No.

In the Supreme Court of the United States

RUI YANG,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal regulation on the processing of asylum applications instructs that "[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. § 1208.13(a).

The question presented in this case is whether an immigration judge must explicitly determine whether an asylum applicant's testimony is credible before denying asylum for failure of the applicant to provide evidence corroborating his or her asylum application.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rui Yang respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 664 F.3d 580. The decisions of the Board of Immigration Appeals (App., *infra*, 18a-22a) and of the Immigration Judge (App., *infra*, 23a-42a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on Dec. 12, 2011. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutory and regulatory provisions involved are set forth in the appendix to this petition. App., *infra*, 43a-45a.

STATEMENT

Federal law permits noncitizens to seek asylum in the United States when they have a reasonable fear of persecution in another country; a key element in assessing entitlement to asylum is a determination by an immigration judge (IJ) and the Board of Immigration Appeals (BIA) whether the applicant's testimony in support of the application is credible. But in this case, the Fifth Circuit—expressly rejecting the contrary holdings of other courts of appeals—held that the agency need *not* make "an explicit credibility determination" when ruling on and rejecting an asylum application. App., *infra*, 11a-12a.

This holding should not stand. It cannot be squared with the language and policy of 8 C.F.R. § 1208.13, the BIA's regulation governing asylum credibility determinations. It undermines the United States' commitment to protecting aliens who face persecution abroad. It greatly complicates review of IJ asylum decisions by the BIA and the courts of appeals. And it exposes applicants to deprivations of life and liberty without the procedural protections mandated by the regulatory regime. Further review by this Court accordingly is warranted.

A. Statutory And Regulatory Framework

1. Federal law has long recognized the right of a noncitizen to seek asylum in the United States if he or she has a "well-founded fear" of future persecution on account of specified grounds such as race, religion, nationality, membership in a particular social group, or political opinion. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 427-428 (1987); 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A); 8 C.F.R. § 1208.13(b). Hundreds of thousands of aliens have sought asylum protection in the United States in the past five years alone, and more than half of all applications in fiscal year 2011 were granted. U.S. Dep't of Justice, Exec. Office for Immigr. Review, *FY 2011: Statistical Year Book* I1, K1, K2 (2012) [hereinafter *FY 2011: Statistical Year Book*], *available at* www.justice.gov/eoir/statspub/fy11syb.pdf.

To establish a well-founded fear of future persecution, an applicant for asylum must show a "reasonable possibility" of suffering persecution if returned to his or her home country. 8 C.F.R. § 1208.13(b)(2)(i)(B). To make such a showing, applicants must establish that a reasonable person in

their circumstances would fear persecution. See *In re Kasinga,* 21 I. & N. Dec. 357, 366 (B.I.A. 1996); *In re Mogharrabi,* 19 I. & N. Dec. 439, 445 (B.I.A. 1987). Applicants may apply for asylum affirmatively with the United States Citizenship and Immigration Services (USCIS) or may seek asylum defensively before an IJ, during removal proceedings or after an affirmative application to USCIS is denied.

Immigration judges' asylum determinations may be reviewed by the BIA. The agency reviews an IJ's findings of fact under a "clearly erroneous" standard, while other aspects of the case are reviewed *de novo*. See 8 C.F.R. § 1003.1(d)(3)(i) ("The Board will not engage in de novo review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous."). The BIA's rulings, in turn, may be appealed to the federal courts of appeals, which review agency factual determinations under a substantial evidence standard. 8 U.S.C. § 1252(b)(4)(B) (indicating that the agency's findings of fact are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"). See also *Martinez-Buendia* v. *Holder*, 616 F.3d 711, 715 (7th Cir. 2010) (reviewing the BIA's "determination of facts * * * for substantial evidence").

2. Determination of an asylum applicant's credibility is central to this process: "'Credibility is arguably the most crucial aspect of any asylum case' and 'the single biggest substantive hurdle' facing asylum applicants." Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 Tex. Int'l L.J. 185, 186-187 (2008) (citations

omitted). Thus, a BIA regulation, unchanged since 1997, provides: "The testimony of the applicant, if credible, *may be sufficient* to sustain the burden of proof without corroboration." 8 C.F.R. § 1208.13(a) (emphasis added).[1]

In 1997, the BIA interpreted Section 1208.13(a) to allow an IJ to require an asylum applicant—even if credible—to furnish corroborating evidence to support his or her claim. See *In re S-M-J-*, 21 I. & N. Dec. 722 (B.I.A. 1997). Even if an IJ "finds an applicant to be credible," the BIA concluded, the IJ may still "find[] that she has failed to meet her burden of proof," such as when an applicant's testimony is "plausible in light of general country condition[s]" but "overly general." *Id.* at 729. This is so, the agency found, because testimony is only "part of the body of evidence which is intertwined and considered in its totality." *Ibid.*

In 2005, Congress enacted the REAL ID Act, Pub. L. 109-13, 119 Stat. 302 (2005), which in relevant part codified the existing standards governing the agency's consideration of asylum applications. See 8 U.S.C. § 1158(b)(1)(B). In particular, the statute codified the regulation's requirement that "[t]he testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration," and further provided that, "[w]here the trier of fact

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[1] Section 1208.13(a) was first added by 55 Fed. Reg. 30,674-01, 30,683 (July 27, 1990), when it read: "The testimony of the applicant, if credible in light of general conditions in the applicant's country of nationality or last habitual residence, may be sufficient to sustain the burden of proof without corroboration." The language was put in its current form by Procedures for Asylum and Withholding of Removal, 62 Fed. Reg. 10,337, 10,342 (Mar. 6, 1997).

determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." 8 U.S.C. 1158(b)(1)(B)(ii).[2] The asylum-related provisions of the REAL ID Act apply only to asylum applications that were filed after the date of the statute's enactment, May 11, 2005. See REAL ID Act § 101(h)(2), 119 Stat. at 305 (indicating that asylum-related provisions apply to "applications for asylum * * * made on or after such date" of enactment). See also *In re S-B-*, 24 I. & N. Dec. 42 (B.I.A. 2006).

Although the REAL ID Act authorizes the agency to require an asylum applicant to furnish corroborating evidence, the Act does not address whether an immigration judge *must* make a credibility determination before demanding corroborating evidence. As discussed below, the courts of appeals have divided on this question, for asylum applications submitted both before and after enactment of the REAL ID Act.

B. Proceedings Below

1. Petitioner Rui Yang, a native and citizen of the People's Republic of China, arrived in the United States in 1998 on a cultural exchange visa to participate in a high-school exchange program. App., *infra*,

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[2] The conference report accompanying the legislation states that "new clause 208(b)(1)(B)(ii)" is "based upon the standard set forth in the BIA's decision in *Matter of S-M-J-*" and then quotes at length from that opinion. H.R. Rep. No. 109-72, at 165-166 (2005) (Conf. Rep.). The new provisions also "codifie[d] factors identified in case law on which an adjudicator may make a credibility determination." *Id.* at 166-167.

2a. He later obtained a student visa so that he could attend college. App., *infra*, 2a, 30a.

In August 2001, Chinese authorities searched petitioner's home in China, arresting his father and detaining him for a year without bail because of his family's practice and support of Falun Gong. App., *infra*, 19a-20a, 31a, 35a. Falun Gong is a spiritual discipline that was banned by the Communist Party of China in 1999. See Thomas Lum, Cong. Res. Serv., RL 33437, *China and the Falun Gong* (2006). The U.S. State Department has recognized the persecution of followers and practitioners of Falun Gong by the Chinese government.[3] By June 2002, petitioner had to stop attending college because he and his family could no longer afford it as a result of his father's imprisonment, and petitioner lost his lawful visa status in the United States. See App., *infra*, 2a, 30a.

On November 28, 2001, a few months after his father's arrest and while he was still in legal status as a student, petitioner filed an application for asylum. App., *infra*, 2a. He explained that he feared that the Chinese government would persecute him because of his association with Falun Gong, noting that

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[3] The State Department's *Country Report on Human Rights Practices*: *China* (released on Mar. 11, 2008), which was considered as part of the administrative record during petitioner's immigration proceedings, details the harsh treatment of practitioners of Falun Gong. A.R. 235. Since the crackdown on Falun Gong began in 1999, hundreds, if not thousands, of adherents have died in custody due to torture, abuse, and neglect. A.R. 237, 254. According to the State Department, family members of Falun Gong practitioners have also been targeted for arbitrary arrest and detention. A.R. 245. Mere possession of Falun Gong materials has often served as the basis of arrest and detention. A.R. 254.

he sent his parents pro-Falun Gong articles, including newspaper and Internet articles regarding the government's unfair treatment of Falun Gong followers, that they distributed in China. App., *infra*, 3a-4a, 19a-20a. It was discovery of the posting of these materials that caused Chinese authorities to arrest petitioner's father. App., *infra*, 3a, 19a-20a. The Chinese government also charged petitioner with "colluding with overseas reactionary forces and attempting to subvert the communist party." App., *infra,* 20a, 35a.

2. Petitioner was interviewed by the USCIS soon after applying for asylum in 2001, but he did not receive a timely decision.[4] App., *infra*, 2a; A.R. 155, 194, 204.

In 2005, four years after submitting his application, petitioner moved to Dallas from Los Angeles to find a way to support himself while his application was pending. A.R. 185. He filed a change-of-address form with the USCIS as required. A.R. 194. Still not hearing anything from the agency, he sent a letter to his Congressman in December 2006 asking for help in getting the USCIS to decide his case. A.R. 194, 204. By then, the attorney who assisted petitioner in preparing his application had ceased his representation of petitioner, having retired from immigration work. A.R. 32, 194. In 2007, petitioner obtained a second attorney, but that attorney was suspended from practice for repeated failure to appear at sche-

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[4] The law provides that such administrative decisions "shall be completed within 180 days after the date an application is filed" in the absence of exceptional circumstances. 8 U.S.C. § 1158(d)(5)(A). Petitioner, however, did not receive a decision in his case for more than four years. A.R. 185.

duled hearings and engaging in conduct that constituted ineffective assistance of counsel, shortly after taking on petitioner's case. A.R. 33, 111; Order, *In re Mason*, Nos. D2006-215, D2007-022, D2007-098 (B.I.A. Jan. 8, 2008).[5]

Unable to work legally unless granted asylum and without support from his family because of his father's arrest, petitioner could not afford to retain another attorney and, despite what the IJ recognized to be a good-faith effort, was not able to find one from low-cost providers. A.R. 33, 119. Petitioner accordingly presented his case *pro se*. App., *infra*, 3a.

3. At his hearing on October 27, 2008, petitioner testified that he feared Chinese authorities would arrest and harm him if he returned to China. App., *infra*, 3a-4a. The IJ did not identify any inconsistencies in petitioner's written material and statements, which were also consistent with the State Department's country report regarding the treatment of supporters of Falun Gong. App., *infra*, 4a-5a. The IJ determined, however, that petitioner did not present evidence specifically corroborating his testimony regarding his father's arrest and detention. App., *infra*, 35a-36a. In particular, the IJ faulted petitioner for not obtaining letters from his family documenting his claims. App., *infra,* 4a.[6] The IJ accordingly denied

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[5] Unfortunately, inadequate representation in immigration proceedings is common. See Robert A. Katzmann, *Deepening the Legal Profession's Pro Bono Commitment to the Immigrant Poor*, 78 Fordham L. Rev. 453, 453 (2009) (discussing the "all too frequent inadequate representation of immigrants").

[6] In his final hearing before the IJ, petitioner did not at first understand the IJ's question regarding whether he had obtained or tried to obtain letters from his family members, and he indicated that he did not think such evidence would be ac-

petitioner's application, refusing to grant a continuance for petitioner to seek letters from his family. App., *infra*, 36a.[7]

On October 31, 2008, the IJ formally denied petitioner's application for asylum, citing his failure to provide corroborating evidence—documentary evidence pertaining to his father's arrest or to his contention that Chinese authorities intended to arrest him. App., *infra*, 37a-38a. The IJ's decision made no specific finding about, and did not question, petitioner's credibility.[8]

The BIA affirmed the IJ's decision, stating that petitioner's application "did not provide sufficient documentation to corroborate his claim." App., *infra*, 20a. The BIA reasoned that statements from petitioner's family members were "reasonably obtainable" and that it was "reasonable to expect such evidence to corroborate the material aspects of [his] case." App., *infra*, 21a. The BIA did not address petitioner's credibility; instead, it rejected petitioner's argument that his testimony was itself sufficient to

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cepted. A.R. 161. When petitioner offered to have his family write letters, the IJ responded that petitioner "had an attorney before" and therefore should have been prepared to present his corroboration. A.R. 165.

[7] Neither the IJ nor the BIA questioned petitioner's assertion that he could not provide documentary evidence of his father's detention because the Chinese government does not document such arrests. App., *infra*, 20a.

[8] The IJ's written decision suggests that petitioner "had more than ample time to present his case" in light of his having had the "services of two attorneys," but failed to note that one of those attorneys retired during the extraordinary delay following submission of petitioner's application and that the other attorney was suspended from practice shortly after taking petitioner's case. App., *infra*, 36a, 37a. See also A.R. 32, 33, 111, 194.

sustain his application "because the lack of corroborative evidence is dispositive of the appeal." App., *infra*, 21a n.3.

3. The court of appeals affirmed. App., *infra*, 1a-17a. It first held that the BIA may reject an asylum application for failure to provide corroborating material even if the applicant's testimony is otherwise credible. App., *infra*, 13a. The Fifth Circuit added, however, that it still had to decide whether the agency may deny an asylum application without making any determination as to the applicant's credibility *at all*, noting that in this case "the BIA did not make a determination regarding [petitioner's] credibility." App., *infra*, 11a.

On this, the court observed that "[t]he BIA's view that a failure to corroborate testimony is 'dispositive' seems, at first glance, to be in tension with the language of 8 C.F.R. § 1208.13(a), which explicitly allows applicants for asylum to establish their entitlement to relief without corroborating their credible testimony." App., *infra*, 11a. As the court noted,

> [t]his language seems to imply that the first step for the BIA in assessing applications for asylum should be to determine whether the applicant's testimony, by itself, satisfies the applicant's burden of proof. Despite this language, the BIA does not assess the credibility of an applicant's testimony—and therefore does not decide whether the applicant's testimony satisfies the burden of proof by itself—unless the BIA determines that corroborating evidence is not reasonably available.

App., *infra*, 11a. As a consequence, the court added, "[i]n effect, the BIA's interpretation reads in an addi-

tional clause to the language of 8 C.F.R. § 1208.13(a): 'The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration, *but only if corroboration is not reasonably available to the applicant*.'" App., *infra*, 11a. The court noted that "[t]wo circuits [the Second and Seventh] have implicitly rejected this iteration of the BIA's corroboration rule." App., *infra*, 11a.

The Fifth Circuit, however, "disagree[d] with these decisions because making an explicit credibility determination is not necessary to effectuate the meaning of the regulation." App., *infra*, 11a-12a. In the court's view, "[b]ecause the BIA's interpretation permits it to deny applications for asylum based solely on their failure to provide reasonably available corroborating evidence, we would elevate form over substance if we required the BIA to make a credibility determination when it decides that an applicant failed to provide reasonably available corroborating evidence." App., *infra*, 12a. "Accordingly," the court concluded, "the BIA need not make a credibility determination when it determines that corroborating evidence is reasonably available to the applicant but was not submitted." App., *infra*, 13a.

REASONS FOR GRANTING THE PETITION

Careful consideration and determination of an asylum applicant's credibility is essential, both to ensure the integrity of administrative decisions and to facilitate judicial review. For this reason, both the controlling regulation and the currently governing statute (which in relevant respects codifies the regulation) instruct that the credible testimony of an applicant may suffice—without corroboration—to establish his or her eligibility for asylum. 8 U.S.C. § 1158(b)(1)(B)(ii); 8 C.F.R. § 1208.13(a). Moreover,

Congress has specified a wide range of factors that may be used in evaluating an applicant's credibility, such as the applicant's demeanor, candor, and responsiveness, as well as the inherent plausibility and internal consistency of the applicant's account. 8 U.S.C. § 1158(b)(1)(B)(ii)-(iii).

Notwithstanding that an applicant's testimony alone may establish his or her eligibility for asylum, the courts of appeals—as the court below noted (App., *infra*, 11a-12a)—have sharply divided over whether the agency must explicitly determine the credibility of the applicant's testimony before denying asylum on the ground of the applicant's failure to provide corroborating evidence. Two circuits (the Second and Seventh) *require* the agency to make a credibility determination. By contrast, three circuits (the Third, Fifth, and Sixth) do not require a credibility determination and regularly uphold denials of asylum despite the agency's failure to decide whether the applicant was credible. This issue is a recurring one of great practical importance, potentially arising in every asylum case. It should be resolved by this Court.

A. The Courts Of Appeals Are Divided On Whether The IJ And BIA Must Make A Credibility Determination Before Demanding Corroborating Evidence.

1. The Second Circuit has concluded that an immigration judge *must* make an explicit determination whether an asylum applicant's testimony is credible. In *Jia Yan Weng* v. *Mukasey*, 272 F. App'x 98, 99 (2d Cir. 2008), the court ruled in relevant part that an immigration judge must "'decide explicitly' whether or not the candidate's testimony was credible (without relying exclusively on the lack of corro-

borating evidence)." *Id.* at 99 (quoting *Zaman* v. *Mukasey*, 514 F.3d 233, 237 (2d Cir. 2008)). Because the immigration judge had failed to evaluate credibility, making a finding only that the applicant's corroborating evidence failed to satisfy his burden of proof, the court remanded for "an explicit credibility finding." *Id.* at 100. See also *Zaman*, 514 F.3d at 237 ("Vague, unclear, and passing statements do not suffice to fulfill the agency's obligation to rule explicitly on the credibility of [a petitioner's] testimony." (internal quotation marks omitted)).

The Second Circuit requires a credibility determination because the agency's failure to determine an applicant's credibility both "frustrates appellate review" and is inconsistent with the statutory command that a grant of asylum may be "based on credible testimony alone." *Diallo* v. *INS*, 232 F.3d 279, 287 (2d Cir. 2000). See also *Zaman*, 514 F.3d at 237 (noting that "an explicit credibility determination is important to ensure that an alien receives the potential benefit of succeeding on credible testimony alone, as well as to ensure that appellate review of such a determination is preserved" (internal quotation marks omitted)).

The Seventh Circuit has similarly concluded that an immigration judge must make an explicit credibility determination before requiring an immigrant to produce corroborating evidence. "To ensure that IJs have the freedom to require supporting evidence, yet do not inappropriately demand it, we require that, before denying a claim for lack of corroboration, an IJ must: (1) make an explicit credibility finding; (2) explain why it is reasonable to have expected additional corroboration; *and* (3) explain why the petitioner's reason for not producing that corroboration

is inadequate." *Ikama-Obambi* v. *Gonzales*, 470 F.3d 720, 725 (7th Cir. 2006) (emphasis added) (citing *Gontcharova* v. *Ashcroft*, 384 F.3d 873, 877 (7th Cir. 2004)). See also *Tandia* v. *Gonzales*, 487 F.3d 1048, 1054-1055 (7th Cir. 2007) (same); *Hussain* v. *Gonzales*, 424 F.3d 622, 629 (7th Cir. 2005) (same).

Like the Second Circuit, the Seventh Circuit has recognized that the factfinder's failure to make a credibility determination undermines the statutory and regulatory requirement that an asylum application may be sustained on the basis of credible testimony alone. Thus, the court has explained that "the Board [of Immigration Appeals] needed to consider [the applicant's] credibility before ruling on the need for corroborative evidence," because "[t]he credibility finding was * * * inextricably intertwined with the IJ's ruling on the need for corroborative evidence." *Rapheal* v. *Mukasey*, 533 F.3d 521, 528 (7th Cir. 2008). The court emphasized that "if the Board (or IJ) had found [the applicant's] testimony credible, [the applicant] might not have been required to provide corroboration." *Ibid.*

The Seventh Circuit has also repeatedly admonished the agency that its failure to determine credibility impedes effective appellate review: "[W]hen an IJ avoids a clean determination of credibility by instead saying that an asylum applicant 'hasn't carried her burden of proof, the reviewing court is left in the dark as to whether the judge thinks the asylum seeker failed to carry her burden of proof because her testimony was not credible, or for some other reason.'" *Ikama-Obambi*, 470 F.3d at 726 (quoting *Iao* v. *Gonzales*, 400 F.3d 530, 534 (7th Cir. 2005)).

2. Other courts have taken the opposite position. The Fifth Circuit's holding below, of course, express-

ly "disagree[d] with the[] decisions [of the Second and Seventh Circuits] because making an explicit credibility determination is not necessary to effectuate the meaning of the regulation [8 C.F.R. § 1208.13(a)]," reasoning that "we would elevate form over substance if we required the BIA to make a credibility determination when it decides that an applicant failed to provide reasonably available corroborating evidence." App., *infra*, 12a. Accordingly, the court concluded that "the BIA need not make a credibility determination when it determines that corroborating evidence is reasonably available to the applicant but was not submitted." App., *infra*, 13a.

Two other circuits—the Third and Sixth—similarly decline to require the agency to make a credibility determination before denying asylum, instead generally presuming credibility for purposes of appellate review in lieu of remanding for a credibility determination when one was not made by the agency.[9] Thus, when reviewing a case lacking an agency

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[9] The Ninth Circuit has taken inconsistent approaches in the absence of a credibility finding by the IJ, sometimes assuming the truth of the applicant's testimony and sometimes remanding so that such a determination could be made. Compare *Chunmiao Wang* v. *Keisler*, 254 F. App'x 572, 575 (9th Cir. 2007) (finding the applicant eligible for asylum after assuming the truth of her testimony), *Gu* v. *Gonzales*, 454 F.3d 1014, 1021 (9th Cir. 2006) (accepting the applicant's testimony as true because the IJ made no explicit credibility determination but nonetheless denying review), and *Kataria* v. *INS*, 232 F.3d 1107, 1113 (9th Cir. 2000) ("It is * * * well established that we must accept an applicant's testimony as true in the absence of an explicit adverse credibility finding."), with *Balwant Singh* v. *Holder*, 401 F. App'x 274, 275 (9th Cir. 2010) (remanding where the agency neither made an explicit credibility determination nor presumed the truth of the applicant's testimony) and *Balwinder Singh* v. *Gonzales*, 491 F.3d 1019, 1026 (9th Cir. 2007)

credibility determination, the Third Circuit will "determine whether the BIA's decision is supported by substantial evidence in the face of [the applicant's] assumed (but not determined) credibility." *Kayembe* v. *Ashcroft,* 334 F.3d 231, 235 (3d Cir. 2003). See also *Toure* v. *Att'y Gen. of U.S.*, 443 F.3d 310, 326 (3d Cir. 2006) ("We have several times affirmed the rule that where an IJ or the BIA fails to make an explicit credibility finding, we will proceed as if the applicant's testimony were credible.").

The Sixth Circuit takes the same approach when the agency fails to make a credibility determination, presuming credibility but not necessarily remanding. See *Maklaj* v. *Mukasey*, 306 Fed. App'x 262, 264 n.4 (6th Cir. 2009). See also *Dorosh* v. *Ashcroft*, 398 F.3d 379, 382 (6th Cir. 2004) (affirming denial of asylum for failure of the applicant to provide corroborating evidence and despite the fact that the BIA "did not indicate whether [applicant] was believable or whether her story provided adequate detail to support her application"). As we explain below, however, an appellate presumption of credibility is in no sense equivalent to an actual and express determination of credibility by the agency in the context of an agency decision to require corroboration.[10]

("Because the IJ neither made credibility findings nor analyzed Singh's testimony to see if he meets the criteria for asylum, we remand the case to the Board."). This intra-circuit confusion confirms the need for clarification of the law by this Court.

[10] This conflict, which concerns the meaning of a regulation that has not been changed since 1997, is not affected by enactment of the REAL ID Act, which in relevant part codified the existing regulatory standard. Both the Second and the Seventh Circuits have applied their rule to cases involving asylum applications filed after the enactment of the Act. See, *e.g.*, *Jia Yan*

B. An Express Determination Of Credibility Is Necessary To Satisfy Regulatory Policy And Facilitate Judicial Review.

The holding below is not only inconsistent with the decisions of other courts of appeals; it is wrong. All of the relevant considerations—the governing regulatory language, the imperatives of federal immigration policy, and the requirements for efficient appellate review of agency decisions—indicate that the IJ in petitioner's case should have made an explicit credibility determination before demanding corroborating evidence and rejecting petitioner's asylum claim.

1. The IJ's Failure To Determine Whether Petitioner Was Credible Before Demanding Corroborating Evidence Is Inconsistent With The Text Of The BIA's Regulation.

To begin with, the IJ's failure to make an explicit credibility determination in petitioner's case is inconsistent with the BIA's own regulation, which clearly contemplates the possibility that an applicant's credible testimony may serve as the sole basis for the success of a petition for asylum: "The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration * * * ." 8 C.F.R. § 1208.13(a). See also *Diallo*, 232 F.3d at 287 ("[T]he precedent of the BIA * * * would sustain a petition for asylum or withholding of deportation based on credible testimony alone * * * .").

As the court below itself recognized, the regulation appears to be premised on an expectation that

Weng, 272 F. App'x at 99 (application filed in June 2005); *Rapheal*, 533 F.3d at 524, 528 (application filed in early 2006).

the BIA will make a credibility determination in asylum cases. See App., *infra*, 11a. After all, if credible testimony alone is capable of sustaining an applicant's burden of proof, it stands to reason that the IJ should decide whether the applicant's testimony *is* credible before requiring the submission of documentary evidence. See, *e.g.*, *Bedesha* v. *BIA*, 203 F. App'x 377, 379 (2d Cir. 2006) ("When deciding a claim for asylum and related relief, an IJ must first determine whether an applicant is credible and then assess whether the applicant has met his or her burden of proof."). Moreover, even if the IJ feels that corroborating evidence is required to satisfy the applicant's burden of proof, performing a credibility assessment is necessary to determine what *type* of and *how much* corroborating evidence the applicant must present to satisfy his or her burden of proof.

For this reason, even if the BIA's decision to deny petitioner's application without requiring the IJ to make a credibility determination is based on its interpretation of Section 1208.13(a), it does not merit deference. While agencies generally receive deference when they interpret their own regulations, courts will not defer to agency interpretations that are "plainly erroneous or inconsistent with the regulations." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (citation omitted) (internal quotation marks omitted). To the extent that the BIA's resolution of petitioner's case reflects its belief that Section 1208.13(a) does not require IJs to make credibility determinations before requiring corroboration, it should be reversed.

2. Thorough And Accurate Resolution Of Asylum Applications Requires That The Factfinder Consider The Applicant's Credibility.

In addition, fair and efficient administration of the asylum process depends upon IJs making express credibility judgments, for a number of reasons. *First*, to make a formal credibility determination, the IJ must carefully consider the applicant's testimony and come to a final conclusion concerning its merit. Such an assessment is central to the resolution of an asylum case, and it is one that only the IJ can make: IJs are "'uniquely qualified to decide whether an alien's testimony has about it the ring of truth.'" H.R. Rep. No. 109-72, at 167 (quoting *Sarvia-Quintanilla* v. *INS*, 767 F.2d 1387, 1395 (9th Cir. 1985)). IJs' ability to see applicants, hear them testify, and evaluate "'[a]ll aspects of * * * [applicants'] demeanor'" enables them to decide whether the applicants are testifying truthfully or falsely. *Id.* at 168 (quoting *Mendoza Manimbao* v. *Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2003)). In short, credibility analysis is key to the proper evaluation of asylum claims: "Because direct authentication or certification of an alien's testimony is difficult, if not impossible to find, the credibility analysis is vital to determining the validity of an applicant's claim." *Diallo* v. *Ashcroft*, 381 F.3d 687, 700 (7th Cir. 2004).[11]

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[11] This conclusion is confirmed by the REAL ID Act itself, which codifies pre-REAL ID Act case law and requires triers of fact to "[c]onsider[] the totality of the circumstances, and all relevant factors" when making credibility determinations in asylum cases. 8 U.S.C. § 1158(b)(1)(B)(iii). Triers of fact may base credibility determinations on

Second, requiring a determination of credibility imposes an essential discipline on the decision-making process. The conclusion of even the most diligent and conscientious factfinder is likely to be affected by an obligation to run through the process of carefully evaluating the applicant's credibility and articulating a conclusion about it.

And the unfortunate fact is that many participants in the agency immigration decision-making process are *not* diligent: Because the courts of appeals have been so overwhelmed with immigration (and particularly asylum) cases, and because the IJs and the BIA are themselves overworked, it is all the more important that immigration cases be governed by consistent rules, like the requirement that IJs al-

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> the demeanor, candor, or responsiveness of the applicant * * * the inherent plausibility of the applicant's * * * account, the consistency between the applicant's * * * written and oral statements * * *,the internal consistency of each such statement, the consistency of such statements with other evidence of record * * *, and any inaccuracies or falsehoods in such statements * * *.

Ibid. See also H.R. Rep. No. 109-72, at 166-168. The creation of this elaborate mechanism for making credibility determinations presupposes that IJs *will* make such determinations. For more on the factors used in credibility assessments prior to the passage of the REAL ID Act, see generally Rempell, *supra*, at 185. Indeed, the REAL ID Act *expressly* requires IJs to determine credibility in cases involving withholding of removal. See 8 U.S.C. § 1229a(c)(4)(B) ("The immigration judge *will* determine whether or not the testimony is credible." (emphasis added)). Because the statute does not explicitly permit applicants in withholding-of-removal cases to meet their burden with credible testimony alone, although it does expressly recognize that possibility for asylum applicants, it follows *a fortiori* that credibility determinations also are required in asylum cases.

ways make explicit credibility determinations before denying an application for failure of the applicant to provide corroborating evidence. Doing so could also help address the problem, identified by judges across the courts of appeals, that "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice." *Benslimane* v. *Gonzales*, 430 F.3d 828, 829-830 (7th Cir. 2005) (Posner, J.) (noting a "staggering 40 percent" BIA reversal rate and collecting cases from across the courts of appeals complaining of inadequate agency adjudication in immigration cases, including in determining asylum applicants' credibility). See also, *e.g.*, *Chen* v. *U.S. Dep't of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (finding the IJ's credibility ruling to be "grounded solely on speculation and conjecture"); *Lopez-Umanzor* v. *Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) ("[T]he IJ's assessment of Petitioner's credibility was skewed by prejudgment, personal speculation, bias, and conjecture."); *Korytnyuk* v. *Ashcroft*, 396 F.3d 272, 292 (3d Cir. 2005) ("[I]t is the IJ's conclusion, not [the petitioner's] testimony, that 'strains credulity.'").

If IJs do not have to perform this multifactor analysis, they will have largely unfettered discretion to deny asylum or require corroborating evidence based on only vague and unconsidered impressions of applicants' credibility. This places asylum seekers at a tremendous disadvantage: A wholly credible applicant could still lose his or her case if the IJ, failing to evaluate the credibility of the applicant's testimony, demanded corroborating evidence that the applicant ultimately did not produce. See *Ikama-Obambi*, 470 F.3d at 725 (7th Cir. 2006) (holding that IJs must first explicitly assess applicants' credibility "[t]o ensure that IJs have the freedom to require supporting

evidence, yet do not inappropriately demand it"); *Zaman*, 514 F.3d at 237 (viewing explicit credibility determinations as "important to ensure that an alien receives the 'potential benefit' of succeeding on credible testimony alone" (citation omitted)).[12]

3. The Absence Of Credibility Assessments By IJs In Asylum Cases Frustrates Appellate Review.

The failure of some IJs to assess the credibility of applicants' testimony before disposing of asylum applications also greatly complicates appellate review of agency decisions in such cases.

The courts of appeal have themselves noted this problem. As a general matter, "untangl[ing] the basis for the immigration judge's decision" to reject an asy-

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[12] The REAL ID Act specifies that, in asylum cases, "if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." 8 U.S.C. § 1158(b)(1)(B)(iii). But this rule of appellate review is no substitute for an actual determination of credibility by the IJ. The immigration judge who makes such a determination may find that an applicant's testimony is highly compelling, in a way that gives it added weight against the other evidence. Moreover, a reliance on a presumption deprives the applicant of the chance that the immigration judge will, in the thorough consideration of all parts of the testimony necessary to make a judgment about credibility, decide that some fact the judge formerly thought needed corroboration is actually unimportant in reaching a conclusion. A court of appeals applying a presumption also will be confined to the facts articulated in the testimony, without making any inferences that an immigration judge might comfortably make with the witness before him. See, *e.g.*, *Kyaw Myo Thein* v. *Holder*, 363 F. App'x 122, 124 (2d Cir. 2010) (finding that the BIA had not properly "presumed" credibility for failing to probe connections between presumptively true facts).

lum applicant's claim when the IJ's opinion fails to make an explicit credibility finding can be exceedingly difficult. *Diallo*, 381 F.3d at 699. For example, although the Seventh Circuit accords great deference to factual determinations by the BIA and IJs, it has pointed out that "the limits of our deferential standard of review are tested when we are asked to defer to findings of fact that the immigration judge has not made." *Id.* at 698. For the same reason, the Tenth Circuit criticized the BIA's practice of assuming, without deciding, credibility: "If immigration judges and the Board evaluate credibility in each case, remand will not be necessary and further delays in the processing of asylum claims can be avoided." *Krastev* v. *INS*, 292 F.3d 1268, 1279 (10th Cir. 2002) (quoting *Canjura-Flores* v. *INS*, 784 F.2d 885, 889 n.1 (9th Cir. 1985)).

By the same token, the failure of IJs to make credibility determinations frustrates appellate review of agency demands for corroborating evidence. The Seventh Circuit has called this failure "disturbing." *Ikama-Obambi*, 470 F.3d at 726 (citing *Iao,* 400 F.3d at 533-534). When an IJ avoids making a "clean determination of credibility," the reviewing court "is left in the dark as to whether the judge thinks the asylum seeker failed to carry her burden of proof because her testimony was not credible, or for some other reason." *Id.* (citation omitted). The Second Circuit has reached a similar conclusion, complaining that the lack of a credibility finding "frustrates" and "defies efficient appellate review" in this context. *Jia Yan Weng*, 272 F. App'x at 100; *Li* v. *U.S. Att'y Gen.*, 173 F. App'x 925, 926 (2d Cir. 2006).

C. The Question Of Whether IJs Must Make Credibility Determinations In Asylum Cases Is A Recurring One Of Great Importance.

There is no denying the recurring nature and practical importance of the issue presented here. Whether IJs must make credibility determinations is a question that arises in virtually every asylum case. Resolution of the circuit conflict on this question, so as to improve the accuracy of asylum decisions and bring uniformity to an important aspect of immigration law, is therefore a matter of considerable significance.

Asylum cases literally involve matters of life and death, and the United States has committed itself as a matter of national policy not to remove a foreign national to a country where his or her life or freedom would be threatened. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); 8 U.S.C. § 1158. See also *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) (discussing the importance of the 1980 Act). Regularity in the process used to resolve asylum cases therefore is essential.

And such cases comprise a signification portion of immigration cases and appeals. Asylum is the most common form of relief requested before an immigration judge. See *FY 2011: Statistical Year Book*, *supra*, at R1. The immigration courts receive more than forty thousand asylum cases each year. *Id.* at I1. And many of these cases make it to the appellate courts: More than a thousand asylum cases are appealed to the courts of appeals each year, and credibility is often a central issue on appeal. See Elizabeth Cronin, *When the Deluge Hits and You Never Saw the Storm: Asylum Overload and the Second*

Circuit, 59 Admin. L. Rev. 547 (2007); John R.B. Palmer et. al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 Geo. Immigr. L.J. 1, 44 (2005) (describing the surge in appeals of BIA decisions to the circuit courts); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 362 tbl.2 (2007) (reporting that the federal courts of appeals decided 2163 asylum cases in 2005).[13] The question presented here will arise in virtually every such case.

Finally, we note that petitioner's asylum application was filed prior to enactment of the REAL ID Act. Although, as we have indicated (at note 10, *supra*), the governing rule was not changed by the Act, it is important that the Court settle the nature of the IJ's obligation to make credibility determinations in *both* pre- *and* post-REAL ID Act cases. Many of the asylum cases now pending in or likely to come before the courts of appeals involve pre-REAL ID Act applications. A sense of the number of pre-REAL Act asylum cases still in the system can be gleaned by examining cases recently decided by the courts of appeals. Of the thirty-six asylum decisions issued since the beginning of 2012 that we could identify for which the

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[13] More generally, more than twelve percent of all filings in the federal courts of appeals are appeals of decisions from the BIA. See Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts, 2010 Annual Report of the Director* (2011), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf. In the Second and Ninth Circuits, more than a third of the cases on appeal have been immigration cases in some recent years. See Rempell, *supra*, at 187.

date of the asylum application could be determined from the opinion, sixteen (43%) were based on asylum applications filed before May 11, 2005.[14] Given

[14] A search in WestlawNext for cases decided since the start of 2012 where the words "filed," "asylum," and "application" appeared in the same sentence returned fifty-two results (search run on March 2, 2012). In sixteen of those cases, the initial applications for asylum were filed before the enactment of the REAL ID Act. See *Arango-Moreno* v. *U.S. Att'y Gen.*, No. 11-13167, 2012 WL 676219 (11th Cir. Mar. 2, 2012) (2002 application); *Mei Juan Zheng* v. *Holder*, No. 10-3838-AG, 2012 WL 603635 (2d Cir. Feb. 27, 2012) (2001 application); *Zhao Mei Lin* v. *Att'y Gen. of U.S.*, No. 11-3265, 2012 WL 593278 (3d Cir. Feb. 24, 2012) (2002 application); *Mironenko* v. *Att'y Gen. of U.S.*, No. 11-2546, 2012 WL 581313 (3d Cir. Feb. 23, 2012) (2003 application); *Latter-Singh* v. *Holder*, No. 08-71277, 2012 WL 516055 (9th Cir. Feb. 17, 2012) (original asylum application in 1993 and a new one circa 2004); *Tambi* v. *U.S. Att'y Gen.*, No. 11-13396, 2012 WL 386289 (11th Cir. Feb. 8, 2012) (motion to reopen decision on asylum application from ten years before); *Mendoza-Pablo* v. *Holder*, 667 F.3d 1308 (9th Cir. 2012) (2003 application); *Josefina Rosales* v. *U.S. Att'y Gen.*, No. 11-11062, 2012 WL 360605, at *3 (11th Cir. Feb. 6, 2012) ("BIA cured this defect by applying the correct pre-REAL ID Act standard in its opinion."); *Sokoli* v. *Holder*, No. 10-4046, 2012 WL 313701 (6th Cir. Feb. 1, 2012) (2004 application); *Guerrero* v. *Holder*, 667 F.3d 74 (1st Cir. 2012) (1992 application); *Haxhari* v. *Att'y Gen. of U.S.*, No. 11-1973, 2012 WL 252397 (3d Cir. Jan. 27, 2012) (application filed before May 11, 2005); *Avdijaj* v. *Holder*, No. 10-1988-AG, 2012 WL 232938 (2d Cir. Jan. 26, 2012) (considering an application to reopen filed in 2009, more than five years after the BIA affirmed the IJ's denial of the asylum application); *Abdurakhmanov* v. *Holder*, 666 F.3d 978 (6th Cir. 2012) (application filed before May 11, 2005); *Cika* v. *U.S. Att'y Gen.*, No. 11-12582, 2012 WL 148646 (11th Cir. Jan. 19, 2012) (2001 application); *Mei Yu Lin* v. *Holder*, No. 10-3785-AG, 2012 WL 119117 (2d Cir. Jan. 17, 2012) (motion to reopen was filed nearly seven years after the BIA affirmed the IJ's denial of asylum application); *Chehazeh* v. *Att'y Gen. of U.S.*, 666 F.3d 118 (3d Cir. 2012) (application filed by May 2002).

these data, it is certain that there are many hundreds, and more likely thousands, of pre-REAL ID Act cases working their way through the system.

In these circumstances, and given the great importance of the question presented, review would be warranted even if the REAL ID Act were thought to have some bearing on the resolution of the question presented here. *INS* v. *St. Cyr*, 533 U.S. 289 (2001) (considering the substance of immigration relief under INA § 212(c) even after § 212(c) was repealed in 1996). This Court should therefore intervene to assure uniform application of a rule that will improve the fact-finding process and facilitate judicial review in critically important asylum cases.

The initial date of filing for fifteen of the asylum applications could not be determined from the circuit court opinion: *Sok Heng Meas* v. *Holder*, No. 08-74471, 2012 WL 678180 (9th Cir. Feb. 28, 2012); *Mejia-Fuentes* v. *Att'y Gen. of U.S.*, No. 08-2783, 2012 WL 593252 (3d Cir. Feb. 24, 2012); *Tsomo* v. *Holder*, No. 10-3810-AG, 2012 WL 556137 (2d Cir. Feb. 22, 2012); *Samad* v. *Holder*, No. 10-3728-AG(L), 2012 WL 539963 (2d Cir. Feb. 21, 2012); *Lleshi* v. *Holder*, No. 10-3716, 2012 WL 400586 (6th Cir. Feb. 8, 2012); *Jisheng Xiao* v. *Holder*, No. 11-60407, 2012 WL 373212 (5th Cir. Feb. 7, 2012); *Malam* v. *Holder*, No. 11-1614, 2012 WL 340326 (4th Cir. Feb. 3, 2012); *Obidjonov* v. *U.S. Att'y Gen.*, No. 11-12915, 2012 WL 280725 (11th Cir. Feb. 1, 2012); *Zapata* v. *Holder*, 449 F. App'x 546 (8th Cir. 2012); *Bushati* v. *Holder*, No. 10-3414, 2012 WL 284207 (6th Cir. Jan. 31, 2012); *Makbul* v. *Holder*, No. 11-1580, 2012 WL 268535 (4th Cir. Jan. 31, 2012); *Maze* v. *U.S. Att'y Gen.*, No. 11-12206, 2012 WL 178533 (11th Cir. Jan. 24, 2012); *Wanigasekara* v. *U.S. Att'y Gen.*, No. 11-12350, 2012 WL 89937 (11th Cir. Jan. 12, 2012); *Xiu Qing Chen* v. *U.S. Att'y Gen.*, No. 11-13123, 2012 WL 89892 (11th Cir. Jan. 11, 2012); *Zhenghao Liu* v. *Holder*, No. 11-60095, 2012 WL 45408 (5th Cir. Jan. 9, 2012). In twenty-one cases, the initial asylum applications were filed after May 11, 2005.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Filed December 12, 2011

No. 10-60745

RUI YANG,

Petitioner,

v.

ERIC H. HOLDER, UNITED STATES ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the Board of Immigration Appeals

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Before HIGGINBOTHAM, DAVIS, and STEWART, Circuit Judges. CARL E. STEWART, Circuit Judge:

Rui Yang petitions for review of an order issued by the Board of Immigration Appeals ("BIA"). Yang, a citizen of China, applied for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"), on the grounds that he fears persecution if he returns to China because his family practices Falun Gong. The immigration judge ("IJ") denied Yang's application and the BIA dis-

missed his appeal of the denial. We DENY the petition for review.

I.

Rui Yang arrived in the United States on September 2, 1998, on a J-1 visa to participate in a high-school exchange program. On January 24, 2002, his visa was changed to an F-1 student visa so he could attend college. Because he no longer had the money to afford it, he stopped attending school on June 24, 2002.

Yang applied for asylum, withholding of removal, and protection under CAT on November 28, 2001, after learning that his father faced prosecution in China for advocating the spiritual movement Falun Gong.[1] Yang received an interview in connection with his application, but he did not hear anything after the interview. While waiting to learn the disposition of his application, Yang moved from Los Angeles to Dallas.

A notice to appear was issued on the basis of Yang's failure to comply with visa requirements and mailed to his Los Angeles address.[2] Because Yang did not receive the notice and therefore did not appear, he was ordered removed in absentia on March 10, 2006. He then filed a motion to reopen his case,

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[1] Because the BIA did not address whether Yang's application for asylum was filed within the time period mandated by statute, we need not address Yang's argument that "changed circumstances" and "extraordinary circumstances" allowed him to file his application more than one year after he arrived in the United States.

[2] The administrative record shows that Yang properly notified the BIA that he had changed his address.

arguing that he had not received a decision regarding his 2001 application for asylum. This motion was granted and his application for asylum was transferred to Dallas.

Yang appeared before an IJ on November 26, 2007, and explained that he did not have a lawyer. He received a continuance until March 17, 2008, to seek an attorney to represent him, and then, because he had not yet located an attorney by that date, he received another continuance until May 19, 2008. At his May 19 hearing, the IJ determined that Yang had "failed to maintain and comply with conditions of [his] changed status." Although Yang still had not obtained an attorney, the IJ scheduled a hearing before another IJ to allow Yang to present his case for asylum.

Yang's asylum hearing was held on October 27, 2008. No attorney appeared on Yang's behalf before the IJ in this proceeding. At the hearing, Yang testified that he feared Chinese authorities would arrest him if he returned to China. Yang explained that while he himself practices Christianity and not Falun Gong, his parents practice Falun Gong. In response to Chinese repression of Falun Gong, Yang said that he had sent pro-Falun Gong articles to his parents that his parents had distributed in China. These materials, Yang contended, caused Chinese authorities to arrest his father.

Yang testified that he believes the Chinese authorities want to harm him because of his support for Falun Gong. The Chinese police have not made any contact with Yang. Nevertheless, Yang said that the authorities are aware that he transmitted pro-Falun Gong materials to his parents because the police would have found envelopes containing Yang's re-

turn address when they searched the house of Yang's family. Yang further maintained that he fears physical harm should he return to China because of his previous support for Falun Gong. During the year in which Yang's father was detained, Yang testified, the Chinese authorities beat his father, and they released him only because Yang's uncle paid a bribe to government officials. Yang said his father had not been detained or physically harmed by the Chinese authorities since his year-long detention ended, but his father had been required to meet periodically with government officials to reaffirm his disapproval of Falun Gong. At the present time, according to Yang, his parents are still in China but suffer from a number of medical ailments.

During the hearing before the IJ, Yang did not present evidence specifically corroborating his testimony. He maintained that the Chinese authorities did not issue any paperwork when they charged, arrested, or released his father because the government does not issue paperwork in cases related to Falun Gong. While Yang speaks regularly to his parents by telephone, he informs this court that he not did not seek letters from his family because he did not think they would be considered by the IJ. Yang told the IJ that he had reports corroborating his parents' medical condition, but he had left them at his apartment. When it became clear during the hearing that the IJ wanted more corroborating evidence, Yang offered to retrieve the medical reports and to gather more information. The IJ refused, however, to provide a continuance for Yang to seek letters from his family members, explaining that Yang's application had been pending for two years and he had received assistance from two attorneys in preparing the application. While Yang did not corroborate the

specific aspects of his story, his testimony was corroborated in general terms by the State Department's country report on China, which details a "crackdown" on Falun Gong and cites reports of 3,000 members of Falun Gong dying from torture in the last decade in China.

On October 31, 2008, the IJ denied Yang's application for asylum, withholding of removal, and protection under CAT. In explaining his denial of Yang's application for asylum, the IJ cited Yang's failure to provide documentary evidence pertaining to his father's arrest, statements from his parents or uncle, or documentation of his contention that the Chinese authorities intended to arrest him. The IJ also ruled that Yang's "evidence fails substantively and legally, as it fails to establish a nexus between one of the 5 bases of the Act and his asserted persecution." Because Yang had failed to establish that he was eligible for asylum, the IJ further determined that he had failed to meet the higher standards for withholding of removal and protection under CAT. Finally, the IJ ruled that Yang was not entitled to voluntary departure, explaining that Yang had not requested voluntary departure and did not meet the standard for voluntary departure in any event.

The BIA affirmed the IJ's decision. The BIA ruled that Yang "did not provide sufficient documentation to corroborate his claim." While acknowledging that Yang's contention that he was unable to provide official documentation of his arrest "may be valid," the BIA held that Yang could have provided statements from his parents "detailing the father's detention, the search of their house, and the alleged charge against [Yang]," as well as a statement from his uncle "who [Yang] claimed was the person re-

sponsible for obtaining his father's release." Such statements "were reasonably available," the BIA explained, "and it was reasonable to expect such evidence to corroborate the material aspects of [his] case." Thus, the BIA held that Yang "failed to meet [his] burden of proof because [he] has not provided sufficient evidence of the foundation of [his] claim." The BIA also ruled that Yang failed to meet the higher burden of showing that he was entitled to withholding of removal or protection under CAT. The BIA did not address the IJ's determination that Yang did not qualify for voluntary departure or that Yang had not established a well-founded fear of future persecution.

Yang subsequently petitioned this court to review the BIA's order. In support of his petition for review of the BIA's order, Yang includes a notice translated from the Chinese purporting to show that Yang faces charges of slander against the Chinese government on account of his support for Falun Gong. This notice, which post-dated the BIA's order, was not submitted to the IJ or BIA.

II

On appeal, Yang argues that the BIA erred by concluding that he had failed to prove that he was a refugee.3 Specifically, he challenges the BIA's determination that his failure to provide corroborating evidence provided a sufficient rationale for the BIA to deny his application for asylum, even without

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[3] Yang also argues that the IJ erred by holding that Yang's fear of future persecution was not on account of a protected ground of asylum. Because the BIA did not adopt this rationale for denying Yang's application, however, we do not consider it here. *See Zhu* v. *Gonzales*, 493 F.3d 588, 594 (5th Cir. 2007).

making a determination about his credibility. This challenge implicates two questions that we have jurisdiction to consider: first, whether, as a matter of law, it is permissible for the BIA to deny an application for asylum based solely on petitioner's failure to submit evidence corroborating his testimony; and second, whether the BIA reasonably applied this rule when considering Yang's application. Yang also contends that the BIA erred by denying his request for withholding of removal and protection under CAT.

A.

"We review factual findings of the BIA and IJ for substantial evidence, and questions of law de novo, giving considerable deference to the BIA's interpretation of the legislative scheme it is entrusted to administer." *Zhu*, 493 F.3d at 594 (internal quotation marks and citation omitted). We review the order of the BIA and the ruling of the IJ to the extent it influences the order of the BIA. *See Mikhael v. INS*, 115 F.3d 299, 302 (5th Cir. 1997).

B.

We first address whether Yang's failure to submit corroborating evidence justifies the denial of his application for asylum. To be eligible for asylum, an applicant must establish that he is a "refugee." 8 C.F.R. § 1208.13(a). A person is a refugee if he has suffered past persecution or has a well-founded fear of future persecution. *Id.* § 1208.13(b). To establish a well-founded fear of future persecution, an applicant for asylum must show a "reasonable probability" of suffering persecution if returned to his home country. *Id.* § 1208.13(b)(2)(i)(B). The applicant bears the burden of proof of establishing that he is a refugee. *Id.* § 1208.13(a).

The BIA determined that Yang did not carry his burden of proving that he is a refugee because he did not provide reasonably available evidence corroborating his testimony. This determination was based on the BIA's interpretation of 8 C.F.R. § 1208.13(a), which reads as follows:

> The burden of proof is on the applicant to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

Id.[4] The BIA's interpretation of 8 C.F.R. § 1208.13(a) is based on its determination in *Matter of S-M-J-*, 21 I. & N. Dec. 722, 724-26 (BIA 1997). In *Matter of S-M-J-*, the BIA held that denial of an application for asylum can be based on the absence of reasonably available corroborating information for the applicant's testimony, even if the BIA has no reason to believe that the applicant lacked credibility. The BIA wrote that even credible testimony might not satisfy the applicant's burden of proof because testimony is only "part of the body of evidence which is intertwined and considered in its totality." 21 I. & N. Dec. at 729. The government argues that this court should defer to the BIA's reasoning in *Matter of S-M-J-*.

Yang responds that credible testimony should be sufficient to carry a petitioner's burden of proof in an

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[4] The parties agree that the REAL ID Act, which explicitly authorizes the BIA to require corroborating information even when applicants for asylum are credible, does not govern Yang's burden of proof because Yang applied for asylum in 2001, before Congress passed the REAL ID Act. *See Matter of S-B-*, 24 I. & N. Dec. 42 (BIA 2006).

application for asylum. In support of his argument, he relies on the language of 8 C.F.R. § 1208.13(a), and a Seventh Circuit case, *Georgis v. Ashcroft*, 328 F.3d 962, 969 (7th Cir. 2003).

Because we defer to the BIA's reasonable interpretations of its own regulations, *Zhu*, 493 F.3d at 594, we must decide whether the BIA's interpretation of 8 C.F.R. § 1208.13(a) is reasonable. The question is one on which circuits have divided. The Ninth Circuit held that the BIA cannot reject credible testimony on the grounds that it was uncorroborated, relying on three separate lines of Ninth Circuit precedent that, according to the court, mandated its conclusion. *See Ladha v. INS*, 215 F.3d 889, 899-901 (9th Cir. 2000), *overruled on other grounds by Abebe v. Mukasey*, 554 F.3d 1203, 1208 (9th Cir. 2009). The Second, Third, Sixth, and Eighth Circuits, conversely, have all held that the BIA's construction of 8 C.F.R. § 1208.13(a) in *Matter of S-M-J-* was reasonable. *See Diallo v. INS*, 232 F.3d 279, 285-86 (2d Cir. 2000); *Abdulai v. Ashcroft*, 239 F.3d 542, 554 (3d Cir. 2001); *Dorosh v. Ashcroft*, 398 F.3d 379, 382 (6th Cir. 2004); *El-Sheikh v. Ashcroft*, 388 F.3d 643, 647 (8th Cir. 2004). The Seventh Circuit permits the BIA to require corroboration of testimony in certain circumstances but prohibits the BIA from rejecting applications for asylum based on the applicant's failure to provide corroborating evidence if the testimony is "specific, detailed, and convincing." *Compare Gontcharova v. Ashcroft*, 384 F.3d 873, 877 (7th Cir. 2004) ("Nevertheless, we do not reject the BIA's corroboration rule out of hand.") *with Dawoud v. Gonzales*, 424 F.3d 608, 612-13 (7th Cir. 2005) ("The regulation, in our view, cannot bear an interpretation that would exclude all possibility of an applicant's relying exclusively on credible but uncorroborated testimony, so

long as that testimony is specific, detailed, and convincing.").[5]

Like most other circuits to have considered this question, we disagree with Yang's argument that the BIA can never require credible applicants for asylum to corroborate their testimony. The Third Circuit persuasively explained why such an interpretation is not supported by the language of the regulation:

> The regulation states that credible testimony may be enough to meet the applicant's burden of proof. Saying that something may be enough is not the same as saying that it is always enough; in fact, the most natural reading of the word 'may' in this context is that credible testimony is neither per se sufficient nor per se insufficient.

Abdulai, 239 F.3d at 552. Given the commonly understood meaning of the word "may," it cannot be that all applicants who provide credible testimony have satisfied their burden of proof.

We still must decide, however, whether it is reasonable for the BIA to interpret the regulation such that the failure to provide corroborating proof is "dispositive" and relieves it of any obligation to make a credibility determination. In response to Yang's argument that his testimony alone was sufficient to carry his burden of proof, the BIA wrote that Yang

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[5] While *Georgis v. Ashcroft*, the Seventh Circuit case cited by Yang, does note that corroborating evidence is not always necessary for applicants for asylum, the court's decision to remand was based on the applicant's submission of evidence specifically corroborating her testimony. *See Georgis*, 328 F.3d at 969. Accordingly, the decision does not help Yang.

has "failed to meet [his] burden of proof because [he] has not provided sufficient evidence of the foundation of his claim." This sentence includes a footnote that describes Yang's failure to corroborate his testimony as "dispositive of the appeal." Accordingly, the BIA did not make a determination regarding Yang's credibility. The BIA's view that a failure to corroborate testimony is "dispositive" seems, at first glance, to be in tension with the language of 8 C.F.R. § 1208.13(a), which explicitly allows applicants for asylum to establish their entitlement to relief without corroborating their credible testimony. This language seems to imply that the first step for the BIA in assessing applications for asylum should be to determine whether the applicant's testimony, by itself, satisfies the applicant's burden of proof. Despite this language, the BIA does not assess the credibility of an applicant's testimony–and therefore does not decide whether the applicant's testimony satisfies the burden of proof by itself–unless the BIA determines that corroborating evidence is not reasonably available. In effect, the BIA's interpretation reads in an additional clause to the language of 8 C.F.R. § 1208.13(a): "The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration, *but only if corroboration is not reasonably available to the applicant*."

We cannot say that this interpretation is unreasonable. Two circuits have implicitly rejected this iteration of the BIA's corroboration rule by remanding due, in part, to the BIA's failure to make a credibility determination. *See Diallo*, 232 F.3d at 287; *Ikama-Obambi v. Gonzales*, 470 F.3d 720, 725 (7th Cir. 2006). We disagree with these decisions because making an explicit credibility determination is not necessary to effectuate the meaning of the regula-

tion. *Cf. Dorosh*, 398 F.3d at 382 (holding that court need not address BIA's credibility determination where applicant for asylum did not sufficiently corroborate her testimony). According to the BIA's interpretation of 8 C.F.R. § 1208.13(a), applicants are eligible for asylum based solely on credible testimony only if corroborating evidence is not reasonably available. Our conclusion that this interpretation is reasonable is supported by Congress's codification of a similar rule, *see* 8 U.S.C. § 1158(b)(1)(B)(ii), and by the importance we ascribe to IJs' ability to verify applicants' testimony. *See Matter of S-M-J-*, 21 I. & N. at 730-31. Because the BIA's interpretation permits it to deny applications for asylum based solely on their failure to provide reasonably available corroborating evidence, we would elevate form over substance if we required the BIA to make a credibility determination when it decides that an applicant failed to provide reasonably available corroborating evidence.

Further, our circuit precedent supports the BIA's interpretation. We have implicitly approved of the BIA's requirement that applicants for asylum submit information corroborating their testimony. *Zhao v. Gonzales*, 404 F.3d 295, 304-05 (5th Cir. 2005) (describing "requirement" that applicants for asylum submit corroborating information); *see also Mutagwanya v. Gonzales*, 129 Fed. App'x 899, 900-01 (5th Cir. 2005) ("When it is reasonable to expect that such evidence exists, an applicant should provide corroborating evidence relevant to the specifics of his allegations, or he should provide an explanation of why he did not provide such evidence."). Our implicit approval of the "requirement" that applicants for asylum submit corroborating evidence further implies that we approve of rejecting applicants for the sole

reason that they do not meet this requirement. Additionally, in an unpublished opinion, we rejected an applicant's argument that the BIA's failure to make a credibility determination with respect to her testimony necessitated remand of her application for asylum. *See Mei He v. Holder*, No. 10-60915, 2011 WL 4436627, at *2 (5th Cir. 2011) (unpublished). Accordingly, the BIA need not make a credibility determination when it determines that corroborating evidence is reasonably available to the applicant but was not submitted.

C.

Having determined that the BIA reasonably interpreted its own regulations in *Matter of S-M-J-* when it ruled that applicants can be required to provide reasonably obtainable corroborating evidence even when their testimony is credible, we next consider whether that rule was appropriately applied to Yang's application.

The BIA based its determination that Yang did not provide reasonably available corroborating evidence on Yang's failure to provide a letter from his parents detailing their detention and the search of their house, and a letter from Yang's uncle detailing how Yang's father was released. Yang argues that he did not obtain a letter from his parents because he "(generally) always communicated with his parents by telephone." He further contends that he did not know that such letters would have helped his application, but he might have known better if he had been represented by a lawyer.[6]

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[6] Yang also explains that he attempted to submit medical records to the BIA, but these records were not accepted because

Our authority to review determinations with respect to availability of evidence is limited. According to the REAL ID Act, "No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence unless the court finds a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable."[7] 8 U.S.C. § 1252 (b)(4). Thus, we must consider whether the IJ was "compelled to conclude" that the letters from Yang's family members were unavailable. *See id.*

We are not convinced that the IJ here was compelled to conclude that letters from Yang's family members were unavailable. In fact, Yang's brief does not argue that letters from Yang's family members were unavailable, or even that they were especially difficult to obtain. While Yang argues that he generally speaks with his parents by telephone, this does not establish that he is unable to obtain letters from them. He does not explicitly address whether a letter from his uncle was reasonably available in his briefing. He instead argues that he did not realize he was supposed to present letters from his family members

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he did not submit them to the IJ. He explains that he left the medical records at home the day of his hearing, and that they had not been translated prior to the hearing. We need not consider these contentions because Yang's failure to submit corroborating medical records was not a basis for the BIA's denial of his application.

[7] While the REAL ID Act does not govern Yang's burden of proof, it does govern our standard of review with respect to the IJ's determination regarding corroborating evidence. *See* REAL ID Act of 2005 § 101(e), Pub. L. 109-13, 119 Stat. 231 (providing that amended standard of review set forth in 8 U.S.C. § 1252(b)(4) takes effect on the date the REAL ID Act was enacted).

in his application because he was not represented by counsel. He does not cite, and our research does not uncover, cases supporting the proposition that a lack of representation in an asylum proceeding excuses the duty of applicants for asylum to satisfy their burden of proof.[8]

To the extent that Yang argues that he would have obtained the required evidence if the IJ had granted him more time, he effectively contends that the IJ abused his discretion by failing to grant Yang a continuance to obtain more evidence. Yang's failure to raise this argument to the BIA, however, constitutes a failure to exhaust administrative remedies and deprives us of jurisdiction to consider this argument. *See Omari v. Holder*, 562 F.3d 314, 318 (5th Cir. 2009). In his briefing to the BIA, Yang wrote, "Again, perhaps if Mr. Yang had had the benefit of having had a lawyer for his hearings, he might have known well enough to have gotten letters from his parents . . . ." The manner in which Yang raised this argument did not exhaust his administrative remedies. As we have explained, "the purpose of the statutory exhaustion requirement is to allow the BIA the opportunity to apply its specialized knowledge and experience to the matter and to resolve a controversy or correct its own errors before intervention." *See Lopez-Dubon v. Holder*, 609 F.3d 642, 644 (5th Cir. 2010) (quoting *Sidabutar v. Gonzales*, 503 F.3d 1116, 1122 (10th Cir. 2007)) (internal quotation marks and citations omitted). Here, the phrasing of

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[8] While the IJ noted that Yang had the assistance of two lawyers prior to his October 27, 2008, hearing, there is no evidence that these lawyers assisted Yang with the application for asylum that the IJ denied on October 31, 2008.

Yang's brief was not sufficiently specific to provide a reasonable opportunity for the BIA to correct the agency's decision before judicial intervention.[9] Instead of requesting a continuance, Yang's argument suggests that he is urging the BIA to alter the standard for what evidence is considered "reasonably available" in cases of applicants proceeding *pro se*. Accordingly, we cannot conclude that Yang exhausted his administrative remedies and we do not have jurisdiction to consider this argument.

D.

In addition, Yang raises a number of other arguments over which we do not have jurisdiction. Yang argues that this panel should consider evidence that he submits to this court for the first time on appeal. He informs this court that he has also submitted the evidence to the BIA in a motion to reopen the case. Because the BIA has not yet ruled on this motion, however, Yang has not exhausted his administrative remedies. *See Omari*, 562 F.3d at 318. Accordingly, this court does not have jurisdiction to consider Yang's newly submitted evidence. *Id.* For the same reason, we also reject Yang's request for voluntary departure. Because he failed to seek voluntary departure before the IJ, Yang failed to exhaust his administrative remedies. *See id.*

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[9] Yang was more specific in his argument to the BIA and to this court that he should have received more time to retrieve corroborating medical records from his residence. We need not address this issue because the BIA's decision was not based on Yang's failure to provide these medical records.

E.

Because we deny Yang's petition for review with respect to his application for asylum, it follows that we also deny his petition for review with respect to his application for withholding of removal, which has a more demanding standard than asylum. *See* 8 U.S.C. 1231(b)(3) (restricting withholding of removal to immigrants whose life or freedom the Attorney General decides "would be threatened in that country . . ."). Given Yang's failure to argue at any point in his brief that he is more likely than not to be tortured should he return to China, we also hold that he has not carried his burden of proving entitlement to relief under CAT. *See* 8 C.F.R. §§ 1208.16(c), 1208.18(a); *Dardar v. Lafourache Realty Co., Inc.*, 985 F.2d 824, 831 (5th Cir. 1993) ("Questions posed for appellate review but inadequately briefed are considered abandoned.") (citations omitted). While we "liberally construe briefs of *pro se* litigants and apply less stringent standards to parties proceeding *pro se* than to parties represented by counsel, *pro se* parties must still brief the issues and reasonably comply with the standards of Rule 28." *Grant v. Cuellar*, 59 F.3d 523, 524 (5th Cir. 1995) (citation omitted).

III.

For the foregoing reasons, we DENY the petition.

APPENDIX B

Decision of the Board of Immigration Appeals

File: A095 200 558 - Dallas, TX
Date: Aug 31 2010
In re: RUI YANG

IN REMOVAL PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT: Pro se
ON BEHALF OF DHS: Cynthia D. Goodman
Assistant Chief Counsel

CHARGE:

> Notice: Sec. 237(a)(1)(C)(i), I&N Act [8 U.S.C. § 1227(a)(1)(C)(i)] - Nonimmigrant - violated conditions of status

APPLICATION: Asylum; withholding of removal; Convention Against Torture

On October 31, 2008, an Immigration Judge denied the respondent's application for asylum as well as his request for withholding of removal and protection pursuant to the regulations implementing the United States' obligations under the Convention Against Torture ("CAT"). The respondent, a native and citizen of the People's Republic of China, now appeals. The respondent's request for a waiver of the

appellate filing fee is granted. *See* 8 C.F.R. § 1003.8(a)(3) (2010). The appeal will be dismissed.[1]

There is no past persecution in this case because the respondent was never personally harmed in China (I.J. at 8). The issue is whether the respondent sufficiently met his burden to show a well- founded fear of future persecution for asylum purposes. *See* section 208(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B); 8 C.F.R. § 1208.13(a). To show a well-founded fear of persecution, an alien must show a "reasonable possibility" of suffering persecution if returned to the country in question. 8 C.F.R. § 1208.13(b)(2)(i)(B). To make such a showing, the alien must establish that a reasonable person in his or her circumstances would fear persecution. *Matter of Kasinga,* 21 I&N Dec. 357 (BIA 1996); *Matter of Mogharrabi,* 19 I&N Dec. 439 (B(A 1987). *See also INS v. Cardoza-Fonseca,* 480 U.S. 421 (1987). We review this issue under the *de novo* standard. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent's parents practice Falun Gong. According to the respondent, Chinese authorities arrested his father in August 2001, and detained him for 1 year, after they discovered that the father posted and distributed Falun Gong material, which the respondent provided from the United States (I.J. at 5, 6, 7; Respondent's Br. at 3-4; Tr. at 46, 49-51, 53, 69, 77; Exh. 3, attached statement). The material included newspaper and internet articles regarding the Chinese government's unfair treatment of Falun Gong followers (I.J. at 6, 7; Tr. at 49, 53, 74-75; Exh.

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[1] The respondent filed his application before May 11, 2005. Thus, his application is not governed by the provisions of the REAL ID Act. *Matter of S-B-,* 24 I&N Dec. 42 (BIA 2006).

3, attached statement). The respondent claimed that the police, during a search of the parents' home, found proof that the respondent mailed the Falun Gong material to his father (I.J. at 6; Respondent's Br. at 4; Tr. at 49-50, 55, 76; Exh. 3, attached statement). The police charged the respondent with colluding with overseas reactionary forces and attempting to subvert the communist party (I.J. at 8; Respondent's Br. at 4; Tr. at 51, 67; Exh. 3, attached statement). The respondent fears that the police will punish him for providing his father with the Falun Gong material if he is removed to China (I.J. at 8; Respondent's Br. at 4; Tr. at 63-64, 72; Exh. 3, attached statement). He also claimed that his father is still required to report routinely to the police to say that he no longer practices Falun Gong (I.J. at 8; Respondent's Br. at 4; Tr. at 52; Exh. 3, attached statement).

We see no reason to disturb the Immigration Judge's ruling in this case. *See* 8 C.F.R. § 1003.1 (d)(3)(ii). The respondent did not provide sufficient documentation to corroborate his claim (I.J. at 6, 9; Tr. at 65, 81).[2] The respondent's assertion that he could not provide official documentary evidence of his father's detention because there were no official papers may be valid (Respondent's Br. at 6; Tr. at 64, 80). However, the respondent could have provided letters from his parents detailing the father's detention, the search of their house, and the alleged charge against the respondent (Tr. at 65). He also

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[2] On appeal, the respondent submitted his parents' medical records. However, this Board does not consider evidence submitted on appeal but rather reviews the record that was before the Immigration Judge. *See Matter of Fedorenko,* 19 I&N Dec. 57, 73-4 (BIA 1984).

could have provided a letter from his uncle, who the respondent claimed was the person responsible for obtaining his father's release (Tr. at 64). The respondent communicated with his family before the hearing, and had ample opportunity to obtain corroborating statements from them (I.J. at 9,10; Tr. at 55, 58). The statements were reasonably obtainable, and it was reasonable to expect such evidence to corroborate the material aspects of the respondent's case (I.J. at 9, 10). *See Matter of S-M-J-,* 21 I&N Dec. 722 (BIA 1997); *Matter of Dass,* 20 I&N Dec. 120 (BIA 1989). The respondent's explanation for the absence of corroborating evidence, *i.e.,* he always communicated with his parents by telephone, is not persuasive (Respondent's Br. at 6). *Matter of S-M-J-, supra,* at 724.

On appeal, the respondent asserts that corroborating evidence was not necessary in his case because credible testimony may be sufficient to sustain his burden of proof (Respondent's Br. at 7). *See* section 208(b)(1)(B)(ii) of the Act, 8 U.S.C. § 1158(b)(1)(B)(ii); 8 C.F.R. § 1208.13(a). *See also Abdel-Masieh v. INS,* 73 F.3d 579 (5th Cir. 1996). We conclude, however, that he "has failed to meet [his] burden of proof because [he] has not provided sufficient evidence of the foundation of [his] claim." *Matter of S-M-J-, supra,* at 731.[3]

For these reasons we conclude that the respondent has not met his burden of proof for asylum. It follows that the respondent also has failed to meet the higher burden for withholding of removal under

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[3] We need not address the respondent's remaining argument because the lack of corroborative evidence is dispositive of the appeal.

section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3). Finally, the respondent failed to meet his burden with respect to protection under the CAT because he has not demonstrated that he more likely than not will be subjected to torture if returned to China. *See* 8 C.F.R. §§ 1208.16(c), 1208.18(a).

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE OF IMMIGRATION REVIEW

DALLAS IMMIGRATION COURT

Date: October 31, 2008.
File: A095-200-558.

Immigration Removal Proceedings in the Matter of: Yang Rui, Respondent.

Charge: Section 237(a)(1)(C)(i), INA.

Application(s): Asylum under INA, Section 208; Withholding under INA, Section 241(b)(3); and Article III, United Nations Convention Against Torture.

On Behalf of the Respondent: Pro Se.

On Behalf of the Department of Homeland Security/Immigration and Customs Enforcement: Cynthia Goodman, Assistant Chief Counsel, Office of the Chief Counsel,

WRITTEN DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

The Respondent is a 26 year old, unmarried male, native and citizen of the People's Republic of China. On January 20, 2006, the Department of Homeland Security charged the Respondent with being subject to removal from the United States. (Exhibit 1). During the course of the proceedings, the Respondent entered pleas as follows.

Allegations

(1) The Respondent admitted that he is not a citizen or national of the United States;
(2) The Respondent admitted that he is a native and citizen of the People's Republic of China;
(3) The Respondent admitted that he was admitted to the United States at San Francisco, California, on or about September 2, 1998 as a J1;
(4) The Respondent admitted that his status was changed to that of F1 on January 24, 2001; and,
(5) The Respondent admitted that he failed to maintain status or to comply with the conditions of his change of status in that he failed to maintain F1 status since June 24, 2002.

Charge: The Respondent conceded that he is subject to removal from the United States pursuant to Section 237(a)(1)(C)(i), INA, as amended, in that after admission as a nonimmigrant and subsequent change to another nonimmigrant status pursuant to Section 248 of the Act, he failed to maintain or comply with the conditions of your change of status.

Sustaining of the Charge: Pursuant to the Respondent's pleas, the previous presiding Immigration Judge sustained the allegations and charge against the Respondent.

Application: The Respondent sought the applications of asylum, withholding of removal, protection under Article III, U.N. Convention Against Torture.

Representation: Pro Se. The Respondent chose to represent himself at his Individual Hearing. As noted in the Record was previously represented by Counsel, Lauren H. Mason, Esquire.

II. MOTIONS

None submitted.

III. STATEMENT OF THE LAW

(Asylum, Withholding of Removal, Convention Against Torture)

The burden is on the Respondent to establish that he is eligible for asylum, withholding or relief pursuant to the Convention Against Torture.

A. Asylum under Section 208 of the INA.

To qualify for asylum under Section 208 of the Act, the Respondent must show that he is a "refugee" within the meaning of Section 101(a)(42)(A) of the Act. See Section 208(a) of the Act. The definition of refugee includes a requirement that the Respondent demonstrate either that he has suffered past persecution or that he has a well-founded fear of future persecution in his country of nationality or, if stateless, his country of last habitual residence on account of one of the five statutory ground: race, religion, nationality, membership in a particular social group, or political opinion. See INS v. Stevic, 467 U.S. 407 (1984). The alien must show that he has a subjective fear of persecution and that the fear has an objective basis. The objective basis of a well-founded fear of future persecution is referred to in the regulations as a "reasonable possibility of suffering such persecution" if the alien was to return to his native country. 8 C.F.R., Section 208.13(b)(2) (2000). The Respondent has established that his fear is "well- founded" if he shows that a reasonable person in his circumstances would fear persecution. Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

Further, an alien who establishes that he suffered past persecution within the meaning of the Act shall be presumed also to have a well-founded fear of persecution. The presumption may he rebutted if a preponderance of the evidence establishes that, since the time the persecution occurred, conditions in the applicant's home country have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he were to return. An alien who establishes past persecution, but not ultimately a well-founded fear of future persecution, will be denied asylum unless there are compelling reasons for not returning him which arise out of the severity of the past persecution. 8 C.F.R., Section 208.13(b)(1) (2000). See also Matter of Chen, 20 I&N Dec 16 (BIA 1989).

The well-founded fear standard required for asylum is more generous than the "clear probability" standard of withholding of removal. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). We first, therefore apply the more liberal 'well-founded fear" standard when reviewing the Respondent's application, because if it fails to meet this test, it follows that he would fail to meet the clear probability test for withholding of removal.

Additionally, the persecution must be inflicted by either the government or by persons the government is unwilling or unable to control. Government unwillingness to protect the applicant is not found where the applicant was afraid to approach the government for protection for personal reasons. Adebisi v. INS, 952 F.2d 910, 914 (5th Cir. 1992).

Finally, an applicant must also establish that he merits asylum in the exercise of the Court's discre-

tion. See Matter of Pula, 19 I&N Dec. 467 (BIA 1987).

B. Withholding of Removal under Section 241(b)(3) of the Act

To qualify for withholding of removal under Section 241 (b)(3) of the Act, the Respondent's facts must show a "clear probability" that his life or freedom would be threatened in the country directed for deportation on account of race, religion, nationality, membership in a particular social group or political opinion. See INS v. Stevic, 467 U.S. 407 (1984). This means that the Respondent's facts must establish that it is more likely than not that he would be subject to persecution for one of the grounds specified.

C. Withholding/Deferral of Removal under the Convention Against Torture

In adjudicating an applicant's request for relief under the United States Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"), 8 C.F.R., Part 208, is applicable, particularly Sections 208.16, 208.17, and 208.18. 8 C.F.R., Section 208.18(b)(1) provides, "An alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999, may apply for withholding of removal under 208.16(c), and, if applicable, may be considered for deferral of removal under Section 208.17(a). 8 C.F.R., Section 208.18(b)(1) (2000).

Among the important tenets of this law are the following:

> Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for

> such purposes as obtaining from him a third person information or a confession, punishing him or her for an act he or she may have committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence [sic] of a public official or other person acting in an official capacity.

8 C.F.R., Section 208.18(a)(1) (2000)

To constitute torture, the "act must be directed against a person in the offender's custody or physical control." 8 C.F.R., Section 208.16(a)(6) (2000). The pain or suffering must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R., Section 208.18(a)(1) (2000). "Acquiescence' requires that the public official have prior awareness of the activity and "thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R., Section 208.18(a)(7) (2000). Torture is an "extreme form of cruel and inhuman treatment" and does not include pain or suffering arising from lawful sanctions. 8 C.F.R., Section 208.18(a)(2) and (3) (2000).

In order to constitute torture, the mental pain or suffering must be "prolonged." 8 C.F.R., Section 208.18(a)(4)(2000). It also must be caused by or resulting from intentional or threatened infliction of severe physical pain or suffering, threatened or actual administration or application of mind altering substances or similar procedures, or threatened imminent death. Id.

The applicant for withholding of removal under the Convention Against Torture bears the burden of proving that it is "more likely than not" that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R., Section 208.16(c)(2) (2000). In assessing whether the applicant has satisfied the burden of proof, the Court must consider all the evidence relevant to the possibililty [sic] of future torture, including:

> (i) Evidence of past torture inflicted upon the applicant;
>
> (ii) Evidence that the applicant could relocate to a different part of the country of removal, where applicable
>
> (iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable;
>
> (iv) Other relevant information regarding conditions in the country of removal.

8 C.F.R., Section 208.16(c)(3)(i-iv) (2000).

III. EVIDENCE

The following documentary and testimonial evidence was presented during the course of the proceedings.

Documentary Evidence

Exhibit 1: Notice to Appear, dated January 20, 2006.
Exhibit 2: U.S. Department of State Country Reports on Human Rights Practices - 2007, China.
Exhibit 3: Application for Asylum and/or Withholding of Removal (Form 1-589), signed by Asylum Officer, January 10, 2002.

Exhibit 4: Application for Asylum and/or Withholding of Removal (Form I-589), signed by Immigration Judge, October 27, 2008.

Testimonial Evidence

A. The Respondent testified, in part, as follows.

Examination by the Immigration Judge

The Respondent said that he was 27 years old and that he was born in China (Zhengzhou, Henan). He said that his mother and father sent him to the United States in 1998. He came as a J-1 exchange student to complete high school in Vermont. He said that he completed his last year in high school in 1999. Became an F-1. The Respondent said he renewed visa June 2002. He said he went out of status and did not have the money to continue.

The Respondent said that his parents supported him. He said that he did not graduate from college. He had gone to the American English Academy in Los Angeles. He said that he had gone to two language schools. He said that in 2002 he was no longer in school.

The Respondent said that in 2001 he applied for asylum. He was interviewed in Orange County, California.

The Respondent said that his parents practice Falun Gong. He said that his father was detained for one year for practicing Falun Gong. The Respondent said that after he came to the United States he sent some Falun Gong materials to his father in China.

Respondent's Testimony

The Respondent said that he wanted to stay in the United States and become well educated. He said

that in 1999 the Chinese government said that Falun Gong was evil. Even so, the Respondent said that his parents practiced Falun Gong. He said that during the Spring Festival of 2000 three people from his hometown committed suicide in Tiennamen Square. The Respondent said he was in the United States at the time. He later sent Falun Gong material back to his parents in China. He said that the materials said that Falun Gong was not bad.

The Respondent said that in August of 2001, his father had distributed the Falun Gong materials to others. He said that his father's house was searched by the authorities and they found the Falun Gong materials that he had sent his father. He said that his father was detained for one year, and that was in 2002. The Respondent further stated that the police put him on a black list. He said that they hold his I.D. and that he is afraid to go back.

Cross-Examination

The Respondent said that his father was detained because he had posted the Falun Gong materials. The Respondent said that he sent Falun Gong information to his father that he had got off internet saying that Falun Gong practicioners [sic] were treated unfairly. He said that his father was released in 2002.

The Respondent said that the police have called his mother several times. The Respondent said that he did not have any letters from his mother or father. He also stated that he did not have a copy of an order for him from the police. He also said d that he had no letters from the government.

The Respondent said that when they searched his father's home they found the Falun Gong mate-

rials he had sent his father. He said that he spoke to his parents about two weeks ago. The Respondent that his mother had kidney problems. He said that she is on dialysis. He said that his father has diabetes.

He said that he does not practice religion. He said that he had no political party. The Respondent said that he wants to finish school in the United States. He also wants to help his parents financially.

The Respondent said that both of his parents had health problems before he came to the United States. He also stated that he wanted to work here and help his parents financially.

The Respondent said that since 2002 that neither of his parents have been harmed. The Respondent said that his father is about 60 and that his mother is 57. He said that the government make his father report to them every few weeks, and tell them that he is not practicing Falun Gong. The Respondent said that his father still practices Falun Gong. The Respondent also said that the Government knows where he is.

The Respondent said that he lived in Los Angeles from 2002 to 2005. In 2005 he moved to Dallas.. He said that he had worked illegally in restaurants during that time period. He said that he did not send any money back to his parents.

The Respondent said that he would go back to China if the Government would not press charges against him. The Respondent said that the Government will punish him if he goes back.

The Respondent said that he has a rich uncle in China.

The Respondent said that he had used false documents in this country.

The Respondent said that he was not married.

The Respondent said that it was in August of 2001 that his father was arrested. After that his uncle wrote him a letter and told that his parents would not be able to pay tuition. The Respondent said that his Uncle (You Lin Ho) was the uncle who wrote. He said that his uncle Zhang was not his uncle, but rather a good friend of the family.

The Respondent said that he wants a good education from this country.

He said that his father used to have his own business.

The Respondent said that his mother still practices Falun Gong to help with her kidney. His father also practices Falun Gong.

The Respondent said that he is now a Christian and that he was baptized in May of this year.

Examination by the Immigration Judge

The Respondent said that he sent his father Chinese news articles for newspapers. The articles were on Falun Gong. He said that he mailed the articles on 7 different occasions. The articles talked about people who practice Falun Gong, and that they are prosecuted by the Chinese government.

He said that his uncle paid to get his father out of jail.

The Respondent said that he had never been harmed while in China.

The Respondent said that his father once worked for the government as a fire prevention leader. He now does deliveries. He had to report to the police station periodically and say that he no longer practices Falun Gong.

THAT COMPLETES THE SUMMARY OF EVIDENCE PRESENTED.

IV. FACTUAL AND LEGAL ANALYSIS & CREDIBILITY

The credibility of the Respondent is of extreme importance in assessing the claim. In determining credibility of the Respondent's testimony this Court has taken into account not only his demeanor while testifying, but also the rationality, internal consistency and inherent persuasiveness of his testimony. The Respondent must also establish that the facts if true would satisfy the stated standards of eligibility for the relief requested.

> The Real I.D. Act credibility framework in section 208(b)(1)(B)(iii), INA, applies only to "applications for asylum, withholding of removal, or other relief from removal on or after [May 11, 2005]." Pub. L. No. 109-13, 119 Stat. 231 (2005), section 101(h)(2). An application is "made" on the date it is initially filed. Therefore, when an application for asylum is filed with an asylum officer prior to the May 11, 2005, effective date, and then renewed in removal proceedings subsequent to that date, the real I.D Act credibility provisions do not apply.

Ibeagwa v. Mukasey, 2008 WL 2663426 (9th Cir., July 8, 2008) (unpubished [sic]).

As the Respondent in this case made his application before the Asylum Officer on January 6, 2002, the REAL ID Act credibility provisions do not apply.

In the instant case, the Respondent's application provides that he seeks asylum based on his membership in a particular social group and, also, his political opinion.

During the course of the Respondent's testimony he provided that he himself had never been harmed while in China. However, he expresses a fear of returning to China because he states that the police there will punish him for his providing his father with articles and materials in support of Falun Gong. In his written statement, which is attached to his application for asylum, the Respondent specifically states that the Chinese police have, "charged me with colluding with overseas reactionary forces and attempting to subvert the communist party."

In his testimony and written statement, the Respondent provides that his father was detained for one year in the 2001/2002 time period for posting materials and articles favorable the practice of Falun Gong. This occurred after the Respondent had left China and was living in the United States. The Respondent further provides in this testimony and written statement that his father still reports to the Chinese authorities periodically to assure them that he is no longer practicing Falun Gong. Even so, the Respondent provided that his parents still practice Falun Gong.

Other than his own testimony, the Respondent has little evidence in support of his assertions. At his immigration removal hearing, the Respondent stated that he had no records or other evidence that would

support his father's arrest and detention. No statements from the Respondent's father or mother were included in the Respondent's evidence. No statement from the Respondent's uncle, the uncle who paid the police authorities to obtain the release of the Respondent's father from detention. Further, no evidence other than the Respondent's testimony, that the Respondent was being sought by the Chinese authorities.

The only potential evidence that the Respondent spoke to was a medical report concerning his father following the asserted detention. However, the Respondent stated that he did not have that report with him at his hearing. This Court did not grant a continuance to the Respondent to gather any more evidence. In not doing so, this Court notes that this Respondent was charged with removal on January 20, 2006, nearly three years before his immigration removal proceeding. Further, on January 10, 2002, the Respondent appeared before an Asylum Officer. Further, the Respondent has had the services of two attorneys: On November 28, 2001, John D. Lueck, Esquire, provided a Notice of Entry of Appearance; and, on May 7, 2007, Attorney Lauren H. Mason, provided Notice of Entry of Appearance on the Respondent's behalf. This Respondent has had more than ample time to present his case before the Immigration Court.

Notably, the Respondent provided that his father had not been detained, nor harmed since the 2001/2002 detention. Once again, no corroborative evidence was provided to establish that the asserted detention even occurred.

An applicant for asylum is well advised that while his testimony may in some cases be sufficient

to satisfy his burden, even in the absence of corroborating evidence. Even so, corroborating evidence should not be considered merely optional; corroborating evidence should be presented where available and where it is reasonable to expect. Matter of Dass, 20 I&N Dec. 120 (BIA 1989); Matter of S-M-J-, Interim Decision, 3303 (BIA 1997). An alien, whose testimony alone is insufficient to meet his burden, and who does not provide any evidence to corroborate his claim, when such evidence is reasonably available, fails to meet his burden of proof. In this instance, this Respondent has had years to put forth his case, he has had the services of two prior attorneys, yet his evidence, in this Court's view, is insufficient to meet his burden.

The Respondent's evidence reflects that he has not suffered harm from anyone in China. That his father's asserted detention occurred over 6 years ago. Further, the Respondent's evidence, in this Court's view, fails to establish the Respondent's fear of future persecution "on account of' one fo [sic] the 5 enumerated grounds in the Act.

It is the finding of this Court that the Respondent's evidence, primarily his testimony, is insufficient to meet his burden. It is the finding of this Court that corroborative evidence should have been produced, and it was reasonably available to be produced. By the Respondent's own testimony, he had spoken to his family only a few weeks before his hearing. The Respondent has had the services of two attorneys. Still, the Respondent failed to meet his burden of proof by failing to provide sufficient evidence. The Respondent's testimony alone is simply not sufficient to meet his burden. And his failure to provide corroborating evidence, which was reasona-

bly available, results in his failure to meet his burden of proof. Additionally, the Respondent's evidence fails substantively and legally, as it fails to establish a nexus between one of the 5 bases of the Act and his asserted persecution.

In sum, upon consideration of all the evidence of Record, and this Court's finding that the Respondent has failed to meet his burden of proof by failing to present specific evidence that he has actually been a victim of persecution, or has a well-founded fear of future persecution that he will be singled out for persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Therefore, his applications will be denied.

Conclusion

Upon consideration of all the evidence of record, and the abovenoted [sic] findings, this Court finds that the Respondent has failed to specific facts establishing that he has actually been a victim of persecution, or has a well founded fear that he will singled out for persecution on account of race, religion, nationality, membership in a particular social group or political opinion. Therefore his application must be denied.

VII. WITHHOLDING OF REMOVAL AND CONVENTION AGAINST TORTURE.

Inasmuch as the Respondents have failed to satisfy the lower burden of proof required for asylum, it necessarily follows that he/she have failed to satisfy the clear probability standard of eligibility required for withholding of removal or consideration under Article III, United Nations Convention Against Torture.

VIII. DISCRETION

Even assuming that the Respondent is statutorily eligible for a grant of asylum under Section 208(a) of the Act, it is necessary for the Court to reach the question of whether he would merit such relief in the exercise of discretion. Matter of Shirdel, 19 I&N Dec. 33 (BIA 1984). This evaluation is being made by considering the entire context of the case, including general humanitarian considerations. See Matter of Pula, 19 I&N Dec. 467 (BIA 1987).

To meet this burden, the Respondent must present evidence of any positive factors that he believes will support the favorable exercise of discretion. Among the factors which should be considered are whether the Respondent passed through any other countries or arrived in the United States directly from his country, whether orderly refugee procedures were in fact available to help him in any country he passed through, and whether he made any attempts to seek asylum before coming to the United States. In addition, the length of time the Respondent remained in a third country, and his living conditions, safety, and potential for long-term residence there are also relevant. Whether the alien has relatives legally in the United States or other personal ties to this country which motivated him to seek asylum here rather than elsewhere is another factor to consider. In this regard, the extent of the Respondent's ties to other countries where he does not fear persecution should also be examined. Moreover, if the Respondent engaged in fraud to circumvent orderly refugee procedures, the seriousness of the fraud should be considered. General humanitarian considerations, such as the Respondent's tender

age or poor health, may also be relevant in a discretionary determination.

Court's Finding: This Court will not make an adverse discretionary determination in regard to his application for asylum. However, as noted below, this Court will not grant the privilege of Voluntary Departure, pursuant to Section 240B, INA.

IX. VOLUNTARY DEPARTURE

To qualify for voluntary departure under Section 240B(b) of the Act, the Respondent must establish that:

> (1) he has been physically present in the United States for a period of at least one year preceding the date the Notice to Appear was served;
>
> (2) he has been a person of good moral character for at least 5 years immediately preceding such application;
>
> (3) he is not deportable under Section 237(a)(2)(A)(iii) or 237(a)(4) of the Act;
>
> (4) he establishes by clear and convincing evidence that he has the means to depart the United States and intends to do so; and,
>
> (5) he shall be required to post a voluntary departure bond.

Additionally, the Respondent must be in possession of a travel document that will assure his lawful reentry into his home country.

Discretionary consideration of an application for voluntary departure involves a weighing of factors, including the Respondent's prior immigration history, the length of residence in the United States, and

the extent of his family, business and societal ties in the United States. Matter of Gamboa, 14 I&N Dec. 244 (BIA 1972).

Court's Finding: The Respondent did not seek voluntary departure. Further, this Court will not grant voluntary departure to this Respondent as a matter of discretion. The Respondent has remained in this country for nearly 6 years after going out of status. During that time period he has worked without authorization. Further, his family and other ties are in China. He has no substantive ties to the United States of America. He is not a property owner. He is not married, and he has no children.

X. ORDERS

Accordingly, the following Orders are entered.

IT IS HEREBY ORDERED, that the Respondent's application for Asylum, pursuant to Section 208, INA, be and is **DENIED.**

IT IS FURTHER ORDERED, that the Respondent's application for Withholding of Removal under Section 241(b)(3), INA, be and is, **DENIED.**

IT IS FURTHER ORDERED, that the Respondent's application for Withholding of Removal/Deferral of Removal under Article 3 of the United Nation's Convention Against Torture be and is **DENIED.**

IT IS FURTHER ORDERED, that the Respondent be **DENIED** the privilege of departing the United States voluntarily, pursuant to Section 240B, INa.

IT IS FURTHER ORDERED, that the Respondent shall be **REMOVED** from the United States to **The People's Republic of China** on the charge contained in the Notice to Appear.

WARNING TO RESPONDENT: An order of removal has been entered against you. If you fail to appear pursuant to a final order of removal at the time and place ordered by the Government, other than because of exceptional circumstances beyond your control, you will not be eligible for VD, cancellation or removal, and any change of adjustment of status for 10 years from the date you are scheduled to appear.

Appeal: This Decision is final unless an appeal is filed with the Board of Immigration Appeals within 30 days of the issuance of this Decision.

Date: October 31, 2008.

Richard Randall Ozmun
Immigration Judge
EOIR/USDOJ

Copy to:

Chief Counsel, DHS/ICE

APPENDIX D

8 U.S.C. § 1158[1]

(a)(1) Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section * * *.

* * *

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

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[1] As part of the REAL ID Act, Pub. L. 109-13, 119 Stat. 302 (2005), Congress added Section 1158(b)(1)(B). Section 1158(a)(1) has not changed since petitioner's initial application for asylum was filed in 2001. The only change to Section 1158(b)(1)(A) is the substitution of "Secretary of Homeland Security or the Attorney General" for "Attorney General."

(B)(i) In general

The burden of proof is on the applicant for asylum to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and consider-

ing the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

* * *

8 C.F.R. § 1208.13

(a) Burden of proof. The burden of proof is on the applicant to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

* * *

(b) Eligibility. The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

* * *

(2)(i) An applicant has a well-founded fear of persecution if:

* * *

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country * * *.