudulent documents, such as Angov's compatriot, Pavlov. *See* p. 13–14 *supra*. Nor does such a rule ultimately help asylum seekers, as it's hard to believe that Congress will long allow the program to continue when it rewards people who lie their way into the United States. Eventually, Congress and the public will catch on that asylum has become a fast-track vehicle for immigration fraud, and the asylum statute will be repealed or amended so as to make it even more difficult for honest asylum seekers to obtain relief. The ultimate victims will be the tired, poor, huddled masses who will find the golden door slammed in their faces.

* * *

We conclude on this record that the IJ acted within his discretion when he admitted the Bunton Letter into evidence and relied on it to find that the subpoenas Angov submitted were fraudulent. The adverse credibility finding based on the fraudulent subpoenas was supported by substantial evidence. Because Angov's claim is based on his mistreatment by the Bulgarian police, the fact that the subpoenas were fraudulent "goes to the heart of [Angov's] claim of persecution." *See Rizk*, 629 F.3d at 1087–88. Furthermore, Angov's testimony is not credible, and he doesn't present other evidence that meets his burden to show that it's "'more likely than not'" that he would be tortured if sent back to Bulgaria. *See*

*Shrestha* v. *Holder*, 590 F.3d 1034, 1048 (9th Cir. 2010). Consequently, the IJ and BIA decisions denying Angov asylum, withholding of removal and protection under the Convention Against Torture must stand.

**PETITION DENIED.**

**Appendix: Mihaylova Letter**

To: Whom it may concern
Re: Case No A3 96 227 355

Dear Madam/Sir,

Romani Baht Foundation is a lEading Bulgarian non-profit organization for protection of Roma/ Gypsies human rights, founded in 1996 and legally registered with Bulgarian court.

In my capacity of Legal Programs' Director in the Romani Baht Foundation, I am writing to confirm that:

1. Sofia based address No 5 "3005" street is based in TolEva mahala, which is a part of one of the biggest Roma ghettos in Sofia, Bulgaria. The living conditions in the Roma ghettos are under the existing minimum, the people live in barracks, they are not provided with electricity, water and savage system, public transportation, and other facilities. Many of the Roma people do not posses documents for ownership, which facilitate the eviction procedures and leaves them without any compensation when evicted.
2. In 2001 about 100 Roma houses have been destructed and the place has been used for building a hypermarket BILLA.

Should you need any additional information, please let us know and we will provide you with such ASAP.

Sincerely: */s/ Daniela Mihaylova*
Daniela Mihaylova
Legal Programs' Director,
Romani Baht Foundation

THOMAS, Chief Judge, dissenting:

I would join the Second Circuit in resolving the issue before us. Unsworn, unauthenticated, hearsay letters—prepared for litigation by the government and not subject to any form of cross-examination—cannot form the sole basis for denying asylum to an otherwise qualified applicant. Therefore, I must respectfully dissent.

I

A

Five of our sister circuits have held that the government may not deny asylum solely on the basis of conclusory letters prepared for litigation in reliance on multiple layers of unauthenticated hearsay, without affording the petitioner some right of confronting the charges. Four of those circuits reached this result on constitutional grounds, holding that the admission of unauthenticated consular letters against an asylum applicant violates that applicant's procedural due process rights. *Banat* v. *Holder*, 557 F.3d 886, 892–93 (8th Cir. 2009); *Anim* v. *Mukasey*, 535 F.3d 243, 256–58 (4th Cir. 2008); *Alexandrov* v. *Gonzales*, 442 F.3d 395, 407 (6th Cir. 2006); *Ezeagwuna* v. *Ashcroft*, 325 F.3d 396, 405–08 (3d Cir. 2003). The Second Circuit declined to reach the constitutional issue but held that such letters, standing alone, could not provide a basis for denying asylum under the substantial evidence standard because they lacked sufficient indicia of reliability and trustworthiness. *Lin* v. *U.S. Dep't of Justice*, 459 F.3d 255, 268–72 (2d Cir. 2006); *see also Balachova* v. *Mukasey*, 547 F.3d 374, 382–83 (2d Cir. 2008) (applying *Lin*). Although I would resolve the present case purely on statutory grounds, as the Second Circuit did, the cases decided

by our other sister circuits also provide useful guidance here.

In *Banat*, for instance, the Eighth Circuit rejected an IJ's reliance on a consular letter that cited an unidentified investigator from the U.S. embassy in Beirut because the letter contained "multiple levels of hearsay" and omitted any mention of the investigator's qualifications, experience, or "contact." 557 F.3d at 891–92. The court acknowledged that "overseas investigations by State Department officials concerning the authenticity of documents purportedly originating in foreign countries are often necessary for the adjudication of an asylum claim," *id.* at 890; however, it concluded that "the IJ's reliance on the State Department letter, which provided no details about the investigation that would allow the IJ to assess the investigation's reliability or trustworthiness and which contained multiple levels of hearsay, violated Banat's right to a fundamentally fair hearing." *Id.* at 893. The court reasoned:

> Reliance on reports of investigations that do not provide sufficient information about how the investigation was conducted are fundamentally unfair because, without that information, it is nearly impossible for the immigration court to assess the report's probative value and the asylum applicant is not allowed a meaningful opportunity to rebut the investigation's allegations.

*Id.* at 891.

The Fourth Circuit relied on similar logic in *Anim* when it rejected a State Department letter authored by the same official involved in our case. The court noted that the official's letter was "comprised

entirely of multiple hearsay statements." 535 F.3d at 257. It also pointed out that "letter does not explain how Bunton received the information she relates, nor does the letter disclose the identities of some of the individuals involved in the chain of communication." *Id.*; *see also id.* ("Without the details of the investigation, it is impossible for an immigration judge, the BIA, or a court to evaluate the reliability of the letter's conclusions." (citations omitted)). Based on these deficiencies, the *Anim* court concluded that "the Bunton letter contains insufficient indicia of reliability and, as a result, its use was fundamentally unfair." *Id.* at 256.

The courts in both *Anim* and *Banat* relied heavily on the Second Circuit's reasoning in *Lin*, 459 F.3d at 268–72. In *Lin*, the Second Circuit rejected a consular report almost identical to the letter at issue here. The consular report was based on the opinions of Chinese government officials who, as the *Lin* court noted, "appear to have powerful incentives to be less than candid on the subject of their government's persecution of political dissidents." *Id.* at 269–70. The court also observed that the report lacked other traditional markers of reliability, namely: "(i) the identity and qualifications of the investigator(s); (ii) the objective and extent of the investigation; and (iii) the methods used to verify the information discovered." *Id.* at 271. The *Lin* court distilled these factors from the Department of Justice's own guidelines for evaluating the reliability of documents produced overseas.[1] Noting that the consular letter failed to satisfy

[1] The Justice Department's guidelines stated that, in the case of a fraudulent document, the "report must contain, at a minimum: (i) the name and title of the investigator; (ii) a statement that the investigator is fluent in the relevant language(s) or

these basic criteria, the court held that the report was "insufficiently detailed to permit a reviewing court to assess its reliability" and, as such, could not support a finding that the petitioner had forged documents submitted with his asylum application. *Id*. at 270.

Critically, the Second Circuit reached this conclusion as a statutory matter, holding that the consular report was "highly unreliable and therefore insufficient to satisfy the substantial evidence requirement." *Id*. at 269. The court noted that the Third and Sixth Circuits had recently rejected similar reports as procedural due process violations[2] but, ultimately,

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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 location(s) 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." Memorandum from Bo Cooper ("Cooper Memo"), Gen. Counsel, Immigration & Naturalization Serv., to Jeffrey Weiss, Dir., Immigration & Naturalization Serv. Office of Int'l Affairs, Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information (June 21, 2001), *available at* http://judiciary. house.gov/ legacy/82238.pdf at 39–45.

[2] *See Alexandrov*, 442 F.3d at 407 (holding that memoranda prepared by a U.S. embassy official in Sofia did "not meet our standards of trustworthiness and reliability and were therefore improperly relied upon by the immigration court"); *Ezeagwuna*, 325 F.3d at 406–08 (holding that a letter prepared by a U.S. embassy official in Yaounde contained "multiple hearsay of the

the *Lin* court held that it was unnecessary to reach the constitutional issue. *Id.* ("Although we find the logic of these cases [concerning procedural due process] persuasive, we do not reach the constitutional issue presented because the *statutory* standard of review requires vacatur." (emphasis in original)). The court later took the same approach in *Balachova*. 547 F.3d at 383 (concluding that a consular report that "contain[ed] no information concerning the qualifications of the investigators, the identity of the Russian officials who prepared the response to the consular inquiry, or the methods, if any, used to verify the information supplied by the foreign official" was "unreliable and cannot contribute to a finding of substantial evidence").

Our case cannot be distinguished from *Lin* or *Balachova*. The IJ relied on a short, unsworn letter from a State Department official to support his finding that Angov forged parts of his asylum application. The letter was devoid of any information concerning the methodology employed in the investigation or the qualifications of the investigators. Instead, it was based on the unauthenticated, hearsay statements of an unidentified Bulgarian police official who worked at the police station where Angov claims to have been severely beaten. Like the government officials in *Lin*, that police official—whose department had been accused of ethnically motivated brutality—had a strong incentive to be "less than candid." 459 F.3d at 269.

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most troubling kind" and, therefore, was "neither reliable nor trustworthy").

In sum, the Bunton Letter was comprised of conclusory statements of fact, none of which were supported by the basic information required under *Lin* and *Balachova*. We are left, as was the Second Circuit, with a document that is "insufficiently detailed to permit a reviewing court to assess its reliability." *Lin*, 459 F.3d at 270. Indeed, in many ways, there is less information in the Bunton Letter than in the letters rejected as unreliable by our sister circuits. Accordingly, because the Bunton Letter lacks the indicia of reliability set forth in Lin, the agency could not have relied on it under the substantial evidence standard.

B

Neither *Lin* nor *Balachova* discussed the specific procedural protections guaranteed to aliens in removal proceedings under 8 U.S.C. § 1229a(b)(4)(B). That provision, however, offers independent grounds for barring the government from relying on unsworn, unauthenticated hearsay letters as the sole basis for denying an alien relief from removal.

Section 1229a(b)(4)(B) expressly provides that every alien "shall have a reasonable opportunity to examine the evidence against [him or her], to present evidence on [his or her] own behalf, and to cross-examine witnesses presented by the Government" during removal proceedings. *See also* 8 C.F.R. § 1240.10(a)(4) (requiring the IJ to "[a]dvise the respondent that he or she will have a reasonable opportunity to examine and object to the evidence against him or her, to present evidence in his or her own behalf and to cross-examine witnesses presented by the government"). We have recognized the "importance of the right to confront evidence and cross-

examine witnesses" under this statute.[3] *Cinapian* v. *Holder*, 567 F.3d 1067, 1074 (9th Cir. 2009) (listing "several cases" highlighting the importance of this right). As we explained in those cases, the "purpose of this statutory guarantee cannot be fulfilled . . . if the government's choice whether to produce a witness or to use a hearsay statement is wholly unfettered." *Baliza* v. *INS*, 709 F.2d 1231, 1234 (9th Cir. 1983). Rather, to comply with this provision, the government must "make a reasonable effort to present the witness" for cross-examination. *Cinapian*, 567 F.3d at 1074.

The majority asserts that the "government here *did* make a reasonable effort to obtain a witness" for cross-examination but, ultimately, was stymied by the State Department's policy of not releasing follow-up information about overseas investigations. *See supra*, Slip Op. at p. 11. This "effort" cannot be sufficient to satisfy the government's burden under the statute. Indeed, allowing one executive branch agency to rely on another executive branch agency's blanket policy of refusing to provide certain information is tantamount to granting the government the kind of unfettered discretion we repudiated in *Baliza*. As

[3] The majority suggests that, because foreign officials are not themselves "amenable to cross-examination," allowing State Department officials to be cross-examined when they "inescapably rely" on information from foreign officials would not significantly enhance the credibility of that information. Slip Op. at p. 11. This view overlooks the fact that State Department officials would be less likely to accept unreliable information as true if they knew that they might later be subject to cross-examination. Furthermore, if State Department officials did rely on information obtained from foreign officials, they would be prepared to explain why that information was trustworthy.

for the policy itself, whatever logistical obstacles might have once justified the State Department's blanket refusal to produce overseas government witnesses for removal proceedings, those obstacles can surely be overcome in an age of video conferencing.[4] Indeed, federal law specifically allows IJs to conduct entire hearings via telephone or video conference. 8 U.S.C. § 1229a(b)(2)(A); *see also* 8 C.F.R. § 1003.25(c) ("An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person.").

Because the government did not make a reasonable effort to produce Bunton for cross-examination, I would hold that its reliance on the Bunton Letter violated Angov's rights under § 1229a(b)(4)(B).[5]

C

The government argues that the Bunton Letter should be credited as trustworthy by employing the

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[4] At the very least, the State Department should be required to produce some specific hardship or reason why it cannot produce the witness for cross-examination, rather than relying on a general policy.

[5] The four of our sister circuits to resolve this issue on constitutional grounds did not discuss the procedural rights guaranteed under § 1229a(b)(4)(B). However, the reasoning they used in concluding (unanimously) that the admission of unauthenticated, hearsay letters during removal proceedings violates an alien's procedural due process rights counsels toward holding that such letters also violate the alien's statutory rights under § 1229a(b)(4)(B). We have recognized that the due process right is closely related to the statutory right in this context. *See Bondarenko* v. *Holder*, 733 F.3d 899, 907 (9th Cir. 2013) ("The due process right, *incorporated into 8 U.S.C. § 1229a(b)(4)(B)*, includes, among other things, 'a reasonable opportunity to examine the evidence against the alien.' (emphasis added; citations omitted)).

presumption of regularity—that is, that government officials accurately perform their reporting duties without bias. *See Espinoza* v. *INS*, 45 F.3d 308, 310 (9th Cir. 1995) (holding that "information on an authenticated immigration form is presumed to be reliable in the absence of evidence to the contrary presented by the alien").

However, the presumption of regularity does not apply when the source of information "was neither a government official nor the subject of the report." *Hernandez-Guadarrama* v. *Ashcroft*, 394 F.3d 674, 681 n.9 (9th Cir. 2005) (citing *Espinoza*, 45 F.3d at 310). The key hearsay statement in the Bunton Letter comes from a Bulgarian police employee, not a U.S. government official or Angov. Statements made by third persons under no business duty to report are not entitled to the presumption of reliability and cannot be considered subject to the presumption, even if included in a document that enjoys such a presumption. *United States* v. *Pazsint*, 703 F.2d 420, 424-25 (9th Cir. 1983); *see also Pouhova* v. *Holder*, 726 F.3d 1007, 1014–15 (7th Cir. 2013) (rejecting application of presumption of reliability to hearsay statements of third parties recorded in official documents); *Jordan* v. *Binns*, 712 F.3d 1123, 1133 (7th Cir. 2013) ("[T]he presumption of reliability that serves as the premise for the public-records exception does not attach to third parties who themselves have no public duty to report.").

Second, the presumption of reliability, similar to the traditional hearsay exception for public records, applies to documents "prepared in accordance with normal recordkeeping requirements." *Espinoza*, 45 F.3d at 310; *see also Lopez-Chavez* v. *INS*, 259 F.3d 1176, 1181 (9th Cir. 2001) ("It must be shown that

the document has been certified by the INS District Director as a true an[d] accurate reflection of INS records."). The Bunton Letter, summarizing the results of an investigation involving multiple individuals and carried out at the behest of a party involved in litigation, is not comparable to an authenticated immigration form routinely filled out by border agents. *Espinoza*, 45 F.3d at 309. It is not a "business record" which is prepared in the usual and ordinary course of business. It was not authenticated or certified. It did not even conform with the agency's own reporting procedures, as described and set forth in the Cooper Memo. Thus, the ad hoc Bunton Letter does not qualify as a government document produced in accordance with regular agency procedure.

For these reasons, I find the government's arguments unpersuasive.

II

Adjudicating asylum claims is necessarily an imperfect endeavor. Witnesses to alleged foreign persecution are rarely available; documents are often impossible to locate. The immigration judge is often left with assessing witness credibility as the only means of resolving the request for relief. We are often limited to seeing through a glass, darkly.

As to post-REAL ID Act asylum seekers, the IJ may require corroboration, even when presented with credible testimony. *See Aden* v. *Holder*, 589 F.3d 1040, 1044 (9th Cir. 2009) ("Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." (quoting 8 U.S.C. § 1158(b)(1)(B)(ii))). We have sustained the BIA's de-

nial of relief founded on the inability of an asylum seeker to obtain corroboration. *Shrestha* v. *Holder*, 590 F.3d 1034, 1047–48 (9th Cir. 2010).

In the post-REAL ID Act world, when corroborating evidence has assumed more importance, it is not unfair or unduly burdensome to require the government to identify basic, rudimentary information about its sources when it challenges corroborating evidence so that the IJ can properly weigh it. The information our sister circuits have demanded is modest. They do not require that every detail be uncovered or every riddle solved, they merely ask that very basic foundational questions—already in the hands of the Executive Branch—be answered. The Executive Branch invests significant resources in forensic document analysts, who provide detailed declarations in immigration cases. It is not much to ask that in the case of routine foreign fact-checking, the government simply tell us how it acquired the facts upon which it asks us to deny asylum.

The alternative is a decision founded solely on anonymous hearsay, often—as in this case—produced by the very foreign government actors the asylum-seeker accuses of persecution. We should be wary of relying on "secret informers, whisperers and talebearers" to decide legal rights in this context, especially when their word is used as the sole basis to deny relief to an otherwise qualified applicant. *See Parker* v. *Lester*, 227 F.2d 708, 719 (9th Cir. 1955) (cautioning against relying on untrustworthy sources in awarding security clearances to Coast Guard employees). The immigration system is fraught with enough risk of error. When it is reasonably possible, we need to minimize that risk.

I respectfully dissent.

## APPENDIX B

**FOR PUBLICATION**
**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

NIKOLAY IVANOV ANGOV,
*Petitioner*,
v.
ERIC H. HOLDER, JR., Attorney General,
*Respondent*.
No. 07-74963
Agency No.
A096-227-355
OPINION
On Petition for Review of an Order of the
Board of Immigration Appeals
Argued and Submitted
June 5, 2012—Pasadena, California
Filed December 4, 2013
Before: Alex Kozinski, Chief Judge, and
Stephen S. Trott
and Sidney R. Thomas, Circuit Judges.
Opinion by Chief Judge Kozinski;
Dissent by Judge Thomas

**SUMMARY***

**Immigration**

The panel denied a petition for review of the denial of asylum and related relief in a case in which the

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Board of Immigration Appeals denied relief on adverse credibility grounds based on a State Department overseas investigation indicating that petitioner had submitted fraudulent evidence.

The panel held that the immigration judge acted within his discretion when he admitted into evidence a letter prepared by the Director of Department of State's Office of Country Reports and Asylum Affairs in Bulgaria, and relied on it to find that the police subpoenas petitioner submitted were fraudulent.

The panel held that the IJ's admission of the letter did not violate petitioner's right to examine evidence or cross-examine witnesses against him. The panel also rejected petitioner's argument that admission of the letter violated due process.

The panel held that the IJ's adverse credibility finding based on the fraudulent subpoenas was supported by substantial evidence and went to the heart of petitioner's claim of persecution by the Bulgarian police, and that petitioner failed to present other reliable evidence to meet his burden of proof.

Dissenting, Judge Thomas would join five other circuits and hold that unsworn, unauthenticated, hearsay letters — prepared for litigation by the government and not subject to any form of cross-examination — cannot form the sole basis for denying asylum to an otherwise qualified applicant.

## COUNSEL

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Gregory G. Katsas, Assistant Attorney General, Barry J. Pettinato, Assistant Director, Jesse Lloyd Busen (argued) and Charles E. Canter, Attorneys,

United States Department of Justice, Civil Division, Washington, D.C., for Respondent.

**OPINION**

KOZINSKI, Chief Judge:

Five other circuits have held that an immigration judge violates due process or the immigration laws by relying on a State Department investigation of an asylum petitioner's claim. Do we fall in line?

## I. BACKGROUND

Nikolay Angov, a Bulgarian citizen, claims he was persecuted by the Bulgarian government because he is Roma.[1] He alleges repeated abuse at the hands of the Bulgarian police, including beatings, false accusations of crimes and illegitimate arrests. After three years of this treatment, he fled Bulgaria and sought asylum in the United States.

An IJ conducted asylum hearings in early 2004, during which Angov presented several documents, including two Bulgarian subpoenas that ordered him to appear at a Sofia police station. The IJ allowed the government to obtain a State Department investigation of Angov's allegations. *See* 8 C.F.R. § 208.11. The investigation was conducted by our consulate in Sofia, and the results were summarized in a letter signed by Cynthia Bunton, Director of Department of State's Office of Country Reports and Asylum Affairs.

The IJ admitted the Bunton Letter, which stated that the Embassy had contacted "an official in the Archive Department at the 5th Police District in So-

[1] Angov's brief refers to him as "Roma" or "gypsy" interchangeably. So do we.

fia." The official found a number of errors in the subpoenas, suggesting that they were forgeries: (1) Three officers named in the subpoena—Captain Donkov, Lieutenant Slavkov and Investigator Vutov—never worked for the police department; (2) the case and telephone numbers were wrong; and, (3) although the subpoenas mentioned room 4 on the second floor of the department and room 5 on the first floor, there are no rooms by those numbers. The official also explained (4) that the seal on the subpoena was too small.

Bunton also stated that the embassy investigator (5) was unable to locate Angov's claimed past residences; and (6) that the neighborhood where Angov lived was only twenty to thirty percent Roma, where Angov claimed that he lived in a "gypsy neighborhood." Attached to the letter were five photographs of the places the investigator had visited while trying to verify the addresses.

Angov's industrious lawyer submitted a plethora of rebuttal evidence, including photos, maps, an article about Angov's neighborhood and a letter apparently signed by someone named Daniela Mihaylova, who identified herself as the legal programs director of a Roma human rights organization in Bulgaria. Angov also argued that, without the opportunity to cross-examine the investigator, the admission of the Bunton Letter would violate his statutory and constitutional rights.

In response to Angov's objection, the government attorney asked the State Department to produce an employee to testify about the investigation. State responded with a letter authored by Nadia Tongour, Bunton's successor. The Tongour Letter provided some general background information on State's in-

vestigation procedures, but explained that it's State's policy to refrain from providing further specific information about an overseas investigation.

Based on the Bunton Letter, the IJ made an adverse credibility finding and denied Angov's applications for asylum, withholding of removal and relief under the Convention Against Torture. The BIA adopted and affirmed the IJ's ruling denying relief, and his determination that the subpoenas are fraudulent. The BIA also denied Angov's motion to supplement the record with a recent Sixth Circuit opinion that Angov claimed constituted new evidence of a "pattern and practice" of law-breaking by officials in the Sofia consulate. *See Alexandrov* v. *Gonzales*, 442 F.3d 395 (6th Cir. 2006).

## II. ANALYSIS

### A. Motion to Remand

Angov claims the BIA abused its discretion by denying his motion. *See Movsisian* v. *Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005). His brief before the BIA spent just two sentences explaining this argument:

> Respondent respectfully submits a copy of *Alexandrov* v. *Gonzales* to supplement the record in this case. The document is submitted to document a pattern and practice of procedural and substantive violations of the law and applicable regulations by the consulate in Sofia during overseas investigations and in divulging the identity of asylum applicants to the authorities in Bulgaria in violation of C.F.R. 208.6 [sic].

"Since a motion to remand is so similar to a motion to reopen, the motion to remand should be drafted in conformity with the regulations pertinent to motions to reopen . . . ." *Rodriguez* v. *INS*, 841 F.2d 865, 867 (9th Cir. 1988) (internal quotation marks omitted). The applicable regulation provides that a motion to reopen shall state "the new facts that will be proven at a hearing to be held if the motion is granted" and be supported by affidavits or other "evidentiary material." 8 C.F.R. § 1003.2(c)(1). But Angov didn't provide any evidence supporting his motion nor did he even explain why he believed that section 208.6 had been violated.[2] The BIA did not abuse its discretion in denying Angov's motion to remand. More, we disagree with *Alexandrov*, *see infra* p. 9, and see no point in remanding for the BIA to apply the teachings of a case we believe is flat wrong.

**B. Admission of the Bunton Letter**

Angov claims that the admission of, and the IJ's and BIA's reliance on, the Bunton Letter violated his statutory and constitutional rights. *See* 8 U.S.C. § 1229a(b)(4)(B); 8 C.F.R. § 1240.10(a)(4); *Cinapian* v. *Holder*, 567 F.3d 1067, 1074–75 (9th Cir. 2009). In considering Angov's argument, we review the IJ's decision, except for the portion that the BIA didn't

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[2] 8 C.F.R. § 208.6(a) provides that "[i]nformation contained in or pertaining to any asylum application ... shall not be disclosed without the written consent of the applicant." Angov argues that *Alexandrov* "exposed the improprieties that have riddled overseas investigations in the Sofia consulate," including that investigations were often conducted by foreign service nationals, that someone other than a consular officer could have authored embassy reports and that consular officials often signed reports written by others. None of these arguments were presented to the BIA.

clearly adopt—here, the IJ's conclusion that the Department of State's inability to verify Angov's addresses supported an adverse credibility finding. *See Joseph* v. *Holder*, 600 F.3d 1235, 1239–40 (9th Cir. 2010). On that issue, we review the BIA's decision.

While we review constitutional and statutory questions de novo, "[t]he BIA's interpretation and application of the immigration laws are generally entitled to deference." *Hernandez-Mancilla* v. *Holder*, 633 F.3d 1182, 1184 (9th Cir. 2011); *Zetino* v. *Holder*, 622 F.3d 1007, 1011–12 (9th Cir. 2010). The agency's factual findings—such as its adverse credibility determination—are reviewed for substantial evidence and can be reversed only if the evidence "compels" a contrary conclusion. *See Rizk* v. *Holder*, 629 F.3d 1083, 1087-88 (9th Cir. 2011) (emphasis omitted).

Angov's statutory arguments can be quickly dispatched. He claims that he was denied his right to examine evidence against him. *See* 8 U.S.C. § 1229a(b)(4)(B). The record tells a different story: He was allowed to examine the Bunton Letter, and given ample time to produce substantial evidence to rebut it. *See supra* p. 5; *cf. Cinapian*, 567 F.3d at 1076 (had the government given petitioners a chance to examine forensic reports before hearing, they may have been able to produce rebuttal evidence).

Angov also argues that he was denied his statutory right to cross-examine the witnesses against him. We've held that, before hearsay statements made by an absent witness can be admitted into an immigration hearing, "'the government must make a reasonable effort . . . to afford the alien a reasonable opportunity to confront the witnesses against him or her.'" *Hernandez-Guadarrama* v. *Ashcroft*, 394 F.3d 674, 681 (9th Cir. 2005) (quoting *Saidane* v. *INS*, 129

F.3d 1063, 1065 (9th Cir. 1997)); *see also* § 1229a(b)(4)(B); *Cinapian*, 567 F.3d at 1076–77. The government here *did* make a reasonable effort to obtain a witness from the Department of State, but was prevented from doing so by State's policy of not releasing follow-up information regarding its overseas investigations. It is entirely reasonable for the government not to bring a hearsay declarant from overseas to appear at an immigration hearing in the United States.

Angov also argues that admission of the Bunton Letter, and the IJ's and BIA's reliance on it, violates due process because the letter didn't provide enough information to evaluate its reliability and trustworthiness. We see little merit in this argument but, surprisingly, five of our sister circuits disagree. Four have held that the Constitution prohibits the IJ and BIA from relying on consular letters like the Bunton Letter. *See Banat* v. *Holder*, 557 F.3d 886, 892–93 (8th Cir. 2009); *Anim* v. *Mukasey*, 535 F.3d 243, 256–58 (4th Cir. 2008); *Alexandrov*, 442 F.3d at 407; *Ezeagwuna* v. *Ashcroft*, 325 F.3d 396, 405–08 (3d Cir. 2003). A fifth reached the same conclusion on statutory grounds. *See Lin* v. *U.S. Dep't of Justice*, 459 F.3d 255, 269 (2d Cir. 2006) (because consular report was unreliable, agency decision that relied on it wasn't based on "substantial evidence"). Consequently, we offer a thorough explanation for parting company with our colleagues elsewhere.

The IJ found that Nikolay Angov presented forged documents. This is a serious matter that, if true, should not merely result in the immediate termination of Angov's asylum petition, but also in criminal prosecution for immigration fraud. But the IJ and the BIA weren't fazed by discovery of the

fraud; they went on to decide whether Angov's asylum claim could be sustained despite the forgeries. No other adjudicator in the United States would react with such equanimity to finding that a party had tried to bamboozle it.

This points to an unfortunate reality that makes immigration cases so different from all other American adjudications: Fraud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated. Our circuit is no exception. *See Abovian* v. *INS*, 257 F.3d 971 (9th Cir. 2001) (Kozinski, J., dissental).

The reason for this deplorable state of affairs is not difficult to figure out. The schizophrenic way we administer our immigration laws creates an environment where lying and forgery are difficult to disprove, richly rewarded if successful and rarely punished if unsuccessful. This toxic combination creates a moral hazard to which many asylum applicants fall prey.

First, the reward: the opportunity to be lawfully admitted into the United States. Those born with U.S. citizenship cannot imagine what this is worth to the world's poor and oppressed billions, most of whom would come here tomorrow if they could. Gaining a lawful foothold in America is an incalculable benefit. It sets an immigrant on the path to a peaceful life in a free society, economic prosperity, citizenship and the opportunity to bring family members in due course. A prize like this is worth a great deal of expense and risk. Telling an elaborate lie, and coming up with forged documents and mendacious witnesses to back it up, is nothing at all when the stakes are so high.

And the risk of getting caught is low. As eight members of this court pointed out in *Abovian*:

> The specific facts supporting a petitioner's asylum claim—when, where, why and by whom he was allegedly persecuted—are peculiarly within the petitioner's grasp. By definition, they will have happened at some time in the past—often many years ago—in a foreign country. In order for the INS to present evidence "refuting or in any way contradicting" petitioner's testimony, it would have to conduct a costly and often fruitless investigation abroad, trying to prove a negative—that the incidents petitioner alleges did not happen.

257 F.3d at 976. There's very little the United States can do to investigate obscure incidents that allegedly occurred in countries on the other side of the globe. Even if it were economically feasible, we can't send the FBI into a foreign country to conduct a full-field investigation. The best we can do is to have consular personnel check basic facts, in addition to the many other functions they perform. And we have very few U.S. consular personnel on the ground in most countries; in all of Bulgaria, there are fewer than two dozen. *See* U.S. Sec'y of State, 1 *Congressional Budget Justification, Department of State Operations, Fiscal Year 2013*, at 306 (2012). All told, there are fewer than 6000 consular officials in embassies and consulates spread out across more than 170 countries. *Id.* at 227–311.

Finally, if an alien does get caught lying or committing fraud, nothing very bad happens to him.

Sure, he may be ordered removed, but most aliens who aren't in custody remain here long after their removal orders become final. *See*, *e.g.*, Office of the Inspector Gen., U.S. Dep't of Justice, *The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders* iii (2003) (reporting that "the INS removed only 3 percent of nondetained asylum seekers with final removal orders"); *see also* Mark Hamblett, *Circuit Sets Policy for Removal Cases Deemed Low Priority by U.S.*, N.Y. L.J., Oct. 18, 2012 (discussing policy that calls for "the exercise of prosecutorial discretion to focus removal efforts on the most high-priority cases"). And if they do get sent back—at our expense—what's lost? They wind up where they started. Would-be immigrants almost never get prosecuted for presenting forged documents in support of asylum petitions, unless they commit some additional misconduct. *See*, *e.g.*, *United States* v. *Jawara*, 474 F.3d 565, 570 (9th Cir. 2007) (defendant charged with document fraud *and* conspiracy to commit marriage fraud). Consequently, immigration fraud is rampant.

Take, for instance, Angov's compatriot, Pavel Pavlov. Pavlov sought asylum as a persecuted gypsy, just like Angov. They even have the same lawyer. But Pavlov's story took a different turn when his wife gained U.S. citizenship and he sought adjustment of status. In the process, he had to disclose that his asylum application was a tissue of lies. Specifically, Pavlov admitted that he wasn't persecuted in Bulgaria. In fact, he's not even a gypsy.

Americans galore wind up in federal prison every year for far less significant lies on government forms or bank loan applications. *See*, *e.g.*, *United States* v. *Prince*, 647 F.3d 1257, 1260–61, 1265 (10th Cir.

2011); *United States* v. *Sandlin*, 589 F.3d 749, 751–53 (5th Cir. 2009); *United States* v. *Jack*, 216 F. App'x 840, 841–43 (11th Cir. 2007). So was Pavlov appealing his criminal conviction? Certainly not. The BIA barred Pavlov from obtaining any relief under our immigration laws because he had filed a frivolous (read: fraudulent) asylum petition—a decision he had the chutzpah to appeal. *See Pavlov* v. *Holder*, 697 F.3d 616 (7th Cir. 2012).

Cases involving fraudulent asylum claims are distressingly common. *See*, *e.g.*, *Cheema* v. *Holder*, 693 F.3d 1045, 1046–47 (9th Cir. 2012); *Dol* v. *Holder*, 492 F. App'x 774, 775 (9th Cir. 2012); *Zheng* v. *Holder*, 672 F.3d 178, 180–81 (2d Cir. 2012); *Fernandes* v. *Holder*, 619 F.3d 1069, 1074–76 (9th Cir. 2010); *Ghazali* v. *Holder*, 585 F.3d 289, 290–91 (6th Cir. 2009); *Ribas* v. *Mukasey*, 545 F.3d 922, 925–26 (10th Cir. 2008); *Siddique* v. *Mukasey*, 547 F.3d 814, 815–16 (7th Cir. 2008); *Rafiyev* v. *Mukasey*, 536 F.3d 853, 855–57 (8th Cir. 2008); *Dhital* v. *Mukasey*, 532 F.3d 1044, 1047-48 (9th Cir. 2008) (per curiam); *Chen* v. *Mukasey*, 527 F.3d 935, 938–39 (9th Cir. 2008); *Ahir* v. *Mukasey*, 527 F.3d 912, 914–16 (9th Cir. 2008). And for every case where the fraud is discovered or admitted, there are doubtless scores of others where the petitioner gets away with it because our government didn't have the resources to expose the lie.

Our sister circuits have given this already shaky system a swift kick in the gut, with only a single dissent by the level-headed Judge Nelson in the Sixth. *See Alexandrov*, 442 F.3d at 409-10 (Nelson, J., dissenting). Their rulings make it pretty much impossible for the immigration authorities to carry out even the little bit of fact checking they now manage to do.

These decisions smother the State Department's informal process of checking up on asylum petitions in layers of procedural complexity that will prove impossible to carry out in practice.

It's absurd. Grandiloquent language and lofty sentiments are no substitute for law and common sense. The other circuits have simply lost their way; they've overlooked some key precedents and misconstrued others. Below, we point out some problems with their opinions. Perhaps the Supreme Court or Congress will intervene and decide who's right.

**1.** We start with a reality check: In how many cases has the Supreme Court held that evidence presented to a trier of fact is so unreliable that its admission violates due process? Angov cites none, and nor do any of the circuits that have adopted his theory. And for good reason: The only Supreme Court case to have addressed this argument in the administrative law context rejected it.

*Richardson* v. *Perales*, 402 U.S. 389 (1971), involved the denial of Social Security disability benefits based on the testimony of a nonexamining physician and the reports of several experts. The district court "was reluctant to accept as substantial evidence the opinions of medical experts submitted in the form of unsworn written reports, the admission of which would have the effect of denying the opposition an opportunity for cross-examination." *Id.* at 397–98. It held that "the opinion of a doctor who had never examined the claimant is entitled to little or no probative value, especially when opposed by substantial evidence including the oral testimony of an examining physician; and that what was before the court amounted to hearsay upon hearsay." *Id.* at 398. The Fifth Circuit naively affirmed, reasoning that

"uncorroborated hearsay could not constitute substantial evidence . . . when the hearsay was directly contradicted by the testimony of live medical witnesses and by the claimant in person." *Id.*

The Supreme Court reversed, emphasizing the informality of Social Security claims procedures, the impartiality of the doctors and the practicalities and expense of conducting 20,000 claims hearings a year. *Id*. at 401–06. The Court rejected both statutory and due process claims. *Id*. at 410. None of the out-of-circuit cases on which Angov relies distinguish—or even cite—*Richardson* v. *Perales*.

Even in criminal cases, the Supreme Court has been extremely reluctant to hold that the mere admission of evidence violates due process. *Dowling* v. *United States*, 493 U.S. 342, 352-53 (1990), firmly rejected the argument that a defendant is denied due process because the prosecution introduced evidence of crimes of which he had been acquitted. *See also Kansas* v. *Ventris*, 129 S. Ct. 1841, 1847 n.* (2009) (refusing, almost unanimously, to "craft a broad[] exclusionary rule for uncorroborated statements obtained [from jailhouse snitches]").

In only one line of cases has the Supreme Court held that the mere admission of evidence amounts to a denial of due process, and that's where police manipulate an eyewitness to identify the defendant as the culprit. The Court announced this rule in *Stovall* v. *Denno*, 388 U.S. 293, 301–02 (1967), and has been backpedaling ever since. *See*, *e.g., Manson* v. *Brathwaite*, 432 U.S. 98, 117 (1977); *Neil* v. *Biggers*, 409 U.S. 188, 201 (1972); *Coleman* v. *Alabama*, 399 U.S. 1, 5 (1970); *Simmons* v. *United States*, 390 U.S. 377, 386 (1968). *But see Foster* v. *California*, 394 U.S. 440, 443 (1969).

The latest case in the *Stovall* line, decided just last year, is particularly instructive. In *Perry* v. *New Hampshire*, 132 S. Ct. 716, 725 (2012), the eyewitness identified the suspect in a suggestive setting, but this happened by accident, rather than as a result of police manipulation. By a decisive margin, the Supreme Court declined to find a due process violation. *Id*. at 730. Justice Ginsburg starts her analysis with words that our colleagues in the other circuits should read twice:

> The Constitution, our decisions indicate, protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit.

*Id*. at 723.

The Court goes on to reject Perry's argument that "trial judges [must] prescreen eyewitness evidence for reliability any time an identification is made under suggestive circumstances." *Id*. at 725. Instead, exclusion of the evidence is appropriate only "to deter law enforcement use of improper lineups, showups, and photo arrays." *Id*. at 726. In another passage our colleagues might pin to their robes, the Court held:

> We have concluded in other contexts . . . that the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair. . . . We reach a similar conclusion here: The fallibility of eyewitness evidence does not, without the taint of improper state

> conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.

*Id*. at 728 (citing *Ventris*, 129 S. Ct. at 1847 n.*, and *Dowling*, 493 U.S. at 353).

The way to deal with unreliable evidence, the Supreme Court tells us, is via the adversary system, which includes the ability to confront witnesses, the assistance of counsel, jury instructions, the burden of proof and the right to introduce contrary evidence. *Id*. at 728–29. Justice Thomas concurs, noting that the *Stovall* line of cases is grounded in substantive due process, which he finds inconsistent with the strictly procedural nature of the Due Process Clause. *See id*. at 730 (Thomas, J., concurring).

The constitutional adventurism of our sister circuits can't be squared with *Perales* or the *Stovall-Perry* line of cases. Criminal trials reflect the pinnacle of procedural formality because the consequences of an erroneous conviction—loss of liberty or life—are the most serious. The Court has been willing to protect these values by adopting quasi-substantive rules such as those announced in *Miranda* v. *Arizona*, 384 U.S. 436, 444–45 (1966), *Mapp* v. *Ohio*, 367 U.S. 643, 655 (1961), *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959), *Brown* v. *Mississippi*, 297 U.S. 278, 285–86 (1936), and *Stovall*. All of those rules were designed to counter a particular evil: misconduct by police and prosecutors. But the Court has steadfastly refused, even in criminal cases, to find a due process violation based on the mere unreliability of evidence.

Ours is not a criminal case. Nor is there an allegation that U.S. government officials manipulated

the evidence or engaged in other misconduct. The due process claim is based entirely on the alleged unreliability of the evidence. Comparing the opinions of other circuits with *Perry* reveals the odd situation we're in: The courts of appeals are forging a due process rule in the administrative context, where the Supreme Court has stressed informality and flexibility, even as the Court itself abjures a similar due process rule in the criminal context.

Nor can the rule our colleagues have invented be cabined to immigration cases. If admission of evidence can violate the due process rights of undocumented aliens, analogous constitutional rights can't be denied to the millions of Americans whose professional licenses, disability benefits, grazing privileges, mining claims, zoning permits and a constellation of other benefits are controlled by federal, state and local agencies. This is just the opening chapter in what could well become the constitutionalization of vast areas of administrative law.

**2.** And Angov's case is not even in the heartland of administrative law cases. It is at the fringes because Angov is an alien who never formally entered the United States. He presented himself at the San Ysidro port of entry without valid entry documents and sought asylum. He is in the United States physically, not legally. *See Aguilera-Montero* v. *Mukasey*, 548 F.3d 1248, 1253 (9th Cir. 2008) (explaining the "entry fiction"); *see also Kaplan* v. *Tod*, 267 U.S. 228, 230 (1925); *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1084–85 (9th Cir. 2011). In *Landon* v. *Plasencia*, 459 U.S. 21 (1982), the Supreme Court explained the difference between a "continuously present permanent resident alien" and one who pre-

sents himself at the border seeking admission for the first time:

> This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative. Our recent decisions confirm that view. As we explained in *Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950), however, once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.

*Id*. at 32 (internal citations omitted); *see also Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001). Angov's claim of a due process violation can't be squared with the Supreme Court's prohibition in *Landon*. It's far more plausible to conclude that the rights of aliens who haven't yet entered the country are defined entirely by the applicable statutes and regulations.

The Supreme Court has said as much: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950); *see also Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (same). While the Court's due process jurisprudence has changed since the two *Shaughnessy* cases, *see, e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 260–61 (1970); *Bd. of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 569–70 (1972), the Court has cited one or both of them in several decisions that postdate the procedural due process revolution, so they remain good law. *See*, *e.g.*,

*Landon*, 459 U.S. at 32; *Zadvydas*, 533 U.S. at 692-94.

In *Landon*, the Court "reaffirmed the classical doctrine on the legal status of aliens seeking initial entry" and "cited with apparent approval *United States ex rel. Knauff* v. *Shaughnessy*." Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1, 20–21, 62–63 & n.343 (1984). In *Zadvydas*, the majority "reaffirm[ed] . . . [the] distinction whereby those defined to be on the inside of the national territorial line enjoy fundamental due process protections whereas those on the outside do not. In the course of the analysis, the Court all but reaffirmed . . . *Mezei*." Linda Bosniak, *A Basic Territorial Distinction*, 16 Geo. Immigr L.J. 407, 407 (2002).

Even if we were to apply the *Goldberg/Roth* line of cases to aliens like Angov, it wouldn't help him. "The Due Process Clause applies only when the 'state' deprives' a person of 'life, liberty, or property.'" 2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.4, at 775 (5th ed. 2010). Asylum is not life or property, and at least one of our sister circuits has held that aliens who seek asylum upon reaching the U.S. border have no liberty interest in entering the country. *See Rafeedie* v. *INS*, 880 F.2d 506, 519-20 (D.C. Cir. 1989). This seems entirely right.

Congress and the Attorney General have given aliens like Angov a variety of procedural rights, including the right to be present at the hearing; to be represented by counsel; to examine the evidence against him and present counter-evidence; to cross-examine witnesses; and to have a written record kept of the proceedings. 8 U.S.C. § 1229a(b)(4). Neither the statute nor the regulations give the asylum ap-

plicant a right to a particular quality of the evidence presented against him. Instead, he is given the right to have an impartial adjudicator assess the evidence. When exercising grace towards individuals who have *no* rights under our laws, Congress can set the precise limits of what it grants and what it withholds. That then defines the process an asylum seeker like Angov is due.

**3.** Furthermore, it is Angov who has the burden of proving his eligibility for asylum. *See* 8 C.F.R. § 1208.13(a). The government has no burden; it can present evidence solely to rebut or impeach petitioner's case.

This matters because the Supreme Court often permits evidence to be used for impeachment, even when it is constitutionally inadmissible for substantive purposes. For example, evidence obtained without giving the suspect proper *Miranda* warnings can't be introduced in the government's case-in-chief, but it *is* admissible for impeachment. *See Harris* v. *New York*, 401 U.S. 222, 224–26 (1971). Similarly, illegally seized evidence can be admitted to impeach statements made by a criminal defendant. *See United States* v. *Havens*, 446 U.S. 620, 627–628 (1980); *Walder* v. *United States*, 347 U.S. 62, 64–66 (1954).

Even assuming it were appropriate to craft a rule limiting the admission of evidence based on an appellate court's gut feeling as to its reliability, what's sufficient for impeachment is certainly less than what's needed to carry the asylum applicant's burden of proof. Impeachment evidence, after all, need not be believed; it need only cast doubt on the evidence presented by the party with the burden of proof. The Bunton Letter is at least sufficient to cast doubt on

Angov's evidence and force him to come up with more solid proof to support his claim.

**4.** Even if petitioner had a due process right in the quality of the impeachment evidence presented by the government, there would be no constitutional violation here. The Supreme Court has told us that the appropriate test for evaluating the constitutional adequacy of procedures in immigration cases is that articulated in *Mathews* v. *Eldridge*:

> In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.

*Landon*, 459 U.S. at 34 (citing *Mathews* v. *Eldridge*, 424 U.S. 319, 334–35 (1976)); *see also Jason Parkin*, *Adaptable Due Process*, 160 U. Pa. L. Rev. 1309, 1325–26 & n.77 (2012).

We must thus consider not only the degree to which Angov may be prejudiced by admission of the Bunton Letter, but also the harm the government would suffer if it were required to produce more. We note that the other circuits did no such balancing; indeed, they seem to overlook *Mathews* and *Landon* altogether.

Angov finds fault with the Bunton Letter because it "provides no information as to who conducted the investigation; who obtained, stored and verified the information underlying the conclusion expressed in the document [or] when and under what authority

the investigation was conducted." He notes that the Bunton Letter offers no explanation for many of its conclusions—for example, that both the case numbers and the telephone numbers listed on the fraudulent subpoenas were incorrect. These are all interesting points to raise at the hearing, and the absence of a satisfactory response from the government might well convince the trier of fact to disregard the letter. But what does this have to do with due *process*?

The problems Angov identifies flow from the fact that the rules of evidence, and the hearsay rules in particular, don't apply to administrative proceedings. *See Richardson* v. *Perales*, 402 U.S. 389, 400-402 (1971); *Hernandez-Guadarrama* v. *Ashcroft*, 394 F.3d 674, 681 (9th Cir. 2005). This inevitably leaves some uncertainty that would be eliminated if this were a formal trial subject to the rules of evidence. But it doesn't deprive the opposing party of any and all means of rebutting the hearsay declarant's assertions.

The Bunton Letter does come to certain factual conclusions: that the addresses identified by Angov in his asylum petition don't exist; that the officers—Captain Donkov, Lieutenant Slavkov and Investigator Vutov—and room numbers specified in the subpoenas presented by Angov don't exist; that the seals on the subpoenas are the wrong size; and that the part of the city where Angov claimed to live was only twenty to thirty percent Roma. Each of these assertions describes facts in the real world, so it's possible to rebut Bunton by presenting proof that those facts are not as the Bunton Letter describes them.

In fact, Angov did precisely that with respect to the two addresses. He presented a letter from someone in Bulgaria, who explained that the Bunton Let-

ter's conclusions about the addresses are wrong. *See supra* p. 5; Appendix. And the BIA seems to have been swayed, as it noted that the "record is unclear" about whether Angov was telling the truth about the addresses.

Angov was free to present similar evidence to undermine the Bunton Letter's statements about the subpoenas. He could have had Ms. Mihaylova from the human rights organization or some other friend in Sofia visit the police station and try to find out whether the rooms referenced in the Bunton Letter do or don't exist. He might also have been able to obtain a roster of the names of police officials in Sofia and shown that it contains the names of the officers referenced in the subpoenas.

The Bunton Letter also asserts that the phone numbers in the subpoenas aren't correct. Angov or one of his friends could have called the numbers and asked whether he'd reached the police station—and then submitted an affidavit to that effect. The same is true about the seals: Angov or his friends might have tried to obtain an official copy of the police seal from the Bulgarian government and introduced it into evidence. He did none of these things, perhaps because he knew that the subpoenas were forged.

Where the petitioner has the burden of proof, there's nothing unfair about having a U.S. government agent check out some of his basic facts and inform the IJ of possible discrepancies. This forces the petitioner to obtain further evidence supporting the challenged claims. There might be situations where obtaining further evidence is impossible, such as where the petitioner has fled from a closed society and can find no one willing or able to obtain the evidence he needs. In such cases, we don't hold the peti-

tioner's failure to present evidence against him. *See Singh* v. *Holder*, 638 F.3d 1264, 1270-71 (9th Cir. 2011). But Angov has never claimed that he couldn't get more evidence; indeed he has resources in Bulgaria.

The Bunton Letter's estimate that Angov comes from a community that is only twenty to thirty percent Roma is similar to the kind of demographic estimates made by the State Department in its country reports, on which we and the BIA rely all the time. *See*, *e.g.*, *Dhillon* v. *Holder*, 485 Fed. App'x 252, 253 (9th Cir. 2012); *Patel* v. *Holder*, 474 F. App'x 584, 585 (9th Cir. 2012); *Sesay* v. *Holder*, 469 F. App'x 617, 617 (9th Cir. 2012); *see also Sowe* v. *Mukasey*, 538 F.3d 1281, 1285 (9th Cir. 2008) ("U.S. Department of State country reports are the most appropriate and perhaps the best resource for information on political situations in foreign nations." (internal quotation marks omitted)); *cf.* 8 U.S.C. § 1158(b)(1)(B)(iii).

Were we to hold that we can't rely on this estimate in the Bunton Letter, we'd be casting doubt on a multitude of country reports that have no better support for their demographic estimates than the Bunton Letter. The country reports are, after all, prepared by the very same consular officials, using some of the same methods, as the Bunton Letter. *See* Bureau of Democracy, Human Rights & Labor, U.S. Dep't of State, *Country Reports on Human Rights Practices for 2012: Appendix A: Notes on Preparation of Reports*, at 1 (2012). Indeed, Cynthia Bunton's title when she wrote her letter was director of the Department of State's "Office of *Country Reports* and Asylum Affairs." (emphasis added). Nadia Tongour is her successor. Adopting Angov's objection to the find-

ings in the Bunton Letter could render country reports inadmissible in immigration proceedings.

Angov complains that the Bunton Letter might have relied on reports from foreign service nationals (FSNs). *See Ezeagwuna*, 325 F.3d at 406. What if it did? Our embassy in Sofia, as elsewhere, employs roughly the same number of FSNs and Americans. U.S. Sec'y of State, 1 *Congressional Budget Justification, Department of State Operations, Fiscal Year 2013*, at 306 (2012). Our short-staffed consular offices no doubt use FSNs, who are fluent in the local language and familiar with local conditions, to do some of the legwork. We see nothing wrong with that. Whether the investigation was conducted by U.S. citizens, FSNs or Hercule Poirot, it resulted in certain factual conclusions that can be refuted.

Submissions such as the Bunton Letter and the various country reports on which we routinely rely aren't just a collection of statements by disconnected individuals. Rather, they are the unified work product of a U.S. government agency carrying out governmental responsibilities. As such, the report itself, and the acts of the various individuals who helped prepare it, are clothed with a presumption of regularity. *See Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004); *see also Kohli* v. *Gonzales*, 473 F.3d 1061, 1068 (9th Cir. 2007). "[I]n the absence of clear evidence to the contrary, courts presume that [these individuals] have properly discharged their official duties." *Favish*, 541 U.S. at 174 (quoting *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996)).

The presumption of regularity has been applied far and wide to many functions performed by government officials. *See*, *e.g.*, *U.S. Postal Serv.* v. *Greg-*

*ory*, 534 U.S. 1, 10 (2001) (Post Office disciplinary procedures); *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (prosecutorial decision making); *FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965) (FCC's decision making process); *cf. INS* v. *Miranda*, 459 U.S. 14, 16-18 (1982) (per curiam) (processing of visa application).

The Bunton Letter is entitled to the presumption that those who participated in its preparation, be they FSNs, consular officers or officials at the State Department in Washington, did their jobs fairly, conscientiously and thoroughly; that each officer in the chain relied on the work of someone down the chain in whom he had confidence; that no one had a personal stake in the substance of the report; and that no one lied or fabricated evidence. Without this presumption, country reports would be no more useful than the Farmers' Almanac or Perezhilton.com.

Holding that the admission of the Bunton Letter violates due process would cripple the government's ability to detect fraud in the asylum process. The asylum unit of the Department of State's Office of Country Reports and Asylum Affairs "has suffered from long standing resource problems." Office of the Inspector Gen., U.S. Dep't of State, *Report of Inspection: Bureau of Democracy, Human Rights and Labor* 23 (2003). Many of its staffers are interns, and even its regular employees are often "pressed into service to work" on the Office's other main responsibility: country reports. *Id.* at 23–24. And the consular officers tasked with verifying asylum applicants' claims are also overworked and understaffed. The Tongour Letter expresses the government's position on providing additional information about the results of an overseas investigation: "Such additional demands

are further burdens on Consular Officers in the performance of their regular responsibilities and are particularly onerous for FSNs who may be subject to local reprisal." The State Department tells us it's doing the best it can with the scant resources allocated to it and our consular corps abroad.

Demanding, as our sister circuits do, that the reports contain a multitude of additional details, such as "the identity and qualifications of the investigator(s)," "the objective and extent of the investigation" and "the methods used to verify the information discovered," *see Lin*, 459 F.3d at 271, *see also Banat,* 557 F.3d at 891–92, *Anim*, 535 F.3d at 257–58, transforms a process that is swift, efficient and informal into one that's ponderous, time-consuming and expensive.

Insisting on these procedures would paralyze the process, making it impossible for our consular officers to do many of these investigations because they're too busy filling in all the jots and tittles our sister circuits enshrine as constitutional requirements. Complying with the requirements put in place by the other circuits considerably lengthens the time it takes to write most reports, and may make it impossible to write others for fear of disclosing sensitive information that could compromise sources or impair relations with local officials.

Nor is it realistic for the government to produce such information in camera. These reports are prepared by Department of State officials stationed in foreign countries, and are then turned over to another agency in another department, which then releases them to an adverse party. These disclosures are made in the context of immigration court proceedings, not in district court, and the immigration court,

despite its name, is an executive branch agency. It has no contempt powers and can't have anyone arrested for violating its orders, including confidentiality orders. *See* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 Duke L.J. 1635, 1674, 1714 (2010); Dana Leigh Marks, *Still a Legal "Cinderella"? Why the Immigration Courts Remain an Ill-Treated Stepchild Today*, 59 Fed. Law., Mar. 2012, 25, at 30. There's a good chance the information will fall into the hands of people who have little regard for U.S. law and find themselves repatriated with a motive for revenge. Consular officials forced to disclose sensitive information in these circumstances would probably leave the information out of the report rather than risk burning their sources, offending local officials or losing their lives.

If we make the job of compiling these reports substantially more risky and onerous, the State Department may stop writing them. The United States gets close to 74,000 asylum cases a year, far more than any other industrialized nation. *See* United Nations High Comm'r for Refugees, *Asylum Levels and Trends in Industrialized Countries* 3, 8 & n.14 (2011). (That's more than three times the number of Social Security cases the Supreme Court considered massive in *Perales*). The use of reports from consular officials gives the government the ability to check facts and puts at least *some* constraint on how far from the truth asylum applicants will stray. By knocking out even this feeble check on fraud and fabrication, the other circuits subvert the asylum process, giving charlatans a free pass into the United States.

**5.** In any event, our sister circuits' "faith in procedural choreography is . . . fundamentally flawed."

*United States* v. *Balough*, 820 F.2d 1485, 1491 (9th Cir. 1987) (Kozinski, J., concurring). Requiring the Department of State to disclose more details will neither materially enhance the reliability of the resulting report nor do very much to help asylum applicants.

We test this proposition by modifying a portion of the Bunton Letter to comply with the requirements put in place by other circuits; new or modified language is italicized:

> *Agent Michael Smith, a foreign service agent with seventeen years offield 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 sub-

> poenas 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 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.*

Best we can tell, this revised letter would comply with the requirements imposed by the other circuits, but would it be much more valuable than what we already have? We would now know for sure that the information came to us via at least four levels of hearsay: (1) Ms. Bunton; (2) Agent Smith; (3) FSN Popov; and (4) Ms. Bogdanovich. That's no help. We'd know a bit more about Agent Smith, and we'd know the identity of the person who did the legwork, but how would that help us? We'd also have a name of someone who purportedly provided the information from the Bulgarians, but how would *that* be of any use? Angov could still complain that the IJ was unable to assess the Bulgarian official's credibility, or even the credibility of any of the later links in the hearsay chain. We'd also know that it was Agent Smith who visually compared the seal on the subpoenas with the station's official seal, but how does that bring us closer to the truth?

At this point, we would be faced with a whole new set of questions: How do we know Popov really went to the police station instead of stopping off in a bar to chug rakia? How did Popov know whether Bogdanovich was really the supervisor of personnel records at the police station? Did he check her identi-

fication papers? How did Popov assess Bogdanovich to be trustworthy, and how can we be sure he's right? Did Popov look at the personnel records himself, or did he take Bogdanovich's word that the three officers never worked there? Can we be sure that Bogdanovich checked all the relevant records? Can we be sure the purported personnel records were accurate and complete? How do we know Popov didn't falsify important details because he was afraid of reprisal or because he hates gypsies? And how can we be sure Smith is telling the truth if we can't cross-examine him? Did Smith have a full-sized copy of the subpoena when he compared the seals or a shrunken photocopy?

These difficulties are inherent in trying to prove up facts related to events that occurred years past and thousands of miles away from where the IJ is holding his hearing. Short of transporting all the declarants and their underlying records to the United States for a hearing before an IJ, there will inevitably be gaps that can be bridged only by multiple levels of hearsay.

This is not a problem that plagues only the government. Almost every piece of evidence asylum petitioners present in support of their cases would be inadmissible if subjected to the rules of evidence, especially those pertaining to hearsay: threats they claim to have been subjected to; racist comments by the police; reports of strange people looking for them; letters from family members and others. A brief scan of our caselaw shows it's pretty much impossible to build an asylum case without relying on evidence that would be laughed out of court if presented in a domestic trial. *See*, *e.g.*, *Meza-Vallejos* v. *Holder*, 669 F.3d 920, 922 (9th Cir. 2012); *Haile* v. *Holder*, 658

F.3d 1122, 1124–25 (9th Cir. 2011); *Singh* v. *Holder*, 656 F.3d 1047, 1049–50 (9th Cir. 2011); *Hu* v. *Holder*, 652 F.3d 1011, 1013–15 (9th Cir. 2011); *Kumar* v. *Gonzales*, 444 F.3d 1043, 1047-48 (9th Cir. 2006).

Take, as a small example, the letter from Daniela Mihaylova that Angov presented to rebut some of the information in the Bunton Letter. This is a two-page, typed document, with a small emblem and a typed address by way of letterhead. (We reproduce it in the Appendix.) It is addressed "To: Whom it may concern" and references Angov's case. The letter represents that the "Romani Baht Foundation is a leading Bulgarian non-profit organization for protection of Roma/Gypsies human rights, founded in 1996 and legally registered with Bulgarian court." Mihaylova purports to be the legal programs' director of the Foundation.

The BIA took this letter seriously and modified some of the IJ's findings based on it and other evidence presented by Angov. But there is absolutely no evidence in the record that there *is* any such person as Daniela Mihaylova and, if there is, how she went about obtaining the information detailed in her letter. For all we know, Angov could have printed the letter using his computer and standard word processing software.

Compared to this letter—and the remaining evidence presented by Angov—the Bunton Letter seems a paragon of reliability. It was prepared by government officials trained to perform this kind of investigation; who have nothing to gain by giving false information; and whose conduct is clothed with the presumption of regularity that attaches to all government actors. *Cf. Perales*, 402 U.S. at 402-06. The Bunton Letter encloses five photographs depicting

locations mentioned in Angov's asylum petition, which confirms that someone from our consulate traveled to those locations and made a personal inspection.

The Bunton Letter also gives specific reasons for doubting the authenticity of the addresses and points to several problems with the subpoenas. It is not an unsupported assertion that Angov is a liar; it is a rational, apparently objective recital of observed facts. At the very least, we can be sure that there *is* a Bunton and a Tongour, and that they can be disciplined or prosecuted if they negligently or deliberately falsified their reports. And we can reasonably presume that, in preparing their reports, Bunton and Tongour relied on trained State Department officers and agents who are themselves subject to discipline or prosecution for incompetence or corruption.

Compare this to the letter from Mihaylova (assuming there even *is* a Mihaylova): It comes from someone who cannot be disciplined or prosecuted in case of a lie, and who has not been screened for competence, honesty or reliability. It encloses no pictures or other documentary evidence. It doesn't explain how the facts asserted were gathered or by whom. It doesn't even claim to be based on first-hand knowledge, rather than hearsay or rumor. The letter simply makes a series of bald factual assertions without any support. Even assuming the letter is genuine (in the sense that it was actually written by its purported signatory in Bulgaria), the IJ and the BIA have absolutely no way to evaluate how accurate or objective it is.

In an environment where it's pretty much impossible to obtain first-hand accounts of most of the relevant facts, does due process require the government

to fight an uphill battle on a slippery slope with one leg and both arms tied behind its back, while its adversary gets to use cleats and brass knuckles? Of course not. As the Supreme Court has explained, "The constitutional sufficiency of procedures provided in any situation . . . varies with the circumstances." *Landon*, 459 U.S. at 34. It would be the height of cognitive dissonance to hold the United States to standards of proof derived from domestic litigation while allowing petitioners to present anything and everything that doesn't bear the watermark "Forgery Purchased on the Black Market." The *Mathews* balancing test calls for a *fair* weighing of the burdens on both parties to the controversy in light of "the circumstances." *Landon*, 459 U.S. at 34. The balance struck by the other circuits is so one-sided and unfair that it hobbles the government's ability to detect and combat fraud in the asylum application process.

The consequence of the rule adopted by the other circuits will not be to allow more of the world's oppressed into the land of the free. Rather, it favors the canny, the dishonest, the brazen and those who have the means and connections to purchase or create fraudulent documents. Nor does the other circuits' rule ultimately help asylum seekers, as it's hard to believe that Congress will long allow the program to continue when it rewards people who lie their way into the United States. Eventually, Congress and the public will catch on that asylum has become a fast-track vehicle for immigration fraud, and the asylum statute will be repealed or amended so as to make it more difficult for honest asylum seekers to obtain relief. The ultimate victims of the epidemic of substantive due process that has infected the circuit courts will be the tired, poor, huddled masses who will find the golden door slammed in their faces.

* * *

We conclude that the IJ acted within his discretion when he admitted the Bunton Letter into evidence and relied on it to find that the subpoenas Angov submitted were fraudulent. The adverse credibility finding based on the fraudulent subpoenas was supported by substantial evidence. Because Angov's claim is based on his mistreatment by the Bulgarian police, the fact that the subpoenas were fraudulent "goes to the heart of [Angov's] claim of persecution." *See Rizk* v. *Holder*, 629 F.3d 1083, 1087–88 (9th Cir. 2011). Furthermore, Angov's testimony is not credible, and he doesn't present other evidence that meets his burden to show that it's "'more likely than not'" that he would be tortured if sent back to Bulgaria. *See Shrestha* v. *Holder*, 590 F.3d 1034, 1048 (9th Cir. 2010). Consequently, the IJ and BIA decisions denying Angov asylum, withholding of removal and protection under the Convention Against Torture must stand.

**PETITION DENIED.**

**Appendix: Mihaylova Letter**

Romani Baht
8 Nov Eivot Str.
1373 Sofia, Bulgaria
Tel. (359) 2 920 42 72
Fax: (359) 2 23 13 03
e-mail: baht2000@rtsonilne.net

To: Whom it may concern

Re: Case No A3 96 227 355

Dear Madam/Sir,

Romani Baht Foundation is a loading Bulgarian non-profit organization for protection of Roma/Gypsies human rights, founded in 1996 and legally registered with Bulgarian court.

In my capacity of Legal Programs' Director in the Romani Baht Foundation, I am writing to confirm that:

1. Sofia based address No 5 "3005" street is based in Toleva mahala, which is a part of one of the biggest Roma ghettos in Sofia, Bulgaria. The living conditions in the Roma ghettos are under the existing minimum, the people live in barracks, they are not provided with electricity, water and savage system, public transportation, and other facilities. Many of the Roma people do not posses documents for ownership, which facilitate the eviction procedures and leaves them without any compensation when evicted.
2. In 2001 about 100 Roma houses have been destructed and the place has been used for building a hypermarket BILLA.

3. The people evicted have been put to live in wagons, placed on 175 Evropa boulevard, which is at the end of Sofia. These people lack any infrastructure facilities.

Should you need any additional information, please let us know and we will provide you with such ASAP.

Sincerely:

/s/ Daniela Mihaylova
Daniela Mihaylova,
Legal Programs' Director,
Romani Baht Foundation

THOMAS, Circuit Judge, dissenting:

I would join the five other circuits that have considered the issue. Unsworn, unauthenticated, hearsay letters–prepared for litigation by the government and not subject to any form of cross-examination–cannot form the sole basis for denying asylum to an otherwise qualified applicant. Therefore, I must respectfully dissent.

I

We have long criticized the practice of using anonymous hearsay as the basis for denying constitutional rights, without affording due process. As Judge Walter Pope wrote in 1955 in a case involving security clearances:

> The question is: Is this system of secret informers, whisperers and talebearers of such vital importance to the public welfare that it must be preserved at the cost of denying to the citizen even a modicum of the protection traditionally associated with due process?

*Parker v. Lester*, 227 F.2d 708, 719 (9th Cir. 1955).

For Judge Pope, the answer was an unequivocal "no," and that should be our answer today.

A

As we have steadfastly held, immigration proceedings must be conducted "in accord with due process standards of fundamental fairness." *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 370 (9th Cir. 2003) (en banc) (internal quotation marks omitted). For that reason, four of our sister circuits have held that the government violates the due process rights of aliens when it denies asylum solely on the basis of conclusory letters prepared for litigation in reliance

on multiple layers of unauthenticated hearsay, without affording the petitioner some right of confronting the charges. *Banat v. Holder*, 557 F.3d 886, 892-93 (8th Cir. 2009); *Anim v. Mukasey*, 535 F.3d 243, 256-258 (4th Cir. 2008); *Alexandrov v. Gonzales*, 442 F.3d 395, 407 (6th Cir. 2006); *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405-08 (3d Cir. 2003). Those circuits have held that due process requires consular letters to meet the minimal standards of reliability and trustworthiness in order to be admissible.

To be sure, "overseas investigations by State Department officials concerning the authenticity of documents purportedly originating in foreign countries are often necessary for the adjudication of an asylum claim." *Banat*, 557 F.3d at 890. However, as the 8th Circuit also explained:

> Reliance on reports of investigations that do not provide sufficient information about how the investigation was conducted are fundamentally unfair because, without that information, it is nearly impossible for the immigration court to assess the report's probative value and the asylum applicant is not allowed a meaningful opportunity to rebut the investigation's allegations.

*Id*. at 891.

Additionally, without reaching the Constitutional question, the Second Circuit rejected a "highly unreliable" consular report on the grounds that it did not amount to substantial evidence to support a finding that the document was forged. *Lin v. U.S. Dep't. of Justice*, 459 F.3d 255, 268–272 (2d Cir. 2006); *see also Balachova v. Mukasey*, 547 F.3d 374, 382–83 (2d Cir. 2008) (applying *Lin*). *Lin* quoted with approval

the Department of Justice's own guidelines for preparation of such reports,[1] distilling them into three factors for evaluating the reliability of a consular letter: "(i) the identity and qualifications of the investigator(s); (ii) the objective and extent of the investigation; and (iii) the methods used to verify the information discovered." *Id.* at 271.

Keeping in mind the *Lin* factors, an examination of the circumstances giving rise to the other circuits' concerns is instructive in evaluating this case.

In *Banat*, the Eighth Circuit rejected the IJ's reliance on a consular letter that cited to an unidentified embassy investigator, with no indication of the qualifications or experience of the investigator or the investigator's "contact," and that contained multiple

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[1] The DOJ guidelines stated that, in the case of a fraudulent document, the "report must contain, at a minimum: (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 location(s) 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." Memorandum from Bo Cooper ("Cooper Memo"), Gen. Counsel, Immigration & Naturalization Serv., to Jeffrey Weiss, Dir., Immigration & Naturalization Serv. Office of Int'l Affairs, Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information (June 21, 2001), *available at* http://judiciary.house.gov/legacy/82238.pdf at 39-45.

levels of hearsay. 557 F.3d at 891–92. The Eighth Circuit applied the *Lin* factors and determined that none of the factors were met. *Id*. at 891–93. As a result, the Court concluded that "the IJ's reliance on the State Department letter, which provided no details about the investigation that would allow the IJ to assess the investigation's reliability or trustworthiness and which contained multiple levels of hearsay, violated Banat's right to a fundamentally fair hearing." *Id*. at 893.

In *Balachova*, the Second Circuit concluded that "the consular report is unreliable and cannot contribute to a finding of substantial evidence." 547 F.3d at 383. The Court noted that the report "contains no information concerning the qualifications of the investigators, the identity of the Russian officials who prepared the response to the consular inquiry, or the methods, if any, used to verify the information supplied by the foreign official." *Id*. Applying the *Lin* factors, it held that the IJ could not rely on the letter.

In *Anim*, the Fourth Circuit considered a State Department letter authored by the same official involved in our case. It concluded that "the Bunton letter contains insufficient indicia of reliability and, as a result, its use was fundamentally unfair." 535 F.3d at 256. It noted that the letter "is comprised entirely of multiple hearsay statements." *Id*. at 257. It also pointed out that the "letter does not explain how Bunton received the information she relates, nor does the letter disclose the identities of some of the individuals involved in the chain of communication." *Id*. The Court observed that the letter provided "markedly insufficient information" as to how the investigation was conducted, and emphasized that "[w]ithout the details of the investigation, it is im-

possible for an immigration judge, the BIA, or a court to evaluate the reliability of the letter's conclusions." *Id*. The Fourth Circuit determined that the letter did not satisfy the *Lin* test, concluding that the letter did not "meet even the minimum standards prescribed by [the Department of Homeland Security]," and lacked "the clarity and content necessary to provide fair or probative evidence in an immigration proceeding." *Id*. at 258. The Fourth Circuit also warned of the temptation to defer to and rely on "the general prestige and competence of the Department of State" as the primary factor in determining the document's authenticity, rather than on "adequate evaluation of the reliability of the document." *Id*.

In *Lin*, the Second Circuit rejected a letter almost identical to the one at issue here. The report was based on the opinions of government officials who, as the Second Circuit noted, "appear to have powerful incentives to be less than candid on the subject of their government's persecution of political dissidents." *Id*. at 269–70. The Court concluded that the Consular Report was "insufficiently detailed to permit a reviewing court to assess its reliability." *Id*. at 270.

In *Alexandrov*, the Sixth Circuit concluded that two consular memoranda did "not meet our standards of trustworthiness and reliability and were therefore improperly relied upon by the immigration court." 442 F.3d at 407. The Court noted that there was no identification of the embassy investigator, no clarification "to any degree [of] what type of investigation was conducted," no description of how the investigation was concluded, no explanation of the investigator's qualifications, and no identification of the person who provided the information. *Id*. As the

Court summarized, "[t]here is not much that we do know aside from the apparent conclusions of the mysterious investigation." *Id*.

In *Ezeagwuna*, the Third Circuit held that the BIA violated the petitioner's due process rights by basing its credibility finding on a consular letter, which the Court concluded was "neither reliable nor trustworthy." 325 F.3d at 408. It found that the letter constituted "multiple hearsay of the most troubling kind." *Id*. at 406. The Court also noted that the investigator was unidentified, country officials were identified only by position, the sources of information were not disclosed, the method of investigation was not detailed, and only conclusory statements were made. *Id*. at 406–08. It observed that it had "absolutely no information about what the 'investigation' consisted of, or how the investigation was conducted in this case." *Id*. at 408. The Court was also concerned that the agency was "attempting to use the prestige of the State Department letterhead to make its case." *Id*. at 407. It emphasized that "the Board's decisions cannot be sustained simply by invoking the State Department's authority," noting that the procedural safeguard of judicial review "would be destroyed if the Board could justify its decisions simply by invoking assertions by the State Department that themselves provide no means for evaluating their validity." *Id*. (quoting *Li Wu Lin v. INS*, 238 F.3d 239, 246 (3d Cir. 2001)).

Our case cannot be distinguished from those decided by our sister circuits. In this case, the immigration judge relied on a short, unsworn letter from Cynthia Bunton, the State Department's Director of the Office of Country Reports and Asylum Affairs ("the Bunton Letter"). The Bunton letter consisted of

unauthenticated, hearsay statements from unidentified officials. There is no description of the methodology employed in the investigation, the qualifications of the investigators, or who was involved. In short, the Bunton Letter contains conclusory statements of fact, but no information, as required by the *Lin* factors, about "(i) the identity and qualifications of the investigator(s); (ii) the objective and extent of the investigation; and (iii) the methods used to verify the information discovered." *Lin*, 459 F.3d at 271. We are left, as were our sister circuits, with a document that is "insufficiently detailed to permit a reviewing court to assess its reliability." *Id.* at 270. Indeed, in many ways, there is less information in the Bunton letter than in letters rejected as unreliable by our sister circuits. Further, the key information provided in this case was by an unnamed individual at the police department where Angov claims to have been severely beaten on account of his political views. Like the government officials in *Lin*, the official–whose department had been accused of brutality by Angov–had a strong incentive to be "less than candid." *Id.* at 269.

In sum, whether we cast the issue as one of due process or of substantial evidence, the Bunton letter falls far short of satisfying the standards of reliability established by our sister circuits and the agency should not have relied upon it.[2]

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[2] If I were writing on a clean slate, I would join the Second Circuit and adopt the *Lin* factors as probative of the substantial evidence question, without reaching the due process issue. If forced to decide the contours of due process in this context, I would join our four other sister circuits and hold that administrative reliance on hearsay letters lacking sufficient authentication, such as the *Bunton* letter, violates due process.

B

The Government argues that the Bunton Letter should be credited as trustworthy by employing the presumption of regularity–that is, that government officials accurately perform their reporting duties without bias. *See Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995) (holding that "information on an authenticated immigration form is presumed to be reliable in the absence of evidence to the contrary presented by the alien").

However, the presumption of reliability does not apply when the source of information "was neither a government official nor the subject of the report." *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 681 n.9 (9th Cir. 2005) (citing *Espinoza*, 45 F.3d at 310). The key hearsay statement in the Bunton Letter comes from a Bulgarian police employee, not a U.S. government official or Angov. Statements made by third persons under no business duty to report are not entitled to the presumption of reliability and cannot be considered subject to the presumption, even if included in a document that enjoys such a presumption. *United States v. Pazsint*, 703 F.2d 420, 424–25 (9th Cir. 1983); *see also Pouhova v. Holder*, 726 F.3d 1007, 1014–15 (7th Cir. 2013) (rejecting application of presumption of reliability to hearsay statements of third parties recorded in official documents); *Jordan v. Binns*, 712 F.3d 1123, 1133 (7th Cir. 2013) ("[T]he presumption of reliability that serves as the premise for the public-records exception does not attach to third parties who themselves have no public duty to report.").

Second, the presumption of reliability, similar to the traditional hearsay exception for public records, applies to documents "prepared in accordance with

normal recordkeeping requirements." *Espinoza*, 45 F.3d at 310; *see also Lopez-Chavez v. INS*, 259 F.3d 1176, 1181 (9th Cir. 2001) ("It must be shown that the document has been certified by the INS District Director as a true an[d] accurate reflection of INS records."). The Bunton Letter, summarizing the results of an investigation involving multiple individuals and carried out at the behest of a party involved in litigation, is not comparable to an authenticated immigration form routinely filled out by border agents. *Espinoza*, 45 F.3d at 309. It is not a "business record" which is prepared in the usual and ordinary course of business. It was not authenticated or certified. It did not even conform with the agency's own reporting procedures, as described and set forth in the Cooper Memo. Thus, the ad hoc Bunton Letter does not qualify as a government document produced in accordance with regular agency procedure.

For these reasons, I find the government's arguments unpersuasive.

II

Adjudicating asylum claims is necessarily an imperfect endeavor. Witnesses to alleged foreign persecution are rarely available; documents are often impossible to locate. The immigration judge is often left with assessing witness credibility as the only means of resolving the request for relief. We are often limited to seeing through a glass, darkly.

As to post-REAL ID Act asylum seekers, the IJ may require corroboration, even when presented with credible testimony. *See Aden v. Holder*, 589 F.3d 1040, 1044 (9th Cir. 2009) ("Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimo-

ny, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." (quoting 8 U.S.C. § 1158(b)(1)(B)(ii))). We have sustained the BIA's denial of relief founded on the inability of an asylum seeker to obtain corroboration. *Shrestha v. Holder*, 590 F.3d 1034, 1047-48 (9th Cir. 2010).

In the post-REAL ID Act world, when corroborating evidence has assumed more importance, it is not unfair or unduly burdensome to require the government to identify basic, rudimentary information about its sources when it challenges corroborating evidence so that the IJ can properly weigh it. The information our sister circuits have demanded is modest. They do not require that every detail be uncovered or every riddle solved, they merely ask that very basic foundational questions–already in the hands of the Executive Branch–be answered. The Executive Branch invests significant resources in forensic document analysts, who provide detailed declarations in immigration cases. It is not much to ask that in the case of routine foreign fact-checking, the government simply tell us how it acquired the facts upon which it asks us to deny asylum.

The alternative is a decision founded solely on anonymous hearsay, often–as in this case–produced by the very foreign government actors the asylum-seeker accuses of persecution. Nearly sixty years ago, Judge Pope underscored the danger of relying on "secret informers, whisperers and talebearers" to decide legal rights in the administrative process. We should not succumb to that temptation again, especially when it is used as the sole basis to deny relief to an otherwise qualified applicant. The immigration sys-

tem is fraught with enough risk of error. When it is reasonably possible, we need to minimize that risk.

I respectfully dissent.

## APPENDIX C

**U.S. Department of Justice**
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A96 227 355 - Los Angeles, CA

Date: NOV 30, 2007

In re: NIKOLAY IVANOV ANGOV

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT:
Nicolette Glazer, Esquire

CHARGE:

| | |
|---|---|
| Notice: | Sec. 212(a)(7)(A)(i)(1), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document |
| APPLICATION: | Asylum; withholding of removal; Convention Against Torture |

The respondent, a native and citizen of Bulgaria, appeals an Immigration Judge's March 26, 2006, decision denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). The appeal will be dismissed. The respondent also moves to remand the proceedings to supplement the record with a non-precedential decision from the United States Court of Appeals from the Sixth Circuit, and the motion will be denied.

The respondent asserts that he was denied the opportunity to object to, impeach, and cross-examine

witnesses presented against him in contravention of section 240(b)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(4), and his right to a full and fair hearing was impaired by the admission of evidence over his objections. He further contends that the Immigration Judge improperly found him ineligible for asylum, withholding of removal, and CAT protection.

The decision sets forth the facts and we do not repeat them here. After review of the record, we find no clear error in the Immigration Judge's factual findings, and we adopt and affirm the Immigration Judge's decision. *See* 8 C.F.R. § 1003.1(d)(3)(i)[1]; *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance or a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision").

We find that the Immigration Judge's decision to admit as evidence the May 5, 2005, advisory opinion from Cynthia Bunton, Director, Office of Country Reports and Asylum Affairs for the Department of State (hereinafter "Bunton letter") (Exh. 11), and the June 6, 2005, letter from Nadia 'Tongour, Direction, Country Reports and Asylum Affairs, United States Department of State (hereinafter "Tongour letter") (Exh. 19), did not deprive the respondent of his right to a full and fair hearing. *See Ladha v. INS*, 215 F.3d 889, 903-904 (9th Cir. 2000) (an alien is entitled to a full and fair hearing of his claims and a reasonable

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[1] We also point out that, contrary to the respondent's assertion, our review of the Immigration Judge's discretionary decisions is *de nov*. *See* 8 C.F.R. 1003.1(d)(3)(ii).

opportunity to present evidence on his behalf; if the proceeding is so fundamentally unfair that the alien was prevented from reasonably presenting his case and if the alien shows prejudice from this unfairness the IJ's decision will be reversed); *cf. Trias-Hernandez v. INS*, 528 F.2d 366 (9th Cir. 1975) (probative documentary evidence, admitted without the presence of the author at trial, was not "so fundamentally unfair as to violate due process"). We find no adequate basis to disturb the Immigration Judge's finding that the Bunton letter calls into question the legitimacy of the subpoenas that the respondent submitted as evidence of the past persecution he alleged to have suffered at the hands of Bulgarian authorities on account of his ethnic status as a gypsy. *See* 8 C.F.R. § 1003.1(d)(3)(i). Moreover, the submission of fraudulent documents related to a material element of a claim of persecution support an adverse credibility finding. *See Desta v. Ashcroft*, 365 F.3d 741, 745 (9th Cir. 2004).

The Immigration Judge also found that the respondent's credibility was undermined by the discrepancies between his assertions about his former addresses and the findings in the Bunton letter about the structures at those locations. The record is unclear as to whether the locations cited in the Bunton letter and shown in the respondent's exhibits are actually the same areas. However, even if we accept as true the respondent's version of events that his home at 3005 Street Number 9 and neighboring homes also owned by gypsies were destroyed so that the property could be used to build a supermarket, and the families were relocated to trailers at 175 Evropa Boulevard in another gypsy ghetto area, this truthful testimony is not sufficient to overcome the indicia of incredibility stemming from the fraudulent

documents. Moreover, the destruction of the respondent's home along with the homes of his neighbors, and their move to replacement homes in the form of trailers, while certainly discriminatory, does not constitute past persecution as contemplated by the Act. *See Ghaly v. INS*, 58 F.3d 1425. 1431 (9th Cir. 1995) (discrimination on the basis of factors like race or religion, while morally reprehensible, does not ordinarily constitute persecution under the Act).

On this record, we conclude that the respondent did not present credible testimony or meet his burden of proof to support a claim for asylum. Consequently, he also did not meet his burden of proof to establish eligibility for withholding of removal. *See Farah v. Ashcroft*, 348 F.3d 1153, 1156 (9th Cir. 2003); *Alvarez-Santos v. INS*, 332 F.3d 1245, 1254-55 (9th Cir. 2003). Moreover, we find that there is no support for a conclusion that the respondent has been or would likely be tortured by or with the acquiescence of a government official in Bulgaria. Therefore, the respondent is not eligible for relief under the Convention Against Torture. *See* 8 C.F.R. §§ 1208.16-1208.18.

Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to remand is denied.

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FOR THE BOARD

## APPENDIX D

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**IMMIGRATION COURT**
**LOS ANGELES, CALIFORNIA**

File: **A 96 227 355**
In the Matter of:
**ANGOV**, Nikolay Ivanov
Respondent.

**IN REMOVAL PROCEEDINGS**

| | |
|---|---|
| **CHARGE**: | Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act ("Act") - *At the time of application for admission, was not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act.* |
| **APPLICATIONS**: | (1) Asylum pursuant to Section 208 of the Act.<br>(2) Withholding of Removal pursuant to Section 241(b)(3)(A) of the Act.<br>(3) Withholding/Deferral of Removal pursuant to Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Convention Against Torture") |

**ON BEHALF OF RESPONDENT:**
Nicolette Glazer, Esquire
Law Offices of Larry R. Glazer
1875 Century Park East, Suite #700
Century City, California 90067

**ON BEHALF OF THE GOVERNMENT:**
Assistant Chief Counsel
United States Department of Homeland Security
606 South Olive Street, 8th Floor
Los Angeles, California 90014

## DECISION AND ORDER OF THE IMMIGRATION JUDGE

### I. Procedural History

On January 6, 2003, Respondent was personally served with a Notice to Appear ("NTA"). In the NTA, the Government alleged that Respondent, a native and citizen of Bulgaria, arrived at the San Ysidro, California port of entry on December 19, 2002, and did not then possess or present a valid immigrant visa, reentry permit, border crossing card, or other valid entry document. Accordingly, the Government charged Respondent with inadmissibility pursuant to section 212(a)(7)(A)(i)(I) of the Act.

On March 17, 2003, Respondent appeared before the San Diego Immigration Court with counsel, admitted the factual allegations contained in the NTA, conceded the charge of inadmissibility, and indicated his desire to seek relief in the forms of asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). Respondent, through counsel, made a Motion for Change of Venue from the San Diego Immigration Court to the Los Angeles Immigration Court, and the Government did not ob-

ject. Respondent's Motion for Change of Venue was granted.

On July 30, 2003, Respondent appeared before the Los Angeles Immigration Court. Respondent filed his application for asylum, withholding of removal, and relief under the Convention Against Torture ("1-589"). Respondent declined to designate a country of removal. The Court designated Bulgaria.

On January 20, 2004, Respondent testified before the Court. The Government noted that on page 14 of the 2002 Department of State Country Reports on Human Rights Practices for Bulgaria, the Bulgarian government and the European Bank for Reconstruction and Development funded the construction of new apartments in Sofia for Roma who were displaced in 2001. (See Ex. 6). The Government indicated that it would send the documents admitted as Exhibit 4 for an overseas investigation in Bulgaria.

On February 17, 2004, Respondent testified before the Court. At the conclusion of testimony, the Court requested that Respondent produce documentation to establish his Roma identity.

The Government requested the assistance of the Department of State in conducting an overseas investigation regarding Respondent's case. On April 21, 2004, Cynthia Bunton, the Director of the Office of Country Reports and Asylum Affairs from the United States Department of State, Bureau of Democracy, Human Rights and Labor, issued a letter to Assistant Chief Counsel Megan Shirn. The letter was in response to Ms. Shirn's request for verification of two addresses and authentication of two subpoenas submitted by Respondent. (See Ex. 3(A) and 3(B)). In the letter, Ms. Bunton states that the American em-

bassy in Bulgaria contacted an official at the Archive Department at the Fifth Police District in Bulgaria, who stated that the subpoenas were forged. The Bulgarian official stated that officers Captain Donkov, Lieutenant Slavkov, and Investigator Vutov have never worked for the Fifth Police District. In addition, the Bulgarian official noted that the case numbers on the subpoenas were not correct, that room 4 did not exist on the second floor, and that room 5 did not exist on the fifth floor. Further, the Bulgarian official stated that the telephone numbers on the subpoenas were incorrect. Ms. Bunton stated that the embassy was unable to locate number 9, 3005 Street in Sofia, Bulgaria. In addition, the embassy was unable to locate 175 Evropa Boulevard in Sofia. The embassy stated that both neighborhoods are located in the Ljulin district, whose residents are approximately 20 to 30 percent Roma.

On June 22, 2004, Respondent appeared before the Court with counsel. The Court admitted Exhibits 11 to 18 into the record. Respondent's counsel objected to the admission of the report from the United States Department of State for the following reasons: (1) the individual who conducted the investigation was an unknown individual at the United States embassy in Bulgaria; (2) the Government failed to offer into evidence a sworn declaration from the investigator; and (3) the Department of State letter states that an unknown investigator contacted an official in the Archive Department at the Fifth Police District, but the Government failed to provide a statement from the official or from the Department for Intergovernmental Cooperation in the Bulgarian Ministry of Internal Affairs, which has the authority to answer requests for information made by the United States consulate in Bulgaria. In addition, Respond-

ent's counsel stated that she conducted an on-line search of the validity of Respondent's identity card on the web site of the Ministry of the Interior of the Republic of Bulgaria, and the on-line search revealed that his identity card is valid. (See Ex. 15A). In addition, she conducted a second on-line search using a random number, and it revealed that the number was non-existent. (See Ex. 16A.). She stated that she conducted the search using the random number in order to have a comparison.

On June 30, 2004, Respondent's counsel submitted a brief entitled, "Notice of Objections to Documents Proffered by the DHS." (See Ex. 12). Accompanying the brief is rebuttal evidence. Respondent submitted a letter from Daniela Mihaylova, legal director of the Romani Baht Foundation in Bulgaria, stating that the address "No. 5 3005 Street" exists in the neighborhood of Toleva Mahala, which is one of the largest Roma ghettos in Sofia, Bulgaria. In addition, the letter states that 100 Roma houses were destroyed in 2001, and that the Roma were sent to live in "wagons" on "175 Evropa boulevard."

At Respondent's hearing on January 31, 2005, Respondent's counsel asserted that the recent Ninth Circuit decision, Hernandez-Guadarrama v. Ashcroft, 394 F.3d 674 (9th Cir. 2005), is applicable to his case and gives him the right to cross-examine the individual who conducted the overseas investigation. Respondent's counsel noted that the Department of State Foreign Affairs Manual states that information supplied to the Department of Homeland Security in the form of oral statements must be reduced to writing and sworn to before a consular officer. Respondent's counsel questioned the credibility of the source of the information in the Department of State report,

noting that the Department for Intergovernmental Cooperation in the Bulgarian Ministry of Internal Affairs has the authority to answer requests for information made by the United States embassy, and failure to contact that agency reflects adversely on the credibility of the source of the information.

On June 10, 2005, the Government filed a brief regarding the admissibility of the Department of State report. In the brief, the Government asserts that reports provided by the Department of State are entitled to significant deference. The Government states that Hernandez-Guadarrama v. Ashcroft is distinguishable from Respondent's case because it concerns the admissibility of a Record of Deportable/Inadmissible Alien ("Form 1-213"), rather than a Department of State report. Further, in the instant case, the burden is on Respondent to prove his eligibility for asylum, and in the smuggling case, the burden of proof was on the Government to prove the alien smuggling charge by clear and convincing evidence. The Government also noted that in Hernandez-Guadarrama, the Government exercised "custodial power" over the witness, but in the instant case, the Government does not exercise "custodial power" over the Department of State.

At Respondent's hearing on June 10, 2005, the Government submitted a letter from Nadia Tongour, Director of Country Reports and Asylum Affairs from the Department of State, dated June 6, 2005. (Ex. 19). In the letter, she states that the Department of State's Bureau of Democracy, Human Rights and Labor, Office of Country Reports and Asylum Affairs (DRL/CRA) has considered Respondent's counsel's request that a Department of State employee testify about the preparation of the advisory opinion letter

issued by the Department of State. Ms. Tongour stated that the Department of State is unable to satisfy the request. The letter states that the DRL/CRA employs foreign service nationals at some posts to conduct local investigations, and DRL/CRA "generally does not provide additional information or follow-up inquiries to DHS offices or immigration judges regarding the results of an investigation."

At Respondent's hearing on November 28, 2005, Respondent submitted evidence which purports to show that the Government did not follow the proper procedure when conducting their overseas investigation. Respondent submitted an excerpt from the U.S. Department of State Foreign Affairs Manual, which cites to "9 FAM 40.4 N10.3 Furnishing Information to DHS for Petition." (Ex. 20). Respondent argues that the Government did not act in compliance with FAM 40.4 N10.3, because they did not reduce their investigation to a writing that was sworn before a consular officer. Respondent also submitted several documents detailing the functions and structure of the Bulgarian Ministry of the Interior. (Exhs. 21-23). Respondent argues that these documents show that there is a proper procedure in Bulgaria to obtain archival information, and that the Government in this case failed to follow that proper procedure when verifying the subpoenas submitted by Respondent. Finally, Respondent submitted a letter from Petya Parvanova, Director of the Ministry of the Interior, to Mr. Lawrence Toby, Consul of the USA in Sofia. (Ex. 24). Respondent stated that this letter refers to an unrelated criminal investigation, but illustrates the correct procedure to follow when obtaining information from the Bulgarian Ministry of the Interior. Respondent argues that this letter shows the course of action the Government should have taken

in this case, which would have been in compliance with its own regulations.

## II. Exhibits

Exhibit 1: Notice to Appear

Exhibit 2: Application for Asylum, Withholding of Removal, and Relief under the Convention Against Torture ("I-589")

Exhibit 3: Collective Exhibit 3 (A-O)

- (A) Subpoena
- (B) Subpoena
- (C) Brain Scan
- (D) Photos of Respondent
- (E) Letter from Krasimir Kanev, President of the Bulgarian Helsinki Committee
- (F) Curriculum Vitae for Mr. Krasimir Kanev
- (G) Roma in Bulgaria, Bulgarian Helsinki Committee, 2001
- (H) Amnesty International, Freedom From Racial Discrimination, 2001
- (I) Amnesty International, 2001 Report on Bulgaria
- (J) European Commission Against Racism and Intolerance, Second Report on Bulgaria, CRI, 2000
- (K) ERRC, Bulgarian Police Violence Against Roma, 2000
- (L) Michael Shafir, Radical Politics, 2000
- (M) Killing by Skinheads in Bulgaria, Roma Rights, 1998
- (N) Written Comments of the European Roma Rights Center in the Matter of Anton Assenov v. Bulgaria

(O) Stacia Spragg, The Dream, A Photographic Essay Among the Chergari Gypsies in Blagoevgrad, Bulgaria, 1996

Exhibit 4: Collective Exhibit 4 (P-S)
- (P) Birth Certificate
- (Q) Medical Certificate
- (R) Photos
- (S) Bulgaria: Human Rights Project on Eviction of Roma

Exhibit 5: Amicus Curiae Brief

Exhibit 6: Country Reports on Human Rights Practices, Bulgaria, 2002

Exhibit 7: "All Ethnic Problems Solved?" Central Europe Review, November 27, 2000[1]

Exhibit 8: The Patrin Web Journal: Romani Culture and History

Exhibit 9: The Ethnosocial Structure of the Roma of Bulgaria

Exhibit 10: The Religion and Culture of the Roma

Exhibit 11: Government's Department of State Report Submission

Exhibit 12: Notice of Objections to Documents Proffered by the Government and Rebuttal Exhibits
- (A) Letter from attorney Daniela Mihaylova, Legal Director of the Romani Baht Foundation in Bulgaria

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[1] Respondent's counsel objected to the admission of exhibit 7, noting that there is nothing in the document to indicate that it relates to the Romani population in Bulgaria. The Court overruled the objection.

(B) "The Short memory of Ljulin Municipality as the Price of a Child's Life" from Bulgarian Helsinki Committee
(C) Map of the area showing the location of "Mr. Bricolage," depicted by the photos proffered by government, in relationship to the "ring road"
(D) Map of Ljulin Municipality
(E) Photos of street 3005
(F) Photo of the trailers at 175 Evropa Boulevard

Exhibit 13: Respondent's Republic of Bulgaria Identity Card (translated by Respondent's counsel)

Exhibit 13A: Respondent's Republic of Bulgaria Identity Card (translated by Dimitinka Santa Cruz)

Exhibit 14: The new Bulgarian passports from the web site of the Bulgarian embassy

Exhibit 15: Ministry of the Interior, Republic of Bulgaria, Inquiry regarding the validity of identity document number 158397750 (translated by Respondent's counsel)

Exhibit 15A: Ministry of Interior, Republic of Bulgaria, Inquiry regarding the validity of identity document number 158397750 (translated by Dimitinka SantaCruz)

Exhibit 16: Ministry of Interior, Republic of Bulgaria, Inquiry regarding validity of identity document number 111222333

Exhibit 17: Patrin Romani Customs and Traditions

Exhibit 18: Photos

Exhibit 19: Letter from Nadia Tongour, Director, Country Reports and Asylum Affairs from the Department of State
Exhibit 20: Excerpt, U.S. Department of State Foreign Affairs Manual, 9 FAM 40.4 N10.3 Furnishing Information to DHS for Petition Cases and Other Proceedings
Exhibit 21: Register of the Administrative Structures, Ministry of the Interior, Directorate "International Cooperation" (translated by Dimitinka Santa Cruz)
Exhibit 22: Register of the Administrative Structures, Ministry of the Interior, Directorate "Information and Archives" (translated by Dimitinka Santa Cruz)
Exhibit 23: Register of the Administrative Structures, Ministry of the Interior, Chart of Organizational Structure (translated by Dimitinka Santa Cruz)
Exhibit 24: Letter from the Ministry of the Interior, from Petya Parvanova

## III. Testimony

### A. Direct Examination

#### 1. Background

Respondent was born in Sofia, Bulgaria, and his ethnic origin is gypsy. Respondent's parents are also gypsies. Respondent's father was born in Gorni Poroi, Greece, and his mother was born in Bulgaria.

A year after Respondent was born, his mother sent him to live with his grandmother. When he was eight years old, he returned to the Toleva Mahala neighborhood, a gypsy neighborhood in Sofia. Respondent's neighbors in Toleva Mahala were gypsies.

Respondent lived in Toleva Mahala until March 2001. Respondent testified that he had problems his entire life because of his ethnicity. He stated that the "skinheads," the Bulgarians, and the police caused him problems.

**2. First Arrest**

Respondent testified that his first encounter with the police occurred on February 18, 1999. According to Respondent, early in the morning, two police officers removed him from his bed. They grabbed him, dragged him to the police car, and took him to the Fifth Police Department. They locked him in a holding cell in the basement of the police station for two days. A police officer took Respondent to an office on the first floor and interrogated him. They asked him whether he had ever been to three specific addresses in Sofia. Respondent recognized one of the addresses, but he had never been to that address. Respondent told the police that he had never been to those addresses. The police accused Respondent of committing burglaries of apartments. Respondent testified that he never committed burglaries or any other crime in Bulgaria. Respondent believes that the police accused of him of the burglaries because he is a welder, and he made an instrument called, "goat leg." The "goat leg" is used to extract nails or move heavy objects. Respondent made a "goat leg" for Dimitar Dimitrov and Anton Krustev, Respondent's neighbors. They are also gypsies. While in the police station, Respondent saw the "goat leg" that he had constructed. The police told him that they caught Dimitar and Anton when they were committing the burglary, and they were using the "goat legs" to break the windows. Dimitar and Anton told the police that Respondent made the tools. Respondent tes-

tified that when he made the tools, he did not know that Dimitar and Anton intended to commit a burglary. Respondent believed that they needed the "goat legs" to perform construction work. The police told Respondent that they believed he was lying to them, and they beat him. The police beat him with a club and their hands. The beating continued until Respondent signed a document stating that he had been to the three addresses. Respondent was not charged with a crime. Respondent stated that Dimitar and Anton were prosecuted, but the charges were dismissed. Respondent was released from detention on February 19, 1999. Respondent stated that he had bruises all over his body as a result of the beating.

Respondent sought medical treatment after he fainted on February 20, 1999. Respondent first went to a local clinic to seek medical treatment, and he was referred to a neurologist. Respondent told the neurologist that he had been beaten by the police. The neurologist believed that he was a gypsy drug addict. The neurologist did not prescribe any treatment for Respondent. He told Respondent that he might have a brain tumor and referred Respondent to get a CAT scan. The neurologist told Respondent that he could have the brain scan in three months. Respondent wanted to obtain the brain scan earlier, so he found a doctor from Pirogov to do the scan. On March 10, 1999, Respondent had a brain scan. The brain scan revealed that he did not have a tumor. Respondent continued to have medical problems after the scan. He was told that he has a problem with the back portion of his brain. The doctors prescribed him several different types of medications. He stated that he felt "dazed" all the time. Before the incident

with the police, he did not have any of these symptoms.

**3. Second Arrest**

Respondent was arrested again on December 27, 1999. In the morning, two police officers took Respondent from his home to the Fifth Police District. The police accused him of stealing preserves from peoples' basements. The police asked him where he was on December 24, and he responded that he was home on December 24. The police beat him. Respondent tried to protect his head during the beating. The police officer led an elderly woman into the office and asked her whether Respondent was the thief, and she stated that he was not the thief The police officer, who was a large man, began to hit Respondent again and jump on his toes. The police then released him. Respondent believes that the police targeted him because he is a gypsy, and "only a gypsy is hungry and could steal from somebody's basement." Respondent believes that the police knew that he was a gypsy because they took him from the gypsy neighborhood. They referred to him as "dirty gypsy," "mongrel," and "vampire." After he was released, he was never brought before a judge, and no charges were brought against him. As a result of the mistreatment in police custody, Respondent was bruised, and his toe became infected.

**4. Third Arrest**

Respondent was arrested again in May 2002, when he was in front of the offices of the Roma-Evropa Confederation. The Roma-Evropa Confederation is an organization that deals with the problems of the gypsy minority. Respondent was in front of these offices because the Pope was coming to Bulgar-

ia on May 24, 2002. Respondent gathered to sign a petition to be given to the Pope. Respondent was not a member of the Roma-Evropa Confederation. Respondent and others who had gathered to sign the petition were arrested on May 23, 2002. Respondent was taken to the Fifth Police Department and locked in a cell in the basement. The police interrogated Respondent regarding the meeting of the Roma-Evropa Confederation. They asked Respondent why he attended the meeting of the Roma-Evropa Confederation. Respondent told the police that he attended the meeting to write about the abuses he had suffered as a result of being a gypsy. At the police station, Respondent saw the police officer who had jumped on his toes in December 1999. The police officer threatened Respondent by stating, "You are here again. How come you did something again? We will have a special conversation with you." Respondent did not see that police officer again. On May 26, 2002, two masked individuals came into Respondent's cell and beat him.

Respondent testified that if he returns to Bulgaria, he fears that he will be beaten again by the police.

**5. Destruction of Respondent's Apartment**

In March 2001, Respondent's house in the Toleva Mahala was destroyed by an Austrian company in order to build a supermarket. Approximately 15 houses were destroyed. Respondent's family was given a "replacement home" on "175 Evropa Boulevard" in Sofia, Bulgaria. The replacement home was a trailer. Respondent and his family moved into the trailer on March 8, 2001. On March 8, 2001, Respondent and his family were still at their apartment in Toleva Mahala. The company brought a bulldozer to destroy the apartments, and Respondent's family

had not finished removing their belongings. A police car with two police officers came and began to insult Respondent and his family. A bus with dark windows came, and people in masks jumped out of the bus. The masked people began to beat everyone. Respondent was beaten and knocked unconscious. When he awoke, he was in the Isul hospital. Respondent spent two days in the hospital. The Roma-Evropa Confederation later obtained Respondent's medical certificate from the Isul hospital in 2002. The Roma-Evropa Confederation obtained the certificate because they wanted to prove that the gypsies were beaten. (See Ex. 4 at page 4.)

A few days after Respondent was released from the hospital, he received a summons to appear at a police station. The police officer told him not to take any legal action.

The destruction of the Toleva Mahala apartments attracted the attention of the Roma-Evropa Confederation. A man from the Roma-Evropa Confederation who was an organizer and nephew of the leader of the party contacted Respondent. This man promised to help Respondent and his family during the winter by giving them coal. The Confederation did not bring any legal action on Respondent's behalf.

Respondent lived at 175 Evropa Boulevard for one and one-half years. The trailer where Respondent's family lived was two meters by six meters, and five people lived there. Respondent testified that the trailer his family lived in is depicted in Exhibit 4. Respondent's niece took the picture, and his mother sent the photo to him in the United States. Respondent testified that the photo accurately portrays the trailer.

## B. Cross-Examination

### 1. Respondent's Family

Respondent's parents live in Sofia, Bulgaria. Respondent has one sister, age 34, who lives with their parents. Respondent's sister is divorced, and she has one child, age 14, who lives with her. Respondent's sister completed eighth grade. Respondent's sister does not work. Respondent's father is retired, and his mother is a housekeeper. Respondent's parents live at 175 Boulevard Europe, Trailer 18.

### 2. Travel to United States

Respondent left Bulgaria on December 5, 2002. This was the only time that Respondent left Bulgaria. Respondent flew from Sofia to Budapest. Respondent testified that at the airport, one of the customs officers looked at his Mexican visa and told him, "You are wasting your money in vain. Some of them are false." Respondent testified that his Mexican visa is an authentic visa. No one from the Bulgarian government tried to stop him from leaving.

He waited at the airport for three hours in Budapest, and then he flew to Amsterdam. He had a short lay-over in Amsterdam. He did not apply for asylum in Amsterdam because he did not know that it was possible to apply for asylum in Amsterdam. He traveled from Amsterdam to Mexico City on KLM airlines. Respondent remained in Mexico for three hours. He had a visa for Mexico that was issued in Budapest. Respondent paid someone to obtain the visa for him at the end of September 2002. From Mexico City, Respondent traveled by plane to Tijuana. Respondent purchased the ticket from Mexico City to Tijuana for $300. He purchased the ticket at the airport in Mexico City. He did not apply for asylum in

Mexico. The Government noted that on Respondent's asylum application, he stated that he left Bulgaria on December 18, but Respondent testified that he left on December 5, 2002. Respondent stated that his testimony is correct, but the date on the asylum application is incorrect.

Respondent's plane ticket to come to the United States cost $800. Respondent borrowed money from the last employer for whom he worked, Zhivko Kouburov. Respondent worked for Zhivko Kouburov for nine or ten months in 2002 as a welder and person who carries heavy wire. Respondent has not repaid Mr. Kouburov because he cannot afford to do so.

Respondent paid his attorney in the United States $7,000 to represent him. He first started working in the United States in February 2003, after he was released from detention. His first job was digging holes on someone's property.

Respondent does not work as a welder in the United States. He worked as a welder in the Bulgarian army. Respondent worked as a full-time welder in Bulgaria in 2002. Before 2002, he worked as "general worker." He did excavations, worked as a loader at warehouses, and worked in construction.

### 3. Questions Regarding Gypsy Heritage and Traditions

Respondent does not know the name of the gypsy tribe to which his parents belong. Respondent's mother's family name is Sarachi. Respondent is a Christian gypsy. When asked, "What is the name of the Christian Bulgarian gypsies," Respondent stated that they do not have a name. When asked whether the Bulgarian Muslim gypsies have a name, he stated that he did not know. According to Respondent,

there are no subgroups of the Christian Bulgarian gypsies. The Christian Bulgarian gypsies speak Bulgarian.

Respondent does not speak any gypsy dialects. Gypsy was not spoken in the area where he lived with his grandmother, nor was it spoken in the Toleva Mahala neighborhood. Respondent's mother and father do not speak a gypsy dialect. The gypsy group to which Respondent belongs speaks Bulgarian.

The Government asked Respondent to describe gypsy customs celebrating the birth of a child. According to Respondent, gypsies wrap the baby in a piece of cloth, bathe the baby, buy new clothes for the mother, and celebrate when the baby starts walking. The Government inquired whether there are any special ceremonies at the time of birth, and Respondent replied that there are none. Respondent testified that gypsies today give birth in hospitals. According to Respondent, gypsies believe that if the baby is born in the home, it will be healthier and more successful in life. Gypsies believe that being born at home protects the baby from the "bad eye."

The Government inquired how the new mother is treated at the time of birth. Respondent did not know if there are any beliefs about pregnant women in the gypsy culture. Respondent did not know if there are specific gypsy customs regarding the treatment of new mothers.

The Government inquired whether the gypsies have any beliefs regarding their languages, and he did not know.

Respondent was asked to describe gypsy marriage traditions, and he testified that gypsies have a

three-day wedding. When Respondent's sister married a non-gypsy, there were "quarrels." Respondent does not know the gypsy beliefs about marriage to a non-gypsy. The Government inquired whether there is a tradition involving the parents of the bride and groom before the wedding. Respondent replied that gypsies do a "ritual of joining," called "venchavka." where the groom officially asks for the bride's hand in marriage. The Government inquired whether Respondent knows of any traditions of dowry in the gypsy culture, and he replied that he has heard of brides being purchased, but he has no first hand knowledge. Respondent stated that he knows that the bride's parents "prepare a present" for the groom. The Government inquired whether there are any special wedding customs that the gypsy community follows, and he replied that he did not know.

Respondent stated that he has never heard of International Roma Day.

The Government inquired whether Respondent is aware of Roma traditions regarding death. Respondent stated that the priest sings or chants over the dead body. He stated that the Roma community has a ritual in which they eat wheat cooked with sugar and give away the deceased person's clothes. The Government inquired whether after the person dies, there is a special belief about preparing food, and Respondent replied that he did not know. The Government inquired whether there are specific beliefs about touching the body of the deceased, and Respondent stated that he did not know.

The Government asked Respondent whether he knows about gypsy taboos, and he replied that he did not.

The Government asked Respondent if the gypsies have any beliefs regarding owning dogs and cats, and Respondent was unable to identify any specific beliefs.

The Government asked Respondent whether he knows about the gypsy legal system, and he stated that he did not. The Government asked if the gypsy community has its own form of punishment, and he did not know.

Respondent has not been involved in any gypsy community groups in the United States because he did not know that such groups existed. Respondent admitted that he had not made any effort to find such groups.

Respondent's parents did teach him about gypsy traditions. Until Respondent was eight years old, he did not know his parents. Respondent's father is an alcoholic and did not follow gypsy traditions. Respondent did not observe any neighbors following gypsy traditions. Respondent stated that he celebrated Gergeovden, Christmas, and Vassilyovden. Vassilyovden is the "gypsy Christmas." On Gergeovden, which is St. George's Day, a lamb is killed. St. George is the protector of the gypsies. The Government asked Respondent whether he knows the best-known Romani religious festival, and he did not know the name.

The Government asked Respondent why he knows so little about the traditions and culture of the gypsy groups. He stated that he grew up with his grandmother, but she did not teach him about gypsy traditions.

#### 4. Questions Regarding Respondent's Identity

Respondent does not have an identification card that identifies him as Roma. He stated that the old green passports identify whether a person is a gypsy, Turk, or Bulgarian by the unified citizen number.

Respondent obtained a passport in Bulgaria in 1989. Respondent had a passport issued in the beginning of 2002. Respondent obtained a passport in June 2000, but he did not intend to travel. The previous passports were green, and they were replaced with identity cards. Respondent testified that he obtained a travel passport along with the identity card because it was less expensive to have a travel passport issued along with the identity card.

#### 5. Questions Regarding Destruction of Respondent's Home

The Government noted that the Country Reports on Human Rights Practices, exhibit 6, page 15, indicates that the Bulgarian government continued to build new housing for the Roma who were displaced from their homes in 2001. Respondent does not know whether the Bulgarian government built new apartments for Roma.

### C. Questioning by Court

#### 1. Establishing Respondent's Identity as a Gypsy

The Court inquired whether Respondent still has the green passport he mentioned in his testimony. Respondent stated that he did not make a copy of the green passport. The green passport was not a travel passport, but rather an internal passport. His mother and father do not have the green passport.

Respondent attended school until the eighth grade. Respondent's school reports did not identify him as gypsy because the reports do not contain this information.

The Court inquired whether there is any documentation that would identify Respondent as gypsy, and he replied that he has no documentation to prove that he is a gypsy.

Respondent stated that the strongest evidence that he is as gypsy is where he lived. Respondent testified that when his house was destroyed in Toleva Mahala, he moved to the trailers at 175 Boulevard Evropa. According to Respondent, Toleva Mahala was only occupied by gypsies.

**2. Questioning Regarding Gypsy Languages and Tribes**

Respondent stated that he knows that the Turkish gypsies speak a mixture of Turkish and Bulgarian. All gypsies that Respondent knows speak Bulgarian. The Katunari tribe, who raise sheep, speak their own language. Respondent does not know if any other tribes speak their own language.

The Court inquired regarding the Vlahichki tribe. Respondent replied that the Vlahichkis are gypsies who live in northern Bulgaria and speak a mixture of Bulgarian and Romanian. The Court inquired whether the Vlahichki is broken down into smaller groups and what those groups are called. Respondent replied that he did not know.

The Court inquired whether Respondent knows about the Sitari group, and he replied that he did not know about the Sitari group.

The Court asked about the Rishatari group, and Respondent stated that the Rishatari is the family name of a clan who makes seeds. The Court asked about the Dassikane and Horohane groups, and he did not know these groups.

**D. Redirect**

Respondent's counsel inquired, "What makes you a Roma?" Respondent replied that he is a descendent of Roma, and he has always lived in a gypsy neighborhood.

Respondent's counsel inquired how someone can distinguish between an ethnic Bulgarian and a gypsy. Respondent stated that gypsies are "dirty," have "matted hair," "old clothes," and are covered in mud.

Respondent stated that the police would know that someone is Roma because Roma stay together in groups. In addition, the police would know that someone is Roma from their address registration. The address registration is on the identity card. The internal identification card contains the address registration. The green passport contains a number that indicates whether someone is a gypsy or ethnic Bulgarian. If the number begins with one, the person is Bulgarian. If the number begins with three, then the individual is Roma. If the number begins with two, then the individual is Turkish. Respondent left his identification card in the trailer where his parents live.

When Respondent attended school, the communists were in power, and the Roma were not allowed to speak their own language. When Respondent was in school, he did not study the history of the Roma people or speak the Roma language. Respondent did not study the Roma traditions.

Respondent knows of people who speak a mixture of Turkish and Bulgarian and the Vlash who speak Romanian and Bulgarian. Respondent stated that the people who speak a mixture of Turkish and Bulgarian are Muslim. The Roma who speak Bulgarian are Christian.

Respondent testified that "clan" means "generations from the same family." The Sarachi clan work in the leather processing trade. Respondent identified the clan of Rashatari by their trade. The Rashatari pick willow trees and use the sticks to make baskets. Respondent stated that the Delevi tribe members are wood carvers. The Bakardzievi tribe members work in metal production. The Mechkari tribe raises bears. Respondent could not name any other clans. Respondent stated that the clan names originate from their trade.

## IV. Law and Analysis

### A. Asylum

To qualify for a grant of asylum, Respondent must credibly demonstrate that he suffered past persecution or has a well-founded fear of future persecution within the meaning of the Act. Matter of E-P-, 21 I. & N. Dec. 860, 860 (BIA 1997). Furthermore, he must demonstrate that the alleged persecution is "on account of [his] race, religion, nationality, membership in a particular social group or political opinion." 8 U.S.C. § 1158(b)(i) (2005); Id. at 860-61. He must also show that the source of the persecution is the government, a quasi-official group, or persons or groups that the government is unable or unwilling to control. See Avetovo-Elisseva v. INS, 213 F.3d 1192, 1196 (9th Cir. 2000). Finally, he must demonstrate that she is eligible for asylum as a matter of discre-

tion. Kaluhi v. Ashcroft, 364 F.3d 1134, 1137 (9th Cir. 2004).

**1. Credibility**

The Court must make a threshold determination of credibility before considering whether Respondent meets any of the statutory criteria for asylum, withholding of removal, or relief under the Convention Against Torture. See Matter of O-D-, 21 I. & N. Dec. 1079, 1081 (BIA 1998). Asylum cases are inherently difficult to prove, and therefore, an applicant may establish her case through her own testimony alone. Chebchoub v. INS, 257 F.3d 1038, 1042 (9th Cir. 2001). An applicant's own testimony, without corroboration, is sufficient to meet her burden of proving her asylum claim if it is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of her fear. Ladha v. INS, 215 F.3d 889, 901 (9th Cir. 2000). However, the Ninth Circuit has allowed courts to require corroborative evidence where applicant's testimony is not sufficient to establish that he or she is a refugee as defined in section 101(a)(42) of the INA. Sidhu v. INS, 220 F.3d 1085, 1090 (9th Cir. 2000). If corroborative evidence is required, the applicant must be given an opportunity at his hearing to explain the failure to provide material corroboration. Id. at 1091. Where the immigration judge has reason to question the applicant's credibility, and the applicant fails to produce non-duplicative, material, easily available corroborating evidence, and provides no credible explanation for such failure, an adverse credibility finding will withstand appellate review. Id. at 1092.

Credibility factors weighed by the Court include inconsistencies in the applicant's testimony. Under the Ninth Circuit law, the inconsistencies must be

substantial to damage a claim. "Minor inconsistencies in the record that do not relate to the basis of an applicant's alleged fear of persecution, go to the heart of the asylum claim, or reveal anything about an asylum applicant's fear for his safety are insufficient to support an adverse credibility finding." Mendoza Manimbao v. Ashcroft, 329 F.3d 655, 660 (9th Cir. 2003). The Ninth Circuit has drawn a fine line between inconsistencies that are minor and those that go to the heart of the claim. Generally, any discrepancies regarding details about past persecution that are the basis of an applicant's asylum claim are deemed to go to the heart of the claim. See Farah v. Ashcroft, 348 F.3d 1153, 1155-56 (9th Cir. 2003) (inconsistent father's name that identifies alien's membership in a persecuted group); Wang v. INS, 352 F.3d 1250, 1257-58 (9th Cir. 2003) (discrepancy between testimony that the alien feared returning to his country and documents that showed that he did return in the past; discrepancy in work termination dates that showed when the alien stopped working before entering the U.S.); Chebchoub v. INS, 257 F.3d 1038, 1043 (9th Cir. 2001) (inconsistent testimony regarding the number of times alien was arrested and regarding events leading up to and surrounding his departure); Pal v. INS, 204 F.3d 935, 938 (9th Cir. 2000) (inconsistent date of rape, different signatures of same doctor on two different letters, alien's statement that she lived with relatives in Fiji for three years compared to her later statement that she spent a year in New Zealand during the same time period, and statement that the rapists were military members based only on the fact that they were carrying weapons).

In the present case, Respondent's asylum claim is predicated on the alleged mistreatment he suffered

at the hands of the Bulgarian police and government. Significant credibility problems exist, however, that call into doubt whether this mistreatment did in fact occur. Specifically, Respondent submits two subpoenas that the Government argues are fraudulent. The Court must address the viability of Respondent's asylum claim in light of the Government's findings of fraud, and weigh them against Respondent's findings to the opposite.

In Matter of O-D-, the respondent proffered documents purporting to be an identity card and a birth certificate from Mauritania, but the Government submitted a forensics report stating that the identity card was a "known counterfeit," and the birth certificate was "probably counterfeit." The Board of Immigration Appeals ("Board') distinguished between two uses of fraudulent documents: (1) the presentation of a fraudulent document in an asylum adjudication for the purpose of establishing the elements of an asylum claim; and (2) the presentation of a fraudulent document in an asylum adjudication for the purpose of escaping immediate danger from an alien's country of origin or resettlement, or for the purpose of gaining entry into the United States. Id. at 1081. The Board recognized the settled law that the second category would not adversely affect an asylum claim. Id. In contrast, the Board found that the respondent's use of one or more counterfeit documents, submitted to prove a central element of the claim, indicates a lack of credibility. Id. gypsy at 1083. The Board also held that "the presentation of such questionable documents, in the absence of an explanation regarding such presentation, creates serious doubts regarding the respondent's overall credibility." Id. Further, the Board noted that "such fraud tarnishes the respond-

ent's veracity and diminishes the reliability of his other evidence." Id.

In this case, Respondent submitted two subpoenas purporting to be from the Ministry of Internal Affairs. The first subpoena states: "The citizen NIKOLAY IVANOV ANGOV, residing in the city of Sofia, Bulvd. Evropa, No 175 is subpoenaed to appear on 13 March 2001 at 10:30 A.M. in 5th RPU, city of Sofia, located at "Mann Drinov" Street #4, Floor 2, Room 4." (Ex. 3, A). The subpoena was signed by "k-n Donkov," and contained a seal which reads "Regional Police Department Sofia." The second subpoena states: "The citizen NIKOLAY IVANOV ANGOV, [residing at] 175 Evropa Bulvd, pursuant to section 55, subsection 2 and section 67, subsection 1 of the ZMVR, is subpoenaed to appear for inquiry to clear up the circumstances regarding the preliminary investigation on case 28030/2002 on 29 May at 11 o'clock, in the building of 5th RPU in the city of Sofia, located at Marin Drinov Street No. 4, floor 1, room 5 with investigator Vutov." (Ex. 3, B). The subpoena was signed by "l-t Slavkov," and contained a seal which reads "Police Department, Sofia Ministry of Internal Affairs." Respondent submitted these documents to show a pattern of abuse by the Bulgarian police against him on account of his Roma identity.

The Government, however, has submitted evidence calling into serious doubt the authenticity of the two subpoenas. In a letter dated April 21, 2004 to Government counsel, from the Bureau of Democracy, Human Rights and Labor, Office of Country Reports and Asylum, Director Cynthia Bunton states that the U.S. embassy "contacted an official in the Archive Department at the 5th Police District in Sofia re-

questing authentication of the two subpoenas." As a result of the investigation, Ms. Bunton states that the Bulgarian official believed that the subpoenas were forged. According to the Bulgarian official, the officers referenced in the subpoenas, Captain Donkov, Lieutenant Slavkov, and Investigator Vutov, never worked for the 5th Police District. Further, the Bulgarian official found 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. Additionally, the Bulgarian official told the embassy that the telephone numbers on the subpoenas were incorrect, and that the seals on the subpoenas were much smaller than the 5th Police Department's official seal.

Respondent counters the Government's fraud claim by arguing that the Government failed to offer into evidence a sworn declaration of the Bulgarian investigator. Respondent points out that pursuant to the U.S. Department of State Foreign Affairs Manual, "oral statements furnishing credible information must, whenever possible, be reduced to writing and sworn to before a consular officer." (Ex. 20, "9 FAM 40.4 N10.3 Furnishing Information to DHS for Petition"). Respondent also argues that the Government did not follow the proper procedure in retrieving information pertaining to the authenticity of the subpoenas. Respondent contends that the Ministry of the Interior's Directorate of Information and Archives and Directorate of International Cooperation are the proper agencies through which the U.S. embassy should have authenticated the subpoenas. (See Exhs. 21, 22, & 23). In Exhibit 22, for example, one of the listed functions of the Directorate of Information and Archives is to issue "certificative documents" and provide documents "to individuals in the manner

prescribed." Respondent provides a letter from Petya Parvanova, Director of the International Collaboration Department, to Mr. Lawrence Toby, Consul of the USA, Sofia, which he states is demonstrative evidence of how the proper procedure was followed in an unrelated criminal matter. (Ex. 24). In the letter, Ms. Parvanova indicates that a certain Bulgarian citizen has a criminal record and used to go by another name. Finally, Respondent argues that pursuant to Hernandez-Guadarrama v. Ashcroft, 394 F.3d 674 (9th Cir. 2005), he has the right to cross-examine the Bulgarian investigator.

Based on the foregoing, the Court finds that the subpoenas submitted by Respondent are fraudulent, despite his contrary assertion, and that this fraud goes to the heart of his claim because it concerns his alleged past persecution. See Desta v. Ashcroft, 365 F.3d 741, 745 (9th Cir. 2004) (upholding the IJ's conclusion that respondent's letters and membership card were fraudulent and finding that the genuineness of those documents went to the heart of the claim). First, Respondent's claim that the Bulgarian investigator's findings had to have been reduced to writing and sworn to before a consular officer pursuant to 9 FAM 40.4 N10.3 is incorrect. 9 FAM 40.4 N10.3 states that oral statements must be reduced to writing and sworn to "whenever possible." In other words, it is not a mandate that the U.S. Department of State's investigations be written and sworn to. Further, a letter from Nadia Tongour, dated June 6, 2005, states that the Department of State's Bureau of Democracy, Human Rights and Labor, Office of Country Reports and Asylum Affairs "generally does not provide additional information or follow-up inquiries from DHS officers or immigration judges regarding the results of an investigation." (Ex. 19). The

Court finds that there is no reason to doubt the veracity of Ms. Bunton's April 21, 2004 letter, detailing the fraud findings related to the subpoenas.

Second, Respondent's argument that the Government failed to follow proper procedures in Bulgaria in authenticating the subpoenas is misguided. While the evidence Respondent provides at Exhibits 21-24 shows that the Bulgarian Ministry of the Interior has the capacity to provide documents to foreign governments, nothing within those documents indicates that is the *only* means by which the U.S. Department of State may go about obtaining documents in Bulgaria. The Court finds that the fact that the U.S. Department of State did not go through the Ministry of the Interior does not undermine the validity of the findings detailed in Ms. Bunton's letter. The Bulgarian investigator contacted the 5th Police District in Sofia, the same police district where the subpoenas were supposedly issued. The 5th Police District pointed to a variety of glaring mistakes in the subpoenas, namely, the rooms referred to in the subpoenas did not exist, the police officers referred to did not exist, the case numbers were not correct, and the telephone numbers were not correct. Respondent has not provided any explanation for these mistakes.

Finally, the Court does not agree that Hernandez-Guadarrama is applicable in this case. In Hernandez-Guadarrama, the issue before the Ninth Circuit was whether Respondent had a right to cross-examine a Government witness who had provided a statement that Respondent participated in alien smuggling. The Ninth Circuit held that a "single affidavit from a self-interested witness not subject to cross-examination simply does not rise to the level of clear, unequivocal, and convincing evidence required

to prove deportability." Id. at 683. The Ninth Circuit noted that the test as to whether a hearsay affidavit has been properly admitted is whether the statement is probative and whether the admission was fundamentally fair. Id. at 681. The Government, in order to use a statement from an absent witness, must establish that it made a "reasonable effort to secure the presence of the witness at the hearing." Id. In this case, Ms. Tongour's letter stated that the presence of the Bulgarian investigator was not feasible, nor was the usual practice. Thus, it appears that a reasonable effort was made to secure the presence of the witness, but the witness is unavailable. Further, Hernandez-Guadarrama involves the admissibility of a Record of Deportable/Inadmissible Alien ("Form I-213"), rather than a Department of State report. Moreover, as the Government pointed out in their brief on this issue, in Hernandez-Guadarrama, the burden of proof was on the Government to prove the alien smuggling charge by clear and convincing evidence, whereas in the present case, the burden is on Respondent to prove his eligibility for asylum.

In sum, the Court finds that the subpoenas submitted by Respondent create serious doubts regarding his overall credibility. See Matter of O-D-, 21 I. & N. Dec at 1083. As was the case in Matter of O-D-, "such fraud tarnishes the respondent's veracity and diminishes the reliability of his other evidence." Id. Respondent testified as to three arrests between 1999 and 2002 that purport to show that he was persecuted on account of his Roma identity, at the hands of the Bulgarian government. As corroborative evidence, Respondent submitted the subpoenas. However, with the subpoenas adjudged fraudulent, the Court is left with an unclear picture of what, if any, harm befell Respondent.

Additionally, Respondent's credibility is further undermined by his assertions that he lived at "3005 Street Sofia" and "175 Evropa Boulevard," which the U.S. embassy in Sofia was unable to locate. Respondent counters by providing a letter from Daniela Mihaylova, Legal Programs Director of the Romani Baht Legal Foundation in Sofia, Bulgaria. (Ex. 12). In the letter, Ms. Mihaylova states that "No. 5 3005 Street" exists in Toleva Mahala, one of the largest Roma ghettos in Sofia. The letter also states that after 100 Roma houses were destroyed in 2001, Roma were sent to live in "wagons" on "175 Evropa Boulevard." These contradictory reports are significant because Respondent asserts that part of the reason that he was identified and targeted as a gypsy was because of where he lived. While Ms. Mihaylova states that the address on 3005 Street exists in one of the largest Roma ghettos, Ms. Bunton's letter states that both the 3005 Street address and "175 Evropa Boulevard" exist in the Ljulin district, which is only "approximately twenty to thirty percent" Roma. The Court again notes that there is no reason to doubt the U.S. State Department's findings, and no reason to give more weight to assertions of the Romani Baht Legal Foundation. Because the U.S. State Department investigation casts doubts on the actual makeup of the neighborhoods Respondent lived in, and because Respondent pointed to such neighborhoods as evidence of his Roma identity, the Court is left questioning the veracity of Respondent's asylum claim.

Accordingly, the Court finds that Respondent is not credible. Although he testified as to beatings and mistreatment by the Bulgarian government, Respondent has proffered fraudulent documents to the Court that undermine his credibility, and go to the

heart of his asylum claim. Consequently, the Court denies Respondent's asylum application.

**B. Withholding of Removal**

Respondent also requests relief in the form of withholding of removal under section 241(b)(3) of the Act. There is no statutory time limit for bringing a petition for withholding of removal. El Himri v. Ashcroft, 378 F.3d 932, 937 (9th Cir. 2004). For withholding of removal, "[t]he alien must establish a 'clear probability' that he would be persecuted if returned to [his] home country." Zi Lin Chen v. Ashcroft, 362 F.3d 611, 617 (9th Cir. 2004). To meet the "clear probability" standard, the alien must prove that "it is 'more likely than not' that he will be persecuted on account of a statutorily-protected ground." Navas v. INS, 217 F.3d 646, 655 (9th Cir. 2000) (quoting Korablina v. INS, 158 F. 3d 1038, 1046 (9th Cir. 1998)). Unlike asylum, withholding of removal is not discretionary. Al-Harbi v. INS, 242 F.3d 882, 888 (9th Cir. 2001). An alien cannot be deported to a country where his "life or freedom would be threatened" on account of one of the same protected grounds that apply under the asylum statute. Id.

In the present case, Respondent has failed to establish a clear probability of future persecution on account of being Roma because the Court has made an adverse credibility determination. Having failed to demonstrate the lower burden required for the relief of asylum, Respondent has also failed to meet the higher burden required for relief under withholding of removal pursuant to section 241(b)(3) of the Act. See INS v. Stevie, 467 U.S. 407 (1984). As a result, Respondent's request for withholding of removal is denied.

**C. Relief Under Article III of the Convection Against Torture**

Pursuant to Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"), the United States may not remove an alien to a country where it is more likely than not that he would be tortured there. 8 C.F.R. § 1208.16(a), (c)(2) (2005). The alien bears the burden of establishing that it is "more likely than not" that he would be tortured if removed to the proposed country of removal. Kamalthas v. INS, 251 F.3d 1279, 1282 (9th Cir. 2001). Torture is an extreme form of cruel and inhuman treatment and is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person." 8 C.F.R. § 1208.18(a)(1). The act must be directed against a person in the torturer's custody or physical control and must be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Id.

In this case, Respondent has not shown that it is more likely than not that he would be tortured upon returning to Bulgaria. Because Respondent has failed to present credible evidence that would demonstrate that he would more likely than not be tortured if returned to Bulgaria, the Court finds that Respondent is not eligible for relief under the Convention Against Torture.

**A. Voluntary Departure**

The Court notes that Respondent has not applied for, nor is he eligible for, voluntary departure.

Accordingly, the following orders are entered:

**ORDER**

**IT IS HEREBY ORDERED** that Respondent's application for asylum pursuant to section 208 of the Act be **DENIED**.

**IT IS FURTHER ORDERED** that Respondent's application for withholding of removal pursuant to section 241(b)(3) of the Act be **DENIED**.

**IT IS FURTHER ORDERED** that Respondent's application for relief under Article III of the Convention Against Torture be **DENIED**.

**IT IS FURTHER ORDERED** that Respondent be removed to Bulgaria based on the charge contained in the Notice to Appear.

_____ /s/ John F. Walsh

**DATE** **John F. Walsh**
**United States**
**Immigration Judge**

## APPENDIX E

**U.S. DEPARTMENT OF JUSTICE**
**IMMIGRATION AND NATURALIZATION SERVICE**
**HQCOU120/12.8**
**OFFICE OF THE GENERAL COUNSEL**

June 21, 2001

MEMORANDUM FOR JEFFREY WEISS
DIRECTOR, OFFICE OF INTERNATIONAL AFFAIRS

FROM: Bo Cooper
General Counsel

SUBJECT: Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information

This memorandum discusses the confidentiality requirements that apply to information contained in or pertaining to asylum applications and gives guidance to Immigration and Naturalization Service (INS) overseas personnel conducting verifications of documents and facts contained in asylum applications. Overseas verification of documents or facts submitted in support of asylum applications is essential to combat fraud in the asylum process and ensure the integrity of the asylum program. INS attorneys are grateful for the invaluable assistance that your offices have provided and continue to provide in furtherance of these goals. The following guidance is intended to assist in the accomplishment of these goals while minimizing the risk of confidentiality breaches. This memo supersedes all prior guidance provided by this office on this topic.

LEGAL FRAMEWORK

The regulation governing the confidentiality of asylum applications is found at 8 C.F.R. § 208.6 (2000), as amended at 65 Federal Register 76121, 76133 (Dec. 6, 2000). This regulation contains mandatory language and is binding on all INS personnel. The regulation provides:

> (a) Information contained in or pertaining to any asylum application, records pertaining to any credible fact determination conducted pursuant to § 208.30, and records pertaining to any reasonable fact 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.
>
> (b) The confidentiality of other records kept by the Service and the Execute Office for Immigration Review that indicate that a specific alien has applied for asylum, received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure. The Service will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.
>
> (c) This section shall not apply to any disclosure to:
>
> (1) Any United States Government official or contractor having a need to examine information in connection with:

(i) The adjudication of asylum applications;

(ii) The consideration of a request for a credible fear or reasonable fear interview, or a credible fear or reasonable fear review:

(iii) The defense of any legal action arising from adjudication of, or failure to adjudicate, the asylum application, or from a credible fear determination or reasonable fear determination under § 208.30 or § 208.31;

(iv) The defense of any legal action of which the asylum application, credible fear determination, or reasonable fear determination is a part; or

(iv) Any United States Government investigation concerning any criminal or civil matter; or

(2) Any Federal, state, or local court in the United States considering any legal action:

(i) Arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear or reasonable fear determination under §208.30 or §208.31; or

(ii) Arising from the proceedings of which the asylum application, credible fear determination, or reasonable fear determination is a part.

8 C.F.R. § 208.6.

As a general matter, the regulation prohibits INS personnel from commenting to any third party on the nature or even the existence of individual applications for asylum, and requires that INS maintain the confidentiality of any INS records that indicate that an alien has applied for asylum or withholding of removal. See 8 C.F.R. § 208.6(b). The regulations, however, enumerate several exceptions to the general rule. First, the records may be disclosed at the discretion of the Attorney General. See 8 C.F.R. § 208.6(a). The INS has interpreted the Attorney General's discretion under this provision as not extending to INS personnel. Pursuant to his discretion, however, the Attorney General has set up specific guidelines for the release of asylum information to the Federal Bureau of Investigation and he may issue further guidelines for the release of such information to specific entities such as the Department of Health and Human Services. Second, the records may be disclosed to any Unites States Government official or contractor having a need to examine information in connection with the adjudication of the application, the defense of any legal action arising from the application, or any United States Government investigations concerning any criminal or civil matter. See 8 C.F.R. § 208.6(c)(1)(i)-(iv). Third, the records may be disclosed to any Federal, state, or local court in the United States considering any legal action arising from the adjudication or failure to adjudicate the asylum application or arising from the proceedings of which the asylum application is a part. See 8 C.F.R. § 208.6(c)(2)(i)-(ii). Thus, while the Attorney General has limitless discretion to disclose information in asylum files to third parties, INS employees, as well as any other government official, are limited to disclosing information in asylum files to

United States government officials or contractors, or courts in a limited number of circumstance that are specifically defined by the regulations. Disclosure is prohibited to all other persons.

The regulatory provisions do not offer specific guidance on how to proceed with an investigation of a claim. The propriety of an investigation procedure will vary in many instances from post to post, and the method of compliance with the regulation will primarily depend on how the investigation is performed. The following guidance is offered to help interpret these requirements and guide INS overseas personnel as the undertake verifications of evidence submitted in support of asylum applications.

CONFIDENTIALITY GUIDELINES

Preserving the confidentiality of asylum applications must always be a primary consideration in processing requests for investigations. The following guidelines will assist in the interpretation of 8 C.F.R. § 208.6 and help INS overseas personnel preserve the confidentiality of applications. In order to ensure consistency in evidentiary submissions to immigration courts, those guidelines are intended to be similar and, in some cases, identical to those issued, after consultation with this office, by the Department of State's Office of Asylum Affairs to their consular officers performing investigations of asylum applications. A copy of the cable is attached.

(1) If an investigation cannot be accomplished without compromising the confidentiality of the application, the investigation should be abandoned and the investigator should inform the requestor of the investigation of this fact.

(2) Generally, confidentiality of an asylum application is breached when information contained therein or pertaining thereto is disclosed to a third party, and the disclosure is of a nature that allows the third party to link the identity of the applicant to: (1) the fact that the applicant has applied for asylum; (2)specific facts or allegation pertaining to the individual asylum claim contained in an asylum application; or (3) facts or allegations that are sufficient to give rise to a reasonable inference that the applicant has applied for asylum. If one or the other part of this link is missing, then no breach has occurred.

The propriety of an investigative procedure will vary in many instances from post to post, and successful compliance with the regulation will primarily depend upon the type of information to be verified and upon how the investigation is performed. An INS investigator may request information for the host government or third parties concerning an applicant for asylum or application information, so long as the investigator does not disclose information that would allow a third party to link the identity of the applicant to either the fact that the applicant has applied for asylum, to specific facts or allegations contained in the asylum application or to facts or allegations that are sufficient to give rise to a reasonable inference that the applicant has applied for asylum.

Disclosure of the applicant's identity might be permissible if the request for information

is made where similar requests for information are routinely made by the United States government for other purposes – e.g., for visa applicants, prospective employees, etc. – and there is no mention of asylum. Many aspects of an asylum claim – including the occurrence of events central to the claim, the addresses and locations of such events, etc. – could be verified or disproved without disclosing the identity of the applicant or any details of his or her claim to anyone. If possible, such an approach is preferable. In particularly sensitive cases, or where similar requests for information are not routinely made, it may not be prudent to approach the host government of third parties at all.

Overseas verification of documents presented in support of asylum application may present unique difficulties. For example, if and Assistant District Counsel sends a birth certificate included by an asylum applicant in his or her asylum application to the overseas OIC for verification of the ethnic status listed thereon, the birth certificate could be verified in a number of ways, some of which would breach the confidentiality of the application, while others would not. If the OIC provides the birth certificate directly to the foreign government officials for verification of its contents, this would be a breach because the birth certificate discloses both the applicant's identity and information - indeed, and actual document - contained in the asylum application. In addition, the possession and investigation of certain personal documents by the US government might be sufficient to give

rise to a reasonable inference that the applicant submitted the document to the US government to buttress an asylum claim. This would be especially true if a document submitted directly to a foreign government were the type of document – such as a PRC hospital record pertaining to coercive family planning measures – that evidences events commonly known to form the basis of asylum claims in the United States.

On the other hand, if the OIC only sent the name of the applicant to the foreign government authorities with a request that they inspect their birth records for information on the applicant, confidentiality would probably not be breached if such an inquiry is routinely conducted for reasons unrelated to an asylum application, such as for an employment application or a visa application. Such an inquiry, although it divulges the applicant's identity, does not disclose specific facts or allegations contained in the asylum application, nor does it disclose the facts sufficient to give rise to a reasonable inference that the applicant has applied for asylum. The only fact divulged is that the United Sates government is interested in the birth records of the alien. In a similar vein, if the OIC personally inspects the logs in which birth certificates would be contained, the confidentiality of the asylum application would remain intact. This last approach, resources permitting, is the preferable approach from the standpoint of maintaining confidentiality.

(3) Material that identifies an applicant and discloses that he or she has applied for asylum may only be transmitted to INS posts in other countries or between foreign posts by official and reliable means. This includes unclassified government telegrams, official fax and approved DOJ/INS electronic mail. Within the United Sates, material may be transmitted by mail, regular fax, or the approved DOJ/INS electronic mail. Specific asylum cases should never be discussed over personal electronic mail accounts.

(4) Foreign service national (FSN) employees of the INS may be allowed access to information contained in or pertaining to asylum application at the discretion of the District Director having jurisdiction over the INS overseas District Office of Sub-Office in which they are employed. In exercising this discretion, the District Director should consider any factor which may affect the likelihood that asylum information may be improperly disclosed at a given INS overseas post or by a given FSN employee including, but not limited to: (1) the integrity and competence of a given FSN employee; (2) whether there is a history or practice of corruption, impropriety or unauthorized disclosure of protected information at a given post; and (3) the ties between FSN employees at a given post and the host government.

(5) INS overseas personnel may disclose information contained in or pertaining to asylum applications to employees of the Department of State (DOS) with the need to

know. The regulations specifically contemplate such a disclosure for the purpose of conduction an overseas investigation. See 8 C.F.R. § 208.6 (b). As noted above, the DOS has issued a cable to its overseas posts governing the confidentiality of asylum applications. If an INS officer transmits such information to a DOS employee with a need to know, the INS officer must inform the DOS employee of the requirements of 8 C.F.R. § 208.6. Overseas INS personnel may also disclose an asylum application to any United States government official or contractor having need to examine the information in connection with any of the situations described in 8 C.F.R. § 208.6(c)(1)(i)-(iv). Any such government official or contractor should be apprised of the confidentially requirements of § 208.6.

(6) All INS overseas personnel who handle information contained in or pertaining to asylum applications must be instructed on the confidentiality requirements found in 8 C.F.R. § 208.6.

(7) In the event of a general disclosure of the asylum application – for example, if the applicant holds a press conference to discuss his claim – an INS response that discusses the claim *may* be appropriate in some circumstances. Before preparing any such response, however, INS employees must receive approval from the INS Office of International Affairs, which will consult with the Office of the General Counsel.

(8) In responding to requests for information or for verification of documents or factual information, overseas officers should include, at a minimum:

(i) the applicant's name;
(ii) the applicant's A-number;
(iii) name and address of the requesting officer (either INS or EOIR);
(iv) name of responding officer and title; and
(v) an investigative report as outlined in number (9) below.

(9) The content of the investigative report is critical if it is to effectively convey information to the adjudicating official, be it an asylum officer or an immigration judge. In proceedings before an immigration judge, for example, the quality of the investigative report can determine the report's admissibility as evidence and, if admitted, the weight of the immigration judge will accord to it. A report that is simply a short statement that an investigator has determined an application to fraudulent is of little benefit. Instead, the reports should lay a proper foundation for its conclusion by reciting those factual steps taken by the investigator that caused the investigator to reach his or her conclusion. In addition, the conclusion of the investigator should be stated in neutral and unbiased language. In the case of a fraudulent document, a comprehensive and, therefore, effective report will led the adjudicator down the path taken by the investigator, and hopefully help the adjudicator reach the same conclu-

sion. Such a report must contain, at a minimum:

(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 languages(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 location(s) 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 searches; and
(ix) a statement that the Service investigator is aware of the confidentiality provisions found in 8 C.F.R. § 208.6.

## CONCLUSION

This memorandum is intended to assist overseas INS personnel conducting verifications of documents and facts contained in asylum applications. We hope the recommended steps simply reflect those already taken by the investigators, and will not be overly burdensome. While anti-fraud initiatives are impera-

tive to maintain the integrity of the asylum application process, such initiatives must always maintain the confidentiality of the application. Compliance with the regulation will primarily depend on how the investigation is performed and the propriety of an investigative procedure will vary from post to post. This memo is intended to provide guidance of general applicability to assist the INS personnel who perform such investigations. If you have any questions regarding this memorandum, please contact Ron Whitney at the office of the General Counsel at (202) 514-9699.

cc: Regional Directors
Regional Counsel

## APPENDIX F

**United States Department of State**
**Washington, D.C. 20520**

Bureau of Democracy,
Human Rights and Labor

April 21, 2004

Megan Schirn, ACC
Office of Chief Counsel, U.S. DHS
606 South Olive Street, 8th Floor
Los Angeles, CA 90014

RE: Request for Verification of Documents and Addressees

NAME: Nikolay Ivanov Angov
A #: 96-227-355
COUNTRY: Bulgaria

Dear Ms. Schirn,

We are writing in response to your request for comments regarding the above applicant. These comments are intended for use in conjunction with the Department of State's *Country Reports on Human Rights Practices*, which are available at www.state.gov. The U.S. Embassy official responsible for the investigation is aware of the confidentiality provisions of U.S. asylum law and did not reveal or imply the existence of an asylum application on the part of the applicant.

On March 8, 2003, you requested authentication of the documents labeled 'Subpoena re. Case 28010/2002' and 'Subpoena re. Case 16451/2001'. The Embassy contacted an official in the Archive Department at the 5th Police District in Sofia request-

ing authentication of the two subpoenas. The Bulgarian official stated that the 5th Police District never issued the documents and that she believed they were forged. She stated that officers Captain Donkov, Lieutenant Slavkov, and Investigator Vutov have never worked for the 5th Police District. She also told the Embassy 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. The Embassy also obtained an imprint of the 5th Police District's official seal, which is much larger than the one on these two subpoenas.

You additionally requested address verification. The Embassy located 3005 Street Sofia, Bulgaria but was unable to locate number 9. The Embassy stated that 3005 Street is very short with both old houses and a few newly built blocks of flats. Only one house had a number (#1) on its wall (see Attachment A). The Embassy was not able to locate 175 Evropa Boulevard Sofia, Bulgaria. The Embassy stated that Evropa Boulevard is the main thoroughfare to Serbia and that #175 appears to be a huge empty space (See Attachment B). Both neighborhoods are located in the Ljulin district which is one of the largest and poorest residential districts in Sofia. The Embassy estimated that approximately twenty to thirty percent of Ljulin's residents are Roma.

I hope that this information will be useful to you.

Sincerely,

/s/Cynthia Bunton
Cynthia Bunton
Director, Office of Country
Reports and Asylum Affairs

## APPENDIX G

**United States Department of State**
**Washington, D.C. 20520**
**www.state.gov**

June 6, 2005

Attorney Megan Schirn
Assistant Chief Counsel
Department of Homeland Security
26 Federal Plaza, Room 1130
New York, NY 10278

NAME: Nikolay Ivanov Angov
COUNTRY: Bulgaria
A NUMBER: A96-227-355

Dear Ms. Schirn:

The Department of State's Bureau of Democracy, Human Rights and Labor, Office of Country Reports and Asylum Affairs (DRL/CRA) has considered the Respondent counsel's request that a Department of State employee testify about the preparation of the advisory opinion letter, dated 5/5/05, regarding Respondent's documents. While we are unable to meet this request, we can provide you with the following information regarding our advisory process.

Under federal regulations 8 CFR 208.11 and 8 CFR 1208.11, the Department of State is to receive copies of all applications for asylum and may, at its discretion, comment on applications to Department of Homeland Security, Citizenship and Immigration Services (CIS) asylum officers or immigration judges who are deciding the cases. Additionally, asylum officers and immigration judges may request specific comments from the Department of State regarding individual cases or types of claims under considera-

tion, or such other information as they deem appropriate. These requests for information are designed to assist CIS asylum officers, ICE trial attorneys, and immigration judges who wish to ask embassies and consulates without a CIS or ICE officer present to investigate the validity of documents and factual statements made in support of applications for asylum.

DRL/CRA is responsible for reviewing these applications and providing the Department's comments. DRL/CRA receives an application or request for information, contacts the relevant post, and, based on the results of an investigation, composes the comment or response to the DHS officer or immigration judge. Because of the large volume of requests for information, the Department of State employs foreign service nationals ("FSNs") at some posts to conduct local investigations. FSN investigators may be used to inquire about documents submitted or claims made in support of an asylum application, provided they are not given information which would lead them to believe that the request is being made in connection with an asylum application. Preserving the confidentiality of asylum applications is always a consideration in processing requests for investigations.

Pursuant to Department of State policy, DRL/CRA generally does not provide additional information or follow-up inquiries to DHS officers or immigration judges regarding the results of an investigation. Such additional demands are further burdens on Consular Officers in the performance of their regular responsibilities and are particularly onerous for FSNs who may be subject to local reprisal. As noted above, these investigations arc conducted for

the benefit of DHS officers and immigration judges to aid them in the adjudication process.

We hope this information is of use to you. Please review the 2004 Country Reports on Human Rights Practices for Bulgaria for additional information.

Sincerely,

/s/ Nadia Tongour
Nadia Tongour
Direction, Country Reports
and Asylum Affairs