CHALLENGING AN IMMIGRATION JUDGE'S ADVERSE CREDIBILITY FINDING WITH THE BOARD OF IMMIGRATION APPEALS

Part One

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I. Introduction

Applicants for relief from removal have the burden of proving each element of their claim. In assessing whether an applicant is eligible for relief, immigration judges (IJs) must determine whether the documentary and testimonial evidence in support of the application is credible, persuasive, and refers to specific facts to satisfy the applicant's burden of proof.[1] A key component of any claim for relief, therefore, is proving that the applicant is credible.[2]

If an IJ denies a respondent's application for relief in removal proceedings for any reason, the respondent has the right to appeal that decision to the Board of Immigration Appeals (BIA).[3] If the IJ's denial was based on an adverse credibility finding, challenging that finding with the BIA will, in almost all cases, be a necessary and crucial step in prevailing on appeal. Without a challenge to the adverse credibility finding, the BIA cannot generally reverse the IJ's decision since a lack of credibility usually means that the applicant cannot meet their burden of proof.

This practice advisory guides practitioners to effectively challenge an IJ's adverse credibility finding on appeal to the BIA. This advisory will be released in two parts. This first part provides an overview of the role of credibility in immigration proceedings and how to identify when an IJ has made an adverse credibility determination. It then details how to challenge an IJ's findings regarding inconsistences, omissions, and the level of specificity or detail in an applicant's claim.

Part Two of the advisory will focus on other common bases for adverse credibility findings, including: demeanor; responsiveness; speculation, conjecture, and plausibility; and corroboration.

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[1] INA § 240(a)(4)(B).
[2] INA § 240(a)(4)(C).
[3] For an overview of the procedures for appealing an IJ's decision to the BIA, as well as how to identify issues for an appeal, see ILRC's Practice Advisory, *Identifying Issues for a BIA Appeal* (June 2022), available at https://www.ilrc.org/resources/identifying-issues-bia-appeal.

II. What is Credibility and When Must it Be Addressed With the BIA?

Under Section 240 of the INA, IJs are required to always assess a respondent's and other personal witnesses' credibility when determining eligibility for relief from removal. When an IJ makes an adverse credibility finding, the IJ may disregard the applicant's oral and written statements. Because the applicant's testimony is almost always the central evidence in a case, an adverse credibility finding is devastating to the claim, as it is virtually impossible to meet the applicant's burden of proof without their own oral and written statements. Accordingly, if a decision denying relief is based on a finding that the applicant is not credible, the adverse credibility finding must generally be reversed for the applicant to prevail on appeal, regardless of any other legal errors in the IJ's decision.

"Credibility" is not defined by the INA. Merriam-Webster Dictionary defines it as "the quality or power of inspiring belief" or "capacity for belief."[4] The BIA has generally characterized a credible witness as one whose testimony is plausible, detailed, internally consistent, consistent with their application for relief, and unembellished despite probing during cross-examination.[5] The INA lists the following factors as relevant to credibility determinations in the context of applications for relief:[6]

- Demeanor
- Candor
- Responsiveness
- Inherent plausibility
- Consistency between written and oral statements
- The internal consistency of each such statement
- The consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions)
- Any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.

The statute further includes a catch-all phrase providing that credibility determinations be made "considering the totality of the circumstances, and all relevant factors."[7]

Where an IJ has made an adverse credibility finding, the decision should explicitly say so. For example, the IJ's decision may state, "the court finds the respondent not credible with respect to his claim," or "the inconsistencies in the record compel the court to make an adverse credibility finding against the applicant." See below at **Part IV**, for guidance on what to do if it is not clear whether an IJ has made an adverse credibility finding.

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[4] *Credibility*, Merriam-Webster's Collegiate Dictionary (11th ed.).

[5] *Matter of B-*, 21 I&N Dec. 66 (BIA 1995).

[6] INA §§ 208(b)(1)(B)(iii) (asylum); 240(c)(4)(C) (all applications for relief from removal).

[7] INA §§ 208(b)(1)(B)(iii) (asylum); 240(c)(4)(C) (all applications for relief from removal).

If the IJ made an adverse credibility finding before denying an application for relief, it is important to specifically argue that the BIA should reverse the credibility determination. Much of the remaining portions of this advisory address how to challenge an IJ's adverse credibility finding. But equally important is to recognize when the IJ has not made an adverse credibility finding—either by explicitly finding the witnesses credible, or through implication. In these cases, the statute provides, at least in the context of applications for relief, that "if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal."[8] See **Part IV**.

PRACTICE TIP: While an adverse credibility finding will generally make it impossible to prevail on most applications for relief from removal, this is not necessarily the case with applications for protection under the Convention Against Torture (CAT). Courts have held that an adverse credibility finding in the context of an application for asylum will not necessarily result in a denial of CAT protection, since CAT relief can be based solely on objective evidence.[9] So in cases where an applicant's asylum claim has been denied based on an adverse credibility finding, practitioners should ensure that the IJ separately considered whether the objective evidence in the record established the applicant's eligibility for protection under the CAT. If the IJ did not do so, that in itself may be a basis for the BIA to remand the matter for the IJ to properly consider the CAT claim. Where an IJ made an adverse credibility finding in the context of an asylum or withholding of removal application, practitioners should not only challenge the IJ's adverse credibility finding on the merits, but also alternatively argue that the applicant proved eligibility for CAT protection even if the BIA were to agree with the IJ's adverse credibility finding.

Importantly, an adverse credibility finding is not the same as a finding that an asylum applicant's claim is "frivolous." Before an adjudicator can make a frivolousness finding, a preponderance of the evidence must demonstrate that the applicant knowingly filed an application with a deliberate fabrication or misrepresentation of a material fact.[10] Unlike an adverse credibility finding, a frivolousness finding in the context of an asylum application, if affirmed, will permanently bar the noncitizen from all benefits under the INA.[11] Because the consequences of a frivolousness finding are so far-reaching, it is crucial to address it separately from any adverse credibility finding, and to not conflate the two.[12]

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[8] INA §§ 208(b)(1)(B)(iii) (asylum); 240(c)(4)(C) (all applications for relief from removal).

[9] *Settenda v. Ashcroft*, 377 F.3d 89, 95 (1st Cir. 2004); *Chen v. Gonzales*, 417 F.3d 268, 273 (2d Cir. 2005); *Pieschacon-Villegas v. Att'y Gen. of U.S.*, 671 F.3d 303, 313–14 (3d Cir. 2011), *abrogated in part by Nasrallah v. Barr*, 140 S. Ct. 1683 (2020); *Quintero v. Garland*, 998 F.3d 612, 646–47 (4th Cir. 2021); *Kukalo v. Holder*, 744 F.3d 395, 402 (6th Cir. 2011); *Mansour v. INS*, 230 F.3d 902, 908 (7th Cir. 2000); *Kamalthas v. INS*, 251 F.3d 1279, 1284 (9th Cir. 2001). *But see*, *Efe v. Ashcroft*, 293 F.3d 899 (5th Cir. 2002) (upholding denial of CAT where adverse credibility finding in asylum case went to issue of whether applicant would be convicted and imprisoned upon removal);

[10] 8 C.F.R. § 1208.20; *Matter of Y-L-*, 24 I&N Dec. 151, 156 (BIA 2007).

[11] INA § 208(d)(6).

[12] This advisory only addresses appealing an immigration judge's adverse credibility finding and does not discuss the special considerations in challenging a frivolousness finding. For guidance on how to prevent and challenge a frivolous application finding, see ILRC's Essentials of Asylum Law (5th Ed.) available for purchase at https://store.ilrc.org/essentials-of-asylum-law.

III. To Prevail on Appeal, the Respondent Must Prove That the IJ's Adverse Credibility Finding Was "Clearly Erroneous"

The BIA will not reverse an IJ's adverse credibility finding unless it is found to be "clearly erroneous."[13] Therefore, when challenging an IJ's adverse credibility finding before the BIA, advocates must ensure that they explicitly argue that the IJ's determination was "clearly erroneous," or based on "clear error."

In interpreting the "clear error" standard, the BIA has stated that "[a] factfinding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder."[14] Rather, for a finding to be "clearly erroneous," the BIA "on the entire evidence must be left with the definite and firm conviction that a mistake has been committed."[15]

IV. What to do if the IJ Has Not Made an Explicit Finding Regarding Credibility or the Reasons for the Finding are Unclear

As mentioned, the statute states: "if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal."[16] This statutory language can be a powerful tool on appeal in cases where the IJ's decision contains no explicit adverse credibility finding, both with respect to the respondent and any other witnesses. In these cases, advocates should argue that there is no explicit credibility finding, and the applicant is entitled to a presumption of credibility on appeal.

If the IJ's decision is not clear as to whether the IJ made an adverse credibility finding, advocates should argue that no such finding was made. For example, the decision may state: "the respondent's testimony makes the court doubt whether the respondent is credible," or "the inconsistent testimony of the respondent raises concerns about the veracity of her claim." In such cases, advocates should first argue that merely expressing doubt or concern is not a sufficiently clear finding on credibility, which means the BIA should presume the respondent's and other witnesses' credibility. So if it is unclear whether the IJ made an adverse credibility finding, or what the reasoning behind such a finding was, that in itself is grounds for reversal of the IJ's decision.[17]

Relatedly, an adverse credibility finding that is unsupported by "specific and cogent reasons" is also subject to reversal.[18] For example, if the finding is conclusory, without citing examples in

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[13] 8 C.F.R. § 1003.1(d)(3)(i).
[14] *Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003) (internal quotation marks and citations omitted).
[15] *Id.*
[16] INA §§ 208(b)(1)(B)(iii) (asylum); 240(c)(4)(C) (all applications for relief from removal). Absent an adverse credibility finding by the IJ, the BIA must presume that an applicant for immigration relief is credible. However, the Supreme Court has held that this presumption of credibility does not apply once a case is appealed to a federal circuit court. *See Garland v. Ming Dai*, 141 S. Ct. 1669 (2021).
[17] *Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000).
[18] *Id.*; *Matter of A-S-*, 21 I&N Dec. 1106, 1109–10 (BIA 1998).

the record, or is based on vague or generalized observations rather than specific factors, advocates should challenge the finding for lacking a specific and cogent basis in the record.

In sum, challenge the existence or specificity of the credibility finding first. But alternatively, if the BIA may interpret the IJ's decision as containing an adverse credibility finding that is supported by specific and cogent reasons, it would be prudent to challenge any such finding on the merits, as discussed in the following section and in Part Two of this practice advisory.[19]

V. What if the IJ Made an Explicit Adverse Credibility Finding and Provided Specific Reasons for the Finding?

If the IJ made an explicit adverse credibility finding and supported it with specific and cogent reasons (or if the BIA may disagree with an argument to the contrary, thus requiring an alternative challenge on the merits), the next step is to closely read the IJ's decision, identify what bases the IJ provided in support of the finding, and craft strong challenges to each basis. This is an important process, since, according to the BIA, where an IJ has made detailed findings in support of an adverse credibility finding, the noncitizen is "obligated on appeal to challenge those findings in a specific manner. It is not enough to challenge them only in generalities."[20]

PRACTICE TIP: It often takes multiple readings of an IJ's decision before fully identifying the IJ's reasons for disbelieving a witness. As you read through the IJ's decision, closely watch for not only explicit reasons provided by the IJ in support of the adverse credibility finding, but also other statements in the decision that imply the IJ's reasons for disbelieving the applicant or witness. For example, in other parts of the decision, the IJ may state that the applicant's claim is "typical" of the claims the IJ has seen from a particular country. Or the IJ may imply that an asylum applicant's true motive for coming to the United States was not fear, but rather economic, because they began working within a week of arriving. These would be examples of reasons that cannot support an adverse credibility finding since the IJ did not state them as reasons in support of the finding, or perhaps because the IJ did not give the respondent an opportunity to explain the perceived credibility issue (see below). They can also demonstrate the IJ's bias against the respondent, which can itself provide grounds for remand. Practitioners should also thoroughly read the transcript of proceedings to identify other implicit instances of bias or failure to allow a witness to fully testify.

The statute provides that for applications for relief filed on or after May 11, 2005, an IJ may base an adverse credibility finding on any relevant factor, "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim."[21] The

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[19] *See*, *e.g.*, *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000) ("Because a finding that testimony is 'implausible' indicates disbelief, for the purposes of this appeal, we treat the BIA's comments regarding 'implausibility' as an adverse credibility finding.").
[20] *Matter of R-S-H-*, 23 I&N Dec. 629, 641 (BIA 2003).
[21] INA §§ 208(b)(1)(B)(iii) (asylum); 240(c)(4)(C) (all applications for relief from removal). These provisions were codified as part of the REAL ID Act, Pub. L. 109-13, 119 Stat. 303-04, which is applicable to all applications filed on or after May 11, 2005. For applications filed before May 11, 2005, the reasons relied on by the IJ in support of an adverse credibility finding must go to the "heart of the claim." *Matter of S-B-*, 24

remainder of this two-part practice advisory addresses the potential grounds on which an IJ may base an adverse credibility finding, either explicitly or implicitly. Advocates should address each reason the IJ may have relied on to support an adverse credibility finding with as much specificity as possible.

A. Inconsistencies and omissions

Likely the most common reason cited by IJs in support of adverse credibility findings is perceived internal inconsistencies within the witness's testimony or between the testimony and other evidence. Relatedly, IJs will sometimes cite to omissions in an applicant's testimony or written claim, which the IJ perceives as an implicit inconsistency.

The BIA employs a three-pronged approach in assessing an IJ's credibility finding, which is most applicable in cases involving perceived inconsistencies and omissions.[22] It will defer to the IJ's adverse credibility finding if: (1) the discrepancies and omissions described by the IJ are actually present in the record; (2) such discrepancies and omissions provide specific and cogent reasons to conclude that the respondent was not credible; and (3) the respondent failed to provide a convincing explanation for the discrepancies and omissions.[23] Based on this three-pronged approach and subsequent case law, following are potential ways to challenge any perceived inconsistency or omission identified by the IJ.

Does the discrepancy or omission actually exist? First and most important, determine whether the inconsistency actually exists in the record.[24] Showing that the evidence is consistent on a certain fact is the strongest argument you can make against a perceived inconsistency. For example, perhaps the IJ misinterpreted your client's testimony regarding an incident, or mistakenly conflated two events with similar but distinct facts. Similarly, if the IJ claims that an omission occurred in the respondent's testimony or other evidence, the first step is to confirm whether there actually was an omission. Review other evidence in the record to determine if the supposedly missing fact was actually stated elsewhere that the IJ failed to consider. If the record indicates that no such inconsistency or omission actually occurred, practitioners should clearly make that argument with specific citations to the record to demonstrate that the IJ misapprehended or overlooked the evidence.

Was the respondent/witness given an opportunity to explain? IJs may not rely on inconsistencies that "take a respondent by surprise.[25] Rather, for an inconsistency to form the

I&N Dec. 42 (BIA 2006). Although applications filed before the effective date of the REAL ID Act are no longer common, it is important to be aware of the difference in standards for pre- versus post-REAL ID cases. Adverse credibility findings in pre-REAL ID cases are generally easier to challenge since the issues cited by the IJ must each go to the heart of the applicant's claim, and it is not enough for the reasons to simply be "relevant" and based on the "totality of the circumstances."

[22] *Matter of A-S-*, 21 I&N Dec. at 1109.

[23] *Id.*

[24] *Matter of S-A-*, 22 I&N Dec. at 1332 ("Having reviewed the record, we find that the discrepancies identified by the Immigration Judge are not actually present.")

[25] *Matter of B-Y-*, 25 I&N Dec. 236, 242 (BIA 2010). *But see*, *Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011) (while the applicant must be given an opportunity to explain perceived inconsistencies, an IJ is not required to adopt an applicant's explanation for an inconsistency if there are other permissible views of the evidence based on the record).

basis of an adverse credibility determination, the respondent must be on notice of the perceived discrepancy and be given an opportunity to explain. So the next step is to ensure that the IJ provided the witness with such an opportunity, either through direct questioning by the IJ or counsel, or during cross-examination. If not, an adverse credibility finding based on the perceived inconsistency or omission cannot stand.[26]

> **Example:** In denying respondent Teresa's asylum application, the IJ stated that Teresa lacked credibility because she testified that police detained her for two days, even though her written declaration stated that she had been detained for three days. At the hearing, neither the IJ nor the government attorney asked Teresa about a perceived inconsistency between these two accounts. When you review the transcript of Teresa's testimony, you notice that Teresa testified that she was arrested in the evening, and that she then referred to the following day as the "first day" of her detention. She then referred to the day she was released as the "second day" of her detention. This appears to be because Teresa was not counting the day of her arrest as the first day of her "detention," likely because she was arrested in the evening and nothing significant happened until the following day. Your first argument on appeal to the BIA will be that no discrepancy exists between Teresa's declaration and testimony regarding the number of days she was detained, since in her declaration referred to the number of days she was detained, while her testimony referred to the "first day" of her detention as the first full day. In making this argument, you will quote and cite to the specific pages of the declaration and transcript. Alternatively, you will argue that even if a discrepancy exists, the IJ erred by failing to give Teresa an opportunity to explain the perceived discrepancy.

Are records of prior proceedings reliable? If the adverse credibility finding was based on inconsistencies between a witness's testimony in court and a prior proceeding, counsel should explore whether the record and circumstances of the prior proceeding are a reliable basis for judging the witness's credibility.[27] Generally, the BIA applies a "presumption of reliability" to "Government documents," including information collected during prior border and asylum

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[26] The Board has held that "[i]f an inconsistency is obvious or glaring or has been brought to the attention of the respondent during the course of the hearing, however, there is no requirement that a separate opportunity for explanation be provided prior to making the adverse credibility determination." *Matter of B-Y-*, 25 I&N at 242. So in arguing that a witness was not given the opportunity to explain a perceived inconsistency or omission, practitioners should additionally point out that the inconsistency was not "obvious or glaring" to the witness, who should have been given an opportunity to explain.

[27] *Matter of S-S-*, 21 I&N Dec. 121, 123–24 (BIA 1995) ("When, as in these asylum proceedings, the applicant's credibility is placed in issue because of alleged statements made at the asylum interview, our review requires a reliable record of what transpired at that interview. This record might be preserved in a hand-written account of the specific questions asked of the applicant and his specific responses to those questions. Such question-and-answer statements could be signed by the applicant as an accurate summary of the interview. Alternatively, a suitable record could be produced through transcription of an electronic recording of the asylum interview. At a minimum, the record must contain a meaningful, clear, and reliable summary of the statements made by the applicant at the interview. The Board needs to know what transpired in the proceedings before the asylum officer before we can evaluate questions with respect to credibility arising from the interview. Only then can we determine whether the notice of intent to deny accurately and thoroughly informed the applicant of all adverse considerations which serve as the basis for the intended denial.").

interviews that are submitted by the government during removal proceedings.[28] However, the BIA recognizes that the courts of appeal "have reversed adverse credibility findings based on such interviews when they lacked adequate safeguards."[29] When reviewing a record of a prior immigration proceeding, the BIA requires the IJ to first "consider whether there are persuasive reasons to doubt the [noncitizen's] understanding of the interviewer's questions" and "[t]he most basic consideration is whether an interpreter was provided if one was requested.[30]

Beyond these basic requirements, there is a circuit split on what constitutes a reliable record of a prior proceeding. For example, the Second Circuit has instructed IJs and the BIA to consider whether: (1) the record of the interview is a verbatim transcript; (2) the interviewer asked questions designed to develop a claim for relief; (3) the applicant's prior traumatic experiences may have impacted their ability to answer questions; and (4) the applicant's answers to the questions suggest that they did not understand English or the interpreter's translations.[31] On the other hand, the First Circuit has held that IJs should not "undertake an inquiry into the reliability of initial interviews with Border Patrol agents using specifically enumerated factors," but rather should consider various factors on a case-by-case basis.[32]

So anytime an IJ has relied on records of prior immigration proceedings to support an adverse credibility finding, it is important to point out specific factors that make the prior record unreliable. For example, advocates should highlight apparent translation issues, indicators that the applicant did not understand the interview questions, or evidence that the record of interview is not a verbatim transcript and therefore is not "a reliable record of what transpired at [the] interview."[33] Additionally, practitioners should incorporate the law of their circuit with regards to how records of prior proceedings are treated.

Is mistranslation or miscommunication to blame for the perceived inconsistency? An IJ may perceive an inconsistency, omission, or unresponsive answer as a credibility issue, when in fact the issue is attributable to translation error or miscommunication. The BIA has recognized that a competent interpreter during removal proceedings is crucial to providing a fundamentally fair hearing for a respondent.[34] However, where an interpretation error has occurred, the respondent must not only prove the error, but also that they were prejudiced by the error.[35]

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[28] *Matter of J-C-H-F-*, 27 I&N Dec. 211, 212 (BIA 2018).
[29] *Id.* at 212.
[30] *Id.* at 213.
[31] *Ramsameachire v. Ashcroft*, 357 F.3d 169, 180 (2d Cir. 2004); *see also Joseph v. Holder*, 600 F.3d 1235, 1243 (9th Cir. 2010) (noting that court has "rejected adverse credibility findings that relied on differences between statements a petitioner made during removal proceedings and those made during less formal, routinely unrecorded proceedings").
[32] *Ye v. Lynch*, 845 F.3d 38, 45 (1st Cir. 2017); *see also Matter of J-C-H-F-*, 27 I&N Dec. at 215 (agreeing with First Circuit's approach).
[33] *Matter of S-S-*, 21 I&N Dec. at 124.
[34] *Matter of Tomas*, 19 I&N Dec. 464, 465 (BIA 1987) ("The presence of a competent interpreter is important to the fundamental fairness of a hearing if the [noncitizen] cannot speak English fluently."). *See also Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984) ("A hearing is of no value when the [noncitizen] and the judge are not understood.").
[35] *Matter of D-R-*, 25 I&N Dec. 445, 461 (BIA 2011) ("the respondent must show both that the interpreter did not perform competently and that his hearing was prejudiced by that failure"). *See also Matter of Exilus*, 18 I&N Dec. 276, 280 (BIA 1982); 8 C.F.R. § 1240.5 ("Any person acting as an interpreter in a hearing before

Where a witness elected to proceed in English but may have nevertheless had difficulty communicating effectively while testifying, some courts have been willing to attribute inconsistencies to limited English language ability rather than a lack of credibility.[36] Similarly, in at least one circuit, discrepancies "capable of being attributed to a typographical or clerical error … cannot form the basis of an adverse credibility finding."[37]

As you review the IJ's decision, transcript of proceedings, and other evidence in the record while preparing an appeal to the BIA, it is important to note instances where mistranslation, miscommunication, or clerical error may be to blame for a perceived inconsistency or other problem. Oftentimes, these issues become apparent after a careful review of the record.[38]

B. Specificity and detail

Before the IJ found the witness's testimony to be lacking in specificity and detail, did the IJ or government counsel ask the witness for more details? Although the specificity and detail of a witness's testimony is a relevant and fair consideration in the assessment of their credibility, witnesses must be given notice and an opportunity to provide more details before being faulted for a lack of specificity or detail.[39] A finding that a witness's testimony was too vague or general especially cannot stand where their testimony was cut short by the IJ.[40] Also,

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an immigration judge under this part shall be sworn to interpret and translate accurately, unless the interpreter is an employee of the United States Government, in which event no such oath shall be required."). *But see He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003) ("Even where there is no due process violation, faulty or unreliable translations can undermine the evidence on which an adverse credibility determination is based.").

[36] *See*, *e.g.*, *Kebede v. Ashcroft*, 366 F.3d 808, 811 (9th Cir. 2004) (inconsistencies in witness's testimony had more to do with "difficulties with English than with prevarication").

[37] *Shah v. INS*, 220 F.3d 1062, 1068 (9th Cir. 2000); *see also Kumar v. Garland*, 18 F.4th 1148, 1153 (9th Cir. 2021) ("cases caution against relying too heavily on inconsistencies that could be attributable to simple human error or reluctance").

[38] *See*, *e.g.*, *Augustin v. Sava*, 735 F.2d 32, 33–35 (2d Cir. 1984) (when applicant was asked if he was a native of Haiti, the interpreter translated his answer as "I am not married yet, but I know I am the Haitian." This was clearly "nonsensical" and indicative of interpretation errors).

[39] *Li v. Mukasey*, 529 F.3d 141, 147 (2d Cir. 2008) ("[A] finding of testimonial vagueness cannot, without more, support an adverse credibility determination unless government counsel or the IJ first attempts to solicit more detail from the [noncitizen]"); *Joseph v. Holder*, 600 F.3d at 1244 ("Even if the IJ could properly consider the lack of detail Joseph gave at his bond hearing, 'a general response to questioning, followed by a more specific, consistent response to further questioning is not a cogent reason for supporting a negative credibility finding.'"); *Chand v. I.N.S.*, 222 F.3d 1066, 1074–75 (9th Cir. 2000) ("While it is true that certain events could have been described in greater detail, the absence of such detail is insignificant on the record before us, particularly given that the IJ made no attempt to elicit a more specific description from Chand. The IJ had a duty, shared with Chand, to ascertain the information relevant to the asylum claim and to aid in the development of the record.").

[40] *See Mukamusoni v. Ashcroft*, 390 F.3d 110, 120–21 (1st Cir. 2004) (BIA erred in finding testimony to be vague, where IJ had encouraged the applicant to keep her testimony short due to the length of her "extensive" affidavit).

practitioners should point out specific details that the witness did provide, which would undercut the IJ's finding.[41]

> **Example:** Wei testified during his asylum hearing that during his detention in a Chinese prison, guards "abused" him. The IJ concluded that Wei was not a credible witness, citing as one reason, Wei's "vague" testimony regarding his detention. In challenging the IJ's credibility finding with the BIA, you will argue that the IJ's finding was clearly erroneous, since neither the IJ nor the attorneys for the parties asked Wei to explain what he meant by being "abused" by the guards. If Wei submitted a declaration or other evidence that provided more details about his treatment in detention, you will cite to those portions of the record to indicate that Wei would have provided more detail during his testimony, had he been asked relevant questions.

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[41] *Issiaka v. Att'y Gen.*, 569 F.3d 135, 139–40 (3d Cir. 2009) (IJ's finding that the respondent did not sufficiently describe a head injury was erroneous where the respondent explained how he was injured; how many cuts he suffered; described the injuries descriptively, and where the IJ examined the respondent's head and acknowledged his injuries); *Sylla v. Ashcroft*, 388 F.3d 924, 928 (6th Cir. 2004) ("Both the IJ and BIA indicate that Sylla's testimony was lacking in detail concerning his arrest and imprisonment …. The record, however, indicates that Sylla through his Malinke translator gave specific answers to almost every question asked.").