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Cancellation of Removal: When Is Exceptional and Extremely Unusual Hardship a Question of Law?

by Nina Elliot and Greta Hendricks

Introduction

Cancellation of removal for nonpermanent residents ("non-LPR cancellation") allows qualifying individuals with no ability to adjust status via family or employment the means to obtain permanent residence in the United States. To become eligible for non-LPR cancellation, an applicant must establish, among other qualifications, that his or her removal would cause exceptional and extremely unusual hardship to a qualifying relative. Traditionally, the Federal circuit courts of appeals have declined to exercise jurisdiction over these hardship determinations. However, in the past few years, some circuit courts have found that in certain instances, the determination whether an alien has established exceptional and extremely unusual hardship can present a legal question over which the court has jurisdiction. This article examines the circumstances in which circuit courts have found they have jurisdiction to review hardship determinations in non-LPR cancellation cases and the rationales upon which this acceptance of jurisdiction is premised.

Cancellation of Removal for Nonpermanent Residents

Acquiring non-LPR cancellation requires an applicant to establish four statutory elements: (A) physical presence in the United States for a continuous period of 10 years; (B) good moral character during that period of time; (C) no convictions for certain criminal offenses; and (D) exceptional and extremely unusual hardship to the applicant's spouse, parent, or child who is a citizen of the United States or an alien lawfully admitted for permanent residence. Section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). The statute states that if these requirements are met, the "Attorney General *may* cancel removal of . . . an alien who is inadmissible or deportable from the United States." *Id.* (emphasis added).

Deciding whether an applicant can demonstrate that a qualifying relative would suffer exceptional and extremely unusual hardship may be difficult for adjudicators, given that there are only three decisions published by the Board of Immigration Appeals to guide them. See *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). In denying the respondent's application for non-LPR cancellation in *Matter of Monreal*, the Board determined that the hardship the respondent's children would face if the respondent were removed to Mexico would not rise to the level of exceptional and extremely unusual hardship. The Board noted that the children were in good health, that the oldest child could speak, read, write, and understand Spanish, and that they would be reunited with family upon their return. Similarly, in *Matter of Andazola*, the Board denied the application of a 30-year-old Mexican single mother of two United States citizen children. The mother had been in the United States for 16 years, had no family in Mexico, and expressed concerns about discrimination and the limited opportunities she and her children would face if removed. In vacating the decision of the Immigration Judge granting her application, the Board stated that "the hardships the respondent . . . outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country." *Matter of Andazola*, 23 I&N Dec. at 324.

By contrast, *Matter of Recinas*, 23 I&N Dec. at 470, identified "the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met." In finding that the Mexican respondent had shown the requisite level of hardship, the Board highlighted the fact that the respondent was a 39-year-old single mother of six children, four of whom were United States citizens. In addition, the respondent's family had been in the United States for 14 years, and her entire family, including her siblings, resided lawfully in the United States. Further, the children spoke little Spanish, the respondent relied heavily upon her family to care for the children while she worked, and no similar support existed in Mexico. The Board emphasized that "the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief." *Id.*

Judicial Review of Non-LPR Cancellation Decisions

Section 242(a)(2)(B)(i) of the Act, 8 U.S.C. § 1252(a)(2)(B)(i), states that, notwithstanding other provisions of the law, courts have no jurisdiction to review "any judgment regarding the granting of relief under" several provisions of the Act, including section 240A, which governs cancellation of removal. In addition, section 242(a)(2)(B)(ii) bars courts from reviewing "any other decision or action of the Attorney General . . . the authority for which is specified under this title to be in the discretion of the Attorney General," except for asylum. However, judicial review of legal and constitutional, as opposed to factual, determinations is permitted under section 242(a)(2)(D), which states that no provision of the Act "shall be construed as precluding review of constitutional claims or questions of law."

In general, circuit court decisions reviewing the merits of non-LPR cancellation determinations have been rare. The Board has characterized non-LPR cancellation as a discretionary form of relief from removal. *Matter of Almanza-Arenas*, 24 I&N Dec. 771, 774 (BIA 2009). In addition, every circuit court has held that in at least certain instances, the determination whether an alien has met his or her burden to establish the requisite hardship is considered a discretionary determination outside of a circuit court's jurisdiction to review. See, e.g., *Arambula-Medina v. Holder*, 572 F.3d 824, 828 (10th Cir. 2009); *Barco-Sandoval v. Gonzales*, 516 F.3d 35, 38-39 (2d Cir. 2008); *Zacarias-Velasquez v. Mukasey*, 509 F.3d 429, 434 (8th Cir. 2007); *Martinez v. U.S. Atty Gen.*, 446 F.3d 1219, 1222-23 (11th Cir. 2006); *Bencosme de Rodriguez v. Gonzales*, 433 F.3d 163, 164 (1st Cir. 2005); *Obioha v. Gonzales*, 431 F.3d 400, 405 (4th Cir. 2005); *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005); *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005); *Rueda v. Ashcroft*, 380 F.3d 831, 831 (5th Cir. 2004); *Leyva v. Ashcroft*, 380 F.3d 303, 305-06 (7th Cir. 2004); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176, 179 (3d Cir. 2003).

However, circuit courts have found jurisdiction to review certain legal determinations with respect to applications for cancellation of removal. See, e.g., *Garcia v. Holder*, 584 F.3d 1288, 1289 n.2 (10th Cir. 2009) (concluding that the alien's conviction for

third-degree assault rendered him ineligible for cancellation of removal); *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1157 (9th Cir. 2009) (remanding from a determination that the alien's crimes rendered him ineligible for cancellation of removal); *Vasquez-Martinez v. Holder*, 564 F.3d 712, 717-19 (5th Cir. 2009) (holding that the alien's Texas conviction for possession of cocaine with intent to deliver was for an aggravated felony, rendering the alien ineligible for cancellation of removal); *Obi v. Holder*, 558 F.3d 609, 612 (7th Cir. 2009) (holding that section 240A(b)(1)(C) of the Act is not impermissibly retroactive when applied to a conviction that occurred prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546); *Mejia-Rodriguez v. Holder*, 558 F.3d 46 (1st Cir. 2009) (finding the alien not eligible for the petty offense exception and therefore ineligible for cancellation of removal); *Augustin v. Att'y Gen. of U.S.*, 520 F.3d 264 (3d Cir. 2008) (finding that the Board did not err in refusing to impute the father's years of continuous residence to his son for purposes of establishing the requisite continuous residence for cancellation of removal); *Mbea v. Gonzales*, 482 F.3d 276, 278 n.1 (4th Cir. 2007) (finding that the malicious burning of property in violation of the D.C. criminal code is a crime of violence, rendering the alien ineligible for cancellation of removal); *Singh v. Gonzalez*, 451 F.3d 400, 406-07 (6th Cir. 2006) (remanding after the Board imputed to the minor petitioners certain fraudulent actions of their parents).

In addition, several cases have recently emerged where circuit courts have found jurisdiction to examine an Immigration Judge's determination whether a qualifying relative will suffer exceptional and extremely unusual hardship if the petitioner is removed. The following summaries provide examples of some recent noteworthy cases where this issue was considered. As explained below, in many of these cases, courts have found jurisdiction to examine whether the Immigration Judge or the Board either: (1) used an incorrect legal standard in this determination; or (2) misapplied the Board's precedent.

Mireles v. Gonzales

In *Mireles v. Gonzales*, 433 F.3d 965 (7th Cir. 2006), the petitioner argued that the Immigration Judge made a legal error in understanding the meaning of exceptional and extremely unusual hardship. The United States Court of Appeals for the Seventh Circuit determined that it retained jurisdiction to review the petitioner's

argument. It then quickly disposed of the argument by saying only that "the IJ used the right legal standard" and that the court cannot review how the Immigration Judge exercised discretion. *Id.* at 969. Once it determined that the Immigration Judge applied the correct legal standard, the court completed its review of the case and did not evaluate how the Immigration Judge weighed the hardship factors in the petitioner's case.

Gomez-Perez v. Holder

In *Gomez-Perez v. Holder*, 569 F.3d 370, 371 (8th Cir. 2009), the petitioner, a native and citizen of Guatemala, argued before the Immigration Court that his removal would result in exceptional and extremely unusual hardship to his United States citizen children. In denying the petitioner's application, the Immigration Judge noted that the hardship to the children would be largely economic, since the petitioner said his children would remain with their mother in this country. On appeal, the petitioner claimed that the Immigration Judge erred by applying an incorrect standard in determining whether his children would suffer exceptional and extremely unusual hardship. The petitioner argued that the Immigration Judge looked at the children's *present* circumstances, instead of looking to *future* hardship. The Eighth Circuit held that whether an Immigration Judge has applied the correct legal standard is a question of law within the court's jurisdiction to review. In concluding that the Immigration Judge applied the proper legal standard, the court looked to the language of the Immigration Judge's decision, explaining that he had correctly evaluated whether the petitioner's removal *would* result in future hardship.

The petitioner also claimed that the Immigration Judge and the Board "applied an incorrect legal standard by failing to adequately consider certain factors [regarding hardship] that have been considered relevant in other BIA decisions." *Id.* at 373. However, the Eighth Circuit declined to review the specific factors weighed by the Immigration Judge, noting that the petitioner was essentially arguing that the Immigration Judge improperly weighed the evidence, a discretionary determination that the circuit courts are prohibited from reviewing.

Figueroa v. Muksaey

In *Figueroa v. Muksaey*, 543 F.3d 487, 491-92 (9th Cir. 2008), the petitioner argued that the Immigration Judge applied an incorrect legal standard in evaluating the

hardship for non-LPR cancellation, in that he required petitioners to show hardship that was “unconscionable.” The petitioners also argued that the Immigration Judge further erred in only considering the *present* medical conditions (Attention Deficit Hyperactivity Disorder, depression, ocular disorder, astigmatism) experienced by the petitioner’s children and failed to analyze whether the children would suffer *future* hardship.

In a matter of first impression, the Ninth Circuit looked to the Seventh Circuit’s decision in *Mireles v. Gonzales*, described above, for guidance on whether to assume jurisdiction. The Ninth Circuit also looked to other areas of immigration law where a circuit court has jurisdiction over the analysis of a legal issue, even when the overarching decision is a discretionary one. For example, the court noted that it has jurisdiction to consider whether an Immigration Judge applied the correct legal standard in finding a crime to be a “particularly serious crime” even though it lacks jurisdiction to review an Immigration Judge’s ultimate discretionary decision as to whether or not an offense is a “particularly serious crime.” *Figueroa*, 543 F.3d at 495 (citing *Afridi v. Gonzales*, 442 F.3d 1212, 1217-21 (9th Cir. 2006)). In finding that it had jurisdiction to review the hardship determination, the Ninth Circuit stated in *Figueroa* that even if an Immigration Judge’s decision is discretionary, it is not outside a circuit court’s power to review the agency’s decision if the agency misapplies the law. *Id.* at 495-96 (citing *Hernandez v. Ashcroft*, 345 F.3d 824, 846-47 (9th Cir. 2003) (stating that the Board “must exercise its discretion within the constraints of the law”)).

The court also distinguished the petitioners’ argument in this case from the often-proffered argument that an Immigration Judge has legally erred by misapplying the facts of the case to the law: a disagreement with the outcome of a discretionary determination that a petitioner cloaks as a legal question. In this respect, the court stated that the petitioners here “do not argue that the IJ made a legal error by misapplying the facts of their case to the applicable law; rather, they argue that the IJ made legal errors in understanding the meaning of ‘exceptional and extremely unusual hardship.’” *Id.* at 495.

In the end, the court did not evaluate how the Immigration Judge weighed the particular hardship

factors but merely determined that the “unconscionable” standard for hardship was incorrect and remanded to the Board for further consideration.

Mendez v. Holder

In *Mendez v. Holder*, 566 F.3d 316 (2d Cir. 2009), the Second Circuit declined to find the hardship determination reviewable as a matter of law but remanded the case to the Board on account of other legal errors, as described below. In its decision, the court referenced two prior Second Circuit cases, *Rodriguez v. Gonzales*, 451 F.3d 60, 62 (2d Cir. 2006), and *Sepulveda v. Gonzales*, 407 F.3d 59, 62-63 (2d Cir. 2005), which described the adjudication of a non-LPR cancellation application as a two-part process. That is, the Immigration Judge must first determine whether an individual is statutorily eligible for the relief and, second, he or she must determine whether the alien merits that relief as an exercise of discretion. In *Rodriguez*, the court found it had jurisdiction to evaluate whether the petitioner had committed certain crimes that would render him ineligible for non-LPR cancellation. Similarly, in *Sepulveda*, the court took jurisdiction to consider whether a petitioner had met his burden of showing that he was a person of good moral character. Citing to *Rodriguez* and *Sepulveda*, the petitioner in *Mendez* argued that the circuit court retains jurisdiction to review all the determinations contained in the first step, namely, those involving whether physical presence and good moral character have been established, whether the alien committed certain crimes, and whether the alien’s removal would result in exceptional and extremely unusual hardship to his or her qualifying relatives. *Mendez*, 566 F.3d at 320-21.

The *Mendez* court rejected the petitioner’s argument, finding that it was bound by its prior precedent decision in *De La Vega*, 436 F.3d 141 (2d Cir. 2006), which held that the determination whether a petitioner’s removal would result in exceptional and extremely unusual hardship to a qualifying relative was a discretionary decision over which the circuit court lacked jurisdiction. But interestingly, the court noted that had this question been presented in the first instance, it “would be inclined to hold” that the determination of exceptional and extremely unusual hardship was a matter of statutory eligibility, over which the court would have jurisdiction. *Mendez*, 566 F.3d at 322.

Nonetheless, the court found that it retained jurisdiction to review the petitioner's application because the Immigration Judge erred as a matter of law in analyzing his claim. Specifically, the court determined that the Immigration Judge failed to address certain evidence presented by the petitioner, including: (1) the specialized piece of medical equipment the petitioner's United States citizen daughter used; (2) the number of asthma attacks the daughter experienced yearly; (3) the long-term prognoses of the daughter's asthma; (4) the specialized medical doctor the petitioner's son visited annually; (5) the unavailability of a specialized medical doctor for the petitioner's son in Mexico; and (6) the petitioner's ability to pay for highly specialized care in Mexico. The court found that the Immigration Judge failed to evaluate all the evidence submitted and therefore did not appropriately address whether the petitioner's removal would result in exceptional and extremely unusual hardship to his two United States citizen children. The court stated:

We readily acknowledge that the agency does not commit an "error of law" every time an item of evidence is not explicitly considered or is described with imperfect accuracy, but where, as here, some facts important to the subtle determination of "exceptional and extremely unusual hardship" have been totally overlooked and others have been seriously mischaracterized, we conclude that an error of law has occurred.

Id. at 323.

At the conclusion of its opinion, the court noted that the Immigration Judge had not made an adverse credibility finding and stated that it was "not confident that, after taking the overlooked evidence into account and describing it accurately," the agency would again conclude that the petitioner failed to establish exceptional and extremely unusual hardship. *Id.* Therefore, the court remanded the case to the Board for a new determination on the question of hardship.

Aburto-Rocha v. Mukasey

In *Aburto-Rocha v. Mukasey*, 535 F.3d 500 (6th Cir. 2008), the Sixth Circuit held that it had jurisdiction to review whether the Board had incorrectly applied its own

precedent regarding exceptional and extremely unusual hardship to the petitioner's case. In taking jurisdiction, the court stated that "the choice by the BIA to disregard its own binding precedent—even when deciding an issue that is within its discretion—is *not itself* a discretionary decision Congress has excluded from review." *Id.* at 503. The court went on to say that because it did not want to "second guess" how the Board weighed the evidence, it would only look to whether the Board "reasonably construed and applied its own precedents." *Id.*

In its analysis, the court first acknowledged that in the decision denying the petitioner's application for non-LPR cancellation, the Board had relied on its previous decisions in *Monreal* and *Andazola*. Then the court went on to review those decisions in order to determine whether the Board "fairly applied its precedent." *Id.* at 503-04. After reviewing *Monreal* and *Andazola*, the court compared the cases to the facts of the petitioner's case. The court noted that in this case, the Board had outlined the potential future hardships faced by the petitioner's qualifying relatives, namely that his United States citizen children would face "emotional hardship," "difficulty adjusting to life in Mexico," and "reduced educational and economic opportunities in Mexico." *Id.* at 504 (quoting the Board's decision). The court also mentioned the potential hardship faced by the petitioner's daughter as a result of her health problems, noting that this was the one difficulty "*not common*" in most cancellation cases. *Id.* at 504-05. The court agreed that this was insufficient to demonstrate the requisite hardship because the petitioner was unable to show that "adequate medical treatment" would not be available to her in Mexico. *Id.* at 505. The court concluded that in determining that the petitioner failed to demonstrate exceptional and extremely unusual hardship, the Board "accurately distilled the standard" in *Monreal* and *Andazola* and did not misapply its own precedent. *Id.* at 504.

Although the Board did not mention *Recinas* in its decision, the court found that this omission was "not unreasonable." *Id.* at 505. The court distinguished this case from *Recinas* on the grounds that, unlike the respondent in *Recinas* who had no family in Mexico, the petitioner's parents and two brothers live in Mexico, and "his common-law wife and mother of his six children" will likely return to Mexico with him. *Id.*

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FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR JANUARY 2010

by John Guendelsberger

The United States courts of appeals issued 403 decisions in January 2010 in cases appealed from the Board. The courts affirmed the Board in 375 cases and reversed or remanded in 28, for an overall reversal rate of 6.9%. The Second and Ninth Circuits together issued 73% of the decisions and 75% of the reversals. There were no reversals from the First, Fifth, Sixth, and Eighth Circuits.

The chart shows the results from each circuit for January 2010 based on electronic database reports of published and unpublished decisions.

Circuit	Total cases	Affirmed	Reversed	% reversed
First	1	1	0	0.0
Second	99	94	5	5.1
Third	28	27	1	3.6
Fourth	16	14	2	12.5
Fifth	10	10	0	0.0
Sixth	9	9	0	0.0
Seventh	5	4	1	20.0
Eighth	10	10	0	0.0
Ninth	194	178	16	8.2
Tenth	3	2	1	33.3
Eleventh	28	26	2	7.1
All circuits:	403	375	28	6.9

The 403 decisions included 205 direct appeals from denials of asylum, withholding, or Convention Against Torture relief; 78 direct appeals from denials of other forms of relief from removal or appeals on issues relating to removal grounds; and 120 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	%
Asylum	205	189	16	7.8
Other Relief	78	72	6	7.7
Motions	120	114	6	5.0

Of the 16 reversals in asylum cases, 3 rejected an adverse credibility determination, 3 found improper application of the 1-year bar, and 3 involved the nexus determination. The others addressed corroboration, firm resettlement, and a Convention Against Torture claim.

The six reversals in the “other relief” category involved the criminal bar in three cancellation of removal cases and good moral character in a fourth. The other two cases addressed the definition of “conviction” and aging out under the “K” visa.

The six reversals involving motions included three motions to reopen for asylum based on changed country conditions, two motions to rescind in absentia removal orders for lack of requisite notice of hearing, and a motion to reissue a Board decision.

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“A Little More Like Other Litigation”: The Ninth Circuit Embraces the REAL ID Act

by Edward R. Grant

Chronicling the application of the REAL ID Act in the Federal circuit courts has become a staple of these pages. *See, e.g.,* Edward R. Grant, *A Crummy Summer Rerun: Still More on Corroboration, Credibility, and the REAL ID Act*, Immigration Law Advisor, Vol. 3, No. 8 (Aug. 2009). At the risk of further repetition, two recent decisions from the United States Court of Appeals for the Ninth Circuit merit another round. Congress explicitly targeted prior rulings of the Ninth Circuit in enacting the burden of proof, corroboration, and credibility provisions of the REAL ID Act; thus, how these provisions fare before that court will determine whether Congress met its objectives. Based on the rulings in *Shrestha v. Holder*, 590 F.3d 1034 (9th Cir. 2010), and *Aden v. Holder*, 589 F.3d 1040 (9th Cir. 2009), Congress seems to have scored a bull’s-eye. The court appears not only to accept, but to

welcome, the REAL ID Act amendments, while reminding that despite these changes, Immigration Judges and the Board will not have a “blank check,” free from judicial scrutiny, to deny claims based on lack of credibility or insufficient corroboration. *Shrestha*, 590 F.3d at 1042.

***Aden*: The Need for Corroboration**

The first sentence of *Aden* sets the stage: “We address corroboration in this asylum case under the REAL ID Act.” *Aden*, 589 F.3d at 1041. The petitioner gave an account of “horrific” persecution by dominant clans in his native Somalia that, if credible, would have merited a grant of asylum. *Id.* at 1042. But the Immigration Judge was skeptical because photographs showed him in clothing inconsistent with his story of having grown up impoverished and illiterate, in a mud hut. Furthermore, he appeared to have some command of English. Finally, and most tellingly, the petitioner offered no evidence to corroborate the existence of the “Bilisyar” or “Wardey” clans in which he claimed membership. Three letters proffered by the petitioner (after the hearing was recessed for him to gather corroborative evidence) were given little weight, either by the Immigration Judge, or by the Board when it affirmed the denial of asylum. *Id.* at 1042-43.

In the absence of an adverse credibility determination, prior rulings of the Ninth Circuit may have forbidden the Immigration Judge and the Board from requiring corroborative evidence regarding the petitioner’s clan membership. See *Karapetyan v. Mukasey*, 543 F.3d 1118 (9th Cir. 2008); *Kataria v. INS*, 232 F.3d 1107, 1113 (9th Cir. 2000); *Ladha v. INS*, 215 F.3d 889, 901 (9th Cir. 2000). *Kataria*’s particular significance is that the Immigration Judge had expressed serious doubts regarding the petitioner’s credibility and, without making an explicit adverse credibility determination, required corroboration of the claim—the very situation arising in *Aden*. The Ninth Circuit in *Kataria* presumed that the petitioner was credible and on that basis held that no corroborative evidence could be required.

That approach, *Aden* recognized, is now “abrogated” by the REAL ID Act. Credible testimony now *may* be sufficient, but it no longer *must* be regarded as sufficient to support a claim.

Congress has thus swept away our doctrine that “when an alien credibly testifies to certain facts, those facts are deemed true.”

Apparently honest people may not always be telling the truth, apparently dishonest people may be telling the absolute truth, and truthful people may be honestly mistaken or relying on unreliable evidence or inference themselves. Congress has installed a bias toward corroboration in the statute to provide greater reliability. This is not very different from other litigation. In the most routine personal injury case, when a plaintiff credibly testifies that the collision caused \$10,000 worth of damage to his car, \$5000 in medical expenses, and \$10,000 in wage loss, the jury is likely to reject and is free to reject his damages testimony unless it sees the body shop invoice, the medical bills, and documentary evidence of wage loss. *Congress thus made asylum litigation a little more like other litigation.*

Aden, 589 F.3d at 1045 (emphasis added) (footnote omitted).

To drive the point home, the Ninth Circuit cited Federal jury instructions stipulating that if a party fails to call a witness or produce documentary evidence that is reasonably available to the party, the jury may infer that the testimony or documents would have been *unfavorable* to the party that failed to produce it. And it observed that “[i]t is hard to imagine a civil trial in which the party bearing the burden of proof asked the trier of fact to take his uncorroborated word for a proposition reasonably subject to corroboration.” *Id.* at 1045 n.13.

The question remains—which aspects of an asylum applicant’s testimony should be deemed reasonably subject to corroboration? Since future Ninth Circuit “corroboration cases” will likely turn on this question, some cautionary notes sounded by *Aden* bear close watch.

The Board discounted the petitioner’s efforts at corroboration because he had provided no scholarly studies or similar evidence showing the existence of the disputed clans. This analysis “invites the objection,” the Ninth Circuit cautioned, “that the half day hearings by impecunious petitioners typical of asylum cases should not be burdened with expensive expert witnesses testifying about their searches of the academic literature and their

opinions about it.” *Id.* at 1046. But since the Board did not absolutely require such evidence, but “merely suggested it as a possibility,” the Ninth Circuit found no error. *Id.*

The Board’s further dismissal of the petitioner’s effort to corroborate his claim with letters from Somali expatriates previously unknown to the petitioner was also “vulnerable to criticism,” the court noted. *Id.* A reliable affiant would not have to know the petitioner in order to corroborate the existence of his purported clans. A reasonable finder of fact, the court concluded, might thus deem the letters sufficient. However, the court concluded that its limited standard of review “does not enable us to substitute our judgment about the persuasiveness of this corroboration for the BIA’s” because the court could not say that “any reasonable adjudicator would be compelled to conclude to the contrary.” *Id.* (quoting section 242(b)(4)(B) of the Act). While the question is “close,” the court stated, the record as a whole does not “compel” acceptance of the letters as probative—particularly in light of the other adverse credibility factors of record. *Id.*

Aden is hardly the first—or last—court of appeals decision to address the sufficiency of “corroboration denials” under the REAL ID Act. See *Zhao v. Holder*, 569 F.3d 238 (6th Cir. 2009); *Balachandran v. Holder*, 566 F.3d 269 (1st Cir. 2009); *Khrystodorov v. Mukasey*, 551 F.3d 775 (8th Cir. 2008); see also *Sanchez-Velasco v. Holder*, 593 F.3d 733 (8th Cir. 2010) (finding that under the REAL ID Act, an Immigration Judge may require corroboration of testimony regarding continuous physical presence for a cancellation of removal application). But it punctuates this line of cases because it emanates from the circuit that was most strict in applying the “no corroboration required” rule to cases of credible testimony. Moreover, its analysis of the sufficiency of the corroboration the petitioner did provide—unsworn letters from witnesses not subject to cross-examination—indicates that the Ninth Circuit will continue to closely examine Immigration Judge and Board determinations dismissing corroborative evidence as unpersuasive. If the sufficiency of the letters in *Aden* was a close question—even under the “any reasonable adjudicator” standard—then future denials in which the petitioner has provided more substantial evidence may result in a different outcome. A high premium remains, therefore, on giving specific and cogent analysis for why a particular item of corroborative evidence is or is not persuasive.

***Shrestha*: Defining Standards for Credibility Determinations Under the REAL ID Act**

Two weeks after the decision in *Aden*, a different panel of the Ninth Circuit reemphasized in *Shrestha*, 590 F.3d at 1042, the “specific and cogent” requirement in the context of setting forth, for the first time, a detailed explication of the circuit’s standards for reviewing adverse credibility determinations under the REAL ID Act. Noting the “sparsity” of Ninth Circuit precedent on the issue, *id.* at 1040, the panel made the following interlocking points:

First, the REAL ID Act was a “welcome corrective,” *id.* at 1041, which the court previously welcomed as “relief . . . on its way” from the circuit’s “eclectic, and sometimes contradictory, opinions” on credibility determinations. *Jibril v. Gonzales*, 423 F.3d 1129, 1138 & n.1 (9th Cir. 2005). In the future, *Jibril* had announced, “only the most extraordinary circumstances will justify overturning an adverse credibility determination.” *Id.* at 1138 n.1.

Second, the higher degree of deference imposed by the REAL ID Act “makes sense because IJs are in the best position to assess demeanor and other credibility cues that we cannot readily access on review.” *Shrestha*, 590 F.3d at 1041. But there is a catch—the Immigration Judge is in the best position to assess tone, demeanor, and the consistency of testimony, “and to apply workable and consistent standards in the evaluation of testimonial evidence.” *Id.* (quoting *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1395 (9th Cir. 1985)).

Third, it follows that the high degree of deference “does not give a blank check to the IJ enabling him or her to insulate an adverse credibility determination from [judicial] review of the reasonableness of that determination.” *Id.* at 1042. “Naked conclusions” that testimony was inconsistent, implausible, unresponsive, or given with suspect demeanor will not pass muster; nor will “boilerplate” opinions lacking an individualized review of the evidence. *Id.*

Fourth, the Ninth Circuit will retain its previously crafted “institutional tools,” chiefly the requirement of “specific and cogent reasons” for finding an applicant not credible. *Id.* “Requiring specificity on the part of the IJ is also consistent with the legislative history expressing the intent of Congress that IJs will describe the factors

forming the basis of their credibility findings.” *Id.* at 1043 (citing H.R. Rep. No. 109-72, at 167 (2005)).

Fifth, the “totality of the circumstances” standards, while permissive on the array of factors that may form the basis of an adverse credibility finding, does not permit an Immigration Judge to “cherry pick solely facts favoring an adverse credibility determination while ignoring facts that undermine that result.” *Id.* at 1040 (stating that “an IJ cannot selectively examine evidence in determining credibility” (quoting *Hanaj v. Gonzales*, 446 F.3d 694, 700 (7th Cir. 2006)), and that “[a]lthough we don’t expect an Immigration Judge to search for ways to sustain an alien’s testimony, neither do we expect the judge to search for ways to undermine and belittle it” (quoting *Shah v. Att’y Gen. of U.S.*, 446 F.3d 429, 437 (3d Cir. 2006))). Similarly, an “utterly trivial inconsistency” should not be grounds for an adverse finding. *Id.* at 1043.

Sixth, in evaluating inconsistencies, the Immigration Judge should consider the applicant’s explanations, as well as other evidence in the record “that sheds light on whether there is in fact an inconsistency at all.” *Id.* at 1044. Failure to do so means that an Immigration Judge has failed to consider the “totality of the circumstances” that are mandated by the REAL ID Act. *Id.*

Having made these points, *Shrestha* then examined the four grounds on which the adverse credibility determination in that case rested—unresponsiveness, lack of detail, inconsistencies, and lack of corroboration. *Id.* at 1045-47. The Immigration Judge’s decision satisfied the “specific and cogent” requirement on all grounds, the court concluded, because it (along with the Immigration Judge’s questioning of the petitioner) identified particular deficiencies in the testimony and gave an opportunity for follow-up and clarification that the petitioner ultimately was unable to provide. The Immigration Judge identified during the course of testimony instances where the petitioner failed to respond, gave vague answers, or made inconsistent factual assertions. Those factors were also set forth in the Immigration Judge’s decision. The chief inconsistency—regarding where the petitioner had resided before leaving Nepal in 1998—may not have related to the “heart of the applicant’s claim,” the court noted, but under the REAL ID Act, this no longer prevented it from being relied upon. *Id.* at 1046 (quoting *Malkandi v. Holder*, 576 F.3d 906, 918 (9th Cir. 2009)).

Finally, on the issue of corroboration, the court concluded that it could not reverse the Immigration Judge’s and Board’s determination that the petitioner should have been able to obtain a supportive affidavit from his parents. The panel rejected the respondent’s argument, premised on *Sidhu v. INS*, 220 F.3d 1085, 1091-92 (9th Cir. 2000), that such out-of-country affidavits are “almost never easily available.” First, *Sidhu* did not announce an absolute rule that such affidavits could never be required. Second, “and more importantly,” the REAL ID Act trumps the rule in *Sidhu* by changing the standard from “easily available” to “reasonably obtainable.” *Shrestha*, 590 F.3d at 1047. A reasonable fact-finder would not be compelled to conclude that an affidavit from the petitioner’s parents was not “reasonably obtainable,” the court concluded, because the petitioner was in regular contact with his parents, they lived in the capital city of Katmandu, and despite their alleged illiteracy and fear of Maoist insurgents, they could be reasonably expected to provide a statement. *Id.* at 1048. Those applying *Shrestha*, therefore, should be careful to consider the specific facts of the case before determining that a particular item of corroborative evidence is “reasonably obtainable”—the Ninth Circuit did not rely upon supposition or other subjective judgment, but on the specific, articulable facts that the respondent was in contact with his parents and that they lived in a city where communication was possible. *Shrestha*, therefore, should not be read to imply that affidavits from parents or other relatives are always “reasonably obtainable.”

Shrestha did not specifically address an issue we have frequently visited in these pages (and discussed at EOIR training conferences): whether failure to corroborate a claim is a factor pertaining to the credibility of the asylum applicant or a separate factor to be addressed once the determination of credibility is made on other factors. On one hand, the court treated the petitioner’s failure to corroborate, as did the Immigration Judge, as a factor pertaining to his overall credibility. On the other hand, in discussing REAL ID Act standards as they pertain to testimony, the court clearly focused on the factors listed in section 208(b)(1)(B)(iii) of the Act—which do not include corroboration. *Shrestha* did emphasize that in determining whether perceived inconsistencies are actual ones, an Immigration Judge should consider the evidence in the record—including, presumably, that which has been provided by the applicant to corroborate his claim. This suggests that while the issues of credibility

and corroboration are closely intertwined, they remain analytically separate, in that a trier of fact should focus on core factors such as demeanor, responsiveness, detail, and consistency in determining the credibility of testimony and then turn to corroborative evidence as a means to determine whether any problems in the testimony can be clarified. Finally, as emphasized in *Aden*, even when a clear adverse credibility determination has not been made, “reasonably available” corroboration can be required of facts necessary to meet the burden of proof. *Aden*, 589 F.3d at 1045 n.13 (quoting jury instructions for civil cases).

To emphasize that the Ninth Circuit’s adoption of the REAL ID Act standards does not constitute a “blank check” for EOIR adjudicators, a recent unpublished decision by the Ninth Circuit held that it was not reasonable for an Immigration Judge to require a petitioner to produce the asylum application he had filed in Canada. The petitioner had corroborated his claim with other evidence, including a copy of the factual declaration he filed in Canada, and the Immigration Judge had not requested a copy of the Canadian application before rendering the decision. *Kumar v. Holder*, 2010 WL 510622 (9th Cir. Feb. 11, 2010).

Conclusion

Aden and *Shrestha* break no new ground on the interpretation of the REAL ID Act’s amendments pertaining to credibility, corroboration, and the judicial standard of review. This itself is news, as it indicates no resistance to those amendments from the court to which they were most directly addressed. Furthermore, the Ninth Circuit is not alone in reminding EOIR adjudicators that these amendments do not insulate their decisions from judicial review and that, if anything, the REAL ID Act raises the bar for crafting decisions that present specific and cogent analysis of these critical questions.

However, quite significant in light of continued criticism of EOIR from some quarters, *Aden* and *Shrestha* signify a high level of trust in the capacity of Immigration Judges and the Board to get things right. The Ninth Circuit’s deference is not stated in grudging or reluctant terms. *Aden* welcomed the fact that asylum hearings will become “a little more like other litigation” with respect to corroboration of testimony. *Aden*, 589 F.3d at 1045. *Shrestha* emphasized that the REAL ID Act amendments “make sense” because the Immigration Judge is, “by

virtue of his [or her] acquired skill, uniquely qualified to decide whether an alien’s testimony has about it the ring of truth.” *Shrestha*, 590 F.3d at 1041 (quoting *Sarvia-Quintanilla v. INS*, 767 F.2d at 1395). These decisions do not at all suggest that the Ninth Circuit wants for itself the less deferential, more intrusive standard of review that some commentators urge be restored to the Federal courts.

Edward R. Grant was appointed to the Board of Immigration Appeals in January 1998.

RECENT COURT OPINIONS

Second Circuit:

Ascencio-Rodriguez v. Holder, __F.3d__, 2010 WL 535791 (2d Cir. Feb. 17, 2010): The Second Circuit denied the petition for review of an applicant for cancellation of removal for nonpermanent residents. In a matter of first impression in this circuit, the court held that the alien’s arrest and conviction for illegal entry into the United States, and his subsequent departure to Mexico, interrupted his period of “continuous physical presence” in this country. The court granted *Chevron* deference to the Board’s precedent decisions in *Matter of Romalez*, 23 I&N Dec. 423 (BIA 2002), and *Matter of Avilez*, 23 I&N Dec. 799 (BIA 2005).

Eighth Circuit:

Tebyasa v. Holder, 593 F.3d 707 (8th Cir. 2010): The Eighth Circuit denied the petition for review and motion to remand of an asylum applicant from Uganda. The Immigration Judge had denied asylum based on an adverse credibility finding, and the Board had affirmed. A month prior to the Board’s decision, the alien married a United States citizen who filed an I-130 petition on his behalf 2 months later. The approval of the I-130 some 10 months after the Board’s decision formed the basis for a motion to reopen the petitioner then filed with the Board. He subsequently filed a motion to remand with the circuit court, asking the court to direct the Board to reopen his case. The court denied the motion to remand, noting that the motion to reopen was untimely and that it did not fall within a narrow exception that had been created by the Board for such motions because the I-130 was not filed while the matter was still pending before the Board. In addition, the court also upheld the Immigration Judge’s adverse credibility finding.

Ninth Circuit:

Corona-Mendez v. Holder, 593 F.3d 1143 (9th Cir. 2010): The Ninth Circuit denied the petition for review of an alien seeking to file simultaneous waivers under sections 212(i) and 237(a)(1)(H) of the Act, as well as an I-212 application for nunc pro tunc permission to reapply for admission. The alien had reentered the United States 3 years after he was deported to Mexico, and he then failed to mention his deportation on subsequent applications for lawful permanent resident status and naturalization. The court found the alien ineligible for the section 237(a)(1)(H) waiver because he was not “otherwise admissible” at the time of his actions constituting fraud. The court further held that he was not eligible for nunc pro tunc permission because he was not eligible for the section 237(a)(1)(H) waiver. Finally, the court rejected the alien’s argument that both his unauthorized return and subsequent fraud arose from a single event.

Aguilar-Ramos v. Holder, ___F.3d___, 2010 WL 376101 (9th Cir. Feb. 4, 2010): The Ninth Circuit granted, in part, the petition for review of an applicant for protection under the Convention Against Torture (“CAT”) from El Salvador. The Immigration Judge had found the petitioner removable as an aggravated felon and as an alien convicted of two crimes involving moral turpitude (“CIMTs”). The Immigration Judge further denied the alien’s CAT application, which was based on his claim that he would face torture in El Salvador because his tattoos and his deportation from the United States would cause the authorities there to believe that he is a gang member. The court found error in the Immigration Judge’s failure to consider the Country Report on El Salvador and therefore remanded for consideration of such evidence.

Nunez v. Holder, ___F.3d___, 2010 WL 446485 (9th Cir. Feb. 10, 2010): The court (with a dissent) granted the petition for review of an alien challenging an Immigration Judge’s decision (upheld by the Board) that he was removable as one convicted of two CIMTs. In its decision, the court reversed the Immigration Judge’s ruling that the alien’s California conviction for indecent exposure constituted a CIMT. The court determined that the California statute did not categorically meet the Federal requirements for moral turpitude, noting that exposing one’s self did not necessarily engender “lewd” or “base, vile and depraved” conduct (citing the example of a sunbather who falls asleep on an empty beach and awakens to find himself surrounded by offended beachgoers). The court further noted that a conviction did not require a

finding that the “victim” was harmed or even bothered by the conduct (analogizing this to the crime of annoying a child, which was recently found to not be a CIMT). The court also prefaced its analysis of the specific statute with its observation of a recent shift in “the fluid boundaries of our nebulous ‘moral turpitude’ standard . . . away from the rigid imposition of austere moral values.”

Kin v. Holder, ___F.3d___, 2010 WL 547650 (9th Cir. Feb. 18, 2010): The Ninth Circuit affirmed the denial of the Cambodian petitioners’ pre-REAL ID Act applications for asylum, withholding of removal, and protection under the CAT. The husband and wife petitioners alleged they were persecuted for their membership in the Sam Rainsy Party. The court first affirmed the adverse credibility finding, which was based on the petitioners’ omitting from their asylum applications that they attended a demonstration in 1998 and on inconsistencies between their testimony, a witness’s testimony, and documentary evidence. The Immigration Judge had also based the adverse credibility finding on the petitioners’ demeanors, but the court did not affirm this justification for the finding, as “the hearing transcript did not provide evidence regarding their non-verbal communication and the IJ did not make explicit reference to particular unrecorded aspects of demeanor in her oral decision.”

BIA PRECEDENT DECISIONS

In *Matter of Morales*, 25 I&N Dec. 186 (BIA 2010), the Board again addressed who may be a qualifying relative for purposes of establishing exceptional and extremely unusual hardship for cancellation of removal under section 240A(b)(1)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1)(D). The Board clarified that a stepparent who qualifies as a “parent” under section 101(b)(2) of the Act, 8 U.S.C. § 1101(b)(2), at the time of the proceedings is a qualifying relative. Section 101(b)(1)(B) provides that the marriage creating the status of stepchild must have occurred before the child reached the age of 18 years, and the Board has held that once this relationship has been established, a stepparent remains a parent, even if the child has married or is over 21 years of age, provided the marriage creating the steprelationship continues to exist.

In *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010), the Board resolved the question whether an alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C.

§ 1182(a)(9)(C)(i), is eligible to apply for adjustment of status under section 245(i) of the Act, 8 U.S.C. § 1255(i). The respondents in this case first entered the United States without inspection in 1988. They were unlawfully in the United States for more than 1 year after April 1, 1997, until October 1, 2000, when they departed. They unlawfully reentered in November 2000 and remained. The respondents were served with a Notice to Appear charging them under section 212(a)(6)(A)(i) of the Act (present without being admitted or paroled). The Immigration Judge found the respondents removable as charged and ineligible for adjustment of status, but he granted them voluntary departure. In finding the respondents ineligible for section 245(i) adjustment of status, the Immigration Judge stated that he was constrained to follow the Board's decision in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), despite the existence of countervailing precedent on this issue by the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the case arose. See *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006)

The Board first noted that the Second and Sixth Circuits have held that because *Matter of Briones* analyzed and interpreted ambiguous provisions of the immigration laws reasonably, deference should be accorded to that decision under *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Further, the Board stated that the reasons underpinning the Ninth Circuit's decision in *Acosta v. Gonzales* no longer apply, because the case the court relied on, *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), has since been overruled by *Gonzales v. Department of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007). The Board therefore reaffirmed its holding in *Matter of Briones* and dismissed the respondents' appeal from the denial of their applications for section 245(i) adjustment of status.

The issue in *Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193 (BIA 2010), was how much time an alien receives to file an asylum application following "changed circumstances" under section 208(a)(2)(D) of the Act, 8 U.S.C. § 1158(a)(2)(D). The respondents in this case are a husband and wife who are natives and citizens of China. The wife filed her asylum application almost 9 months after the birth of their second child, while the husband waited nearly a year to file his application. The Immigration Judge found that the respondents' applications were filed within a "reasonable period" given the changed circumstances. 8 C.F.R. § 1208.4(a)(4)(ii).

The Board began by noting that while the term "reasonable period" is not defined in the Act or regulations, the Supplementary Information to the asylum regulations indicates that the Department expects an asylum-seeker to apply as soon as possible after the expiration or termination of status, and waiting 6 months or longer is not considered reasonable. The Supplementary Information further states that an alien does not receive an automatic 1-year extension to file an asylum application. While the Supplementary Information is not binding, the Board found its guidance useful and held that there is no automatic 1-year extension. Instead, the Immigration Judge must evaluate the particular circumstances related to delays in filing an asylum application. Because the Immigration Judge did not make findings of fact in this regard, the Board remanded for further proceedings.

In *Matter of Milian*, 25 I&N Dec. 197 (BIA 2010), the Board decided whether the Immigration Judge should have considered the police report, which the respondent incorporated by reference into his guilty plea during his criminal proceedings as the factual basis for the plea, in determining whether the respondent's offense is a crime of domestic violence. The respondent, a lawful permanent resident of the United States, pled guilty to battery of a spouse in violation of section 243(e)(1) of the California Penal Code. The respondent was charged under section 237(a)(2)(E)(i) of the Act, 8 U.S.C. § 1227(a)(2)(E)(i) (crime of domestic violence). The Immigration Judge concluded that the Department of Homeland Security did not establish by clear and convincing evidence that the respondent was removable as charged, and he terminated removal proceedings. In so finding, the Immigration Judge excluded the police report.

The Board first found that the respondent's offense is not categorically a crime of domestic violence. In next analyzing the offense under a modified categorical approach, the Board considered which documents are part of the record of conviction. Police reports, standing alone, are not considered part of the record of conviction, but in this case, the police report served as the "findings of fact adopted by the defendant upon entering the plea," which became part of the record upon which the courts may rely. *United States v. Hernandez-Hernandez*, 431 F.3d 1212, 1217-18 (9th Cir. 2005) (quoting *Shepard v. United States*, 544 U.S. 13, 20 (2005)). The Board found that it is not necessary for the respondent to acknowledge the truth of every statement in the police report or for the

judge in the criminal case to have specifically reviewed the report during those proceedings. The Board remanded the case to permit the Immigration Judge to consult the police report to determine whether the respondent's offense is a crime of domestic violence.

REGULATORY UPDATE

75 Fed. Reg. 5225

Professional Conduct for Practitioners: Rules, Procedures, Representation, and Appearances

AGENCY: Office of the Secretary, DHS.

ACTION: Interim rule with request for comments.

SUMMARY: The Department of Homeland Security (DHS) is amending its regulations governing representation and appearances by, and professional conduct of, practitioners in immigration practice before its components to: Conform the grounds of discipline and procedures regulations with those promulgated by the Department of Justice (DOJ); clarify who is authorized to represent applicants and petitioners in cases before DHS; remove duplicative rules, procedures, and authority; improve the clarity and uniformity of the existing regulations; make technical and procedural changes; and conform terminology. This rule enhances the integrity of the immigration adjudication process by updating and clarifying the regulation of professional conduct of immigration practitioners who practice before DHS.

DATES: Effective date: This interim rule is effective March 4, 2010. Comments: Written comments must be submitted on or before March 4, 2010.

Cancellation of Removal *continued*

Conclusion

In non-LPR cancellation cases, every circuit court has held that in many instances, the question whether a petitioner has shown his qualifying relatives will suffer exceptional and extremely unusual hardship is a discretionary determination outside of the court's jurisdiction to review. However, petitioners have had some success in attaining circuit court review of hardship determinations by arguing that the agency has either applied an incorrect legal standard or misapplied its precedent decisions to the facts of a particular case.

In taking jurisdiction over these claims, circuit courts have undertaken varying degrees of review. For example, in *Mireles*, the Seventh Circuit took jurisdiction but, in denying the petition for review, simply stated that "the IJ used the right legal standard" in her decision. *Mireles*, 433 F.3d at 969. On the other hand, in *Aburto-Rocha* the Sixth Circuit reviewed *Monreal* and *Andazola* in depth and compared these precedent decisions with the specific facts of the petitioner's case in concluding that the Board did not err. Looking at all these decisions together, the circuit courts seem to be attempting to strike a balance in non-LPR cancellation cases between granting deference to discretionary determinations and reviewing matters of law. The most appropriate way to strike this balance is not always obvious. Circuit courts clearly do have jurisdiction to review matters of law in these cases. However, when a circuit court reviews the underlying facts of a petitioner's claim, even if the court is reviewing a legal issue over which it has jurisdiction, the court may at times come close to reweighing the evidence and reviewing the agency's discretionary determination, over which it does not have jurisdiction. While the circuit courts continue to strike this balance, EOIR adjudicators in these cases should apply as carefully as possible the statutory standard of "exceptional and extremely unusual hardship" in section 240A(a)(1)(B) of the Act in accordance with the Board's precedent decisions in *Monreal*, *Andazola*, and *Recinas*.

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