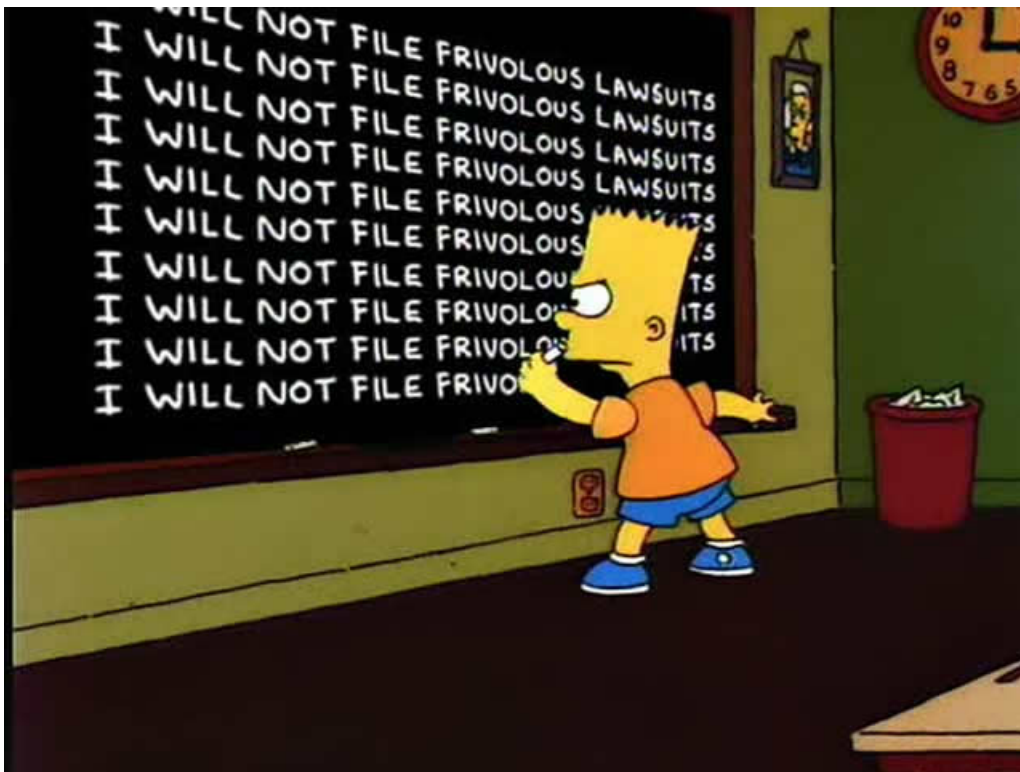


## Liu v. Holder: Frivolous Asylum Applications

The Ninth Circuit recently examined "the distinction between an applicant for asylum whose testimony lacks credibility and one who has 'deliberately fabricated' material aspects of her application. See [Liu v. Holder, No. 08-72849 \(9th Cir. Feb. 23, 2011\)](#) The Court held:

"[A]n asylum application is frivolous if any of its material elements is deliberately fabricated." 8 C.F.R. § 1208.20. If found to have "knowingly made a frivolous application for asylum," an applicant will be "permanently ineligible for any benefits under [the Immigration and Nationality Act]," including asylum relief. 8 U.S.C. § 1158(d)(6). Given these harsh consequences, the distinctions between the requirements for an adverse credibility determination and a frivolousness finding are of critical importance.



The Court ultimately concluded that whether an alien submitted a frivolous asylum application is a "distinct question requiring a separate analysis."

In examining Ms. Liu's case, the Court found that the Board's adverse credibility finding was supported by substantial evidence. However, "a finding of frivolousness does not flow automatically from an adverse credibility determination." The Court noted four substantive requirements that distinguish an adverse credibility finding from a finding of frivolousness:

First, an asylum application may be deemed frivolous only if it contains a deliberate fabrication, and the applicant has thus perpetrated a fraud on the court. Second, a frivolousness determination requires a finding that a "*material element*" of the claim was fabricated, whereas an adverse credibility determination may be supported by an inconsistency or apparent falsehood that merely *relates to* a material element of the claim. Third, although the "applicant for relief from removal has the burden of demonstrating that he or she meets all of the requirements" for such relief, the burden shifts to the government to prove the applicant has filed a frivolous application. Fourth, a frivolousness finding requires a stronger evidentiary showing than an adverse credibility finding: frivolousness must be proven by a preponderance of the evidence, whereas an adverse credibility finding must be supported only by substantial evidence.

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Besides the substantive requirements, there are also procedural requirements for a finding of frivolousness. In [Matter of Y-L-, 24 I&N Dec. 151 \(BIA 2007\)](#) the Board set forth four procedural requirements for a frivolous finding:

(1) Notice to the alien of the consequences of filing a frivolous application; (2) A specific finding by the Immigration Judge or the Board that the alien knowingly filed a frivolous application; (3) Sufficient evidence in the record to support the finding that a material element of the asylum application was deliberately fabricated; and (4) An indication that the alien has been afforded sufficient opportunity to account for any discrepancies or implausible aspects of the claim.

In other words, it's not easy to have your asylum case found frivolous. This is as it should be, given the harsh consequences for a frivolous finding.