Case No. 08-71478

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OLAKUNLE OSHODI,

Petitioner,

vs.

ERIC H. HOLDER, ATTORNEY GENERAL,

Respondent.

On Review from the Board of Immigration Appeals

BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND CENTER FOR GENDER AND REFUGEE STUDIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER, URGING THAT THE PETITION FOR REVIEW BE GRANTED

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS OF THE SAN
FRANCISCO BAY AREA
Robin Goldfaden (SBN 208055)
131 Steuart Street, Suite 400
San Francisco, CA 94105
Phone: (415) 543-9444

ARNOLD & PORTER LLP
Lawrence A. Cox (SBN 076140)
Gwendolyn M. Ostrosky (SBN 261801)
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017
Telephone: (213) 243-4000
Facsimile: (213) 243-4199

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici* state that no *amicus* has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any *amicus*.

Dated: September 28, 2012 ARNOLD & PORTER LLP

By: s/ Gwendolyn Ostrosky
Gwendolyn Ostrosky
Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATUTES AND RULES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Lawyers' Committee for Civil Rights of the San Francisco Bay Area is a civil rights and legal services organization that protects and promotes the rights of communities of color, immigrants, and refugees. Through its longstanding Asylum Program, Lawyers' Committee, with the assistance of pro bono attorneys, has provided free legal representation to thousands of low-income refugees.

Center for Gender & Refugee Studies, a national leader in refugee law and policy, annually advises hundreds of attorneys representing asylum-seekers nationally and in the Ninth Circuit, including women and children fleeing domestic violence and other harms by non-State actors, who cannot reasonably obtain corroborating evidence.

This brief is filed, with an accompanying motion, to address a central issue before the Court – that of how corroboration requirements are applied to asylum seekers. This is a matter of great concern to *amici*, as the refugees they serve are often unable to reasonably obtain documentation to support their claims. The resulting concern is only magnified for the many other refugees who must navigate the asylum application process without legal representation and without access to evidence and other crucial resources.

While noting agreement with the briefs of Petitioner and other *amici*, *amici* focuses here on interrelated concerns raised by the panel decision and the agency

decision it approved. The first concerns the relationship between credibility on the one hand and corroboration and burden of proof on the other. Corroboration may be necessary and properly required in some cases for an applicant to address credibility concerns or to meet the burden of proof where otherwise credible testimony does not suffice to do so, but the absence of corroboration cannot form the basis for an adverse credibility finding. To allow otherwise would contravene the statute and congressional intent and effectively deny protection to many *bona fide* refugees, who through no fault of their own can offer little more than their own testimony as evidence of the persecution they have fled. Second, where corroboration is properly demanded, a standard of reasonableness must apply to such demands. Again, a contrary understanding would contravene the statute and congressional intent and lead inexorably to violations of the principle of nonrefoulement.

SUMMARY OF ARGUMENT

With the REAL ID Act of 2005 ("the Act"), Pub. L. No. 109-13, div. B, 119 Stat. 231 (May 11, 2005), Congress codified the framework for adjudication of applications for asylum, withholding of removal, and protection under the Convention against Torture. The Act sets forth permissible bases for credibility determinations and also addresses how the burden of proof may be met and the

circumstances under which immigration judges (IJs) may require corroboration from applicants.

With regard to credibility, the Act largely "codifie[d] factors identified in the case law." H.R. Rep. No. 109-72, at 166 (2005) (Conf. Rep.). One notable change came from the Act's provision that inconsistencies need not go to the "heart of the matter" to support an adverse credibility finding. *Compare* 8 U.S.C. §1158(b)(1)(B)(iii), *and Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir.2003). As this Court has noted, however, "[t]o support an adverse credibility determination, inconsistencies must be considered in light of the 'totality of the circumstances, and all relevant factors.'" *Shrestha v. Holder*, 590 F.3d 1034, 1043 (9th Cir.2010) (citations omitted). "[T]rivial inconsistencies that under the total circumstances have no bearing on a petitioner's veracity should not form the basis of an adverse credibility determination." *Id.* at 1044.

With regard to corroboration, REAL ID abrogated an aspect of this Court's precedent by allowing IJs in some circumstances to require applicants to provide evidence corroborating otherwise credible testimony. 8 U.S.C. §1158(b)(1)(ii); *see Aden v. Holder*, 589 F.3d 1040, 1043-44 (9th Cir.2009). Congress recognized, however, that "[m]any aliens validly seeking asylum arrive in the United States with little or no evidence to corroborate their claims," H.R. Rep. No. 109-72, at 165, and provided that an applicant's testimony can suffice to meet the burden of

proof. 8 U.S.C. §1158(b)(1)(B)(ii). Congress thereby communicated its intent that the absence of corroboration, in and of itself, ought not be a factor in determining credibility.

Despite the distinction between credibility and corroboration, the two are frequently confused and were here. The absence of certain forms of corroboration plainly infected the IJ's view of Petitioner's credibility. A.R. 335-52. The Panel, in turn, signaled approval of basing an adverse credibility finding on a perceived failure to corroborate. But conflating credibility and corroboration in this way runs counter to the statute and Congress's intent, and threatens to deny relief to *bona fide* refugees whose testimony *is* credible but who, by virtue of the circumstances of their persecution, flight, and home country conditions, cannot obtain corroboration, if such ever existed. *See, e.g.*, *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir.1984).

Under REAL ID, there are circumstances where IJs may require production of reasonably available evidence to corroborate otherwise credible testimony. It may in some cases be needed for an applicant to satisfy the burden of proof.[1] When such evidence is required, however, the demands put upon applicants must be reasonable – a limitation made clear by the statute itself.

[1] Alternatively, as before REAL ID, such evidence may sometimes be needed to cure or otherwise address perceived inconsistencies or other issues with credibility. *See, e.g.*, *Cosa v. Mukasey*, 543 F.3d 1066, 1070 (9th Cir.2008).

ARGUMENT

I. THE ABSENCE OF CORROBORATION CANNOT FORM THE BASIS OF AN ADVERSE CREDIBILITY FINDING.

The credibility of an applicant's testimony and its sufficiency to carry the burden of proof must be addressed before it can be determined that corroborating evidence is necessary. 8 U.S.C. §1158(b)(1)(B)(ii). To sustain the burden of proof without corroborating evidence, the applicant's testimony need only be (1) "credible," (2) "persuasive," and (3) "refer[] to specific facts sufficient to demonstrate that the applicant is a refugee." *Id.*

It is only "[o]nce the IJ has decided that he is not persuaded by the applicant's otherwise credible testimony, [that] he may 'determine[ ] that the applicant *should provide* evidence that corroborates' that testimony." *Ren v. Holder*, 648 F.3d 1079, 1091 (9th Cir.2011) (quoting with emphasis 8 U.S.C. §1158(b)(1)(B)(ii)). As this Court has explained, the provision for requiring corroboration "focuses on conduct that *follows* the IJ's determination, not *precedes* it." *Id*.

Frequently it is impossible for "a refugee to 'prove' every part of his case" and therefore it may be "necessary to give the applicant the benefit of the doubt" if his or her statements are "coherent and plausible, and [do] not run counter to generally known facts." *Matter of S-M-J-*, 21 I.&N. Dec. 722, 725 (B.I.A. 1997) (citation omitted). Congress understood this – the text, structure, and legislative

history evidence its intent that the absence of corroboration in and of itself not be permitted to call into question the credibility of an applicant's testimony.[2]

To start, the statute addresses credibility and corroboration in separate subsections. *Compare* 8 U.S.C. §1158(b)(1)(B)(ii), *and* 8 U.S.C. §1158(b)(1)(B)(iii). Additionally, the factors Congress identified as relevant to credibility assessments do not include "corroboration." 8 U.S.C. §1158(b)(1)(B)(iii); H.R. Rep. No. 109-72, at 166-67. Further, the Board decision Congress specifically endorsed was explicit that "[a] failure of proof is not a proper ground per se for an adverse credibility determination." 21 I.&N. Dec. at 731; *see* H.R. Rep. 109-72, at 166. *S-M-J-* explained by example that an applicant's "plausible" but "overly general" testimony might "fail[] to meet the required burden of proof, but an adverse credibility determination would not be appropriate. . . . The latter finding is more appropriately based upon inconsistent statements, contradictory evidence, and inherently improbable testimony." *S-M-J-*, 21 I.&N. Dec. at 729, 731. *See also Chukwu v. Atty. Gen.*, 484 F.3d 185, 191 (3d Cir.2007) (noting "BIA's avowed policy of considering separately the issues of credibility and failure to provide corroboration"); *Ikama-Obambi v. Gonzales*, 470 F.3d 720, 725 (7th Cir.2006).

[2] *Amici* distinguish situations where the explanation for the absence of corroboration is not credible, which can bear on overall credibility.

Allowing adjudicators to consider an absence of corroboration in determining credibility would seriously undermine the provision that testimony may be sufficient to sustain an applicant's burden of proof. Myriad *bona fide* refugees cannot provide corroborating evidence. H.R. Rep. 109-72, at 165. Permitting their circumstances to cast their credibility in a negative light would quickly eviscerate their statutorily-mandated opportunity to meet their burden through testimony and make it nearly impossible for them to prove their cases. *See Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir.1996).

At the same time, to avoid negative credibility inferences, applicants would effectively be forced to take on the impossible task of predicting at the outset of the process what evidence the adjudicator might conceivably deem useful. *See Kalubi v. Ashcroft*, 364 F.3d 1134, 1139 (9th Cir.2004). This problem is aggravated when most applicants are without counsel and resources and may be detained, and seeking evidence could put others in danger. And there is no knowing what effort will be deemed sufficient.

II. REQUESTS FOR CORROBORATION MUST BE REASONABLE.

That requests for corroboration must be reasonable is most apparent from the provision that an applicant cannot be required to produce corroboration that he cannot "reasonably" obtain. 8 U.S.C. §1158(b)(1)(B)(ii). The statute also imposes limitations by directing IJs first to assess the credibility of testimony and the

sufficiency of credible testimony and other record evidence[3] to meet the burden of proof, and *then* to seek corroboration "*where*" it is determined that such evidence should be provided. *Id.* (emphasis added); *Ren*, 648 F.3d at 1091.

Further evidence of a reasonableness requirement comes from *Matter of S-M-J-*, to which Congress looked in crafting REAL ID's corroboration provisions. *S-M-J-* was clear that applicants should not be subjected to "[u]nreasonable demands." 21 I.&N. Dec. at 725.

> Unreasonable demands are not placed on an asylum applicant to present evidence to corroborate particular experiences (e.g., corroboration from the persecutor). However, 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. That is, an asylum applicant should provide documentary support for *material* facts which are *central* to his or her claim and *easily subject to verification*. . . .

Id. (emphasis added).

Courts have similarly recognized the need to limit expectations and demands for corroboration. *See, e.g.*, *Ming Shi Xue v. BIA*, 439 F.3d 111, 122 (2d Cir.2006) (noting "serious risk that unreasonable demands will inadvertently be made"); *Balogun v. Ashcroft*, 374 F.3d 492, 502 (7th Cir.2004) ("No matter what form of

[3] Records will typically include general country conditions documentation, which IJs are instructed to place into evidence and which often provides a basis for gauging the plausibility of an account of persecution. *S-M-J-*, 21 I.&N. Dec. at 729.

corroboration is at issue, the corroboration requirement should be employed reasonably.").

The importance of this principle is apparent given the limitless types of evidence that could be demanded, the constraints asylum seekers often face, and the need to safeguard against "arbitrary and excessive requests." *Qiu v. Ashcroft*, 329 F.3d 140, 153 (2d Cir.2003), *overruled on other grounds by Shi Liang Lin v. U.S. Dept. of Justice*, 494 F.3d 296, 305 (2d Cir.2007); *cf. Shrestha*, 590 F.3d at 1041 & n.2 (explaining applicability of "rule of reason" to credibility determinations and other agency conduct). The record in this case, far from lacking in corroboration, is illustrative. It includes documentation that Oshodi was brutally tortured, evidence of Post-Traumatic Stress Disorder, credible expert testimony, letters from family members, and a range of other documentation, as well as an attempt by Oshodi to rely on still more corroboration in the form of police and medical reports from the time in question. A.R. 342, 436-73, 669-72, 749-52, 754-56, 758, 760, 762, 933-37.

This is far more corroboration than an asylum seeker will typically be able to provide, and yet the IJ faulted Oshodi for not producing different forms of corroboration (identified for the first time in the IJ's decision). A.R. 342-44. Simply, there must be a limit. One may contemplate a nearly unbounded universe of potentially corroborative evidence, but without the limitation that demands for

such evidence be reasonable, the burden of proof can become a perpetually rising bar – a result that Congress did not intend and one that would serve only to ensure that protection be withheld where it should be granted.

CONCLUSION

For these reasons, *Amici Curiae* respectfully urges the Court to make clear that an absence of corroboration cannot be the foundation for an adverse credibility finding, an applicant's credible testimony can suffice to carry the burden of proof without corroboration, and where corroboration is required, a rule of reason applies.

Dated: September 28, 2012 Respectfully submitted,

By: s/ Gwendolyn Ostrosky
Gwendolyn Ostrosky
Attorneys for Amici Curiae

STATEMENT OF RELATED CASES

I, the undersigned, hereby certify that I am aware of no pending related cases.

Dated: September 28, 2012

ARNOLD & PORTER LLP

By: s/ Gwendolyn Ostrosky
Gwendolyn Ostrosky
Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 2097 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirement of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

Dated: September 28, 2012 ARNOLD & PORTER LLP

By: s/ Gwendolyn Ostrosky
Gwendolyn Ostrosky
Attorneys for Amici Curiae

CERTIFICATE OF SERVICE
FOR DOCUMENTS FILED USING CM/ECF

I hereby certify that on September 28, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Gwendolyn Ostrosky
Gwendolyn Ostrosky