Overturning Asylum Denials Under the Compelling Evidence Standard

The Ninth Circuit routinely overturns asylum denials that should be upheld under the compelling evidence standard set forth in 8 U.S.C. 1252 (b)(4) and *INS v. Elias-Zacarias*, **502 U.S. 478 (1992). The court isolates the individual elements of the adverse credibility determination, discarding even partially flawed elements, and reweighing the evidence in light of any plausible alternative arguments.**

This contrasts with the practice of other circuits, even in cases not covered by the REAL ID Act. *See, e.g., Diadjou v. Holder,* **662 F.3d 265, 278 (4th Cir. 2011)(cumulative effect of "seemingly minor and tangential inconsistencies" can justify adverse credibility finding);** *Zine v. Mukasey,* **517 F.3d 535, 541 (8th Cir. 2008)(even where individual reasons are inadequate support, the issue is whether "their cumulative weight" is sufficient); Pan v. Gonzales, 489 F.3d 80, 86 (1st Cir. 2007) (although individual inconsistencies may "seem like small potatoes . . . their cumulative effect is great");** *Xiao Ji Chen v. U.S. DOJ,*

434 F.3d 144, 160 n.15 (2d Cir. 2006) ("the IJ did not err in stressing the cumulative impact" of the inconsistencies); *Yu v. Ashcroft,* **364 F.3d 700, 704 (6th Cir. 2004) (although minor inconsistencies about dates would alone be inadequate, "their cumulative effect gives support to the other grounds");** *Chun v. INS,* **40 F.3d 76, 78-79 (5th Cir. 1994) (upholding an adverse credibility finding based upon collective significance of inconsistencies).**

This problem has plagued government litigators for over 20 years. In 1990, Judge Sneed noted developing problems in the circuit's asylum case law, including heightened obstacles to adverse credibility findings. *Mendoza Perez v. INS,* **902 F.2d 760, 764 (9th Cir. 1990) (Sneed, J., concurring specially). The government anticipated that first the Supreme Court's 1992 Elias-Zacarias decision, and later the 1996 IIRIRA amendments, would rein in the court's overreaching; only the passage of time revealed that the court would ignore both.**

Individual judges began dissenting with more frequency and a greater sense of urgency. See, e.g,. *Borja v. INS,* **175 F.3d 732, 738 (9th Cir. 1999) (en banc) (O'Scannlain, Kleinfeld, JJ., dissenting);** *Mgoian v. INS,* **184 F.3d 1029, 1037 (9th Cir. 1999) (Rymer, J., dissenting). The government responded by filing a series of rehearing petitions in a concerted effort to challenge the Ninth Circuit's judge-made rules, such as the "divide-and-conquer" analysis, that usurp the agency's factfinding authority. Although the Ninth Circuit denied our rehearing petitions, the effort produced a remarkable dissent in** *Abovian v. INS,* **257 F.3d 971 (9th Cir. 2001), in which Judges O'Scannlain, Trott, T.G. Nelson, Kleinfeld, Graber, Tallman, and Rawlinson joined Judge Kozinski in soundly criticizing the court's approach. In light of the Ninth Circuit's unwillingness to reconsider its credibility jurisprudence, the Solicitor General filed a petition for a writ of certiorari. Chen v. INS, 266 F.3d 1094 (9th Cir. 2001), cert. granted, judgment vacated and remanded for reconsideration in**

light of I*NS v. Ventura,* **537 U.S. 1016, on remand, 326 F.3d 1316 (9th Cir. 2003).**

The Supreme Court's vacatur and remand for reconsideration in light of the Ventura ruling failed to persuade the Ninth Circuit to change its approach. The Solicitor General subsequently asked the Ninth Circuit to reconsider and reject its credibility rules in response to a sua sponte call for the parties' views on whether the court should rehear *Suntharalinkam v. Keisler,* **506 F.3d 822 (9th Cir. 2007). T h e court granted en banc rehearing, but Suntharalinkam mooted out when the petitioner withdrew his petition following oral argument. Both adverse credibility losses and individual dissents continued.**

The Supreme Court found the Ninth Circuit's "evaluation and rejection of . . . factors in isolation from each other does not take into account the 'totality of the circumstances'" and explicitly rejected the "divide-and-conquer analysis." Id. at 274. It held that it was "reasonable for [the agent] to infer from his observations, his registration check, and his experience as a border control agent. . . ." Id. at 277. It stated that "A determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct," ibid., meaning that the possibility that each separate factor might relate to innocent conduct does not prevent their aggregate from giving rise to reasonable suspicion.

After granting en banc rehearing and ordering that the panel decision not be cited, 714 F.3d 1134 (April 25, 2013), the en banc court found reasonable suspicion. 738 F.3d 1074 (Dec. 24, 2013) (Pregerson, Reinhardt, Thomas, J.J., dissenting). The court noted that reasonable suspicion requires more than a hunch but less than probable cause and "is not a particularly high threshold to reach." 738 F.3d at 1078. The court observed that the correct approach "precludes a 'divide-and-conquer analysis' because even though each of the

suspect's 'acts was perhaps innocent in itself . . . taken together, they [may] warrant[] further investigation." Ibid., quoting Arvizu, 534 U.S. at 274. "The nature of the totality-of-the circumstances analysis also precludes us from holding that certain factors are presumptively given no weight without considering those factors in the full context of each particular case." 738 F.3d at 1079. Proper evaluation "cannot be done in the abstract by divorcing factors from their context in the stop at issue." *Id.*

"And the facts must be filtered through the lens of the agents' training and experience." Ibid. The en banc court stated that the district court's findings were not clearly erroneous and that, given the totality of the circumstances, "many of the facts found relevant by the district court are highly probative in our view as well." Ibid. "In light of the totality of the circumstances, giving due weight to the agents' experience and reasonable deductions, we hold that the agents had a reasonable, particularized basis. . . ." Id. at 1080. There is no need for an officer to rule out an innocent explanation; . . . [a] series of innocent acts may be enough for reasonable suspicion. . . ." Ibid. "We need not decide whether any single fact would be enough to support suspicion because we are not called upon to review single facts in isolation." Id. at 1081.

The threshold for according deference to agency adverse credibility findings should be even lower, because the substantial evidence standard – a more deferential standard – applies to them.

By statute, "the administrative findings of fact [underlying an immigration petition for review] are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B).

The relevance of *Arvizu* **is particularly strong in petition for review cases in which the REAL ID Act applies, i.e., cases in which an application for asylum, withholding, and/or protection under the Convention Against Torture**

originally was filed on or after May 11, 2005. Section 101(a)(3)(B)(iii) of the REAL ID Act added new language to the INA on the subject of credibility determinations. That language begins: “Considering the totality of the circumstances, and all relevant factors. . . .” 8 U.S.C. 1158(b)(1)(B)(iii) (asylum). See also 8 U.S.C. 1231(b) (3 (C) (withholding); 8 C.F.R. 208.16 (b) (Convention Against Torture).

Revision #1

Created 14 May 2025 17:43:34 by Joseph

Updated 14 May 2025 17:49:51 by Joseph