Standard Language Addendum: Frivolous Asylum Application

The following statements of law are hereby incorporated into the Immigration Judge's oral decision. These statements are not the sole legal basis for the decision and are meant to be read in conjunction with any law cited in the oral decision itself.

Frivolous Asylum Application

A respondent who has "knowingly made a frivolous application for asylum . . . shall be permanently ineligible for any benefits under the [INA]." *See* INA § 208(d)(6). The Immigration Judge must make a specific finding that the respondent "deliberately fabricated" a "material element[]" of the application. 8 C.F.R. § 1208.20. The Board of Immigration Appeals has devised a four-part framework to determine whether a respondent has made a frivolous application for asylum. *See Matter of Y-L-*, 24 I&N Dec. 151, 155 (BIA 2007). When the issue of the frivolous asylum application bar is raised, and Immigration Judge must make sufficient findings of fact and conclusions of law on whether the requirements for a frivolousness determination under *Matter of Y-L-* have been met. *Matter of M-M-A-*, 28 I&N Dec. 494 (BIA 2022)

First, the framework requires notice to a respondent of the consequences of filing a frivolous application. *Matter of Y-L-*, 24 I&N Dec. at 156. "[A]s a matter of law, the written notice provided on the asylum form is sufficient" to establish such notice. *Ribas v. Mukasey*, 545 F.3d 922, 930 (10th Cir. 2008).

Second, the Immigration Judge must make a specific finding that the respondent knowingly filed a frivolous application. *Matter of Y-L-*, 24 I&N Dec. at 156. A deliberate fabrication involves a knowing and intentional misrepresentation of the truth. *Id.* Determining whether a fabrication was knowing or deliberate is a factual question of intent, and such a determination can be made using either circumstantial or direct evidence. *Id.* at 159. The Court must provide cogent and convincing reasons for finding, by a preponderance of the evidence, that the respondent knowingly and deliberately fabricated material elements of his claim. *Id.* at 156.

Third, there must be sufficient evidence in the record to support the finding that the respondent deliberately fabricated a material element of the asylum application. *Matter of Y-L-*, 24 I&N Dec. at 156. The materiality of a fabricated element of an asylum application is determined at the time the application is filed. *Matter of M-S-B-*, 26 I&N Dec. 872, 877 (BIA 2016). Misrepresentation of the date of entry is material if it goes to the question of whether the application is time barred. *See id.* at 878-79.

Lastly, the respondent must be given sufficient opportunity to account for any discrepancies or implausibilities. *Matter of Y-L-*, 24 I&N Dec. at 159-60; *see also* 8 C.F.R. § 1208.20. It is "good practice" for the Court to inform the respondent of its concerns that the application may be frivolous prior to the conclusion of proceedings. *Id.*

In making a frivolous determination, the Court may incorporate any factual findings made in support of an adverse credibility finding. *See Matter of B-Y-*, 25 I&N Dec. 236 (BIA

2010). Additionally, the filing of the asylum application is the only action required to trigger a frivolous finding, such that the respondent need not pursue the filed application to finality. *See Matter of X-M-C-*, 25 I&N Dec. 322, 324 (BIA 2010). "Allowing the preemptive withdrawal of an application to prevent a finding of frivolousness would undermine both the plain language of, and the policy behind, section 208(d)(6)." *Id.* at 325. Therefore, a respondent remains subject to the frivolous bar even if the respondent is otherwise ineligible for asylum, statutorily barred from asylum on other grounds, withdraws the application, or recants false statements. *See Matter of M-S-B-*, 26 I&N Dec. 872, 878 (BIA 2016).

FRIVOLOUS ASYLUM APPLICATION

Boilerplate – General

At the time of filing an application for asylum, the Attorney General must advise a respondent of the privilege of being represented by counsel and of the consequences of knowingly filing a frivolous application for asylum and provide the alien a list of persons who have indicated their availability to represent the aliens in asylum proceedings on a pro bono basis. INA § 208(d)(4). If a respondent receives such notice and then knowingly makes a frivolous application for asylum, the respondent shall be permanently ineligible for any benefits under the Act, effective as of the date of a final determination of such application. INA § 208(d)(6).

The BIA has formulated a four-part test for determining frivolousness, requiring that (1) the applicant receive notice of the consequences of filing a frivolous application; (2) the Immigration Judge (IJ) make a specific finding that the applicant knowingly filed a frivolous application; (3) there be sufficient evidence in the record that a material element was deliberately fabricated; and (4) that the applicant has been afforded a sufficient opportunity to account for any discrepancies or implausible aspects of the claim. Matter of Y-L-, 24 I&N Dec. 151, 155 (BIA 2007). An application is frivolous if the fabricated elements "materially bolstered" the claim. Limbeya v. Holder, 764 F.3d 894, 900 (8th Cir. 2014) (holding an asylum application was not frivolous merely because the applicant had lied about who prepared his application). An IJ must provide "cogent and convincing reasons" for determining by a preponderance of the evidence that Respondent knowingly and deliberately fabricated a material element of an asylum claim. See Matter of Y-L-, 24 I&N Dec. at 159.

An IJ or the DHS can raise the issue of a frivolous asylum application. Matter of M-M-A-, 28 I&N Dec. 494, 497 (BIA 2022) (citation omitted). If the DHS does not raise the issue, the IJ is not required to address it. Id. (citation omitted). However, if the DHS raises the issue, the IJ "must make sufficient findings of fact and conclusions of law on whether the requirements for a frivolousness determination under Matter of Y-L-, 24 I&N Dec. at 155–60, have been met." Id. at 499.

Although the Board in Matter of Y-L- suggested that it might be "good practice" for an IJ who believes that an applicant may have submitted a frivolous asylum application to bring this issue to the attention of the applicant prior to the conclusion of proceedings, an IJ is not required to provide additional warnings during the course of the merits hearing that a frivolousness determination is being considered. Matter of B-Y-, 25 I&N Dec. 236, 241-42 (BIA 2010) (clarifying Matter of Y-L-, 24 I&N Dec. 151 (BIA 2007)). Sufficient notice exists when the IJ explains the consequences of filing a frivolous asylum application, either at the time the asylum application is filed or prior to the merits hearing. Id.

In making a frivolousness determination, an IJ may incorporate by reference any factual findings made in support of an adverse credibility finding, so long as the IJ makes explicit findings that the incredible aspects of the asylum application were material and deliberately fabricated. Matter of B-Y-, 25 I&N Dec. at 239-40.

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Board of Immigration Appeals: STANDARD AND SCOPE OF REVIEW

JLC/New Attorney Training

2022

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AGENDA

- BIA standard and scope of review
- de novo
- clear error
  - what is clear error?
  - what is a fact?
  - employing the standard
    - terminology
    - application
- interplay of de novo and clear error
- weighing evidence
- recognizing when a remand is warranted

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8 C.F.R. § 1003.1(d)(3)

(i) The Board will not engage in *de novo* review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.

(ii) The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*.

8 C.F.R. § 1003.1(d)(3), cont.

(iii) The Board may review all questions arising in appeals from decisions issued by Service [DHS] officers *de novo*.

(iv) Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, **the Board will not engage in factfinding in the course of deciding appeals.** A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service [DHS].

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STANDARD OF REVIEW

- amount of deference given by one court when reviewing the decision of another court
- strictness or intensity of an appellate court's review

DE NOVO REVIEW

- review is “anew” and unfettered
- DHS decisions (e.g, visa petitions)
  - all issues
- IJ decisions – questions of:
  - law (*e.g.*, whether crime is aggravated felony, CIMT)
  - discretion (*e.g*, cancellation, voluntary departure)
  - judgment and all other issues (except facts)

CLEAR ERROR REVIEW

IJ Decisions

- applies to facts
- 8 C.F.R. § 1003.1(d)(3)(i)

WHAT IS CLEAR ERROR?

- although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

- where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer, 470 U.S. 564, 537-74 (1985).

Highly deferential and requires more than the Board just disagreeing with the Immigration Judge's determinations.

See e.g., Matter of R-S-H-, 23 I&N Dec. 629, 637 (BIA 2003).

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WHAT ARE "FACTS"?

- credibility determinations
- findings as to what may or may not occur in future
  - *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015)
- subjective motivation of persecutor
  - *Matter of D-R-,* 25 I&N Dec. 455 (BIA 2011)
- states of mind such as intentions and opinions
  - *Crespin-Valladares v. Holder,* 632 F.3d 117 (4th Cir. 2011)
  - *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007)
    - whether fabrication was knowing or deliberate
- establishing that an event occurred on, before, or after a particular date
- what happened to the respondent

- Whether a person is a member of a particular social group
  - *Matter of A-R-C-G-*, 26 I&N Dec. 388, 391 (BIA 2014)

- government unable/unwilling to control (asylum)
  - *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2008); *Crespin Valladares* at 128-29

- internal relocation (asylum)
  - *Zhu v. U.S. Attorney General*, 703 F.3d 1303, 1311 (11th Cir. 2013)

- finding of competency
  - *Matter of J-S-S-,* 26 I&N Dec. 388, 391 (BIA 2015)

- whether noncitizen diligently pursued collateral relief from removal
  - *Matter of L-N-Y-,* 27 I&N Dec. 755, 758 (BIA 2020)

- false testimony with subjective benefit of obtaining immigration benefits
  - *Flores v. Holder,* 699 F.3d 998 (8th Cir. 2013)

  - Note: be mindful of circuit specific holdings

USING CORRECT TERMINOLOGY

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- standard language paragraph not enough
- employ proper terminology throughout analysis
- most significant when reversing IJ grant, but courts always pay attention (e.g., upholding IJ denial; R's want increased review)
- "disagree" does not mean clear error
- "agree" does not mean no clear error

Do not utilize phrases that do not reflect our standard of review such as:

- substantial evidence
- reversible error
- abuse of discretion
- evidence compels

EMPLOYING CLEAR ERROR STANDARD

- highly deferential
- cannot set aside the IJ's findings just because you disagree
- when determining clear error, need to provide a meaningful explanation which comports with limits of review

INTERPLAY OF STANDARDS

Asylum

- IJ's predictive findings of what may or may not occur in the future are findings of fact subject to clear error review
- whether an applicant has an objectively reasonable fear of persecution based on the events that the IJ found may occur upon the applicant's return to the country of removal is a legal determination subject to de novo review

Matter of Z-Z-O-, 26 I&N Dec. 586 (BIA 2015).

INTERPLAY OF STANDARDS

Convention Against Torture

- what is likely to happen to R upon return is a factual question
- whether these events rise to the legal definition of torture is subject to de novo review

e.g., Matter of R-A-F-, 27 I&N Dec. 778 (A.G. 2020).

INTERPLAY OF STANDARDS

Convention Against Torture/Acquiescence

- how public officials are likely to act in response to harm the R fears is a factual question
- whether these actions qualify as acquiescence under the regulations is a legal question

e.g., Guzman Orellana v. Att'y Gen., 956 F.3d 171 (3d Cir. 2020); *Cruz-Quintanilla v. Whitaker,* 941 F.3d 884 (4th Cir. 2019).

INTERPLAY OF STANDARDS

Cancellation of Removal/EEUH

- clear error: what R claims is EEUH to qualifying relative
  - e.g. health issues; educational achievements or concerns; financial situation; conditions in native country
- de novo: whether those facts determined by IJ and found not to be clearly erroneous amount to EEUH

INTERPLAY OF STANDARDS

Discretion

- review underlying facts for clear error; generally R's equities, including:
  - family ties; employment history; health assessments; credibility; criminal history; remorse or rehabilitative activities
- the discretion or judgment based on those findings of fact, and weight to be accorded to individual factors may be reviewed de novo

WEIGHING EVIDENCE

- Weighing evidence
  - de novo review
  - distinct from fact finding
  - *Matter of H-L-H-*, 25 I&N Dec. 209 (BIA 2010), *abrogated by Hui Lin Huang v. Holder*, 677 F.3d 120 (2d Cir. 2012)
    - BIA concludes that Department of State information is more persuasive than respondent's particularized evidence, such as letters from friends and relatives
  - do not cherry pick evidence to rely upon – must consider all evidence and facts as found by IJ

RECOGNIZING WHEN REMAND IS WARRANTED

- BIA cannot find facts in the first instance.
  - 8 C.F.R. § 1003.1(d)(3)(iv)
  - except administrative notice, limited circumstances
- Did IJ make necessary findings of fact?
  - *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002) –explains the need for IJs to include in their decisions clear and complete findings of fact that are supported by the record and are in compliance with controlling law.
  - If no separate oral or written decision, can basis for decision be discerned from transcript? *Matter of Rodriguez-Carrillo*, 22 I&N Dec. 1031 (BIA 1999).

RECOGNIZING WHEN REMAND IS WARRANTED

- Can remand be avoided?
  - facts uncontested on appeal
  - viewing facts in most favorable light, record still supports IJ determination
    - *cf.* where facts contested and necessary to resolve case
      - e.g., case rests on credibility
  - alternative grounds can resolve case
    - e.g., statutory bar so credibility not determinative

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SUMMARY

- pay extra attention when reversing IJ grant of relief
- recognize what is a “fact”
- correctly employ the clear error standard
  - use correct terminology
  - recognize limits of clear error review and accord proper deference to IJ’s findings of facts
  - analysis must reflect a meaningful consideration of IJ’s reasoning
- when weighing evidence, do not cherry pick what to rely upon
- if further fact finding is necessary, a remand might be warranted.

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FINAL NOTE

- Resources :
  - Standard and Scope of Review outline: Board Basics/G drive
    - updated May 2022
  - BIA case alerts & EOIR weekly bulletin
  - Circuit court review: OIL training 2022
    - (remember: BIA has different SOR)

Asylum, Withholding and CAT

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8 C.F.R. § 208.15.

The government has the initial burden of producing evidence that indicates that the firm resettlement bar applies. *See Abdille v. Ashcroft*, 242 F.3d 477, 491 (3d Cir. 2001) (applying 8 C.F.R. § 208.13(c)(2)(ii) burden allocation scheme to applications filed after April 1, 1997). A *prima facie* case of firm resettlement is established once the evidence shows that the applicant received an offer of permanent resident status, citizenship or some other type of permanent resettlement in a third country.[19] *Abdille v. Ashcroft*, 242 F.3d 477, 486 (3d Cir. 2001); *see also Matter of A-G-G-*, 25 I&N Dec. 486, 501-02, 502 (BIA 2011) (holding that the government should secure "direct evidence of governmental documents indicating an alien's ability to stay in a country indefinitely" as part of a four-step analysis). Should the government satisfy this threshold burden of production, the burden then shifts to the respondent to demonstrate by a preponderance of the evidence that an offer of firm resettlement has not been made to the respondent or that he or she would not qualify for it. *Matter of K-S-E*, 27 I&N Dec. 818, 820 (BIA 2020) (citing *Matter of D-X- & Y-Z-*, 25 I&N Dec. 664, 665 (BIA 2012)); *Matter of A-G-G-*, 25 I&N Dec. 486, 501-02 (BIA 2011). A viable and available offer to apply for permanent residence in a country of refuge is not negated by the noncitizen's unwillingness or reluctance to satisfy the terms for acceptance. *Matter of K-S-E*, 27 I&N Dec. 818 (BIA 2020) (finding that a resettlement offer that is contingent on maintaining employment does not prevent the status offered from being "permanent"). To establish that an exception to firm resettlement applies, the respondent may provide evidence indicating that the nature of his stay in the country at issue was too tenuous or that the conditions imposed by the country's government were too restrictive for him to be considered firmly resettled. *See Matter of K-S-E*, 27 I&N Dec. at 821; *see also* 8 C.F.R. § 1208.15(a)-(b).

The Third Circuit has rejected a "totality of the circumstances approach" in determining firm resettlement. *Abdille v. Ashcroft*, 242 F.3d 477, 479 (3d Cir. 2001) (reversing firm resettlement finding where person was granted asylum for two years in South Africa). The court reasoned that non-offer based factors, such as availability of housing to the noncitizen, extent and types of employment accessible to the noncitizen, and the ability of the noncitizen to hold property, should be considered only in determining whether one of the two exceptions to firm resettlement is satisfied. *Abdille v. Ashcroft*, 242 F.3d 477, 486 (3d Cir. 2001). However, if the government is unable to secure direct evidence of a formal government offer and is thus unable to make a *prima facie* showing that an applicant has been firmly resettled, non-offer-based elements can serve as a surrogate for direct evidence. *Abdille v. Ashcroft*, 242 F.3d 477, 486-87 (3d Cir. 2001).

8. Frivolous Applications

An applicant who "has knowingly made a frivolous application for asylum . . . shall be permanently ineligible for any benefits under this Act," including asylum. INA § 208(d)(6). Such an applicant is not, however, ineligible for withholding of removal. 8 C.F.R. § 1208.20; *see Luciana v. Att'y Gen.*, 502 F.3d 273, 278 n.3 (3d Cir. 2007) (citing *Muhanna v. Gonzales*,

[19] In *Matter of D-X- & Y-Z-*, the BIA held that a facially valid permit allowing an asylum applicant to reside in a third country constitutes *prima facie* evidence of firm resettlement offer, even if the permit was obtained fraudulently. 25 I&N Dec. 664, 665-66 (BIA 2012).

399 F.3d 582, 589 (3d Cir. 2005)).

There is no statute of limitations on making a frivolous determination and IJs are not limited to considering the frivolousness of only currently pending asylum applications. *Matter of X-M-C-*, 25 I&N Dec. 322, 325 n.3 (BIA 2010). Once a finding of frivolousness has been made, it may not be waived under any circumstances. *Muhanna v. Gonzales*, 399 F.3d 582, 588 (3d Cir. 2005). Either the IJ or DHS may raise the issue of frivolousness, but the IJ need not evaluate an application for frivolousness if DHS does not raise the issue. *Matter of X-M-C-*, 25 I&N Dec. 322, 324 n.1 (BIA 2010). DHS bears the burden to demonstrate frivolousness. *Matter of B-Y-*, 25 I&N Dec. 236, 240 (BIA 2010). When DHS raises the issue of frivolousness, an IJ must make sufficient findings of fact and conclusions of law on whether the requirements for a frivolousness determination have been met. *Matter of M-M-A-*, 28 Dec. 494, 497 (BIA 2022).

An asylum application is frivolous "if any of its material elements is deliberately fabricated." 8 C.F.R. § 1208.20. The materiality of a fabricated element of an asylum application is determined at the time the application is filed. *See Matter of X-M-C-*, 25 I&N Dec. 322, 324 (BIA 2010). An analysis of whether a material element was deliberately fabricated centers on whether the fabrication had a natural tendency or capability of influencing the decision of an asylum officer, an immigration judge, or the BIA. *Luciana v. Att'y Gen.*, 502 F.3d 273, 280 (3d Cir. 2007).

An untimely application for asylum may be found to be frivolous where there is a deliberate misrepresentation regarding the applicant's date of entry that is material to the threshold question of the applicant's eligibility to seek asylum. *Matter of M-S-B-*, 26 I&N Dec. 872, 877 (BIA 2016).[20]

A finding of frivolousness does not flow automatically from an adverse credibility determination. 8 C.F.R. § 208.20; *see Muhanna v. Gonzales*, 399 F.3d 582, 589 (3d Cir. 2005). Inconsistencies between testimony and an asylum application, while certainly relevant to a credibility determination that may result in the denial of an applicant's asylum claim, do not equate to a frivolousness finding under INA § 208(d)(6), which carries with it much greater consequences. *Muhanna v. Gonzales*, 399 F.3d 582, 589 (3d Cir. 2005) (finding that frivolousness determination violated due process where it was based solely on a credibility determination and not on the application as a whole and where respondent was not permitted to present testimony on his claim).

The BIA has devised four requirements for a frivolousness finding: (1) notice to the noncitizen of the consequences of filing a frivolous asylum application when the noncitizen files the asylum application;[21] (2) a specific finding by the IJ or BIA that the noncitizen knowingly

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[20] In *M-S-B-*, the BIA distinguished the holding in the Third Circuit's case *Luciana v. Att'y Gen.*, 502 F.3d 273, 280 (3d Cir. 2007), by finding that the respondent in *Luciana* "made a misrepresentation that went solely to the merits of her asylum claim – namely, the facts underlying her claim of past persecution," and, in this case, the respondent's "misrepresentation of his date of entry concern[ed] a threshold question regarding his eligibility to seek asylum." 26 I&N Dec. at 876.

[21] Once the frivolousness warnings have been given prior to the start of the merits hearing, the IJ is not required to afford additional warnings or seek further explanation with regard to inconsistencies that have become obvious to the applicant in the course of the hearing. *Matter of B-Y-*, 25 I&N Dec. 236, 242 (BIA 2010). Specific warnings

filed a frivolous asylum application; (3) sufficient evidence in the record to support the finding that a material element of the asylum application was deliberately fabricated; and (4) an indication that the noncitizen has been afforded sufficient opportunity to account for any discrepancies or implausible aspects of the claim. *Luciana v. Att'y Gen.*, 502 F.3d 273, 281 (3d Cir. 2007) (citing *Matter of Y-L-*, 24 I&N Dec. 151, 155 (BIA 2007)).

With regard to the third requirement, certain factors that may be relevant to credibility determinations are, in and of themselves, insufficient to establish "materiality and deliberate fabrication." *Matter of B-Y-*, 25 I&N Dec. 236, 243 (BIA 2010). For example, an applicant's omission of facts, or an admission or finding that the applicant fabricated statements at the airport interview, are insufficient to support a frivolous determination because the omitted or fabricated facts may or may not relate to the factual basis for the asylum application. *Matter of B-Y-*, 25 I&N Dec. 236, 243 (BIA 2010). Similarly, minor inconsistencies that are not material to the claim will be insufficient. *Id.* at 244 (holding that where applicant was inconsistent regarding whether he had gone home first or gone straight to the family planning office was found immaterial to his claim and insufficient by itself to make a frivolousness determination). Finally, as aforementioned, an adverse credibility finding does not necessarily warrant a determination of frivolousness. *See Matter of Y-L-*, 24 I&N Dec. 151, 156 (BIA 2007).

With regard to the fourth requirement, whether the applicant has had a full and fair opportunity to address inconsistencies is determined by the totality of the circumstances and includes such factors as whether the applicant had counsel at the merits hearing, the nature and extent of the inconsistencies, and the manner in which the asylum application was prepared. *Matter of B-Y-*, 25 I&N Dec. 236, 243 (BIA 2010).

The IJ must address the question of frivolousness separately from the credibility analysis and "include specific findings that the respondent deliberately fabricated material elements of his asylum claim." *Matter of Y-L-*, 24 I&N Dec. 151, 157 (BIA 2007). However, an IJ need not separate and repeat those aspects of a credibility determination that overlap with a frivolous determination. *Matter of B-Y-*, 25 I&N Dec. 236, 240 (BIA 2010). Although an IJ may incorporate an adverse credibility finding and analysis by reference, a frivolousness determination should separately address the applicant's explanations in the context of how they bear on the materiality and deliberateness requirements unique to such a finding. *Matter of B-Y-*, 25 I&N Dec. 236, 240 (BIA 2010). Ideally, a frivolousness determination will be addressed under a separate section from credibility. *Id.* The IJ must "make specific findings based on cogent reasoning that material aspects of the claim were deliberately fabricated," and "[t]hese findings should not simply be left to be inferred or extrapolated from the strength of the overall adverse credibility determination." *Matter of B-Y-*, 25 I&N Dec. 236, 240 (BIA 2010).

After a frivolousness determination has been made, a separate evaluation of the merits of the application is not necessary because the only requirements are that the application be "made"

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regarding frivolous applications *must* be given before inquiry into frivolousness can commence; this is a mandatory prerequisite. INA § 208(d)(4); 8 C.F.R. § 1208.3.

or "filed." *Matter of X-M-C-*, 25 I&N Dec. 322, 324-25 (BIA 2010).[22] Additionally, once a frivolous asylum application has been made and the required warnings have been given, withdrawal of the application by the applicant does not negate such a finding. *Matter of X-M-C-*, 25 I&N Dec. 322, 325 (BIA 2010) (holding that a frivolousness determination still stands when the applicant could have withdrawn her asylum application before being given the warnings or after being asked whether she wished to proceed but choosing neither until she had a viable adjustment claim).

G. Statutory Eligibility for Asylum

Asylum is a discretionary form of relief that allows noncitizens to remain in the United States and apply for residency after one year, if they are fleeing persecution in their country of nationality or last habitual residence on account of their race, religion, nationality, membership in a particular social group, or political opinion. INA § 208; 8 C.F.R. § 1208.1.

An asylum applicant bears the burden of demonstrating that he or she is a refugee within the meaning of section 101(a)(42)(A) of the INA. *See* INA § 208(b)(1). An asylum applicant may demonstrate that he or she is a "refugee" in either of two ways. First, an asylum applicant may demonstrate that he or she suffered past persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A). Second, an asylum applicant may demonstrate a well-founded fear of future persecution on account of one of the aforementioned protected grounds by demonstrating that he or she subjectively fears persecution and that his or her fear is objectively reasonable. INA § 101(a)(42)(A).

In order to establish past or future persecution, an applicant must demonstrate that he or she suffered past persecution or will face future persecution on account of one of the statutorily-protected grounds, and that such persecution is inflicted by the government or by forces that the government is unable or unwilling to control. *See Garcia v. Att'y Gen.*, 665 F.3d 496, 503 (3d Cir. 2011) (finding that a government's decision to relocate applicant to another country is evidence that they are unable to protect the applicant); *Valdiviezo-Galdamez v. Att'y Gen.*, 502 F.3d 285, 288-89 (3d Cir. 2007) (finding that the applicant is not required to demonstrate that the police refused to protect him from persecution by gang members, but only that the government was unable or unwilling to protect him); *Matter of V-T-S-*, 21 I&N Dec. 792, 799 (BIA 1997) (finding that the respondent had not demonstrated the government was unable or unwilling to protect his family when the evidence suggested that his family "was afforded extraordinary governmental assistance" when officials engaged in "massive rescue effort[s]" when his brother and sister were kidnapped).

1. Nationality and Statelessness

[22] In *M-S-B-*, the BIA recognized that the Third Circuit's decision in *Luciana v. Att'y Gen.*, 502 F.3d 273, 280 (3d Cir. 2007), is inconsistent with its own prior decision in *X-M-C-*, 25 I&N Dec. at 324-25 to the extent that *Luciana* holds that any deliberate fabrication relating to the merits in a time-barred asylum application is immaterial for purposes of the frivolousness bar under INA § 208(d)(6). 26 I&N Dec. at 877. The BIA declined to follow the Third Circuit's contrary holding in *Luciana* outside of that circuit. *Id.* at 878-79 ("[N]either the materiality requirement under 8 C.F.R. § 1208.20 nor the time-bar provision under section 208(a)(2)(B) of the Act precludes an [IJ] from making a frivolousness finding in cases involving time-barred applications for asylum, including cases in which the fabrications relate to the merits.").