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Beyond the Record: Administrative Notice and the Opportunity To Respond

by Robyn Brown and Vivian Carballo

Immigration courts are frequently faced with voluminous evidentiary submissions. However, whether the quantity of evidence in a case is vast or meagre, the court at times finds itself in a position of needing to consider evidence outside the record of proceedings to further analyze the matter at hand. To what extent does an Immigration Judge or the Board of Immigration Appeals have the authority to do so? And for what types of evidence is such consideration appropriate? What are the relevant due process concerns related to administrative notice?

This article will look at the practice of taking official notice of facts outside the record, otherwise known as "administrative notice." It will also discuss case law related to the consideration of "judicial experience," including awareness of inter-proceeding similarities. Finally, the article will examine due process concerns related to administrative notice and briefly describe the circuit split as to whether parties must be given an opportunity to respond to administratively noticed facts before the court issues a decision.

Administrative Notice

It is well established that courts "take judicial notice of matters of common knowledge." *See Ohio Bell Tel. Co. v. Public Utils. Comm'n of Ohio*, 301 U.S. 292, 301 (1937). Administrative notice, which is official notice taken by administrative agencies, is very similar to judicial notice, but it is broader in scope. *See de la Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1026 (9th Cir. 1992) ("The appropriate scope of notice is broader in administrative proceedings than in trials, especially jury trials."). This breadth arises from several different factors, including the fact that the Federal Rules of Evidence do not apply in immigration proceedings. *See, e.g.*, *Matter of D-R-*, 25 I&N Dec. 445, 458 (BIA 2011). Additionally, the range of "commonly known facts" that can be officially noticed is more expansive in the administrative context given the repetitive nature of administrative proceedings and the

agency's specialized expertise in a certain area of subject matter. *See Castillo-Villagra*, 972 F.2d at 1026; *McLeod v. INS*, 802 F.2d 89, 93 n.4 (3d Cir. 1986).

Authority To Take Notice

The Board derives its authority to take administrative notice from 8 C.F.R. § 1003.1(d)(3)(iv), which provides that it may take administrative notice of "commonly known facts such as current events or the contents of official documents." There is no analogous regulatory provision for Immigration Judges, but the Board and circuit courts have recognized Immigration Judges' ability to take administrative notice of certain types of evidence. *See, e.g.*, *Vasha v. Gonzales*, 410 F.3d 863, 874 n.5 (6th Cir. 2005) (explaining that administrative notice is limited to commonly known facts or matters within the Immigration Judge's "expertise or experience in handling asylum claims"); *Singh v. Ashcroft*, 393 F.3d 903, 905–07 (9th Cir. 2004) (acknowledging "the ordinary power of any court to take notice of facts that are beyond dispute"); *Medhin v. Ashcroft*, 350 F.3d 685, 690 (7th Cir. 2003) (stating that the Immigration Judge "may take administrative notice of changed conditions in the alien's country of origin"); *Matter of Chen*, 20 I&N Dec. 16, 18 (BIA 1989) (noting that the Immigration Judge or Board "may take administrative notice of changed circumstances in appropriate cases, such as where the government from which the threat of persecution arises has been removed from power"); *see also* 8 C.F.R. § 1003.36 ("The Immigration Court shall create and control the Record of Proceedings."). Moreover, adjudicators may draw reasonable inferences from administratively noticed evidence that "comport with common sense." *See Kapcia v. INS*, 944 F.2d 702, 705 (10th Cir. 1991) (quoting *Kaczmarczyk v. INS*, 933 F.2d 588, 594 (7th Cir. 1991)).

Commonly Known Facts, Country Conditions, and Official Documents

The Board and Immigration Judges may take administrative notice of current events and changed country conditions. *See, e.g.*, *Yang v. McElroy*, 277 F.3d 158, 163 n.4 (2d Cir. 2002); *Meghani v. INS*, 236 F.3d 843, 847–48 (7th Cir. 2001). Several circuits have addressed whether administrative notice may be taken of specific types of documentary evidence related to country conditions. In *Constanza-Martinez v. Holder*, 739 F.3d 1100, 1102–03 (8th Cir. 2014), the Eighth Circuit held that the asylum applicant was not deprived of due process where the Immigration Judge introduced into evidence a United States governmental report on gangs in Central America and a State Department issue paper on gangs in El Salvador, and the applicant had an opportunity to examine and respond to the documents. In *Ogayonne v. Mukasey*, 530 F.3d 514, 518–20 (7th Cir. 2008), the Seventh Circuit concluded that the Immigration Judge did not err in admitting into the record documents from his own Internet research, including United Nations articles, a BBC News article, and an Amnesty International report. The court noted that the documents "merely stated commonly acknowledged facts that were amenable to official notice," that the Immigration Judge provided the parties with an opportunity to respond, and that the applicant did not object to the admission of the documents. The Seventh Circuit also noted that it was "not particularly troubled by the [Immigration Judge's] reliance on these documents because the relevant information was independently included in other properly admitted evidence." *Id.* at 520. In *Kazlauskas v. INS*, 46 F.3d 902, 906 n.4 (9th Cir. 1995), the Immigration Judge sought two advisory opinions from the State Department. The Ninth Circuit rejected the applicant's argument that the Immigration Judge abused his discretion in taking administrative notice of changed country conditions, noting that the applicant had notice and an opportunity to respond. *Id.*

Several circuits have spoken regarding the appropriateness of taking administrative notice of State Department Country Reports on Human Rights Practices ("Country Reports") and Country Profiles. In *Ying Chen v. Attorney General of the U.S.*, 676 F.3d 112, 115 n.2 (3d Cir. 2011), the Third Circuit concluded that the Board did not err in considering the Country Profile, even though it was not submitted into evidence. In *Jian Hui Shao v. Mukasey*, 546 F.3d 138, 166–68 (2d Cir. 2008), the Second Circuit upheld the denial of relief where the Board expanded the record to include more recent versions of the Country Report and Country Profile, because the Board did not base its determination solely on administratively noticed facts. In contrast, in *Qun Yang v. McElroy*, 277 F.3d 158, 161–62 (2d Cir. 2002), the Board had affirmed an Immigration Judge's determination that the applicant's fear of future persecution was not objectively reasonable, a finding based on a dated Country Report. The Second Circuit remanded the case to the Board for consideration of changed country conditions,

noting that the record was "silent as to [the country's] contemporary treatment of persons" in situations similar to the applicant's. *Id.* at 163. In *Francois v. INS*, 283 F.3d 926, 933 (8th Cir. 2002), the Eighth Circuit held that the Board properly took administrative notice of the Country Reports for Eritrea where the alien was previously aware of evidence of changed country conditions. The Seventh Circuit has warned, however, that adjudicators should treat Country Reports with a "healthy skepticism" and not afford conclusive weight to statements in the reports that are contestable. *Galina v. INS*, 213 F.3d 955, 958–59 (7th Cir. 2000).

The Board may also take notice of "commonly known facts." 8 C.F.R. § 1003.1(d)(3)(iv). Similarly, the Ninth Circuit found that it could take judicial notice of recent dramatic political developments in some circumstances, explaining in one case that the administrative record was "hopelessly out of date" and that a recent coup in Fiji was "so troubling, so well publicized, and so similar to the earlier coups that [the court] would be abdicating [its] responsibility were [it] to ignore the situation." *Gafoor v. INS*, 231 F.3d 645, 654–57, 664 (9th Cir. 2000), *superseded by statute on other grounds by* REAL ID Act of 2005, Division B of Pub. L. No. 109-13, 119 Stat. 302. While *Gafoor* addressed the Ninth Circuit's authority to take judicial notice of this development, it arguably indicates that similar events constitute "commonly known facts" of which the Board and Immigration Judges may take administrative notice. *See*, *e.g.*, *Quinn v. Robinson,* 783 F.2d 776, 797 n.18 (9th Cir. 1986) (noting that "courts generally will take judicial notice of a state of uprising").

The outer limits of what constitutes an "official document" under 8 C.F.R. § 1003.1(d)(3)(iv) has not been defined by the Board or circuit courts, but the Fifth Circuit concluded that the Board has "wide latitude" to take notice of official documents, including its own files and records. *Enriquez-Gutierrez v. Holder*, 612 F.3d 400, 410–11 (5th Cir. 2010) (holding that the Board did not abuse its discretion in taking administrative notice of transcripts from the applicant's prior proceedings where the applicant did not challenge their authenticity). The Second Circuit has also taken a broad view, finding that a State court decision disbarring an asylum applicant's counsel was an "official document" under 8 C.F.R. § 1003.1(d)(3)(iv) and was "too important [for the Board] to ignore" when adjudicating an ineffective assistance of counsel claim. *Yi Long Yang v. Gonzales,* 478 F.3d 133, 142–43 (2d Cir. 2007).

Judicial Experience

The extent to which Immigration Judges may consider "judicial experience" is an unresolved question. In *Matter of Gomez-Gomez*, 23 I&N Dec. 522, 525 (BIA 2002), the Immigration Judge took administrative notice of the former Immigration and Naturalization Service's regional practice of releasing without bond adults accompanying juveniles, as well as her own awareness of false claims of parentage. The Board stated that it is unclear whether "any or all of these matters would be deemed the type of 'commonly acknowledged' fact of which administrative notice may legitimately be taken." *Id.* at 525 n.2. The Sixth Circuit has indicated that Immigration Judges may consider commonly known facts or information derived from "institutional expertise" in hearing asylum claims. *Vasha*, 410 F.3d at 874 n.5. However, it found that an Immigration Judge improperly relied on "extra-record knowledge" gleaned from an off-the-record conversation with her clerk regarding the respondent's relationship with a prominent member of the Albanian community. *Id*. (citing section 240(c)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(1)(A) ("The determination of the immigration judge [as to removability] shall be based only on the evidence produced at the hearing.")).

The Ninth Circuit has stated that "judicial experience combined with obvious warning signs of forgery, when articulated on the record, may satisfy the substantial evidence requirement" to sustain an adverse credibility finding. *Dao Lu Lin v. Gonzales*, 434 F.3d 1158, 1164 (9th Cir. 2006) (citing *Bropleh v. Gonzales*, 428 F.3d 772, 777 (8th Cir. 2005)). In *Bropleh*, the Eighth Circuit upheld an Immigration Judge's determination that a passport was purposely altered where the Immigration Judge "stated he had reviewed 'hundreds' of passports, and was familiar with the precise place a stamp concerning a visa application would be placed." 428 F.3d at 777. Taking *Bropleh* into consideration, the Ninth Circuit found that an adverse credibility finding was not supported by substantial evidence where the Immigration Judge found three documents "suspicious" but failed to indicate whether her suspicions were based on her review of numerous other documents purportedly

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CIRCUIT COURT DECISIONS FOR AUGUST 2015

by John Guendelsberger

The United States courts of appeals issued 131 decisions in August 2015 in cases appealed from the Board. The courts affirmed the Board in 115 cases and reversed or remanded in 16, for an overall reversal rate of 12.2%, compared to last month's 13.9%. There were no reversals from the First, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for August 2015 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	10	10	0	0.0
Second	30	29	1	3.3
Third	8	7	1	12.5
Fourth	7	7	0	0.0
Fifth	14	14	0	0.0
Sixth	5	4	1	20.0
Seventh	4	4	0	0.0
Eighth	6	5	1	16.7
Ninth	40	28	12	30.0
Tenth	2	2	0	0.0
Eleventh	5	5	0	0.0
All	131	115	16	12.2

The 131 decisions included 61 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 42 direct appeals from denials of other forms of relief from removal or from findings of removal; and 28 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	61	56	5	8.2
Other Relief	42	34	8	19.0
Motions	28	25	3	10.7

The five reversals or remands in asylum cases involved particular social group (two cases), nexus, relocation, and a frivolous claim. The eight reversals or remands in the "other relief" category addressed the categorical approach (six cases), crimes involving moral turpitude, and adjustment of status. The three motions cases involved changed country conditions (two cases) and ineffective assistance of counsel.

The chart below shows the combined numbers for January through August 2015 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	26	20	6	23.1
Ninth	537	423	114	21.2
Tenth	40	34	6	15.0
First	22	19	3	13.6
Eleventh	48	43	5	10.4
Third	76	69	7	9.2
Sixth	45	41	4	8.9
Second	189	175	14	7.4
Fourth	71	66	5	7.0
Eighth	31	29	2	6.4
Fifth	82	80	2	2.4
All	1167	999	168	14.4

Last year's reversal rate at this point (January through August 2014) was 15.1%, with 1539 total decisions and 233 reversals or remands.

The numbers by type of case on appeal for the first 8 months of 2015 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	588	497	91	15.5
Other Relief	317	265	52	16.4
Motions	262	237	25	9.5

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

First Circuit:

Xin Qiang Liu v. Lynch, No. 14-1159, 2015 WL 5306451 (1st Cir. Sept. 11, 2015): The First Circuit denied a petition for review challenging the Board's denial of a motion to reopen removal proceedings. The petitioner was ordered removed in absentia when he did not appear for his hearing in 1998. His subsequent motion to reopen was denied by the Immigration Judge the same year. Almost 14 years later, the petitioner filed a second motion to reopen, alleging both ineffective assistance of prior counsel and changed conditions related to his 2011 conversion to Christianity, which he argued warranted reopening to allow him to apply for asylum. The Immigration Judge denied the motion and the Board dismissed the petitioner's subsequent appeal. The First Circuit concluded that the respondent's motion based on the alleged ineffective assistance of counsel was untimely because a motion to reopen based on "exceptional circumstances" must be made within 180 days. The court further concluded that it lacked jurisdiction to consider the petitioner's claim that the filing deadline should have been equitably tolled since that argument was not developed in his opening brief. Although no such time limit on filing applies where reopening is sought to apply for asylum arising from changed circumstances in the country of origin, the court relied on prior precedent in holding that changed personal circumstances such as a religious conversion will not, by themselves, establish changed country conditions. The court agreed with the Board's conclusion that the petitioner had not otherwise established a change in country conditions that would warrant reopening proceedings. It specifically cited to the Immigration Judge's comparison of the 1998 and 2009 State Department Country Reports on China as evidence that the mistreatment of unauthorized Christian groups is indicative of a continuation of previous policies, rather than an increase in religious persecution. The court was unpersuaded that the Immigration Judge and the Board erred in not referencing particular documents that the petitioner had submitted. Finding nothing in the record to suggest any of the petitioner's evidence had been disregarded, the court quoted *Raza v. Gonzales*, 484 F.3d 125, 128 (1st Cir. 2007), for its conclusion that the Immigration Judges and the Board are "not required to dissect in minute detail every contention that a complaining party advances."

Eighth Circuit:

Shoyombo v. Lynch, No. 14-2649, 2015 WL 5084623 (8th Cir. Aug. 28, 2015): The Eighth Circuit dismissed a petition for review of the Board's denial of the petitioner's motion to reopen proceedings sua sponte. The court noted the petitioner's acknowledgment that the applicable statute allowed for only one motion to reopen, and that he had therefore asked the Board to consider his third motion under its sua sponte authority. In declining to do so, the Board concluded that the record (which included extensive evidence of fraud by the petitioner) did not establish an "exceptional situation" warranting sua sponte reopening. The petitioner argued that the Board's decision was not "reasoned" and failed to consider his argument concerning ineffective assistance of counsel. However, because the petitioner's motion and the Board's decision were based exclusively on the Board's sua sponte authority under 8 C.F.R. § 1003.2(a), the court held that it lacked jurisdiction to review the denial of the motion. The court noted that its holding in this respect is consistent with the position of 10 other circuits.

Ninth Circuit:

Quijada-Aguilar v. Lynch, No. 12-70070, 2015 WL 5103038 (9th Cir. Sept. 1, 2015): The Ninth Circuit granted a petition for review from the Board's removal order. The petitioner was convicted in 1992 of voluntary manslaughter in violation of section 192(a) of the California Penal Code. The Board found his offense to be a categorical crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony under section 101(a)(43)(F) of the Act. As a result, the petitioner was ineligible to apply for withholding of removal under section 241(b)(3). Ninth Circuit precedent stated that to be a crime of violence under 18 U.S.C. § 16(b), "the underlying offense must require proof of an *intentional* use of force or a substantial risk that force will be *intentionally* used during its commission." However, the California Supreme Court held that a person could be convicted of voluntary manslaughter under section 192(a) for "reckless" conduct. The Ninth Circuit concluded that the State statute encompasses a broader range of conduct than that described in 18 U.S.C. § 16 and therefore does not categorically fall within the definition of a crime of violence. Consequently, it found that the petitioner was not statutorily barred from withholding of removal. The Government argued that case law requiring the intentional use of force at the time of the petitioner's conviction should govern in this case. The court disagreed, noting

that the California Supreme Court held in *People v. Lasko*, 999 P.2d 666 (Cal. 2000), that an intent to kill was never an element of voluntary manslaughter and that prior holdings to the contrary were "fleeting observations" and "mere dictum." As a result, the Ninth Circuit determined that the *Lasko* decision did not alter the elements of the crime but rather "set forth the law as it always was, including at the time of Quijada-Aguilar's conviction in 1992." The court also directed the Board to reconsider on remand the petitioner's claim for deferral of removal under the Convention Against Torture, a claim based on the past experiences of his family, which the Board had considered waived.

Andrade v. Lynch, No. 12-70803, 2015 WL 5040202 (9th Cir. Aug. 27, 2015): The Ninth Circuit denied a petition for review of the Board's denial of deferral of removal to El Salvador under the Convention Against Torture. The petitioner argued that the Board did not properly consider the country conditions evidence of record or his argument that he would likely face torture upon return to El Salvador because his tattoos would cause him to be labeled as a gang member. Although the record did not contain a photo of the tattoos, which the petitioner said included his initials and those of his girlfriend, the court observed that they were decorative and not gang related. The court noted that the petitioner was found not to be a former gang member during the proceedings below. According to the court, the Board had given "extensive and careful consideration" to the country materials in the record, and substantial evidence supported its conclusion that the evidence did not establish a likelihood that the petitioner faced a probability of mistreatment rising to the level of torture upon return to El Salvador. The court distinguished these facts from those in *Cole v. Holder*, 659 F.3d 762 (9th Cir. 2011). In *Cole*, the court remanded where the record established that the petitioner's tattoos were specifically associated with the Crips gang and, per expert testimony, would cause the petitioner to have a greater than 75 percent risk of being killed in his home country. The court clarified that *Cole* did not establish that any type of tattoo would be enough to justify protection under the Convention Against Torture. The court held that substantial evidence supported the Board's conclusion that the petitioner had not established a likelihood of torture upon return to El Salvador, given that he was not a former gang member and did not have gang tattoos.

Acosta-Olivarria v. Lynch, No. 10-70902, 2015 WL 5023955 (9th Cir. Aug. 26, 2015): The Ninth Circuit granted a petition for review of the Board's decision denying the petitioner's application for adjustment of status pursuant to *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007). In *Briones*, the Board concluded that aliens who are inadmissible under section 212(a)(9)(C)(i)(I) of the Act as the result of having been in unlawful status in the United States for more than 1 year are not eligible for adjustment of status under section 245(i) of the Act. However, at the time that the petitioner's application was filed, the petitioner was eligible for adjustment pursuant to the Ninth Circuit decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006) (overruled by the en banc court in 2012). Relying on the holding in *Acosta* then in effect, an Immigration Judge granted the adjustment application in December 2006. The Department of Homeland Security appealed. During the pendency of the appeal, the Board issued its decision in *Briones*, and remanded the record to the Immigration Judge, who denied adjustment pursuant to the new precedent. In a split panel decision, the Ninth Circuit found that the petitioner reasonably relied on *Acosta* at the time of filing. The court further held that under the retroactivity analysis set forth in *Montgomery Ward & Co., Inc. v. Federal Trade Commission*, 691 F.2d 1322 (9th Cir. 1982), the holding in *Briones* should not apply retroactively to bar the petitioner's adjustment application. The court determined that the petitioner's "reliance interests and the burden retroactivity would impose on him outweighed the interest in uniform application of the immigration laws." The court therefore remanded with instructions to reinstate the Immigration Judge's 2006 grant of adjustment. The decision contains a dissenting opinion.

Acevedo v. Lynch, No. 12-71237, 2015 WL 4999292 (9th Cir. Aug. 24, 2015): The Ninth Circuit denied a petition for review of the Board's decision affirming an Immigration Judge's determination that the petitioner had not derived citizenship through his stepfather. The petitioner was born in Mexico in 1987. His mother married a United States citizen when the petitioner was 12 years old, and he was admitted to this country 2 years later as a lawful permanent resident based on a visa petition filed on his behalf by his stepfather. The petitioner was placed in removal proceedings following a 2008 domestic violence conviction. Both the Immigration Judge and the Board rejected the petitioner's argument that he

had derived citizenship through his stepfather under section 320(a) of the Act, 8 U.S.C. § 1431(a), finding it to be inconsistent with the Board's holding in *Matter of Guzman-Gomez*, 24 I&N Dec. 824 (BIA 2009). Noting that it does not owe deference to the Board's interpretations of citizenship laws, the Ninth Circuit nevertheless agreed with the Board. In *Guzman-Gomez*, the Board found it significant that Congress had included a "stepchild" in its definition of the term "child" under section 101(b) of the Act, 8 U.S.C. § 1101(b), which applies to all immigration provisions of the Act except citizenship, but that stepchildren were not included in the definition of a "child" in section 101(c) (which applies to the citizenship and naturalization provisions of the Act only). Finding that the negative inference drawn from the differing statutory language might not be conclusive, the court was also persuaded by the Board's consideration of legislative history from the 1952 McCarren-Walter Act, which was the first version of the Immigration and Nationality Act. The Board specifically relied on a Senate subcommittee report stating that the proposed legislation did not intend to change existing law relating to derivative citizenship under which "[s]tepchildren do not derive citizenship through the naturalization of a stepparent." The court acknowledged that the facts in the petitioner's case were distinguishable since his stepfather had not become a naturalized citizen after his marriage to the petitioner's mother but was already a citizen at the time of the marriage. The court was not persuaded that this difference affected its analysis and found the legislative history sufficient to establish that the omission of a "stepchild" from section 101(c) of the Act "was purposeful." The court also rejected the petitioner's argument (which was not raised in *Guzman-Gomez*) that the reference in section 320(b) of the Act to adopted children, as defined in section 101(b)(1), should be viewed as implicitly incorporating all of section 101(b)(1)'s definitions of a child into the requirements for citizenship in section 320(a) of the Act. Applying the same negative inference employed above, the court concluded that Congress' choice not to include a reference to section 101(b)(1) of the Act in section 320(a) signaled its intent that citizenship matters should be governed by the Act's "default definition" in section 101(c), which does not mention "stepchildren." Further, the references to provisions for adopted children would not apply to the petitioner, who was never adopted. Lastly, the court found that the purpose of section 320 (which was to streamline foreign adoptions) did not support the petitioner's interpretation.

BIA PRECEDENT DECISIONS

In *Matter of M-A-F-*, 26 I&N Dec. 651 (BIA 2015), a case on remand from the United States Court of Appeals for the Ninth Circuit, the Board considered the controlling filing date for purposes of determining if an asylum application was timely filed and whether it is subject to the provisions of the REAL ID Act of 2005, Division B of Pub. L. No. 109-13, 119 Stat. 302 ("REAL ID Act"), when the alien has submitted more than one application.

Noting that 8 C.F.R. §§ 208.4(c) and 1208.4(c) permit the amendment or supplementation of an asylum application, the Board reasoned that the determination whether the REAL ID Act applies hinges on whether a later application presents a new claim or is an amendment or supplement to the original application. The Board explained that in making such a determination, the specific facts and circumstances of each filing must be examined. If the later application presents a claim for relief that was not previously raised or is predicated on a new or substantially different factual basis, it generally will be considered a new application. In contrast, if the subsequent application merely clarifies or slightly alters the original, it will not be considered to be new. The Board held that where an initial asylum application was filed prior to May 11, 2005, and a subsequent one submitted on or after that date, if the later application is properly viewed as a new one, the later date is deemed to be the filing date for purposes of applying the REAL ID Act provisions to credibility determinations.

In the case at hand, the respondent filed his first asylum application in February 2003 and then a second application in May 2006, after the enactment of the REAL ID Act. He admitted that the initial application contained a false narrative. Even though the 2006 application was based on the same protected ground, the Board concluded that it was a new application because the factual differences between the two were so substantial that the later one could not be considered a supplement or amendment to the original. The Board therefore concluded that the respondent's application was subject to the REAL ID Act's credibility provisions.

Relying on Ninth Circuit law, the Board also concluded that where a subsequently filed application is considered to be a new one, the filing date of the

later application controls for purposes of determining whether the 1-year statutory time bar applies. Because the respondent's second application was determined to be a new one and was filed more than 6 years after he arrived in the United States, the Board found that it was untimely. The Board remanded the case to the Immigration Judge to determine whether changed circumstances or extraordinary circumstances excused the late filing.

In *Matter of R-K-K-*, 26 I&N Dec. 658 (BIA 2015), the Board held that in making an adverse credibility finding, Immigration Judges may consider significant similarities between statements submitted by different people in different proceedings, so long as a three-part procedural framework is followed. The steps include: (1) providing the alien with meaningful notice of the similarities considered to be significant; (2) giving the applicant a reasonable opportunity to explain the inter-proceeding similarities; and (3) considering the totality of the circumstances in reaching the credibility determination.

The Board explained that in implementing step one, the Immigration Judge should provide the applicant with copies of the questionable statements or documents and explain how that evidence undermines his or her credibility, making certain that the similarities are identified for the record. In step two, the Board indicated that the Immigration Judge may continue the hearing so that the applicant has an opportunity obtain supporting evidence to explain the similarities. For the final step in the credibility determination, the Board stated that the Immigration Judge should assess all of the applicant's evidence for reliability and decide whether, under the totality of the circumstances, the applicant has adequately explained the inter-proceeding similarities.

In this case, the Board observed that the Immigration Judge had asked the respondent to explain similarities between his and his brother's asylum applications, including the experiences described, the use of identical language in describing the events and the feelings evoked, and the inclusion of the same syntax and spelling irregularities. When the respondent explained that he and his brother had similar upbringings and both had used the same transcriber to prepare their applications, the Immigration Judge continued the proceedings for 3 months so that the respondent could obtain the transcriber's statement or present him as a witness. But no evidence or testimony from the transcriber was ever presented.

Pointing out that the Immigration Judge had applied the appropriate framework in clearly identifying the suspect similarities, providing the respondent with the opportunity to explain, and weighing the totality of the circumstances, the Board concluded that the Immigration Judge's adverse credibility determination was not clearly erroneous. Additionally, the Board determined that the respondent did not satisfy his burden of proving that he was eligible for asylum through independent corroborating evidence. Affirming the Immigration Judge's conclusion that the respondent had also not established eligibility for withholding of removal or relief under the Convention Against Torture, the Board dismissed the appeal.

REGULATORY UPDATE

80 Fed. Reg. 51,582 (Aug. 25, 2015)
DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services
[CIS No. 2567–15; DHS Docket No. USCIS– 2014–0001] RIN 1615–ZB40

Extension of the Designation of Haiti for Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.
ACTION: Notice.
SUMMARY: Through this Notice, the Department of Homeland Security (DHS) announces that the Secretary of Homeland Security (Secretary) is extending the designation of Haiti for Temporary Protected Status (TPS) for 18 months, from January 23, 2016 through July 22, 2017.

The extension allows currently eligible TPS beneficiaries to retain TPS through July 22, 2017, so long as they otherwise continue to meet the eligibility requirements for TPS. The Secretary has determined that an extension is warranted because the conditions in Haiti that prompted the TPS designation continue to be met. There continue to be extraordinary and

temporary conditions in that country that prevent Haitian nationals (or aliens having no nationality who last habitually resided in Haiti) from returning to Haiti in safety.

Through this Notice, DHS also sets forth procedures necessary for nationals of Haiti (or aliens having no nationality who last habitually resided in Haiti) to re-register for TPS and to apply for renewal of their Employment Authorization Documents (EAD) with U.S. Citizenship and Immigration Services (USCIS). Re-registration is limited to persons who have previously registered for TPS under the designation of Haiti and whose applications have been granted. Certain nationals of Haiti (or aliens having no nationality who last habitually resided in Haiti) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions if they meet (1) at least one of the late initial filing criteria, and (2) all TPS eligibility criteria (including continuous residence in the United States since January 12, 2011, and continuous physical presence in the United States since July 23, 2011).

For individuals who have already been granted TPS under Haiti's designation, the 60-day re-registration period runs from August 25, 2015 through October 26, 2015. USCIS will issue new EADs with a July 22, 2017 expiration date to eligible Haiti TPS beneficiaries who timely re-register and apply for EADs under this extension. Given the timeframes involved with processing TPS re-registration applications, DHS recognizes that not all re-registrants will receive new EADs before their current EADs expire on January 22, 2016. Accordingly, through this Notice, DHS automatically extends the validity of EADs issued under the TPS designation of Haiti for 6 months, through July 22, 2016, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended and their impact on Employment Eligibility Verification (Form I-9) and the E-Verify processes.

DATES: The 18-month extension of the TPS designation of Haiti is effective January 23, 2016, and will remain in effect through July 22, 2017. The 60-day re-registration period runs from August 25, 2015 through October 26, 2015.

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DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services
[CIS No. 2570–15; DHS Docket No. USCIS–2015–0005] RIN 1615–ZB41

Designation of the Republic of Yemen for Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.
ACTION: Notice.
SUMMARY: Through this Notice, the DHS announces that the Secretary has designated the Republic of Yemen (Yemen) for Temporary Protected Status for a period of 18 months, effective September 3, 2015, through March 3, 2017. Under section 244(b)(1)(A) of the Act, the Secretary is authorized to designate a foreign state (or any part thereof) for TPS upon finding that there is an ongoing armed conflict within the foreign state and, due to such conflict, requiring the return of nationals of the state would pose a serious threat to their personal safety.

This designation allows eligible Yemeni nationals (and aliens having no nationality who last habitually resided in Yemen) who have continuously resided in the United States since September 3, 2015, and have been continuously physically present in the United States since September 3, 2015 to be granted TPS. This Notice also describes the other eligibility criteria applicants must meet.

Individuals who believe they may qualify for TPS under this designation may apply within the 180-day registration period that begins on September 3, 2015, and ends on March 1, 2016. They may also apply for Employment Authorization Documents and for travel authorization. Through this Notice, DHS also sets forth the procedures for nationals of Yemen (or aliens having no nationality who last habitually resided in Yemen) to apply for TPS, EADs, and travel authorization with USCIS.

DATES: This designation of Yemen for TPS is effective on September 3, 2015, and will remain in effect through March 3, 2017. The 180-day registration period for eligible individuals to submit TPS applications begins September 3, 2015, and will remain in effect through March 1, 2016.

issued by the same agency. *Dao Lu Lin*, 434 F.3d at 1164–66. Similarly, the Second Circuit found that an Immigration Judge's adverse credibility finding was not supported by substantial evidence where the finding that birth certificates "appeared fabricated" was based "solely on speculation and conjecture" that the certificates should bear sequential numbers. *Jin Chen v. U.S. Dep't of Justice*, 426 F.3d 104, 115 (2d Cir. 2005).

An Immigration Judge's initiative in considering inter-proceeding similarities is another ambiguous realm of administrative notice related to judicial experience. The Department of Homeland Security sometimes submits similar affidavits or applications to the court from other proceedings to impeach an applicant's credibility. *See Matter of R-K-K-*, 26 I&N Dec. 658 (BIA 2015) (approving an Immigration Judge's consideration of intra-proceedings similarities where appropriate procedural safeguards where observed). In some cases, Immigration Judges have also considered such similarities on their own accord. In *Shahinaj v. Gonzales*, 481 F.3d 1027, 1028–29 (8th Cir. 2007), the Immigration Judge based his adverse credibility determination in part on his "personal experience" that more than three-quarters of gay Albanian applicants claim to be election observers, just like the applicant in the case at issue. The Board affirmed the credibility determination, although it did not adopt the Immigration Judge's decision to the extent that it "referred to circumstances from other proceedings." *Id*. at 1028. However, the Eighth Circuit granted the petition for review because the Board failed to explain how the Immigration Judge's remaining findings were not "tainted by the [Immigration Judge's] bias." *Id*. at 1029.

In *Mei Chai Ye v. U.S. Dep't of Justice*, 489 F.3d 517, 520 (2d Cir. 2007), the Immigration Judge recalled a similar asylum application by another petitioner that "strikingly resembled" the respondent's claim. The Second Circuit held that "the dangers inherent in relying on inter-proceeding similarities are significantly reduced" when an Immigration Judge carefully identifies the similarities, closely considers the nature and number of those particular similarities, and rigorously complies with procedural protections, which include (1) notifying the respondent of the similarities, (2) openly and exhaustively expressing to the respondent concerns about the inter-proceeding similarities, (3) granting the respondent opportunities to comment on those similarities, and (4) inviting the respondent to offer evidence of plagiarism, inaccurate translations, or any other possible innocent explanation. *Id*. at 525 (citing *Ming Shi Xue v. BIA*, 439 F.3d 111 (2d Cir. 2006)). The Second Circuit cautioned that it would "view much more skeptically an adverse credibility finding by an Immigration Judge who, in relying on inter-proceeding similarities, adopted a less rigorous approach." *Id*. at 527. The Board noted in *Matter of R-K-K-*, 26 I&N Dec. at 660, that the approach taken in *Mai Che Ye* provides a "useful framework" for approaching such situations.

Thus, it appears that an Immigration Judge relying upon his or her judicial experience or inter-proceeding similarities in making a determination would be wise to admit into the record evidence of specific similarities and take appropriate procedural safeguards to ensure that the applicant's due process rights are not violated.

Opportunity To Respond

The Act does not expressly provide applicants for immigration relief with an opportunity to rebut administratively noticed facts. However, courts have acknowledged that constitutional due process rights are implicated when administrative notice is taken of contested facts or when such notice significantly affects an alien's claim, and they have said that aliens must be given a "meaningful opportunity to be heard" in removal proceedings. *See, e.g.*, *Kaczmarczyk*, 933 F.2d at 595 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). Circuit courts are split, however, on what constitutes an opportunity for an alien to respond to administratively noticed facts. The Second, Ninth, and Tenth Circuits require that the alien be given the opportunity to respond before issuance of a decision. *See Burger v. Gonzales*, 498 F.3d 131, 134–35 (2d Cir. 2007); *Circu v. Gonzales*, 450 F.3d 990, 994–95 (9th Cir. 2006); *de la Llana-Castellon*, 16 F.3d at 1100. The Fifth, Seventh, and District of Columbia Circuits have held that motions to reopen satisfy due process in this context, so they do not require an opportunity to respond prior to the issuance of a decision. *See Gutierrez-Rogue v. INS*, 954 F.2d 769, 773 (D.C. Cir. 1992); *Rivera-Cruz v. INS*, 948 F.2d 962, 968 (5th Cir. 1991); *Kaczmarczyk*, 933 F.2d at 596–97.

The First Circuit has also held that motions to reopen may preserve an alien's right to respond, but the issue of due process may ultimately depend on the

circumstances. *See Gebremichael v. INS*, 10 F.3d 28, 38 (1st Cir. 1993). The Eighth and Eleventh Circuits have not specifically ruled on whether motions to reopen satisfy the demands of due process for aliens. *See Francois*, 283 F.3d at 933; *Lorisme v. INS*, 129 F.3d 1441, 1445 (11th Cir. 1997). The Third, Fourth, and Sixth Circuits have not meaningfully addressed the issue whether due process demands that an alien receive prior notice when the Board or Immigration Judge intends to take administrative notice of extra-record facts. *See* Audra E. Santucci and Judith K. Hines, *"World, Take Good Notice": The Circuits' View of Administrative Notice*, Immigration Law Advisor, Vol. 1, No. 11, at 2 (Nov. 2007) (discussing the circuit courts' positions on the opportunity to respond to facts that are administratively noticed on appeal).

Prior Notice Required

In *Burger*, 498 F.3d at 135, the Second Circuit held that the Board violated an alien's due process rights when it failed to give the alien notice of its intent to take administrative notice of certain facts and an opportunity to rebut the significance of such facts. Due process demands that an asylum applicant "must be given notice of, and an effective chance to respond to, potentially dispositive, administratively noticed facts." *Id.* at 134 (quoting *Chhetry v. U.S. Department of Justice*, 490 F.3d 196, 200 (2d Cir. 2007)). In *Burger*, the Board's denial of the applicant's asylum claim was premised solely on its administrative notice of certain facts relating to country conditions in the former Yugoslavia. *Id.* at 135. The Second Circuit held that where the Board's actions were critical to the applicant's request for relief, a motion to reopen did not protect "her right to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* (quoting *Mathews*, 424 U.S. at 333); *see also Singh v. Mukasey*, 553 F.3d 207, 214 n.2 (2d Cir. 2009) ("[I]n taking notice of potentially controlling facts, an [Immigration Judge] can exceed his discretion when he fails to provide an opportunity to rebut such facts."); *Alibasic v. Muksasey*, 547 F.3d 78 (2d Cir. 2008) (distinguishing *Burger* and finding that the alien's due process rights were not violated because the Board took administrative notice of facts that were present in the record when it reversed the Immigration Judge's grant of asylum).

In *Jian Hui Shao*, 546 F.3d at 167, the Second Circuit, relying on *Burger* and *Chhetry*, found that the Board had failed to provide the alien with notice of its intention to take administrative notice of a State Department Country Profile and the opportunity to challenge information from the report before issuing its decision. However, the court also distinguished *Jian Hui Shao* from *Burger* and *Chhetry* by noting that in the latter two cases the administratively noticed facts were the *sole* basis for the Board's denial of asylum. *Id.* at 167–68 (citing *Chhetry*, 490 F.3d at 198, and *Burger*, 498 F.3d at 135). *Jian Hui Shao*, however, was "quite different" because the Board had also considered substantial evidence, in addition to the administratively noticed Country Profile, in finding that the alien had failed to demonstrate his eligibility for asylum. *Id.* at 168. Accordingly, since administrative notice of the Country Profile was not the dispositive basis for the Board's denial, the Second Circuit found that the alien was not denied due process, but the court nevertheless urged the Board "to adopt procedures that will provide notice of and an opportunity to be heard on any administratively noticed facts." *Id.*

In *Circu*, 450 F.3d at 992, the Ninth Circuit held that the Immigration Judge's administrative notice of a Country Report that was not part of the record was a violation of due process. The alien had appealed to the Board, requesting a remand to rebut the substance of the extra-record Country Report on which the Immigration Judge had relied, but the Board affirmed the Immigration Judge's decision. *Id.* The Ninth Circuit relied on its prior case law holding that "controversial or individualized facts require *both* notice to the [alien] that administrative notice will be taken *and* an opportunity to rebut the extra-record facts or to show cause why administrative notice should not be taken of those facts." *Id.* at 993 (quoting *Getachew v. INS*, 25 F.3d 841, 846 (9th Cir. 1994)). The court held that because the extra-record Country Report contained controversial facts, the respondent should have been provided notice and an opportunity to respond. *Id.* at 993–94 (citing *Getachew*, 25 F.3d at 846); *see also Gonzalez v. INS*, 82 F.3d 903, 912 (9th Cir. 1996) ("Taking notice of legislative, undebatable facts . . . does not require notice and an opportunity to be heard, but taking administrative notice of post-hearing debatable adjudicative facts without warning and an opportunity to offer rebuttal denies due process of law." (citing *Castillo-Villagra*, 972 F.2d at 1028–29)).

In *de la Llana-Castellon*, 16 F.3d at 1096, the Tenth Circuit held that the Board's sole reliance on administratively noticed facts of changed country

conditions to deny an alien family's asylum application was a violation of due process. The court explained that facts relating to a change in government in Nicaragua, which were the sole basis for the Board's reversal of the Immigration Judge's decision, were subject to reasonable dispute. *Id.* at 1097–99. Further, the court held that the failure to provide the petitioners with an opportunity to respond denied them "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 1100–01 (quoting *Mathews*, 424 U.S. at 333). In addition, the court dismissed the Government's argument that a motion to reopen preserves an alien's due process rights because it is a mechanism through which the alien may rebut administratively noticed facts. *Id.* at 1099. The court agreed with the Ninth Circuit's reasoning that reopening procedures do not adequately protect an alien's due process rights, particularly because the alien could be deported prior to consideration of the motion to reopen. *Id.* at 1100 (citing *Castillo-Villagra*, 972 F.2d at 1030). In *Woldemeskel v. INS*, 257 F.3d 1185, 1192–93 (10th Cir. 2001), the Tenth Circuit restated the principle that the Board may not base its decisions on administrative notice of extra-record facts without providing the petitioner notice and the opportunity to respond. However, the court in *Woldemeskel* rejected the petitioner's claim that she was denied due process because the Board's decision was not primarily grounded on administratively noticed facts. *Id.* at 1193.

Prior Notice Not Required

In contrast, the courts of appeals for the Fifth, Seventh, and District of Columbia Circuits have held that motions to reopen preserve an alien's due process rights because motions provide them with the opportunity to respond and rebut administratively noticed facts. In *Rivera-Cruz v. INS*, 948 F.2d 962, 968 (5th Cir. 1991), the Fifth Circuit held that motions to reopen provide aliens "with an opportunity to be heard regarding facts officially noticed and to present contrary evidence." Aliens can then file a petition for review of the Board's denial of the motion to reopen with the circuit court, whose judicial review safeguards the alien's due process following the Board's administrative notice of facts. *Id.* at 968–69 (citing *Kaczmarczyk*, 933 F.2d at 597). Since the petitioner in *Rivera* had not provided on appeal or in a motion to reopen evidence to rebut the Board's administratively noticed facts, the Fifth Circuit upheld the Board's denial of his asylum application. *Id.* at 969.

In *Kaczmarczyk*, 933 F.2d at 596–97, the Seventh Circuit held that due process requires that an alien be given the opportunity to rebut administratively noticed facts, especially in situations where such facts are dispositive. The court further held that motions to reopen provide a mechanism for aliens to rebut officially noticed facts. A motion to reopen allows an alien to challenge the administratively noticed facts as incorrect or irrelevant to his case. *Id.* at 597. If the Board denies the motion to reopen, the alien may then seek judicial review, which ensures that the Board's administrative notice does not deprive the alien of due process. *Id.* In *Kaczmarczyk*, the Seventh Circuit denied the petition for review because the petitioners did not file a motion to reopen in their case or "request from the [Board] any other opportunity to respond to the noticed facts at issue." *Id.* In *Sankoh v. Mukasey*, 539 F.3d 456, 465–66 (7th Cir. 2008), the Seventh Circuit noted it had "held many times" that an alien can rebut administratively noticed facts in a motion to reopen, thereby ensuring due process. In *Sankoh*, the alien did not file a motion to reopen to challenge the Board's administrative notice of country conditions in Sierra Leone, and the court affirmed the Board's conclusion that the alien had not established eligibility for asylum. *Id.* at 466; *see also Meghani v. INS*, 236 F.3d 843, 848 (7th Cir. 2001); *Gonzalez v. INS*, 77 F.3d 1015, 1024 (7th Cir. 1996).

In *Gutierrez-Rogue*, 954 F.2d at 773, the District of Columbia Circuit also recognized that due process guarantees that an alien has the right to rebut "an officially noticed fact–with respect both to its truth and its significance." The court further held, however, that motions to reopen are the mechanism through which an alien can present evidence to challenge administratively noticed facts. *Id.*

Other Circuit Courts

The Eighth Circuit has not specifically addressed whether the availability of motions to reopen to challenge administratively noticed facts will satisfy due process requirements, but it has recognized that this is a way for an alien to rebut such facts. *Francois*, 283 F.3d at 933. In *Francois*, the Eighth Circuit held that due process requires that the Board provide an alien with "notice of [its] intention to take administrative notice, and a sufficient opportunity to respond." *Id.* at 933. The court held that the alien was not given notice of the Board's

administrative notice of facts relating to recent country conditions but found that she was "neither harmed nor prejudiced" because she was aware of the noticed facts. *Id.* Specifically, the Board took administrative notice of facts from the 1995 and 1999 State Department Country Report relating to Eritrea, but the information contained in those reports was not materially different from that contained in the 1993 Country Report, which was part of the record. *Id.* The Eighth Circuit concluded that the alien could have challenged the underlying facts during her hearing before the Immigration Judge or filed a motion to reopen with the Board. *Id.*

In *Constanza-Martinez*, 739 F.3d at 1103, the Eighth Circuit held that Immigration Judges and the Board may take administrative notice of country conditions as long as the alien is given notice of the intention to take administrative notice, as well as the opportunity to challenge those facts. The court discussed administrative notice in the context of the Immigration Judge's affirmative duty to develop the record. *Id.* In *Constanza-Martinez*, the Immigration Judge provided the parties with notice of his reliance on two reports regarding country conditions in El Salvador. *Id.* at 1102. The Eighth Circuit held that the Immigration Judge provided the alien with notice and an opportunity to respond. *Id.* at 1103.

The Eleventh Circuit has not ruled on whether motions to reopen provide aliens with the opportunity to respond to administratively noticed facts. However, in *Lorisme*, 129 F.3d at 1445, the court found that it was not inappropriate for the Board to take administrative notice of changed country conditions in Haiti.

The First Circuit has agreed with the Fifth, Seventh, and District of Columbia circuits and recognized that a motion to reopen may "ordinarily satisfy the demands of due process." *Gebremichael*, 10 F.3d at 38. However, the court further stated that if the Board takes administrative notice in deciding a motion to reopen or reconsider "it would be absurd to force an applicant to file a second motion to respond to the newly noticed facts." *Id.* at 39. Due process "will, as always," depend on the circumstances. *Id.*; *see also Fergiste v. INS*, 138 F.3d 14, 19 n.4 (1st Cir. 1998) (stating that its holding in *Gebremichael* was not that "a motion to reopen is always necessary and sufficient to protect a petitioner's rights," but rather that the circumstances of each case determine whether due process was satisfied).

Conclusion

The rights of an alien to present evidence and to be meaningfully heard in removal proceedings are fundamental. They must therefore be safeguarded by Immigration Judges who have the important role as adjudicators to determine the admissibility and reliability of proffered evidence. The Board and circuit courts retain an important role in reviewing these determinations. It is expected that the Board and circuit courts will continue to articulate standards related to the types of evidence of which administrative notice may be taken and also speak to the issue of when due process is satisfied in light of administratively noticed facts. However, Immigration Judges will always have a significant role in using their judgment and experience in determining when to look beyond the record in accordance with the interests of justice.

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