No. 16-____

In the Supreme Court of the United States

TING XUE,

Petitioner,

v.

JEFFERSON B. SESSIONS III,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal immigration law permits the Attorney General or the Secretary of Homeland Security to grant asylum to a "refugee," which is defined to include a person "unable or unwilling" to return to his or her country of origin "because of persecution … on account of … religion." 8 U.S.C. §1101(a)(42)(A).

The questions presented are:

1. Whether an asylum applicant suffers "persecution" if he or she is forced to practice his or her religion in secret in order to avoid state-imposed punishment.

2. Whether a court of appeals reviews the Board of Immigration Appeals' determination regarding the existence of persecution *de novo* (as a question of law) or for substantial evidence (as a question of fact), where all the underlying facts giving rise to the claim of persecution are undisputed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ting Xue respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Tenth Circuit (Pet. App. 1a) is published at 846 F.3d 1099. The decision of the Board of Immigration Appeals is unpublished, but is available at Pet. App. 24a. The decision of the immigration judge is unpublished, but is available at Pet. App. 31a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Tenth Circuit was entered on November 25, 2016. Pet. App. 1a. The court of appeals denied a timely petition for rehearing en banc on January 23, 2017. *Id.* at 62a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 8 of the United States Code defines the term "refugee" for purposes of U.S. immigration law to include an alien outside his or her home country who is "unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of … religion …." 8 U.S.C. § 1101(a)(42)(A). Other pertinent provisions are set forth in the appendix to the petition at pages 64a-97a.

STATEMENT

Prior to the Tenth Circuit's opinion in this case, "[e]very circuit court to consider the question ha[d] held that being forced to practice one's religion underground constitutes persecution" for purposes of the federal asylum statute. *Shi* v. *Att'y Gen. of U.S.*, 665 F. App'x 161, 166 (3d Cir. 2016). The Seventh, Ninth, and Eleventh Circuits have all reached that result in published opinions.

Here, however, the Tenth Circuit held it was "obligated" by its prior precedent "to reject such an approach." Pet. App. 18a. Treating the issue of persecution as purely "factual in nature," *id.* at 9a, the court of appeals denied Petitioner Ting Xue's asylum claim despite an undisputed factual record showing that the Chinese government arrested, fined, and punished Mr. Xue for attending an unregistered Christian church, and that this mistreatment forced him to "practice religion underground to avoid punishment," *Kazemzadeh* v. *U.S. Att'y Gen.*, 577 F.3d 1341, 1354 (11th Cir. 2009).

The Tenth Circuit acknowledged that Mr. Xue established, through testimony credited by the Board of Immigration Appeals ("BIA") and immigration judge ("IJ") (Pet. App. 8a), that he was arrested while attending an illegal church, harshly interrogated, "detained in cramped, dark, and unsanitary conditions," fined more than half his annual salary, and forced, as a condition of his release, to disclaim his church. *Id.* at 15a-16a. The court of appeals concluded, however, that these facts were inadequate to establish persecution on the basis of reli-

gion, and that an asylum petitioner must show more than a state "order[], under threat of penalty, to stop practicing [one's] religion." *Id.* at 17a.

That holding sets the Tenth Circuit squarely in opposition to the circuits holding, as the Eleventh Circuit did in *Kazemzadeh*, that a claimant establishes persecution as a matter of law if she or she must worship in secret in order to avoid actual or threatened punishment by the government. And in arriving at that holding, the Tenth Circuit reinforced and extended a *second* circuit split, regarding the proper standard of review. The court held that its refusal to adopt the prevailing "generalized rule" regarding religious persecution was driven in part by its precedents holding that "the existence of persecution is a factual determination" subject to substantial evidence review. Pet. App. 18a. The court recognized, however, that "[t]he Circuits are split as to the standard of review applicable to the question whether an undisputed set of facts constitute persecution," and that there was "serious reason to question" whether its approach (which the Tenth Circuit panel was obligated to follow) was correct. *Id.* at 9a, 11a.

This Court should grant certiorari to resolve these questions, both of which are recurring and important. The ability to practice one's religion openly and out of the shadows is a fundamental element of religious freedom protected by the "language and purpose of our asylum laws," *Qiu* v. *Holder*, 611 F.3d 403, 409 (7th Cir. 2010)—laws informed by our core constitutional liberties. And as this case illustrates, whether the ultimate question of persecution is

treated as legal (as in three circuits) or factual (as in four circuits) or just muddled (as in others) frequently has a determinative effect on the resolution of a petitioner's asylum claim.

Given the "paramount" need for "uniformity in immigration law," *Cazares-Gutierrez* v. *Ashcroft*, 382 F.3d 905, 914 (9th Cir. 2004), and the important values at stake, this Court should intervene to clarify both the standard of review for persecution determinations and whether being forced to practice one's religion in secret to avoid punishment amounts to persecution.

1. Mr. Xue, a Chinese national, sought asylum as a refugee from government persecution for practicing his Christian faith. Federal immigration law empowers the Attorney General or the Secretary of Homeland Security to "grant asylum to an alien" if either official "determines that such alien is a refugee within the meaning of Section 1101(a)(42)(A)." 8 U.S.C. §1158(b)(1)(A). That provision, in turn, defines a refugee to include an alien "unable or unwilling to return" to his country of origin because of "persecution" on "account of … religion." *Id.* §1101(a)(42)(A). Where an asylum applicant has shown that he or she suffered past persecution, the applicant is entitled to a "presumption" of "a well-founded fear of persecution" on the same basis. 8 C.F.R. §208.13(b)(1). Mr. Xue invoked this presumption in his petition seeking asylum.

a. The Chinese government strictly controls religious activity among its citizens. Pet. App. 2a. Religions and churches must register with the govern-

ment, and their messages and doctrine are subject to state approval and regulation. *Ibid.* The practice of religion outside these bounds, including informal religious gatherings or "house churches," is prohibited. *Ibid.* The record establishes that Chinese government officials have arrested and imprisoned leaders and members of house churches. *Ibid.*

b. Despite these risks, Mr. Xue and his family regularly attended a Christian house church and practiced their Christian faith outside the confines of what the Chinese government allows. Pet. App. 2a-3a. The house church where Mr. Xue worshipped moved location, from house to house, each week. *Ibid.* Mr. Xue eschewed the government-approved Christian church because it "modifies doctrine and theology," privileging loyalty to country and the Communist Party over loyalty to God. *Ibid.* Mr. Xue testified that "people did not have the freedom to express their views" at the government-approved church, while his house church was "very much alive." *Id.* at 35a.

On October 26, 2007, Chinese authorities raided a house church service attended by Mr. Xue, arresting all the parishioners present. Pet. App. 3a. At the police station, officers interrogated Mr. Xue and the other church members about their involvement in the house church. *Ibid.* Mr. Xue was questioned in an interrogation room by three police officers, two seated at the table with him and one standing behind him. *Ibid.* The officers pressured him to disclose the name of the church's leaders. *Ibid.* When Mr. Xue insisted the house church had no leader or organizer, but was a group of Christians sharing

their faith, the officers slapped him across the head and struck him on the arm with a baton. *Ibid.*

The police detained Mr. Xue in a small cell with four other men from his church. Pet. App. 3a. The men were forced to share a single straw bed and a single wooden bucket for a latrine. *Id.* at 3a, 38a. They were fed a bowl of porridge twice each day, and the officers ridiculed their mealtime prayer by forcing them to sing the national anthem for their food. *Ibid.* Mr. Xue testified that the officers taunted him and his cellmates about their religion, referring to themselves as the prisoners' god and suggesting they call upon Jesus to rescue them. *Id.* at 3a.

Mr. Xue remained in custody for three days and four nights. Pet. App. 4a, 25a. During that period, the latrine bucket was never emptied, and Mr. Xue was never allowed out of the cell. *Id.* at 3a, 37a-38a. The police released Mr. Xue only after his mother paid a fine of 15,000 yuan, equivalent to 60% of Mr. Xue's 25,000-yuan annual salary working at a shoe factory. *Id.* at 4a. The police also forced him to sign a pledge not to attend any more illegal church meetings, warning that he would face even more severe punishment if he resumed. *Ibid.* Following his release, Mr. Xue was required to report to the police station once a week for "reeducation" sessions, during which officers asked about his activities and attempted to indoctrinate him on the importance of patriotism and work. *Ibid.*

Three weeks after his release, Mr. Xue returned to his house church. A short while later, in December 2007, the police again raided the house church. Pet.

App. 4a. All the parishioners present during the service were again arrested and taken to the police station. *Ibid.* Although Mr. Xue was at work at the time of the raid, he later learned that the repeat offenders arrested in this raid were sentenced to a one-year prison term. *Ibid.*

Mr. Xue and his family feared for his safety. Pet. App. 4a-5a. Concerned that the police would discover, through their interrogation, that Mr. Xue had resumed attending the house church, Mr. Xue's mother sent him to live with his aunt in another province. *Ibid.* When Mr. Xue stopped reporting to the police station for reeducation, the police searched for him at his parents' house, warning his mother that he would be punished if he did not report. *Ibid.* Mr. Xue and his parents decided that he should leave the country instead of returning home. *Ibid.*

c. Mr. Xue's six uncles paid a smuggler exorbitant fees to transport him out of China. In March 2008, Mr. Xue left China using his own passport. Pet. App. 5a. After traveling for several months, he ultimately entered the United States illegally, through Mexico, in July 2008. *Ibid.* He currently lives in Commerce City, Colorado, with his wife, a lawful permanent resident, and their young daughter. *Id.* at 34a, 42a-43a. He and his family attend Christ Revival Church in Denver. *Id.* at 42a-43a.

2. DHS identified Mr. Xue as a removable alien and issued a notice to appear. Pet. App. 32a. Mr. Xue applied for asylum, withholding of removal, and protection under the Convention Against Torture. *Ibid.* Mr. Xue alleged that he had suffered past per-

secution, and had a well-founded fear of future persecution, based upon his religion. *Ibid.* He argued that the abusive detention and interrogation he suffered, as well as the government's oath and reeducation requirements, would force him to continue practicing his faith in secret. *Id.* at 38a-39a, 54a-55a.

The IJ found Mr. Xue credible and credit his factual account, but denied his asylum petition. Pet. App. 5a-6a. While recognizing that the police imposed "harsh and offensive" conditions on Mr. Xue in jail and expressing "sympath[y]" for his "mistreatment," the IJ concluded it "does not amount to more than a restriction on [his] liberty and thus does not rise to the level of persecution." *Id.* at 55a. The IJ similarly found that Mr. Xue had a "subjective fear of future persecution on account of his religion," but that the mistreatment grounding his fear was not sufficiently "severe" for relief. *Id.* at 56a-58a. Mr. Xue had not identified threats "beyond that which he ha[d] already endured," the IJ reasoned, and "similar treatment in the future would not rise to the level of persecution." *Ibid.*

In arriving at these determinations, the IJ noted that the Seventh and Eleventh Circuit had held "that having to practice religion underground to avoid punishment is itself a form of persecution." Pet. App. 57a (citing *Kazemzadeh*, 577 F.3d 1341, and *Muhur* v. *Ashcroft*, 355 F.3d 958 (7th Cir. 2004)). But the IJ declined to follow these decisions, concluding that, "while persuasive," the decisions were "not binding." *Ibid.* *Kazemzadeh* was "distinguishable," the IJ believed, because the applicant there "was forced to choose between practicing

Christianity in hiding or facing death due to apostasy," and the consequences Mr. Xue faced for practicing his faith were not as "serious." *Ibid.* The BIA affirmed on similar grounds. *Id.* at 24a-30a.

3. The Tenth Circuit denied Mr. Xue's petition for review. Applying its precedent in *Vicente-Elias* v. *Mukasey*, 532 F.3d 1086 (10th Cir. 2008), the court treated the question of whether Mr. Xue had established persecution as a "question of fact," even though "the underlying factual circumstances are not in dispute and the only issue is whether those circumstances qualify as persecution." Pet. App. 8a. The Court observed that "[t]he circuits are split as to the standard of review applicable to the question whether an undisputed set of facts constitute persecution," and characterized its own approach as "odd." *Id.* at 11a. It left the matter for a future case, however, because it concluded "Xue has not challenged the correctness of *Vicente-Elias*," and the panel was "bound" by that decision. *Id.* at 9a.

Turning to the merits, the Tenth Circuit held that the trial court's "factual determination" that the "level of harassment" endured by Mr. Xue fell short of past persecution was supported by substantial evidence. Pet. App. 16a, 18a. The court noted the physical abuse Mr. Xue suffered and "unsanitary conditions" of his detention, but stressed that Mr. Xue "did not testify that he required medical treatment" or "experienced any lasting problems as a result of his detention." *Id.* at 14a-15a.

The Tenth Circuit declined to hold that persecution is categorically established when "an asylum

seeker was ordered, under threat of penalty, to stop practicing his religion." Pet. App. 17a. The Court recognized *Kazemzadeh*'s holding that "having to practice religion underground to avoid punishment is itself a form of persecution," but deemed it "highly specific to context and the record [there]." *Ibid.* Even if the decision created a "generalized rule," the Court explained, the Court would "be obligated to reject such an approach" given *Vicente-Elias*'s holding that the existence of persecution is a factual issue. *Id.* 18a.

Mr. Xue sought panel rehearing and rehearing en banc, arguing that the panel opinion created a conflict with the circuits holding that being forced to worship in secret under the threat of punishment constituted persecution on the basis of religion. In setting out this conflict, Mr. Xue challenged the panel's application of the standard of review in *Vicente-Elias*, arguing that the issue of persecution here was legal in nature. The panel denied rehearing, and the Tenth Circuit denied en banc review. Pet. App. 62a-63a.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari to Resolve the Conflict Among the Circuits Regarding Whether Being Forced to Practice One's Religion in Secret to Avoid Punishment Constitutes Persecution

1. The Tenth Circuit's opinion directly conflicts with the opinions of three other courts of appeals:

the Seventh, Ninth, and Eleventh Circuits. Each of these circuits has squarely held that being forced to practice one's religion in secret to avoid state-imposed punishment (as Mr. Xue was) constitutes persecution on the basis of religion. This Court should grant certiorari to resolve the circuit split created by the Tenth Circuit here.

a. In three published opinions, the Seventh Circuit has held that aliens suffer persecution for purposes of the immigration laws if forced to practice their religion in secret in order to avoid actual or threatened punishment by the government. In *Muhur* v. *Ashcroft*, 355 F.3d 958 (7th Cir. 2004), the court held that an immigration judge committed "a clear error of law" when he assumed "that one is not entitled to claim asylum on the basis of religious persecution if … one can escape the notice of the persecutors by concealing one's religion." *Id.* at 960. The petitioner in *Muhur* asserted that she was a Jehovah's Witness, and introduced evidence showing that Jehovah's Witnesses were forced to conceal their religion to avoid punishment in her native Eritrea. *Id.* at 959.

The Seventh Circuit granted her petition and reversed the BIA's ruling. It held that, "if Muhur is indeed a Jehovah's Witness … she is entitled to asylum" if forced to return to Eritrea, because "she has a well-founded fear of being persecuted by the Eritrean authorities unless she abandons or successfully conceals her religion." 355 F.3d at 961. The court emphasized that it was irrelevant whether the petitioner likely *could* succeed in concealing her religion to avoid punishment. As the court observed,

"Christians living in the Roman Empire before Constantine made Christianity the empire's official religion faced little risk of being thrown to the lions if they practiced their religion in secret; it doesn't follow that Rome did not persecute Christians." *Id.* at 960. Indeed, "[o]ne aim of persecuting a religion is to drive its adherents underground in the hope that their beliefs will not infect the remaining population." *Id.* at 961. The Court remanded the case for the agency to resolve whether the petitioner was, in fact, a Jehovah's Witness who would be required to return to Eritrea, as opposed to Ethiopia, where she had also lived. *Ibid.*

The Seventh Circuit reaffirmed this conclusion the following year in *Iao* v. *Gonzales*, 400 F.3d 530 (7th Cir. 2005). There, the petitioner testified that she was an adherent of the Falun Gong spiritual movement. *Id.* at 531. In light of the extensive evidence documenting the Chinese government's persecution of Falun Gong, the court determined that if the petitioner "practiced Falun Gong in China … she would face a substantial likelihood of persecution." *Id.* at 532. Citing *Muhur* and *Zhang* v. *Ashcroft*, 388 F.3d 713, 719 (9th Cir. 2004) (discussed below), the court held that although the petitioner "might be able to conceal her adherence to Falun Gong from the authorities, … the fact that a person might avoid persecution through concealment" of her faith was "in no wise inconsistent with her having a well-founded fear of persecution." *Iao*, 400 F.3d at 532. The court remanded the case for further proceedings regarding

whether the petitioner was in fact a Falun Gong practitioner. *Id.* at 533.

Most recently, the Seventh Circuit applied these precedents and reached the same result in *Qiu* v. *Holder*, 611 F.3d 403 (7th Cir. 2010), where the court emphasized that "[a]sylum exists to protect people from having to return to a country and conceal their beliefs." *Id.* at 408-409 (citing *Muhur* and *Iao*). As in *Iao,* the petitioner sought asylum on the basis that he faced persecution as a Falun Gong practitioner. *Id.* at 404. The BIA and IJ denied his petition, noting that many people in China "practice Falun Gong in their homes and … punishment for Falun Gong practice depends on the facts of each case … ranging from loss of employment to imprisonment." *Id.* at 406. Although the police sought the petitioner out for questioning, they never arrested him, and the IJ and BIA faulted him for failing to "establish where his case falls along that spectrum" of punishment. *Id.* at 406-407.

The Seventh Circuit rejected the BIA's reasoning, deeming the type of punishment that drove petitioner underground immaterial to the issue of religious persecution. What mattered, the court held, was that "Falun Gong is illegal in China and the only way for Qiu to avoid punishment is to cease practicing Falun Gong or work even harder to avoid discovery." *Qiu*, 611 F.3d at 407. The court held that these facts "established" that the petitioner "was subject to a well-founded fear of persecution on return to China." *Id.* at 409. It reaffirmed the core principle that "[p]utting Qiu to [the] choice" between practicing his religion and facing punishment for

doing so "runs contrary to the language and purpose of our asylum laws." *Ibid.*

The Ninth Circuit has reached the same conclusion. In *Zhang* v. *Ashcroft*, 388 F.3d 713 (9th Cir. 2004) (per curiam), the petitioner claimed that he faced punishment for practicing Falun Gong, although he had never personally been arrested or imprisoned. *Id.* at 716-717. The BIA and IJ denied his asylum application on the ground that the petitioner could "avoid persecution … by practicing Falun Gong in the privacy of his own home." *Id.* at 719. The court rejected this argument, explaining that "to require Zhang to practice his beliefs in secret" in order to avoid punishment "is contrary to our basic principles of religious freedom and the protection of religious refugees." *Ibid.* The court held that the petitioner "had shown a clear probability of persecution on account of his spiritual and religious beliefs" because the Chinese government "prohibited the practice of Falun Gong, and … Zhang would be unable to practice Falun Gong in China without harm." *Id.* at 720 (citing *Guo* v. *Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004) (holding that facts "compel[led] a finding" that the petitioner "was persecuted" on account of religion where he was "detained for a day and a half" because of his Christian faith and "coerced into signing a document saying he would no longer believe in Christianity")).

In *Kazemzadeh* v. *U.S. Attorney General*, 577 F.3d 1341 (11th Cir. 2009), the Eleventh Circuit "agree[d] with the decision of the Seventh Circuit [in *Muhur*] that having to practice religion underground to avoid

punishment is itself a form of persecution." *Id.* at 1354. In *Kazemzadeh*, the petitioner had converted from Islam to Christianity and fled Iran in part because apostasy was punishable by death. *Id.* at 1350, 1353. The BIA and IJ denied his asylum application, reasoning that there was no evidence Iranian officials knew he had converted to Christianity, and that the apostasy law was rarely enforced. *Id.* at 1350. The Eleventh Circuit granted the petition, holding that the petitioner had shown "a well-founded fear of persecution based on his religion," *id.* at 1355-1156, and criticizing the BIA for failing to "consider whether enforcement is rare because apostates practice underground and suffer instead that form of persecution to avoid detection and punishment," *id.* at 1354-55.

b. The Tenth Circuit's opinion here directly conflicts with the holding and reasoning of these circuits, for it expressly rejects the principle that having to practice one's religion in secret in order to avoid punishment constitutes persecution. Pet. App. 18a. The court held that it was "obligated to reject" that principle because it would be "flatly inconsistent" with the court's prior opinion in *Vicente-Elias*, which held "that the existence of persecution is a factual determination," not a legal question. *Ibid.*

Had the Tenth Circuit followed the other circuits holding that persecution exists when actual or threatened punishment "drive[s] its adherents underground," *Muhur*, 355 F.3d at 959-961, it would have reached the opposite result here. The Tenth Circuit recognized that Mr. Xue was arrested for

practicing his Christian faith when authorities raided his church; was interrogated and physically assaulted; was imprisoned in cramped, dark, and unsanitary conditions for three days and four nights; was released only after paying a fine of more than half his annual salary and signing a document promising not to attend church; and was subjected to state "reeducation" and harassment following release. Pet. App. 3a-4a. The court also recognized that two months after Mr. Xue's release, authorities again raided his house church, arrested everyone present (Mr. Xue was not present), and imprisoned repeat offenders for a term of at least one year. *Id.* at 4a-5a.

Under the approach followed by the Seventh, Ninth, and Eleventh Circuits, Mr. Xue suffered past persecution and had a well-founded fear of future persecution based on his religion. In those circuits, having to practice one's religion in secret in order to avoid punishment constitutes persecution as a matter of law. *Muhur*, 355 F.3d at 961; *Zhang*, 388 F.3d at 719-720; *Kazemzadeh*, 577 F.3d at 1354. It is irrelevant what particular form of punishment drove the petitioner underground; it is enough that the government's oppressive action forced the petitioner to worship in secret.

Indeed, in those cases, none of the petitioners had been arrested or harmed by the authorities on account of their religion. *Muhur*, 355 F.3d at 958, 960; *Zhang*, 388 F.3d at 717; *Kazemzadeh*, 577 F.3d at 1349. Mr. Xue's case thus is *a fortiori*: if the petitioners in those cases could establish a likelihood of persecution merely by showing a likelihood that

they *would be* imprisoned or fined for practicing their religion openly, Mr. Xue surely meets that same standard after having *actually been* imprisoned on account of his religious practice. Pet. App. 3a-4a.

The Tenth Circuit determined, however, that Mr. Xue had failed to establish past persecution or a likelihood of future persecution. It held that the BIA had permissibly concluded, as a factual matter, that the arrest, assault, imprisonment, and harassment Mr. Xue suffered for practicing his Christian faith did not rise to the level of harm necessary to constitute persecution. Pet. App. 15a-16a. It reached this conclusion even though the mistreatment Mr. Xue suffered was coupled with a "significant fine" and a compulsory pledge to "refrain from attending Christian services at an unregistered church." *Ibid.*

The conflict is palpable. Despite Mr. Xue's express reliance on *Muhur* and *Zhang* in his briefing, the Tenth Circuit did not cite, discuss, or attempt to reconcile its opinion with those decisions. The court briefly did attempt to distinguish *Kazemzadeh*, but in an unpersuasive way that merely underscores the conflict between its opinion and the Eleventh Circuit's there. Pet. App. 17a-18a. Citing the Eleventh Circuit's unpublished opinion in *Wang* v. *U.S. Attorney General*, 591 F. App'x 794, 799 (11th Cir. 2014), the Tenth Circuit suggested that *Kazemzadeh* did not "create[]" any "hard-and-fast rule," but rather was "highly specific to context and the record" in that case. Pet. App. 17a-18a.

That interpretation of *Wang* and *Kazemzadeh* is untenable. The Eleventh Circuit in *Wang* recognized and followed *Kazemzadeh*'s holding that "'having to practice religion underground to avoid punishment is itself a form of persecution.'" *Wang*, 591 F. App'x at 799 (quoting *Kazemzadeh*, 577 F.3d at 1354). But the court concluded that the evidence simply did not show "that if [Wang] returns to China she will in fact be forced to practice her religion secretly." *Ibid.* The court noted that Wang herself had never been imprisoned, and that "her mother, father, and siblings have long attended unregistered churches in China without incident." *Ibid.* *Wang* is fully consistent, then, with the Eleventh Circuit's rule that being forced to "practice religion underground to avoid punishment" is persecution. *Kazemzadeh*, 577 F.3d at 1354. The only difference is that Wang, unlike Kazemzadeh and unlike Mr. Xue, could not show that she actually had faced, or likely would face, punishment for practicing her religion openly.

2. This case is a good vehicle for resolving the circuit split. The Tenth Circuit unequivocally rejected the rule adopted by the Seventh, Ninth, and Eleventh Circuits that having to practice one's religion underground to avoid punishment constitutes religious persecution, holding its contrary approach "compelled" by Circuit precedent. Pet. App. 17a-18a. The question implicates our Nation's most deeply held commitments to religious freedom, warranting this Court's review. See *infra* at 27-31. And the circuit split is unlikely to resolve itself, given that Mr. Xue asked the Tenth Circuit to take the case en banc in light of the disagreement

among the circuits, but the court declined to do so. Pet. App. 62a-63a.

In addition, the record makes clear that the outcome of this case will be determined by the Court's resolution of this legal question. In many cases, there are factual disputes about whether a particular asylum applicant is actually a member of a disfavored religious group, or whether he or she actually would face punishment for practicing his or her religion openly. See, *e.g.*, *Muhur*, 355 F.3d at 961 (remanding for factual determination of whether petitioner was actually a Jehovah's Witness); *Iao*, 400 F.3d at 533 (remanding for factual determination of whether petitioner actually was a practitioner of Falun Gong); *Wang*, 591 F. App'x at 799 (factual dispute over whether asylum applicant would face punishment for practicing her religion openly).

Here, by contrast, there is no dispute that Mr. Xue is a faithful Christian and that he was imprisoned, assaulted, held in unsanitary conditions, severely fined, and forced to sign a letter renouncing his religious faith, all because of his practice of Christianity. Pet. App. 3a-4a. There is also no dispute that, two months after Mr. Xue was arrested, authorities again raided his church, arrested the individuals present, and imprisoned them for one year. *Id.* at 4a. Thus, there will be no factual impediment to the Court being able to reach and resolve the important legal issue presented here.

II. This Court Should Grant Certiorari to Resolve the Conflict Among the Circuits Regarding Whether a Court of Appeals Reviews *De Novo* or for Substantial Evidence the Agency's Determination of Whether an Undisputed Set of Facts Constitutes Persecution

1. The Tenth Circuit held that, in reviewing Mr. Xue's petition, it was bound by its prior precedent in *Vicente-Elias*, 532 F.3d at 1091, that "the ultimate determination whether an alien has demonstrated persecution is a question of fact, even if the underlying factual circumstances are not in dispute and the only issue is whether those circumstances qualify as persecution." Pet. App. 8a-9a. As the Tenth Circuit itself recognized (*id.* at 11a-12a), that question is itself the subject of a deep split among the circuits, reinforced by the court of appeals' opinion in this case. Certiorari is warranted to resolve this important question as well.

a. At least three courts of appeals—the Second, Eighth, and Eleventh Circuits—have held in published opinions that the determination of whether an undisputed set of facts constitutes persecution is a legal question the court of appeals reviews *de novo*. See *Huang* v. *Holder*, 677 F.3d 130, 136 (2d Cir. 2012) (the "question [of] whether what may or will happen to the asylum applicant is serious enough to meet the legal test of persecution" is "subject to *de novo* review" in the court of appeals); *Chen v. Holder*, 773 F.3d 396, 403 (2d Cir. 2014) (describing this as a "question of law"); *Alavez-*

Hernandez v. *Holder*, 714 F.3d 1063, 1066 (8th Cir. 2013) (whether petitioner's experience had "been severe enough to constitute past persecution" is "a question of law we review de novo"); *Mejia* v. *U.S. Att'y Gen.*, 498 F.3d 1253, 1256-1257 (11th Cir. 2007) (holding that court reviews "legal determination[s] … *de novo*" and noting that "[t]he question before us … is whether, as a matter of law, what Mejia endured constitutes past persecution").

In addition, the Ninth Circuit also has applied *de novo* review to this question, though its case law appears to be inconsistent (see *infra* at 23). See *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005) ("*Whether particular acts constitute persecution*" is "a legal question, which we review *de novo*") (emphasis in original) (citing *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097 (9th Cir. 2000), *overruled on other grounds*, *Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005) (en banc)). And the Third Circuit has held that the question of "whether [certain] events meet the legal definition of persecution" is "reviewed *de novo* because it is plainly an issue of law." *Huang v. Att'y Gen. of U.S.*, 620 F.3d 372, 383 (3d Cir. 2010).

These courts do not follow the rule the Tenth Circuit applied here: that persecution is a factual question "even if the underlying factual circumstances are not in dispute and the only issue is whether those circumstances qualify as persecution." Pet. App. 8a-9a. To be sure, where the facts are disputed or unclear, or where the agency's determination involves an element of predicting what will happen to an asylum applicant in the

future, courts apply substantial evidence review because the issue is factual in nature. See 8 U.S.C. §1252(b)(4)(B) (BIA's "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"); Pet. App. 10a (discussing *In re Z-Z-O-*, 26 I. & N. Dec. 586, 590 (BIA 2015)). But the courts of appeals on the side of the split opposite the Tenth Circuit apply *de novo* review to the question of whether an undisputed set of past events amounts to persecution.

In *Boer-Sedano*, for instance, the Ninth Circuit held that "the IJ erred as a matter of law by concluding" that the petitioner "had not been persecuted" when a police officer held a loaded gun to his head and threatened to pull the trigger. 418 F.3d at 1088. Similarly, in *Mejia*, the Eleventh Circuit held that where the petitioner received multiple "threats and attempted attacks over an 18 month period," including being threatened at gunpoint and having his nose broken, he had had established "past persecution" "as a matter of law." *Id.* at 1257-1258.

b. By contrast, at least four courts of appeals—the First, Fifth, Seventh, and Tenth—have held that the determination of whether an undisputed set of facts constitutes persecution is a factual question reviewed for substantial evidence. See, *e.g.*, Pet. App. 8a-9a (citing *Vicente-Elias*, 532 F.3d at 1091); *Attia* v. *Gonzales*, 477 F.3d 21, 24 (1st Cir. 2007) (per curiam) ("IJ's conclusion" that "two altercations in a nine year period and a general climate of discrimination" did not amount to "past persecution"

was "supported by substantial evidence"); *Eduard* v. *Ashcroft*, 379 F.3d 182, 187-188 (5th Cir. 2004) (reviewing for "substantial evidence" IJ's determination that harm petitioner suffered did not "rise to the level" necessary to qualify as "past persecution"); *Tarraf* v. *Gonzales*, 495 F.3d 525, 534 (7th Cir. 2007) ("We review the conclusion that the harm the petitioner may have suffered did not rise to the level of persecution under the substantial evidence standard."). The Tenth Circuit's opinion in this case, adhering to its holding in *Vicente-Elias*, has reinforced and extended the circuit split.

Beyond these four courts of appeals, published opinions in the Third and Ninth Circuits suggest that a substantial evidence standard of review may apply, although the law in these circuits appears muddled. See *Ahmed* v. *Keisler*, 504 F.3d 1183, 1194 (9th Cir. 2007) (reviewing for "substantial evidence" IJ's finding that petitioner's past "suffering" did not "rise[] to the level of persecution"); *Voci* v. *Gonzales*, 409 F.3d 607, 616 (3d Cir. 2005) (holding that the BIA's "determin[ation] that the pattern of mistreatment allegedly suffered" by the petitioner "was not sufficiently severe to constitute persecution" was "not supported by substantial evidence"). But see *supra* at 21 (discussing contrary opinions from these circuits in *Boer-Sedano* and *Huang*).

These courts, unlike courts on the other side of the split, ask only whether substantial evidence supports the agency's determination that certain undisputed facts amount to persecution. For instance, in *Eduard*, the undisputed facts were that

the petitioner, an Indonesian Christian, "was struck in the head with a rock while walking to church," but was never "interrogated, detained, arrested, or convicted" by the authorities on account of his faith. 379 F.3d at 187-188. The Fifth Circuit affirmed on the ground that "substantial evidence supports the IJ's finding" that these undisputed facts "failed to establish past persecution." *Id*. at 188. Similarly, in *Tarraf,* the Seventh Circuit affirmed the IJ's determination that "even crediting" the petitioner's testimony regarding detention and a shooting, these incidents did not warrant a "finding of past persecution." 495 F.3d at 534. The court reasoned that although this testimony "*could support* a finding of past persecution," they did not "compel" one, so the IJ's "conclusion" was "supported by substantial evidence." *Id.* at 535 (emphasis added). Like the Tenth Circuit in this case, these courts treat the agency's determination as to whether a set of facts constitute persecution as a factual rather than a legal issue, and thus review the agency's ruling for substantial evidence, rather than *de novo*.

2. This case is a good vehicle for resolving the split between, and confusion among, the courts of appeals. The Tenth Circuit grounded the result here in its binding precedent regarding the standard of review, explaining that it was "obligated to reject" the approach in *Kazemzadeh* because it was "flatly inconsistent with the *Vicente-Elias* standard of review." Pet. App. 17a-18a. Because the standard of review was central to the court's denial of relief to Mr. Xue, this Court's resolution of the circuit split

regarding the standard of review will bear directly on the result of Mr. Xue's petition.

Moreover, the split is unlikely to resolve itself, in light of how deep it is. Even if (hypothetically) one or two circuits were to take the issue en banc to reconsider their precedent (or, in the case of some courts, to resolve the internal contradictions in their precedent), the split would remain. Only this Court can resolve it and provide clarity to this issue, which has generated such confusion and discord in the courts of appeals.

III. The Questions Presented Are Important and Warrant this Court's Review

A. Resolving the Circuit Split Presented in this Case Is Important to Maintaining the Uniformity and Integrity of United States Immigration Law

1. The policy of uniformity in immigration law "is rooted in the Constitution." *Gerbier* v. *Holmes*, 280 F.3d 297, 311 (3d Cir. 2002). The Constitution provides that "Congress shall have Power To … establish an *uniform* Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4 (emphasis added). Consistent with this foundation, Congress designed the Immigration and Nationality Act "'to implement a uniform federal policy.'" *Kahn* v. *INS*, 36 F.3d 1412, 1414 (9th Cir. 1994) (quoting *Rosario* v. *INS*, 962 F.2d 220, 223-224 (2d Cir. 1992)) (internal quotation marks and alterations omitted).

Just as "the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States," *Arizona* v. *United States*, 132 S. Ct. 2492, 2498 (2012), so should the federal courts speak in harmony, rather than with discordant voices. Thus, as numerous courts of appeals and the BIA itself have recognized, "the immigration laws should be applied uniformly across the country." *Ye* v. *INS*, 214 F.3d 1128, 1132 (9th Cir. 2000); see also, *e.g.*, *Huang* v. *Att'y Gen. of U.S.*, 620 F.3d 372, 386 (3d Cir. 2010) ("'[i]mportant policy considerations favor applying a uniform federal standard'" in immigration law) (quoting *In re Crammond*, 23 I. & N. Dec. 9, 15 (BIA 2001)). "Fundamental fairness" compels that "aliens who are in like circumstances, but for irrelevant and fortuitous factors," should "be treated in like manner." *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976).

Mr. Xue's case illustrates the point. He filed his claim for asylum in Los Angeles, within the jurisdiction of the Ninth Circuit. Pet. App. 32a-33a. As explained above, Mr. Xue plainly would have been able to establish persecution under the Ninth Circuit's standard, for it recognizes that being forced to practice one's religious in secret upon pain of punishment can constitute persecution. *Zhang*, 388 F.3d at 719-720. Yet, Mr. Xue's move to Colorado—where he has found steady employment—led to a change of venue into a circuit in which the persecution he has suffered is not legally cognizable. Pet. App. 32a-33a. It makes no sense that Mr. Xue's eligibility for asylum should turn on whether he found work in California or Colorado, rather than on

whether or not he had suffered past persecution or had a well-founded fear of persecution in China. His place of residence in the United States is exactly the sort of "irrelevant and fortuitous" consideration that courts have held should not exist in our immigration law. *Francis*, 532 F.2d at 273.

B. Mr. Xue's Ability to Practice His Faith Openly and in Church is at the Core of America's Notion of Religious Liberty

For most of recorded history, religious minorities have survived persecution by worshipping in private. Indeed, the early religious minorities to find freedom in America first survived in England by hiding their faith. See, *e.g.*, 1 Puritans and Puritanism in Europe and America 455 (Francis J. Bremer & Tom Webster eds., 2006) ("Those who wished to continue Protestant worship [during Mary Tudor's reign] could draw hope from the long success of the Lollards in maintaining their faith underground over the centuries. There were clearly secret congregations that met in private rooms, in ships, and elsewhere to worship."). This enforced secrecy has always been understood as being itself a form of persecution, and escaping such persecution was one reason for the early emigration to America.

A parishioner's ability to practice his faith publicly, and to worship openly, thus goes to the core of our religious freedoms. As Professor Michael McConnell has explained, "[Religious] [o]pinion, expression of opinion, and practice were all expressly protected." Michael W. McConnell, *The Origins and*

Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1459-1460 (1990). Since then, this Court has emphasized that the government cannot "force []or influence a person to go to or to remain away from church against his will." *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947). Other American courts likewise have recognized that "[r]eligion" inherently "includes" a public "gregarious association" of individuals "openly expressing [their] belief." *Mo. Church of Scientology* v. *State Tax Comm'n*, 560 S.W.2d 837, 842 (Mo. 1977) (quoting *Fellowship of Humanity* v. *County of Alameda*, 315 P.2d 394, 406 (Cal. Ct. App. 1957)). And it is against that backdrop that our nation has understood religious persecution abroad. "While drafting the Refugee Act, Congress repeatedly referenced the founding legacy of our nation as a powerful motivation for the creation of the statutory scheme protecting asylum seekers from religious persecution." *Kazemzadeh*, 577 F.3d at 1359-1360 (Marcus, J., specially concurring).

The issues presented in this case thus represent not some fringe arcana in immigration law, but a matter of paramount national interest.

IV. The Tenth Circuit's Decision Is Incorrect

1. The Tenth Circuit's decision is an outlier among the circuits because it is fundamentally wrong. As set forth above—and as explained by the many courts that have come to the correct result—practicing one's faith in secret to avoid punishment is not a cure for persecution but a symptom of persecution.

As with all matters of statutory construction, interpretation of the INA begins with the "plain language" of the statute. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). Here, the plain meaning of the term "persecution" as used in 8 U.S.C. §1101(a)(42)(A) illustrates the error of the Tenth Circuit's view. A government's attempt to silence a religion by forcing its adherents to practice in secret fits perfectly into the dictionary definition of "persecution": "a campaign having for its object the subjugation or extirpation of the adherents of a religion or way of life." Webster's Third New International Dictionary 1685 (2002); see *Bucur* v. *INS*, 109 F.3d 399, 405 (7th Cir. 1997) (noting that "it is virtually the definition of religious persecution that the votaries of a religion are forbidden to practice it" and are therefore forced into secret worship to avoid punishment).

This common meaning of "persecution" has even permeated the highest levels of the U.S. government. On occasions dating all the way back to the founding era, U.S. government officials have endorsed the view that being forced to worship in secret constitutes persecution. In 1789, for example, President George Washington assured the United Baptist Churches of Virginia that as president he would ensure that citizens could "worship[] the Deity according to the dictates of [their] own conscience," thus protecting the population from "every species of religious persecution." George Washington, Remarks at the United Baptist Churches of Virginia, *Founders*

Online, National Archives (May 1789).[1] Thus, it was widely understood at the time of the Framing that freedom of religion encompassed not merely the right to hold religious beliefs, but to "express[]" those beliefs and to "practice" one's religion openly. McConnell, *supra*, 103 Harv. L. Rev. at 1459, 1489; see also, *e.g.*, Mass. Const. (1780), Part I, art. II (noting the "right … of all men in society, *publicly*" to "worship the Supreme Being" and providing that "no subject shall be hurt, molested, or restrained … for worshipping God in the manner … most agreeable to the dictates of his own conscience; or for his religious profession or sentiments" (emphasis added)).

That understanding of religious freedom and religious persecution, so deeply engrained in American tradition, has become a shared principle of international law as well. The United Nations' *Handbook on Procedures and Criteria for Determining Refugee Status*, which this Court has held provides "significant guidance … to which Congress sought to conform" in giving effect to 1967 Protocol Relating to the Status of Refugees, *Cardoza-Fonseca*, 480 U.S. at 438-439 & n.22, is crystal clear on this point. It states: "[R]eligious belief … can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution." U.N. High Comm'r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status 126 (Dec. 2011).[2] "Indeed,

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[1] http://founders.archives.gov/documents/Washington/05-02-02-0309 (accessed April 20, 2017).

[2] http://www.unhcr.org/en-us/publications/legal/3d58e13b4/handbook-procedures-criteria-

the Convention would give no protection from persecution for reasons of religion if it was a condition that the person affected must take steps—reasonable or otherwise—to avoid offending the wishes of the persecutors. Bearing witness in words and deeds is often bound up with the existence of religious convictions." *Ibid.*

The rule adopted by the Seventh, Ninth, and Eleventh Circuits is faithful to these principles. These courts correctly recognize that "[o]ne aim of persecuting a religion is to drive its adherents underground in the hope that their beliefs will not infect the remaining population." *Muhur*, 355 F.3d at 961. It is important to note that this rule is not unbounded; acknowledging that forced secret worship is persecution does not entitle every Chinese Christian to asylum. An asylum seeker must still make a "particularized" factual showing that he or she either has actually been punished by the government for practicing his or her religion (as Mr. Xue undisputedly was) or *would* be punished for practicing openly. *Kazemzadeh*, 577 F.3d at 1361 (Marcus, J., specially concurring). "There is no threat of floodgates opening here." *Id.* at 1362.

The Tenth Circuit's contrary rule would deny relief to those who need it most—the victims of the harshest persecution, who, because they are so harshly persecuted, are the most likely to practice in secret in order to avoid that persecution. That rule

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determining-refugee-status-under-1951-convention.html (accessed April 20, 2017).

finds no support in either the text of the INA or the fundamental constitutional values that underlie it.

2. The Tenth Circuit's conclusion regarding the standard of review is equally wrong. The question of whether a set of undisputed past facts constitutes persecution is a legal question subject to *de novo* review, not a factual determination reviewed for substantial evidence. The Tenth Circuit frankly admitted that its contrary rule is "odd, to say the least," and that there was "serious reason to question" it. Pet. App. 11a. That concern is borne out by the controlling statute, which calls for substantial evidence review only of "administrative findings of fact." 8 U.S.C. §1252(b)(4)(B); see Pet. App. 12a ("[T]he statute empowering review of asylum rulings in the circuit courts of appeals does not contemplate the application of a substantial evidence standard to any determinations that are not factual in nature."). It also contravenes this Court's authorities considering analogous questions such as whether probable cause exists, whether a fine is excessive, or whether a confession is voluntary.

In *Ornelas* v. *United States*, 517 U.S. 690 (1996), the Court held that probable cause and reasonable suspicion determinations are reviewed *de novo* where "[t]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Id.* at 696-697 (internal quotation marks and citation omitted; alterations in original). "A policy of sweeping deference would

permit … the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." *Id.* at 697 (internal quotation marks and citation omitted; alterations in original). "Such varied results would be inconsistent with the idea of a unitary system of law" and therefore "unacceptable." *Ibid.*

In *Cooper Industries, Inc.* v. *Leatherman Tool Group*, 532 U.S. 424, 436 (2001), the Court drew upon the teachings of *Ornelas* to apply *de novo* review to whether a punitive damages award was excessive. The Court also endorsed Justice Breyer's observation that "[r]equiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself." *Cooper Industries*, 532 U.S. at 436 (quoting *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring)).

In *Miller* v. *Fenton*, 474 U.S. 104, 110 (1985), the Court explained that, "[w]ithout exception, the Court's confession cases hold that the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination." While "subsidiary factual questions" about what actually happened were entitled to deference, the question whether those acts deprived the confession of its voluntary nature was not. *Id.* at 112. Because this voluntariness analysis "subsumes … a 'complex of values,'" it

cannot be treated as a question "of simple historical fact." *Id.* at 116 (internal citation omitted).

Whether undisputed facts satisfy a legal standard is thus a question of law, not a question of fact. What constitutes persecution before one immigration judge must also constitute persecution before another; the question entrusted to them is whether the alien in fact has a well-founded fear of such persecution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 24, 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NO. 15-9540

TING XUE, PETITIONERS

v.

LORETTA E. LYNCH, UNITED STATES ATTORNEY GENERAL, RESPONDENT

November 25, 2016

SLIP OPINION

On Petition for Review of an Order of the
Board of Immigration Appeals
(BIA No. 1:A 089 898 694)

BEFORE BRISCOE, MURPHY, AND PHILLIPS, CIRCUIT JUDGES.

OPINION FOR THE COURT FILED BY MURPHY, CIRCUIT JUDGE

Ting Xue, a native and citizen of China, petitions for review of an order by the Board of Immigration Appeals ("BIA"). The BIA affirmed an Immigration Judge's ("IJ") decision to deny Xue's application for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). Exercising jurisdiction pursuant to 8 U.S.C. § 1252, this court **denies** Xue's petition for review.

I. Background

A. Factual Background[1]

Xue is a long-practicing, faithful Christian. He was raised as a Christian by his mother and was baptized in 1998 when he was thirteen years old. Xue attended services two or three times a week at an illegal "house church."[2] In light of the need to avoid detection by gov-

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[1] The IJ found, pursuant to the provisions of 8 U.S.C. § 158(b)(1)(B)(iii), that Xue's testimony was credible. The BIA affirmed this finding. Accordingly, the factual background is, for the most part, drawn from Xue's testimony before the IJ.

[2] Because they are not registered with the Chinese government, which strictly controls the content of approved religions, house churches are illegal. The record indicates the government-approved Christian church "modifies doctrine and theology in an effort to eliminate elements of Christian faith that the Communist Party regards as incompatible with its goals and ideology." For example, Xue testified the government-approved Christian church teaches that loyalty to country and the Communist Party come before loyalty to God. Due to the Chinese government's perception that house churches threaten its con-

(continued …)

ernment officials, the house church Xue attended gathered at a different member's house each week. Despite this precaution, on Friday, October 26, 2007, Chinese authorities raided a house church service attended by Xue.[3] The authorities arrested everyone in attendance and took them to the police station.

At the police station, each church member faced interrogation. In the interrogation room, two police officers sat behind a table facing Xue and another officer stood behind him. Officers questioned Xue as to his personal/biographical information and sought information regarding the organization and leadership of the house church. After Xue persisted in responding that there was no organizer of the house church, officers slapped Xue across the head and used a baton to hit Xue on his upper left arm. Because he was extremely frightened, all Xue could do was continuously repeat that he did not know the answers to the officers' questions.

After the interrogation ended, the officers placed Xue in a small, dim jail cell with four other men from his house church. The five men shared a single wooden bucket for a toilet—a bucket not emptied during Xue's entire incarceration. Officers routinely mocked Xue and his cell mates, referring to themselves as the prisoners' "God," claiming the power to refuse to feed them,

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trol of the country, officials have sought out house churches and arrested and imprisoned their members and leaders.

[3] Although his mother attended the same house church attended by Xue, she was not present during this raid. While Xue attended church on both Fridays and Sundays, his mother only attended services on Sundays. Xue explained that the Friday house church gatherings were for young people.

and taunting them to call on Jesus for rescue. The prisoners were fed a bowl of porridge twice a day. Sometimes before they were fed, the officers forced the prisoners to sing the national anthem to ridicule the prisoners' habit of praying before eating. Xue remained in custody for three days and four nights. Xue was released from imprisonment only after his mother paid a significant fine. That is, although Xue's entire yearly salary at the shoe factory was 25,000 yuan, the fine paid by Xue's mother to secure his release was 15,000 yuan. Upon his release, he was forced to sign a document guaranteeing he would not attend any more illegal church meetings. Officers warned Xue that if he ever again attended services at a house church, he would be severely punished. Xue was required to report to the police station once every week and remain for one hour. During these weekly sessions, officers would ask Xue about his whereabouts during the week, tell him he should be patriotic and faithful to his job, and force him to write down his personal feelings about his reeducation.

Two weeks after his release, Xue returned to his underground house church. Police officers again raided Friday youth services at Xue's house church in December 2007. Xue, who was working overtime at his job at a shoe factory, was not present during the raid. Everybody present at the house church during the second raid was arrested. Xue learned that all repeat offenders arrested during the second raid were prohibited from posting bond and were eventually sentenced to imprisonment for a term of one year.

Xue testified he became fearful officers would learn he had continued to attend the house church, even though he was not present during the second raid. Be-

cause of these concerns, Xue's mother counseled him to stop reporting to the police station. Xue's mother sent him to stay at his aunt's house, a location ten hours away by bus. Xue remained at his aunt's residence for three months without returning home. When Xue failed to appear at the police station as required by the terms of his release from jail, officers came to his parents' house looking for him. Xue's mother told him the officers asked why he had failed to report as required and stated he needed to immediately report or he would be severely punished. Rather than returning home and resuming his weekly visits to the police station, Xue and his parents decided he should leave China. Xue's six uncles paid an exceedingly large amount of money to a smuggler to help Xue escape China. In March 2008, Xue left China using his own passport. He traveled for several months, ultimately entering the United States illegally through Mexico in July 2008.

In addition to the testimony summarized above, Xue related that his mother continues to attend unregistered church services and his father and brother sometimes also attend those services. Although Xue's mother began hosting a weekly church meeting at her own home in 2010, she has never been arrested.

B. Agency Decision

An IJ denied Xue's request for asylum,[4] withholding of removal,[5] and relief under CAT.[6] As to asylum,

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[4] *See* 8 U.S.C. § 1158(a)(1) (providing that an alien present in the United States, without regard to status, may apply for asylum); *id.* § 1158(b) (setting out eligibility standards for a grant of asylum, including that the alien qualify as a refugee under the provisions of 8 U.S.C. § 1101(a)(42)); *id.* § 1101(a)(42) (tying

(continued …)

the IJ found Xue's testimony credible but insufficient to establish refugee status. *See* 8 U.S.C. § 1158(b)(1)(B) (imposing on an asylum seeker the burden of establishing an entitlement to relief). The IJ concluded Xue's treatment at the hands of Chinese authorities before he came to the United States was not sufficiently severe to amount to past persecution. *Cf. Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1337 (10th Cir. 2008) ("[P]ersecution requires the infliction of suffering or harm . . . in a way regarded as offensive and must entail more than just restrictions or threats to life or liberty." (quotation omitted)). Absent a showing of past persecution, the IJ recognized Xue was not entitled to a presumption of a well-founded fear of future persecution. *See* 8 C.F.R. § 1208.13(b)(1)-(2). Instead, Xue was obligated to independently establish the existence of a reasonable possibility he would suffer future persecution upon return to China. *See id.* The IJ determined Xue could not make the necessary showing given that his mother held house church meetings in her residence without incident over the previous three years. Fur-

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refugee status to past persecution or a well-founded fear of future persecution on account of, inter alia, religion in an alien's country of nationality).

[5] *See* 8 U.S.C. § 1231(b)(3) (providing that absent certain exceptions, "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's . . . religion").

[6] *See* 8 C.F.R. § 1208.16(c) (implementing the provisions of the U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

thermore, the IJ found the letters Xue submitted from his mother failed to demonstrate Xue would be specifically targeted for persecution if he returned to China. Because Xue failed to demonstrate his entitlement to relief under the asylum standard, the IJ concluded Xue also failed to meet the more stringent standard of proof applicable to a request for withholding of removal.[7] Finally, because Xue had alleged neither past torture nor asserted a fear of torture in the future, the IJ concluded Xue was not entitled to relief under CAT. *See* 8 C.F.R. §§ 208.13(c), 208.18(a).

In a brief order, a single member of the BIA reviewed and affirmed the IJ's denial of asylum, withholding of removal, and relief under CAT. *See* 8 C.F.R. § 1003.1(e)(5) (empowering a single member of the BIA to resolve certain appeals in "a brief order"). When the BIA reviews an IJ's decision under the provisions of § 1003.1(e)(5), it is the BIA's decision "that constitutes the final order of removal under 8 U.S.C. § 1252(a)." *Uanreroro v. Gonzales*, 443 F.3d 1197, 1204 (10th Cir. 2006). "Accordingly, in

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[7] *Compare* 8 C.F.R. § 1208.13(b)(2)(i)(B) (providing that to demonstrate a well-founded fear of future persecution, an asylum seeker must demonstrate only that there is a "reasonable possibility" of suffering persecution upon a return to the alien's country of origin), *with id.* § 1208.16(b)(2) (providing that to demonstrate a well-founded fear of persecution, an alien seeking withholding of removal must establish "it is more likely than not" he would be persecuted on account of, inter alia, religion upon a return to his country of nationality); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 427-32 (1987) (noting differing standards of proof in these two contexts).

deference to the agency's own procedures, we will not affirm on grounds raised in the IJ decision unless they are relied upon by the BIA in its affirmance." *Id.* In its order, the BIA affirmed the IJ's finding that Xue's testimony was credible. Nevertheless, like the IJ, the BIA concluded Xue's testimony was insufficient to carry his burden of establishing he was subjected to past persecution or there was a reasonable possibility he would, upon being returned to China, be subjected to persecution in the future. Because Xue could not satisfy the less rigorous standard for relief required for asylum seekers, and because he had not alleged past torture or a fear of future torture, the BIA concluded Xue's claims for withholding of removal and relief under CAT likewise failed.

II. Discussion

A. Standard of Review

1. Binding Tenth Circuit Precedent

This court reviews "the BIA's legal determinations de novo, and its findings of fact under a substantial evidence standard." *Niang v. Gonzales*, 422 F.3d 1187, 1196 (10th Cir. 2005). "The administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). This court has made clear that "the ultimate determination whether an alien has demonstrated persecution is a question of fact, even if the underlying factual circumstances are not in dispute and the only issue is whether those circumstances qualify as persecution." *Vicente-Elias v. Mukasey*, 532 F.3d 1086, 1091 (10th Cir. 2008).

Xue has not challenged the correctness of *Vicente-Elias* and, in any event, this panel is bound by that decision. *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) ("We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court."). Accordingly, in resolving Xue's appeal, this court applies the standard of review set out in *Vicente-Elias*.

2. Existence of Persecution as a Question of Fact

Despite the parties' failure to recognize the issue, there is serious reason to question whether this court should treat the BIA's ultimate determination as to the existence of persecution (i.e., whether a given set of facts amounts to persecution) as factual in nature. The BIA's own regulations prohibit it from reviewing an IJ's factual determinations de novo.[8] "Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding appeals." 8 C.F.R. § 1003.1(d)(3)(iv). In the context of asylum cases, the BIA has emphasized that the prohibitions set out in § 1003.1(d)(3)(i) and (iv) apply only to questions of

[8] 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."); *see also id.* § 1003.1(d)(3)(ii) ("The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges de novo.").

historical fact. *In re A-S-B-*, 24 I.&N. Dec. 493, 496-97 (BIA May 8, 2008), *overruled in part on other grounds by*, *In re Z-Z-O-*, 26 I.&N. Dec. 586, 589-91 (BIA May 26, 2015). To be clear, the BIA has specifically determined that the ultimate resolution whether a given set of facts amount to persecution is a question of law reviewed de novo.[9] There is nothing in the record indicating the BIA deviated from this course of de novo review in evaluating whether Xue had demonstrated past persecution, as the BIA's order merely recites that it reviewed the IJ's findings of fact and credibility determinations for clear error and reviewed de novo all other issues.[10]

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[9] In *In re A-S-B-*, 24 I.&N. Dec. 493, 496-97 (BIA May 8, 2008), the BIA discussed the genesis of the new rules cabining BIA review of IJ determinations set out in § 1003.1(d)(3). It concluded § 1003.1(d)(3) was never intended to prevent it from reviewing any type of legal issue de novo, specifically including (1) whether a given set of facts amounts to persecution and (2) a prediction as to the likelihood of certain events occurring in the future. *Id.* Numerous circuit courts of appeals held invalid the portion of *In re A-S-B-* treating as an issue of law an IJ's predictions as to what events were likely to happen in the future. *In re Z-Z-O-*, 26 I.&N. Dec. 586, 589-91 (BIA May 26, 2015) (discussing circuit decisions). The BIA eventually overruled that narrow portion of *In re A-S-B-*. *Id.* In so doing, however, the BIA specifically left in place the portion of *In re A-S-B*which empowered the agency to review de novo an IJ's determination as to whether a given set of facts amounts to persecution. *Id.*

[10] It does not appear that this issue (i.e., the appropriate standard of review to be applied by this court) arises in the context of Xue's appeal from the BIA's determination as to the existence of a well-founded fear of future persecution. The IJ found that Xue failed to prove he would likely be targeted for, or subjected to, mistreatment if he returned to China. This factual determina-

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It is certainly odd, to say the least, for this court to review for substantial evidence a determination the BIA itself has concluded is legal in nature.[11] This is

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tion fully resolved the future-persecution component of Xue's asylum claim. For that reason, the IJ did not address the logically subsequent question whether any such adverse consequences Xue might suffer would amount to persecution. The BIA affirmed the IJ's factual determination. There is no doubt this court should review that factual determination under a substantial evidence standard.

[11] The circuits are split as to the standard of review applicable to the question whether an undisputed set of facts constitute persecution. *See, e.g.*, *Lin v. Holder*, 723 F.3d 300, 307 (1st Cir. 2013) (recognizing the BIA reviews de novo IJ's determination as to persecution but, nevertheless, reviewing under "deferential substantial evidence standard" "the BIA's rulings on this question"); *Voci v. Gonzales*, 409 F.3d 607, 613 (3d Cir. 2005) ("Whether an asylum applicant has demonstrated past persecution or a well-founded fear of future persecution is a factual determination reviewed under the substantial evidence standard."); *Eduard v. Ashcroft*, 379 F.3d 182, 187-88 (5th Cir. 2004) (evaluating the BIA's decision that petitioner failed to show past persecution for substantial evidence); *Borca v. INS*, 77 F.3d 210, 214 (7th Cir. 1996) ("We review the BIA's factual findings that Borca failed to establish past persecution or a well-founded fear of future persecution under the 'substantial evidence' standard."); *Ghaly v. INS*, 58 F.3d 1425, 1429 (9th Cir. 1995) ("The [BIA's] factual determinations, including its finding of whether an applicant has demonstrated a 'well-founded fear of persecution,' are reviewed for substantial evidence."). *But see Chen v. Holder*, 773 F.3d 396, 403 (2d Cir. 2014) ("[W]hether certain events, if they occurred, would constitute persecution as defined by the INA is a question of law."); *Alavez-Hernandez v. Holder*, 714 F.3d 1063, 1066 (8th Cir. 2013) ("[Petitioners] . . . contend the BIA erred in concluding the conditions in Mexico had not been severe enough to constitute past persecution. This is a question of law we review de novo."). Those circuits treating the existence of persecution as a fact issue appear to rely un-

(continued …)

especially true when the BIA's governing regulations forbid it from engaging in factfinding. It is presumably for this reason that the statute empowering review of asylum rulings in the circuit courts of appeals does not contemplate the application of a substantial evidence standard to any determinations

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critically on the Supreme Court's twenty-plus-year-old decision in *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). In *Elias-Zacarias*, the Court was confronted with a decision of the Ninth Circuit holding that "conscription by a nongovernmental group constitute[d] persecution on account of political opinion." *Id.* at 480. The Supreme Court began by holding as follows:

> The BIA's determination that Elias-Zacarias was not eligible for asylum must be upheld if supported by reasonable, substantial, and probative evidence on the record considered as a whole. It can be reversed only if the evidence presented by Elias-Zacarias was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed.

Id. at 481 (citation and quotation omitted). The Court ultimately reversed the Ninth Circuit, concluding the record did not compel the conclusion that (1) Elias-Zacarias's opposition to recruitment into the guerrilla group was based on political motivation or (2) the guerrillas erroneously believed political motivations drove Elias-Zacarias's refusal to join. *Id.* at 482-84. Thus, it appears the question of persecution in *Elias-Zacarias* turned on disputed facts, not on the ultimate question of whether a given set of facts amounted to persecution. In any event, and most importantly, *Elias-Zacarias* was decided well before the BIA propounded its own regulations, which regulations unambiguously (1) preclude the BIA from making factual findings on review of an IJ's asylum decision and (2) establish that the ultimate question regarding the existence of persecution is a question of law subject to de novo review by the BIA. 8 C.F.R. § 1003.1(d)(3).

that are not factual in nature. 8 U.S.C. § 1252(b)(4)(B). Unless the BIA's decision in *In re A-S-B-* is wrong, it appears entirely likely this court should be treating BIA decisions on the ultimate question of the existence of persecution as legal in nature. *See generally Castellanos-Pineda v. Holder*, 537 F. App'x 797, 800 (10th Cir. 2013) (recognizing tension between review standard set out in *In re A-S-B-*and this court's decision in *Vicente-Elias*, but concluding it was unnecessary to address the issue because petitioner failed to exhaust her merits claim before the BIA). Alternatively, even assuming the determination whether a given set of facts amounts to persecution could properly be labeled a factual determination, the review structure set out by the BIA in *In re A-S-B-* and *In re Z-Z-O-* is at odds with the rule set out in 8 C.F.R. § 1003.1(d)(3)(i). That is, if the issue is factual in nature, § 1003.1(d)(3)(i) mandates review by the BIA under the clear-error standard. The failure of the BIA to apply the correct standard of review on appeal from the decision of an IJ is, itself, a legal error requiring remand for additional proceedings. *See Kabba v. Mukasey*, 530 F.3d 1239, 1244-45 (10th Cir. 2008) (holding question whether BIA applied correct standard of review is legal in nature, and therefore subject to de novo review, and concluding BIA erred because it reviewed an IJ's credibility determinations de novo). As noted above, however, Xue did not raise this issue on appeal. Thus, we leave the matter for a future case in which the parties have presented the court with appropriate briefing.

B. Asylum

The Attorney General has discretion to grant asylum to a person who qualifies as a "refugee." 8 U.S.C. § 1158(b). A refugee is a person unable or unwilling to return to his country of nationality because of past persecution or a well-founded fear of future persecution on account of, inter alia, religion. *Id*. § 1101(a)(42)(A). The term "persecution" is not defined in the Immigration and Nationality Act. *Balazoski v. INS*, 932 F.2d 638, 641-42 (7th Cir. 1991). Nevertheless, this court has "observed that it requires the infliction of suffering . . . in a way regarded as offensive and requires more than just restrictions or threats to life and liberty." *Hayrapetyan*, 534 F.3d at 1337.

1. Past Persecution

In concluding he did not suffer past persecution, the BIA explained that "[a]lthough [Xue] was detained for [four] nights, [he] was physically harmed only once, and he did not testify that he required medical treatment or suffered any lasting physical effects as a result of his detention." The BIA rejected Xue's assertion that restrictions on his freedom and the practice of his religion in the form of the guarantee letter and requirement to report weekly to the police station, when added to the harm of his detention, established persecution. As the BIA explained, "[Xue] testified that he returned to the underground church [two] weeks after being released, and did not demonstrate that the reporting requirement was onerous or that he suffered other harm."

On appeal, Xue contests the BIA's determination by asserting it is reasonably subject to debate and

several circuits have held that conduct similar to that at issue here qualifies as persecution. *See, e.g.*, *Beskovic v. Gonzales*, 467 F.3d 223, 226 (2d Cir. 2006) ("The BIA must . . . be keenly sensitive to the fact that a 'minor beating' or, for that matter, any physical degradation designed to cause pain, humiliation, or other suffering, may rise to the level of persecution if it occurred in the context of an arrest or detention on the basis of a protected ground."). He further contends that none of the Tenth Circuit cases identified by the BIA compel the result reached by the agency. Xue's argument as to the existence of past persecution is not convincing. Xue's arguments in this regard misunderstand the governing standard of review. To prevail on appeal, Xue must show that a reasonable factfinder would be compelled to conclude he suffered past persecution. *Vicente-Elias*, 532 F.3d at 1091. Xue fails to make the required showing. The BIA's "finding," *see id.*, is supported by both substantial evidence and by this court's precedents.

According to his testimony, Xue was arrested and detained in cramped, dark, and unsanitary conditions for four nights and three days. He was fed a bowl of porridge twice a day. He was interrogated once, during which time he was hit on the back of his head with an officer's hand, and then struck on his arm with an officer's baton. Xue did not testify that he required medical treatment, or even that he was in significant pain. He also did not claim he experienced any lasting problems as a result of his detention. Xue's family paid a significant fine to secure his release and Xue promised to report to the police station weekly and refrain from attending Christian

services at an unregistered church. When he reported as requested for questioning, he did not suffer any physical mistreatment. As noted above, this court has previously determined that similar fact situations did not compel a finding of past persecution. *Witjaksono v. Holder*, 573 F.3d 968, 977 (10th Cir. 2009); *Kapcia v. INS*, 944 F.2d 702, 704, 708 (10th Cir. 1991). Nevertheless, Xue has not identified a single case concluding a similar level of harassment (i.e., incarceration lasting no more than four days coupled with a single incident of physical abuse amounting to two separate blows which did not inflict serious pain) compels a finding of persecution. Indeed, this court has consistently concluded that this type of evidence does not compel a finding of past persecution. *See*, *e.g.*, *Witjaksono*, 573 F.3d at 977 (affirming BIA finding that alien had not suffered past persecution when evidence showed soldier physically assaulted alien on one occasion and alien suffered minor injuries that did not require medical treatment); *Kapcia*, 944 F.2d at 704, 708 (affirming BIA finding that aliens suffered no past persecution when evidence showed one alien was arrested four times, detained three times, and beaten once and the other alien was twice detained for forty-eight hours during which time he was interrogated and beaten). Other circuits have reached a similar result. *See, e.g.*, *Dandan v. Ashcroft*, 339 F.3d 567, 574 (7th Cir. 2003) (holding that being detained, beaten, and deprived of food for three days did not compel a finding of persecution); *Prasad v. INS*, 47 F.3d 336, 340 (9th Cir. 1995) (holding that, "[a]lthough a reasonable factfinder *could* have found" a brief detention and beating requiring no medical care "sufficient to es-

tablish past persecution . . . a factfinder would [not] be compelled to do so"). Xue claims he faced financial harm in the form of the fine paid to secure his release and asserts this harm to his pecuniary interests, when coupled with the harms identified above, compel a finding of past persecution. The problem for Xue is that he did not testify to any long-term effects from paying the fine and the record reveals his family was able to secure the money to pay the fine within a few days. Furthermore, just a few months after his release from jail, Xue, with the help of his family, was able to pay a significantly larger amount of money to a smuggler to aid Xue's travels to the United States. This evidence strongly suggests the fine was not as burdensome to Xue as he now asserts on appeal. That being the case, this evidence does not compel a finding of past persecution, even when considered in conjunction with evidence regarding Xue's mistreatment while incarcerated.

Alternatively, Xue asks this court to hold that any time an asylum seeker was ordered, under threat of penalty, to stop practicing his religion, persecution is established. In so requesting, Xue relies on the Eleventh Circuit's decision in *Kazemzadeh v. U.S. Attorney General*, 577 F.3d 1341 (11th Cir. 2009). In *Kazemzadeh*, an asylum seeker was forced to choose between practicing Christianity in hiding or facing death in Iran. *Id.* at 1353-54. *Kazemzadeh* concluded that "having to practice religion underground to avoid punishment is itself a form of persecution." *Id.* at 1354. This court perceives more than one problem with Xue's reliance on *Kazemzadeh*.

Most importantly, under similar facts to those at issue here, the Eleventh Circuit declined to extend its holding in *Kazemzadeh* in the way requested by Xue. In *Wang v. U.S. Attorney General*, 591 F. App'x 794, 799 (11th Cir. 2014) (unpublished disposition), the Eleventh Circuit rejected the notion that *Kazemzadeh* created a hard-and-fast rule, explaining that case-specific evidence in *Wang* demonstrated "that local governments do not interfere with unregistered churches viewed as non-threatening; restrictions on religious freedom vary according to region; and certain areas protect religious freedom." In that regard, the court in *Wang* recognized the petitioner's testimony "that her mother, father, and siblings have long attended unregistered churches in China without incident." *Id.* Like the court in *Wang*, we do not read *Kazemzadeh* as creating the generalized rule advocated by Xue. Instead the result in *Kazemzadeh* is highly specific to context and the record.

Even if *Kazemzadeh* could be read as creating the inflexible rule advocated by Xue, this court would be obligated to reject such an approach. Here the record supports the BIA's determination that the restriction on Xue's religious practice in the form of the guarantee letter was not particularly meaningful given that Xue returned to his house church within two weeks of his release from jail. As noted above, *Vicente-Elias* holds that the existence of persecution is a factual determination focused on the record evidence. An inflexible rule treating each and every instance of a certain type of religious harassment as amounting to persecution as a matter of law is flatly inconsistent

with the *Vicente-Elias* standard of review. Thus, this court cannot conclude the BIA was compelled to find past persecution based exclusively on the fact Xue was required to sign the guarantee letter as a condition of his release from jail.

Considering the entire record, the evidence adduced by Xue at the immigration hearing does not compel the conclusion he suffered persecution prior to leaving China to travel to the United States. That being the case, the BIA's finding that Xue did not suffer past persecution must be affirmed.

2. Future Persecution

In affirming the IJ's finding that Xue did not show a well-founded fear of future persecution, the BIA concluded Xue did not demonstrate that he faces a particularized threat of persecution should he return to China. The BIA observed that Xue was able to depart China using his true name and passport, which "supports a conclusion that the authorities were not actively pursuing him [three] months after he stopped reporting to the police station on a weekly basis." The BIA also noted that Xue "ha[d] not offered any updated evidence establishing that [the] police have a continued interest in him in China." Finally, the BIA noted that Xue's "mother has not been arrested and detained, or been required to report to the police; however, she has actively participated in an underground church and for years has been holding [a] weekly church meeting at her home." According to the BIA, "evidence that [Xue's] parents and brother actively participate in an unreg-

istered church undermines the reasonableness of his fear of future persecution."

Because Xue failed to establish past persecution, he is not entitled to a presumption that he has a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1). He must, therefore, establish a well-founded fear of persecution to demonstrate an entitlement to asylum. *Id.* § 1208.13(b)(2). In the context of this particular case, he can do so only by showing that a reasonable factfinder would be compelled to conclude he will be targeted for mistreatment upon his return to China. On the record before the BIA, we have no difficulty concluding Xue has failed to carry that burden.

The BIA could reasonably conclude that the fact Xue's family remains in China unharmed and continues to attend unregistered church services, including hosting a weekly service in the family home, demonstrates Xue will not be targeted upon a return to China. *See Ritonga v. Holder*, 633 F.3d 971, 977 (10th Cir. 2011). Xue attempts to overcome this evidence by arguing he is not similarly situated to his family members because he was previously arrested and required to report weekly to police. He also asserts that signing the guarantee letter upon his release from jail singled him out as a dissident and that police officers visited his parents' house on occasion after he stopped reporting. Xue's arguments in this regard suffer from a lack of evidentiary support.

In asserting he is not similarly situated to his family members, Xue focuses on the guarantee letter and evidence in the record demonstrating individuals

arrested during the second raid of his house church who were repeat offenders were sentenced to a year of imprisonment. That evidence certainly demonstrates (1) an active effort by Chinese authorities in 2008 in Xue's hometown to eliminate underground house churches and (2) if Xue were targeted by Chinese authorities upon a return to his country of nationality, he would likely suffer persecution. This evidence does not, however, negate in any way the BIA's finding that authorities in Xue's hometown have not targeted house church services since at least 2010, as demonstrated by the experience of Xue's family. The BIA's finding in this regard is entirely consistent with documentary evidence in the record, including country reports, which indicates suppression of Christian house churches in China is both regionalized and irregular.

Likewise, although the record (i.e., letters and other forms of communication from Xue's mother to Xue) indicates officials maintained a particularized interest in Xue immediately after Xue stopped attending his weekly reporting sessions, none of that evidence compels the conclusion Chinese officials have maintained that particularized interest. In arguing for a contrary finding, Xue relies heavily on a letter from his mother dated January 27, 2012. That letter, however, appears to discuss Xue's unhappiness with past events and appears to explain that Xue's mother sent him abroad in 2008 because police, **at that time**, threatened Xue with a penalty for failing to report for his weekly sessions at the police station. The letter does not compel the conclusion officials maintain a particularized interest in Xue. Fur-

thermore, as noted by the BIA, despite the entitlement to do so, Xue did not adduce any additional evidence demonstrating such a particularized interest between the IJ's decision and the BIA's resolution of the appeal. *See generally* Board of Immigration Appeals Practice Manual 5(f), at 78 (relevant page last revised April 26, 2016) (discussing process for filing motions based on new evidence), *available at* https://www.justice.gov/eoir/board-immigration-appeals-2; *see also* 8 C.F.R. § 1003.1(d)(4) (empowering the BIA to "to prescribe procedures governing proceedings before it").

For those reasons set out above, the BIA's finding that Xue would not be targeted for persecution based on religion should he return to China is supported by substantial evidence. Therefore, the BIA did not clearly err in concluding Xue failed to establish a reasonable possibility of future persecution.

C. Other Requests for Relief Asylum

The BIA correctly concluded that because Xue failed to show a reasonable possibility of future persecution, he necessarily failed to meet the higher burden required for withholding of removal under the Immigration and Nationality Act. *See supra* n.7. The BIA also correctly concluded Xue failed to show his eligibility for relief under the CAT. Because Xue did not present sufficient evidence to establish it is more likely than not he would be tortured upon his return to China, he is not entitled to CAT relief. 8 C.F.R. § 1208.16(c).

III. Conclusion

For the foregoing reasons, this court **DENIES** Xue's petition for review.

OPINION CONCURRING IN PART FILED BY BRISCOE, CIRCUIT JUDGE

I agree that Xue's petition for review should be denied.

I join, except for section II.A.2., which addresses an issue not raised or briefed by the parties. The views expressed there regarding standard of review concern a "rule of law or legal proposition not necessarily involved nor essential to the determination of the case in hand," and are thereby dicta. Rohrbaugh v. Celotex Corp., 53 F.3d 1181, 1184 (10th Cir. 1995) (quoting Black's Law Dictionary 454 (6th ed. 1990)).

APPENDIX B

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

FILE NO.: A089 898 694

IN REMOVAL PROCEEDINGS
IN RE: TING XUE

April 17, 2015

DECISION OF THE BOARD OF IMMIGRATION APPEALS

APPLICATION: ASYLUM; WITHHOLDING OF REMOVAL; CONVENTION AGAINST TORTURE

BEFORE THE BOARD OF IMMIGRATION APPEALS

The respondent, a native and citizen of China, appeals from the decision of the Immigration Judge, dated June 19, 2013, which denied his application for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). *See* sections 208(b)(1)(A) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A) and 1231(b)(3);

8 C.F.R.§§ 1208.16(c)-1208.18. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R.§1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R.§ 1003.1(d)(3)(ii). Since the respondent submitted his asylum application after May 11, 2005, it is governed by the provisions of the REAL ID Act. *Matter of S-B-,* 24 I&N Dec.42 (BIA 2006).

The respondent claims he was persecuted on account of his religion; namely, his practice of Christianity at an unregistered or underground church (I.J. at 3-4; Exh. 2; Tr. at 26-35). On appeal, the respondent argues that the Immigration Judge erred by denying his application for relief and protection from removal on the basis that he did not meet his burden of proof (Resp. Br. at 4-7, 9-14, 17-19).

We affirm the Immigration Judge's determination that, although the respondent was credible, he did not satisfy his burden of proof (I.J. at 10-12). The respondent testified that, in October 2007, the police interrupted a church meeting and arrested him and detained him in a small jail cell for 4 nights. While he was detained, police interrogated him about the other church members, slapped him across the back of his head, and hit his upper arm with a baton. He was released when his parents and uncle paid a fine and he signed a letter guaranteeing that he would not attend an underground church and he would report weekly to the police station. In December 2007, the police broke up another church meeting. The respondent was not

there at the time, but he heard that some church members were tried and sentenced to 1 year in prison. The respondent fled to his aunt's house and 3 months later left China.

Although he was detained for 4 nights, the respondent was physically harmed only once, and he did not testify that he required medical treatment or suffered any lasting physical effects as a result of his detention (I.J. at 12; Tr. at 26-36). *See Witjaksono v. Holder*, 573 F.3d 968, 977 (10th Cir. 2009) (finding no past persecution where alien was physically injured in one beating by a soldier but did not require medical attention); *Kapcia v. INS*, 944 F.2d 702, 704, 708 (10th Cir. 1991) (alien's two-day detention involving interrogation and beating did not constitute persecution). Therefore, we agree with the Immigration Judge's determination that the harm described by the respondent did not rise to the level of persecution (I.J.at 12-13).

The respondent argues that the Immigration Judge erred in focusing on his detention. He contends that the restrictions on his freedom and prohibition on practicing his religion added to the harm and together with his detention established that he was persecuted (Resp. Br.at 3-6). We are not persuaded, as the respondent testified that he returned to the underground church 2 weeks after being released, and did not demonstrate that the reporting requirement was onerous or that he suffered other harm (I.J. at 5, 12). *See Ronghua He v. Holder*, 555 Fed. App'x. 786, 789 (10th Cir. 2014) (finding no past persecution where alien was arrested for attending an underground church, detained for one week, interrogated twice, beaten, and released from custody after signing a letter stating that she would no longer attend the underground

church services and would report back to the police every week).

As the respondent did not demonstrate past persecution, he is not entitled to the presumption of a well-founded fear of persecution. 8 C.F.R.§ 1208.13(b)(1). We affirm the Immigration Judge's determination that the respondent did not independently establish that he will face a reasonable possibility of being persecuted on account of his religion upon his return (I.J.at 13).

Although the respondent speculates that he will be harmed if he returns to China, he did not demonstrate that he faces a particularized threat of persecution. The respondent did not adequately demonstrate that the police are still interested in his whereabouts (I.J. at 13). The Immigration Judge found that the respondent departed China using his true name and passport and his passport had an exit stamp from customs. This supports a conclusion that the authorities were not actively pursuing him 3 months after he stopped reporting to the police station on a weekly basis. The Immigration Judge also found that the respondent did not submit evidence to show that the authorities recently or regularly were looking for him (I.J.at 13). Finally, he found it significant that the respondent's parents and brother have continued to attend the house church without incident and host weekly house church gatherings (I.J.at 13).

On appeal, the respondent argues that his mother last indicated that the police were looking for him in a 2012 letter, and he was not asked for more recent evidence (Resp. Br. at 11). Since the written decision was issued, however, the respondent has not offered any updated evidence establishing that police have a con-

tinued interest in him in China. We are also not persuaded by his argument that his parents and his brother are not similarly situated to him (Resp. Br. at 13). The respondent's mother has not been arrested and detained, or been required to report to the police; however, she has actively participated in an underground church and for years has been holding weekly church meeting at her home. The evidence that the respondent's parents and brother actively participate in an unregistered church undermines the reasonableness of his fear of future persecution (I.J. at 13). See *Ritonga v. Holder*, 633 F.3d 971, 977 (10th Cir. 2011) (finding that similarly situated family members who remain unharmed undermines the reasonableness of fear of persecution); *Yuk v. Ashcroft*, 355 F.3d 1222, 1234 (10th Cir. 2004) (reasonableness of an alien's fear of harm is lessened when family members remain in his country without experiencing harm); *Matter of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998) (same).

The respondent argues that he has a well-founded fear of persecution based on the government's restrictions on the practice of religion (Resp. Br. at 15). We agree with the Immigration Judge that cases such as *Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1354 (11th Cir. 2009) are distinguishable because in that case, the alien was forced to choose between practicing Christianity in hiding or death in Iran (I.J.at 14). The respondent did not face such severe consequences. See *Yuk v. Ashcroft*, supra, at 1233 (persecution is "infliction of suffering or harm … in a way regarded as offensive and requires more than just restrictions or threats to life and liberty").

The respondent contends that he could have faced more severe punishment had he not left China, citing

the 2009 and 2011 Department of State Country Reports for China and the 2010 International Religious Freedom Report for China (Resp.Br. at 9-10, 14).[1] While the Reports reflect that there are some government restrictions on the practice of religion, they also indicate that the type of restrictions vary widely by locale. His family's continued practice of religion in his mother's home, without registering with the government, support the conclusion that he has not demonstrated an objectively well-founded fear that he will be targeted for harm that reaches the level of persecution. See *Ronghua He v. Holder*, supra, at 790. Thus, we affirm the Immigration Judge's denial of asylum.

Inasmuch as the respondent has not satisfied the lower burden of proof required for asylum, it follows that he also has not satisfied the higher clear probability standard of eligibility for withholding of removal. See 8 C.F.R.§ 1208.16(b); *Ba v. Mukasey*, 539 F.3d 1265, 1271 (10th Cir.2008).

We also uphold the Immigration Judge's conclusion that the respondent did not present sufficient evidence to establish that it is "more likely than not" he would be tortured upon his removal either at the hands of the Chinese government, or with its acquiescence (I.J.at 14). 8 C.F.R.§ 1208.16(c); *Ritonga v. Holder*, supra, at 978-79; *Matter of J-F-F-*, 23 I&N Dec.912 (A.G.2006). The Immigration Judge did not clearly err in finding that the respondent "neither alleged past torture, nor asserted a fear of torture in the future" (I.J.at 14).

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[1] The Immigration Judge did not mark exhibits, but the 2011 International Religious Freedom Report and 2011 Country Reports were submitted by the respondent and included in the record.

Thus, the application for CAT protection was properly denied. Accordingly, the following order shall be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
DENVER, CO 80293

FILE NO.: A089 898 694

IN REMOVAL PROCEEDINGS
IN RE: TING XUE

June 19, 2013

WRITTEN DECISION

CHARGE:

Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA" or "the Act"), as amended, in that, an alien is present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATIONS:

Applications for Asylum, Withholding of Removal, and Relief Under the United Nations Convention Against Torture ("Torture Convention"), and Post-Conclusion Voluntary Departure.

I. Procedural History

The respondent, Ting Xue ("Respondent"), is a twenty-eight-year-old single male, native and citizen of the People's Republic of China. (Exh. 1, Notice to Appear ["NTA"], 03/20/09; Form I-589, Application for Asylum and Supporting Doc. ["I-589"], 02/09/09.) Respondent arrived in the United States at an unknown location on or about July 8, 2008.[1] (Exh. 1, NTA; I-589.) Respondent was not then admitted or paroled after inspection by an Immigration Officer. (Exh. 1, NTA.) Based on the foregoing allegations, the Department of Homeland Security ("DHS") issued an NTA to Respondent on March 20, 2009, charging him as removable from the United States pursuant to section 212(a)(6)(A)(i) of the Act, as an alien who is present without being admitted or paroled. (*Id.*)

On April 16, 2009, Respondent appeared in the Los Angeles Immigration Court with counsel. At that time, he admitted the factual allegations asserted against him and conceded the charge of removability. (Tape of Proceeding, 04/16/09.) As Respondent declined to designate a country of removal, the Immigration Judge ("IJ") directed the People's Republic of China. By way

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[1] The NTA alleges an unknown date of entry. Respondent established through credible testimony, discussed below, that he entered on or about July 8, 2008.

of relief, Respondent renewed his application for asylum, withholding of removal, and relief under the Torture Convention. (I-589.) In the alternative, he requests voluntary departure.

Pursuant to Respondent's motion to change venue, the IJ changed venue to the Denver Immigration Court ("Court") on June 13, 2011. (Resp't. Mot. to Change Venue, 05/31/11; Order of the IJ, 06/13/11.) On April 30, 2013, Respondent and his wife testified to the merits of his asylum claim. (Digital Audio Recording ["DAR"], 04/30/13.) After careful consideration of all evidence submitted, including evidence not specifically named in this decision, the Court issues the following decision.

II. Evidence Presented

A. Documentary Evidence

In addition to Respondent's testimony, the Court admits the following documentary exhibits into evidence without objection from DHS: the NTA, the I-589 with Respondent's affidavit, and five supplementary documentary submissions. (Exh. 1, NTA; I-589; Resp't. Index of Exhibits ["Resp't. Index"], 03/30/10; Resp't. Doc. Submission ["Resp't. Doc."],04/8/13; Resp't. Supp. Doc. Submission ["Resp't. Supp."],04/16/13; Resp't. Supp. Doc. Submission ["Resp't. Supp. II."], 04/21/13; Resp't. Corrected Asylum Statement ["Resp't. Statement"], 04/24/13.) Respondent's document submissions included a corrected translation of his asylum statement, country condition articles, affidavits from Respondent's mother, aunt, and pastor, evidence of his Christianity, including his baptism, and certificates of his marriage and daughter's birth. (Resp't. Index;

Resp't. Doc.; Resp't. Supp.; Resp't Supp. II; Resp't Statement.)

B. Testimonial Evidence

1. Respondent's Testimony

On April 30,2013, Respondent testified to the merits of his case. (DAR, 04/30/13.) Respondent testified he was born in China on May 25, 1985. He stated he grew up in Nanxiao Village in the Fujian Province where he lived with his parents. He stated he has two younger brothers. Respondent testified that he went to school in China and finished his education there when he was eighteen. After school, he stated he worked in the assembly line at a privately owned shoe factory in China.

Respondent stated he currently lives in Commerce City, Colorado, is married to Ling Ling He ("Ms. He"), who is a lawful permanent resident ("LPR"), and they have one daughter, Christina. Respondent explained that Ms. He received her LPR status by first obtaining political asylum. As for his daughter, Respondent asserted that she is a U.S. citizen ("USC") who was born in Colorado. On cross-examination, Respondent testified that he met Ms.He.in May 2010 and that they were married in February 2011.

Respondent testified that his religion is Christianity and that he was raised as a Christian by his mother. He explained that his mother had a friend who was a Christian and shared the gospel with her. Respondent testified that being a Christian is important to him because of Jesus's message in John 3:16 of the Bible that calls on people to be his disciples. Respondent testified that he was baptized in China on October 1998. On cross-examination, Respondent testified that his moth-

er and one of his younger brothers were also present at his baptism. He testified that his daughter has not been baptized yet. On re-direct, Respondent explained that his daughter has not been baptized because she is too young and he wants her to understand the meaning of baptism.

Respondent testified that he attended church in China, but that it was an illegal church because it was not registered with the Chinese government. He testified that he attended a government-registered church once in 2006 because he wanted to observe the difference between the two churches. He stated he noticed that at the government-registered church the people did not have the freedom to express their views because the message conveyed was to first be patriotic and love your country, then to love your party, and finally to love the Lord. He explained that he felt like there was no truth there and that he could not enjoy Jesus because the church felt dead to him. In contrast, he felt like his underground or unregistered church was very much alive. Respondent testified that at his church they read the bible together, sang hymns, asked and answered questions about the Bible, and if he felt hardship or sadness, he could share that with his fellow church members. Respondent stated he felt joy going to his church.

Respondent stated he attended church two or three times a week, usually on Fridays and Sundays. He further stated that his mother also attended church with him, but only on Sundays. Respondent explained that the gathering at his church on Fridays was only for the young people. He further explained that the church was held at different members' houses each week because they needed to be cautious to avoid the govern-

ment discovering them. On cross-examination, Respondent testified that his father sometimes attended house church, that his mother still attends church on a weekly basis, and that one of his younger brothers will sometimes attend house church. He stated his other brother is in Japan and attends church there.

Respondent testified to an incident that occurred with the government on October 26, 2007.[2] He stated that it was a Friday evening and that they were having a youth gathering. While they were reading the Bible, Respondent testified that the police came in and told them that their meeting was illegal. According to Respondent, one of the elders of the group told the police that they were just enjoying Jesus together and not doing anything illegal. Respondent stated a police man pushed this person aside, told him to shut up, and then ordered all of the members to follow him. He asserted that there were fourteen church members at the house, five males and nine females. He further asserted that there were five male policemen. Respondent explained that he knew they were policemen because they were wearing uniforms, identified themselves as policemen, and had police batons.

Respondent testified that the policemen took the fourteen of them to the police station by placing them all in a large police vehicle. Respondent approximated that it took them half an hour to get to the police station. At the police station, Respondent stated they were ordered out of the vehicle and made to stand in a

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[2] Respondent first testified that the incident occurred in November, but it appears that that was an interpreter error and it was later corrected to October.

room. He further stated they were then taken individually into another room and that he was the third person taken.

Respondent testified that he was taken to a small room where there were two officers sitting behind a table and that he was made to sit in front of these men. Respondent indicated that the officer who escorted him to the small room stood behind him. Once in the room, Respondent testified that the two men asked for his name, address, birth date, and phone number. They also told Respondent that the meeting was illegal and asked him what the purpose of the meeting was, who the leader was, who organized the meeting, and how many people were gathered. Respondent asserted that he replied that they did not have an organizer and that they were just gathering together to enjoy Jesus. He further asserted that the policemen did not believe him and asked again for the name of the organizer as well as every member's name. When he reiterated that they did not have an organizer, he stated that one of the police officers became very mad, pounded his fist on the table, and told Respondent that he needed to be honest. He testified that the police officer standing behind them then slapped him across the head with his hand. When he again told them that they were all just enjoying Jesus and had no organizer, Respondent stated the police officer used his police baton to hit his upper left arm. Respondent stated he was scared during this time and just kept repeating that he did not know anything.

Respondent testified that the policemen finally took him to another room where he remained for half an hour before being taken to a jail cell. Respondent stated there were two other men with him. He described the jail cell as an iron door with vertical

straight iron bars that contained a long bed with a straw mat and a wooden bucket for them to use the bathroom. He indicated that there was no light into the room. Respondent testified that he remained in the cell for four days and three nights and was never let out of the room. He testified that while in the cell he used the bucket to go to the bathroom and that the bucket was never changed or removed while he was in the cell. Respondent stated the officers sometimes mocked him and the other church members, telling them that they should call on God to rescue them. He stated policemen further referred to themselves as their God, asserting they had the power to refuse to feed them and to hold them in the cell. For food, Respondent testified that he was given a bowl of porridge twice-a-day and that before eating, the police officers made them sing the national anthem.

Respondent testified that he was released on the morning of the fourth day, October 29, because his mother paid a fine of 15,000 RMB.[3] He indicated that his parents and uncle were there when he was released. At the time of his release, Respondent testified that the police made him sign a document guaranteeing that he would no longer attend the illegal church meetings. He stated he was warned that if he ever attended an underground church meeting, he would be

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[3] The RMB, or Renminbi yuan, is the currency used in China. *See* CIA World Factbook, available at https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html. In 2008, the exchange rate between the U.S. dollar and the yuan was estimated at RMB 6.94 to one U.S. dollar. See CIA World Factbook.

severely punished. He further stated he was required to report to the same police station every Wednesday at 9 a.m. Respondent testified that when he reported to the police station, he would remain for one hour and the policemen would ask about his whereabouts during the week, tell him he should be patriotic and faithful to his job, and force him to write his personal feelings about his reeducation.

Respondent testified he started going back to his underground church two weeks after he was released because his parents told him to be patient and not give up so easily. They told him to continue loving Jesus. Respondent asserted that he prayed and felt that Jesus told him not to give up his faith. He explained that he did not go a registered church because he could not enjoy Jesus in a government church — going to the government church was like not going at all.

Respondent testified that there was another incident between his underground church and the police during a youth gathering on Friday, December 21, 2007. Respondent indicated that he was not at church that evening because he was working overtime at the shoe factory. He testified that when he got home that night, his mother told him that the meeting place had been raided by the police and that everyone was arrested. After he heard about this incident, Respondent stated he became fearful that the police would find out that he was still attending the underground meeting. He further stated that the church members who had been arrested for a second time were sentenced to one year in prison.

After this raid, Respondent stated his mother told him not to report to the police station anymore. Re-

spondent testified that his mother then sent him by bus to his aunt's house, which took approximately ten hours. He stated he left on December 24, 2007 and arrived on December 25. He indicated he remained at his aunt's house for three months and that he never returned to his parent's house during that time. He also indicated that he never reported to the police. When he did not report to the police, Respondent testified that the police came to look for him at his parent's house. Respondent stated that his mother told him they asked her why he had not reported for the past two weeks and told her that he needed to immediately report to the police station or be severely punished.

Respondent testified that his parents starting planning for him to leave China around January 2008 because of everything that had happened. He stated that he left China by plane from Beijing on March 18, 2008. He further stated that he used a passport to leave China and he traveled to Jamaica where he remained for three days. Respondent testified that he then traveled to Cuba where he remained for two months before traveling to Guatemala. He indicated he spent thirteen days in Guatemala before traveling to Mexico where he remained for twenty days. From Mexico, Respondent testified that he crossed into Texas. After he arrived in Texas, he stated he remained at a house by the border for two days before he was loaded into a truck and traveled to Dallas, Texas. He stated he then went to Los Angeles, California because he had cousins living there. Respondent clarified that he entered the United States on July 8, 2008 and has remained in the United States since that time.

DHS asked Respondent more questions on cross-examination about his travel from China to the United

States. Respondent testified that he left China on March 18, 2008 and was able to go through customs even though the police were looking for him. He stated he applied for a visa from Jamaica in January. He explained that he had given his passport to the smuggler in January who went to Beijing and obtained the visa for Respondent even though he was not there in person. He indicated that he paid the smuggler 600,000 RMB for everything having to do with his travels. Respondent acknowledged that he only earned 25,000 RMB per year and that his parents did not work, but explained that his six uncles also helped to raise the money. Respondent testified that the smuggler notified his family when he was in Guatemala that they needed to start paying him and that this was when his uncles started gathering the money. Respondent testified that he did not stay in Jamaica because he did not know what kind of country it was and because the smugglers told them not to venture outside.

When asked about the Peru visa that he had in his passport indicating that it was issued in China on May 5, 2008, Respondent testified that the smuggler put it in his passport and that it is a false visa. He explained that the smuggler put the visa in his passport while they were in Cuba because they were having difficulty exiting Cuba. He further explained that the smuggler gave him a false Korean passport in Cuba and that he had two plane tickets - one for Guatemala and one for Cuba. Respondent testified that he was able to exit Cuba and fly to Guatemala where the smuggler told him to stand and wait until a customs official waived him through. Respondent asserted he never went to Peru and explained that the purpose of the Korean passport was simply to help him travel from Cuba

through to Guatemala. He stated the smuggler than took the Korean passport from Respondent. He further stated that the smuggler told them to throw the plane tickets away. As for Mexico, Respondent testified that he did not come to the attention of Mexican authorities while there. Respondent also indicated that he traveled with four other people from China to the United States, but that only three of them made it through to the United States. He indicated that one person now lives in Los Angeles and that the second person lives in Hawaii. He asserted that he did not know the four people in China. On re-direct, Respondent testified that they remained in Cuba for two months because they were having difficulty finding a way to exit the country. Respondent acknowledged that he witnessed the smuggler put the Peru visa stamp in the passport.

On direct examination, Respondent testified that he currently attends the Church of Denver. He stated his wife is also a Christian and that they attend the same church. Respondent testified that if he were removed to China he would continue to attend underground church because he does not want to give up his faith. He asserted that if he were arrested in China, then he would be put in jail, sentenced, and lose the ability to practice his faith freely. Respondent indicated that if the Court denies his asylum application he would leave the United States voluntarily and that he has the means to do so.

On cross-examination, Respondent testified that his mother has never been arrested. He testified that his mother has been holding house church meetings every Tuesday since 2010. However, while he was in China, he stated he never had a house church meeting at his house. On re-direct, Respondent explained that his

mother started hosting church gatherings because she saw that other families were opening up their homes and she was willing to do the same because she loves Christ.

2. Ms. He's Testimony

Respondent's wife, Ms. He, testified on April 30, 2013. (DAR, 04/30/13.) Ms. He testified that she and Respondent are Christians. She stated they attend Church of Denver, which is also called Christ Revival Church. She asserted that they have one child together, but she is not baptized yet. Ms. He explained that they want their daughter to grow up and know who Christ is before they baptize her. On cross-examination, Ms. He testified that Respondent has been attending the Church of Denver since he moved to Denver in August 2010. She indicated that the pastor there is Stephen Johnson.

In response to the Court's questions, Ms. He testified that she is an LPR. She explained that she was granted lawful status from the Immigration Court on July 10, 2008 and received her LPR card in September 2010.

III. Statements of Law

A. Credibility

The respondent's testimony is of the utmost importance in proving an asylum claim because of the difficulty an individual faces in procuring documentary evidence after having fled a country. *Wiransane v. Ashcroft*, 366 F.3d889, 897 (10th Cir. 2004). Thus, an applicant's testimony, standing alone, may be sufficient to carry the burden of proof if it is deemed credi-

ble. *Id.*; 8 C.F.R.§ 1208.13(a)(2013) ("[t]he testimony of the applicant, if credible, may be sufficient to carry the burden of proof without corroboration"). Therefore, an IJ must give "specific, cogent" reasons if he is to make an adverse credibility finding. *Wiransane*, 366 F.3d at 897-98.

Generally, the Board will defer to an IJ's credibility analysis. *Matter of S-A-*, 22 I&N Dec.1328, 1331 (BIA 2000). The Board articulated a tripartite test to determine if an IJ's credibility finding should be sustained. *Id.* The Board stated that it defers to an IJ's adverse credibility finding based on inconsistencies and omissions regarding events *central to an alien's claim* where a review of the record reveals: (1) the discrepancies and omissions described by the IJ are actually present in the record; (2) such discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; and (3) the alien has failed to provide a convincing explanation for the discrepancies and omissions. *Id.* (citing *Matter of A-S-*, 21 I&N Dec. 1106, 1109 (BIA 1998)). The Board also noted the most pertinent discrepancies exist between the respondent's testimony and the I-589 or the testimony on direct examination and the testimony on cross-examination. *Id.* at 1331-32.

Under the provisions of the REAL ID Act, the trier of fact makes a credibility finding Based on the totality of the circumstances and consideration of all relevant factors. INA § 208(b)(1)(B)(iii)(2013). In making this determination, the trier of fact may base a credibility determination on 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 con-

sistency of each statement; the consistency of the statements with other evidence of record; 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. *Id.* "If the trier of fact determines that corroborative evidence should be produced, it must be produced unless the applicant does not have the evidence and cannot reasonably obtain the evidence." *Matter of J-Y-C-*, 24 I&N Dec. 260, 263 (BIA 2007) (internal quotations removed).

B. Asylum Pursuant to INA § 208

1. Eligibility for Asylum

Asylum is a discretionary form of relief available to aliens physically present or arriving in the United States who apply for relief in accordance with section 208 of the Act or section 235(b) of the Act. INA § 208(a)(1); *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 444 (1987). The Attorney General may grant asylum to an applicant who establishes that he is a "refugee" as defined in section 101(a)(42) of the Act. INA § 208(b)(1)(A).

a. Burden of Proof

The burden of proof is on the alien to establish that she meets the definition of "refugee" as defined in INA § 101(a)(42). INA § 208(b)(1)(B)(i); 8 C.F.R.§ 1208.13(a). This means that the applicant has to demonstrate that he is outside of her country of nationality and is unable or unwilling to return to, or unable or unwilling to avail himself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nation-

ality, membership in a particular social group, or political opinion. INA § 101(a)(42). The applicant does not have to demonstrate the exact motive for the persecution where different reasons for action are possible. Matter of S-P-, 21 I&N Dec. 486, 494-95 (BIA 1996). In a case where the persecutor has mixed motives, the applicant must show that at least one of the motives was or would be related to an actual or imputed protected ground. Id.; see also Matter of J-B-N- & S-M-, 24 I&N Dec. 208, 211-12 (BIA 2007)(citing Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988)). Asylum is a discretionary form of relief and it can be denied to an applicant who is otherwise eligible. Cardoza-Fonseca, 480 U.S. at 444; see also Ismaiel v. Mukasey, 516 F.3d 1198, 1204 (10th Cir. 2008).

b. Timeliness

Subject to INA § 208(a)(2)(D), an alien is not eligible to apply for asylum unless the alien can demonstrate by clear and convincing evidence that she filed her asylum application within one year after the date of her last entry into the United States. INA § 208(a)(2)(B); 8 C.F.R.§ 1208.4(a)(2)(i). An application may be considered, notwithstanding the fact that it was filed more than one year after the alien's last entry into the United States, if the alien demonstrates either the existence of changed circumstances which materially affect the alien's eligibility for asylum relief or the existence of extraordinary circumstances relating to the delay in filing an application. INA § 208(a)(2)(D); 8 C.F.R.§ 1208.4(a)(4)-(5).

2. Persecution

Persecution means the infliction of harm or suffering on an individual in order to punish her for possessing a belief or characteristic the persecutor seeks to overcome. *See Matter of Acosta*, 19 I& N Dec. 211, 223 (BIA 1985) (overruled on other grounds). The Tenth Circuit Court of Appeals stated, "persecution requires the infliction of suffering or harm upon those who differ...in a way regarded as offensive and must entail more than just restrictions or threats to life or liberty." *Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1337 (10th Cir. 2008). The Tenth Circuit Court of Appeals does allow for the aggregation of harmful events when evaluating whether an applicant has suffered persecution. *Id*. at 1337-38. The persecution must be carried out either by the government or a group the government is unable or unwilling to control. *See Niang v. Gonzales*, 422 F.3d 1187, 1194-95 (10th Cir. 2005); *Hayrapetyan*, 534 F.3d at 1337.

a. Past Persecution and Well-Founded Fear of Future Persecution

Past persecution is persecution which was suffered in the past on account of one of the five protected grounds. 8 C.F.R§ 1208.13(b)(1). An applicant who has been found to have suffered past persecution is presumed to have a well-founded fear of future persecution on account of the same ground. *Id*. The presumption of future persecution can be rebutted if the government demonstrates there has been a fundamental change such that the applicant no longer has a well-founded fear of persecution, or the applicant could relocate to another part of the country to avoid future harm, and it would be reasonable to expect the appli-

cant to do so. 8 C.F.R.§§ 1208.13(b)(1)(i)(A)-(B). Ultimately, where an applicant has demonstrated past persecution the government bears the burden of rebutting the presumption of a well-founded fear of future persecution by a preponderance of the evidence. 8C.F.R§ 1208.13(b)(1)(ii).

In the absence of evidence of past persecution, an applicant is deemed to have a well-founded fear of future persecution if there is a "reasonable likelihood" the applicant would be persecuted upon returning to his country of nationality on account of one of the five protected grounds and is unable or unwilling to avail himself of the protections of that country based upon such fear. 8 C.F.R.§ 1208.13(b)(2). The applicant need not show it is more likely than not that he will be persecuted upon being returned to his country of nationality. *Cardoza-Fonseca*, 480 U.S. at 449. Rather, it is enough for an applicant to show that persecution is a reasonable possibility. *Id.* at 440 ("There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening.").

Establishing a well-founded fear requires both a subjective and objecting showing. *Yan v. Gonzales*, 438 F.3d1249, 1251(10th Cir. 2006); *Sadeghi v.INS*, 40 F.3d 1139,1142 (10th Cir. 1994); *see also Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987) (stating the reasonable person standard is used in well-founded fear determinations). The subjective element requires that the applicant's fear be genuinely held. *Mogharrabi*, 19 I&N Dec.at 445. The objective component requires that the applicant's fear be objectively reasona-

ble. *Id.* The objective component is proven through "credible, direct, and specific" evidence that shows the reasonableness of the fear. *Id.* Specifically, the applicant must possess a belief or characteristic a persecutor seeks to overcome by means of punishment of some sort; he must demonstrate the persecutor is already aware, or could easily become aware, that the applicant possesses the belief or characteristic; he must show the persecutor has the capability to punish the applicant; and he must prove the persecutor has the inclination to punish the applicant. *Id.* at 446.

b. "On Account of" a Protected Ground

To meet the definition of refugee pursuant to INA § 101(a)(42), an applicant must demonstrate that he was or will be persecuted "on account of" one of the five protected grounds. INA § 101(a)(42)(A). One of these five protected grounds must be "at least one central reason" for the persecution. INA § 208(b)(1)(B)(i); *see also J-B-N- & S-M-*, 24 I&N Dec. at 211-12. However, the applicant need not show the exact reason for which he was persecuted. *S-P-*, 21 I&N Dec. at 489-90. When persecution is alleged on account of one's religion, evidence of mistreatment of members of the asylum applicant's religion is probative of a threat against the applicant. *Kazemzadeh v. U.S. Att'y Gen.*,577 F.3d 1341, 1354 (11th Cir. 2009) (remanded to BIA for failure to consider that practicing Christianity in hiding or facing death due to apostasy in Iran would constitute religious persecution). Additionally, some circuits have found that being forced to practice religion underground to avoid punishment may be religious persecution. Id.; *see also Muhur v.Ashcroft*, 355 F.3d 958 (7th Cir. 2004).

C. Withholding of Removal Pursuant to INA 6241(b)(3)

The Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in the country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3)(A). In determining whether the alien has established the requisite elements for relief under INA § 241(b)(3), the trier of fact shall utilize INA §§ 208(b)(1)(B)(ii) and (iii) to determine whether the alien is credible and has met his burden of proof. INA § 241(b)(3)(C); *see also Matter of S-B-*, 24 I&N Dec. 42, 43 (BIA 2006).

D. Relief Pursuant to the Torture Convention

To qualify for relief under 8 C.F.R.§ 1208.16(c), an alien has the burden of demonstrating that it is more likely than not that he will be tortured if removed to the proposed country of removal. *See also* 8 C.F.R. § 1208.18(a)(1) (defining torture). In assessing whether the alien has met his burden, all relevant evidence shall be considered including, but not limited to: (A) evidence of past torture inflicted upon the applicant; (B) evidence that the applicant could relocate to a part of the country where he will not likely be tortured; (C) evidence of gross, flagrant, or mass violations of human rights within the proposed country of removal; and (D) other relevant information regarding country conditions in the proposed country of removal. 8 C.F.R.§ 1208.16(c)(3). If an applicant meets his burden under 8 C.F.R.§ 1208.16(c), he shall be granted deferral of removal and shall not be removed to the coun-

try where it is more likely than not he will be tortured. 8 C.F.R. § 1208.17(a).

E. Voluntary Departure

To qualify for voluntary departure at the conclusion of removal proceedings, a respondent must establish that he has been physically present in the United States for at least one year immediately preceding the issue date of the NTA. INA § 240B(b)(1)(A). The respondent must also demonstrate that he has been a person of good moral character for the five years prior to the date of application for voluntary departure. INA § 240B(b)(1)(B). Third, the respondent must establish that he is not deportable from the United Stated under either section 237(a)(2)(A)(iii) or 237(a)(4) of the Act. INA § 240B(b)(1)(C). Finally, the respondent must demonstrate by clear and convincing evidence that he has the means to depart the United States and intends to do so. INA § 240B(b)(1)(D).

IV. Discussion and Analysis

A. Removability

Respondent admitted the factual allegations asserted against him and conceded the charge of removability at a master calendar hearing. Based upon these admissions, the Court sustained the charge of removability. 8 C.F.R.§ 1240.10(c). Having found Respondent removable as charged, the Court must proceed to determine whether he is eligible for the relief requested.

B. Credibility Determination

Respondent filed his application for relief on February 9, 2009. (I-589.) As a result, he is subject to the credibility provisions of the REAL ID Act. *See J-Y-C-*,

24 I&N Dec. at 262; *see also S-B-*, 24 I&N Dec. at 43. Respondent's testimony regarding his harm in China was internally consistent as well as conformed to the information in his asylum application and declaration. Nevertheless, the Court must note that there was some concern as to when Respondent left China and when he entered the United States. Specifically, DHS called into question the reliability of Respondent's passport which shows an exit stamp for China indicating he left on March 18, 2008, but contains a visa to enter Peru that was issued in China in May 2008. (*Id.* at pp. 4, 16.) In making a credibility determination, the Court must take into account the totality of the circumstances. *J-Y-C-*, 24 I&N Dec. at 262. When confronted with this information, Respondent was immediately forthcoming about the Peruvian visa. Specifically, he admitted that it was a false visa that the smuggler had stamped into Respondent's passport as a possible way for Respondent to exit Cuba. He further testified that they were in Cuba for two months because of the difficulty they had exiting and that the smuggler also gave him a false Korean passport to use to exit Cuba if necessary. Given Respondent's truthfulness regarding the falsity of the Peruvian visa and his detailed explanation of the process he went through to exit Cuba, the Court finds, when considering it in context, that Respondent has provided a sufficient and credible explanation for the Peruvian visa. *Id.* As such, the Court also finds that Respondent's passport is sufficiently reliable to establish his date of entry.

DHS also questioned Respondent's testimony that he paid the smuggler 600,000 RMB to leave China, but that the smuggler did not demand that money until he was in Guatemala. Although Respondent could not

provide an explanation for why the smuggler waited until Guatemala to pay, the Court notes that he stated the money was collected from at least 8 different people, not including Respondent's own contribution. While Respondent's ability to pay the smuggler is somewhat hard to believe, the testimony was not incredible. *See Chaib v. Ashcroft*, 397 F.3d 1273, 1278 (10th Cir. 2005) (credibility determination "may not be based upon speculation, conjecture, or unsupported personal opinion."). As such, the Court further finds Respondent's statements regarding his travels from China to the United States plausible and credible. *See J-Y-C-*, 24 I &N Dec. at 264. The Court reiterates that Respondent testified consistently on both direct- and cross-examinations as to his activities in China and his travels from China. *See S-A-*, 22 I&N Dec. at 1331-32. As such, the Court finds that Respondent is credible. *See J-Y-C-*, 24 I &N Dec. at 264; INA § 208(b)(1)(B)(iii).

C. Respondent is Ineligible for Asylum Pursuant to INA § 208

1. Presence and Timeliness

Respondent is eligible to file for asylum because he is physically present in the United States. INA § 208(a)(1). As an initial matter, the Court notes that once alienage is established, as is the case here, the burden shifts to Respondent to prove the time, place, and manner of his entry into the United States. INA § 291; *Matter of Benitez*, 19 I&N Dec. 173 (BIA 1984). To that end, Respondent testified that he left China on March 18, 2008 and entered the United States on July 8, 2008. To corroborate that claim, Respondent submitted a photocopy of his passport with a stamp show-

ing he exited China on March 18, 2008.[4] (Resp't. Doc. at p. 1-17.) The Court finds that, given Respondent's credible testimony and his documentary corroboration, he has met his burden in establishing that he entered the United States on July 8, 2008. Respondent filed for asylum on February 9, 2009, less than a year after he left China and entered the United States. (Exh. 1, NTA; 1-589.) Consequently, this Court finds that Respondent has met his burden to establish that he filed for asylum within one year of his last entry. INA § 208(a)(2)(B).

2. Past Persecution

Respondent argues that he suffered past persecution on account of his religion. Specifically, he states that the police raided a house church meeting he was attending, they arrested him, interrogated him, beat him, and detained him for four days. (I-589; Resp't Statement.) In evaluating the events leading to Respondent's departure from China, the Court finds that Respondent has not established that he suffered past persecution.

Beyond his weekly reporting, Respondent asserts only one encounter with the Chinese police. He states that on October 26, 2007, the police barged into a house church meeting, took all fourteen members to the police station, interrogated him individually, slapped him across the back of his head and hit him on the forearm with a police baton. He further stated he was detained in a small jail cell for three nights where

[4] Respondent's original passport appears to have been submitted to the asylum officer. (*See* Resp't. Index.)

he was fed twice-a-day and forced to use the bathroom in a wooden bucket that was never changed. Upon release, Respondent testified that he signed a letter guaranteeing that he would not attend a house church and was ordered to report weekly to the police station for one hour at a time. While this treatment is certainly harsh and offensive, it simply does not rise to the level of persecution contemplated by the Act. *See Kapcia v. INS*, 944 F.2d 702 (10th Cir. 1991) (finding no persecution where the alien had been detained for a total of four days during which time he endured beatings); *Woldemeskel*, 257 F.3d at 1188. Respondent also did not indicate that his beatings were severe or that they resulted in any long term injury. *Hayrapetyan*, 534 F.3d at 1337.

Furthermore, Respondent does not claim that he suffered any additional harm either while detained or after he was released. See id. at 1338. Respondent did state that the police had been to his parents' home to look for him. However, he did not allege that his family was in any way threatened or harmed by this. The Court is sympathetic to Respondent's mistreatment; however, in considering Respondent's past harm, three-night detention, his release and forced reporting, the Court finds that this mistreatment simply does not amount to more than a restriction on Respondent's liberty and thus does not rise to the level of persecution. Wiransane, 366 F.3d at 893; see also Matter of V-T-S-, 21 I&N Dec. 792 (BIA 1997) (persecution does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional). Therefore, the Court finds that Respondent has failed to establish that he suffered past persecution. 8 C.F.R§ 1208.13(b)(1).

3. Well-Founded Fear of Persecution On Account of Religion

Because the Court finds that Respondent has not made a showing of past persecution, he is not entitled to a presumption of a well-founded fear of future persecution. *Id.* Respondent must independently establish that there is a reasonable possibility he will suffer future persecution upon his return to China and that the persecution he will suffer is on account of a protected ground. 8 C.F.R.§ 1208.13(b)(2). Respondent asserts he has a well-founded fear of persecution on account of his religion because if he were arrested again in China, the police would sentence him to time in prison and he would be prevented from practicing his religion. The Court is satisfied that he has a subjective fear of future persecution on account of his religion and that the authorities are aware of his involvement with the house church. *Mogharrabi*, 19 I&N Dec. at 445. However, the Court finds that Respondent has not met his burden of demonstrating that the authorities are inclined to persecute him on account of religion. *See id.*

While Respondent asserts that he would be individually targeted for persecution, he has not met his burden in establishing that the police are still interested in his whereabouts or activities or inclined to persecute him. *See id.* Specifically, although the November 3, 2008 letter from Respondent's mother states that the police looked for Respondent while he was still in China and the January 27, 2012 letter indicates that the police have asked his parents to tell Respondent to report to them when he returns home, none of the letters indicate that the police have continued to look for Respondent since he left or that they regularly inquire into his whereabouts. (*See* Resp't. Doc. at p. 52; Resp't.

Supp. II at p. 320.) Indeed, it seems unlikely that the police continue to visit Respondent's parents' home to look for him as Respondent testified that his mother now holds weekly house church gatherings and has done so successfully for the past three years. Moreover, Respondent did not testify to any difficulties leaving China; rather, he stated that he presented his true passport and was able to obtain a stamp from customs officials to exit China.

Furthermore, Respondent has not demonstrated that, should he be targeted by the police, he would be subject to persecution within the meaning of the Act. Respondent stated he left China because he feared he would be arrested and imprisoned for continuing to attend the house church. However, he did not indicate that he fears any harm beyond that which he has already endured. As the Court found that Respondent did not suffer past persecution, it further finds that similar treatment in the future would not rise to the level of persecution. Moreover, and as mentioned above, the Court notes that Respondent's parents and brother have continued to attend the house church without incident and host weekly house church gatherings. The fact that Respondent's similarly-situated family continues to live unharmed in China undermines the objective reasonableness of his fear of persecution. *See Ritonga v. Holder*, 633 F.3d 971, 977 (10th Cir. 2011).

Finally, although some courts have found that "having to practice religion underground to avoid punishment is itself a form of persecution," such decisions while persuasive are not binding on this Court. *See Kazemzadeh v. U.S. Att'y Gen.*,577 F.3d 1341, 1354 (1lth Cir. 2009)(remanded to BIA for failure to consider

that practicing Christianity in hiding or facing death due to apostasy in Iran would constitute religious persecution); *see also Muhur v. Ashcroft*, 355 F.3d 958 (7th Cir. 2004). Additionally, Respondent's case is distinguishable from *Kazemadeh*, in which the alien was forced to choose between practicing Christianity in hiding or facing death due to apostasy in Iran. 577 F.3d at 1353-55. Here, Respondent has not alleged such severe consequences. As such, the harm Respondent fears appears to the Court to be a restriction on liberty far less severe than the possibility of death or serious injury that existed in *Kazemadeh*. Therefore, the Court finds that Respondent has not demonstrated that there is a reasonable possibility he will be persecuted in the future on account of his religion. *Cardoza- Fonseca*, 480 U.S. at 440; *Mogharrabi*, 19 I&N Dec. at 446; 8 C.F.R. § 1208.13(b)(2).

D. Respondent is Ineligible for Withholding of Removal and Relief under the Torture Convention

Inasmuch as Respondent has failed to satisfy the lower burden of proof required for asylum, it necessarily follows that he has also failed to satisfy the more stringent clear probability of persecution standard required for withholding of removal. *See INS v. Stevic*,467 U.S. 407, 413 (1984). Therefore, the Court will deny Respondent's request for withholding of removal. INA § 241(b)(3)(C).

Respondent has also not demonstrated that it is more likely than not that he will be tortured if removed to the China. Specifically, Respondent neither alleged past torture nor asserted a fear of torture in the future. The record contains no evidence the Chinese govern-

ment is currently engaged in the systematic gross, flagrant, or mass violation of human rights or that the government acquiesces to such violations. As Respondent has provided no evidence to this effect, the Court denies relief under the Convention Against Torture. 8 C.F.R.§ 1208.16(c)(3).

E. Voluntary Departure

Based upon the evidence of record, the Court concludes that Respondent is ineligible for post-conclusion voluntary departure. Specifically, Respondent has established that he last entered the United States on July 8, 2008. His NTA was served, however, on March 9, 2009. As such, Respondent has not been physically present in the United States for at least one year preceding the issuance of his NTA. INA § 240B(b)(1)(A). The Court therefore finds that he is ineligible for post-conclusion voluntary departure and will deny his application for such relief.

V. Conclusion

Respondent has not met the burden of proof necessary for asylum under section 208 of the Act. Specifically, the Court finds that Respondent's harm on account of his religion did not rise to the level of past persecution. In addition, he failed to establish that he has a reasonable likelihood of being persecuted upon return to China on account of his religion. Therefore, this Court will deny his application for asylum. INA § 208(b)(1)(A). As Respondent failed to meet the lower burden of proof necessary for asylum, the Court further finds that Respondent failed to establish eligibility for withholding of removal under section 241(b)(3)(A) of the Act and will deny such application. Further, as Re-

spondent has not alleged that he was tortured in the past or objectively established that he fears torture if returned to the People's Republic of China, he is ineligible for relief under the Torture Convention. 8 C.F.R.§ 1208.16(c). Finally, the Court finds that Respondent is statutorily ineligible for post-conclusion voluntary departure as he was not physically present in the United States for one year prior to the issuance of his NTA. INA § 240B(b)(1)(A). The Court therefore denies his request for post-conclusion voluntary departure. The Court will order Respondent removed to the People's Republic of China.

ORDERS

IT IS HEREBY ORDERED that Respondent's Application for Asylum Pursuant to INA § 208 be DENIED.

IT IS HEARBY FURTHER ORDERED that Respondent's Application for Withholding of Removal Pursuant to INA § 241(b)(3) be DENIED.

IT IS HEREBY FURTHER ORDERED that Respondent's Application for Relief Under Torture Convention pursuant to 8 C.F.R.§§ 1208.16(c), 1208.17, 1208.18 be DENIED.

IT IS HEREBY FURTHER ORDERED that Respondent's Application for Voluntary Departure Pursuant to INA § 240B(b) be DENIED.

IT IS HEREBY FURTHER ORDERED that Respondent be REMOVED to the People's Republic of China.

IT IS HEREBY FURTHER ORDERED that Appeal be RESERVED by Both Parties.

JUNE 19, 2013

DAVID J. CORDOVA
IMMIGRATION JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NO. 15-9540

TING XUE, PETITIONERS

v.

LORETTA E. LYNCH, UNITED STATES ATTORNEY GENERAL, RESPONDENT

January 23, 2017

ORDER
ON PETITION FOR REHEARING EN BANC

This matter is before the court on Respondent Loretta E. Lynch's unopposed Motion to Amend the Decision and Petitioner Ting Xue's Petition for Panel Rehearing and Rehearing En Banc.

The panel grants the Respondent's unopposed Motion to Amend and, thereby, replaces the phrase "clear error" with the phrase "substantial evidence" in the first and third sentences on page four of the slip opinion and the final sentence of footnote ten. A copy of the revised opinion, filed nunc pro tunc to the original fil-

ing date of November 25, 2016, is attached to this order.

Petitioner Xue's Petition for Panel Rehearing is denied. The request for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular, active service on the court requested that the court be polled, that request is also denied.

Judges Matheson and Gorsuch are recused.

ENTERED FOR THE COURT

ELISABETH A. SHUMAKER, CLERK

APPENDIX E

RELEVANT STATUTORY AND REGULATORY PROVISIONS

1. 8 U.S.C. § 1101(a)(42) provides:

Definitions

(a) As used in this chapter--

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that 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, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee"

does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

2. 8 U.S.C. § 1158 provides:

Asylum

(a) *Authority to apply for asylum*

(1) In general

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 or, where applicable,

section 1225(b) of this title.

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previ-

ously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(E) Applicability

Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 279(g) of Title 6).

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

(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.

(B) Burden of proof

(i) In general

The burden of proof is on the applicant 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 considering 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.

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or oth-

erwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an ag-

gravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations

The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review

There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

(3) Treatment of spouse and children

(A) In general

A spouse or child (as defined in section 1101(b)(1) (A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.

(B) Continued classification of certain aliens as children

An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under

this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 1159(b)(3) of this title, if the alien attained 21 years of age after such application was filed but while it was pending.

(C) Initial jurisdiction

An asylum officer (as defined in section 1225(b)(1)(E) of this title) shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child (as defined in section 279(g) of Title 6), regardless of whether filed in accordance with this section or section 1225(b) of this title.

(c) *Asylum status*

(1) In general

In the case of an alien granted asylum under subsection (b), the Attorney General--

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) Termination of asylum

Asylum granted under subsection (b) does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that--

(A) the alien no longer meets the conditions described in subsection (b)(1) owing to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2);

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

(3) Removal when asylum is terminated

An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section[1] 1182(a) and 1227(a) of this title, and the alien's removal or return shall be directed by the Attorney General in accordance with sections 1229a and 1231 of this title.

(d) *Asylum procedure*

(1) Applications

The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a). The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.

(2) Employment

An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

(3) Fees

The Attorney General may impose fees for the consideration of an application for asylum, for employment authorization under this section, and for adjustment of status under section 1159(b) of this title. Such fees shall not exceed the Attorney General's costs in adjudicating the applications.

The Attorney General may provide for the assessment and payment of such fees over a period of time or by installments. Nothing in this paragraph shall be construed to require the Attorney General to charge fees for adjudication services provided to asylum applicants, or to limit the authority of the Attorney General to set adjudication and naturalization fees in accordance with section 1356(m) of this title.

(4) Notice of privilege of counsel and consequences of frivolous application

At the time of filing an application for asylum, the Attorney General shall--

(A) advise the alien of the privilege of being represented by counsel and of the consequences, under paragraph (6), of knowingly filing a frivolous application for asylum; and

(B) provide the alien a list of persons (updated not less often than quarterly) who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

(5) Consideration of asylum applications

(A) Procedures

The procedure established under paragraph (1) shall provide that--

(i) asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on

which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum;

(ii) in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed;

(iii) in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed;

(iv) any administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within 30 days of the completion of removal proceedings before an immigration judge under section 1229a of this title, whichever is later; and

(v) in the case of an applicant for asylum who fails without prior authorization or in the absence of exceptional circumstances to appear for an interview or hearing, including a hearing under section 1229a of this title, the application may be dismissed or the applicant may be otherwise sanctioned for such failure.

(B) Additional regulatory conditions

The Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter.

(6) Frivolous applications

If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.

(7) No private right of action

Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(e) *Commonwealth of the Northern Mariana Islands*

The provisions of this section and section 1159(b) of this title shall apply to persons physically present in the Commonwealth of the Northern Mariana Islands or arriving in the Commonwealth (whether or not at a designated port of arrival and including persons who are brought to the Commonwealth after having been interdicted in international or United States waters) only on or after January 1, 2014.

3. 8 U.S.C. § 1252 provides:

Judicial review of orders of removal

(a) *Applicable provisions*

(1) General orders of removal

Judicial review of a final order of removal (other

than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review--

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law

(statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court

of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) *Requirements for review of orders of removal*

With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The

petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)--

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for

admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision

on that claim as if an action had been brought in the district court under section 2201 of Title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that-

(i) no genuine issue of material fact about the

defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of Title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) during the criminal proceeding.

(8) Construction

This subsection--

(A) does not prevent the Attorney General, after

a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) *Requirements for petition*

A petition for review or for habeas corpus of an order of removal--

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) *Review of final orders*

A court may review a final order of removal only if--

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) *Judicial review of orders under section 1225(b)(1)*

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may--

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made un-

der section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of--

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of--

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable

provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner--

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this ti-

tle, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) *Limit on injunctive relief*

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) *Exclusive jurisdiction*

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

4. 8 C.F.R. § 208.13 provides:

Establishing asylum eligibility

(a) Burden of proof. The burden of proof is on the applicant for asylum 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. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.

(b) Eligibility. The applicant may qualify as a refugee either because he or she has suffered past per-

secution or because he or she has a well-founded fear of future persecution.

(1) Past persecution. An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

(i) Discretionary referral or denial. Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in

circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) Burden of proof. In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.

(iii) Grant in the absence of well-founded fear of persecution. An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to

that country.

(2) Well-founded fear of persecution.

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

(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

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

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

(ii) An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

(3) Reasonableness of internal relocation. For purposes of determinations under paragraphs (b)(1)(i), (b)(1)(ii), and (b)(2) of this section, adjudicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. Those factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored.

(ii) In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(c) Mandatory denials—

(1) Applications filed on or after April 1, 1997. For applications filed on or after April 1, 1997, an applicant shall not qualify for asylum if section 208(a)(2) or 208(b)(2) of the Act applies to the applicant. If the applicant is found to be ineligible for asylum under either section 208(a)(2) or 208(b)(2) of the Act, the applicant shall be considered for eligibility for withholding of removal under section 241(b)(3) of the Act. The applicant shall also be considered for eligibility for withholding of removal under the Convention Against Torture if the applicant requests such consideration or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal.

(2) Applications filed before April 1, 1997.

(i) An immigration judge or asylum officer shall not grant asylum to any applicant who filed his or her application before April 1, 1997, if the alien:

(A) Having been convicted by a final judgment of a particularly serious crime in the United States, constitutes a danger to the community;

(B) Has been firmly resettled within the meaning of § 208.15;

(C) Can reasonably be regarded as a danger to the security of the United States;

(D) Has been convicted of an aggravated felony, as defined in section 101(a)(43) of the Act; or

(E) Ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

(F) Is described within section 212(a)(3)(B)(i)(I), (II), and (III) of the Act as it existed prior to April 1, 1997, and as amended by the Anti-terrorist and Effective Death Penalty Act of 1996 (AEDPA), unless it is determined that there are no reasonable grounds to believe that the individual is a danger to the security of the United States.

(ii) If the evidence indicates that one of the above grounds apply to the applicant, he or she shall have the burden of proving by a preponderance of the evidence that he or she did not so act.