

## NOTE

### **"THEY TOLD ME HE SAID HE WOULD KILL ME."<sup>1</sup> WHY HEARSAY SHOULD GET FULL WEIGHT IN ASYLUM PROCEEDINGS<sup>2</sup>**

"[M]y family has always told me that they are looking for me. I'm being sought out and they killed my father and later they killed my uncle, then the same thing will happen to me."<sup>3</sup>

"How does a refugee prove that a guerilla came to his home and made verbal threats on his life?"<sup>4</sup> Through hearsay testimony. Quoted above, Leticia Cordon-Garcia testified at her asylum hearing that guerillas threatened and even killed some of her relatives while demanding her whereabouts.<sup>5</sup> Her understanding of these events rested upon hearsay, and sometimes even double hearsay.<sup>6</sup> Taking into account the difficulty with which a refugee must prove his or her claim, the Ninth Circuit Court of Appeals in 2000 ruled the hearsay nature of

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1. This quote paraphrases an excerpt of Kulvier Singh's testimony in *Singh v. Gonzales*. See *Singh v. Gonzales*, 406 F.3d 191, 194 (3d Cir. 2005). Singh testified in his asylum proceeding that his uncle told him that the Indian police said they would kill Singh if they found him. *Id.* This statement is hearsay under the definition found in the Federal Rules of Evidence. See FED. R. EVID. 801(c).

2. This Note is dedicated to Xiaoxong Gu and to those who flee persecution. "[A]nd you will be hated by all because of my name. But the one who endures to the end will be saved. When they persecute you in one town, flee to the next; for truly I tell you, you will not have gone through all the towns of Israel before the Son of Man comes." *Matthew* 10:22-23 (New Revised Standard Version).

3. *Cordon-Garcia v. INS*, 204 F.3d 985, 992 (9th Cir. 2000).

4. Laura Isabel Bauer, *They Beg for Our Protection and We Refuse: U.S. Asylum Law's Failure to Protect Many of Today's Refugees*, 79 NOTRE DAME L. REV. 1081, 1090 (2004).

5. *Cordon-Garcia*, 204 F.3d at 992.

6. *Id.*

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her testimony inconsequential.<sup>7</sup> In July 2006, however, the Ninth Circuit ignored the refugee's plight and took a different approach to hearsay testimony in asylum proceedings.<sup>8</sup> In *Gu v. Gonzales*, the court held that hearsay evidence may receive less weight than non-hearsay evidence.<sup>9</sup> This Note argues for a return to the reasoning articulated in *Cordon-Garcia*, and more specifically that the trier of fact should give a credible claimant's hearsay testimony full weight.

Asylum proceedings are filled with hearsay testimony.<sup>10</sup> In these hearings, hearsay evidence is generally admissible.<sup>11</sup> However, in the special situation of a refugee,<sup>12</sup> hearsay evidence needs to be more than just admissible. It should be deemed reliable. Plainly put, hearsay should be deemed reliable because it may be the only evidence the claimant has. By virtue of the very status the claimant is trying to prove, hearsay evidence may be the only kind of evidence available.<sup>13</sup>

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7. *Id.* at 992-93 (citing *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1985)).

8. *Gu v. Gonzales*, 454 F.3d 1014, 1021 (9th Cir. 2006).

9. *Id.*

10. *See, e.g., Yang v. Gonzales*, 478 F.3d 133, 136 (2d Cir. 2007) (quoting Testimony of Yi Long Yang) (“[T]hey said according to birth control policy nobody should get pregnant before . . . they get [sic] official marriage certificate.”); *Shmyhelskyy v. Gonzales*, 477 F.3d 474, 477 (7th Cir. 2007) (“Shmyhelskyy also testified . . . that when he visited Nesenjuk in the hospital, Nesenjuk told him that he regretted sponsoring Shmyhelskyy's membership in the RP and that he should run for his life and try to save himself.”); *Kohli v. Gonzales*, 473 F.3d 1061, 1063 (9th Cir. 2007) (“She testified that the police officer told her that these were cultural practices and should not be changed.”); *Chang Lin v. Gonzales*, No. 05-4461-AG, slip op. at 2 (2d Cir. Dec. 26, 2006) (“Additional questioning on cross examination elicited little more than Lin's reiteration that his wife had told him that she had been forced to undergo the abortions.”).

11. *Gu*, 454 F.3d at 1021 (citing *Baliza v. INS*, 709 F.2d 1231, 1233 (9th Cir. 1983)) (“In the immigration context, hearsay is admissible if it is probative and its admission is fundamentally fair.”).

12. A refugee is a person fearing persecution if returned to his or her home. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2000).

13. *See Marisa Silenzi Cianciarulo, Terrorism and Asylum Seekers: Why the REAL ID Act is a False Promise*, 43 HARV. J. ON LEGIS. 101, 123 (2006) (“In many cases . . . the more legitimate the persecution, the less likely it is that the asylum seeker will have the required proof. As such, establishment of an accurate but not unduly burdensome corroboration process can be very difficult.”); Derek C. Smith & Bruce A. Hake, *Evidence Issues in Asylum Cases*, 90-10 IMMIGR. BRIEFINGS 1, 27 (1990) (“The most important, and sometimes the only, evidence in asylum cases is

However counterintuitive it may seem in a legal culture that pursues truth and shuns fraud, this Note proposes that if an asylum claimant is deemed credible, the trier of fact should accord hearsay evidence full weight. Part I presents the facts and holding of *Gu v. Gonzales*, summarizes general asylum law and explains the evidentiary rules of asylum proceedings. Part II demonstrates the inverse relationship between the special circumstances of a refugee and the ability of that refugee to establish refugee status. Part III identifies the fears and hesitations surrounding hearsay evidence and its reliability. The second section of Part III argues that these reservations presuppose a standard of accuracy that is nearly impossible to achieve in the context of asylum seekers. Part IV contends that if the asylum claimant is found credible, the trier of fact should not only be able but required to give hearsay evidence full weight. Part IV then applies this construct to *Gu's* case. Cautiously acknowledging faults in other procedural steps, Part IV then warns of defects that may lie in a credibility determination and admits that if a credible claimant's hearsay testimony is given full weight, the process of reaching a credibility determination must also be refined. Finally, Part V concludes by reiterating that the trier of fact must give the claimant's credible testimony full weight because a refugee cannot be expected to obtain direct, first-hand evidence of persecution.

## I. BACKGROUND

### A. *Gu v. Gonzales*

Chinese native Xiaoguang Gu developed an interest in Christianity after his sister sent him Christian materials from the United States.<sup>14</sup> Upon receiving these materials, Gu began attending the Christian church sponsored by the Chinese government and soon sought baptism.<sup>15</sup> After a few months, however, Gu stopped attending the government-run church because he suspected the church ignored

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the applicant's testimony. The BIA has ruled that when the applicant's testimony is the only evidence available, it can suffice to establish eligibility for asylum if it is believable, consistent and sufficiently detailed to provide a plausible and coherent account of the basis of the applicant's fear.'').

14. Opening Brief for Petitioner at 3, *Gu*, 454 F.3d 1014 (No. 02-74417).

15. *Id.*

Biblical teachings and touted the Chinese government's political opinion.<sup>16</sup> Instead, Gu attended an unofficial, Christian "house church,"<sup>17</sup> comprised of about six or seven attendees who gathered at a friend's home on Sundays.<sup>18</sup> Presumably enthusiastic about his new religion, Gu copied the evangelical pamphlets his sister had sent him and distributed them to church members and coworkers.<sup>19</sup> Later that year, public security officers arrested Gu and interrogated him for two hours, inquiring into the origin of the religious pamphlets.<sup>20</sup> When Gu refused to reveal the source of the materials the police repeatedly beat him with a rod.<sup>21</sup> After three days of confinement and the payment of a bond, the officers released Gu on the condition that he report to the police weekly.<sup>22</sup>

After his release, Gu tried to keep quiet.<sup>23</sup> He stopped attending the house church because he feared another arrest.<sup>24</sup> At work, Gu's employer warned Gu that he would lose his job if he engaged in any more illegal activities.<sup>25</sup> Too scared to gather with others at the underground house church, Gu instead chose to read his Bible at home.<sup>26</sup> Gu left China several months after his arrest and came to the United States on a fraudulently obtained business visa.<sup>27</sup> Once in the United States, Gu spoke with his wife on the phone, and she told him that public security officers had inquired as to his whereabouts.<sup>28</sup> In another phone call to China, a friend told Gu to stop calling his family

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16. *Id.*

17. *Gu*, 454 F.3d at 1017. In China, "[u]nofficial Protestants, meeting in unregistered 'house churches,' are estimated to number more than 50 million." In 2005, the government arrested 1,958 pastors and attendees of these unofficial house churches. *China Executes 15 Christians of Underground Church*, SPERO NEWS, Nov. 29, 2006, <http://www.speroforum.com/site/article.asp?id=6807>.

18. Opening Brief for Petitioner, *supra* note 14, at 3.

19. *Id.* at 4.

20. *Id.* at 4-5.

21. *Gu*, 454 F.3d at 1018.

22. *Id.*; Opening Brief for Petitioner, *supra* note 14, at 5.

23. *See* Opening Brief for Petitioner, *supra* note 14, at 6.

24. *See id.*

25. *Gu*, 454 F.3d at 1018.

26. *Id.*

27. *Id.* at 1017; Opening Brief for Petitioner, *supra* note 14, at 5.

28. Opening Brief for Petitioner, *supra* note 14, at 5.

because the security people had come "to his house to look for him."<sup>29</sup> Gu believed that the Chinese authorities came to his family's home in China because he sent religious materials back to China from the United States.<sup>30</sup>

Gu applied for asylum claiming that if he returned to China, the Chinese government would again arrest him and beat him for attending a house church and distributing religious materials.<sup>31</sup> Gu presented his story in an asylum hearing in Immigration Court, and the immigration judge denied his application for asylum.<sup>32</sup> Although the immigration judge found Gu credible, the judge concluded that, while Gu had encountered difficulties in practicing Christianity, the facts of Gu's case did not "rise to the level of persecution as intended by the immigration laws."<sup>33</sup> At the next level of administrative review, the Board of Immigration Appeals (BIA) affirmed the immigration judge's decision and emphasized the fact that Gu did not "experience further problems" in China after his arrest.<sup>34</sup>

Neither the immigration judge nor the BIA claimed "to give hearsay testimony less than full weight."<sup>35</sup> On appeal to the Ninth Circuit Court of Appeals, neither the government nor Gu briefed or argued the issue of hearsay evidence or its weight.<sup>36</sup> Despite the fact that the issue did not go up on appeal, the majority in the Ninth Circuit decision found that Gu's primary support for establishing a well-founded fear of persecution was "hearsay evidence from an anonymous friend."<sup>37</sup> The Ninth Circuit ultimately held that in an asylum proceeding the trier of fact may accord hearsay evidence less weight when weighed against non-hearsay evidence.<sup>38</sup> Because the immigration judge did not find that Gu lacked credibility, however, the appellate court had to

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29. *Gu*, 454 F.3d at 1018.

30. *See* Opening Brief for Petitioner, *supra* note 14, at 5-6.

31. *Gu*, 454 F.3d at 1017-18.

32. Brief for Respondent at 3, *Gu*, 454 F.3d 1014 (No. 02-74417).

33. *Gu*, 454 F.3d at 1018.

34. *Id.*

35. *Id.* at 1026 (Pregerson, J., dissenting).

36. *Id.*

37. *Id.* at 1021 (majority opinion).

38. *Id.*

accept Gu's factual testimony as true.<sup>39</sup> This testimony included the out-of-court statements of both Gu's friend and Gu's wife.<sup>40</sup> The majority, however, reasoned that the principle requiring acceptance of the credible claimant's testimony as true did "not prevent [the court] from considering the relative probative value of hearsay and non-hearsay testimony."<sup>41</sup> Following this logic, the court reasoned that Gu, because he was found credible, testified truthfully that his friend told him the security team was looking for him.<sup>42</sup> In contrast, the friend's out-of-court statement, the strongest piece of evidence supporting the fact that the security official did come to Gu's house and did ask for Gu, was not as "persuasive" or "specific" as an in-court, first-hand account would have been.<sup>43</sup>

### B. Asylum Law

When a non-citizen arrives in the United States, he or she is eligible to apply for asylum.<sup>44</sup> The applicant has the burden of proving that he or she is a "refugee," that is, that the applicant will suffer persecution upon return to the applicant's home country "on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>45</sup> If the non-citizen is not in removal proceedings, he or she may apply to the United States Citizen and Immigration Services (USCIS) for asylum.<sup>46</sup> If the Department of Homeland Security (DHS)<sup>47</sup> has already instituted proceedings to remove the non-citizen,

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39. *Id.* (citing *Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000)).

40. *See id.*

41. *Id.*

42. *See id.* ("[W]e do not question the veracity of Gu's understanding that his friend told him that members of China's public security team came to question him.").

43. *Id.* (quoting *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453 (9th Cir. 1985)).

44. Immigration and Nationality Act, 8 U.S.C. § 1158(a)(1) (2000).

45. *Id.* § 1101(a)(42), *quoted in*, *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001).

46. 8 C.F.R. § 1208.2(a)-(b) (2000); Regina Germain, *Seeking Refuge: The U.S. Asylum Process*, 35 COLO. LAW. 71, 74 (2006).

47. The functions of the former Immigration and Nationality Services (INS) were transferred to the Department of Homeland Security through the Homeland Security Act of 2002 (HSA). *See* Homeland Security Act of 2002, 6 U.S.C. § 291(a)

or if the USCIS has denied the application, the non-citizen may file the asylum application with the Immigration Court.<sup>48</sup> Claims filed before the immigration judge receive judicial review.<sup>49</sup> Thus, for the purposes of this Note, the non-citizen is presumed to have brought his or her claim before the immigration judge.

A claimant establishes refugee status when the claimant demonstrates either that he or she has suffered persecution in the past or that the claimant presently has a well-founded fear of suffering persecution upon return home.<sup>50</sup> To prove a well-founded fear of persecution, the claimant must demonstrate both a subjective and an objective fear of persecution.<sup>51</sup> The claimant meets the subjective component by providing credible testimony that he or she will be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>52</sup> To fulfill the objective component, the claimant must meet at least one of two requirements.<sup>53</sup> One requirement is to provide proof of past persecution.<sup>54</sup> If an applicant can prove that he or she previously suffered persecution, then he or she is presumed to have an objective, well-founded fear of persecution.<sup>55</sup> DHS can rebut this presumption if it establishes by a preponderance of the evidence that the country's conditions have since changed, thus voiding the likelihood of persecution.<sup>56</sup> Like Gu, a claimant may find it difficult to

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(2002). *See generally* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 2-3 (4th ed. 2005); David A. Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements*, MIGRATION POLICY INSTITUTE, Apr. 2003, at 1.

48. 8 C.F.R. § 208.4(b)(3)(i)-(ii) (2000); Germain, *supra* note 46, at 74.

49. *See* 8 U.S.C. § 1252(a)(1)-(2)(B)(ii) (2000).

50. *Id.* § 1101(a)(42).

51. *Gu v. Gonzales*, 454 F.3d 1014, 1019 (9th Cir. 2006) (citing *Nagoulko v. INS*, 333 F.3d 1012, 1016 (9th Cir. 2003)); *Canales-Vargas v. Gonzales*, 441 F.3d 739, 743 (9th Cir. 2006) (quoting *Sael v. Ashcroft*, 386 F.3d 922, 924 (9th Cir. 2004)); *In re Y-B-*, 21 I. & N. Dec. 1136, 1149 (1998) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)).

52. *Gu*, 454 F.3d at 1019 (citing *Nagoulko v. INS*, 333 F.3d 1012, 1016 (9th Cir. 2003)).

53. *See id.*

54. *Id.* (citing 8 C.F.R. § 1208.13(b)(1) (2000)).

55. 8 C.F.R. § 1208.13(b)(1) (2000).

56. *Id.*

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prove past persecution because persecution is an “extreme concept,”<sup>57</sup> which does not “include every sort of treatment our society regards as offensive.”<sup>58</sup> The other way to satisfy the objective component is to give “credible, direct, and specific evidence” that supports a reasonable fear of persecution.<sup>59</sup> To meet this standard, the non-citizen does not have to prove that it is more likely than not that he or she will suffer persecution upon return home; even a ten percent chance of persecution may suffice.<sup>60</sup> To state it in non-numeric terms, a non-citizen meets the objective component of a well-founded fear of persecution if there is a reasonable possibility of actually suffering persecution once the non-citizen returns home; therefore, he or she cannot avail him- or herself of the home state’s protection.<sup>61</sup> The precedent regarding hearsay established in *Gu*’s asylum proceedings directly affects a claimant’s ability to meet this standard. If hearsay evidence is less “specific”<sup>62</sup> than a first-hand account, then out-of-court statements will be less probative especially when proving a well-founded fear of persecution, interpreted as requiring “credible, direct, and specific evidence” of such fear.<sup>63</sup> Although the claimant need only prove a ten percent chance of persecution,<sup>64</sup> the Ninth Circuit has made this task more strenuous by limiting the probative value of hearsay.<sup>65</sup>

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57. *Gu*, 454 F.3d at 1019 (quoting *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995)).

58. *Id.* (quoting *Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001)).

59. *See Ladha v. INS*, 215 F.3d 889, 897 (9th Cir. 2000) (quoting *Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 (9th Cir. 1999)).

60. *Al-Harbi v. I.N.S.*, 242 F.3d 882, 888 (9th Cir. 2001) (citing *INS v. Cardozo-Fonseca*, 480 U.S. 421, 440 (1987)); *Canales-Vargas v. Gonzales*, 441 F.3d 739, 743 (9th Cir. 2006).

61. 8 C.F.R. § 1208.13(b)(2) (2000).

62. *Gu*, 454 F.3d at 1021 (quoting *Cardozo-Fonseca v. INS*, 767 F.2d 1448, 1453 (9th Cir. 1985)).

63. *Ladha v. INS*, 215 F.3d 889, 897 (9th Cir. 2000) (quoting *Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 (9th Cir. 1999)).

64. *Al-Harbi*, 242 F.3d at 888; *Canales-Vargas*, 441 F.3d at 743.

65. Just ten days after *Gu v. Gonzales* was decided, a study showed that receiving asylum is not only arduous, but arbitrary. A study of immigration judges based on data from the Executive Office for Immigration Review (EOIR) shows that asylum denials vary by judge from ten percent of all cases to ninety-eight percent of all cases. *Judges Vary on Asylum*, PITTSBURG POST-GAZETTE, July 31, 2006, at A-7.



### C. Federal Rules of Evidence and Asylum Proceedings

The Federal Rules of Evidence do not apply to administrative proceedings.<sup>66</sup> In administrative proceedings generally, evidence is admissible as long as the agency excludes "irrelevant, immaterial, or unduly repetitious evidence."<sup>67</sup> Under these more lenient rules, administrative courts may, without nullifying the proceedings, receive evidence that a non-administrative court would regard as legally inadequate.<sup>68</sup> The "classic exception" to the Federal Rules of Evidence in administrative proceedings lies in the permitted admission of hearsay evidence.<sup>69</sup> In a removal proceeding, "the immigration judge may receive into evidence any oral or written statement that is material and relevant to any issue in the case."<sup>70</sup> As long as the use of hearsay evidence is fundamentally fair and the evidence itself is probative and "bears satisfactory indicia of reliability," the evidence will come in.<sup>71</sup>

Although the general rule of admissibility of hearsay applies to all administrative adjudications,<sup>72</sup> specific rules for the admission of evidence vary from agency to agency.<sup>73</sup> Within the Executive Office for Immigration Review (EOIR), the Department of Justice agency comprised of the immigration judges and the BIA,<sup>74</sup> there are few formal rules governing evidence.<sup>75</sup> The main reason for this lack of formality

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66. *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980) (citing *Marlowe v. INS*, 457 F.2d 1314, 1315 (9th Cir. 1972) (per curiam)); *Navarrette-Navarrette v. Landon*, 223 F.2d 234 (9th Cir. 1955), cert. denied, 351 U.S. 911 (1956); Administrative Procedure Act, 5 U.S.C. § 556(d) (2006).

67. 5 U.S.C. § 556(d).

68. *Navarrette-Navarrette*, 223 F.2d at 237 (9th Cir. 1955).

69. *Calhoun*, 626 F.2d at 148; *Diaz v. U.S. Postal Serv.*, 658 F. Supp. 484, 490 (E.D. Cal. 1987).

70. 8 C.F.R. § 1240.7(a) (2006).

71. *Diaz*, 658 F. Supp. at 490 (citing *Richardson v. Perales*, 402 U.S. 389, 407-08 (1971)).

72. See 5 U.S.C. § 556(d) (stating that oral and documentary evidence may be received by the agency, which presumably includes hearsay evidence).

73. See Ernest H. Schopler, Annotation, *Comment Note—Hearsay Evidence in Proceedings Before Federal Administrative Agencies*, 6 A.L.R. FED. 76 § 12[a] (1971).

74. United States Department of Justice Website, EOIR Background Information, <http://www.usdoj.gov/eoir/background.htm> (last visited Mar. 24, 2007).

75. *Smith & Hake*, *supra* note 13, at 24.

is that Department of Justice officials are the adjudicators in asylum proceedings.<sup>76</sup> Because the purpose of the Federal Rules of Evidence (Rules) is to keep unreliable evidence from the jury, the Rules should not apply in adjudications held before “experienced administrative adjudicators.”<sup>77</sup> Referring specifically to hearsay, one scholar has labeled this mistrust of the jury the “calibration issue”: this is the issue of whether jurors give appropriate weight to hearsay evidence.<sup>78</sup> In removal proceedings, there is no need to shield the experienced adjudicator from evidence that could lead a jury of laypeople astray.<sup>79</sup> In fact, a hearsay document may be the only basis upon which the adjudicator reaches a decision in a removal proceeding.<sup>80</sup>

## II. THE INVERSE RELATIONSHIP BETWEEN REFUGEE STATUS AND NON-HEARSAY TESTIMONY

An important difference between the relief sought in asylum claims and the relief sought in other immigration proceedings is that, because of the definition of refugee, the claimant will often not be able to corroborate his or her claims.<sup>81</sup> When requesting other relief, such as cancellation of removal for certain non-permanent residents,

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76. *Id.*

77. *Id.*

78. David Dunning, *On the Social Psychology of Hearsay Evidence*, 5 PSYCHOL. PUB. POL’Y, & L. 473, 473 (1999).

79. *See* Smith & Hake, *supra* note 13, at 24.

80. *Kiareldeen v. Ashcroft*, 273 F.3d 542, 549 (3rd Cir. 2001). The Supreme Court has “recognized that a hearsay document (INS Form I-213) typically constitutes the exclusive basis for a decision made in a removal proceeding.” *Id.* (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984)).

81. Asylum seekers, uprooted from their homes, may find it difficult to bolster their claims. *See* Cianciarulo, *supra* note 13, at 122 (“Corroborating asylum claims presents significant challenges especially in terms of logistics and authentication.”); *see also* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2000). Comparatively, depending on the relief sought, other non-citizens seeking relief from removal will find it less difficult to corroborate their claims. For example, a non-citizen trying to prove hardship to a loved one who is a legal resident of the United States will be able to corroborate this claim through documentation easily available in the United States like medical bills or live testimony from social workers. *See generally* 8 U.S.C. § 1182(h)(1)(B) (2000) (waiving inadmissibility to the United States if denial of admission would result in extreme hardship to certain relatives who are United States citizens or legal permanent residents).

non-citizens who have lived in the United States for ten years are more likely to easily obtain witnesses to testify on their behalf.<sup>82</sup> In contrast, it may be that the more legitimate an asylum claim, the less likely it is that the claimant will be able to corroborate that claim.<sup>83</sup> A legitimate claim, for example, might include a high degree of past persecution, and the fear associated with this would make it more difficult to document or corroborate the persecution as it occurs. Furthermore, asylum seekers often originate "from countries that lack infrastructure, adequate communication systems, and sometimes even a functioning government."<sup>84</sup> Corroboration of an asylum claim is thus quite a difficult task.<sup>85</sup> Inversely, and even more unfortunately, a fraudulent claimant would be likely to have more documentation and more witnesses than would a valid refugee.<sup>86</sup> Through an asylum fraud scheme, a claimant could pay witnesses to sign affidavits or testify on behalf of the claimant.<sup>87</sup>

An article by Agata Szypszak vividly illustrates the grueling task of corroborating a claim and finding witnesses in the asylum context.<sup>88</sup> In the article, Szypszak, then a law student, describes how she and another student in an asylum law clinic helped Dolores Wilson

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82. See 8 U.S.C. § 1229b (2000) (requiring at least ten years of continuous physical presence in the United States before a non-permanent resident may file an application for cancellation of removal).

83. Cianciarulo, *supra* note 13, at 123.

84. *Id.* at 122.

85. *Id.*

86. See, e.g., John R. B. Palmer, *The Second Circuit's "New Asylum Seekers": Responses to an Expanded Immigration Docket*, 55 CATH. U. L. REV. 965, 992 (2006) (describing instances where asylum claims were proven to be based on false documentation); David A. Martin, *Adelaide Abankwah, Fauziya Kasinga, and the Dilemmas of Political Asylum*, in IMMIGRATION STORIES 243, 243-70 (David A. Martin & Peter H. Schuck eds., 2005) (telling the story of Adelaide Abankwah who was granted asylum in the United States through forged documents and fraudulent testimony).

87. This paradox presupposes that asylum fraud is more than just a product of society's fear and cynicism. In response to claims that asylum fraud is "rampant," a Georgetown asylum law expert has stated that the asylum system is "under control." *Fox News* (Fox News television broadcast June 25, 2006).

88. See generally Agata Szypszak, *Where in the World is Dr. Detchakandi? A Story of Fact Investigation*, 6 CLINICAL L. REV. 517 (2000) (describing how difficult it was for two students at an asylum law clinic to corroborate a claim).

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request asylum before an immigration judge.<sup>89</sup> Wilson was fleeing the persecution she suffered at the hands of forces loyal to the then president of Liberia on account of her service to the prior Liberian president.<sup>90</sup> The students' primary task was to corroborate the claim with documentary and testimonial evidence.<sup>91</sup> The difficulties the two encountered powerfully demonstrate how the refugee's situation makes it unlikely that the claimant will secure non-hearsay testimony.

Because of the war, Ms. Wilson had not been able to seek medical attention after being raped. Most of her documents had been destroyed. Nearly all of the people who had known about Ms. Wilson's political activities in Liberia and her treatment at the hands of the rebels had been scattered throughout Liberia and other parts of Africa. Furthermore, Ms. Wilson asked us not to contact anyone in Liberia because communications were not secure and she did not want to put her friends and family in any more danger.<sup>92</sup>

In Wilson's case, people who would be able to testify to a "first hand" account, the type of account that would receive full weight according to *Gu's* holding, had dispersed across the African continent.<sup>93</sup> Even if these people had the resources and the ability to come to the United States to give a first-hand account of Wilson's treatment at the hands of the rebels, Wilson feared that if the students contacted these individuals, it would expose her loved ones to even more danger.<sup>94</sup> The peril associated with contacting people in the persecuting home country may be so great that a recent argument demands that the regulations explicitly require asylum adjudicators to recognize this danger.<sup>95</sup>

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89. *See id.* at 517.

90. *See id.* at 518-20.

91. *Id.* at 521.

92. *Id.* at 520-21.

93. *See id.* at 522.

94. *Id.* at 521.

95. Virgil Wiebe, *Maybe You Should, Yes You Must, No You Can't: Shifting Standards and Practices for Assuring Document Reliability in Asylum and Withholding of Removal Cases* (Univ. of St. Thomas Legal Studies Research Paper No. 06-18, 2006-2007), available at <http://ssrn.com/abstract=899213> [hereinafter Wiebe I].

Within the general classification of those covered by the refugee definition, disparity exists in the ability of particular groups to provide first-hand evidence to support their claims. Feminist scholars suggest that female refugees, as compared with male refugees, suffer a persecution unique to their gender.<sup>96</sup> Claims made by women may be more difficult to prove.<sup>97</sup> For example, women may not be able to organize by virtue of their position in society.<sup>98</sup> This inability to assemble in the public sphere renders a female refugee's resistance to her government unrecognizable in a system where "phallogentrism [masquerades] as universalism."<sup>99</sup> Similarly cloaked in a "social invisibility,"<sup>100</sup> lesbians, gays, bisexual and transgender claimants also encounter a particularly difficult task in obtaining direct or first-hand evidence.<sup>101</sup> This invisibility occurs especially in situations where openly expressing sexual identity implicates danger or where the government censors sexual discourse.<sup>102</sup>

The United Nations anticipated this inverse relationship between the refugee's plight and the refugee's ability to prove his or her claim.<sup>103</sup> In "most cases" a refugee will arrive with only the "barest necessities," lacking even personal documents.<sup>104</sup> Judge Pregerson in *Gu*'s dissenting opinion recognized that the requirement that a refugee prove refugee status creates a paradox.<sup>105</sup> He pointed out that in *Ladha*

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96. See Jacqueline Greatbatch, *The Gender Difference: Feminist Critiques on Refugee Discourse*, 1 INT'L J. REFUGEE L. 518, 519 (1989).

97. *Id.*

98. *Id.* at 520; Marika Meijer, *Oppression of Women and Refugee Status*, discussion papers presented at a seminar on refugee women in Soesterberg, Neth., May 22-24, 1985.

99. See Greatbatch, *supra* note 96, at 519.

100. Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 LAW & SEXUALITY 135, 141 (2006).

101. *Id.*

102. *Id.*

103. See U.N. High Comm'n. on Refugees [UNHCR], *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶¶ 195-202, HCR/IP/4/Eng/Rev.1 (Jan. 1992) [hereinafter *Handbook*].

104. *Id.* ¶ 196.

105. See *Gu v. Gonzales*, 454 F.3d 1014, 1025 (9th Cir. 2006) (Pregerson, J., dissenting) (citing *Ladha v. INS*, 215 F.3d 889, 899 (9th Cir. 2000)).

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*v. INS* the Ninth Circuit purported to recognize “the serious difficulty with which asylum applicants are faced in their attempts to prove persecution.”<sup>106</sup> The majority in *Gu* ignores that court’s own admission that it is “difficult to imagine” any available testimony other than the petitioner’s own statements.<sup>107</sup>

The BIA has also acknowledged that a refugee will not easily be able to prove his or her claim.<sup>108</sup> In accordance with the UNHCR, the BIA recognized that refugees do not “stop to gather affidavits and other supporting evidence when fleeing persecution.”<sup>109</sup> Because of the refugee’s “special situation,” the committee recommends a lenient application of the evidence requirement.<sup>110</sup> Evidentiary standards must not be too strict so they may stay aligned with the “humanitarian nature of international refugee law.”<sup>111</sup>

When the Ninth Circuit Court of Appeals held that hearsay evidence may be given less weight than non-hearsay evidence in an asylum proceeding, it flouted the well-established rule regarding the treatment of hearsay evidence in administrative proceedings.<sup>112</sup> The majority in *Gu v. Gonzales* disregards the “well-recognized” difficulty that asylum applicants face when attempting to prove their claims.<sup>113</sup> The court’s holding is illogical because refugees, by their very nature, often do not have documentary evidence.<sup>114</sup> In doing so, the majority ignores the inverse relationship between the plight of an uprooted mi-

106. *Id.*

107. *Id.* (citing *McMullen v. INS*, 658 F.2d 1312, 1319 (9th Cir. 1981)).

108. *In re S-M-J-*, 21 I. & N. Dec. 722, 723 (B.I.A. 1997) cited in Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA Patriot Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505, 526 (2002).

109. *In re Mogharrabi*, 19 I. & N. Dec. 439, 445-46 (B.I.A. 1987) (interim order granting asylum) cited in Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee’s Narrative*, 53 RUTGERS L. REV. 127, 131 (2000).

110. *Handbook*, *supra* note 103, ¶ 197.

111. Brian Gorlick, *Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status*, 15 INT’L J. REFUGEE L. 357, 359-60 (2003).

112. *Gu*, 454 F.3d at 1026 (Pregerson, J., dissenting).

113. *Id.*

114. Tina Bay, *Ninth Circuit Rejects Asylum Claim of Chinese Man, Divided Panel Rules Credible Hearsay Testimony Not Weighty Enough to Establish Threat of Future Persecution*, METROPOLITAN NEWS ENTERPRISE (Los Angeles), July 24, 2006, available at <http://www.metnews.com/articles/2006/guxx072406.htm>.

grant fleeing persecution, and the ability of that refugee to provide non-hearsay, in-court testimony regarding his or her persecution.

### III. AN IMPOSSIBLE QUEST FOR ACCURACY

Because hearsay evidence will comprise much of the claimant's testimony, the issue of the weight to be given that evidence is crucial to the outcome of the case. It is generally agreed that hearsay evidence is admissible,<sup>115</sup> but courts differ on the issue of its weight.<sup>116</sup> For instance, the Third Circuit Court of Appeals stated that although hearsay is admissible, the fact that the evidence is hearsay "certainly affects the weight it is accorded."<sup>117</sup> The Ninth Circuit in *Gu* quotes the Third Circuit when stating that "while hearsay evidence may be given less weight in immigration proceedings, 'seemingly reliable hearsay evidence should not be rejected.'"<sup>118</sup> The Third Circuit reasoned that although the Federal Rules of Evidence do not apply in immigration proceedings, reliance on hearsay evidence "raises the precise concerns that are fundamental to its general inadmissibility in civil proceedings."<sup>119</sup>

According to the Third Circuit's reasoning, which the Ninth Circuit follows in *Gu*, admitted hearsay should be given less weight in immigration proceedings.<sup>120</sup> The Third Circuit argues for this decreased evidentiary weight for the same reasons the Federal Rules of Evidence actually bars hearsay evidence altogether.<sup>121</sup> Following this

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115. See *supra* note 11.

116. Schopler, *supra* note 73, §12[a].

117. *Kiarelddeen v. Ashcroft*, 273 F.3d 542, 549 (3d Cir. 2001); see also *Handbook*, *supra* note 103, ¶ 197.

118. *Gu*, 454 F.3d at 1021 (citing *Dia v. Ashcroft*, 353 F.3d 228, 254 (3d Cir. 2003)).

119. *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 406 (3d Cir. 2002).

120. See *Kiarelddeen*, 273 F.3d at 549; *Gu*, 454 F.3d at 1021.

121. See *Ezeagwuna*, 325 F.3d at 406 ("Although the Federal Rules do not apply in this case, exceptions set forth in the Rules focus on trustworthiness, further indicating why we regard hearsay with a level of suspicion."). The Third Circuit applied the residual exception to the hearsay bar in this case. *Id.* The residual exception accounts for statements that have "circumstantial guarantees of trustworthiness," which are equivalent to the guarantees found in the other exceptions. See FED. R. EVID. 807. As Smith and Hake point out, however, the overarching reason for the Federal Rules is to account for the risks associated with a jury of laypersons and

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logic, it is necessary to first identify the foundation upon which the federal hearsay exclusion rule stands in order to understand why the immigration judge as the fact finder should accord less weight to hearsay evidence.

The “largely accepted” modern account purports that “hearsay is generally excluded because it is less reliable than live testimony.”<sup>122</sup> Hearsay evidence’s “fundamental evidentiary flaw” lies in its inability to be tested through cross-examination of the declarant.<sup>123</sup> The opportunity to observe the declarant’s demeanor “confers depth and meaning upon oath and cross-examination.”<sup>124</sup> The “calibration issue” refers to this evidentiary flaw as the “fidelity issue”: whether the witness can accurately report the hearsay evidence that has been told to them by a child.<sup>125</sup> While hearsay’s fundamental flaw relates to the inability to determine the accuracy of the declarant, another reason the federal courts generally distrust hearsay lies in their inability to gauge the level of accuracy with which the in-court witness will reproduce the statement.<sup>126</sup> These two unknowns create the ultimate danger of hearsay evidence: the possibility that the tribunal will present unreliable evidence to the trier of fact.<sup>127</sup> Inasmuch as the absence of a jury justifies the admission of hearsay evidence in immigration proceedings, the Ninth and Third Circuits’ reasoning is flawed because there is no fundamental difference between trusting a trained adjudicator to be exposed to the evidence and trusting the same adjudicator to weigh the evidence.<sup>128</sup> The federal rule barring hearsay evidence stems from the

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thus do not apply in administrative proceedings held before experienced, trained adjudicators. *See Smith & Hake, supra* note 13, at 24.

122. Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 370 (1992).

123. Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 55-56 (1988).

124. FED. R. EVID. 804(b)(1) advisory committee’s note.

125. Dunning, *supra* note 78, at 474.

126. Park, *supra* note 123, at 56.

127. *Id.* at 58.

128. One of the reasons hearsay is admitted into evidence in immigration proceedings is that experienced adjudicators, as opposed to juries, can generally be trusted with less reliable evidence like hearsay testimony. Smith & Hake, *supra* note 13, at 24. This Note argues that the same justification should support a rule where the adjudicator is trusted in weighing the evidence, especially after performing a credibility determination.



intention to "protect a defendant from the power of the state" by maintaining strict standards of evidence inclusion.<sup>129</sup> In asylum proceedings, ironically, this same aim of upholding strict standards actually hinders the protection of individuals from the persecution of their home states.

One of the psychological reasons that hearsay is devalued is because of the many variables in the hearsay chain that might create error.<sup>130</sup> As with the theory behind the Federal Rules, the question of hearsay weight from a psychological standpoint revolves around a quest for accuracy. The declarant must perceive, remember, and report accurately.<sup>131</sup> The witness must do exactly the same.<sup>132</sup> Oral transmission, however, can distort information.<sup>133</sup> William C. Thompson and Maithilee K. Pathak argue that the role of a psychologist, when testing the presumptions about hearsay, is to test variables affecting accuracy during this transmission chain.<sup>134</sup> The fear that the jury will give the evidence too much weight comes from the "well-established" fact that the information will likely be distorted or changed.<sup>135</sup>

Truth can only be discerned if evidence is accurate. Rules for determining what evidence contributes to this determination and what weight that evidence carries developed in a litigation system where primary concerns did not yet include refugees.<sup>136</sup> Richard Friedman surveyed current hearsay doctrine and questioned to what extent that doctrine achieves the goal of truth in litigation.<sup>137</sup> Friedman argued

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129. See William C. Thompson & Maithilee K. Pathak, *Empirical Study of Hearsay Rules: Bridging the Gap Between Psychology and Law*, 5 PSYCHOL. PUB. POL'Y & L. 456, 456 (1999).

130. See *id.* at 464 (listing bias, prejudice, or inadvertent error as possible variations from an accurate account).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 465.

135. *Id.*

136. Although refugees have existed throughout most of history, refugee law did not emerge until 1921 when the League of Nations appointed a High Commissioner for Russian Refugees. LEGOMSKY, *supra* note 47, at 920. In contrast, the Anglo-American legal system has grappled with hearsay's admissibility due to the "sensational trials of Sir Nicholas Throckmorton and Sir Walter Raleigh, starting in the 16th century." Dunning, *supra* note 78, at 473.

137. See generally Richard D. Friedman, *Truth and its Rivals in the Law of*

that the goal of “truth determination” in litigation should be central to the reform of the hearsay doctrine.<sup>138</sup> But the ultimate goal of asylum proceedings cannot be to find the same truth, or the same level of accuracy, sought in criminal proceedings or even litigation. The truth of a litigated event is “what in fact happened.”<sup>139</sup> By definition, a refugee will not have the same tools, like documentary or first-hand testimonial evidence, to tell the adjudicator what happened.<sup>140</sup> The ultimate goal of an asylum hearing should be to assess refugee claims, and grant refuge to genuine refugees.<sup>141</sup> The process is humanitarian in nature.<sup>142</sup> As truth determination “should be the pre-eminent consideration governing evidentiary law” in litigation,<sup>143</sup> so the goal of providing refuge to genuine refugees, through inherent recognition of their plight, should form the evidentiary law of asylum proceedings. The question of how much weight to accord hearsay in asylum proceedings should be molded in a way so as to conform to the humanitarian goal of refuge. Asylum procedure should not be distorted so as to comport with litigation’s rigid system of truth determination.

Keeping in mind that the ultimate goal of the proceeding is to determine genuine refugee status, a strict, truth-seeking evidentiary system still has a place within that hearing. That place is at the table where the attorney for DHS sits. Because due process governs the proceeding at all times, using hearsay *against* the non-citizen is fundamentally unfair.<sup>144</sup> Therefore government’s use of highly unreliable hearsay violates the non-citizen’s due process rights.<sup>145</sup> For example, in one case, a letter from a declarant three steps away in a hearsay chain from the actual person who made the original statement claimed

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*Hearsay and Confrontation*, 49 HASTINGS L.J. 545 (1998).

138. *Id.* at 564.

139. *Id.* at 546.

140. *See Handbook, supra* note 103, ¶ 196.

141. The ultimate result is protection for genuine refugees. The international community, “for humanitarian reasons, began to assume responsibility for protecting and assisting refugees.” *Id.* ¶ 1.

142. Gorlick, *supra* note 111, at 359-60; *see also Handbook, supra* note 103, ¶ 1.

143. Friedman, *supra* note 137, at 564.

144. *See* *Alexandrov v. Gonzales*, 442 F.3d 395, 404-05 (6th Cir. 2006).

145. *See id.* at 405 (citing *Yongo v. INS*, 355 F.3d 27, 31 (1st Cir. 2004)).

that an investigation revealed the claimant's fraud.<sup>146</sup> The immigration judge's admission of this hearsay evidence violated the asylum claimant's due process rights.<sup>147</sup> The fear of unreliability logically carries over from criminal and civil proceedings when the entity under the resultant structure has the means to meet that structure's stringent standards. DHS does not find itself in the same situation as a refugee.

#### IV. IF CREDIBLE, THEN CREDITED

Materials regarding hearsay evidence suggest that the underlying problem of hearsay involves the inability to determine both the declarant's and the witness's accuracy.<sup>148</sup> Of these risks, only one may invariably be assessed during an asylum proceeding while still heeding the refugee's plight: the claimant's or witness's accuracy.<sup>149</sup> Because of the refugee's situation, an immigration judge's finding that the refugee is credible may be the best possible indicator that he or she speaks truthfully. As far as the ability to test the accuracy of the out-of-court statement, the refugee's plight will often make this impossible.<sup>150</sup> Because of these limitations stemming from the refugee's scenario, the trier of fact should give full weight to the hearsay evidence within a credible claimant's testimony. To couch it in terms of the Federal Rules of Evidence, the truth of the matter asserted in the out-of-court statement would be made more probable by the full weight of the statement.<sup>151</sup> All other hearsay risks that might affect the evidence's weight, risks associated with possible errors in the search for accuracy and incompatible with the recognition of the refugee's situation, would no longer apply. This Note argues that the fact finder, considering the statement as made and true, should then give the hear-

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146. See generally *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 406-07 (3d Cir. 2003).

147. *Id.* at 405-06.

148. See *Park*, *supra* note 123, at 55-58.

149. See *id.* at 55-56.

150. See, e.g., *Szypszak*, *supra* note 88, at 521 (explaining that Ms. Wilson did not want to contact people who could provide first-hand testimony or documentary evidence supporting her claim for fear that contacting them would place them in further danger).

151. See FED. R. EVID. 801(c).

say statement full weight regardless of whether the statement is hearsay.

### A. The Credibility Determination

In determining whether an asylum applicant has met his or her burden of proving refugee status, the trier of fact may weigh credible testimony and evidence of record.<sup>152</sup> When neither the immigration judge nor the BIA has made an adverse credibility finding, the applicant's testimony must be taken as true.<sup>153</sup> An adjudicator assesses credibility by examining many factors: reasonableness of alleged facts, "consistency and coherence," "corroborative evidence," "consistency with common knowledge," "and the known situation in the country of origin."<sup>154</sup> Adjudicators must take into account the totality of the circumstances, considering "demeanor, plausibility, and factual inconsistencies and omissions."<sup>155</sup>

In the past, immigration judges based incredibility decisions on inconsistencies only if the inconsistencies were "major" and went to "the heart of the claim."<sup>156</sup> The "heart" of an asylum claim includes the persecutor's identity, the claimant's identity, and the claimant's fear.<sup>157</sup> With the recent REAL ID Act,<sup>158</sup> however, refugees may receive an adverse credibility determination even if the inconsistencies in their testimony do "not go 'to the heart of the applicant's claim.'"<sup>159</sup> The REAL ID Act states that one of the relevant considerations in a credibility determination is the presence of "any inaccuracies or falsehoods . . . without regard to whether an inconsistency, inaccuracy, or

152. Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)(iii) (2000).

153. See *id.*; *Gu v. Gonzales*, 454 F.3d at 1021 (citing *Kataria v. INS*, 232 F.3d 1107, 1113 (9th Cir. 2000)); *id.* at 1025 (Pregerson, J., dissenting) (citing *Smolnikova v. Gonzales*, 422 F.3d 1037, 1038 (9th Cir. 2005)); *Navas v. INS*, 217 F.3d 646, 657 (9th Cir. 2000) (citing *Gaya Prasad v. INS*, 101 F.3d 614, 616 (9th Cir.1996)).

154. Gorlick, *supra* note 111, at 371.

155. Cianciarulo, *supra* note 13, at 129.

156. Elaine C. Schneider, *Challenging an Incredibility Finding on Appeal: An Incredibility Paradigm*, 27 WM. MITCHELL L. REV. 2375, 2398 (2001).

157. *Id.*

158. REAL ID Act, Pub. L. 109-13, 119 Stat. 231 (2005).

159. Eleanor Acer, *Refugee in an Insecure Time: Seeking Asylum in the Post-9/11 United States*, 28 FORDHAM INT'L L.J. 1361, 1393 (2005).

falsehood goes to the heart of the applicant's claim."<sup>160</sup> With this change in law, even innocent discrepancies between the claimant's application and the claimant's testimony may result in an adverse credibility determination. Often enlisting a third party to file the initial asylum application, the claimant may not know what facts are essential to the application or lack the ability to explain the persecution adequately in writing.<sup>161</sup> Asylum claimants regularly try to add these facts later, thinking them unimportant at the outset of the application process.<sup>162</sup> Because legislation like the REAL ID Act increases the difficulty with which a claimant may be found credible, the immigration adjudication system is less likely to be regarded as too lenient if it accords hearsay statements found in credible testimony full weight. Furthermore, because the REAL ID Act may result in the return of refugees to the countries which persecute them,<sup>163</sup> the evidentiary burden should be as lenient as possible once the claimant crosses this arguably harsh barrier.

*B. What Should Have Happened in Gu's Case:  
Why Gu's Claim Still Fails*

After the immigration judge admits hearsay testimony in an asylum proceeding, the finder of fact may consider it and rely on it, even if the evidence is contradicted by direct evidence.<sup>164</sup> The majority in

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160. Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)(iii) (2000).

161. Durst, *supra* note 109, at 139, 143-44 (giving examples of when an asylum application conflicted with testimony due to the applicant's ignorance at the time the application was filed). "Many negative determinations of credibility can be explained by the inability of the asylum applicant, or his attorney, to translate the persecution suffered into a narrative graspable by the adjudicator." *Id.* at 128. *See also, e.g.,* Susan Bibler Coutin, *The Oppressed, the Suspect, and the Citizen: Subjectivity in Competing Accounts of Political Violence*, 26 LAW & SOC. INQUIRY 63, 87 n.26 (2001) (noting that asylum was denied when the claimant filed through a notary who failed to include all the material facts of the claimant's case in the application).

162. *See* Coutin, *supra* note 161, at 87 n.26; Durst, *supra* note 109, at 143-44.

163. *See generally* Acer, *supra* note 159, at 1391-94. "[T]his new law constitutes a significant blow to U.S. asylum law and to the rights of refugees." *Id.* at 1394. "With the REAL ID Act in place, the United States may very well find itself returning refugees to their countries of persecution, despite its obligations to the contrary under the 1951 Refugee Convention and its Protocol." *Id.*

164. *Gu v. Gonzales*, 454 F.3d 1014, 1024 (9th Cir. 2006) (Pregerson, J., dissenting) (citing *Richardson v. Perales*, 402 U.S. 389, 402 (1971)). In *Richardson v.*

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*Gu v. Gonzales* made a mistake when it considered the hearsay statement of Gu's friend as "less 'persuasive' or 'specific' than a first-hand account of the incident would have been."<sup>165</sup> The majority stated that because Gu's testimony must be taken as true, the court does not question Gu's understanding that the statement was made.<sup>166</sup> The majority, however, made a devastating distinction between believing the petitioner, and believing the out-of-court statement.<sup>167</sup> According to the majority's rationale, the statement to be regarded as true is "I heard statement X," and not statement X itself.<sup>168</sup> Thus, the majority's rationale indicates that the last chronological link in the hearsay transmission chain is to be trusted,<sup>169</sup> but the inability to test the accuracy of the first link allows for the hearsay evidence to receive less weight than non-hearsay evidence.<sup>170</sup> The majority goes on to argue that even if it "were to give full weight to the evidence that the authorities looked for Gu at his former home in China," the outcome would have

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*Perales*, however, the Supreme Court held that a licensed physician's written report was admissible even though it was hearsay; despite the presence of opposing direct medical testimony, the report could constitute substantial evidence to support a finding. *Richardson*, 402 U.S. at 402. The Court considered the fact that the reports were "routine, standard, and unbiased medical reports by physician specialists." *Id.* at 404. The oral recitation of a threat that occurred some time ago and in another country does not justify the same conclusion of standardized reliability. This Note accounts for that discrepancy. Because the rationale behind the unreliability of hearsay should not come into play at all in asylum proceedings if the claimant is found credible, there is no need to search for factors that make the testimony more reliable than other hearsay.

165. *Gu*, 454 F.3d at 1021 (citing *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453 (9th Cir. 1985)).

166. *Id.*

167. *Id.*

168. The basic definition of hearsay differentiates between out-of-court statements and statements made while testifying in court. *See* FED. R. EVID. 801(c). Hearsay encompasses the out-of-court statement that is being offered for its truth, not the in-court statement relating that the testifying witness heard that out-of-court statement. *See id.*

169. *Gu*, 454 F.3d at 1021.

170. *See id.* at 1025 (Pregerson, J., dissenting) ("The majority faults Gu for failing to provide a 'first hand account' of the incident. But direct evidence that the security officials had been looking for Gu would not be 'easily available' to Gu." (citations omitted)).

been the same because the evidence lacked detail.<sup>171</sup> Here, the majority admits that it did not give the out-of-court statement full weight, and at the same time, undermines its holding.<sup>172</sup> Even if the majority had considered the full evidentiary force of the statement, Gu's asylum claim would still have been denied.<sup>173</sup> It is thus possible that a trained adjudicator could consider the full weight of an out-of-court statement and find that, even so weighted, the statement is not outcome determinative. Because the immigration judge and the BIA did not base their decisions on the hearsay statements in Gu's testimony,<sup>174</sup> it might be assumed that the administrative adjudicators in Gu's case did just that.

The out-of-court statement should be deemed true if the petitioner is found credible, and the fact finder must give this evidence, considered true, the most weight possible. It should be given full weight because the testimony of the claimant is likely the most probative evidence available.<sup>175</sup> The inquiry in Gu should have been this: if, because Gu is credible, the trier of fact assumes the friend's out-of-court statement is true, does that statement make it more likely that Gu's fear of persecution in China is well-founded? Or, the question can be stated as it was in *Ladha v. INS*: "[W]hen an alien credibly testifies to certain facts, those facts are deemed true, and the question remaining to be answered becomes whether these facts, and their reasonable inferences, satisfy the elements of the claim for relief."<sup>176</sup> As suggested above, this inquiry would not invariably result in a successful claim. In *Gu*, the Ninth Circuit implied that the only true fact was simply that Gu understood his friend to utter the out-of-court statement.<sup>177</sup> Because most testimony in an asylum proceeding will be that of the claimant, and not the testimony of first-hand witnesses from the

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171. *Id.* at 1022.

172. *Id.*

173. *See id.*

174. *See id.*

175. Cianciarulo, *supra* note 13, at 129.

176. *Ladha v. INS*, 215 F.3d 889, 900 (9th Cir. 2000).

177. *See Gu*, 454 F.3d at 1021.

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claimant's home country,<sup>178</sup> this cannot be the interpretation that the *Ladha* court intended.<sup>179</sup>

Because the immigration judge may consider corroboration of the claim as a factor in a credibility determination, the requirement of corroboration should be lessened once the claimant has been found credible. But, because at times the claimant may have nothing but his or her own testimony to corroborate the claim,<sup>180</sup> it is inherent that, although corroboration may contribute to a credibility finding, lack of corroboration should not result in an adverse finding. Accordingly, the applicant only has the responsibility to support statements with evidence that is "reasonably available."<sup>181</sup> Case law suggests that corroborating evidence is necessary when the facts can be easily verified.<sup>182</sup> This standard is a good, moderate hurdle for the credibility determination as it recognizes the refugee's plight; if the facts cannot be easily verified, like those surrounding Dolores Wilson's rape,<sup>183</sup> only detail, and not corroboration, should be necessary.

Admittedly, this Note's thesis places much in the hands of the credibility determination. Credibility may already be the "single most important step" in determining refugee status.<sup>184</sup> One author argues that credibility is "the most crucial aspect of any asylum case."<sup>185</sup> If a claimant is not perceived credible, it is unlikely that he or she will be granted asylum.<sup>186</sup> In fact, a positive credibility determination is so essential that scholars have argued the process should begin with a re-

178. Cianciarulo, *supra* note 13, at 122-23.

179. *See Ladha*, 215 F.3d at 899 (citing *Cordon-Garcia v. INS*, 204 F.3d 985, 992 (9th Cir. 2000)).

180. The Code of Federal Regulation states that testimony alone may be enough to corroborate a claim. *See* 8 C.F.R. § 1208.13(a).

181. David K. Reinert, *Rape Shield: Immigrants Deserve the Same Protection We Give Our Citizens*, 13 S. CAL. REV. L. & WOMEN'S STUD. 355, 369 (2004).

182. Virgil Wiebe, et. al., *Asking for a Note from Your Torturer: Corroboration and Authentication Requirements in Asylum, Withholding and Torture Convention Claims*, IMMIGR. BRIEFINGS 1, 4-6 (Oct. 2001) [hereinafter *Wiebe II*].

183. *See generally* Szypszak, *supra* note 88, at 522-29.

184. Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 367 (2003).

185. Cianciarulo, *supra* note 13, at 129.

186. Reinert, *supra* note 181, at 368.



buttable presumption that the claimant speaks the truth.<sup>187</sup> During the credibility assessment, however, current law may operate in discord with the refugee's situation.<sup>188</sup> A refugee is, by definition, from another country.<sup>189</sup> Cultural and linguistic differences separate the applicant, fleeing a persecuting country, from the adjudicator, accustomed to the "patriarchal government, [or] the 'good' parent . . ."<sup>190</sup> Concepts of race might also influence a credibility determination when adjudicators' "perceptions of intelligence and of honesty are tainted by subconscious stereotypes."<sup>191</sup> This Note is predicated on the hope that, with more scholarship and jurisprudence, the credibility determination might better acknowledge the refugee's situation.

A comparison of the refugee's plight to the rules regarding hearsay in other administrative proceedings will demonstrate why it is necessary to give hearsay testimony full weight when the asylum claimant is deemed credible. In *Calhoun v. Bailar*, a former postal employee challenged hearsay affidavits admitted in an administrative proceeding which led to his discharge.<sup>192</sup> There, the Ninth Circuit refused to accept a per se rule that hearsay evidence can never be substantial evidence.<sup>193</sup> The court instead returned to the rule that the evidence need only "have probative value and bear indicia of reliability."<sup>194</sup> If the evidence is reliable and credible, it may constitute substantial evidence in administrative settings.<sup>195</sup>

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187. Kagan, *supra* note 184, at 373-74.

188. The REAL ID Act now allows minor discrepancies to affect a credibility determination. Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)(iii) (2000); see Cianciarulo, *supra* note 13, at 135 (proposing that legislators should consider repealing the portion of the REAL ID Act that allows minor discrepancies to be factored into the credibility determination). This law ignores aspects of the refugee's plight. See, e.g., *id.* at 130 (stating that the trauma associated with persecution an asylum seeker might have endured can actually result in the inability to recall details).

189. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15) (2000).

190. Durst, *supra* note 109, at 161.

191. *Id.* at 165.

192. *Calhoun v. Bailar*, 626 F.2d 145, 147 (9th Cir. 1980).

193. *Id.* at 149.

194. *Id.*

195. *Id.* (citing *Richardson v. Perales*, 402 U.S. 389, 407-408 (1971); *McKee v. United States*, 500 F.2d 525, 528 (Ct. Cl. 1974); *Reil v. United States*, 456 F.2d 777, 780 (Ct. Cl. 1972); *School Bd. of Broward City v. Dep't of Health, Educ. &*

In *Calhoun*, the court emphasized the reliability and credibility of hearsay evidence.<sup>196</sup> What makes hearsay evidence reliable and credible? Although there is no “bright line test,” the court lists factors that could help determine whether the hearsay testimony could constitute substantial evidence.<sup>197</sup> The application of the *Calhoun* factors to the refugee’s situation yields absurd results. The final product reveals why the hearsay testimony presented by a credible claimant should be given full weight. The first of the *Calhoun* factors are the bias and independence of the declarant.<sup>198</sup> In an asylum proceeding, an unbiased and objective declarant is not likely to appear.<sup>199</sup> Many declarants will be subject to the same persecution as the claimant or be the persecutors themselves.<sup>200</sup> Other *Calhoun* factors in determining reliable hearsay are also unlikely to be applicable in an asylum context, simply because of the refugee’s plight: the court in *Calhoun* considers whether the statements are contradicted, corroborated, sworn, or signed.<sup>201</sup> With Wilson’s situation as representative of a refugee’s plight,<sup>202</sup> the declarants may also fear their own life, and persecutors are unlikely to give a signed account of their persecution. The title of Virgil Wiebe’s essay, *Asking for a Note from Your Torturer*, says it all.<sup>203</sup>

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Welfare, U.S. Office of Educ., 525 F.2d 900, 905-907 (5th Cir. 1976); *Bethlehem Steel Corp. v. Clayton*, 578 F.2d 113 (5th Cir. 1978)).

196. See generally *Calhoun*, 626 F.2d 145.

197. *Id.*

198. *Id.*

199. See, e.g., *Gu v. Gonzales*, 454 F.3d 1014, 1021 (9th Cir. 2006) (stating that the out-of-court declarant was Gu’s friend). *But cf. Calhoun*, 626 F.2d at 149 (citing *Richardson v. Perales*, 402 U.S. 389, 402-08) (noting that the medical professionals who routinely prepared the hearsay were unbiased out-of-court declarants).

200. See *Szypszak*, *supra* note 88, at 521 (stating that out-of-court declarants may also be victims of similar persecution); Respondent’s Answering Brief at 6, *Perdomo-Duarte v. Gonzales*, No. 05-76613 (9th Cir. Aug. 21, 2006) (finding the out-of-court declarant, the union, a victim of government persecution).

201. See *Calhoun*, 626 F.2d at 149.

202. See *Szypszak*, *supra* note 88, at 518-19 (describing Dolores Wilson’s persecution and flight).

203. See *Wiebe II*, *supra* note 182.

There are only two *Calhoun* factors pertinent to the reliability and credibility of hearsay evidence in the asylum context, or, rather, there are only two that are not in discord with the definition of a refugee. These applicable *Calhoun* factors are, first, whether or not the declarant is unavailable to testify and no other evidence is available; and second, the credibility of the witness testifying to the hearsay.<sup>204</sup> Within the facts of many asylum claims, the declarant will not be available to testify.<sup>205</sup> And, as previously stated, hearsay evidence may be the only evidence available.<sup>206</sup> As to the concern that hearsay evidence lacks reliability, an examination of the credibility of the witness testifying is required for a successful asylum claim.<sup>207</sup> Applying the *Calhoun* factors in the asylum context, the hearsay testimony has met the minimum threshold of reliability. After considering *Calhoun* factors such as the declarant's unavailability and the witness's credibility, the result is usually this: a credible claimant's hearsay evidence should constitute "substantial" evidence in the words of the court in *Calhoun*,<sup>208</sup> or receive "full weight," in the words of *Gu v. Gonzales*.<sup>209</sup>

## V. CONCLUSION

In August 2006, Wilfredo Perdomo-Duarte appealed to the Ninth Circuit from the BIA's decision affirming the immigration judge's denial of his asylum claim.<sup>210</sup> He had claimed he would suffer persecution upon return to Guatemala because leaders of the Sindicato do

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204. See *Calhoun*, 626 F.2d at 149.

205. See Smith & Hake, *supra* note 13, at 27 ("The most important, and sometimes the only, evidence in asylum cases is the applicant's testimony. The BIA has ruled that when the applicant's testimony is the only evidence available, it can suffice to establish eligibility for asylum if it is believable, consistent and sufficiently detailed to provide a plausible and coherent account of the basis of the applicant's fear.").

206. *Id.*

207. Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)(iii) (2000); see also *Calhoun*, 62 F.2d at 149-50.

208. *Calhoun*, 62 F.2d at 149.

209. *Gu v. Gonzales*, 454 F.3d 1014, 1022 (9th Cir. 2006).

210. Respondent's Answering Brief at 6, *Perdomo-Duarte v. Gonzales*, No. 05-76613 (9th Cir. Aug. 21, 2006).

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Trabajeros Bananeros De Izabal (Banana Workers Union of Izabal), of which he was once a member, had received death threats.<sup>211</sup> To support this claim, he submitted an internet newsletter, published by the union, describing an eight-hour assault on union officials.<sup>212</sup> Misinterpreting the *Gu v. Gonzales* holding and unfortunately adopting the *Gu* reasoning, the government in its answering brief cites *Gu* to assert that the internet publication, as hearsay, is “not authoritative.”<sup>213</sup> The government continues to argue that if it is credited, the evidence would still not aid in establishing Perdomo’s case because of the attenuated connection between Perdomo and the assault documented in the newsletter.<sup>214</sup> For example, when Perdomo lived in Guatemala, he went unharmed.<sup>215</sup> His father held a higher position in the union, still lived in Guatemala at the time of the asylum hearing, and continued to go unharmed.<sup>216</sup> The government discredited the hearsay evidence of a claim that was already weak.<sup>217</sup> In this argument the government mirrored the Ninth Circuit in *Gu* when it reasoned that even if it were to give *Gu*’s friend’s statement full weight, the fact that the authorities simply came to look for *Gu* did not prove a well-founded fear of persecution.<sup>218</sup> Although almost identical, the two arguments subtly but crucially diverge. The wording in the government’s Perdomo brief misinterprets *Gu*’s holding, expanding on what already constitutes a blow to the rights of refugees.<sup>219</sup> The government substitutes language of “credit”<sup>220</sup> for the court’s language of “weight.”<sup>221</sup> With this, the government incorrectly augments the *Gu* holding from a rule that accords hearsay less probative value to a rule that eviscerates the evi-

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211. *Id.*

212. *See id.* at 16-17.

213. *Id.* at 17.

214. *Id.*

215. *Id.*

216. *Id.* at 15.

217. *See generally id.* at 11-18.

218. *See Gu v. Gonzales*, 454 F.3d 1014, 1022 (9th Cir. 2006).

219. *See generally* Respondent’s Answering Brief, *supra* note 210, at 17.

220. *Id.*

221. *Gu*, 454 F.3d at 1021.

dence altogether.<sup>222</sup> Although the government's claim that hearsay evidence in asylum law is not authoritative,<sup>223</sup> it represents the manner in which practitioners and officials at the EOIR and BIA levels interpret, and may continue to interpret, the *Gu v. Gonzales* holding.

Once an asylum claimant has overcome the credibility hurdle, he or she should be able to testify to all facts that indicate past persecution or a well-founded fear of persecution. The trier of fact should accord each of these pieces of evidence full weight, regardless of whether the testimony is based on hearsay or on first-hand knowledge. Proper consideration of the refugee's plight emasculates the historical and psychological reasons for devaluing hearsay. A refugee is someone fleeing persecution,<sup>224</sup> and by this definition, most refugees will not be able to gather specific, first-hand testimony regarding past persecution or a fear of future persecution. This Note's thesis does not require gullible fact finders to be mesmerized by the horrific facts of tall tales; there is already a corroboration element to the credibility determination itself. Furthermore, even when the trier of fact allots hearsay full probative value, the refugee may still fail to meet his or her burden of proving just a ten percent chance of future persecution upon return home. If this article's thesis were implemented by the BIA and the EOIR, no floodgate would open. Indeed, the proposed scheme would not even open a narrow door for Xiaoguang Gu.

Currently, through federal circuit case law, the demand for corroboration in asylum cases is rising.<sup>225</sup> *Gu v. Gonzales*, however, demands even more than corroboration; it favors first-hand, in-court testimony.<sup>226</sup> Because corroboration is already considered in the credibility determination, this holding goes too far. Ignoring the refugee's situation, the Ninth Circuit has created an "insurmountable burden."<sup>227</sup> A credible claimant's testimony must be taken as true; spe-

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222. See generally Respondent's Answering Brief, *supra* note 210, at 17.

223. As of the time of this publication, Perdomo-Duarte's case had not yet been decided by the Ninth Circuit.

224. See *supra* note 12.

225. Wiebe I, *supra* note 95, at 16.

226. See *Gu*, 454 F.3d at 1021.

227. Bay, *supra* note 114 (quoting Joseph S. Porta, counsel for Xiaoguang Gu).

cifically, hearsay statements within that credible testimony should be given their full weight. Only the declarant's accuracy and credibility are on the line once the claimant's witness is found credible, and these traits are likely impossible to ascertain in the asylum context. Was Gu's friend lying? Who knows? Was Gu lying? No.

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