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Challenging an Incredibility Finding on Appeal: An Incredibility Paradigm

Elaine C. Schneider

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CHALLENGING AN INCREDIBILITY FINDING ON APPEAL: AN INCREDIBILITY PARADIGM

Elaine C. Schneider

I. INTRODUCTION .................................................................................. 2376

II. THE INCREDIBILITY PARADIGM ...................................................... 2378
   A. Was An Explicit Finding of Incredibility Made On The Record? If Not, Credibility Will Be Presumed .......... 2378
   B. Specific, Cogent Reasons Must Be Articulated On The Record Supporting An Incredibility Finding. If Not, On Review, If An Abuse Of Discretion Is Found, Remand Will Be Required ................................................................. 2380
   C. Does The Record Reflect That The Applicant Received An Opportunity To Explain Any Significant Inconsistency? ............................................................ 2384
   D. Reasons Underlying Incredibility Findings Must Be Logical and Based On Proper Grounds .................. 2385
   E. Each Reason Must Be Major, And It Must Reach The “Heart” Of The Claim ............................................ 2388
      1. Inconsistent Testimony On Material Facts Relating To Events ............................................................. 2389
      2. Inconsistencies Between An Application Or Earlier Statements Under Oath Compared To Later Testimony ................................................................. 2391
      3. Contradictions And Misrepresentations Coupled With A Suspicious Omission Or Submission Of Corroborative Evidence—Show And Tell ......................... 2392
      4. Date Discrepancies Critical To A Claim ..................................................................................................... 2395
      5. Minor Discrepancy Or Inconsistency ......................................................................................................... 2397

III. TECHNICAL REVIEW ....................................................................... 2405

IV. INCREDIBILITY PARADIGM: AN EXAMPLE ..................................... 2405

† J.D., William Mitchell College of Law; B.A., University of Minnesota, Phi Beta Kappa. The author practices extensively in the area of immigration law. This article is dedicated to the Minnesota Advocates for Human Rights, the Volunteer Lawyer’s Network, to all the outstanding attorneys, staff members, other volunteers who work for these fine organizations, and to Vanessa Inez Olive, my seven-year old daughter, who has encouraged me to “help” and “save people.
V. THE ANALYSIS

VI. PREPARING A WITNESS TO PREVENT AN INCREDIBILITY FINDING

I. INTRODUCTION

Challenging an incredibility finding requires raising credibility as an issue on appeal. Reviewing the underlying reasons for an incredibility finding in a transcript to predict the probability of the outcome on appeal requires a soothsayer rather than a lawyer, in light of existing asylum decisions. This article provides a framework for analysis of a transcript for the practitioner preparing an appeal, focusing on adverse or negative credibility ("incredibility") issues. Collateral factors are also discussed. The challenge of developing a uniform approach for analysis of an incredibility finding is based in part on a "pro bono" asylum appeal that became moot after the applicant joined his family in Canada. Five supporting reasons were stated in the record as the basis for an incredibility finding. These reasons will be analyzed in the last section of this article, applying the proposed incredibility paradigm, followed by comments on preparing a witness to avoid an incredibility finding.

In most federal and Board of Immigration Appeals (hereinafter "BIA") decisions turning on credibility, the courts review the record to find: an explicit credibility finding; support by specific, cogent reasons; and, identifiable inconsistencies material to identity and/or fear for safety. In 1998, the BIA in In re A-S-, set forth a

1. In re Burbano, 20 I. & N. Dec. 872, 875-76 (1994) (reviewing past criminal convictions and significance of family ties); see also Stoyanov v. INS, 172 F.3d 731, 733-36 (9th Cir. 1999) (stating that raising adverse credibility, sua sponte, deprives applicant of notice and opportunity to explain discrepancies, thereby violating due process).

2. Akinmade v. INS, 196 F.3d 951, 954 (9th Cir. 1999). BIA relied on impermissible grounds differing from the Immigration Judge ("IJ") as the basis for incredibility after remands from district court and appellate court. Id.; see also Bojorques-Villanueva v. INS, 194 F.3d 14, 15 (1st Cir. 1999). The BIA reviewed de novo an adverse credibility finding after rejecting the IJ's adverse finding of credibility based on lack of "specific and cogent" reasons. Id. The BIA concluded that it was adverse based on discrepancies significant and directly related to the heart of the claim. Id.; see also De Leon-Barrios v. INS, 116 F.3d 391, 393-94 (9th Cir. 1997) (finding applicant incredible based on discrepancies held as not minor and relating to the basis for alleged fear, specifically, inconsistencies between two applications and testimony about guerilla incidents); Osorio v. INS, 99 F.3d 928, 929, 931 (9th Cir. 1996). Applicant in Osorio was found credible after a review of an incredibility finding where specific and cogent reasons and a substantial nexus were lacking. Osorio, 99 F.3d at 929. Omission of details was not equivalent to in-
three-prong test for an incredibility analysis: (1) discrepancies and omissions described by the Immigration Judge ("IJ") are present; (2) the discrepancies and omissions provide specific, cogent reasons to support incredibility; and (3) a convincing explanation for the discrepancies and omissions is absent. Although this three-prong test for analysis is a step in the right direction, most decisions reviewing an incredibility finding tend to merge or skip crucial steps needed to evaluate credibility. The proposed incredibility paradigm requires additional steps to review a record: (1) an explicit finding of incredibility; (2) verifying the underlying logic or nexus; (3) determining if improper grounds were used; and (4) deciding as a two-step process if any inconsistencies are major and whether they go to the "heart of the claim." The result of this step-

credibility, according to the court, and minor inconsistencies and misrepresentations of unimportant facts are irrelevant to fear for safety. Id.; see also Aguilera-Cota v. INS, 914 F.2d 1375, 1380-82 (9th Cir. 1990) (concluding that the case should be reversed and remanded on credibility finding after review of record). The IJ finding that appellant was "not entirely credible" was erroneous because specific, cogent reasons were not articulated. Id. at 1381. Additionally, "those reasons must be substantial and must bear a legitimate nexus to the finding." Id. Omissions of corroborative evidence, a threatening note, and omission of two collateral incidents involving relatives in I-589 document did not support incredibility finding. Id.; see also Ceballos-Castillo v. INS, 904 F.2d 519, 520 (9th Cir. 1990) (noting on review of the record gross inconsistency between the I-589 document and the hearing regarding the identity of persecutor that affected heart of the claim); Vilorio-Lopez v. INS, 852 F. 2d 1137, 1141-42 (9th Cir. 1988) (concluded on review of adverse credibility finding on record that minor inconsistencies in testimony of applicant and second witness were not material to fear for safety claim); Turcios v. INS, 821 F.2d 1396, 1398, 1400 (9th Cir. 1987) (reviewing explicit findings, specific, cogent reasons and misrepresentations); Damaize-Job v. INS, 787 F.2d 1332, 1337 (9th Cir. 1986) (analyzing explicit findings, specific, cogent reasons, and legitimate nexus); Martinez-Sanchez v. INS, 794 F.2d 1396, 1400 (9th Cir. 1986) (reviewing the IJ's adverse credibility led to reversal where reasons were based on inconsistencies in the record including the date of joining the paramilitary group and the listing of two additional children); In re A-S-, Interim Decision 3336, 1998 WL 99553 (BIA Feb. 19, 1998). Analysis assumed an incredibility finding and that omissions and discrepancies were "central" to the claim. Id. Then, the reviewing court applied a three-prong test: (1) Whether discrepancies and omissions described by the IJ are actually present; (2) Whether these discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; and (3) Whether a convincing explanation for the discrepancies and omissions was not supplied by the alien. In re A-S-; 1998 WL 99553; see also In re O-D-, Interim Decision 3334, 1998 WL 24904 (BIA Jan. 8, 1998) (applying an inverse Balancing Test: corroborative evidence of identity and nationality documents determined fraudulent indicates lack of credible testimony in the absence of an explanation or rebuttal).

4. Id.
by-step analysis would lead to a more complete and uniform appellate review of incredibility findings.

II. THE INCREDIBILITY PARADIGM

There are five elements in the proposed incredibility paradigm.

(1) Was an explicit finding of incredibility made on the record? If not, credibility will be presumed.

(2) Were specific, cogent reasons articulated on the record, which support an incredibility finding?
If not, on review, if an abuse of discretion is found, remand will be required.

(3) Does the record reflect that the applicant received an opportunity to explain any significant inconsistency?

(4) Were the reasons underlying incredibility findings logical and based on proper grounds?

(5) Was each reason major and did it reach the "heart" of the claim?

An applicant should not be found incredible if a fact is material but it does not go to the heart of the claim, or if a fact is minor, even though it does go to the heart of the claim. Decisions vary using a one or two-step analysis.

The following patterns can be used to analyze elements four and five on whether facts are material and whether they go to the heart of the claim:

A (material or minor fact?) plus B (heart of the claim?) = C (credibility finding).

If A (material fact) plus B (it does not go to the heart of the claim) = Credible Applicant.
If A (minor fact) plus B (heart of the claim) = Credible Applicant.
If A (material fact) plus B (heart of the claim) = Incredible Applicant.

A. Was An Explicit Finding Of Incredibility Made On The Record? If Not, Credibility Will Be Presumed

Explicit incredibility findings issued by the IJ and/or the BIA must appear on the record or credibility will be presumed. If the

5. Leiva-Motalvo v. INS, 173 F.3d 749, 751 (9th Cir. 1999) (accepting testimony as true because neither the IJ or BIA made an adverse credibility finding); Prasad v. INS, 101 F.3d 614, 616 (9th Cir. 1996) (stating that a petitioner's testi-
IJ and the BIA findings present conflicting views of credibility on the record, as distinguished from an omission of an incredibility finding, the result will be that the court will review and remand the case. The applicable standard of review of factual findings re-
quires the record, reviewed as a whole to comply with "substantial evidence," defined as "more than a mere scintilla ... of relevant evidence accepted by a reasonable mind to support the conclusion." 7

B. Specific, Cogent Reasons Must Be Articulated On The Record Supporting An Incredibility Finding. If Not, On Review, If An Abuse Of Discretion Is Found, Remand Will Be Required

The IJ and BIA should provide specific, cogent reasons on the record, based on valid grounds, stating why an asylum applicant’s testimony and/or demeanor led to a finding of disbelief and, on review, if an abuse of discretion is found, remand will be required. 8

[Footnotes]

7. Turcios v. INS, 821 F.2d 1396, 1399 (9th Cir. 1987) (stating that evasive testimony, without more specific direction in the record, will not lead to an incredibility finding); see also INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992) (reviewing the record as a whole on appeal); Garrovillas v. INS, 156 F.3d 1010, 1013 (9th Cir. 1998) (reviewing BIA fact findings under substantial evidence standard); Lopez-Reyes v. INS, 79 F.3d 908, 911 (9th Cir. 1996) (stating that adverse credibility findings are reviewed under the substantial evidence standard); Osorio v. INS, 99 F.3d 928, 931 (9th Cir. 1996) (examining the record to see whether substantial evidence supports the conclusion and whether the IJ's reasoning is fatally flawed); Abedini v. INS, 971 F.2d 188, 191 (9th Cir. 1992) (stating substantial evidence standard requires the IJ's credibility findings to be upheld unless "no reasonable fact finder would find the same"); Aguilera-Cota v. INS, 914 F.2d 1375, 1378 (9th Cir. 1990) (stating substantial evidence is the standard of review for findings of fact, and questions of law are reviewed de novo); Vilorio-Lopez v. INS, 852 F.2d 1137, 1141 (9th Cir. 1988) (reviewing under substantial evidence standard and stating that absent specific direction to portions of record when stated reasons for adverse credibility finding are inadequate, the court of appeals will not find adverse credibility as supported by substantial evidence); Saballo-Cortez v. INS, 761 F.2d 1259, 1262 (9th Cir. 1985) (stating that credibility findings are reviewed for substantial evidence); Shukoor v. Rogers, 954 F. Supp. 1415, 1419-21 (C.D. Cal. 1997) (finding that applicant lacked credibility and that a prima facie case was not supported by substantial evidence that police had beaten applicant until he was unconscious); In re Fauziya Kasinga, Interim Decision 3278, 1996 WL 379826 (BIA June 13, 1996) (reviewing the record as a whole).

8. Nasir v. INS, 122 F.3d 484, 486 (7th Cir. 1997) (stating that decisions made by the IJ based on a credibility determination are entitled to deference on review and are overturned only "when extraordinary circumstances so require"); Osorio, 99 F.3d at 931 (asserting that the IJ must have a legitimate, articulable basis for questioning the applicant's credibility, and specific, cogent reasons must be stated supporting the IJ's disbelief); Cordero-Trejo v. INS, 40 F.3d 482, 487 (1st Cir. 1994) (noting that credibility findings based on demeanor deserve more deference than those based on testimony); Hartooni, 21 F.3d at 342 (acknowledging that specific, cogent reasons need to be stated to show lack of credibility); Paredes-Urrestarazu v. INS, 36 F.3d 801, 817 (9th Cir. 1994) (listing nervousness as a factor to be considered in assessing an alien's credibility); Berroteran-Melendez v. INS, 955 F.2d 1251, 1254-56 (9th Cir. 1992) (stating that an IJ's incredibility findings must be supported by specific, cogent reasons for disbelief); Aguilera-Cota, 914 F.2d
Each reason should be logical and bear a legitimate nexus to the incredibility finding. A finding of incredibility requires major inconsistencies or discrepancies, which are relevant to the asylum applicant’s fear. The IJ’s incredibility finding is “the beginning, not the end, of [the] inquiry.” The reviewing court will not “blindly accept” the IJ’s lack of credibility finding. The court looks to the reasonableness of the decision. “It is not enough that the IJ has arrived at point B from point A, or that others might also ....” If observations of a witness’s demeanor are used as a critical factor in determining veracity, an explanation stating why the demeanor indicated untruthfulness should be provided. An IJ’s findings must be explicit and direct, providing more direction than the descriptions of an applicant as being “not entirely credible” or “evasive.”

at 1381-82 (deciding that the IJ’s finding of statement by applicant as “not entirely credible” is not supported by substantial evidence); Valle v. INS, 901 F.2d 787, 792 (9th Cir. 1990) (noting that the rejection of testimony based on a lack of credibility must be accompanied by a specific, cogent reason for the rejection); Vilorio-Lopez v. INS, 852 F.2d 1137, 1141 (9th Cir. 1988) (stating that the IJ must offer specific, cogent grounds for a lack of credibility, and specific reasons are reviewed to determine if grounds are valid for incredibility finding); Turchios, 821 F.2d at 1399 (explaining that the trier of fact who rejects a witness’s positive testimony because in his or her judgment it lacks credibility should “offer a specific, cogent reason for [his or her] disbelief”) (quoting Damaize-Job, 787 F.2d at 1338); Sarvia-Quintanilla v. INS, 767 F.2d 1387, 1395 (9th Cir. 1985) (stating that the IJ is in a unique position to observe an alien’s tone and demeanor, explore inconsistencies in testimony, and to determine whether the testimony has a ring of truth); Kookinis v. INS, 429 F.2d 938, 941-42 (2d Cir. 1970) (noting that “great weight” should be afforded to the officer observing the demeanor of the applicant); Chen v. Slattery, 862 F. Supp. 814, 824 (E.D.N.Y. 1994) (explaining that the IJ must support adverse credibility finding with specific, cogent reasons); In re A-S-, Interim Decision 3336, 1998 WL 99553 (BIA Feb. 19, 1998) (observing that the inconsistencies and omissions would alone suffice for a finding of incredibility, and that the applicant’s “very halting” and “hesitant” demeanor in answering emphasized the court’s finding).

10. Lopez-Reyes, 79 F.3d at 911; Aguilera-Cota, 914 F.2d at 1381.
11. Id.
12. Id.
13. Id.
15. E.g., Osorio v. INS, 99 F.3d 928, 931 (9th Cir. 1996) (stating that incredibility based on unidentified “inconsistencies” is an inadequate finding); Aguilera-Cota, 914 F.2d at 1380-82 (remanding the case because the IJ failed to articulate specific, cogent reasons); Turchios v. INS, 821 F.2d 1396, 1399 (9th Cir. 1987) (stating that the applicant’s answers were explanatory, not evasive as described by the IJ); In re V-T-S-, Interim Decision 3308, 1997 WL 107592 (BIA Mar. 6, 1997) (noting the advantage of observing the alien as he testifies); In re Burbano, 20 I. & N. Dec. 872, 874 (BIA 1994) (giving significant consideration to other findings of the IJ based upon his or her observance of witnesses); In re Teng, 15 I. & N. Dec. 516, 518 (BIA 1975) (adopting the IJ’s incredibility finding based on demeanor and
Examples of IJ fact findings that are accepted as specific, cogent reasons include: (1) Inconsistencies spotted when comparing the applicant's testimony with the applicant's application. This would include omissions or additions of relevant incidents, especially if coupled with discrepancies in major dates considered central to the claim; (2) Contradictions in a religion-based claim. In re B-, Interim Decision 3251, 1995 WL 326740 (BIA May 19, 1995) (finding that applicant's looking at wall or table and not the IJ was not deception). Cf. Gonzalez v. INS, 77 F.3d 1015, 1021 (7th Cir. 1996) (noting that the IJ found applicant and brother to be "evasive," "vague" and lacking in "forthrightness"); In re A-S, 1998 WL 99553; (Schmidt, Guendelsberger & Rosenberg, dissenting) (noting that halting delivery of presentation in formal setting could be caused by reasons other than untruthfulness).

15. See, e.g., Bojorques-Villanueva v. INS, 194 F.3d 14, 16 (1st Cir. 1999). In this case the BIA found discrepancies in the petitioner's testimony and exhibits that were significant and went directly to the heart of the claim. *Id.* The petitioner claimed that at the time of his father's abduction he was: (1) working in the field with his brother; (2) on his way to the fields with his brother; and (3) traveling to an unknown destination with his father. *Id.* His mother's letter states that his father was abducted at a meeting place and no one had noticed. *Id.* The petitioner claims that: (1) his father and uncle were abducted together; and (2) his uncle informed him that his father had been abducted when he was alone. *Id.* There were also inconsistencies about whether or not the petitioner had seen his father after the abduction. *Id.* at 17. In Ahmad v. INS, 163 F.3d 457, 461 (7th Cir. 1999), the applicant, a Pakistani, a member of the Ahmad sect of Islam, was found not credible based on inconsistencies between his testimony and written application about accounts of his being tortured. *Id.* In addition, a letter verifying his membership in the Ahmadiyya Movement was not issued by the proper authority, and he lacked a basis for a determination of membership. *Id.* The IJ did not believe the testimony about how funds used to travel to the United States had been procured. *Id.*; see also Stoyanov v. INS, 172 F.3d 731, 733-36 (9th Cir. 1999). In Stoyanov, the court remanded the case based on the applicant's due process right to explain inconsistencies where the BIA, sua sponte, made the following credibility findings regarding: (1) whether stabbed or merely threatened with knife; (2) whether Turkish and gypsy minority were both persecutors; (3) testimony on tooth broken during second or third beating, which was not mentioned in application; and (4) no corroborative objective evidence. 172 F.3d at 733-36; De Leon-Barrios v. INS, 116 F.3d 391, 395-94 (9th Cir. 1997) (finding applicant not credible based on discrepancies between two applications and his testimony regarding guerrilla incidents that the court considered a major basis of alleged fear); Ceballos-Castillo v. INS, 964 F.2d 519, 520 (9th Cir. 1990) (finding that adverse credibility was supported when inconsistencies between the I-589 document and the applicant's testimony on identity of persecutor went to heart of the claim). *Cf.* Hartooni v. INS, 21 F.3d 336, 342-44 (9th Cir. 1994) (finding for applicant despite having offered testimony on mistreatment contradicting answers on application).

16. In re A-S, 1998 WL 99553. In this case the court found that omissions and additions between applicant's testimony and application provided additional reasons to find lack of credibility. *Id.* The record reflected major date discrepancies on three incidents viewed by the court as central to the claim. *Id.* The asylum application described that the BNP/Awami League entered the applicant's house two times. *Id.* The applicant testified that the BNP entered his house on July 12,
Stating that he or she is Catholic in the I-589 document and then later testifying to be a Baptist, combined with the inability to state tenets of Christianity or prove conversion or membership serves as one example;\textsuperscript{(17)} An affirmative response to an IJ hypothetical about guards approaching two hundred times during a two-year period, plus confusion on dates, locations and time-spans of alleged invasions;\textsuperscript{(18)} General and speculative testimony about an alleged photograph of an applicant being taken during a demonstration in the United States, and then being sent to Iran was too attenuated to be a basis for fear of persecution;\textsuperscript{(19)} or (5) Major inconsistencies

\textsuperscript{17} Hajiani-Niroumand v. INS, 26 F.3d 832, 837-38 (8th Cir. 1994) (convincing reasons such as inadequate and contradictory testimony supported incredibility finding where applicant reported having converted to Christianity, to being a Catholic in the I-589 document, and a Baptist during testimony). Applicant could not state tenets of Christianity, and he offered no proof of membership, attendance or conversion. \textit{Id.} In Hajiani-Niroumand, the applicant also stated he was a member of a group of Iranians in the U.S. opposing Khomeini, and that he was interviewed on television and threatened afterwards. \textit{Id.} He stated the events were 1976-1978, while Khomeini did not assume power until 1979. \textit{Id.}

\textsuperscript{18} Akinmade v. INS, 196 F.3d 951, 954-55 (9th Cir. 1999). In Akinmade, the IJ found the applicant incredible because his testimony was inconsistent on the nature of torture by Nigerian police and on the number of demonstrations. \textit{Id.} at 954-55. The applicant had also given insufficient details regarding his arrest and detention, and his account of his student activism and escape from Nigeria was implausible. \textit{Id.} The BIA found the applicant incredible based on the following fraudulent entry factors: (1) the chain of custody of Canadian passport; (2) the applicant’s time of arrival in South Korea; and (3) the applicant’s inability to establish his birth date by certificate. \textit{Id.} The BIA failed to adopt the IJ’s conclusions. \textit{Id.} The court of appeals remanded the case, and the BIA findings were found impermissible based on fraudulent entry. \textit{Id.}; see also Hamzehi v. INS, 64 F.3d 1240, 1243 (8th Cir. 1995) (finding testimony about Revolutionary Guards given by ethnic Kurd Iranian applicant implausible and therefore supportive of an adverse credibility finding).

\textsuperscript{19} Ghasemimehr v. INS, 7 F.3d 1389, 1391 (8th Cir. 1993). In Ghasemimehr, an Iranian student’s testimony was found to be unspecific, uncorroborated and incredible, unsupported by record of events, and too general and speculative in nature. \textit{Id.} There was no supporting evidence such as affidavits of other demonstrating students or warning letters from Iran. \textit{Id.} There was also no evidence that the government persecuted him or his family, and there was no order to return. \textit{Id.} It was too attenuated to believe that someone took his photograph in the U.S.
and inadequacies such as the inability to identify an acronym or a political party allegedly involved in a persecution claim.  

C. Does The Record Reflect That The Applicant Received An Opportunity To Explain Any Significant Inconsistency?

An asylum applicant should be given the opportunity to address apparent inconsistencies and explain misrepresentations or concealment of facts on the record. One asylum applicant, who testified to mistreatment, was found credible even though she had failed to check a box on her application indicating mistreatment.

at a demonstration and sent it to Iran, viewing him as an anti-government activist.  

Id. Cf Selgeka v. Carroll, 184 F.3d 337, 340 (4th Cir. 1999). In Selgeka, an asylum officer deemed an Albanian stowaway incredible because only general details about the problems of Kosovar Albanians under the Serbian government were given.  

Id. Moreover, the stowaway's claim that he was forced into the Yugoslav army to fight was unsupported by evidence.  

Id. The BIA, however, found the applicant's testimony consistent, logical and supported by corroborative evidence submitted in rebuttal to the notice of intent to deny.  

Id. at 341. Similar to the holdings in the Second and Third Circuits, the Court of Appeals for the Fourth Circuit held that the applicant was entitled to a hearing before an IJ.  

Id. at 346.  

20. Nsukami v. INS, 890 F. Supp. 170, 177 (E.D.N.Y. 1995). The IJ found a Zaire applicant's testimony to be incredules, inconsistent and contradictory based on the following grounds: (1) she did not know what the letters of her father's political party stood for; (2) her political organization had no name; (3) she offered no explanation as to why she did not seek refuge in Congo or Belgium [this could be an improper ground]; (4) she did not present any corroborative evidence of her or her father's involvement in opposition parties in Zaire; and (5) her escape from a prison hospital was unbelievable [this could be an improper ground].  

Id.; see also Ceballos-Castillo, 904 F.2d at 520 (stating that inconsistencies regarding the identity of the persecutor support an incredibility finding).  

21. Osorio v. INS, 99 F.3d 928, 932 (9th Cir. 1996) (concluding that an adverse credibility determination should not have been made without first evaluating any explanation for perceived inconsistencies); Berroteran-Melendez v. INS, 955 F.2d 1251, 1256 (9th Cir. 1992) (finding the applicant's testimony incredible, and no reasons for discrepancies were offered in the lower court or on appeal); In re A-S, 1998 WL 99553 (applying the third-prong of the credibility analysis); In re Fauziya Kasinga, Interim Decision 3278, 1996 WL 379826 (BIA June 13, 1996) (involving an applicant who had explained the inconsistencies); OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES & CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE REFUGEES CONVENTION at ¶ 199 (1979) [hereinafter UNHCR HANDBOOK] (providing that an applicant should be given the opportunity to address apparent inconsistencies and to explain misrepresentations or concealment of facts); see also Stoyanov v. INS, 172 F.3d 731, 733-36 (9th Cir. 1999). The IJ found the applicant credible. The BIA, however, sua sponte, made incredibility findings and remanded the case, allowing petitioner to explain inconsistencies where affirmed on an alternate ground was invalid.  

Id.  

22. Hartooni v. INS, 21 F.3d 336, 342-44 (9th Cir. 1994) The IJ must have legitimate, articulable basis to question applicant's credibility and must offer spe-
Other asylum applicants have also been found credible despite prior inconsistent statements made to INS officials or a determination that they were lying.23

D. Reasons Underlying Incredibility Findings Must Be Logical And Based On Proper Grounds

Findings of incredibility can be analyzed, one at a time, to determine if they pass the incredibility “smell test” for logic and permissible grounds. In the following decisions, one or more findings were found not to be logical or permissible. Usually an analysis will require a discussion of several enumerated reasons in a decision issued by the IJ and/or the BIA to support the incredibility finding. Some of the reasons may hold more water, so to speak, than others. Any reasons left standing at the end of an analysis can be tempered by raising the review of the record as a whole where the bulk of testimony has been detailed and consistent. In addition, other evidence, such as country conditions, can be used to tilt the scales in favor of the applicant. Similar to any case law, most decisions discussing credibility will provide rational arguments if a dissenting opinion was written addressing the flip-side of the majority’s factual conclusions. Examples of findings of fact failing the incredibility “smell test” fall into a variety of categories.

The first of these categories is “Observations about the Applicant.” This category includes: (1) Demeanor: an applicant was not specific, cogent reason for any stated disbelief. Id. at 342. Otherwise the reviewing court must accept testimony as true. Id. In this case the applicant had offered testimony on mistreatment even though she had not checked the box indicating mistreatment. Id. She was not asked by the court to explain. Id. The dissent was persuaded that the IJ’s incredibility finding was sufficient based on implicit findings on credibility, which included conflicting facts and unexplained inconsistencies. Id. at 343-44 (O’Scannlain, J., dissenting).

23. Balasubramanrim v. INS, 143 F.3d 157, 165 (3d Cir. 1998) (reversing BIA incredibility finding based on prior inconsistent statements made to INS officials where the record of the statement might not be reliable, questions did not address details of claim, and applicant abused by government officials was fearful of U.S. government officials); Turcios v. INS, 821 F.2d 1396, 1398 (9th Cir. 1987) (viewing an evasive answer as explanatory when applicant’s lie regarding his Mexican nationality was explained and accepted as part of fear of persecution claim); ASYLUM BRANCH, OFFICE OF THE GENERAL COUNSEL, U.S. DEP’T. OF JUSTICE, INS BASIC LAW MANUAL 106 (1991) [hereinafter INS MANUAL]. An applicant who has lied on one part of a claim may be found credible on other parts of a claim and may be granted asylum. INS MANUAL at 106; see also UNHCR HANDBOOK, supra note 22, at ¶ 199 (providing that an untrue statement alone is inadequate to deny a claim and should be reviewed in light of all the circumstances for cumulative effect).
deceptive who looked at the wall and table instead of the judge while testifying; 24 (2) Family Moral Judgments: factors include leaving a two-year-old child behind in the country of alleged persecution, 25 bearing a child out of wedlock, 26 or failing to marry the mother of his child; 27 (3) Age of Applicant During Persecution: an applicant’s age when events occurred, ability to recall, the belief that a fifteen-year-old child is an unlikely target of political violence, 28 youth, trauma and secondhand information is not equivalent to fabrication; 29 and (4) Political Prominence or Alliances: Applicant was not “politically prominent” to receive threats 30 or an applicant’s relationship as son-in-law to a former commander. 31

The second category, “Discrepancies on Dates Attributed to Typographical or Language and Translation Errors,” includes Family Biographical or Entry Data Errors or discrepancies of birth dates of children or entry dates into the United States. 32

24. In re B-, Interim Decision 3251, 1995 WL 326740 (BIA May 19, 1995) (concluding that the actions of an Afghani applicant, who failed to look at the IJ while testifying and did not provide precise dates, did not indicate deception); see also supra note 9.

25. Ceballos-Castillo, 904 F.2d at 520 (leaving two-year-old child behind was an impermissible ground for adverse credibility because it was not supported by substantial evidence).

26. Garcia-Ramos v. INS, 775 F.2d 1370, 1372 n.4, 1375 n.9 (9th Cir. 1985) (finding the IJ’s pejorative credibility finding based on child born out of wedlock was not relevant).

27. Damaize-Job v. INS, 787 F.2d 1332, 1337 (9th Cir. 1986). The IJ questioned the applicant’s credibility on three separate impermissible grounds: (1) testimony and asylum application discrepancies on birthdates of two children; (2) never marrying mother of the children; and, (3) failing to apply for asylum in other countries he traveled through en route to the United States. Id.

28. Civil v. INS, 140 F.3d 52, 56 (1st Cir. 1998) (affirming the BIA’s denial of asylum but noting that serious doubt is cast on the IJ’s contention that fifteen-year-old children are unlikely targets of political violence); see also Kahssai v. INS, 16 F.3d 323, 324-26 (9th Cir. 1994). The IJ questioned an applicant’s testimony of persecution based on her age, i.e. her ability to recall, but not on her credibility. Kahssai, 16 F.3d at 324-26. The court of appeals rejected the IJ’s credibility determination, determining that persecution of applicant’s family was adequate, despite inconsistencies between applicant’s and siblings’ testimony. Id.


30. Gailius v. INS, 147 F.3d 34, 41 (1st Cir. 1998) (doubting a Lithuanian applicant’s credibility because he was insufficiently prominent to receive threats); Aguilera-Cota v. INS, 914 F.2d 1375, 1379 (9th Cir. 1990) (characterizing the applicant as a “low” level employee).


32. Vilorio-Lopez v. INS, 852 F.2d 1137, 1141-42 (9th Cir. 1988) (concluding that the date of incident and length of time sheltered were minor inconsistencies
Finally, the third category, "The IJ's Personal Conjecture about the Applicant's Story," includes Assumptions About Governments and/or Persecutors or Facts Not In the Record: Applicant failed to identify "unknown armed men" or "death squads" allegedly attacking him. An IJ found an applicant's story alleging threats to join guerillas in a situation where he would have been killed hard to believe and his testimony about short-term military training prior to combat unbelievable. Other improper grounds for incredibility findings include testimony about a passport and citizenship taken as apparent inconsistencies in treatment by officials, questioning if a government persecuting an applicant would have allowed him to leave, or resettlement or failure to apply for asylum en route to the United States. Examples of improper factual assumptions by an IJ not reflected in the record include a Spanish-speaker would not have called an ambulance in a predominantly English-speaking part of town, a Jehovah's Witness would not take an oath, and attributed to language problems; Damaize-Job, 787 F.2d at 1337 (stating that the IJ questioned the applicant's credibility on impermissible grounds, including testimony and asylum application discrepancies and the birth dates of two children); Garcia-Ramos, 775 F.2d at 1372 n.4, 1375 n.9 (concluding that the IJ's finding of a variance in the entry date was not probative where the inconsistency between filed papers and testimony could have been a typographical error).

33. Cordero-Trejo v. INS, 40 F.3d 482, 488 (1st Cir. 1994) (concluding that an applicant's failure to identify "unknown armed men" or "death squads" who threatened him was not a reasonable basis for doubting credibility).

34. Lopez-Reyes v. INS, 79 F.3d 908, 911-12 (9th Cir. 1996) (finding threats to join guerillas in Guatemala hard to believe and, therefore, not credible by the IJ and the BIA). The court of appeals found the application sufficiently detailed and corroborating affidavits were unnecessary for credibility. Id. The IJ's finding that the applicant's story was not believable, being based on personal conjecture that he would have been killed, was not a proper basis to discount his credibility. Id. at 912. Reasons must bear a legitimate nexus to the incredibility finding. Id.


36. Turcios v. INS, 821 F.2d 1396, 1401 (9th Cir. 1987) (concluding that it is inaccurate to presume, like the IJ did in this case, that if a government allows a person to leave then that individual is free from the threat of persecution).

37. Damaize-Job, 787 F.2d at 1335 (noting that it is impermissible for an IJ to question an applicant's credibility because of the applicant's failure to apply for asylum in other countries through which he traveled while en route to the United States); Kahssai v. INS, 16 F.3d 323, 327 (9th Cir. 1994).

38. DeBrown v. Dept. of Justice, 18 F.3d 774, 778 (9th Cir. 1994).

39. Mejia-Paiz v. INS, 111 F.3d 720, 726 (9th Cir. 1997) (Ferguson, J., dissenting). The dissenter thought the following impermissible grounds were used in making the adverse credibility determination: (1) failure to present membership indica in the Jehovah's Witnesses local or Nicaraguan church; (2) failure of brother to state in affidavit or oral testimony how he would know his brother was a
where the Board acted improperly as “lay theologians” in the case of an Ethnic Fijian Indian.\(^4\) This also includes Non-tangential Matters: A separate incredibility finding during a “bona fide marriage” interview or a Nevada arrest were unrelated matters not to be used to establish incredibility in an asylum claim.\(^4\)

### E. Each Reason Must Be Major, And It Must Reach The “Heart” Of The Claim

After a careful review of the transcript of the trial, if an explicit incredibility determination was made, supported by logical, permissible, specific, cogent reasons, the next step is to review the record for discrepancies or inconsistencies. A close examination of each finding will be necessary to analyze if the finding can be argued as “minor” or “collateral.” A further step is to ask if it is arguably “major” or does it relate to the “heart” of the asylum claim.

The definition of a fact as minor or collateral appears to be a matter determined on a case-by-case administrative and judicial basis depending on each individual decision maker’s perception of the facts, rather than determined by regulatory, statutory, or common law definitions. The omnipresence of variance in human perceptions allows virtually any set of facts to be subject to “reasonable minds” differing as to whether a discrepancy is major or minor. In Vilorio-Lopez v. INS,\(^4\) the majority viewed minor inconsistencies in dates attributable to the applicant’s language problems, not as an attempt to enhance a claim of persecution. The majority expounded that trivial errors should not be an excuse to predicate a finding of no credibility, and it emphasized rather the consistencies. The dissenter viewed the same inconsistencies as anything but minor, noting the presence of other inconsistencies in the record in support of an incredibility finding.\(^4\) The other inconsistencies

\(^4\) Jehovah’s Witness; and (3) the applicant took an oath, which was contrary to the IJ’s personal experience with the religious practices of Jehovah’s Witnesses. \textit{Id.}

\(^4\) Singh v. INS, 94 F.3d 1353 (9th Cir. 1996) (containing an argument by the dissenters that adverse credibility was indirectly used on impermissible grounds to deny a claim as if the court were “lay theologians”).

\(^4\) Fisher v. INS, 79 F.3d 955, 965 (9th Cir. 1995) (finding the applicant credible on asylum claim despite the fact that she was found incredible on a marriage issue in an unrelated immigration interview); Maldonado-Cruz v. INS, 883 F.2d 788, 789 n.1, 795 n.9, 795 (9th Cir. 1989) (finding by IJ of incredibility based on facts relating to a Nevada arrest were non-tangential, thereby leaving the presumption of credibility).

\(^4\) 852 F.2d 1137, 1141-42 (9th Cir. 1988).

\(^4\) \textit{Id.} at 1142-43 (Brunetti, J., dissenting).
were whether a cousin had been shot in the leg or arm, the length of petitioner’s service in the army, and the petitioner’s waiting for a year to leave El Salvador following the incident with guerillas and the death squad. 44

In Maldonado-Cruz v. INS, 45 the majority held that factual discrepancies were minor, stating in a footnote that the IJ did not find complete fabrication of kidnapping by guerillas. The IJ based his ruling on the applicant’s fears being too generalized, as a matter of law. 46 Thus, the facts were not in dispute, and remand would have been inappropriate. The dissent, however, argued that the same inconsistencies regarding kidnapping and witnesses were “integral” to the claim. 47

“Major discrepancies” found in case law used as support for incredibility findings can be divided into at least four categories: (1) inconsistent testimony about events that occurred considered material facts; (2) inconsistencies between an application or earlier statements under oath compared to later testimony; (3) contradictions and misrepresentations coupled with a suspicious submission or omission of corroborative evidence; and (4) date discrepancies if critical to the claim. Pragmatically, each individual case involving an incredibility finding may be supported by one or more reasons classified within one or more of these four categories. Each “reason” should be analyzed separately to determine if it has merit.

1. Inconsistent Testimony On Material Facts Relating To Events

Contradictions regarding material facts include contradictions relating to whether an applicant was arrested and beaten, 48 employment, 49 the applicant’s or persecutor’s identity, 50 and the basis

44. Id. at 1143.
45. 883 F.2d 788, 789 n.1, 793 n.9, 795 (9th Cir. 1989).
46. Id. at 792 n.7.
47. Id. at 793-95 (Wallace, J., dissenting). The inconsistencies were as follows: (1) The applicant and a friend were captured by guerillas, while the application stated the friend ran away when the guerillas approached, and (2) The application reported the applicant was with his friend when he was shot while he testified he was not present but heard his friend was shot. Id.
48. Rezai v. INS, 62 F.3d 1286, 1289 (10th Cir. 1995) (holding that inconsistencies in an Iranian applicant’s testimony regarding the frequency of beatings was support for an adverse credibility finding); Carvajal-Munoz v. INS, 743 F.2d 562, 577-78 (7th Cir. 1984) (concluding that a Chilean-born Argentine who had contradicted his testimony regarding his number of arrests failed to establish a well-founded fear based on nationality or political opinion).
of fear. Certain changes in a story can be fatal to credibility. Examples of fatal changes include changing “not arrested” to “arrested and beaten” and “beaten up once” to “many times.” Differ-

stated she hid from Shining Path group in Peru for twenty-two days prior to leaving, later testified that she had been employed until she left); Nasir v. INS, 122 F.3d 484, 486-87 (9th Cir. 1997) (finding discrepancies in the applicant’s testimony regarding employment to support an incredibility determination); Mejia-Paiz v. INS, 111 F.3d 720, 724 (9th Cir. 1997) (involving an applicant who testified that he was forced to resign from his job and then on cross-examination made contradictory remarks about joining a union); Ceballos-Castillo v. INS, 904 F.2d 519, 520-21 (9th Cir. 1990) (stating that the applicant’s position in the civil patrol during the time he claimed persecution by government pointed to incredibility); Saballo-Cortez v. INS, 761 F.2d 1259, 1264 (9th Cir. 1985) (involving an applicant who stated he was refused a work card, but the evidence contradicted this statement, establishing employment until he left).

50. Acuna-Lapola v. INS, 162 F.3d 1163, 1168 (8th Cir. 1998) (stating that the presence of inconsistent testimony regarding material facts was a valid reason for discrediting the Guatemalan applicant’s testimony); In re O-D-, Interim Decision 3334, 1998 WL 24904 (BIA Jan. 8, 1998) (stating that material misrepresentation by submission of fraudulent corroborative identity documents is analogous to material inconsistencies); Sarvia-Quintanilla v. INS, 767 F.2d 1387, 1392 (9th Cir. 1985) (involving an El Salvadoran applicant who alleged fear of government and leftist political group and was found not credible based on past lies relating to nationality). Cf Mejia-Paiz, 111 F.3d at 722-24 (involving a Nicaraguan who originally testified that he was forced by the Sandinistas to resign from his job but later contradicted that statement); Dulane v. INS, 46 F.3d 988, 999 (10th Cir. 1995) (providing that proof of nationality was not required by Ethiopian during Somali clashes in battles over the Ogaden); Khano v. INS, 999 F.2d 1203, 1208 (7th Cir. 1993) (finding inconsistencies in applicant’s testimony regarding alleged persecution based on Assyrian Christian activities and resolved such inconsistencies against the applicant); Turcios v. INS, 821 F.2d 1396, 1401 (9th Cir. 1987) (holding that lying to the INS about nationality is not inconsistent with asylum claim).

51. Caballos-Castillo, 904 F.2d at 520. This case involved the following material inconsistencies held to involve the heart of the claim: (1) 180 degree change of identity of persecutor from guerillas to government; (2) inconsistencies about passports; (3) applicant’s position for over two years in volunteer para-military government civil patrol supervised by the army during the time he claimed persecution by the government and to be subject to a capture order; and (4) leaving two year old child behind while fleeing persecution. Id. The last reason, however, was not supported by substantial evidence. Id.; see also Bojorques-Villanueva v. INS, 194 F.3d 14, 16 (1st Cir. 1999) (involving major inconsistencies affecting the heart of the claim); De Leon-Barrios v. INS, 116 F.3d 391, 393-94 (9th Cir. 1997) (changing the persecutor from guerillas to opponents of a labor organization was viewed as major discrepancy on basis of fear involving the heart of the claim); Coriolan v. INS, 559 F.2d 993, 1005 (5th Cir. 1977) (noting that the persecutors, the Communists, were not mentioned in the asylum application).

52. Rezai, 62 F.3d at 1289; Carvajal-Munoz, 743 F.2d at 577-78; see also Hamzehi v. INS, 64 F.3d 1240 (8th Cir. 1995). The majority in Hamzehi determined that the applicant’s testimony lacked credibility and was vague, confusing, and inconsistent on the number of events, dates, locations and time spans of Revolutionary Guard invasions. Hamzehi, 64 F.3d at 1243. The dissent believed the majority was improperly targeting these inconsistencies within otherwise credible testimony. Id. at
ent applicants have contradicted themselves, claiming to be Catholic, then Baptist, offering no proof of membership or knowledge of tenets of Christianity.53

2. Inconsistencies Between An Application Or Earlier Statements Under Oath Compared To Later Testimony

Inconsistencies between applications and statements under oath support incredibility findings.54 Examples included past lies

1247-49 (Godbold, J., dissenting); see also Demirovski v. INS, 39 F.3d 177 (7th Cir. 1994). In Demirovski, the BIA determined that petitioner's testimony lacked credibility. Demirovski, 39 F.3d at 180. This was because the petitioner first testified to being picked up by police and beaten and later testified that he had not been arrested but was stopped in the street and beaten. Id. He again changed his story, testifying that the incident amounted to a beating after a demonstration outside an employment office when others were arrested. Id. The testimony was also found to be sketchy and lacking in detail, and even if believed, would not meet one of the five categories for asylum. Id.

53. Hajiani-Niroumand v. INS, 26 F.3d 832, 837-39 (8th Cir 1994); see also Castillo v. INS, 951 F.2d 1117, 1119-20 (9th Cir. 1991) (stating that the following inconsistencies led to the applicant's failure to establish a well-founded fear: (1) after interrogations, lived openly and safely for five and one-half years before voluntarily leaving; (2) claimed to be Catholic, then Baptist in testimony; (3) claimed he would not fight in the Nicaraguan military but would fight in the U.S. military; (4) claimed he could not get position due to political party where evidence showed he could not find a position in his profession based on other reasons).

54. Bojorques-Villanueva, 194 F.3d at 16 (involving major inconsistencies affecting the heart of the claim); De Leon-Barrion, 116 F.3d at 393-94 (changing the persecutor from guerillas to opponents of a labor organization was viewed as major discrepancy on basis of fear involving the heart of the claim); Berroteran-Melendez v. INS, 955 F.2d 1251, 1256 (9th Cir. 1992). This case involved the following discrepancies between the asylum application and testimony: (1) application states incarceration without injury one time by the Sandinistas, and at the hearing, he testified being taken to jail on three other occasions, and having his jaw broken on one occasion; (2) he testified his last incarceration was in 1986, while his application mentions several arrests without resulting incarcerations; and (3) testimony was given about being a captain in the National Guard, but the identification submitted to the Court was for captain of police. Berroteran-Melendez, 955 F.2d at 1256-57. The court held that the discrepancies were not minor. Id.; see also Chun v. INS, 40 F.3d 76, 78-79 (5th Cir. 1994) (containing significant discrepancies between testimony and application); Ceballos-Castillo, 904 F.2d at 520; Saballos-Cortes, 761 F.2d at 1264 (discussing the applicant's inconsistencies between asylum application and testimony). The inconsistencies led to the finding that the testimony was not credible. Ceballos-Castillo, 904 F.2d at 1267. The applicant stated: (1) He was refused a work card but was employed until he left; (2) He had no right to buy food, but he could buy food without a discount; (3) He departed with no trouble obtaining passport and exit visa; (4) He refused to serve in the military but was not arrested and was free to leave; (5) No political organization or position; and (6) No corroboration. Id. at 1263. Cf. Aguilera-Cota v. INS, 914 F.2d 1375, 1381-82 (9th Cir. 1990) (finding omissions of corroborative documentary evidence, a threatening note, and failure to list two collateral incidents involving
about identity or nationality, not just to gain entry to the United States, but submitted with the asylum application or stated under oath and without justification; and if an omission of key events is revealed, coupled with numerous inconsistencies.

3. Contradictions And Misrepresentations Coupled With A Suspicious Omission Or Submission Of Corroborative Evidence—Show And Tell

Testimony alone, or "tell," is increasingly subject to a balancing-test analysis. The weaker the testimony, the greater the need to also "show" (testimony plus, "show and tell") corroborative evidence that arguably could have been submitted. The same bal-

relatives in I-589 document inadequate to support incredibility finding).

55. Akinmade v. INS, 196 F.3d 951, 954 (9th Cir. 1999) (noting that an important distinction exists between false identity documents and a claim of citizenship used for entry); Sarvia-Quintanilla v. INS, 767 F.2d 1387, 1395 (9th Cir. 1985) (involving an El Salvadoran applicant who alleged fear of government and leftist political group and was found not credible based on past lies relating to nationality). Cf. Dulane, 46 F.3d at 999 (providing that proof of nationality was not required by Ethiopian during Somali clashes in battles over the Ogaden); Turcios, 821 F.2d at 1400 (finding against adverse credibility even though the applicant had untruthfully claimed he was Mexican three times during INS arrests to avoid deportation to El Salvador).

56. Ceballos-Castillo, 904 F.2d at 520 (holding material inconsistencies involve the heart of the claim; In re A-S-, Interim Decision 3336, 1998 WL 99553 (BIA Feb. 19, 1998) (providing for deference to the IJ’s adverse credibility finding on central events if based on inconsistencies and omissions and the record reveals: (1) discrepancies and/or omissions are present; (2) specific, cogent reasons for incredibility are stated; and (3) no convincing explanation for discrepancies and/or omissions is provided by the applicant. The third prong of In re A-S- is similar to the UNHCR HANDBOOK, which provides that omissions of fact in an asylum application or testimony might not, alone, support an adverse credibility determination, but omission of key events coupled with numerous inconsistencies, provide another specific and cogent reason supporting the IJ’s adverse credibility finding. UNHCR HANDBOOK, supra note 22, at ¶199. Cf. Osorio v. INS, 99 F.3d 928, 929, 931 (9th Cir. 1996) (stating that omission of details is not equivalent to incredibility and that omitted details should be labeled as unimportant or collateral facts not material to fear); Aguilera-Cota, 914 F.2d at 1381, 1383. Aside from failing to prove delivery of a threatening note, the applicant’s failure to include two collateral incidents involving relatives on his I-589 document was not supported by substantial evidence to find him not credible. Id. Applicant’s testimony was not inconsistent and supporting documentary evidence was provided. Id. The requisite nexus was lacking, and the IJ’s finding did not meet the test of legitimacy. Id.

57. These cases are examples of weak testimony and omissions of corroborative evidence.

Testimony alone, Tell: Abdel-Masieh v. INS, 73 F.3d 579, 584 (5th Cir. 1996) (concluding that because the credibility of a Coptic Christian in Sudan had not been questioned, testimony alone could be sufficient to sustain burden of proof without corroboration); Lopez-Reyes v. INS, 79 F.3d 908, 912 (9th Cir. 1996)
(concluding that testimony alone is sufficient and that incredibility could not be determined from lack of production of corroborative affidavits from friend and mother); Osorio, 99 F.3d at 931 (stating that omission of details is not equivalent to incredibility); Singh v. Ilchert, 63 F.3d 1501, 1506 (9th Cir. 1995) (concluding that applicant may satisfy subjective element of "well-founded" fear of persecution by credible testimony that he fears persecution, and the objective element may be satisfied by specific documentary evidence or by testifying credibly and persuasively); Sotelo-Aquije v. Slattery, 17 F.3d 33, 36 (2d Cir. 1994) (holding uncorroborated testimony sufficient); Aguiler-Cota, 914 F.2d at 1380-81 (recognizing that refugees frequently do not possess documentary evidence regarding relevant events); Mendoza-Perez v. INS, 902 F.2d 760, 762 (9th Cir. 1990) (concluding that testimony alone about letter threats was sufficient without actual production); United States v. Santos-Vanegas, 878 F.2d 247, 251-52 (8th Cir. 1989) (stating that uncorroborated testimony can establish a well-founded fear when an IJ does not make an adverse credibility finding); INS v. Cardoza-Fonseca, 480 U.S. 421, 438 n.20 (1987) (stating that an applicant should give a plausible, coherent account why he or she fears persecution); Turcios, 821 F.2d at 1402 (explaining that a detailed testimony mitigates need for corroborating testimony and actions); Diaz-Escobar v. INS, 782 F.2d 1488, 1492 (9th Cir. 1986) (stating that an applicant may satisfy objective element of well-founded fear by credible, direct and specific evidence in the record); Hernandez-Ortiz v. INS, 777 F.2d 509, 514 n.5 (9th Cir. 1985) (discussing that direct corroborating evidence is not necessary in a full hearing unless the testimony is inherently unbelievable); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285, 1288 (9th Cir. 1984) (concluding that the applicant's testimony alone was sufficient as it was viewed unrefuted and credible).

Testimony plus, Show and Tell: Carvajal-Munoz, 743 F.2d at 574-77 (determining that where the IJ had not found petitioner incredible on the record, the evidentiary burden had not been met because uncorroborated testimony is insufficient unless it is credible, persuasive, and points to specific facts of persecution).

Testimony alone, Tell: Zavala-Bonilla v. INS, 730 F.2d 562, 565 (9th Cir. 1984) (stating that a petitioner cannot be expected to provide a certified document from authorities attesting to persecution upon return); McMullen v. INS, 658 F.2d 1312, 1319 (9th Cir. 1981). An alien's own testimony, if unrefuted and credible about a threat, if viewed as insufficient to establish the fact that a threat was made, would make it close to impossible for any political refugee to make out a case for asylum. Id.

Testimony plus, Show and Tell: Nsukami v. INS, 890 F. Supp. 170, 177 (E.D.N.Y. 1995) (balancing testimony and corroborative evidence); Chen v. Slattery, 862 F. Supp. 814, 824 (E.D.N.Y. 1994) (stating that the IJ could not base an incredibility finding in part on petitioner's failure to offer documentary evidence to corroborate his statements about U.S. Virgin Islands birth or because his testimony seemed implausibly vague. Id. The BIA's insistence on docu-
ancing test applies in situations where a submission of suspicious corroborative evidence is combined with "weak" testimony to equal incredibility. Recent case law examples illustrate the pejorative effect of weak testimony combined with submission of suspicious documents. One example involved two questionable identity cards, a forged refugee camp document, and suspicious name changes. 58

58. These cases are examples of weak testimony combined with questionable submissions. Singh-Kaur v. INS, 183 F.3d 1147, 1150-51 (9th Cir. 1999) (involving an applicant from India whose credibility was questioned based on his demeanor, inconsistent testimony given to police, a fingernail removed by torture, and an apparent name change to match the name in a corroborating newspaper article); Aguilar-Solis v. INS, 168 F.3d 565, 571 (1st Cir. 1999); Gailius v. INS, 147 F.3d 34, 41 (1st Cir. 1998). Reasons stated in firing letter with unveiled and personal terms made DOS question authenticity. Gailius, 147 F.3d at 41. Expert witnesses rebutted this conclusion. Id. at 41-42. In Communist regimes and their formerly ruled countries, defiance by children was openly acknowledged in official documents. Id. DeBrown v. Dept. of Justice, 18 F.3d 774, 775 (9th Cir. 1994). Excluded alien was denied habeas corpus relief where substantial evidence supported finding that she was not born in the U.S. Id. She had presented a copy of an uncertified California birth certificate, live testimony of her mother, and two affidavits of people asserting they had witnessed or knew of her birth. Id. at 775-78. Contradicting her claim of U.S. Citizenship was a certified copy of a Mexican birth certificate and a Certification of No Record issued by the State of California reflecting her birth. Id.; see also Berroteran-Melendez v. INS, 955 F.2d 1251, 1256 (9th Cir. 1992). Testimony was given about being a captain in the National Guard, but the identification submitted to the Court was for captain of police. Berroteran-Melendez, 955 F.2d at 1256. Discrepancies were not considered minor and no reasons were given below or on appeal for discrepancies. Id.; Perlera-Escobar v. INS, 894 F.2d 1292, 1295 (11th Cir. 1990) (using fact that the applicant used false social security card and alias in discretionary denial of asylum); Sarvia-Quintanilla, 767 F.2d at 1395 (finding an applicant from El Salvador not credible because he had lied about nationality to the INS officials to obtain a Mexican passport); In re O-D-, Interim Decision 3334, 1998 WL 24904 (BIA Jan. 8, 1998) (involving a Mauritanian applicant who submitted two questionable documents including a counterfeit identity card); In re Y-B-, 1998 WL 99554 (back-dooring the need for a lack of credibility finding.
Other cases similar to these recent precedents involved the submission of a Captain of police card while testifying to membership and position as Captain in National Guard, the suspicious purchase of an "ersatz" temporary residence card while claiming no desire for residency at the time, and a passport procurement story inconsistent with submission of a questionable passport with suspicious markings and numbers, or multiple passports.

4. Date Discrepancies Critical To A Claim

First, an analysis of an omitted or inconsistent date should be whether the date, if in error, materially affects the outcome of the claim of persecution. If the date varies, would it indicate the event of persecution did not take place at all within a prerequisite framework of historical time? Secondly, is the inconsistent date central to the claim of persecution? Major date inconsistencies should involve events such as a political or religious demonstration, an arrest, or shooting. Date discrepancies, absent a solid supporting reason, should be viewed as minor, if they are limited to dates of birth, marriage, or death of a family member.

Date discrepancies are held to support an incredibility finding when they are perceived as "major" discrepancies, critical to an asylum claim. Pejorative dispositions are more likely if an applicant is where testimony was consistent but vague on key elements of claim, combined with UNHCR letter about refugee camp document indicating forgery); In re M-S-, Interim Decision 3258, 1995 WL 688876 (BIA Nov. 8, 1995) (establishing adverse credibility by documents submitted to asylum officer causing credibility to be questioned). Cf. Dulane, 46 F.3d at 999 (requiring no proof of nationality by ethnic Somali displaced in context during battle in Ogaden region, stating that asylum is available to the stateless); Turcios, 821 F.2d at 1399 (finding against adverse credibility even though the applicant had untruthfully claimed he was Mexican three times during INS arrests to avoid deportation to El Salvador); In re Pula, 19 I. & N. Dec. 467 (BIA 1987) (concluding, based on a nine-factor test, that false documents used to escape the country of persecution are not a significant adverse factor when evaluating the seriousness of an applicant's fraud circumventing refugee procedures).

59. Aguilar-Solis, 168 F.3d at 571; Berroteran-Melendez, 955 F.2d at 1256 (finding discrepancies in testimony regarding the National Guard not minor, and no reasons were given in the lower court or on appeal for the discrepancies).

60. Nasir v. INS, 122 F.3d 484, 486-87 (9th Cir. 1997) (involving questionable passports and a letter from the DOS about Ahmadi Sect of Pakistan applicants filing false claims for asylum); Ceballos-Castillo, 904 F.2d at 520 (holding that material inconsistencies about passports involve the heart of the claim); Mentor v. INS, 834 F. Supp. 133, 139-40 (E.D. Pa. 1993) (finding adverse credibility based on one act of fraud, which was one applicant with two passports).
unable to state any date, or misstates an historical date or time-span within the backdrop of civil unrest, war or other threatening event. Other misstated dates, treated less conclusively as major inconsistencies or discrepancies include dates or timeframes of persecution, dates of entry, or dates of an applicant's or relative's birth, marriage or death.

61. Mejia-Paiz v. INS, 111 F.3d 720, 724 (9th Cir. 1997) (stating that the court viewed the applicant's difficulty in recalling the date when he allegedly joined the Jehovah's Witnesses religious group as adverse to his credibility); Berroteran-Melendez, 955 F.2d at 1256 (affirming the denial of the applicant's request for asylum because the record was lacking in detail and there were several discrepancies in the applicant's testimony); In re A-S, 1998 WL 99553 (Schmidt, Guendelsberger & Rosenberg, dissenting) (discussing the difficulty of victims of persecution to remember dates); see also Tina Rosenberg, To Hell and Back, N.Y. Times Mag., Dec. 28, 1997, at 32, 34 (discussing brain processing, amnesia, and the fragmented recall typical for refugees who had been victims of torture).

62. Hajiani-Niroumand v. INS, 26 F.3d 832, 837 (8th Cir. 1994) (stating that the court would not accept as a mere mix-up an Iranian applicant's statement, in which he admitted that he openly opposed the revolution led by Khomeini from 1976-78, when, in fact, the Khomeini government did not assume power until 1979); Vilorio-Lopez v. INS, 852 F. 2d 1137, 1141 (9th Cir. 1988) (holding that minor inconsistencies in testimony of the applicant and his cousin regarding the year that twenty guerillas stormed his home were not an adequate basis for finding him not to be credible); Gumbol v. INS, 815 F.2d 406, 407-08 (6th Cir. 1987) (stating that an Iraqi alien who gave inconsistent accounts concerning the date of an alleged beating that occurred in Iraq at his place of employment resulted in an adverse credibility finding by the court); Coriolan v. INS, 559 F.2d 993, 999 (5th Cir. 1977) (discussing a Haitian applicant's date discrepancies concerning anti-Duvalier events that happened to his father). He testified that the events happened in 1971, but the correct year was 1956, which would justify discounting his testimony but the IJ did not state that on the record. Coriolan, 559 F.2d at 999; see also Hamzehi v. INS, 64 F.3d 1240 (8th Cir. 1995) (involving an Iranian applicant who had confused dates of invasions and moves between Tehran and Kerman-shah); In re A-S, 1998 WL 99553. This case contained the following discrepancies: two year difference on date of initial act of persecution; 18 month difference on date of beating; six month difference on alleged unjustified police charge; omission of a break-in on I-589; and, 1993 demonstration mentioned only in testimony. 1998 WL 99553.; see also In re B, 1995 WL 326740 (stating that no deception was indicated by an Afghan applicant's failure to provide precise dates); Pereda-Acosta v. INS, No. 97-9508, 1998 WL 60408, at *4 (10th Cir. Feb. 13, 1998) (upholding an adverse credibility finding of IJ where petitioner, who stated she hid from Shining Path group in Peru for twenty-two days prior to leaving, later testified that she had been employed until she left).

63. Aguilar-Solis, 168 F.3d at 568 n.1 (stating that conflicting accounts of an original entry date into the United States, although not needing resolution by the court, would be regarded as germane to the issue of the petitioner's credibility); Vilorio-Lopez, 852 F.2d at 1141 (concluding that minor inconsistencies in the testimony of applicant and his cousin regarding the year of the date of the incident were not an adequate basis for finding an applicant not credible); Martinez-Sanchez v. INS, 794 F.2d 1396, 1400 (9th Cir. 1986) (inconsistencies on date joining paramilitary group were not fatal to credibility); see generally Gumbol v. INS,
5. Minor Discrepancy Or Inconsistency

An IJ and the BIA should indicate the nature and gravity of inconsistencies underlying incredibility findings. Minor omissions, inconsistencies or trivial errors do not support incredibility findings.64 Events may be included in an asylum application, albeit in less detail, or in a different section than expected when compared to testimony as omissions or discrepancies.65 Analysis of discrepan-

815 F.2d 406 (6th Cir. 1987); Hamzehi v. INS, 64 F.3d 1240 (8th Cir. 1995); In re B, 1995 WL 326740 (stating that the IJ erred when finding applicant, who did not provide precise dates, untruthful).

64. Bojorques-Villanueva v. INS, 194 F.3d 14, 16 (1st Cir. 1999) (stating that adverse credibility determination cannot be based solely on “trivia but must be based on discrepancies that involved the heart of the asylum claim”). Multiple inconsistencies were not minor, but rather were central to facts of triggering event, location, abduction and subsequent viewing. Id. at 17; Vongsakdy v. INS, 171 F.3d 1203, 1206 n.2 (9th Cir. 1999) (stating that discrepancies by applicant regarding two separate thumb injuries were minor inconsistencies that were attributed to confusion and fear that the immigration proceeding would not be treated as confidential); Miranda v. INS, 139 F.3d 624, 626 (8th Cir. 1998) (finding El Salvadoran applicant credible, even though there were inconsistencies and ambiguities in her statements in the record); De Leon-Barrios v. INS, 116 F.3d 391, 393-94 (9th Cir. 1997) (stating that inconsistencies involving the “heart of the asylum claim” are required for adverse credibility finding); Lopez-Reyes v. INS, 79 F.3d 908, 911 (9th Cir. 1996) (failing to file an application not as complete as desired, alone, does not support a negative credibility finding); Cordero-Trejo v. INS, 40 F.3d 482, 488 (1st Cir. 1994) (deeming one alleged inconsistency, calling attackers “death squads” and “unknown armed men,” ephemeral and other challenges hyper-technical); Osorio v. INS, 99 F.3d 928, 932 (9th Cir. 1996) (“[M]inor omissions, minor inconsistencies, and trivial errors ... cannot support an adverse credibility finding”). The IJ and Board should give an indication of the nature and gravity of inconsistencies they rely on. Osorio, 99 F.3d at 932. The IJ did not identify facts or inconsistencies he deemed established by an INS examiner’s testimony. Id. at 931. The applicant’s first application, which was the source of inconsistencies, may have been illusory, a product of language barriers, or a “misreading of a largely unintelligible document.” Id. at 932. Aguilara-Cota v. INS, 914 F.2d 1375, 1382 (9th Cir. 1990) (analogizing minor inconsistencies to minor omissions, minor inconsistencies or misrepresentations of unimportant facts cannot be the basis for an adverse credibility finding). Details included in testimony that were not in the application are not sufficient to indicate a lack of credibility. Aguilara-Cota, 914 F.2d at 1382; Viloria-Lopez, 852 F. 2d at 1142 (stating that minor inconsistencies that reveal nothing about an applicant’s fear for his safety are not sufficient to indicate a lack of credibility); Martinez-Sanchez, 794 F.2d at 1400 (noting that trivial errors are not a valid ground to find that an applicant is not credible); In re Fefe, 20 I & N. Dec. 116, 118 (BIA 1989); INS SUPPLEMENTARY REFUGEE/ASYLUM ADJUDICATION GUIDELINES Jan. 22, 1990 (stating that minor inconsistencies, misrepresentations or concealment in a claim should not lead to a finding of incredibility where the inconsistency, misrepresentation or concealment is not material to the claim).

65. Lopez-Reyes, 79 F.3d at 911 (holding that an applicant’s testimony will not be considered to be lacking in credibility because it includes details that were not included in the application).
cies as "major" or "minor," "collateral" or "the heart" (central part) of the claim may be a one-step or a two-step process, varying in different written opinions. The "heart" of the persecution claim includes fear and identity of the applicant and the persecutor.

Advocating a fact as "minor" involves its characterization as a language problem, mistranslation, miscommunication, typographical error, innocent human oversight or misperception, or a trivial discrepancy not used to enhance persecution or fear. It is insignificant compared to the bulk of consistent testimony. A fact can also be attributed with a two-word label, such as a "minor-collateral" fact, and it can be analyzed in one step, "minor," and not reaching the heart of the claim. An example of a "minor-collateral" fact, in most asylum claims, would be the accuracy of the number of children stated in the application. Typically this is a matter of little or no bearing on the prima facie case. The flipside of the "minor" argument characterizes an inconsistent fact as "major," an intentional misrepresentation, fabrication or fraud, without an acceptable explanation.

After labeling a fact, "minor," or "major," a one-step analysis jumps ahead to the finish line, which is the heart of the claim, (as in the "minor-collateral" example above). A two-step analysis of the "major fact" and "heart of the claim" findings requires first, finding each fact to be major, and second, analyzing if the fact is pivotal to the heart of the claim. This second step is a matter of perception: if a significant fact is central to the heart of a claim, significantly impacting the identity of the applicant or the persecutor or affecting fear of persecution. Only the combinations of a fact being found as major or material and going to the heart of the claim should be fatal to credibility. Any other combination of minor or major facts, if they fail to go to the heart of the claim, should result in a lack of substantial evidence supporting an incredibility finding. Also, mitigating factors tipping the scale in favor of an applicant, such as a bulk of consistent testimony on the record or consistent country conditions, should not be overlooked.

Precedent provides guidance on facts constituting minor misrepresentations or inconsistencies such as language barriers, including difficulties with translation or typographical errors, collat-

66. Osoio, 99 F.3d at 932 ("[M]inor omissions, minor inconsistencies, and trivial errors ... cannot support an adverse credibility finding"). The IJ and Board should give an indication of the nature and gravity of inconsistencies they rely on. Id. The IJ did not identify facts or inconsistencies he deemed established by an
eral incidents, “unimportant facts,” omissions in asylum petition, and date discrepancies, such as entry dates, birth-dates, date variation joining paramilitary group or dates not recalled all carried no relevance to fear for safety.

INS examiner’s testimony. *Id.* at 981. The applicant’s first application, which was the source of inconsistencies, may have been illusory, a product of language barriers, or a “misreading of a largely unintelligible document.” *Id.* at 932; Chen v. Slattery, 862 F. Supp. 814, 824 (E.D.N.Y. 1994) (finding it insufficient for an incredibility determination that the applicant answered questions differently at time of entry than in her application or hearing); Hartooni v. INS, 21 F.3d 336, 340 (9th Cir. 1994) (holding not incredible fourteen-year-old Iranian girl who was not fluent in English and inconsistently testified to mistreatment). The translator who “coached” applicant spoke in broken English but was not deemed to have prejudiced the outcome of the hearing. *Id.* at 340-43; Turcios v. INS, 821 F.2d 1396, 1400-01 (9th Cir. 1987) (stating that the minor inconsistencies were characterized as errors attributed to possible mistranslation or miscommunication and not material to the petitioner’s fear for his safety); Damaize-Job v. INS, 787 F.2d 1332, 1337 (9th Cir. 1986) (stating that minor discrepancies in dates attributable to language problems or typographical errors and not attempts to enhance a persecution claim do not bear on credibility); Garcia-Ramos v. INS, 775 F.2d 1370, 1372 n.4, 1375 n.9 (9th Cir. 1985) (stating that the entry date variance was an inadequate ground for incredibility); *In re* Pula, 19 I. & N. Dec. 467, 476 (BIA 1987) (concluding that the minor discrepancies did not impeach the applicant but rather were attributed to difficulty with translations); see also *In re* Fauziya Kasinga, Interim Decision 3278, 1996 WL 379826 (BIA June 13, 1996) (concluding that inconsistent dates are minor and not central to claim); Nsukami v. INS, 890 F. Supp. 170, 174 (E.D.N.Y. 1995) (invoking a Zaire applicant who claimed that inadequate translation resulted in an incredible finding by the IJ); Mentor v. INS, 834 F. Supp. 133, 133 (E.D. Pa. 1993) (invoking an applicant who unsuccessfully raised inadequate translation issue via motion to reopen to the BIA).

67. *Aguilera-Cota*, 914 F.2d at 1382. Applicant testified to information not included in his application involving two collateral incidents with relatives. *Id.* If minor inconsistencies or misrepresentations of unimportant facts cannot constitute the basis for an adverse credibility finding, a fortiori, minor omissions cannot. *Id.*

68. *Cordero-Trejo*, 40 F.3d at 489-90 (stating that minor inconsistencies in record, including date discrepancies, are not relevant to fear for safety and are, therefore, an improper basis for adverse credibility finding); *Turcios*, 821 F.2d at 1400-01 (lying to INS about nationality was not inconsistent with asylum claim and minor inconsistencies were characterized as errors attributed to possible mistranslation or miscommunication and not material to the petitioner’s fear for his safety); *Damaize-Job*, 787 F.2d at 1337 (holding three grounds on which the IJ based his adverse credibility finding impermissible: Discrepancies found between asylum application and testimony regarding: (1) birth-dates of two children; (2) failure to marry mother of children; and (3) failure to apply for asylum in other countries he passed through en route to the United States); *Martinez-Sanchez*, 794 F.2d at 1400-01 (reversing the IJ’s finding that applicant was not a credible witness based on inconsistencies in the date of joining a paramilitary group); *Garcia-Ramos*, 775 F.2d at 1372 n.4, 1375 n.9 (concluding that an adverse credibility finding based on a child out of wedlock was not relevant, and that the entry date variance was not probative because the inconsistency between filed papers and testimony could
Examples of other differences between the application and testimony deemed insignificant are a failure to indicate mistreatment by checking a box on asylum application, yet testifying about mistreatment,\textsuperscript{69} cause of death of applicant's father, by heart attack or execution and whether mother was tortured during imprisonment,\textsuperscript{70} if abductors were military officers or individuals wearing civilian clothes and if detention was at a police station or a house used as a police station,\textsuperscript{71} discrepancies relating to a union strike,\textsuperscript{72} capture by guerillas,\textsuperscript{73} and inconsistencies between an applicant and his cousin's testimony on the date and the length of time sheltered.\textsuperscript{74} Examples of "collateral" matters are an applicant listed have been merely a typographical error); \textit{Chen}, 862 F. Supp. at 824 (finding confusion over dates to be an inadequate basis for adverse credibility finding); \textit{In re B-}, Interim Decision 3251, 1995 WL 326740 (BIA May 19, 1995) (stating that Afghani's lack of precise dates did not indicate deception). \textit{Cf. In re M-S-}, Interim Decision 3258, 1995 WL 688876 (BIA Nov. 8 1995) (involving an applicant who stated three different dates for his military service during interview).

\textsuperscript{69} \textit{Hartooni}, 21 F.3d at 342.

\textsuperscript{70} Kahssai v. INS, 16 F.3d 323, 327 (9th Cir. 1994) (noting the inconsistencies between the applicant and her siblings regarding: (1) the death of their father; and (2) their mother's imprisonment).

\textsuperscript{71} Lopez-Galarza v. INS, 99 F.3d 954, 958 n.5 (9th Cir. 1996). Inconsistencies viewed as minor between applicant and half-sister's testimony included: (1) if abductors were military officers or individuals wearing civilian clothing; (2) if detention was at a police station or a house used as a police station. \textit{Id}.

\textsuperscript{72} Zava-la-Bonilla v. INS, 790 F.2d 562, 568 (9th Cir. 1984) (providing that discrepancies between application for asylum and testimony of a trade union member executive about a nationwide strike where two union officials had allegedly been killed were insufficient to undermine his credibility).

\textsuperscript{74} Maldonado-Cruz v. INS, 883 F.2d 788, 789 n.1, 792 n.9, 795 (9th Cir. 1989). The IJ made case disposition on failure to qualify on account of neutral political opinion, and the legal issue was reversed on appeal. \textit{Id} at 791-92 Credibility became an issue. \textit{Id} at 792 n.8. The majority held factual discrepancies as minor; IJ's finding of lack of credibility on facts relating to a Nevada arrest were non-tangential, and credibility would be presumed based on lack of findings, even if they were deemed unnecessary due to the case disposition. \textit{Id} at 792 n.7. The majority stated that the IJ did not find complete fabrication of kidnapping by guerillas, despite minor discrepancies, the IJ based his ruling on the applicant's fears being too generalized as a matter of law, thus facts were not in dispute, and remand would be inappropriate. \textit{Id}. The dissent argued the same inconsistencies were "integral" to the claim: 1) Testimony: the applicant and a friend were captured by guerillas, while the application stated the friend ran away when the guerillas approached; 2) The application reported the applicant was with his friend when he was shot while he testified he was not present but heard his friend was shot. \textit{Id} at 795 (Wallace, J., dissenting). The dissent would have remanded to the fact finder on credibility. \textit{Id} at 795 (Wallace, J., dissenting).

\textsuperscript{73} Vilario-Lopez v. INS, 852 F.2d 1137, 1140-42 (9th Cir. 1988). The Ninth Circuit did not view inconsistencies in testimony by applicant and his cousin on date of the year of the incident (two year difference) and the length of time shel-
two children, while he testified about four children,\textsuperscript{75} testimony on female genital mutilation, the heart of the claim, was consistent and other discrepancies were not significant to undermine claim and applicant offered explanation.\textsuperscript{76}

Other findings or evidence can have an impact on incredibility: country conditions,\textsuperscript{77} returning or remaining in the country of

\textsuperscript{75} Martinez-Sanchez v. INS, 794 F.2d 1396, 1400-01 (9th Cir. 1986) (reversing the IJ’s finding that the applicant was not a credible witness where his finding was based on inconsistencies such as: (1) date of joining ORDEN, a paramilitary group; and (2) he listed on the I-589 two children, while he testified that he had four children). These errors were termed “trivial errors” not supported by “substantial evidence” to find an asylum applicant not credible.

\textsuperscript{76} In re Fauziya Kasinga, Interim Decision 3278, 1996 WL 379826 (BIA June 13, 1996); see also INS MANUAL, supra note 24, at 104-105 (providing that prior inconsistent statements made by applicant to INS official are insufficient to support adverse credibility as record of statement may not be reliable).

\textsuperscript{77} Gailius v. INS, 147 F.3d 34, 45 (1st Cir. 1998). Where there is corroborating evidence, (an affidavit and threatening letters), an IJ must do more than point to general country conditions. The IJ must determine the other evidence produced to corroborate testimony is not genuine or not persuasive. \textit{Id}. If this evidence is ignored, substantial evidence does not support the underlying decision. \textit{Id}. The evidence is pertinent to the credibility of the claimed fear. \textit{Id}. The State Department Report that country conditions were changing was rebutted by expert witnesses on current situation in Lithuania by 1992. \textit{Id}. at 45-46.; Mejia-Paiz v. INS, 111 F.3d 720, 722-24 (9th Cir. 1997) (stating that Nicaraguan DOS letter did not support persecution of Jehovah’s Witnesses in Nicaragua at time involved in claim); Cordero-Trejo v. INS, 40 F.3d 482, 491 (1st Cir. 1994). The First Circuit found the adverse credibility finding to be contradicted by Guatemalan country conditions presented by applicant, and knowledge of conditions in the applicant’s country is a well-established factor in credibility assessment of applicant. \textit{Cordero-Trejo}; 40 F.3d at 491; Kahssai v. INS, 16 F.3d 323, 323 (9th Cir. 1994) (holding that the BIA could not take administrative notice of changed country conditions in Ethiopia without allowing applicant to rebut); Zavala-Bonilla v. INS, 730 F.2d 562, 566 (9th Cir. 1984) (finding that oppressive conditions in El Salvador supported claim, despite discrepancies between application for asylum and testimony); In re Dass, 20 I. & N. Dec. 120, 124 (BIA Sept. 6, 1989) (noting that background conditions are critical to case evaluation); In re E-P, Interim Decision 3311, 1997 WL 123905 (BIA Mar. 14, 1997) (involving the changed conditions in Haiti, post-Aristide); In re S-M-J, Interim Decision 3503, 1997 WL 80984 (BIA Jan. 31, 1997) (stating that general country background information should be submitted in IJ asylum hearing); In re H, Interim Decision 3276, 1996 WL 291910 (BIA May 30,
alleged persecution for a prolonged period of time without an explanation, and behavior contradicting the basis for persecution. Examples include a Jehovah’s Witness taking an oath or a purported non-conforming Islamic female wearing traditional Islamic

1996) (finding that country conditions in general was enough corroborative evidence); see also 8 C.F.R. § 208.13(a) (2000) (providing that credible testimony of an applicant in light of general conditions in the country of nationality or last habitual residence may be sufficient to sustain the burden of proof without corroboration). Cf. In re Y-B., Interim Decision 3337, 1998 WL 99554 (BIA Feb. 19, 1998) (invoking the situation where the BIA sought particular corroborative evidence and viewed the country conditions as weak and lacking in specific detail).

78. Miranda v. INS, 139 F.3d 624, 627-28 (8th Cir. 1998) (finding it inconsistent with the alleged fear for the applicant’s life that she continued to work for several years in the coffee fields in El Salvador after having received serious threats from guerillas); Aruta v. INS, 80 F.3d 1389, 1392-93 (9th Cir. 1996) (stating that the fact that the applicant voluntarily returned to alleged zone of danger undermined the objective reasonableness of the fear of future persecution); Rezai v. INS, 62 F.3d 1286, 1289 (10th Cir. 1995) (finding an Iranian pro-Shah loyalist, who stayed in Germany seven years and waited eight months after deportation proceedings began to file for asylum, not credible); Abedini v. INS, 971 F.2d 188, 188 (9th Cir. 1992) (stating that the applicant’s staying three years in Iran without persecution undermined claim); Castillo v. INS, 951 F.2d 1117, 1120 (9th Cir. 1991) (invoking an applicant who stayed in Nicaragua for five and one-half years unharmed following alleged interrogations); Elnager v. INS, 930 F.2d 784, 788-89 (9th Cir. 1991) (turning on a lack of specific persecution and adverse country conditions and not on credibility). The applicant claimed persecution as Islamic convert to Christianity, but a DOS letter reported no persecution of Christians. Elnager, 930 F.2d at 788-89; Alvarez-Flores v. INS, 909 F.2d 1, 5 (1st Cir. 1990) (stating that the applicant stayed four years in El Salvador unharmed after incident, providing cheese to guerillas); Damaize-Job v. INS, 787 F.2d 1332 (9th Cir. 1986) (finding that spending two years in Nicaragua without incident undermined the applicant’s claim of persecution); Rodriguez-Rivera v. INS, 848 F.2d 998, 1006 (9th Cir. 1988) (noting that El Salvadoran applicant was undisturbed for two months after alleged threat of guerilla recruitment); Turcios v. INS, 821 F.2d 1396, 1401 (9th Cir. 1987) (holding it was an error to afford great weight on applicant remaining in El Salvador for several months after release from prison); Estrada v. INS, 775 F.2d 1018 (9th Cir. 1985) (finding incredible threats received five years after the applicant, who was not an important political figure, left); see also Pereda-Acosta v. INS, No. 97-9508, 1998 WL 60408, at *4 (10th Cir. Feb. 13, 1998) (upholding an adverse credibility finding where petitioner failed to seek asylum for two years). Issues of delays in filing claims for asylum may be limited in scope after the enactment of INA section 208, 8 U.S.C. section 1158(a)(2)(B), Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208 (“IIRIRA”). IIRIRA, which became effective on April 1, 1997, requires the filing of an asylum application within one year of arrival in the United States with two limited exceptions: (1) changed circumstances which materially affect an applicant’s eligibility for asylum; and (2) “extraordinary circumstances” relating to the delay in filing an application within the period specified. 8 C.F.R. § 208.4 (2000); see also In re C-A-L-, Interim Decision 5305, 1997 WL 80985 (BIA Feb. 21, 1997) (stating that the applicant’s living one year in area with guerillas undermined his claim).
Another critical factor with an impact on credibility occurs when an IJ or the BIA determine the applicant has failed to establish a prima facie case. In asylum cases, an applicant's testimony may be the only proof, or together with any corroborative evidence, an integral part of the burden of proof. Some decisions
take the position that if an applicant fails to establish a prima facie case for asylum, there is no need to reach the issue of credibility. Another line of decisions has elected to evaluate credibility, including assuming arguendo, if credibility is presumed, can a prima facie case be established? An appeal challenging incredibility findings accomplishes the same effect as incredibility finding without necessity of making it); In re Y-B, 1998 WL 99554 (stating that the weaker the testimony, the greater the need for particular corroborative evidence); In re S-M-J, 1997 WL 80984 (stating that available corroborative evidence should be submitted if normally accessible from the country in issue); In re H, 1996 WL 291910 (providing that no corroborative documents are needed for credibility); In re Dass, 20 I. & N. Dec. at 124 (discussing the credibility and burden of proof nexus); In re Mogharrabi, 19 I. & N. Dec. 439, 445-46 (BIA June 12, 1987) (concluding that an alien's own testimony may be only evidence and can suffice when believable, consistent, sufficiently detailed to provide a plausible and coherent account of the basis of his fear). The applicant must show a well-founded fear of persecution and that a reasonable person in the alien's circumstances would fear persecution on account of race, religion, nationality, membership in a particular social group or political opinion upon return to that country. In re Mogharrabi, 19 I. & N. Dec. at 445-46; see also 8 C.F.R. § 208.13 (2000); see generally Regina Germain, AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure 56-58 (American Immigration Lawyers Association 1998); Margaret Kuehne Taylor, The Mogharrabi Rule in 1998: A Review of Recent BIA Asylum Decisions, 75 Interpreter Releases 901-10 (1998); Thomas K. Ragland, Presumed Incredible: A View From the Dissent, 75 Interpreter Releases 1541 (1998).

82. Singh v. INS, 94 F.3d 1353, 1356-57 (9th Cir. 1996) (discussing whether a prima facie case exists without addressing credibility); Ozdemir v. INS, 46 F.3d 6, 8 (5th Cir. 1994) (determining that credibility did not need to be addressed because persecution claim failed); Etugh v. U.S., INS, 921 F.2d 36, 39-40 (3d Cir. 1990) (finding no prima facie case and noting that matters of unbelievable factions and inconsistencies did not require analysis); Figeroa v. INS, 886 F.2d 76, 76-77 (4th Cir. 1989) (affirming dismissal based on failure to establish a prima facie case of persecution based on one or more of the five factors); Rodriguez-Rivera, 848 F.2d at 1006 (holding that substantial evidence supported the BIA's determination of applicant's failure to meet objective prong of well-founded fear); Carvajal-Muñoz, 743 F.2d 562, 577-78 (7th Cir. 1984) (involving a Chilean-born Argentine who had contradicted himself regarding his arrest and thereby failed to establish a well-founded fear based on nationality or political opinion); see generally Rasool v. INS, 758 F.Supp.188 (S.D.N.Y. 1991) (stating that the Afghan applicant, who claimed persecution by agents of Communist government, did not meet his burden of proof to qualify for asylum or withholding of deportation); In re Vigil, 19 I. & N. Dec. 572 (BIA 1988) (stating that credibility determination is not required where no prima facie case was established).

83. Lorisme v. INS, 129 F.3d 1441, 1442 n.2 (1st Cir. 1997) (noting that substantial evidence did not support the IJ's conclusion that the applicant's testimony was not credible while disposing the petition because the political changes constituted an insufficient reason to resolve questions of a well-founded fear of persecution); see generally Mikhael v. INS, 115 F.3d 299 (5th Cir. 1997) (raising issue of adverse credibility finding on appeal, the court did not address whether applicant would succeed if he were credible); Gonzalez v. INS, 77 F.3d 1015 (7th Cir. 1996) (finding that the applicant and her brother's lack of "forthrightness," coupled
usually should include due process as another issue on appeal. Examples include if the record reflects the appellant’s inability to understand questions, an IJ’s repeated comments about time constraints, and if witnesses who could have established or clarified key facts were not allowed to testify. A final consideration in asylum cases, unlike other immigration cases, should be to remember the underlying focus of its unique humanitarian considerations. 84

III. TECHNICAL REVIEW

A technical review of enumerated findings of fact should be made prior to developing a strategy on credibility issues to be argued on appeal.

IV. INCREDIBILITY PARADIGM: AN EXAMPLE

(1) Was an explicit finding of incredibility made on the record? (Silent or implicit findings are insufficient). If not, the result is an abuse of discretion requiring review and remand.

(2) Specific, cogent reasons must be articulated on the record supporting an incredibility finding. If not, on review, if an abuse of discretion is found, remand will be required.

(3) Does the record reflect the applicant received an opportunity to explain any significant inconsistency?

with lacking corroboration, undermined her attempt to establish an objective fear upon return to Nicaragua); Demirovski v. INS, 39 F.3d 177 (7th Cir. 1994) (stating that if the applicant were found credible, he did not prove his claim to fall within one of the five categories required for asylum); Ozdemir v. INS, 46 F.3d 6 (5th Cir. 1994) (reviewing on credibility the court of appeals decided that the prima facie case failed because political opinion was not established by routine interrogations conducted following terrorist incidents); Estrada-Posadas v. INS, 924 F.2d 916 (9th Cir. 1991) (finding adverse credibility based on contradictory testimony, which, even if true, does not establish a well-founded fear of persecution); Maldonado-Cruz v. INS, 883 F.2d 788 (9th Cir. 1989) (stating that whether an applicant qualified for asylum based on “neutrality” as a political opinion was a question of law and therefore a credibility determination had been unnecessary); Saballo-Cortez v. INS, 761 F.2d 1259 (9th Cir. 1985) (finding no prima facie case because there was no evidence that the applicant voiced political opinion or that the Nicaraguan government had inclination to punish); Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977) (noting that the testimony, even if credible, revealed no fear of persecution); Shukoor v. Rogers, 954 F. Supp. 1415 (C.D. Cal. 1997) (finding applicant not credible and no prima facie case where applicant had been beaten until unconscious by police).

84. See generally In re Pula, 19 I. & N. Dec. 467 (BIA 1987) (noting that humanitarian considerations apply to asylum applicants, and a nine-part “totality of the circumstances” test can be used by the IJ when exercising discretion).
(4) Reasons underlying incredibility findings must be logical and based on proper grounds.
(5) Each reason must be major, and it must reach the "heart" of the claim.

First, did the IJ or BIA actually make an incredibility determination on the record? Yes. If not, on appeal, a presumption of credibility should be argued. Second, if an incredibility finding was made on the record, did the IJ or BIA provide specific, cogent reasons for an incredibility finding? Arguably, yes. Write a list separating each finding. In this example, five findings have been listed. Third, was the applicant given an opportunity to explain the inconsistencies or discrepancies? Arguably, yes. Fourth, is each reason a specific, cogent reason, bearing a substantial nexus to the applicant's fear of persecution? Arguably, no. If all of the reasons are found to be impermissible, the result can be an implied finding of credibility. 85 Fifth, is each inconsistency or discrepancy material and does it reach the heart of the applicant's claim? Arguably, no. Visualize a time machine. Does the asylum applicant's 1-589 document and testimony, including inconsistencies, operate so that his or her account removes him or her from the time and location necessary to be consistent with the represented race, nationality, identity, religion, social group, political or other events, including country conditions and particular persecutor alleged? The applicant's inconsistencies must meet this time machine test to be so egregious that they are major facts and go to the heart of the claim.

The facts, in this example, involved a finding of "incredibility" by the IJ based on five inconsistencies between the applicant's application for asylum (1-589), supporting affidavit and testimony:

The birth-year dates and age of his brother who was shot and killed by government soldiers in Sri Lanka;

The exact time of day and circumstances surrounding his mother's heart attack and death during government bombing of the area and government soldiers entering their home.

The exact number of days, describing one of the five times he had been detained and tortured;

Listing one address in Jaffna for a span of years on his written asylum application (1-589), and adding two additional addresses during

85. Damaize-Job v. INS, 787 F.2d 1332, 1337-38 (9th Cir. 1986). Three grounds of incredibility by the IJ were impermissible. Id. The result is an implied finding of credibility that the witness was otherwise credible, and where the BIA was silent, the witness was presumed credible. Id.
testimony;

Testimony about an incident riding a bicycle to school which led to his arrest, detention and torture where the year was inconsistent with his asylum application and affidavits stating he had *stopped attending school full-time during the previous year*.

V. THE ANALYSIS

The IJ incredibility findings were not supported by "substantial evidence," and the ultimate finding, that the petitioner was not a "refugee," was not supported by the record. The Appellant's testimony, if accepted as credible in all material aspects, meets his burden of proof establishing persecution, and he is entitled to a judgment reversing the denial of withholding of removal. Substantial evidence requires more than a mere scintilla and is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. 86 When the IJ provides specific reasons for questioning a witness's credibility, the reviewing court may evaluate those reasons to determine if they are valid grounds upon which to base a finding that the applicant is not credible. 87 The "reasons must be substantial and must bear a legitimate nexus to the finding." 88 The five findings set forth on the record as a basis for incredibility are minor inconsistencies, collectively insufficient after reviewing the record as a whole to justify precluding asylum to the Appellant.

Appellant, a torture survivor recalling traumatic events, presented consistent testimony on all material aspects of his asylum claim. 89 A civil war between the Sri Lankan government military and Liberation Tamil Tigers Elite (hereinafter "LTTE") has been going on for over a decade. Appellant testified that Sri Lankan government soldiers shot one of his brothers in the late 1980's. After this incident, two other brothers fled to Canada where they were granted asylum. Later, his father fled to Canada.

Appellant's testimony was consistent on direct and cross-examination about detention based on his Tamil ethnicity. His testimony on the time-frame and locations of his flight (Kulanchi, Vo...
vonya, and Columbo) from Jaffna was consistent with his written testimony. The record did not reflect any discrepancy in appellant’s identity, nationality, or ethnicity, or the identity of the LTTE persecutors and the Sri Lankan military in 1996 and 1998. The Appellant was consistent about the protection money paid to LTTE, the location of each event, the number of incidents, and dates (timing and year) of the events he relies on to establish his claim for asylum. Appellant alleged five incidents of arrest and torture at the hands of the Sri Lankan government army on account of his being a Tamil. These incidents, standing alone, support a claim of past persecution and a well-founded fear of future persecution.

First, the IJ was concerned about the birth and death date discrepancies of the Appellant’s brother who was shot and killed. The IJ reviewed Appellant’s application for parole that listed his deceased brother’s birth date as 1974 and compared it with the asylum claim made by one of his brothers in Canada. The brother’s application stated that his brother who was shot was only 10 years old when killed in 1989, so he would have been born in 1979. The dates of birth and death of the applicant’s brother, stated incorrectly, would not remove the applicant or his brother from presence during the civil war in Sri Lanka.

The birth and death date discrepancies of the brother are minor inconsistencies, probably the result of mistranslation and miscommunication. In Damaize-Job,90 the court held that asylum application discrepancies on birth dates of family members were an impermissible ground. Overemphasizing collateral date errors reveals how easily all parties in a proceeding can make this type of error. A careful review of the record reveals that all the parties in this proceeding also failed to accurately obtain a consensus on the Appellant’s birth date. The brother’s shooting death, if established, simply adds secondary support to Appellant’s persecution claim. Further, telephonic testimony of two brothers and the father’s in person testimony was available, but was not used to clarify the date and age inconsistencies between the brothers’ and the Applicant’s asylum applications. This oversight raises serious due process concerns surrounding the incredibility finding.

90. 787 F.2d at 1337. Minor discrepancies in dates, that are attributable to the applicant’s language problems or typographical errors, cannot be viewed as attempts by the applicant to enhance his claims and should have no bearing on credibility. Id.
Second, the IJ found Appellant's testimony incredible based on his testimony about the first incident of detention. The applicant testified that he was detained for four days, but his asylum application indicated he was detained for five or six days. The questioning went as follows:

IJ: "So, the first detention they kept you 4 days. Is that correct?"
A: "Yes."
IJ: "Well, your asylum application says you were detained for five or six days."
A: "Well, it's four or five days. The, the state of mind I was in, I couldn't count even the days and the time I was in there, especially when I have lost my mother."

This difference, even if viewed as central to the persecution claim, is minor in view of the bulk of the consistent testimony about several arrests and torture, and visible physical evidence of scars on the Appellant.91

Third, the IJ's determination on incredibility relating to cause and timing of the mother's death does not establish incredibility. According to the IJ, there were various versions of how the mother died. It does appear that she died in March of 1996. In the parole letter it indicates, "It was also unfortunate that my mother died suddenly due to shock while the military was moving towards Kulmanachi on the 26 March 1996." In his asylum application, he does not mention anything about the army marching, but he indicates that the government or the army came to his house to arrest him and take him away, and his mother begged the army not to arrest him or take him away. He states, "As she covered my body from the army, she died of a heart attack. The night of my mother's death, the Sri Lankan army arrested me." That was inconsistent with his other testimony.

Appellant's mother died during the time stated and from the cause he stated, which was a heart attack caused by the military actions of the Sri Lankan soldiers. The discrepancy on if she died while covering up his body, or later that evening after he was taken away, is insignificant. Only if Appellant's mother did not die during

91. Vilorio-Lopez v. INS, 852 F.2d 1137, 1141 (9th Cir. 1988) (concluding that inconsistencies on the length of time sheltered did not support incredibility finding); Rosenberg, supra note 62, at 32, 34. (discussing brain processing, amnesia, and the fragmented recall typical for refugees who had been victims of torture).
the time frame and events caused by the persecutor as stated, or if she died from an unrelated cause, should this testimony be considered as affecting the heart of his claim. To the contrary, his mother’s death caused by the government military should be viewed to add support to his claim of persecution. Confusion of the timing of her death can be attributed to language and communication barriers, not fabrication to create an asylum claim. *Kahssai v. INS*, 16 F.3d 323, 327 (9th Cir. 1994) involved inconsistent testimony about a father’s death. The inconsistency was deemed “minor” in light of the bulk of testimony. The *Kahssai* decision supports labeling a discrepancy in testimony about the exact cause of death, as “minor” when in fact it is not in dispute that the victim died and that the death was at the hands, directly or indirectly, of the persecutor.

Fourth, the IJ found an inconsistency between the addresses on the asylum application. The Appellant listed addresses in Saravashi Karnavari Center and Karavadi, Jaffna, Sri Lanka, from birth until November. After that, the family was moving around to various other places. The addition of two addresses at trial does not remove the Appellant’s location outside the “zone of persecution” in Sri Lanka. Minor inconsistencies or misrepresentations of unimportant facts cannot constitute the basis for an incredibility finding and, a fortiori, minor omissions cannot. For example, a failure to complete an application form as complete as might be desired does not, without more, properly serve as a basis for a finding of lack of credibility, as in *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990). In another decision, the court reversed the IJ’s finding that the applicant was not a credible witness where his finding was based on inconsistencies such as the date of joining a paramilitary group and listing two children when in fact he had four children. Martinez-Sanchez v. INS, 794 F.2d 1396, 1400 (9th Cir. 1986). These errors were termed “trivial errors,” insufficient for finding that an asylum applicant is not credible.

Fifth, the IJ found the applicant not credible based on an inconsistency on his education and time in school. He indicated he was at the American Mission College from May 1995 to August 1995. His asylum application said he was biking to school in 1996 when he was arrested, which would have been after the date of termination of his schooling according to the asylum application. The date discrepancy can be attributed to a typographical error, a

92. 16 F.3d 323, 327 (9th Cir. 1994)
93. 914 F.2d 1375, 1382 (9th Cir. 1990).
94. Martinez-Sanchez v. INS, 794 F.2d 1396, 1400 (9th Cir. 1986).
variance, or difficulty in communication. The Appellant, in his affidavit and asylum application, made statements about trying to continue his education despite arrests and problems. Being unable to do so, he finally ceased school completely due to weakness caused from his being starved and beaten by Sri Lankan military captors during 1996. There could have been a discrepancy between ceasing full-time school and attempts to continue periodically that were not clarified in the record. Based on the record as a whole, the Appellant should be found credible.

VI. PREPARING A WITNESS TO PREVENT AN INCREDIBILITY FINDING

Draw a time line chart. Prepare and rehearse with the applicant the total number of incidents, the number per year, the month, day, and year, the time of day of each incident, and the length of time of each incident in minutes, hours or days. If others were involved, what happened to them? If others who one would logically inquire about were not involved, why were they not targeted? If vehicles, incidents inside buildings or attackers are part of a claim, describe them. If any physical force was threatened or used, describe the exact threats, weapons and dialogue. At a minimum, ask why seemingly illogical actions were or were not taken, such as taking too much time to leave a country. There may be a rational explanation, including economic reasons and cultural differences, behind an answer or action that would otherwise seem to indicate fabrication and illogic. Collect all possible corroborative exhibits by organizing the personal information first, followed by country conditions and news specifically and generally applicable to the time and place of the claim.
