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Article

"OF COURSE WE BELIEVE YOU, BUT . . ."
THE THIRD CIRCUIT'S POSITION ON CORROBORATION OF CREDIBLE TESTIMONY

BRIAN P. DOWNEY & ANGELO A. STIO III*

I. INTRODUCTION

Alice Alien lived in the Country of Oppressa where she was a leader of a political minority party that advocated a democratic form of government. As a result of her political affiliation, the ruling government party imprisoned Alice, deprived her of food and water, tortured her and threatened her friends and family. The ruling government party took these actions against Alice and other minority party leaders in order to prevent them from advocating democratic political views.

After Alice was released, government party members attacked her home, beating her family and setting fire to the building. Alice narrowly escaped and fled Oppressa in order to save her life. With the assistance of friends, Alice obtained a fake passport and a plane ticket for a flight to the United States.

Upon arriving in the United States, authorities questioned Alice because she was traveling without any luggage and because they deemed her passport suspicious. Ultimately, the American government detained Alice because she attempted to use a fake passport to enter the country. The government determined that Alice should be deported to Oppressa.

To avoid deportation, Alice advised an asylum officer from the Immigration and Naturalization Service ("INS") that she would be killed if she were forced to return to Oppressa. The asylum officer listened to Alice's story and subsequently assisted her in filling out an application for eligibil-

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(1281)
ity for asylum¹ and an application for withholding of removal,² both under the Immigration and Nationality Act ("INA").³

During the application process, the asylum officer advised Alice that she could qualify for asylum if she could demonstrate that she suffered past persecution or a well-founded fear of future persecution if she were forced to return to Oppressa.⁴ The same asylum officer advised Alice that she could qualify for entitlement to withholding of removal if she could demonstrate a clear probability that she would be persecuted if deported.⁵

In her haste to flee Oppressa, Alice had not brought any personal belongings or documentation to support her claims. Alice asked the asylum officer what evidence she needed to present in order to demonstrate the appropriate showing of persecution to entitle her to avoid being deported. The asylum officer responded by telling Alice that her testimony alone could suffice to entitle her to relief if the testimony were believable. The asylum officer then qualified his answer by informing Alice that even if her testimony were believable, there are times when an immigration court may still require her to produce documentary evidence to corroborate her otherwise believable testimony. “In other words,” he said, “they believe you, but you still have to prove that what you are saying is true.”


². See 8 U.S.C. § 1231(b)(3)(A) (2003) ("[T]he Attorney general may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.").

³. See Tsevegmid v. Ashcroft, 318 F.3d 1226, 1229 (10th Cir. 2003) (“An alien who fears persecution if deported has two possible means of relief: asylum and withholding of deportation.”). In addition to asylum and withholding of removal, an alien also can avoid deportation under the United Nations Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027 [hereinafter Convention]. In order to obtain relief under the Convention, an alien must prove that it is more likely than not that the alien will be in danger of being subjected to torture by a public official, or at the instigation or with the acquiescence of such official, if removed to the proposed country of removal. See 8 C.F.R. § 208.16(c)(2) (2003) (requiring applicant to establish that it is more likely than not that applicant will be tortured after being deported). The “more likely than not” standard is the same standard as that for entitlement for withholding of removal under section 241(b)(3) of the INA. Compare 8 C.F.R. § 208.16(b)(1) (stating that burden is met in cases of past persecution and prohibiting asylum officers from requiring any additional evidence if applicant proves that applicant has membership in group that is currently being persecuted), with 8 C.F.R. § 208.16(d) (denying applications from those who have committed crime despite their meeting more-likely-than-not standard).

⁴. See 8 C.F.R. § 208.13(b) (2003) (classifying applicant as refugee because of past persecution or well-founded fear of future persecution).

⁵. See Senathirajah v. INS, 157 F.3d 210, 215-16 (3d Cir. 1998) (holding that applicant must demonstrate greater than fifty percent chance of persecution); Chang v. INS, 119 F.3d 1055, 1066 (3d Cir. 1997) (stating that applicant need only show subjective fear supported by objective evidence that persecution is reasonable possibility even if possibility is less than fifty percent).
Alice was puzzled by this answer because she did not understand how a court could require corroboration of testimony that it already believes is true.

Alice is not alone in her bewilderment regarding the standard of proof for asylum and withholding of removal. Indeed, today many aliens and their counsel are now grappling with the issue of what evidence an alien must present to meet the burden of proving eligibility for asylum or entitlement to withholding of removal. According to the INS regulations, which govern eligibility for asylum and withholding of removal, an alien can meet the burden of proving entitlement to relief through the alien’s own credible testimony without the need to present any corrobating evidence. The Board of Immigration Appeals (“BIA”), however, has interpreted these regulations to mean that even if an alien’s testimony is credible, an immigration court may still require the alien to corrobate material facts related to the specifics of the alien’s claim when it is reasonable to do so. This corroboration of credible testimony requirement has been referred to as the corroboration rule. The BIA has further held that if an alien fails to provide corroborative evidence or to explain why such evidence was not produced, a court may find that the alien did not meet the burden of proving an asylum or withholding of removal claim.

The Ninth Circuit has rejected the BIA’s interpretation and has repeatedly held that independent corroborative evidence can never be required from an alien who has testified credibly. Unlike the Ninth Circuit, the Third Circuit has adopted the BIA’s interpretation of the INS asylum and withholding of removal eligibility regulations.

This Article examines what evidence is needed to prove eligibility for asylum or entitlement to withholding of removal in the Third Circuit. Specifically, it discusses the elements of proving eligibility for asylum or withholding of removal in the Third Circuit. The Ninth Circuit has rejected the BIA’s interpretation and has repeatedly held that independent corroborative evidence can never be required from an alien who has testified credibly. Unlike the Ninth Circuit, the Third Circuit has adopted the BIA’s interpretation of the INS asylum and withholding of removal eligibility regulations.

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6. See 8 C.F.R. § 208.13(a) (“The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.”); 8 C.F.R. § 208.16(b) (“The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.”).

7. See Board of Immigration Appeals Practice Manual 10 (Sept. 25, 2002), available at http://www.usdoj.gov/eoir/bia/qapracmanual/apptmtn4.htm. (The Board of Immigration Appeals is the highest administrative tribunal on immigration matters in the United States.). The BIA’s jurisdiction is nationwide and it is responsible for reviewing immigration court orders and certain INS orders and issuing public decisions that guide the immigration judges and the INS on the proper interpretation and administration of the INA. See id. (describing role of BIA). The decisions of the BIA are binding on immigration courts unless they are modified or overruled by a federal court. See id. at 11 (same).

8. See Meighan v. INS, 236 F.3d 843, 846 (4th Cir. 2001) (characterizing requirement to corrobate credible testimony as corroboration rule).


10. See Ladha v. INS, 215 F.3d 889, 900-01 (9th Cir. 2000) (rejecting requirement of corroboration and finding credible testimony alone sufficient to satisfy burden of proof).
entitlement to withholding of removal and then it addresses the Ninth and Third Circuits’ different interpretations of the INS asylum and withholding of removal eligibility regulations. Finally, the Article discusses why the authors believe the Third Circuit’s interpretation of INS asylum and withholding of removal eligibility regulations in *Abdulai v. Ashcroft* will be upheld if the United States Supreme Court ever reviews the issue. In short, the Article argues that the *Abdulai* decision is legally correct because it affords the proper judicial deference to the INS. More precisely, the *Abdulai* decision provides the immigration court with the flexibility to uncover meritless claims and, where appropriate, it provides aliens like Alice with the ability to prove that they are entitled to protection from persecution when protection is needed.

II. ASYLUM AND WITHHOLDING OF REMOVAL

A. Asylum

Section 208(a) of the INA makes an alien who is physically present in the United States or who arrives at a United States border eligible for the discretionary grant of asylum if the alien is found to be a “refugee.” The INA defines a “refugee” as:

[A]ny person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that 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.

Cases interpreting this definition have generally held that a claim for asylum requires proof of three elements: “(1) an incident, or incidents, that rise to the level of persecution; (2) that is ‘on account of’ one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either ‘unable or unwilling’ to control.” If the

11. 239 F.3d 542 (3d Cir. 2001).
12. See INS v. Cardoza-Fonseca, 480 U.S. 421, 427 (1987) (declaring that whether alien is eligible for asylum depends entirely on whether alien qualifies as refugee); Senathirajah v. INS, 157 F.3d 210, 215 (3d Cir. 1998) (stating that Attorney General must determine whether alien qualifies as refugee); Fatin v. INS, 12 F.3d 1233, 1238 (3d Cir. 1993) (explaining that Attorney General has discretion over whether to grant asylum to aliens who qualify as refugees).
14. Gao v. Ashcroft, 299 F.3d 266, 272 (3d Cir. 2002) (quoting Navas v. INS, 217 F.3d 646, 655 (9th Cir. 2000)). If the asylum application is based on well-founded fear of persecution in the future, an alien must show a genuine fear and that a reasonable person in the same circumstances would fear persecution if returned to the person’s native country. *See id.* (citing Elnager v. INS, 930 F.2d 784, 786 (9th Cir. 1991)).
elements of this definition are met, the Attorney General has the discretion to grant the alien asylum.\textsuperscript{15}

\section*{B. Withholding of Removal}

Under Section 241 of the INA, an alien is entitled to withholding of removal if “the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”\textsuperscript{16} To be entitled to withholding of removal, an alien must demonstrate through objective evidence that it is more likely than not that the alien will be persecuted upon return to the country of origin.\textsuperscript{17} Unlike asylum, the Attorney General does not have discretion in granting withholding of removal; once the alien establishes this more-likely-than-not standard, the Attorney General must grant withholding of removal.\textsuperscript{18}

\section*{C. Distinctions Between Asylum and Withholding of Removal}

Although the two remedies serve similar functions and are based on the same set of operative facts, asylum and withholding of removal are two distinct forms of relief available to aliens.\textsuperscript{19} The principal difference between the two is that, unlike withholding of removal, a grant of asylum is solely within the Attorney General’s discretion.\textsuperscript{20} Indeed, the Supreme Court has clearly stated, “the Attorney General is not required to grant asylum to everyone who meets the definition of refugee.”\textsuperscript{21} Thus, in Alice’s case, even if she were able to establish that she is a refugee, the Attorney General would not be required to grant her asylum. The Attorney

\begin{itemize}
\item \textsuperscript{15} See Cardoza-Fonseca, 480 U.S. at 428 n.5 (recognizing that Attorney General is not required to grant asylum to everyone who meets definition of refugee); Li Wu Lin v. INS, 238 F.3d 239, 244 (3d Cir. 2001) (recognizing that once definition of refugee is satisfied, Attorney General has discretion to decide whether to grant asylum).
\item \textsuperscript{17} See Senathirajah v. INS, 157 F.3d 210, 215-16 (3d Cir. 1998) (holding that alien must prove that alien has greater than fifty percent chance of persecution if returned); Chang v. INS, 119 F.3d 1055, 1066 (3d Cir. 1997) (holding that aliens must show with objective evidence that it is more likely than not that they will face persecution if deported).
\item \textsuperscript{18} See Senathirajah, 157 F.3d at 215-16 (stating that Attorney General must not deport alien if alien proves by preponderance of evidence that alien’s life or freedom would be threatened); see generally INS v. Stevic, 467 U.S. 407 (1984) (stating that withholding of removal is mandatory once alien meets burden of proof).
\item \textsuperscript{19} See Cardoza-Fonseca, 480 U.S. at 429 n.6 (explaining that asylum is granted at Attorney General’s discretion, but once granted, provides broader benefits than does withholding of removal).
\item \textsuperscript{20} See id. (explaining difference between asylum and withholding of removal).
\item \textsuperscript{21} Id. at 429 n.5 (emphasis in original) (quoting 8 U.S.C. § 1158 (2003)). Examples of where the Attorney General may not grant asylum are found in 8 U.S.C. § 1158(b)(2). That statute allows the Attorney General to deny asylum if he determines that:
General's discretion is broad and may be exercised to allow an otherwise removable alien to remain in the United States.\textsuperscript{22} Thereafter, provided the alien meets certain requirements, the alien may ultimately be eligible for adjustment of status to that of a lawful permanent resident.\textsuperscript{23}

In contrast to asylum, withholding of removal is a mandatory remedy.\textsuperscript{24} Generally, "[i]f an alien qualifies for withholding of [removal] . . . then the Attorney General is prohibited from deporting the alien to the country where the persecution will occur."\textsuperscript{25} Additionally, unlike asylum, withholding of removal does not per se allow the alien to remain in the United States. Rather, withholding of removal only prevents the United States from removing the alien to the country where it is more likely than not that the persecution will occur; it does not prevent the United States from deporting the alien to a country that will not persecute the alien.\textsuperscript{26}

\begin{itemize}
  \item[(i)] The alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
  \item[(ii)] the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
  \item[(iii)] there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;
  \item[(iv)] there are reasonable grounds for regarding the alien as a danger to the security of the United States;
  \item[(v)] the alien is inadmissible under subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or removable under section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien inadmissible under subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or
  \item[(vi)] the alien was firmly resettled in another country prior to arriving in the United States.
\end{itemize}

\textit{Id.}

\textsuperscript{22} See Abdulai v. Ashcroft, 239 F.3d 542, 545 (3d Cir. 2001) (explaining that discretionary grant of asylum permits removable aliens to remain in United States).

\textsuperscript{23} See 8 C.F.R. §§ 209.1-2 (2003) (allowing those granted asylum to be lawfully admitted for permanent residence, provided that they apply within one year of entry into United States and that they continue to be refugees).

\textsuperscript{24} See INS v. Aguirre-Aguirre, 526 U.S. 415, 419 (1999) (mandating withholding if alien establishes by preponderance that alien would be subject to persecution); Lin v. INS, 238 F.3d 239, 244 (3d Cir. 2001) (holding that if alien qualifies for withholding, Attorney General may not deport alien). Until 1968, the Attorney General also had discretion to grant withholding of deportation. On November 1, 1968, however, the United States agreed to comply with the provisions of the 1951 United Nations Convention Relating to the Status of Refugees and what was formerly a discretionary decision became mandatory. See Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. 33, 19 U.S.T. 6223 (prohibiting expulsion of refugee whose life or freedom would be threatened).

\textsuperscript{25} Lin, 238 F.3d at 244.

\textsuperscript{26} See Aguirre-Aguirre, 526 U.S. at 419 (stating that withholding bars deportation to particular country or group of countries).
D. The Persecution Requirement

Despite the differences between these remedies, both turn on a common linchpin: persecution. To be eligible for either remedy, an alien must demonstrate an appropriate showing of persecution if compelled to return to his or her country of origin.\(^\text{27}\) Despite this common requirement, neither the statute nor the applicable regulations define this key term.

Courts have stepped in to fill this void. The Third Circuit has recognized that the term denotes extreme conduct tantamount to “a program or campaign to exterminate, drive away, or subjugate individuals because of their religion; race, or beliefs.”\(^\text{28}\) It includes: death, torture and confinement,\(^\text{29}\) as well as “threats to life and economic restrictions so severe that they constitute a real threat to life or freedom.”\(^\text{30}\) In the Third Circuit persecution does not, however, “encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.”\(^\text{31}\)


\(^{28}\) Fatin v. INS, 12 F.3d 1233, 1241 n.10 (3d Cir. 1993) (adopting Random House Dictionary of English Language definition for ordinary meaning of persecution in asylum context). The Third Circuit’s definition appears to be generally in accordance with the definitions in other circuits. See, e.g., Tesfu v. Ashcroft, 322 F.3d 477, 481 (7th Cir. 2003) (defining persecution as “punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate,” including “detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture”); Singh v. INS, 134 F.3d 962, 967 (9th Cir. 1998) (noting that persecution is “the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive”); Abdel-Masih v. INS, 73 F.3d 579, 583 (5th Cir. 1996) (noting that persecution is “infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.), in manner condemned by civilized governments” and may take form of “deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life”); Baka v. INS, 963 F.2d 1376, 1379 (10th Cir. 1992) (recognizing that persecution is “the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive [and] encompass[es] more than just restrictions or threats to life and liberty”).

\(^{29}\) See Blazina v. Bouchard, 286 F.2d 507, 511 (3d Cir. 1961) (defining persecution as death, torture or confinement inflicted on account of race, religion or political viewpoint).

\(^{30}\) Lin, 238 F.3d at 244 (citing Chang v. INS, 119 F.3d 1055, 1066 (3d Cir. 1997)).

\(^{31}\) Fatin, 12 F.3d at 1240 (establishing that definition of persecution has certain limits). Other authorities reveal that there is no precise definition for persecution and the finding depends on the circumstances of each particular case. See Manzoor v. United States Dep’t of Justice, 254 F.3d 342, 346 (1st Cir. 2001) (recognizing that persecution must be determined on a case-by-case basis); Balazoski v. INS, 932 F.2d 638, 641 (7th Cir. 1991) (defining persecution as “a most elusive and imprecise task”); Etugh v. INS, 921 F.2d 36, 39 (3d Cir. 1990) (recognizing that essential elements of prima facie case of “well-founded fear of persecution, needed for asylum under section 208 of the [INA], can only be given concrete meaning through a process of case-by-case adjudication”) (internal quotation omitted); see
The Third Circuit’s opinion in *Chang v. INS* is also instructive in outlining what constitutes “persecution” for purposes of asylum and withholding of removal applications. Chang, the head of a Chinese delegation visiting the United States, sought political asylum and withholding of removal after he failed to notify the Chinese government of his belief that other members of the delegation were going to remain in the United States. His failure to notify the authorities constituted a violation of China’s security law. Chang argued that his fear of prosecution under China’s security law for failing to report his colleagues’ suspicious behavior constituted persecution on the basis of political opinion for purposes of asylum and withholding of removal.

Both the immigration judge and the BIA rejected this argument. The BIA held that since China’s security laws are generally applied to all, the persecution that the alien fears if forced to return to China does not rise to the level of persecution for establishing eligibility for asylum or entitlement to withholding of removal.

On appeal, the Third Circuit reversed the BIA. It held that there is no bright line rule in the INA or its legislative history that indicates that fear of prosecution under laws of general applicability may never provide the basis for the element of persecution for an asylum or withholding of removal claim. Instead, the court held that the INA “provides protection for those who fear persecution or threats to life and freedom on account of a number of factors, including religion and political opinions, as well as Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 51-52 (Geneva, 2d ed. 2002), available at www.hrea.org/learn/tutorials/refugees/Handbook/hbtoc.htm* [hereinafter *Handbook*] (revealing that determination of persecution depends on circumstances of each particular case). The Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees has been repeatedly relied upon to provide guidance on construing the definition of refugee by the international community. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n. 22 (1987) (recognizing that Handbook provides significant guidance in construing Protocol, to which Congress sought for INS to conform); *Chang v. INS*, 119 F.3d 1055, 1061 (3d Cir. 1997) (stating that Handbook lacks force of law, but is nonetheless instructive in construing definition of refugee); *McMullen v. INS*, 658 F.2d 1312, 1319 (9th Cir. 1981).

32. 119 F.3d 1055 (3d Cir. 1997).
33. See id. at 1060 (clarifying that unsubstantiated fear of persecution does not entitle one to withholding of removal).
34. See id. at 1058-59 (explaining factual background).
35. See id. at 1059 (stating alien’s reasons for seeking asylum).
36. See id. (stating that alien failed to present sufficient evidence of persecution if forced to return to home country).
37. See id. at 1060-61 (suggesting that alien’s general fear of persecution may support alien’s claim for asylum).
Corroboration of Credible Testimony

The court went on to hold that the persecution must amount to more than "harsh conditions shared by many other persons." It includes "threats to life, confinement, torture, and economic restrictions so severe that they constitute a real threat to life or freedom." Since Chang provided significant testimony on the imprisonment and economic repercussions he would face if forced to return to China, the court found that he was entitled to withholding of deportation and eligibility for asylum because he demonstrated that he "faced a better than even likelihood" that he would experience persecution.

Although asylum and withholding of removal both require evidence of "persecution," the standard of proof necessary to establish that persecution differs for the two claims. In INS v. Stevic, the Supreme Court analyzed the alien's burden of proof to establish eligibility for withholding of removal. The Court held that an alien seeking withholding of removal must satisfy the "clear probability of persecution standard," not the well-founded "fear of persecution" standard governing asylum relief.

The Court reached this conclusion reasoning that there is nothing in the language of the INA or the legislative history of the INA to suggest that every alien that qualifies as a refugee is entitled to withholding of removal.

In INS v. Cardoza-Fonseca, the Supreme Court revisited the burden of proof standard for claims for asylum and withholding of deportation. There, the Court addressed whether the clear probability of persecution standard used in withholding of deportation claims also governed applications for asylum. Relying on the express language in the INA and the

38. Id.
39. Id. at 1066 (quoting In re Acosta, 19 I & N. Dec. 211, 235 (1985)).
40. Id. (quoting Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993)).
41. Id. at 1068 (basing conclusion on Chang's testimony of subjective fear of persecution based on FBI's informing him that he was in danger).
44. See id. at 409 (questioning whether alien must show clear probability of persecution to avoid deportation).
45. See id. at 430 (stating that "clear probability of deportation is the standard for withholding deportation").
46. See id. at 428 (clarifying that standard for refugee status is not same standard used for withholding of removal).
48. See id. at 423 (defining issue).
United Nations Protocol Relating to the Status of Refugees it reaffirmed that the asylum standard and withholding of deportation standard are not identical.\textsuperscript{49} In other words, the Court recognized that in order to establish a "well-founded fear of persecution" for purposes of asylum, the alien did not have to prove that it is more likely than not that he or she will be persecuted in his or her home country.\textsuperscript{50}

Guided by these two Supreme Court decisions, the Third Circuit has held that in order to qualify for the mandatory remedy of withholding of removal, the alien must show a "clear probability of persecution."\textsuperscript{51} That is, the alien must demonstrate that "it is more likely than not that he will face persecution if he is deported."\textsuperscript{52} In \textit{Senathirajah v. INS},\textsuperscript{53} the Third Circuit found that this standard is satisfied if the alien can demonstrate that there is a "greater-than-fifty percent chance" of being persecuted upon being returned to the country of deportation.\textsuperscript{54} That burden may be met through objective evidence of past persecution or a clear probability that persecution will occur in the future.\textsuperscript{55} In this regard, an alien’s "own assertions or belief, without corroboration, will not suffice. . . . [A]t a minimum an [alien] has to provide specific facts regarding the applicant’s conduct and contentions."\textsuperscript{56} If past persecution is shown, a legal presumption arises that the alien will be persecuted upon return to the country of deportation.\textsuperscript{57} This presumption can be overcome only if "a preponderance of the evidence establishes that the conditions in the country have changed to such an extent that it is no longer more likely

\textsuperscript{49} See \textit{id.} at 446 (explaining reasoning for holding).
\textsuperscript{50} Id. at 449.
\textsuperscript{51} Fatin v. INS, 12 F.3d 1233, 1238 (3d Cir. 1993) (citing \textit{Stevic}, 467 U.S. at 430).
\textsuperscript{52} Lin v. INS, 238 F.3d 239, 244 (3d Cir. 2001); \textit{see also} Atique v. Ashcroft, No.CIV.A.02-3283, 2003 WL 1961208, at *1 (3d Cir. 2003) (discussing standard for remedy of withholding of removal in Third Circuit); Senathirajah v. INS, 157 F.3d 210, 215-16 (3d Cir. 1998) (same); Balasubramanirin v. INS, 143 F.3d 157, 164 n.10 (5th Cir. 1998) (same).
\textsuperscript{53} 157 F.3d 210 (3d Cir. 1998).
\textsuperscript{54} \textit{See id.} at 215 (citing Vilorio-Lopez v. INS, 852 F.2d 1137, 1140 (9th Cir. 1988)).
\textsuperscript{55} \textit{See} 8 C.F.R. § 208.16 (2003) (stating evidence required to prove probable persecution on deportation); \textit{see also} \textit{Cardoza-Fonseca}, 480 U.S. at 430 (same); Chang v. INS, 119 F.3d 1055, 1066 (3d Cir. 1997) (stating that to establish withholding of removal, alien "must show with objective evidence that it is 'more likely than not' he will face persecution if he is deported"); Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1977) (finding that under "clear probability" standard, objective evidence that alien will be persecuted is necessary for relief).
\textsuperscript{56} Carvajal-Munoz v. INS, 743 F.2d 562, 573 (7th Cir. 1984) (emphasis in original); \textit{see also} Chavarria v. United States Dep’t of Justice, 722 F.2d 666, 670 (11th Cir. 1984) (suggesting that objective evidence must establish that this particular applicant will more likely than not be singled out for persecution); Pereira-Diaz v. INS, 551 F.2d 1149, 1154 (9th Cir. 1977) (suggesting that statements of belief are insufficient); Kashani, 547 F.2d at 379 ("[T]he alien's own assertions, without corroboration, will not suffice.")
\textsuperscript{57} \textit{See} Qiu v. Ashcroft, 329 F.3d 140, 149 (2d Cir. 2003).
than not that the applicant would be so persecuted" in the country of deportation.\textsuperscript{58}

To qualify for asylum, on the other hand, the alien must prove persecution or "well-founded" fear of persecution in accordance with the definition of refugee. The INS regulations indicate that this standard is satisfied by a showing of past persecution or by a showing of a well-founded fear of future persecution.\textsuperscript{59} According to the INS regulations, once the alien establishes past persecution, the alien is entitled to a legal presumption that a well-founded fear of future persecution exists.\textsuperscript{60} Thereafter, this presumption can only be rebutted if the INS shows by a preponderance of the evidence that (1) "[t]here has been a fundamental change in circumstances such that the [alien] no longer has a well-founded fear of persecution in the applicant's country of nationality or . . . country of last habitual residence," or (2) the alien "could avoid future persecution by relocating to another part of the applicant's country of nationality . . . another part of the [alien]'s country of last habitual residence, and under all the circumstances, it would be reasonable to expect the alien to do so."\textsuperscript{61}

In the most recent Third Circuit case to explore the burden of proving persecution for an asylum claim, \textit{Lin v. INS},\textsuperscript{62} the court recognized that this asylum standard is less exacting than the more likely than not standard in withholding of removal.\textsuperscript{63} The \textit{Lin} court held that the well-founded fear of persecution standard includes both subjective and objective components.\textsuperscript{64} The court found that the standard is satisfied by showing the alien has "a subjective fear of persecution that is supported by objective evidence that persecution is a reasonable possibility."\textsuperscript{65} The

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} See 8 C.F.R. § 208.13(b) (2003) (stating evidence required to prove probable persecution or deportation).

\textsuperscript{60} See id. § 208.19(b)(1)(i) (explaining presumption of future persecution on proof of past persecution).

\textsuperscript{61} \textit{Id.} §§ 208.13(b)(1)(i)(A), (B).

\textsuperscript{62} 238 F.3d 239 (3d Cir. 2001).

\textsuperscript{63} See id. at 244 (recognizing that fear can be well-founded even when there is less than fifty percent chance that persecution will exist). Because the proof for asylum is less stringent than that of withholding of removal, an alien who establishes the clear probability of persecution under the withholding of removal standard \textit{a fortiori} satisfies the less stringent test of showing reasonable possibility of persecution. See, e.g., Osorio v. INS, 18 F.3d 1017, 1032 (2d Cir. 1994) (explaining that where higher standard of clear probability of persecution is met, lower standard of reasonable possibility of persecution is met); De Valle v. INS, 901 F.2d 787, 790 (9th Cir. 1990) (same); Ganjour v. INS, 796 F.2d 832, 837 (5th Cir. 1986) (same); Rasool v. INS, 758 F. Supp. 188, 194-95 (S.D.N.Y. 1991) (same).

\textsuperscript{64} See \textit{Lin}, 238 F.3d at 244 (3d Cir. 2001) (stating components of persecution standard). In contrast, withholding of removal relief only involves an objective component. For a further discussion of the evidence required to establish withholding of removal, see supra note 56 and accompanying text.

\textsuperscript{65} Lukwago v. Ashcroft, 329 F.3d 157, 175 (3d Cir. 2003) ("The term 'well-founded fear' has both a subjective and objective component."); see also Abdille v. Ashcroft, 242 F.3d 477, 496 (3d Cir. 2001) ("The alien must show that he has a
court did not, however, give any further description of the objective and subjective components of proof.

In Duarte de Guinac v. INS, the Ninth Circuit explained the meaning of the subjective and objective components of proof of a well-founded fear of persecution for purposes of establishing eligibility for asylum. There, the court held that in order to establish a well-founded fear of persecution, an alien must establish a fear of persecution that is both "subjectively genuine and objectively reasonable." Addressing the "subjectively genuine" requirement, the court explained it is met by the alien "credibly testifying that he genuinely fears persecution."

Turning to the "objectively reasonable" requirement, the court discussed the two methods of establishing this component. First, relying on 8 C.F.R. § 208.13(b)(1)(I), the court noted that if the asylum applicant demonstrates, through documentary evidence or "credible and persuasive testimony" that the applicant was the victim of past persecution, a presumption arises that a well-founded fear of future persecution exists. This past persecution then shifts the burden of proof to the INS to establish by a preponderance of the evidence that the country conditions have changed to such an extent that the petitioner's fears of persecution are no longer well-founded.

Second, an applicant can show good reason to fear future persecution "by adducing credible, direct, and specific evidence in the record" that demonstrates the applicant's fear of persecution upon being deported is reasonable. The court noted that this objective component can be established through either "the production of specific documentary evidence or by credible and persuasive testimony." The question of what "specific documentary evidence," if any, must be produced in addition to "credible and persuasive testing" has been the subject of much discussion in the federal courts.

subjective fear of persecution that is supported by objective evidence that persecution is a reasonable possibility.

66. 179 F.3d 1156 (9th Cir. 1999).
67. Id. at 1159.
68. Id. The Third Circuit recently held that an applicant may use testimonial, documentary or expert evidence to show both a subjective and an objective component of a reasonable fear of future persecution. See Lukwago, 329 F.3d at 177 (discussing types of evidence used to prove components of reasonable fear of future persecution).
69. See Duarte de Guinac, 179 F.3d at 1159 (stating that evidence of past persecution creates presumption that applicant has well-founded fear of future persecution).
70. See id. (stating that burden shifts to INS to show that applicant would no longer have well-founded fear of persecution if applicant were to return).
71. Id. (citing Ghaly v. INS, 58 F.3d 1425, 1428 (9th Cir. 1995)).
72. Id. (citing Ramos-Vasquez v. INS, 57 F.3d 857, 862-63 (9th Cir. 1995)).
III. THE NECESSITY OF CORROBORATION

Over the last few years one of the major issues that the circuit courts have addressed with respect to asylum and withholding of removal claims deals with when an alien must provide corroboration of evidence offered in support of an asylum or withholding of removal application. Specifically, the issue the Second, Third and Ninth Circuits have considered is whether the BIA can require an applicant for asylum and withholding of removal to corroborate the applicant’s otherwise credible testimony with documentary evidence, or, in the alternative, whether the BIA can require the applicant to provide an explanation why corroborative evidence was not presented.78

A. The BIA’s Position on the Corroboration Rule

This issue has its genesis in the BIA opinion In re S-M-J.74 There, the BIA sitting en banc reviewed an appeal by an alien from Liberia of an immigration judge’s denial of her claims for asylum and withholding of deportation.75 The alien in that case sought eligibility for asylum and entitlement to withholding of deportation based solely on her own testimony, without offering any corroborative evidence or explaining why such corroborative evidence was not produced.76 The alien argued that she was a member of the Via tribe and her father was governor of the tribe. Because of this tribal affiliation and her father’s ranking position, she feared persecution from rival Liberian tribes if she were forced to return to Liberia.77 As evidence of persecution she noted that her father’s home had been singled out and burned down.78

Although the BIA reversed the immigration judge’s ruling on grounds unrelated to corroborative evidence, it established the burden of proof an alien must meet to establish eligibility for asylum or withholding

73. The Second, Third and Ninth Circuits are the only circuits to issue precedential decisions that provide an in-depth discussion of the corroboration rule. Other circuits have addressed the need for corroboration in passing. For example, in Meghani v. INS, 256 F.3d 843, 846 (4th Cir. 2001), the Fourth Circuit affirmed the BIA’s denial of an asylum claim holding, among other things, that the BIA’s application of the corroboration rule was appropriate. In Adbele-Masieh v. INS, 73 F.3d 579, 584 (5th Cir. 1996), the Fifth Circuit vacated an order of deportation and remanded the matter to the BIA because the alien’s credibility was not impugned and his testimony alone may have been sufficient to sustain his burden of proving entitlement to asylum and withholding of deportation relief without any corroboration.


75. See id. at 722-23 (stating issue on appeal).

76. See id. at 724 (stating facts of case). The BIA specifically noted that the alien failed to provide “any general information about country conditions in Liberia, nor [did] she explain whether such evidence was unavailable.” Id. at 730.

77. See id. at 723 (stating facts of case).

78. See id. (stating facts of case).
of removal.\textsuperscript{79} It held that an alien has the burden of "presenting testimony that is believable, consistent, and sufficiently detailed to provide a coherent account of the basis for [the] fear" of persecution.\textsuperscript{80} In this regard, the BIA noted that:

Where the record contains general country condition information, and an applicant's claim relies primarily on personal experiences not reasonably subject to verification, corroborating documentary evidence of the asylum applicant's particular experience is not required. Unreasonable demands are not placed on an asylum applicant to present evidence to corroborate particular experiences (e.g., corroboration from the persecutor).\textsuperscript{81}

The BIA also held that when it is reasonable to expect corroborating evidence for certain material facts that are easily subject to verification, such evidence should be provided.\textsuperscript{82} The BIA expressly noted that this requirement to corroborate applies even when an alien is otherwise credible.\textsuperscript{83} The BIA indicated that this type of corroborative evidence included documents such as those relating to the alien's place of birth, news media reports of persecution, evidence of publicly held office and/or medical records outlining treatments the alien received.\textsuperscript{84}

Finally, the BIA held that the alien has the burden of providing an adequate explanation why reasonable corroborating evidence is not produced.\textsuperscript{85} Moreover, the immigration judge is required to include the alien's explanation in the record for purposes of review.\textsuperscript{86}

B. The Ninth Circuit's Position on the Corroboration Rule

In \textit{Ladha v. INS},\textsuperscript{87} the Ninth Circuit expressly disapproved the BIA's holding in \textit{In re S-M-J} requiring corroboration of otherwise credible testi-

\textsuperscript{79} See id. at 732-33 (reversing immigration judge's decision because (1) record contained country reports from wrong country and (2) immigration judge relied on information outside record in rendering decision).

\textsuperscript{80} Id. at 731.

\textsuperscript{81} Id. at 725.

\textsuperscript{82} See id. ("Where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided.").

\textsuperscript{83} See id. at 731 (recognizing that evidentiary standard for asylum requires that alien provide background evidence so that claim can be evaluated in context of alien's country).

\textsuperscript{84} See id. at 725 (listing documentary evidence that supports material fact of applicant's claim).

\textsuperscript{85} See id. at 724 ("If such evidence is unavailable, the applicant must explain its unavailability . . . . ").

\textsuperscript{86} See id. (recognizing immigration judge's duty to include applicant's explanation for lack of corroborating evidence).

\textsuperscript{87} 215 F.3d 889 (9th Cir. 2000).
mony by an asylum applicant. In *Ladha*, three Pakistani aliens, a husband, wife and daughter, brought claims for asylum and withholding of deportation in order to prevent the INS from returning them to Pakistan. The aliens claimed that if they were returned to Pakistan, they would suffer political, religious and social group persecution. An immigration judge rejected the claims for asylum and withholding of deportation and the BIA dismissed their appeal. The BIA declined to determine whether the aliens' testimony was credible. It held that the aliens failed to meet their burden of proof because they failed to corroborate "both their personal circumstances and the general country conditions that frame[d] their asylum claim" and they failed to offer any explanation for the lack of corroboration.

The Ninth Circuit reversed the BIA's decision regarding the need for the aliens to corroborate their testimony and found that the aliens were eligible for asylum on account of religious and political persecution. In so doing, it reviewed Ninth Circuit precedent on the need for corroboration and reaffirmed that, in the Ninth Circuit, "an alien's testimony, if unrefuted and credible, direct and specific, is sufficient to establish the facts testified [to] without the need for corroboration." Moreover, the court noted in dicta that, in the Ninth Circuit, there is no availability limitation, and courts should assume that "evidence corroborating testimony found to be credible is unavailable if not presented."

88. See id. at 901 ("To the extent that decisions such as *Matter of S-M-J* . . . establish a corroboration requirement for credible testimony, they are disapproved.").

89. See id. at 894 ("All three conceded deportability, but sought asylum, withholding of deportation, and in the alternative, voluntary departure.").

90. See id. (noting aliens' argument). The aliens claimed that they feared persecution because they were Khoja Muslims, a religious minority in Pakistan and supporters of the Mohajir Quami Movement ("MQM"), a political organization in competition with other political organizations in Pakistan. See id. at 893-94 (explaining aliens' argument).

91. See id. at 895-96 (noting lower court ruling).

92. See id. at 897 ("The BIA expressly declined to determine whether the Ladhas' testimony was credible.").

93. Id. at 896.

94. See id. at 901 (stating holding). The court also remanded the matter to the BIA to assess the withholding of removal standard under the proper standard. See id. at 903 (explaining procedure after ruling).

95. The Ninth Circuit outlined three lines of cases where the alien's testimony alone was sufficient: (1) cases where the alien's testimony alone was sufficient to prove specific threats of persecution; (2) cases where the alien's testimony alone was sufficient to prove other facts; and (3) cases where the alien's credible testimony was deemed true and the only issue was whether the alien satisfied all the elements of relief. See id. at 899-901 (discussing precedent on issue).

96. Id. at 901.

97. Id. at 900.
The court noted that assuming the aliens' were credible, they satisfied the subjective component of their asylum claim—i.e., a genuine fear of persecution. The court also noted that because the aliens demonstrated compelling evidence of past persecution, which the INS failed to rebut, they also satisfied the objective component of the asylum analysis and were, therefore, eligible for asylum.

The Ladha decision is consistent with numerous other Ninth Circuit decisions where the court has held that corroboration of an alien's testimony is not necessary. It is worth noting, however, that a number of judges in the Ninth Circuit disagree with the Ladha holding and the Ninth Circuit's view on corroboration.

In Abovian v. INS, eight judges on the Ninth Circuit issued a scathing dissent from an order denying a petition for a rehearing en banc. In rejecting the Ninth Circuit's position on the corroboration rule that the BIA may not deny asylum relief to a credible witness on the basis of a failure to present corroborating evidence, the dissent stated that the Ninth

98. In the Ninth Circuit, an alien’s testimony is assumed to be credible unless the BIA or the immigration judge make a finding to the contrary. See Kataria v. INS, 232 F.3d 1107, 1113 (9th Cir. 2000) ("It is also well settled that we must accept an applicant’s testimony as true in the absence of an explicit adverse credibility finding.").

99. See Ladha v. INS, 215 F.3d 889, 902 (9th Cir. 2000) ("Assuming the Ladhas' credibility, they have satisfied the subjective component of the test for asylum eligibility.").

100. See id. (explaining sufficiency of evidence to prove past persecution).

101. See, e.g., Kataria, 232 F.3d at 1113 ("It is well established in this circuit that the BIA may not require independent corroborative evidence from an asylum applicant who testifies credibly in support of his application."); Abovian v. INS, 257 F.3d 971, 978 (9th Cir. 2000) (stating that corroborative evidence is not required from asylum applicant whose testimony is unfurfted); Lopez-Reyes v. INS, 79 F.3d 908, 912 (9th Cir. 1996) ("The applicant’s testimony, if unfurfted and credible, is sufficient to establish the fact that a threat was made."); Castillo v. INS, 951 F.2d 1117, 1121 (9th Cir. 1991) ("The objective standard may be satisfied with the applicant’s testimony alone if documentary evidence is unavailable."); Limsico v. INS, 951 F.2d 210, 212 (9th Cir. 1991) ("Where corroborating documentary evidence is unavailable, an alien’s testimony alone will suffice to prove a well-founded fear, but only if it is ‘credible, persuasive, and specific.’"); Blanco-Comarrribas v. INS, 830 F.2d 1039, 1042-43 (9th Cir. 1987) ("[I]f documentary evidence is not available, the applicant’s testimony will suffice if it is credible, persuasive, and refers to ‘specific facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution on one of the specified grounds’ listed in section 208(a)."") (emphasis in original) (quoting Cardoza-Fonseca, 767 F.2d 1448, 1453 (internal citation omitted)); Artiga Turcios v. INS, 829 F.2d 720, 723 (9th Cir. 1987) ("The alien is not, however, required to provide independent corroborative evidence of the threats of persecution. An alien’s own testimony regarding specific threats can establish a clear probability of persecution, if credible and supported by general documentary evidence that the threats should be considered serious.").

102. See Abovian v. INS, 257 F.3d 971, 971 (9th Cir. 2000) (Kozinski, J., dissenting) (accusing majority of actions that are antithesis of administrative deference).

103. 257 F.3d 971 (9th Cir. 2000).
Circuit "overthrows . . . perfectly reasonable BIA decision[s in asylum and withholding of removal cases] by invoking novel rules divorced from administrative law, Supreme Court precedent and common sense," and thus has "whittled away the authority and discretion of immigration judges and the BIA."\textsuperscript{104}

The dissent argued that the Ninth Circuit's rule "renders corroboration evidence unnecessary and runs contrary to the permissive language of the applicable INS regulations."\textsuperscript{105} In this regard, the dissent noted that the INS regulations indicate that the testimony of an applicant alone may be sufficient to sustain a burden of proof, whereas the Ninth Circuit corroboration rule now holds that the testimony of an applicant must be sufficient to sustain a burden of proof.\textsuperscript{106}

The dissent also noted that the Ninth Circuit's corroboration rule eliminates all incentive for an applicant to present any corroboration "because anything [the applicant] presents in addition to his own testimony could give the INS grounds for" disbelief, stating:

A rule of law that encourages parties to withhold relevant evidence is unwise. That this rule conflicts with the immigration regulations and requires us to break with other circuits makes it indefensible.\textsuperscript{107}

C. The Second Circuit's Position on the Corroboration Rule

The Second Circuit deviated sharply from the Ninth Circuit in its interpretation of the INS regulations regarding proof of eligibility for asylum and entitlement to withholding of removal. In \textit{Diallo v. INS},\textsuperscript{108} the Second Circuit held that the INS regulations\textsuperscript{109} should be interpreted to mean that credible testimony alone may be sufficient to satisfy the burden of proving asylum or withholding of removal, "depending on the circumstances."\textsuperscript{110} There, the court articulated a two-part inquiry that must be made for proper application of the corroboration rule. First, the BIA must determine whether an alien's testimony is credible.\textsuperscript{111} The court noted that in making this determination the BIA must consider "the underlying consistency and plausibility of [the alien's] story, the extent to

\textsuperscript{104} Id. (Kozinski, J., dissenting).
\textsuperscript{105} Id. (Kozinski, J., dissenting) (quoting Diallo v. INS, 232 F.3d 279, 286 (2d Cir. 2000)).
\textsuperscript{106} See id. (Kozinski, J., dissenting) (discussing discrepancy between INS corroboration rules and Ninth Circuit's interpretation of those rules).
\textsuperscript{107} Id. at 977 (Kozinski, J., dissenting).
\textsuperscript{108} 232 F.3d 279 (2d Cir. 2000).
\textsuperscript{109} See 8 C.F.R. §§ 208.15, 208.16 (2003) (providing applicable INS regulations).
\textsuperscript{110} See Diallo, 232 F.3d at 286 ("[T]he appropriate formulation \textit{may} be enough . . .") (emphasis added).
\textsuperscript{111} See id. at 290 (stating first prong of test).
which it was corroborated and the believability of the explanations . . . offered for failing to . . . corroborate[e]."112 The court cautioned that the lack of corroboration cannot be the sole basis for an adverse credibility finding; an applicant may nevertheless be credible especially when the explanation for the lack of corroboration is credible.113

Second, if the BIA determines that the applicant’s testimony is credible, it must then determine whether corroboration of the testimony is necessary to meet the burden of proof.114 If corroboration is required, the BIA can only deny the relief for lack of corroboration if it articulates (1) why the corroboration is reasonable and (2) why the applicant’s explanation for lack of corroboration is insufficient.115 The Second Circuit has reaffirmed its position on the corroboration rule in *Avarado-Carillo v. INS*116 and *Qiu v. Ashcroft*.117

D. *The Third Circuit’s Position on the Corroboration Rule*

Similar to the Second Circuit, in *Abdulai v. Ashcroft*118 the Third Circuit upheld the BIA’s rule that it is permissible to require an otherwise credible asylum applicant to corroborate the applicant’s testimony when it is reasonable to do so.119 In that case, the Third Circuit addressed a Nigerian alien’s claims that his applications for asylum and withholding of removal were improperly denied because the BIA required him to corroborate the credible testimony he offered in support of his claims.120

In making the determination that the BIA may sometimes require corroboration of credible testimony, the court specifically addressed the language of the INS regulations dealing with eligibility for asylum and withholding of removal.121 These eligibility regulations provide, in relevant part, that “[t]he testimony of the applicant, if credible, may be suffi-

112. Id.
113. See id. ("[S]imple failure to produce any particular documentary support cannot serve as the sole basis of an adverse credibility finding. While corroboration may bolster credibility, an applicant may still be credible absent specific corroboration, especially where his or her explanations for the absence of corroboration are themselves credible.").
114. See id. (stating second prong of test).
115. See id. (explaining when BIA can deny relief for lack of corroboration).
116. 251 F.3d 44, 54-55 (2d Cir. 2001) (reversing BIA for failing to identify type of corroborative documents that were reasonable for alien to produce).
117. 329 F.3d 140, 154 (2d Cir. 2003) ("Unless the BIA anchors its demands for corroboration to evidence which indicates what the petitioner reasonably could be expected to provide, there is a serious risk that unreasonable demands will inadvertently be made.").
118. 299 F.3d 542 (3d Cir. 2001).
119. Id. at 552 (stating holding).
120. See id. at 546 (explaining that immigration judge determined that Abdulai had not presented enough evidence for asylum or withholding of removal to be granted).
121. See id. at 552 (noting that proper inquiry was whether regulations were silent or ambiguous with respect to corroboration requirements).
cient to sustain the burden of proof without corroboration." In an amicus brief submitted by the Lawyer's Committee for Human Rights, amicus argued that these regulations establish that the BIA can never require a credible applicant to corroborate testimony as a condition of meeting the burden of proof.

Relying on the substantial deference that must be accorded to an agency's interpretation of its own rules, the court rejected the amicus reading of the asylum and withholding of removal eligibility regulations. The court stated:

Saying that something may be enough is not the same as saying that it is always enough; in fact, the most natural reading of the word "may" in this context is that credible testimony is neither per se sufficient nor per se insufficient. In other words, "it depends." And, according to the BIA, it depends, at least in part, on whether it would be reasonable to expect corroboration. We do not see how this construction is plainly erroneous or inconsistent with the regulation.

The court also addressed an amicus argument that the Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees ("Handbook") dictates that the BIA cannot require a credible applicant to corroborate the applicant's story. Amicus contended that its reading of the eligibility regulations was supported by the Handbook language recommending that "if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt." The court found this argument unpersuasive because the Handbook is not binding and, even if it were, the BIA rule does not violate the recommendation. In this regard, the court stated that the Handbook only recommends not requiring corroborating evidence "unless there are good reasons to the contrary." Since the corroboration rule holds a failure to corroborate against an applicant when it is "reasonable to expect" corroboration and there is no reasonable explanation for not doing

122. 8 C.F.R. §§ 208.13(a), 208.16(b) (2003).
123. See Abdulai, 239 F.3d at 552 (explaining argument presented by amicus).
124. Id. (emphasis in original). It is important to note that the Ninth Circuit took a contrary position in Ladha v. INS, 215 F.3d 889 (9th Cir. 2000). There, the Ninth Circuit noted that the word "may" in the asylum and withholding of removal eligibility regulations does not mean that the BIA can sometimes require corroboration of credible testimony. See Ladha, 215 F.3d at 901 n.12 (finding that word "may" indicates that "sometimes the facts, credibly testified to and taken therefore to be true, will not cover all the elements of the asylum or withholding claim needed to justify relief").
126. Abdulai, 239 F.3d at 553 (citing Handbook).
127. Id. (citing Handbook).
so, "'[t]he standard applied by the BIA adheres to [the Handbook’s] general parameters.'"  

Finally, the court outlined a three-part inquiry that the BIA must make before it can find that a credible alien has failed to meet the burden of proof for failure to provide corroboration. First, the BIA must identify the particular aspects of the testimony for which it would be reasonable to expect corroboration.  

Second, the BIA must determine whether the alien has provided the necessary corroboration. Third, if the BIA determines that corroborative evidence is lacking, then it must inquire whether the alien provided an adequate explanation for the failure to corroborate. Absent this three-part inquiry, the court noted that there is no way to review the BIA’s reasoning.

The holding for \textit{Abdulai} has been followed by one recent unpublished Third Circuit decision involving asylum and withholding of removal claims. Additionally, during this term the Third Circuit heard oral argument on a case whose issue involved the proper application of the BIA’s requirement for corroboration.

\section*{IV. Conclusion}

Based on a review of the circuit courts’ opinions on the corroboration of credible testimony, the Second and Third Circuits’ position that the BIA may sometimes require an applicant for asylum or withholding of removal to corroborate otherwise credible testimony to meet the burden of proof is legally correct. This position appropriately recognizes the sub-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{128} \textit{Id.} (quoting Diallo v. INS, 232 F.3d 279, 282 (2d Cir. 2000)). The \textit{Abdulai} court also rejected an argument that the Third Circuit established that an alien’s credible testimony is always sufficient to meet the burden of proof. \textit{See id.} (rejecting argument). Unlike the Ninth Circuit, the court noted that no precedent exists to support the rule that credible testimony alone is sufficient. \textit{See id.} (noting lack of precedent).
\item \textsuperscript{129} \textit{See id.} at 554 (explaining requisite three-part inquiry into whether alien produced adequate corroborating evidence). In the case of Alice, it would be reasonable to expect her to provide evidence of the general country conditions in Oppressa, as well as media accounts of the persecution of minority party leaders by the ruling party. In addition, it also would be reasonable to expect Alice to produce documentary evidence that she was a member of the minority party in Oppressa and to produce letters from friends and relatives describing how Alice was arrested, how her family was beaten and how her home was set on fire.
\item \textsuperscript{130} \textit{See id.} at 554 (explaining second prong of three-prong inquiry).
\item \textsuperscript{131} \textit{See id.} (explaining third prong).
\item \textsuperscript{132} \textit{See id.} (noting importance of three-prong test to reviewability of BIA’s reasoning).
\item \textsuperscript{133} \textit{See Butkovic v. Ashcroft, No. CIV.A.02-2421, 2003 WL 1477781, at *3 (3d Cir. Mar. 24, 2003)} (recognizing BIA must identify particular aspects of testimony that require corroboration).
\item \textsuperscript{134} \textit{See Miah v. Ashcroft, Case No. 01-3764 (3d Cir. 2003)}. The primary issue in \textit{Miah} was whether the BIA could require corroborative evidence from an applicant whose testimony was credible, and if so, how much corroboration could the BIA require the applicant to provide.
\end{itemize}
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Substantial deference that the United States Supreme Court requires courts to accord to an agency’s reasonable interpretation of the regulations it is entrusted to administer. Since it was not unreasonable for the BIA to interpret 8 C.F.R. § 208.13(a) and 8 C.F.R. § 208.16(b) as providing the BIA with the ability to sometimes require corroboration, that interpretation should not and, applying Chevron deference, cannot be disregarded.

While one may argue that a corroboration requirement is unreasonable because it places an impossible burden on refugees because often times these individuals are fleeing persecution and do not have time to collect corroborative evidence, the Third Circuit’s rule alleviates this concern. As outlined in the Abdulai decision, the Third Circuit’s rule is flexible and takes into account each alien’s particular circumstances. In the Third Circuit, an alien can still satisfy the burden of proving an asylum and/or withholding of removal claim through credible testimony alone, in appropriate circumstances, when such testimony is believable, consistent and sufficiently detailed to provide a plausible account of the persecution. Moreover, the Third Circuit’s interpretation of the INS asylum and withholding of removal eligibility regulations recognizes that a lack of corroboration cannot be used as a sole basis for the BIA to deny relief unless and until the immigration court or the BIA first scrutinizes the record (1) to identify the facts for which it “reasonably” expects corroboration, and (2) to determine whether the applicant was provided the opportunity to either provide the information or offer a credible explanation as to why such information is not available. In fact, in some instances the lack of corroboration could actually strengthen an asylum or withholding of removal claim because the applicant has the ability to demonstrate that the persecution the applicant endured was so substantial that it was impossible to obtain evidence one would reasonably expect to be present.

The Third Circuit’s rule strikes the proper balance between weeding out meritless claims and providing legitimate victims of persecution with appropriate sanctuary. Unlike the Ninth Circuit, which essentially requires the immigration court and the BIA to treat an applicant’s testimony as gospel no matter how bizarre it may be, the Third Circuit rule allows the immigration court and the BIA to go beyond the abstract statements and to view the testimony in the context of a relevant and appropriate background situation to ensure that the applicant has a well-founded fear

135. See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845-44 (1984) (recognizing that reviewing court’s function regarding agency’s interpretation of statute agency is tasked to administer is limited to following: (1) determining whether regulation is silent or ambiguous with respect to specific issue, and, if so, (2) determining whether agency’s interpretation is based on permissible construction of statute).

136. For a further discussion of Chevron deference, see supra note 136 and accompanying text.

137. See generally Abovian v. INS, 257 F.3d 971, 971-72 (9th Cir. 2001) (Kozinski, J., dissenting) (explaining that BIA has “burden of proving that petitioner is not entitled to relief” (emphasis in original)).
of persecution and/or there is a clear probability of persecution if the applicant is forced to return to the applicant's homeland. In this regard, the Third Circuit's approach agrees with the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, which cautions against considering an applicant's statements solely in the abstract without any background information.138

Recognizing that deportation is indeed a harsh measure with grave consequences to the applicant if denied,139 the Third Circuit's rule with respect to corroborating evidence is the proper approach because it affords the proper level of deference to the INS, it is flexible in that it considers all circumstances of each particular case and it enables the immigration court and the BIA to weed out meritless claims.

138. See HANDBOOK, supra note 32, ¶ 42 ("The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin—while not a primary objective—is an important element in assessing the applicant's credibility.").