

05-75890

PRO BONO APPEAL

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YING QING CHEN,

Petitioner,

vs.

MICHAEL B. MUKASEY, Attorney General,

Respondent.

APPEAL FROM AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS
LAURI S. FILPPU, JUDGE • A95 448 807

PETITIONER'S REPLACEMENT OPENING BRIEF

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PETITIONER'S REPLACEMENT OPENING BRIEF

INTRODUCTION

Petitioner Ying Qing Chen (“Chen”), a native and citizen of the People’s Republic of China, petitions for review of the Bureau of Immigration Appeal’s (“BIA”) decision denying his application for asylum, withholding of removal, and relief under the Convention Against Torture (“CAT”) based on severe religious persecution he suffered at the hands of the Chinese government.

Chen practices Zhong Gong, a religion that the Chinese government has banned. On May 10, 2001, Chen returned to China from a trip abroad. That evening, the police arrested him in his apartment for practicing his religion. He was subsequently incarcerated and brutally beaten by the police. Upon release from jail, he was terminated from his government job. Indeed, an undisputed, credible document from Chen's government employer explains that Chen was "dismissed from his public employment on May 28, 2001" because of his "persistence in participating in ZhongGong organization and activities, ignoring his leaders' patient advice, and refusing to mend his ways despite repeated education" (Certified Administrative Record 217-218 (CAR).) This same document confirms that Chen had previously been arrested for his religious practices. (CAR 217-218.)

Chen then paid \$50,000 to a human smuggler to help him flee China and enter the United States. He left China on July 14, 2001. Prior to leaving China, he gave his passport to others, who (by means unknown to Chen) arranged to have his passport stamped with two Belizean stamps—a visa dated March 27, 2001, and an extension dated June 1, 2001—both of which purported to be

issued in Belmopan, Belize. Chen testified that he did not know the details of how these stamps were obtained because other individuals obtained these stamps for him. He was not in Belize on either of these dates.

The Immigration Judge (“IJ”) found Chen’s testimony that he was in China from May 10, 2001 until July 14, 2001 (and consequently subject to arrest, beatings, and termination of his employment on account of his religion) was contradicted by the Belizean stamp on his passport dated June 1, 2001. On the basis of this supposed inconsistency, the IJ made an adverse credibility finding, and held that Chen was not eligible for asylum, withholding of removal, or CAT relief. He also held that Chen deliberately made a false statement, and that his application for asylum was therefore frivolous. The BIA adopted the IJ’s adverse credibility finding and affirmed.

The judgment should be reversed for two principal reasons. First, the documentary evidence Chen submitted in support of his application independently establishes that he was eligible for asylum. In particular, the notice from his government employer plainly states that Chen had been arrested, subjected to “repeated education,” and fired for his religious beliefs.

Neither the IJ nor the BIA made any finding that the termination notice or any other document submitted by Chen was not credible. Therefore, this documentary evidence establishes that Chen suffered past persecution on account of his religion and that he is eligible for asylum.

Second, the adverse credibility finding is not supported by substantial evidence. Chen's testimony that he was in China from May 10, 2001 to July 14, 2001 is corroborated by the Chinese entry and exit stamps on his passport, showing he entered China on May 10, 2001 and exited July 14, 2001. The passport bears no other entry or exit stamps from China between these two dates, which proves that he did not leave China during this time. He therefore could not have been in Belmopan, Belize during this interim period as the IJ found. His testimony as to the dates he was in China is also corroborated by the termination notice he received on May 28, 2001. Accordingly, Chen's testimony of religious persecution should have been credited, thus establishing his eligibility for asylum.

JURISDICTION, TIMELINESS, AND VENUE

Chen petitions this court for review of a final order issued by the BIA on September 14, 2005, which denied his claims for asylum, withholding of removal, and CAT relief. (CAR 2-4.) The BIA had jurisdiction under 8 C.F.R. section 1003.1(b)(3). This court has jurisdiction pursuant to 8 U.S.C.A section 1252(a).

Chen's petition is timely. It was filed on October 13, 2005, within thirty days of the BIA's September 14, 2005 order. 8 U.S.C.A. § 1252(b)(1) (West 2005).

This court is the proper venue for Chen's petition under 8 U.S.C.A. section 1252(b)(2) because the removal proceedings took place in Los Angeles, California. (CAR 66-130.)

STATEMENT OF THE ISSUES

1. Whether independent documentary evidence established that Chen was persecuted on account of his religion?
2. Whether the adverse credibility determination made by the IJ, and adopted by the BIA, was supported by substantial evidence?
3. Whether Chen is entitled to withholding of removal?
4. Whether Chen is entitled to CAT relief?
5. Whether the BIA erred in finding Chen's asylum application was frivolous?

STATEMENT OF THE CASE

Chen entered the United States on or about October 17, 2001, seeking refuge from religious persecution he suffered at the hands of the Chinese government. (CAR 396.) He sought asylum, withholding of removal, and CAT relief, but on May 3, 2004, an IJ found that he was not credible, and

therefore not entitled to any relief. (CAR 42-52.) The IJ also found that Chen's application was frivolous, and barred him from obtaining any benefit under the immigration and nationality laws for life. (CAR 49-50.)

The BIA upheld this decision on September 14, 2005, holding that substantial evidence in the record supported the IJ's conclusion that Chen was not credible. (CAR 2-4.)

Chen asks this court to reverse the adverse credibility determination and to remand his case to the BIA with directions that he is eligible for asylum. He further asks this court to grant withholding of removal and CAT relief. Finally, he asks this court to reverse the determination that his application for asylum was frivolous.

STATEMENT OF FACTS^{1/}

A. Chen practices Zhong Gong in China. China has a history of persecuting members of Zhong Gong.

Chen is a native and citizen of the People's Republic of China. (CAR 88, 395.) He is thirty years old and married. (CAR 88, 395.) Chen was introduced to the practice of Zhong Gong by a friend in China sometime prior to July 1999. (CAR 89, 395.)

Zhong Gong, like the better-known Falun Gong, is a variant of qigong—traditional Chinese exercise and meditation meant to promote health and spiritual harmony. (CAR 272.) The Chinese government's persecution of the practitioners of qigong religions, including Zhong Gong, is documented in the U.S. State Department's 2001 Country Report on Human Rights Practices ("Country Report"). (CAR 131-213; *see also* 291-99 (State Department

^{1/} These facts are drawn from the CAR, including Chen's testimony before the IJ and his application for asylum.

report on political and religious oppression in China and Tibet.) The Country Report documents that in 1999, the Chinese government began to crack down on people who belong to qigong religions, or “cults,” as they are labeled by the Chinese government. (CAR 151.) In 2000, Zhong Gong was formally included in the list of banned religions, and its leader, Zhang Hongbao, was arrested and charged with various crimes. (CAR 157.)

The Country Report details the extreme persecution suffered by members of banned qigong religions. Mere belief in a banned religion, even without any public manifestation of its tenets, “has been sufficient grounds for practitioners to receive punishments ranging from loss of employment to imprisonment. . . . Many thousands of individuals are serving sentences in reeducation-through-labor camps. Other practitioners have been sent to facilities specifically established to ‘rehabilitate’ practitioners who refuse to recant their belief voluntarily.” (CAR 156-57.)

Even more strikingly, the State Department reported that 200 or more qigong practitioners died in detention between 1999 and 2001 when the report was written, and that “many of their bodies reportedly bore signs of severe

beatings or torture or were cremated before relatives could examine them.”

(CAR 151.)^{2/}

Chen first practiced Zhong Gong at the FuZhou Preserving Health Science Technology Institute and subsequently practiced in a park in FuZhou with more than forty people every morning. (CAR 90.) In July 1999, the government no longer allowed anyone to practice Zhong Gong in public because, in Chen’s words, the “Chinese government [gave] an announcement

^{2/} The certified administrative record also contains reports from other international observers who have likewise documented the Chinese government’s egregious human rights violations on the basis of religion. (*See* CAR 237-70 (Amnesty International report on the Chinese government’s crackdown on “heretical organizations”), 281-86 (Amnesty International report on use of torture in China, including torture on the basis of religion), 288-89 (Amnesty International report entitled “China’s clamp down on ‘heretical organizations’”), 272-78 (Center for Studies on New Religions report on persecution of Zhong Gong practitioners), 301-23 (Office of Immigration and Security (an executive agency of the Home Office of the United Kingdom) report on the Chinese government’s persecution of practitioners of qigong religions), 325-86 (Country Information & Policy Unit, Immigration & Nationality Directorate (of the Home Office of the United Kingdom) report on Chinese government’s persecution of practitioners of qigong religions), 228-35 (religiousfreedomforchina.org report detailing Chinese government’s persecution and torture of its citizens on the basis of religion).) The certified administrative record also includes news stories reporting on the Chinese government’s abuses of Zhong Gong practitioners. (CAR 417-29.)

that all those illegal cults should not be practiced as the leading cult, such as Falun Gong.” (CAR 91; *see* CAR 151 (Country Report finding that in 1999, the Chinese government began to crack down on practitioners of qigong)).

Thereafter, Chen continued to practice Zhong Gong secretly with other adherents in the privacy of his own home. (CAR 92-93.) His sister, who had a kidney problem, began practicing with him in November 1999. (CAR 395.)

B. Chen temporarily leaves China and when he returns, he is arrested, imprisoned and brutally beaten by the police because he refuses to renounce his religion.

Chen traveled away from China on January 6, 2001 (*see* CAR 409 (Chinese exit stamp on his passport dated January 6, 2001)), and returned to China on February 8, 2001 (*see* CAR 409 (Chinese entry stamp dated February 8, 2001)). He left China again on April 16, 2001 (*see* CAR 409 (Chinese exit stamp dated April 16, 2001)), and returned on May 10, 2001 (*see* CAR 409

(Chinese entry stamp dated May 10, 2001)). Consistent with these stamps, he testified that he returned to China on May 10, 2001. (CAR 107.)

On the evening of May 10, 2001 at about 9:00 p.m., Chen was practicing Zhong Gong in his apartment with his sister and other Zhong Gong adherents when the police burst in and arrested him and his sister. (CAR 93-94.)^{3/} He was taken to the local police station. (CAR 95.) While there, the police attempted to force him to renounce his religion. (CAR 95.) When he refused to do so, the police slapped him, kicked him, and hit him in the head with a baton, bloodying his face. (CAR 95, 112, 396.) The police subsequently locked him in a small cell. (CAR 396.)

^{3/} The police learned Chen was practicing Zhong Gong because his mother told the “neighborhood leader,” and this information made its way back to the police. (CAR 94, 396.) It is not entirely clear from the record whether his mother purposely informed on him and his sister, or whether she indiscretely let their religion slip to one of her neighbors. What is clear is that Chen’s mother bitterly regretted the fact that her actions led to her children being arrested and beaten. In his application for asylum, Chen explained, “After my sister died, my mother felt too late to repent [sic]. She said that she told the neighborhood leader about our practice when they were chatting and she did not anticipate that my sister would die.” (CAR 396.)

The next day, the police transferred him to a detention center, where he remained incarcerated for more than two weeks. (CAR 95-96.) During his incarceration, he was interrogated by the police on two additional occasions. (CAR 96, 396.) During each interrogation, he received savage beatings at the hands of the police for refusing to renounce his religion. (CAR 96, 396.) As a result of these beatings, he sustained injuries to his forehead and his chest. (CAR 112.)

C. Chen secures conditional release from jail and visits his sister before she dies.

On May 25, 2001, Chen's father secured his release by paying the police. (CAR 95-96.) As a condition of his release, Chen was required to check in at the police station every Monday at 8:30 a.m., ensuring that he was subject to frequent monitoring, and placing him at risk for future incarceration and physical violence. (See CAR 96-97.) Upon being released, even before having all of his own injuries fully attended to, Chen went to the hospital to see his

sister, who had been arrested at the same time he was. (CAR 113, 396.) During this visit, she informed him that the police had beaten her as well. (CAR 396.) Several days later, she died of “kidney failure.” (CAR 396.)

D. Chen is terminated from his government job at the FuZhou Post Office because of his religion.

On May 28, 2001, three days after being released from jail, Chen attempted to return to work at his government job at the FuZhou Post Office, only to be given a termination notice from his employer. (CAR 99, 110, 217-18.) The termination notice explains:

The employee of FuZhou City Post Delivering Co., Ltd, Chen, YingQing due to his persistence in participating in ZhongGong organization and activities, ignoring his leaders’ patient advice, and refusing to mend his ways despite repeated education, has been arrested by the public security authority again. Since he obstinately sticks to ZhongGong, it is decided by the leaders of this bureau that Chen, YingQing is officially dismissed from his public employment on May 28, 2001.

(CAR 217-18.)

E. Chen makes arrangements with a human smuggler and flees China.

Chen and his parents paid a human smuggler \$50,000, which they borrowed from family and friends, to smuggle Chen from China. (CAR 97.) Prior to leaving China, Chen temporarily relinquished control of his passport to “other people” (presumably under the direction of the smuggler) who obtained two Belizean stamps on Chen’s passport, and returned it to him on July 12 or 13, 2001. (CAR 102-04.)

The stamps appear to show that a visa was issued in Belmopan, Belize on March 27, 2001 (CAR 404), and that it was extended in Belmopan, Belize on June 1, 2001 (CAR 404). Chen testified that he did not know the exact details of how these stamps were obtained, but that the stamps were obtained by others and he was not in Belize on those dates. (CAR 102-104.)

Chen left China for Hong Kong on July 14, 2001. (CAR 97.) His passport has a Chinese exit stamp (CAR 416), and a Hong Kong entry stamp (CAR 407) issued on this date. He testified that he left Hong Kong the next

day, July 15, 2001, and traveled through several other countries before ending up in Belize. (See CAR 97.) His passport bears a Hong Kong exit stamp issued on July 15, 2001. (See CAR 407.)

F. Chen's family warns him not to return to China because the police are looking for him.

After Chen left China, his parents told him that the police came to their home and threatened them, saying that if they could not find Chen they would take his father instead. (CAR 98.) In his testimony, Chen testified that if he returned to China, he would not be allowed to practice his religion. (CAR 101.) Instead, he would be arrested and sentenced to jail because of his religion. (CAR 101.) Chen also submitted a letter from his wife, Ting, warning him that the police were looking for him. (CAR 220-21.) The letter states in part:

Be sure not to take the foolish action as you mentioned over the phone. I know you are not at ease with leaving me and your parents here. But you should know when you left China, your

case was not ended yet. The police and neighborhood committee officers almost have come to our home to harass and spy on us, they try to force us to make you surrender yourself as soon as possible. Therefore, if you come back, it won't be any different from seeking your own doom like moths flying into the fire. And if anything untoward should happen to you, there won't be any meanings for me to continue living in this world. No matter what, the police should not arrest me to take the place of your case. I have been used to their threats and purposely causing troubles.

(CAR 220-221.)

G. Chen enters the United States and seeks asylum on the basis of religious persecution.

Chen entered the United States on October 17, 2001. (CAR 89, 396.) On May 4, 2002, he filed a written application for asylum in the United States, based on religious persecution he suffered at the hands of the Chinese government. (CAR 394.)

H. The IJ makes an adverse credibility finding based upon Chen's supposed inability to explain the Belizean passport stamp, denies Chen's application for asylum, withholding of removal, and CAT relief, and finds him permanently ineligible to obtain any benefit from the immigration and nationality laws.

On February 9, 2004, Chen testified to the facts summarized above at his removal hearing before the IJ and provided documentary evidence, including the termination notice, a copy of his passport, and the letter from his wife. (CAR 85-101.) On May 3, 2004, the IJ conducted a follow-up hearing and made his ruling. (CAR 123-30.)

The IJ found that Chen had made a significant misstatement and was therefore not credible because Chen's passport contained a stamp that purported to be issued in Belmopan, Belize on June 1, 2001:

[t]he respondent could not have been in China on the date that this document was issued because this document was issued in Belize. Thus, the Court's knowledge and speculation, Belize is not adjacent to or anywhere similarly situated in a geographical configuration where it is possible for the individual to leave

China, enter Belize and return to China and not be aware of the departure and trip. Accordingly, the Court believes that this is a significant misstatement. This is not based on speculation, conjecture or an unsupported assumption. This is sufficient to make an adverse credibility finding, which is supported by specific, cogent reasons, and this does bear a legitimate nexus to the rejection. The respondent could not have been tortured and mistreated in the People's Republic of China in May and June and not depart the People's Republic of China until the 14th of July if he had time to go make a trip to Belize and get his visa extended. On this basis, the Court will make an adverse credibility finding. I find that it does go to the basis of his claim, and it certainly does indicate that the respondent's veracity is not present, at least as to that much testimony.

(CAR 49.) The IJ then denied Chen's claim for asylum, withholding of removal, and CAT relief. (CAR 49-50.) The IJ also held that Chen's asylum application was frivolous, and permanently barred him from obtaining any benefits under the immigration and nationality laws. (CAR 49-50.) Nowhere did the IJ find that the documentary evidence submitted by Chen was not credible. (*See* CAR 42-52.)

I. The BIA agrees with the IJ's decision, and Chen petitions for review.

On September 14, 2005, the BIA affirmed the IJ's decision in a reasoned decision. (CAR 2-4.) It agreed with the IJ that "the documentary evidence in the record shows that the respondent's claims that he was mistreated in China could not have occurred at the time the respondent testified that they did, because his passport indicates that he was in Belize, and not in China, at the time. The respondent had no explanation for this discrepancy, which was central to his asylum claim." (CAR 4.) The BIA did not state that the documentary evidence submitted by Chen was not credible. (*See* CAR 2-4.)

On October 13, 2005, Chen timely petitioned for review of the BIA's decision.

STANDARD OF REVIEW

When the BIA conducts an independent review of the IJ's findings, as in this case, this court reviews the BIA's decision, as well as the IJ's decision to the extent that it was expressly adopted by the BIA. *Chen v. INS*, 266 F.3d 1094, 1098 (9th Cir. 2001), *overruled on other grounds by INS v. Ventura*, 537 U.S. 12 (2002). Factual determinations by the IJ and the BIA are reviewed for substantial evidence. *Khup v. Ashcroft*, 376 F.3d 898, 902 (9th Cir. 2004). Under this standard, eligibility determinations must be upheld if they are "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *Id.* (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992)). "To reverse the IJ's [or the BIA's] determinations, the evidence . . . must have been such that a reasonable fact-finder would have been compelled to conclude that he was eligible for relief." *Id.*

While this standard is deferential, this court does not "act as a rubber stamp or a decorative potted plant in disregard of Congress' expectation that [it] correct the BIA's factual decisions where that body has made an egregious

mistake.” *Jahed v. INS*, 356 F.3d 991, 1001 (9th Cir. 2004). Instead, this court examines the entire record to determine “whether substantial evidence supports that conclusion, and whether the reasoning employed by the IJ [or the BIA] is fatally flawed.” *Kumar v. Gonzalez*, 444 F.3d 1043, 1050 (9th Cir. 2006) (quoting *Aguilera-Cota*, 914 F.2d at 1381, alterations omitted). Indeed, an adverse credibility determination cannot be sustained unless the IJ “point[s] to a ‘specific and cogent’ reason supporting an adverse credibility finding, and such reason must be substantial and bear a legitimate nexus to the finding.” See *Kaur v. Ashcroft*, 379 F.3d 876, 884 (9th Cir. 2004) (citations and quotations omitted).

If the adverse credibility finding is not supported by substantial evidence, the petitioner’s testimony must be presumed credible. See *Singh v. Gonzales*, 439 F.3d 1100, 1111 (9th Cir. 2006) (“Having found that the IJ’s adverse credibility determination was not supported by substantial evidence, we accept [the petitioner’s] testimony as true.”); *Kaur*, 379 F.3d at 890 (“[W]hen each of the IJ’s . . . proffered reasons for an adverse credibility finding fails, we must accept a petitioner’s testimony as credible.”).

Likewise, the IJ must use the same standard in judging the veracity of documentary evidence as with testimony: “[A]n IJ must provide a specific, cogent reason for rejecting [the evidence], and this reason must bear a legitimate nexus to that rejection.” *Kumar*, 444 F.3d at 1050 (quoting *Zahedi v. INS*, 222 F.3d 1157, 1165 (9th Cir. 2000)). And as with testimony, if the IJ fails to give clear reasons for rejecting documents that bear a legitimate nexus to those documents, the documents are accepted as credible. *Zahedi*, 222 F.3d at 1164-65.

SUMMARY OF THE ARGUMENT

The IJ and the BIA found Chen was not credible based on supposed inconsistencies between Chen’s testimony and the date of a Belizean stamp on his passport. This judgment should be reversed. First, even without Chen’s testimony, the documentary evidence alone (in particular the termination notice from Chen’s government employer) is sufficient to demonstrate that Chen suffered persecution on account of his religion

Second, the adverse credibility finding was not supported by “reasonable, substantial, and probative evidence on the record considered as a whole.” *Elias-Zacarias*, 502 U.S. at 481. It was based on pure speculation, and was flatly contradicted by uncontroverted documentary evidence conclusively demonstrating that events unfolded exactly as Chen testified. The IJ and the BIA erred by failing to recognize that the Chinese entry and exit stamps on Chen’s passport proved he was in China on the dates he testified he was. They further erred by not adequately considering and addressing Chen’s explanation for this supposed discrepancy—Chen gave his passport to others, who obtained the Belizean stamp without Chen being present.

ARGUMENT

I.

THE RECORD COMPELS THE CONCLUSION THAT CHEN IS ELIGIBLE FOR ASYLUM.

- A. **Chen is entitled to asylum if he shows either by documentary or testimonial evidence that he suffered past religious persecution.**

To be eligible for a grant of asylum, a petitioner must show that he is a refugee. 8 U.S.C.A. § 1158(b)(1) (West 2005). A refugee is one who is “unable or unwilling to avail himself or herself of the protection of [his or her native] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C.A. § 1101(a)(42)(A) (West 2005).

“An alien who establishes past persecution is presumed to have a well-founded fear of future persecution.” *Prasad v. INS*, 101 F.3d 614, 617 (9th

Cir. 1996). A petitioner may establish persecution by credible testimony, credible documentary evidence, or both. See *Kaur*, 379 F.3d at 889-90 (“[A]n alien’s testimony, if unrefuted and credible, direct and specific, is sufficient to establish the facts testified without the need for any corroboration.” (quoting *Ladha v. INS*, 215 F.3d 889, 901 (9th Cir. 2001))); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1379 (9th Cir. 1990) (“Documentary evidence establishing past persecution or threat of future persecution is usually sufficient to satisfy the objective component of the well-founded fear standard.”); *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453 (9th Cir. 1985) (same), *aff’d*, 480 U.S. 421 (1987); *Zahedi*, 222 F.3d at 1163 (“This court has explained that an applicant may establish facts that demonstrate the reasonableness of his claim either ‘through the production of specific documentary evidence *or* by credible and persuasive testimony.’” (quoting *Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 (9th Cir. 1999))).

B. The documentary evidence submitted by Chen independently establishes that he is entitled to asylum.

1. The termination notice from Chen’s employer was not found to be incredible, and is therefore presumed credible.

The IJ based its decision solely on the ground that it found Chen’s *testimony* incredible. (CAR 48-49.) As we now explain, that finding cannot be upheld in the face of credible documentary evidence.

“Testimonial vagueness and inconsistency are not reasons that bear a legitimate nexus to the rejection of documents” *Zahedi*, 222 F.3d at 1165. Instead, “[i]n judging the veracity of documentary evidence, the IJ must use the same standard he would in judging the credibility of testimonial evidence: ‘an IJ must provide a specific, cogent reason for rejecting [the evidence], and this reason must bear a legitimate nexus to that rejection.’” *Kumar*, 444 F.3d at 1050 (quoting *Zahedi*, 222 F.3d at 1165). If the IJ fails to give clear reasons

for rejecting documents that bear a legitimate nexus to those documents, the documents are accepted as credible. *Zahedi*, 222 F.3d at 1164-65.

Neither the IJ nor the BIA found that any of the documentary evidence Chen submitted was incredible. The documents therefore must be presumed credible.

- 2. The termination notice independently proves that Chen was persecuted on account of his religion and compels a reversal of the IJ's decision.**

Credible documentary evidence independently demonstrates that Chen is eligible for asylum irrespective of his testimony. On May 28, 2001, after being released from prison, Chen attempted to return to his government job at the FuZhou Post Office, only to find that the government had fired him on account of his religion. (CAR 99, 110, 217-18.) The termination notice explicitly states that Chen was fired "due to his persistence in participating in ZhongGong organization and activities, ignoring his leaders' patient

advice, and refusing to mend his ways despite repeated education,” and also that Chen had previously been arrested because of his religion. (CAR 217-18.)

As we explain in the next section, this evidence corroborates Chen’s testimony that he was in China from May 10, 2001 to July 14, 2001, and therefore demonstrates that the IJ’s adverse credibility determination was not supported by substantial evidence. (*See infra* pp. 32-41.) However, the termination notice by itself independently establishes that Chen is eligible for asylum in three different ways.

First, it shows that Chen was arrested by the Chinese government on account of his religion. *See, e.g., Ndom v. Ashcroft*, 384 F.3d 743, 752 (9th Cir. 2004) (detention and confinement constitute persecution); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1136 (9th Cir. 2004) (same); *Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997) (same).

Second, it demonstrates that Chen was deprived of his livelihood—his job at the FuZhou Post Office—on account of his religion. *See Chand v. INS*, 222 F.3d 1066, 1074 (9th Cir. 2000) (“[P]urely economic harm can rise to the level of persecution where there is ‘a probability of deliberate imposition of

substantial economic disadvantage' upon the applicant on account of a protected ground." (quoting *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969)); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996)); *Baballah v. Ashcroft*, 367 F.3d 1067, 1075 (9th Cir. 2004) ("[B]y removing the word physical from the description of persecution, Congress provided that economic persecution alone could sustain an asylum claim.").

Third, the termination notice establishes that Chen was a practitioner of Zhong Gong and that the Chinese government was aware of this fact. (CAR 218-19.) As explained above, the Chinese government's persecution of adherents of Zhong Gong and other qigong religions has been well documented by the State Department and other international observers. (CAR 131-213, 225-386.)

The termination notice therefore demonstrates that Chen was eligible for asylum under 8 U.S.C.A. section 1101(a)(42)(A). The court should therefore remand this case to the BIA for an exercise of the Attorney General's discretion.

C. The adverse credibility finding made by the IJ and adopted by the BIA was not supported by substantial evidence.

1. The documentary evidence demonstrates that Chen's testimony was credible.

The IJ found that Chen's testimony was not credible, based on a supposed conflict between Chen's testimony that he was in China from May 10, 2001 to July 14, 2001 and the Belizean stamp on his passport that purported to be issued in Belmopan, Belize on June 1, 2001. (CAR 48-49.) But there was no evidence in the record from which one could infer that Chen actually traveled personally to Belize to obtain this stamp. Indeed, credible,^{4/}

^{4/} As explained in greater detail above, neither the IJ nor the BIA gave any indication that they questioned the authenticity of the documentary evidence. Indeed, they relied on Chen's passport to discredit his testimony. Because neither the IJ nor the BIA gave specific, cogent reasons for rejecting any documentary evidence, it must be accepted as credible. *Kumar*, 444 F.3d at 1050; *Zahedi*, 222 F.3d at 1164-65.

uncontroverted documentary evidence conclusively demonstrates that Chen was in fact in China on the dates stated in his testimony:

- Chen's passport bears stamps indicating that he left China on January 6, 2001 and returned on February 8, 2001. (CAR 409.)
- Chen's passport bears stamps indicating that he left China on April 16, 2001 and returned on May 10, 2001 (CAR 409), exactly as he testified he did (CAR 107).
- Chen's passport bears stamps indicating that he left China on July 14, 2001 (CAR 416), entered Hong Kong on July 14, 2001 (CAR 407), and exited Hong Kong on July 15, 2001 (CAR 407), exactly as he testified he did (CAR 97).
- The passport gives no other indication that Chen entered or exited China between May 10, 2001 and July 14, 2001 to travel to Belize or anywhere else. (CAR 400-16.)
- Chen was given a notice from the government terminating his employment at the FuZhou Post Office on May 28, 2001. (CAR 217-18.)

In other words, the stamps on Chen's passport, as well as the termination notice, establish that he was in fact in China from May 10, 2001 to July 14, 2001, exactly as he said he was, and not in Belize.

In contrast to this perfectly cogent and consistent testimony,^{5/} corroborated by documentary evidence, the IJ's version of events, which was adopted by the BIA, does not withstand any serious scrutiny. As explained above, Chen could not have been in Belize on June 1, 2001. (CAR 217-18, 409, 416.) To reach a conclusion that he was in Belize, the IJ would have had to speculate, with no support in the record, that the Belizean stamp was completely authentic^{6/} and issued in Belmopan, Belize on the date written on

^{5/} Chen's testimony regarding the dates on which the persecution occurred cannot be seen as an attempt to bolster his claim that he was persecuted. If Chen were going to fabricate a story about being persecuted, and he knew that he was in Belize on June 1, 2001, there is no reason to believe that Chen could not have concocted a story that matched his travel dates. *See He v. Ashcroft*, 328 F.3d 593, 600 (9th Cir. 2003) (finding an applicant credible in part because he "remained consistent and steadfast on a factual point that did not make much difference to the truth of his claim. . . . Because [the factual point] did not make much difference, there was little reason for [the applicant] to lie about it.").

^{6/} If the Belizean stamps on Chen's passport were fake or were otherwise obtained by unlawful means, it would not adversely impact Chen's
(continued...)

the stamp (apparently by hand (*see* CAR 404)) while Chen was physically present (even though his passport does not reflect him leaving China or returning to China during that time). The IJ would further have had to speculate that while the Belizean stamp was authentic, the Chinese stamps showing when he did enter and exit China were incorrect and that the termination notice was not issued when it purported to be.

Such suppositions have no support in the record. While Chen provided a sound explanation of how the Belizean stamps came to be on his passport without Chen traveling to Belize—other people arranged for the stamps to be placed in his passport while it was not in his possession (CAR 102-04)—there is no reason whatsoever to conclude that the Chinese entry and exit stamps and the termination notice were not authentic. Indeed, the IJ made no such

6/(...continued)

credibility. This court has long recognized that the use of fraudulent documents or other misrepresentations made in order to flee the country of persecution and enter another country is not a valid reason for an adverse credibility finding. *See Akinmade v. INS*, 196 F.3d 951, 955 (9th Cir. 1999) (holding that the use of false statements or false documents to enter the United States does not make a petitioner incredible); *Turcios v. S*, 821 F.2d 1396, 1400 (9th Cir. 1987) (same).

finding. (See CAR 42-52.) Instead, the IJ simply ignored the documentary evidence, including the Chinese passport stamps, proving that Chen was in China during the relevant period. (See CAR 42-52.)

2. **The BIA did not properly consider and address Chen’s explanation for the supposed discrepancy between the Belizean stamps on his passport and his testimony.**

The IJ and the BIA must provide a petitioner “with a reasonable opportunity to explain any perceived inconsistencies that factor into an adverse credibility finding.” *Suntharalinkam v. Gonzales*, 458 F.3d 1034, 1043 (9th Cir. 2006). More importantly, the IJ and the BIA must consider and address the petitioner’s explanation for the identified discrepancy. *Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001) (substantial evidence for an adverse credibility determination was lacking where applicant provided an explanation for a discrepancy, but neither the BIA nor the IJ addressed it).

This court has recognized that “asylum hearings frequently generate mistranslations and miscommunications.” *Bandari v. INS*, 227 F.3d 1160, 1166 (9th Cir. 2000) (quoting *Maini v. INS*, 212 F.3d 1167, 1176 (9th Cir. 2000)). It has also held that translation difficulties should not be confused for a lack of credibility. *See Suntharalinkam*, 458 F.3d at 1043 (“We are especially cautious in attributing any weight to an inconsistency that likely relates more to a mismatch of terms after translation than to [petitioner’s] claim.”)

The BIA found that “[w]hen questioned about whether he applied for his visa in Belize in March 2001, before he was arrested, rather than July 2001, as he testified, he stated that ‘he did not really know about that, and had no impression about that.’” (CAR 3.) The BIA then found that Chen “had no explanation for this discrepancy [between his testimony and the Belizean passport stamps], which was central to his asylum claim.” (CAR 4.)

The BIA’s finding takes Chen’s testimony out of context. Chen did give an explanation for this perceived discrepancy. He testified that he did not know exactly how the Belizean stamps were placed on his passport because he was not there when those stamps were obtained. (*See* CAR 102-04.)

Rather, he gave the passport to others, without leaving China himself, and they returned his passport to him with Belizean stamps in place. (*See* CAR 102-04.)

The BIA appeared to discredit Chen's explanation because he responded to questions about the dates that the Belizean stamps purported to be issued by saying that "[b]ecause I really do not know about that" and that he had "no impression about that." (CAR 3, citing CAR 102.) But these answers, taken in their proper context, were fully consistent with his explanation about the source of the stamps. Chen did not know how the Belizean stamps were obtained. (*See* CAR 102-04.) He did not know whether one or both of these stamps were fake, altered, or backdated. (*See* CAR 102-04.) He did not know whether they were obtained in China, Belize, or elsewhere. (*See* CAR 102-04.) His only knowledge was that he gave his passport to others, and that he did not know the details of how they obtained the Belizean stamps. (*See* CAR 102-104.)

When the removal proceedings suffer from garbled syntax and poor translation,^{7/} the ensuing confusion cannot be attributed to a lack of credibility on Chen's part. See *Bandari*, 227 F.3d at 1166; *Maini*, 212 F.3d at 1176; *Suntharalinkam*, 458 F.3d at 1043. The only logical interpretation of Chen's testimony, viewed in its entirety, is that Chen could not provide details on exactly how the Belizean stamps were obtained because they were placed in his passport while it was not in his control, and by means unknown to him.

Furthermore, the BIA failed to explain why the IJ's finding that Chen was in Belize on June 1, 2001 was in any way plausible based on the record. Indeed, it was flatly contradicted by the documentary evidence (i.e., the Chinese passport stamps showing he was in China from May 10, 2001 to July 14, 2001). While Chen's *passport* could obviously go anywhere without *him*,

^{7/} A review of the transcript of the removal proceedings readily demonstrates the translator's limited facility with the English language. For example, in discussing an injury that Chen received at the hands of the police, Chen's answer was translated as follows: "Yes. Yes. I, I, I did to see [sic] my sister first. Because the—because I bleeding a lot [sic]. So that's why. That night, already the—my forehead—the injury on my forehead already be treated [sic]." (CAR 113.) It seems rather unlikely that this was a literal translation of what Chen actually said. The better explanation is that his translator lacked facility with the English language.

there is no way *he* could have entered or exited China without his *passport* being stamped by the Chinese authorities. As his passport shows that he did not leave China during the relevant period, his explanation is the only plausible way to reconcile the apparent conflict between the Chinese entry and exit stamps proving that he was in China from May 10, 2001 to July 14, 2001 and the Belizean stamp that appears to show that his passport was elsewhere during that time.

Because the adverse credibility determination is not supported by substantial evidence, Chen's testimony must be presumed credible. *See Singh*, 439 F.3d at 1111; *Kaur*, 379 F.3d at 890. Chen's credible testimony shows that he was arrested, incarcerated, interrogated, beaten, and fired from his job on account of his religion, and no documentary evidence, properly understood, contradicts this testimony. He is therefore a refugee within the meaning of 8 U.S.C.A. section 1101(a)(42)(A) and eligible for asylum. The court should remand this case to the BIA for an exercise of the Attorney General's discretion.

II.

CHEN IS ENTITLED TO WITHHOLDING OF REMOVAL.

A petitioner is entitled to withholding of removal if he can “demonstrate that it is more likely than not that he would be subject to persecution on one or more specified grounds” if he were forced to return to his home country. *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (internal quotation marks omitted). If a petitioner shows past persecution by the government because of a protected ground, he is entitled to a presumption of future persecution as well. 8 C.F.R. § 1208.16(b)(1)(2007) (mandating that if an applicant establishes past persecution, “it shall be presumed that the applicant’s life or freedom would be threatened in the future in the country of removal on the basis of the original claim.”); *Deloso v. Ashcroft*, 393 F.3d 858, 863-64 (9th Cir. 2005).

If a petitioner makes this showing, withholding of removal is mandatory. *Al-Harbi*, 242 F.3d at 888.

As explained above, both independent, unchallenged documentary evidence and credible testimony prove that Chen was persecuted by the Chinese government on account of his religion. (*See supra* pp. 28-41.) He is therefore entitled to a presumption of future persecution and should be granted withholding of removal.

III.

CHEN IS ENTITLED TO RELIEF UNDER THE CONVENTION AGAINST TORTURE EVEN IF HE IS NOT ENTITLED TO ASYLUM.

When a petitioner shows that he will more likely than not be tortured if he is returned to his home country, he is entitled to CAT relief. *See* 8 C.F.R. § 1208.16(c)(3)(I); *Nuru v. Gonzales*, 404 F.3d 1207, 1217 (9th Cir. 2005); *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001). “A failure to establish eligibility for asylum does not necessarily doom an application for [CAT] relief” *Farah v. Ashcroft*, 348 F.3d 1153, 1156 (9th Cir. 2003). Instead, this

court has cautioned against “allowing a negative credibility determination in the asylum context to wash over the torture claim.” *Kamalthas*, 251 F.3d at 1284 (quoting *Mansour v. INS*, 230 F.3d 902, 908 (7th Cir. 2000)). Therefore, in assessing whether it is more likely than not that a petitioner will be tortured if he is forced to return to his country of origin, the IJ is required to consider *all* probative evidence in the record, including evidence of country conditions. “[P]ursuant to 8 C.F.R. § 208.16(c)(3), ‘all evidence relevant to the possibility of future torture shall be considered,’ even apart from any prior findings in the asylum context.” *Id.* at 1283. Such evidence includes “[e]vidence of gross, flagrant or mass violations of human rights within the country of removal; and [o]ther relevant conditions concerning the country of removal.” *Id.* at 1282 (emphasis omitted) (quoting 8 C.F.R. § 208.18(a)(1)); *Nuru*, 404 F.3d at 1217 (holding that in addressing a CAT relief claim, all relevant evidence must be considered). In determining eligibility for CAT relief, the court considers both past torture and the likelihood of future torture. *See* 8 C.F.R. § 1208.16(c)(3); *Nuru*, 404 F.3d at 1217; *Kamalthas*, 251 F.3d at 1282.

As with withholding of removal, when a petitioner “meets his burden of proof regarding future torture, withholding of removal is mandatory” *Nuru*, 404 F.3d at 1216.

In evaluating Chen’s claim for CAT relief, neither the IJ nor the BIA considered the documentary evidence submitted by Chen separate and apart from his testimony, as they were required to do. (CAR 4, 50.) Instead, they appeared to let the adverse credibility finding “wash over” Chen’s claim for CAT relief, exactly as this court has instructed them not to do. *Kamalthas*, 251 F.3d at 1284 (quoting *Mansour*, 230 F.3d at 908).

Chen presented credible documentary evidence sufficient to show that he was tortured in the past and he is likely to be tortured again if he is forced to return to China. Documents submitted by Chen prove the following:

- Chen was a practitioner of Zhong Gong. (CAR 217-18 (termination notice from Chen’s government job at the FuZhou Post Office on the basis of his religion).)

- The Chinese government was aware that he was an adherent of Zhong Gong and had arrested him and subjected him to “education” in an attempt to force him to abandon his beliefs. (CAR 217-18.)
- The police were looking for Chen after he fled China. (CAR 220-221 (letter from Chen’s wife warning him not to return to China because the police were looking for him).)
- The Chinese government has banned Zhong Gong and other qigong religions, and routinely tortures practitioners of such religions. (CAR 131-213 (Country Report); 291-99 (State Department report on China and Tibet); 225-89, 301-86 (reports from other international agencies documenting the Chinese government’s human rights abuses, including torture based on religious affiliation).)

Even if the documentary evidence were insufficient to demonstrate that Chen is eligible for asylum, these documents show at a minimum that the Chinese government was aware he was a practitioner of Zhong Gong and that the government routinely tortures adherents of such banned religions. It is therefore more likely than not that Chen will be tortured if he is forced to

return to China. Because the IJ and the BIA failed to consider this documentary evidence, their decision to deny Chen CAT relief must be reversed.

IV.

AT A MINIMUM, CHEN'S APPLICATION FOR ASYLUM WAS NOT FRIVOLOUS.

In addition to finding that Chen was not credible, the IJ found that Chen's application for asylum was frivolous under 8 U.S.C.A. section 1208.20 (CAR 50), and the BIA upheld this finding (CAR 3-4). This is an extremely rare, harsh penalty, and is not required whenever an adverse credibility finding is made. (*See Farah v. Ashcroft*, 348 F.3d 1153, 1157 (9th Cir. 2003) (upholding an adverse credibility determination, but overturning the IJ's finding that an application was frivolous because the petitioner was not given an adequate opportunity to address the discrepancies that formed the basis of the ruling on frivolousness, and noting that "[t]his court has apparently

never recognized, in any published opinion, a finding under § 1158(d)(6) of a frivolously filed asylum application.”).

As explained above, no evidence supports the conclusion that any element of Chen’s application was deliberately fabricated. Indeed, both the IJ and the BIA ignored credible documentary evidence—the Chinese stamps on Chen’s passport and the termination notice—which corroborated Chen’s testimony that he was in China from May 10, 2001 to July 14, 2001 and suffered persecution at the hands of the Chinese government during this time. The IJ’s finding that Chen’s testimony on this point was knowingly false, and that his application was therefore frivolous, should be reversed.

CONCLUSION

For the foregoing reasons, this court should grant this petition and reverse the BIA's finding that Chen was not credible. It should hold that Chen is eligible for asylum and remand this case to the BIA for an exercise of statutory discretion to grant asylum. It should also grant Chen withholding of removal and CAT relief. At a minimum, it should reverse the BIA's finding that Chen's asylum application was frivolous.

Dated: April 4, 2008

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STATEMENT OF DETENTION

Pursuant to Circuit Rule 28-2.4(b), petitioner states that he is not detained in the custody of the Department of Homeland Security, and he has not moved the Board of Immigration Appeals to re-open or applied to the district court for an adjustment of status.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, petitioner states that he is not aware of any other case particularly related to the present case.

CERTIFICATION OF COMPLIANCE

- X 1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:
- this brief contains 8,069 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
- X 2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:
- this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect 10 in 14-point Palatino Linotype font type.

April 4, 2008

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