No. _____

IN THE
Supreme Court of the United States

WEI SUN,
Petitioner,

v.

JEFFERSON B. SESSIONS III,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under 8 U.S.C. § 1158(b)(1)(B)(ii), an asylum applicant whose testimony is deemed credible, but whom the Immigration Judge determines "should provide evidence that corroborates otherwise credible testimony," must be given the opportunity to obtain and provide such evidence.

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PETITION FOR WRIT OF CERTIORARI

Wei Sun petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

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The decision of the Second Circuit is reported at 883 F.3d 23. The opinion of the Board of Immigration Appeals and the order of the Immigration Judge are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 2018. On May 4, 2018, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including June 25, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent portion of the REAL ID Act of 2005, codified at Section 1158(b)(1)(B)(ii) of Title 8 provides:

> 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.

INTRODUCTION

This case presents an acknowledged conflict among the circuits regarding the meaning of 8 U.S.C. § 1158(b)(1)(B)(ii). The question presented is whether an immigration judge who determines that an asylum applicant "should provide evidence that corroborates otherwise credible testimony," *id.*, has the statutory obligation to afford the applicant the opportunity to obtain and provide that corroborating evidence.

Petitioner, an asylum applicant from China, testified about the religious persecution he had suffered as a Christian in China. His application included evidence corroborating his Christian religious beliefs, including a baptism certificate from a church in Los Angeles, where he lived after arriving in the United States. The Immigration Judge expressly found his testimony to be credible.

The Immigration Judge, however, concluded that additional corroboration of Petitioner's religious beliefs, such as a letter from his pastor or fellow congregants, was necessary to substantiate Petitioner's asylum claim. Petitioner indicated that he could readily obtain that evidence and present it at a subsequent hearing. The Immigration Judge, however, refused to allow Petitioner the opportunity to obtain that evidence and denied his application for asylum. The Board of

Immigration Appeals ("BIA") affirmed, relying on prior BIA precedent holding that an immigration judge does not have a statutory obligation under Section 1158(b)(1)(B)(ii) to afford an applicant the opportunity to provide the corroborating evidence that he "should provide." 8 U.S.C. § 1158(b)(1)(B)(ii); *see Matter of L-A-C-*, 26 I. & N. Dec. 516 (BIA 2015).

The Second Circuit upheld the BIA's interpretation of Section 1158(b)(1)(B)(ii). According to that court, when an immigration judge determines that an applicant is credible but "should provide" corroborating evidence, Section 1158(b)(1)(B)(ii) does not unambiguously require the immigration judge to afford the applicant an opportunity to obtain and provide that evidence before denying the application. Pet. App. 12a. Applying *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Second Circuit deferred to the BIA's decision in *Matter of L-A-C-*. *Id.* at 11a. Two other courts of appeals—the Seventh Circuit and Sixth Circuit—have concurred with the Second Circuit.

In finding the statute ambiguous and deferring to the BIA, the Second Circuit acknowledged its disagreement with the Ninth Circuit. Pet. App. 12a. That court held that a "plain reading of the statute's text makes clear" that an immigration judge must provide an applicant with "an opportunity to either produce the evidence or explain why it is unavailable" before denying the application. *Ren v. Holder*, 648 F.3d 1079, 1090 (9th Cir. 2011); *see also Ai Jun Zhi v. Holder*, 751 F.3d 1088, 1095 (9th Cir. 2014) (applying *Ren* and remanding).

This case is an ideal vehicle to resolve this conflict of authority. There is no question that Petitioner easily could have obtained the evidence identified by the Immigration Judge if he had been given the opportunity to do so. Moreover, his failure to present that evidence to the Immigration Judge at the time of his testimony was the sole ground on which the Board of Immigration Appeals affirmed the denial of his asylum application. Finally, Petitioner personifies the need for this Court's intervention: his case began in an immigration court covered by the Ninth Circuit, but was transferred to an immigration court covered by the Second Circuit when Petitioner moved from Los Angeles to New York. That move made all the difference given the circuits' conflicting rules, and Petitioner was ordered removed despite credibly testifying that he would face persecution upon return. Matters of life and death should not turn on the fortuity of forum choice.

STATEMENT OF THE CASE

A. Statutory Framework.

To be eligible for asylum, an applicant must demonstrate that he or she is "unable or unwilling to return" to his or her country of origin because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A); *id.* § 1158(b)(1)(B)(i). To be eligible for withholding of removal, an applicant must demonstrate that his or her "life or freedom would be threatened … because of [his or her] race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1231(b)(3)(A).

An applicant's credible testimony can be sufficient to sustain the burden of demonstrating eligibility for either asylum or withholding of removal. *Id.* § 1158(b)(1)(B)(ii) (asylum); *id.* § 1231(b)(3)(C) (withholding). However, even when an applicant testifies credibly, an immigration judge may require the applicant to submit evidence corroborating the testimony. *Id.* § 1158(b)(1)(B)(ii). Specifically, Section 1158(b)(1)(B)(ii) provides that "[w]here 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." *Id.*

B. Petitioner's Persecution in China and Immigration to the United States.

Petitioner Wei Sun is a citizen of China. After his wife was forced to abort their child in China in 1995, he joined an underground Christian church. Pet. App. 3a. While attending the church in 2007, he and other worshippers were arrested by the police and detained. *Id.* He was "accused of conducting cult activities, disturbing social order, and spreading overseas reactionary thought." *Id.* During his ten-day detention, he was kicked repeatedly and forced to squat for lengthy periods of time. *Id.* To obtain release and avoid further abuse, he signed an "accusation[] letter" and was released, though he was never sentenced. *Id.*

Later that year, Petitioner entered the United States on a B-1 visitor visa. His wife, who was still in China, told him that the Chinese police were looking for him. He was baptized in a Christian church in Los Angeles in 2007 and worshipped there until he moved to

New York in 2012. Upon his move to New York, he began attending a Christian church in Queens. Pet. App. 3a.

Sun's visa expired on June 12, 2007, and on that date he filed an I-589 application for asylum and withholding of removal. Pet. App. 3a-4a.

C. Proceedings Below.

1. The Department of Homeland Security initiated removal proceedings against Petitioner in Los Angeles in July 2007. Pet. App. 4a. In 2012, the venue of the proceedings transferred from Los Angeles to New York, due to Petitioner's change in residence. Pet. App. 3a.

On March 24, 2014, Petitioner appeared before the Immigration Judge in New York. Petitioner testified regarding his church attendance in China and the persecution he had suffered as a result. Pet. App. 3a-4a, 23a. In response to questions regarding his church attendance in the United States, Petitioner testified that he was baptized at Rong Yao Church in Los Angeles and described the meaning of that baptism and of his Christian faith. He testified that when he moved to New York City, he began attending Living Water Church on Princess Street. Admin. Record at 87-88.

Petitioner also provided the Immigration Court with documentation to corroborate his asylum claim, including his marriage license; medical records from an abortion his wife was forced to undergo in 1995; and his certificate of baptism, dated July 1, 2007, and signed by Senior Pastor Phillip Wang. Pet. App. 4a; Admin. Record at 105, 109, 118.

Petitioner testified that he asked the pastor of Living Water Church to testify in court on his behalf, but that the pastor was too busy that day to attend. Admin. Record at 88. His friend was also unable to attend. *Id.* at 88-89. The Immigration Judge asked Petitioner if he had a letter from his friend that would corroborate his church attendance in New York City. Pet. App. 34a-35a. Petitioner replied that he did "not anticipate that [he would] be asked for this letter. If that is needed next time when I come back here, I can bring it." *Id.* at 35a. The Immigration Judge then asked why Petitioner had not submitted church records, other than his baptismal certificate, to corroborate his church attendance in the United States. *Id.* Petitioner said that he "thought the one baptismal certification would be sufficient enough." *Id.*

Following Petitioner's testimony, the Immigration Judge issued an oral decision denying Petitioner's claim for asylum and withholding-of-removal. The Immigration Judge expressly found Petitioner's testimony to be credible. Pet. App. 4a, 27a. Nevertheless, the Immigration Judge held that Petitioner's testimony was insufficient to sustain his burden of proof and denied his claim for relief due to an absence of corroborating evidence. *Id.* at 27a-28a. The Immigration Judge in particular emphasized Petitioner's failure to present letters or testimony from his pastor or other congregants corroborating his church attendance. *Id.* at 28a-29a. The Immigration Judge acknowledged Petitioner's testimony that "he could bring a church letter to another hearing," and thus that "such a document was reasonably available to him." *Id.*

Rather than allow Petitioner the opportunity to obtain and provide that evidence, however, the Immigration Judge denied his claim for relief and ordered him removed. *Id.* at 30a.

2. The Board of Immigration Appeals ("BIA") affirmed on the ground that Petitioner "did not submit sufficient evidence to corroborate his testimony." Pet. App. 19a. In response to the argument that, having identified the specific corroborating evidence deemed lacking and having determined that it could readily be obtained, the Immigration Judge was required to allow Petitioner the opportunity to obtain it, the BIA held: "The Immigration Judge is not required to identify the specific evidence necessary for the [applicant] to meet his burden of proof and continue the proceedings for him to gather the evidence prior to rendering a decision on the application. *Id.* at 19a-20a (citing *Matter of L-A-C-*, 26 I. & N. Dec. 516 (BIA 2015)).

3. The Second Circuit denied the petition for review. It rejected Petitioner's argument that the plain language of Section 1158(b)(1)(B)(ii) required the Immigration Judge to allow him the opportunity to gather and provide the corroborating evidence the Immigration Judge identified. The court reasoned that the statute "is silent … as to the procedure to be followed where corroborating evidence is needed," Pet. App. 12a, and found the BIA's interpretation—under which an immigration judge has discretion to grant or deny a continuance—to be reasonable and worthy of deference under *Chevron*. *Id.* at 13a-14a. It noted that the BIA's interpretation was consistent with the agency's practice prior to the passage of Section

1158(b)(1)(B)(ii), and agreed with the Seventh Circuit that the statute "clearly states that corroborative evidence may be required, placing immigrants on notice of the consequences for failing to provide corroborative evidence." *Id.* at 14a (quoting *Rapheal v. Mukasey*, 533 F.3d 521, 530 (7th Cir. 2008)).

The Second Circuit expressly acknowledged that its holding conflicted with decisions from the Ninth Circuit, which were "based on a textual reading of § 1158(b)(1)(B)(ii)." Pet. App. 13a. As the Second Circuit explained, the Ninth Circuit had held that "because the statute 'does not say "should *have* provided," but rather "should provide," [it] expresses an imperative that the applicant must provide further corroboration in response to the IJ's determination.'" *Id.* (quoting *Ren*, 648 F.3d at 1091) (emphasis and alteration in original). The Second Circuit found that this reading of the text was "plausible," but "not the only reasonable interpretation." *Id.*; *see id.* at 12a-13a ("Sun asks this Court to adopt the Ninth Circuit's conclusion… We decline to adopt this interpretation."). Thus, the Second Circuit deferred to the BIA's holding. *Id.* at 13a.

The Second Circuit then rejected Petitioner's alternative argument that, in denying him a continuance, the Immigration Judge had abused her discretion. Pet. App. 16a-17a.

REASONS FOR GRANTING THE WRIT

This case presents a question of statutory interpretation that has divided the circuits, and the Second Circuit's resolution of that question was outcome determinative. Had Petitioner remained in Los

Angeles, where the case began, he would have been afforded the opportunity, under the Ninth Circuit's interpretation of § 1158(b)(1)(B)(ii), to obtain the corroborating evidence demanded by the Immigration Judge, which he indisputably could have readily obtained. But because Petitioner moved to New York, he no longer had that right, due to the Second Circuit's express rejection of the Ninth Circuit's statutory interpretation.

The Second Circuit's interpretation of the statute, moreover, is irreconcilable with the statute's plain text. When an applicant has presented credible testimony that he or she will suffer persecution if returned home, Congress did not intend for an immigration judge to deny the claim merely because a credible applicant failed to guess precisely what type of corroborating evidence the immigration judge would decide should be provided. Instead, when the immigration judge decides that "the applicant should provide evidence that corroborates otherwise credible testimony," the applicant must be given the opportunity to "obtain the evidence" so that it can "be provided." 8 U.S.C. § 1158(b)(1)(B)(ii).

I. THERE IS AN ACKNOWLEDGED CIRCUIT SPLIT ON THE QUESTION PRESENTED.

This case presents an acknowledged circuit conflict, with three courts on one side and one on the other, concerning whether an asylum applicant whose testimony is deemed credible, but who the immigration judge determines "should provide evidence that corroborates otherwise credible testimony," must be

given the opportunity to obtain and provide such evidence. 8 U.S.C. § 1158(b)(1)(B)(ii).

The BIA, Second Circuit, Sixth Circuit, and Ninth Circuit have all acknowledged the conflict. *See Matter of L-A-C-*, 26 I. & N. Dec. at 523 (stating that "[o]ur approach is consistent with that taken by the Second and Seventh Circuits" and that "we disagree" with the Ninth Circuit); Pet. App. 12a-13a ("Sun asks this Court to adopt the Ninth Circuit's conclusion…. We decline to adopt this interpretation."); *Gaye v. Lynch*, 788 F.3d 519, 529 (6th Cir. 2015) ("We agree with the Seventh Circuit, and disagree with the Ninth Circuit."); *Ai Jun Zhi*, 751 F.3d at 1094 n.6 (noting split and collecting cases). So too has the United States. *See* U.S. Br. in Opp. to Pet'n for Cert. at 20, *Silais v. Sessions*, No. 17-469 (U.S. Jan. 5, 2018), 2018 WL 333816 (acknowledging that "there is a circuit conflict on the interpretation of the REAL ID Act's corroboration provision").

A. The Sixth and Seventh Circuits Adopt the Same Interpretation as the Second Circuit.

As described above, the Second Circuit held that Section 1158(b)(1)(B)(ii) does not unambiguously require an immigration judge to afford an applicant the opportunity to obtain corroborating evidence that the immigration judge determines he or she "should provide." Pet. App. 13a. Invoking *Chevron*, the Second Circuit deferred to the BIA's interpretation of the statute in *Matter of L-A-C-*, 26 I. & N. Dec. 516 (2015). Pet. App. 12a. In that case, the BIA held that the corroboration requirement in Section 1158(b)(1)(B)(ii) was intended to codify pre-existing BIA precedent permitting immigration judges to require evidence

corroborating credible testimony. 26 I. & N. Dec. at 519 (citing *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997)). According to the BIA, because the pre-existing framework "did not require the Immigration Judge to identify the specific corroborating evidence at the merits hearing that would be considered persuasive under the facts of the case … [or] require the Immigration Judge to grant an automatic continuance for the applicant to present that corroborating evidence," Section 1158(b)(1)(B)(ii) likewise should not be interpreted to impose such a procedural requirement. *Id.* at 520.

The Seventh Circuit has agreed that an immigration judge is not required to provide an applicant with the opportunity to obtain the corroborating evidence that the immigration judge determines he or she should provide. According to the Seventh Circuit, such a requirement would "necessitate two hearings," which "would seem imprudent where the law clearly notifies aliens of the importance of corroborative evidence." *Rapheal v. Mukasey*, 533 F.3d 521, 530 (7th Cir. 2008); *Silais v. Sessions*, 855 F.3d 736, 745-46 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 976 (2018); *Darinchuluun v. Lynch*, 804 F.3d 1208, 1216-17 (7th Cir. 2015).

The Sixth Circuit has adopted the same position as the Second Circuit and Seventh Circuit. *See Gaye*, 788 F.3d at 530 ("[F]ederal law does not entitle illegal aliens to notice from the Immigration Court as to what sort of evidence the alien must produce to carry his burden.").

B. The Ninth Circuit Is In Conflict With the Second, Sixth, and Seventh Circuits.

By contrast, the Ninth Circuit has held that "the statute is clear. An applicant must be given notice of the corroboration required, and an opportunity to either provide that corroboration or explain why he cannot do so." *Ren*, 648 F.3d at 1091-92; *id.* at 1094 (describing the "unambiguously expressed intent of Congress").[1]

First, the statute says that "*[w]here 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." 8 U.S.C. § 1158(b)(1)(B)(ii) (emphasis added). Thus, "it is only when the IJ determines that such corroborative evidence is necessary that the applicant must then provide it." *Ren*, 648 F.3d at 1091.

Second, the statute says that when that determination has been made, "the applicant *should provide*" the needed evidence. 8 U.S.C. § 1158(b)(1)(B)(ii) (emphasis added). "[T]he Act does not say 'should *have* provided,' but rather 'should provide,' which expresses an imperative that the applicant must

[1] The Third Circuit has similarly held that "the IJ must give the applicant notice of what corroboration will be expected and an opportunity to present an explanation if the applicant cannot produce such corroboration." *Chukwu v. Attorney Gen. of U.S.*, 484 F.3d 185, 192 (3d Cir. 2007); *see Alimbaev v. Attorney Gen. of United States*, 872 F.3d 188, 201 n.11 (3d Cir. 2017) (reaffirming *Chukwu* in post-REAL ID Act case). However, the Third Circuit has not analyzed the text of the statute in detail.

provide further corroboration in response to the IJ's determination." *Ren*, 648 F.3d at 1091 (emphasis in original).

Third, the statute says that corroborating evidence "must be provided" in the event that the immigration judge decides that the applicant "should provide" it. 8 U.S.C. § 1158(b)(1)(B)(ii). "Again, this language focuses on conduct that *follows* the IJ's determination, not *precedes* it, as the phrase '*must have been* provided' would do." *Ren*, 648 F.3d at 1091.

Fourth, the statute "excuse[s] an applicant from satisfying the IJ's request for corroboration if he '*does not have* the evidence and *cannot reasonably obtain* it.' This language is present-and-future-oriented as well; the statute does not say 'unless the applicant *did* not have the evidence and *could not have* reasonably *obtained* the evidence.'" *Id.* (quoting 8 U.S.C. § 1158(b)(1)(B)(ii) (emphasis in original)).

Accordingly, "[a] plain reading of the statute's text makes clear that an IJ must provide an applicant with notice and an opportunity to either produce the evidence or explain why it is unavailable before ruing that the applicant has failed in his obligation to provide corroborative evidence and therefore failed to meet his burden of proof." *Id.* at 1090.

The Ninth Circuit has subsequently applied its reading of the statute to require a remand when the immigration judge failed to give an applicant the opportunity to obtain corroborating evidence that the immigration judge determined he should provide. *Ai Jun Zhi*, 751 F.3d at 1095. That case "illustrates well the

importance of [the Ninth Circuit's] holding." *Id.* The immigration judge held that the applicant, a Chinese bookstore owner who stocked books concerning the Falun Gong, should provide letters from the Falun Gong practitioners who purchased books there. *Id.* at 1094. But, as the Ninth Circuit noted, requesting that information could place those others at risk of persecution. Before having his claim denied for a failure to corroborate, Congress intended for the applicant to have "an opportunity to navigate the risks and logistical complexity in obtaining the requested corroborative evidence or, in the alternative, an opportunity to explain why it is not reasonably available." *Id.* at 1095.

II. THIS CASE WARRANTS THIS COURT'S REVIEW.

This case presents an ideal vehicle for this Court to resolve the circuit conflict. Indeed, the circuit conflict was outcome determinative in this case.

There is no dispute that, had he been given the opportunity, Petitioner would have been able to obtain the corroborating evidence requested by the Immigration Judge. Pet. App. 28a-29a ("[Petitioner] … indicated that he could bring a church letter to another hearing. Thus, such a document was reasonably available to him, but was not obtained."); *id.* at 35a (Petitioner testifying that he did "not anticipate that [he would] be asked for this letter. If that is needed next time when I come back here, I can bring it."); *id.* (Petitioner explaining that he did not submit church letters because he thought that the baptismal certificate would be sufficient to corroborate his church attendance).

If the case had ended in the Los Angeles immigration court where it began, Petitioner would have been entitled to an opportunity to obtain and provide that evidence before his claim could be denied. But because Petitioner moved from Los Angeles to New York during the pendency of his proceeding, he lost that entitlement.

Asylum cases involve matters of life and death, and the outcome should not depend upon the forum. Indeed, non-uniformity creates perverse incentives for both the government and for applicants. In immigration cases, applicants are frequently under the physical control of the government, and a circuit split makes it possible for the government to move individuals so as to gain the benefit of more favorable legal rules. Moreover, applicants who are not detained should not be induced to move from one circuit to another because of differences in circuit law.

III. THE SECOND CIRCUIT'S DECISION IS INCORRECT.

The Court should also grant review because the Second Circuit's decision is incorrect. That court should not have "resort[ed] to *Chevron* deference, … for Congress has supplied a clear and unambiguous answer to the interpretive question at hand." *Pereira v. Sessions*, No. 17-459, 2018 WL 3058276, at *7 (U.S. June 21, 2018).

First, as the Ninth Circuit explained in *Ren*, the plain text of the statute—and in particular, Congress's use of a present- and future-oriented verb tense—indicates that Congress intended to allow applicants an opportunity to obtain and provide corroborative

evidence requested by an immigration judge. The statute states that "where the trier of fact determines" that an applicant "should provide evidence" corroborating his or her testimony, such evidence "must be provided" unless the applicant "cannot reasonably obtain the evidence." 8 U.S.C. § 1158(b)(1)(B)(ii). The determination that an applicant "should provide evidence" is forward-looking and calls for action on the part of the applicant: to provide that evidence unless the applicant "cannot reasonably obtain" it. *Id.* The BIA's interpretation simply ignores the verb tense Congress used in the statutory text. *See, e.g.*, *Carr v. United States*, 560 U.S. 438, 448 (2010) ("Consistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach."); *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."). As a result, its interpretation is nonsensical. "It would make no sense to ask whether the applicant can obtain the information unless he is to be given a chance to do so." *Ren*, 751 F.3d at 1091.

Second, under the BIA's reading, the entire last sentence of Section 1158(b)(1)(B)(ii) would be superfluous. The first two sentences of that provision are by themselves sufficient to allow an immigration judge to require evidence corroborating otherwise credible testimony, and to deny a claim that is not adequately corroborated. And "one of the most basic interpretive canons" is that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314

(2009) (internal quotation marks omitted; alteration in original). The Ninth Circuit's interpretation gives the last sentence meaning: that sentence qualifies the first two sentences of the provision by requiring the immigration judge to provide an opportunity for the applicant to obtain and provide the requested evidence.

In holding to the contrary, the Second Circuit reflexively deferred to the BIA without engaging even in "[a] cursory analysis of the question[] whether, applying the ordinary tools of statutory construction, Congress' intent could be discerned." *Pereira*, 2018 WL 3058276, at *14 (Kennedy, J., concurring). Notably, although the Second Circuit found that the statute was ambiguous, it did not actually identify any ambiguity in the statutory text, or explain why the statute's verb tense did not compel a reading in Petitioner's favor. Instead, it asserted that the statute was "silent" as to "the procedure to be followed where corroborating evidence is needed." Pet. App. 12a. But that simply ignores the present- and future-oriented language of the statute. The text is not silent. "Congress could have phrased its requirement in language that looked to the past . . . , but it did not choose this readily available option." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987).

The Second Circuit also relied on the notion that it is unnecessary to provide an applicant with an opportunity to obtain evidence in response to an immigration judge's request for corroboration, because the statute and the asylum application both already provide applicants with notice that they should submit supporting evidence with their applications. Pet. App. 14a.

That argument, however, makes little sense given the statutory structure. The corroboration requirement is only triggered when the applicant has testified credibly—that is, when there is reason to believe that the applicant would indeed face persecution if removed. 8 U.S.C. § 1158(b)(1)(B)(ii) (concerning evidence that "corroborates otherwise credible testimony"). Because the predicate for Section 1158(b)(1)(B)(ii) is that the applicant has testified credibly, there is reason to believe that the applicant could provide evidence to corroborate his or her testimony, unless that evidence for some reason cannot be reasonably obtained. Yet in seeking asylum, an applicant is essentially telling his or her life story—a series of events that, in many cases, have unfolded over a period of many years. An applicant may not be able to anticipate precisely what aspect of that life story will lead an immigration judge to request corroboration. Congress did not intend to doom such an applicant to removal—despite credible testimony regarding the persecution the applicant would face if removed, and readily available evidence corroborating that testimony—simply because the applicant was insufficiently clairvoyant regarding what specific corroboration the immigration judge would decide the applicant "should provide." 8 U.S.C. § 1158(b)(1)(B)(ii). Instead, Congress spoke clearly and directed that the applicant must have the opportunity to obtain and provide that corroborating evidence (it "must be provided"), or explain why he or she "cannot reasonably obtain" it. *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

June 25, 2018

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2017

(Submitted: November 9, 2017
Decided: February 23, 2018)

Docket No. 15-2342-ag

WEI SUN,

Petitioner

- against -

JEFFERSON B. SESSIONS III,
United States Attorney General,

Respondent.[*]

ON PETITION FOR REVIEW FROM THE
BOARD OF IMMIGRATION APPEALS

Before:

LEVAL, LIVINGSTON, and CHIN, *Circuit Judges*,

Petition for review of a decision of the Board of Immigration Appeals affirming the decision of an Immigration Judge denying an application for asylum

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[*] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Jefferson B. Sessions III is substituted for former Attorney General Loretta E. Lynch as respondent.

after finding petitioner credible but nonetheless concluding that he did not meet his burden of proof because he failed to provide corroborating evidence.

PETITION DENIED.

CHIN, *Circuit Judge:*

Petitioner Wei Sun ("Sun") seeks review of a June 26, 2015 decision of the Board of Immigration Appeals ("BIA") affirming the decision of an Immigration Judge ("IJ") denying him asylum for religious persecution in China. Sun entered the United States on a visitor visa in 2007 and subsequently filed a timely application for asylum and withholding of removal under the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1158 and 1231(b)(3), respectively, and for relief under the Convention Against Torture ("CAT"), *see* 8 C.F.R. § 208.16. The IJ and the BIA denied Sun's petition on the ground that he failed to meet his burden of proof because of an absence of corroborating evidence.

The BIA interpreted the corroboration provision of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 303 (2005), as not requiring an IJ to give a petitioner specific notice of the evidence needed to meet his burden of proof, or to grant a continuance before ruling to give a petitioner an opportunity to gather corroborating evidence. On appeal, Sun argues that an IJ must give a petitioner notice and an opportunity to submit additional evidence when the IJ concludes that corroborating evidence is required, relying on the Ninth Circuit's decision in *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011). We conclude that the

REAL ID Act is ambiguous on this point, and that the BIA's interpretation of the statute is reasonable and entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Accordingly, we deny the petition for review.

BACKGROUND

Sun, a native and citizen of China, is married and his wife still lives in China. Sun testified that after his wife was forced to abort her child in China in 1995, he joined an underground Christian church. While attending the church on February 11, 2007, he says that he and other worshippers were arrested by the police and taken to the police station. Sun claims he was detained for ten days and accused of conducting cult activities, disturbing social order, and spreading overseas reactionary thought. He denied the allegations but was nonetheless punished by being required to squat for lengthy periods and by being kicked. Eventually, Sun signed an "accusation[] letter" to be relieved of the punishment. Cert. Admin. Rec. at 85. He was released but never sentenced.

On May 13, 2007, Sun entered the United States on a B-1 visitor visa. According to Sun, he was baptized in a church in Los Angeles in 2007, and continued to attend that church until 2012. He subsequently moved to New York sometime in 2012 and he told the IJ that he began attending a church in Queens. He testified that in 2007, his wife informed him that the police in China were looking for him.

Sun's visa authorized him to remain in the United States until June 12, 2007. On June 12, 2007, Sun filed

an I-589 application for asylum and withholding of removal. On July 24, 2007, the Department of Homeland Security ("DHS") commenced removal proceedings against Sun in immigration court for remaining in the United States longer than permitted. Through counsel, Sun admitted the charge and conceded removability.

After a hearing in which Sun was the only witness, the IJ denied Sun's application on March 24, 2014 and ordered him removed to China. The IJ "enter[ed] a positive credibility determination overall in the sense that respondent's testimony was internally consistent, and mostly consistent with his written statement," but she nonetheless found Sun's testimony "vague and lacking in detail, such that the testimony alone was not sufficient to sustain respondent's burden of proof to persuade." Cert. Admin. Rec. at 41. In particular, the IJ pointed to Sun's failure to provide details about the location of the church he attended in Los Angeles from 2007 to 2012 or identify the month when he started attending church in New York. The IJ then looked to the record for objective corroboration to support Sun's claims, but found it lacking. Sun provided a certificate of baptism, but the IJ noted that there was no testimony or written statements from Sun's pastor or parishioners from either the New York or Los Angeles churches, nor were there any attendance records. Sun stated that the pastor was unavailable on the day of the hearing, but did not provide an explanation for the lack of letters, records, or other witnesses. Lastly, the IJ found that there was no corroborating evidence

presented demonstrating past persecution in China based on Sun's faith.

The IJ concluded that Sun failed to meet his burden of proof due to an absence of corroborating evidence when such evidence was reasonably available. The IJ noted that Sun had over six years since filing his application to collect necessary documentation, he testified that he could bring a church letter to a subsequent hearing, and he testified that he remains in contact with his wife.

The IJ alternatively determined that Sun failed to meet his burden of demonstrating a well-founded fear of future persecution because police had not contacted his wife in over six years and appeared to have lost interest in him. Sun appealed the decision to the BIA.

On June 26, 2015, the BIA dismissed Sun's appeal. The BIA agreed that Sun "testified in a vague manner[] and . . . did not submit sufficient evidence to corroborate his testimony." Cert. Admin. Rec. at 3 (citing 8 U.S.C. § 1158(b)(1)(B)(ii); *Matter of L-A-C-*, 26 I. & N. Dec. 516 (B.I.A. 2015)). The BIA rejected Sun's argument that he should have been informed by the IJ that submission of corroborating evidence would be required, reasoning that Sun was represented by counsel who was presumably aware of Sun's burden to corroborate his testimony and that IJs, prior to rendering a decision, are not required to first identify specific pieces of evidence and then continue proceedings to allow for their production.

This petition followed. On appeal, Sun argues that the BIA erred in finding that 8 U.S.C.

§ 1158(b)(1)(B)(ii) of the REAL ID Act does not require an IJ, after finding the petitioner's testimony to be insufficiently compelling, to identify specific corroborating evidence required to prove eligibility for asylum, or to grant a continuance to allow the petitioner an opportunity to obtain corroborating evidence.

DISCUSSION

In the circumstances of this case, where the BIA affirmed the IJ's decision but did not reach the IJ's alternative finding, we review the IJ's decision as modified by the BIA. *See Yang v. U.S. Dep't of Justice*, 426 F.3d 520, 522 (2d Cir. 2005). We review administrative findings of fact under the substantial evidence standard, that is, "we will not disturb a factual finding if it is supported by reasonable, substantial, and probative evidence in the record when considered as a whole." *Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003) (citation and internal quotation marks omitted). We thus treat factual findings as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). Questions of law are reviewed *de novo*. *Weng v. Holder*, 562 F.3d 510, 513 (2d Cir. 2009). It is well settled, however, that the BIA is entitled to Chevron deference in interpreting ambiguous provisions in the immigration statutory scheme. *See Negusie v. Holder*, 555 U.S. 511, 516-17 (2009).

We first consider Sun's contention that the agency erred in construing the corroboration standard and then we address Sun's contention that he was entitled to a continuance in any event.

A. Corrobation Standard

Under the prevailing framework, Sun bears the burden of proving his eligibility for asylum, withholding of removal, and CAT protection. *See* 8 U.S.C. § 1158(b)(1)(B) (asylum); 8 U.S.C. § 1231(b)(3)(C) (withholding of removal); 8 C.F.R. § 208.16(b), (c) (CAT protection). "Asylum and withholding of removal are two alternative forms of relief available to an alien claiming that he will be persecuted, if removed back to his native country." *Vanegas-Ramirez v. Holder*, 768 F.3d 226, 237 (2d Cir. 2014) (citation and internal quotation marks omitted).

Asylum allows an otherwise removable alien to remain and work in the United States. To qualify for asylum, an applicant must demonstrate that he is a "refugee," 8 U.S.C. § 1158(b)(1)(B)(i), meaning that he "is unable or unwilling to return to [his home country] . . . because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. § 1101(a)(42)(A). "[A] well founded fear of future persecution requires a subjective fear that is objectively reasonable." *Chen v. Holder*, 773 F.3d 396, 404 (2d Cir. 2014) (citing *Huang v. INS*, 421 F.3d 125, 128 (2d Cir. 2005)).

Sun applied for withholding of removal under both the INA and CAT. Withholding of removal under the INA prevents an otherwise removable alien from being removed to a country where his "life or freedom would be threatened . . . because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). "Eligibility

for withholding of removal . . . requires a 'clear probability of persecution,' *i.e.*, 'it is more likely than not that the alien would be subject to persecution.'" *Vanegas-Ramirez*, 768 F.3d at 237 (quoting *INS v. Stevic*, 467 U.S. 407, 413, 424 (1984)). The "clear probability" standard for withholding of removal is more demanding than the "well-founded fear" standard for asylum. *See id.* Accordingly, an applicant who fails to establish eligibility for asylum fails to establish eligibility for withholding of removal. *Id.* Lastly, to obtain CAT relief, the applicant must prove "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2).

In deciding whether to grant asylum and withholding of removal, the IJ often must assess the applicant's credibility. *See* 8 U.S.C. §§ 1158(b)(1)(B)(iii) and 1231(b)(3)(C). In making this determination, the IJ considers the "totality of the circumstances," including "the demeanor, candor, or responsiveness of the applicant," "the inherent plausibility of the applicant's . . . account," "the consistency between [statements and] . . . the internal consistency of each such statement," and "any inaccuracies or falsehoods in such statements." 8 U.S.C. § 1158(b)(1)(B)(iii). There is no presumption of credibility. *Id.*

The applicant's testimony can be sufficient by itself to establish a claim for asylum, but corroborating evidence may be required in certain circumstances. Under the REAL ID Act, the applicant's testimony "may be sufficient to sustain [his] burden without corroboration, but only if [he] satisfies the trier of fact

that [his] testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." 8 U.S.C. § 1158(b)(1)(B)(ii). Accordingly, an applicant's testimony may be credible and sufficiently detailed and persuasive to prove eligibility without corroboration; in some cases, however, an applicant may be generally credible but his testimony may not be sufficient to carry the burden of persuading the fact finder of the accuracy of his claim of crucial facts if he fails to put forth corroboration that should be readily available. Where, as here, "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." *Id.*

The corroboration standard under the REAL ID Act closely tracks our pre-REAL ID Act case law. *See Diallo v. INS*, 232 F.3d 279, 285-86 (2d Cir. 2000) ("While consistent, detailed, and credible testimony may be sufficient to carry the alien's burden, evidence corroborating his story, or an explanation for its absence, may be required where it would reasonably be expected.").

The question here is the procedure required when the trier of fact determines that corroboration is required. We conclude that the REAL ID Act is ambiguous on this point, and that, pursuant to *Chevron*, the BIA's interpretation of the statute is entitled to deference.

The BIA here relied on its decision in *Matter of L-A-C-*, 26 I. & N. Dec. 516 (B.I.A. 2015). The BIA

reasoned there that § 1158(b)(1)(B)(ii) "is ambiguous with regard to what steps must be taken when the applicant has not provided . . . evidence" to corroborate otherwise credible testimony, and that the legislative history and broader context of the REAL ID Act make clear that "[t]he intent was not to create additional procedural requirements relating to the submission and evaluation of corroborating evidence," such as requiring advance notice or granting an automatic continuance to collect corroborating evidence. *Id.* at 518-20.

Rather, the BIA held, where an IJ finds that an applicant for asylum or withholding of removal has not provided reasonably available corroborating evidence to establish his claim, the IJ should first consider the applicant's explanations for the absence of such evidence and, if a continuance is requested, determine whether there is good cause to continue the proceedings for the applicant to obtain the evidence. The BIA further held, however, that the REAL ID Act does not require the IJ to identify the specific evidence necessary to meet the applicant's burden of proof and to provide an automatic continuance for the applicant to obtain that evidence prior to rendering a decision on the application. Nevertheless, the BIA acknowledged that "[t]here are circumstances in which it is appropriate to continue the proceedings to another merits hearing for an applicant to present additional corroboration," such as where "the applicant was not aware of a unique piece of evidence that is essential to meeting the burden of proof." *Id.* at 522.

In reaching its conclusion, the BIA adopted the pre-REAL ID Act approach taken by the Second and Seventh Circuits and applied it to its post-REAL ID Act analysis, rejecting the Ninth Circuit's contrary interpretation of § 1158(b)(1)(B)(ii). *Id.* at 522-23 (discussing *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011)); *Ai Jun Zhi v. Holder*, 751 F.3d 1088 (9th Cir. 2014).[1]

The validity of the BIA's interpretation of § 1158(b)(1)(B)(ii) is governed by principles of *Chevron* deference. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). At the first step of the two-step *Chevron* framework, the Court "examine[s] the statute itself and determine[s] whether Congress has directly spoken to the precise question at issue. If Congress has so spoken, that is the end of the matter because this Court must give effect to the unambiguously expressed intent of Congress." *Adams v. Holder*, 692 F.3d 91, 95 (2d Cir. 2012) (citation and internal quotation marks omitted). If we determine that "the statute remains ambiguous despite our use of all relevant tools of statutory construction and legislative history, we proceed to a second step of analysis to examine whether the agency's interpretation is reasonable, and not arbitrary, capricious, or manifestly contrary to the statute. If the agency interpretation is reasonable,

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[1] The Ninth Circuit has observed that its interpretation of § 1158(b)(1)(B)(ii) is inconsistent with this Court's approach to corroboration. *Ai Jun Zhi*, 751 F.3d at 1094 n.6 (citing *Liu v. Holder*, 575 F.3d 193, 198 (2d Cir. 2009)).

then we must defer to it." *Id.* (citation and internal quotation marks omitted).

We conclude that the BIA's construction of § 1158(b)(1)(B)(ii) is entitled to *Chevron* deference. First, the BIA is correct that § 1158(b)(1)(B)(ii) "is ambiguous with regard to what steps must be taken when the applicant has not provided . . . evidence" to corroborate otherwise credible testimony. *Matter of L-A-C-*, 26 I. & N. Dec. at 518. The relevant portion of the text is as follows: "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." 8 U.S.C. § 1158(b)(1)(B)(ii). The statutory language makes clear that corroborating evidence should be provided under certain circumstances if it is reasonably available. The language is silent, however, as to the procedure to be followed where corroborating evidence is needed. It does not provide, for example, that the trier of fact must advise the applicant that corroborating evidence is necessary before issuing a final decision nor does it provide that the trier of fact must allow a continuance to permit the gathering of corroborating evidence.

Sun asks this Court to adopt the Ninth Circuit's conclusion -- that "[a] plain reading of the statute's text makes clear that an IJ must provide an applicant with notice and an opportunity to either produce the evidence or explain why it is unavailable before ruling that the applicant has failed in his obligation to provide corroborative evidence and therefore failed to meet his

burden of proof." *Ren*, 648 F.3d at 1090. We decline to adopt this interpretation.

The Ninth Circuit's holding was based on a textual reading of § 1158(b)(1)(B)(ii), as it reasoned that because the statute "does not say 'should *have* provided,' but rather 'should provide,' [it] expresses an imperative that the applicant must provide further corroboration in response to the IJ's determination." *Id.* at 1091 (emphasis in original).

While the Ninth Circuit's interpretation is plausible, it is not the only reasonable interpretation. The Ninth Circuit takes the words "should provide evidence that corroborates otherwise credible testimony" and reads into the statute the requirements of "notice" and an "opportunity" to produce or explain the absence of corroborating evidence "before" a ruling is made. But these words simply do not appear in the statute. *See Dean v. United States*, 556 U.S. 568, 572 (2009) (courts must "ordinarily resist reading words or elements into a statute that do not appear on its face") (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997)). We conclude that the passage is indeed ambiguous. Moreover, the test is not whether the Ninth Circuit's interpretation is plausible or "better" than the agency's, as Sun suggests. Pet. Br. at 21. Rather, the test is whether the statute is "silent or ambiguous" and if so, then whether "'the agency's answer is based on a permissible construction of the statute,' which is to say, one that is 'reasonable,' not 'arbitrary, capricious, or manifestly contrary to the statute.'" *Riverkeeper Inc. v. EPA*, 358 F.3d 174, 184 (2d Cir. 2004) (quoting *Chevron*, 467 U.S. at 843-44).

With respect to notice, we reject the Ninth Circuit's finding that its interpretation is required to avoid constitutional due process concerns. *See Ren*, 648 F.3d at 1092-93. As the BIA explained in *Matter of L-A-C*, applicants are already on notice about the corroboration requirement because "the instructions for the Application for Asylum and Withholding of Removal (Form I-589) provide . . . notice to an applicant that he 'must submit reasonably available corroborative evidence' relating to both general country conditions and the specific facts upon which the claim is based," and that "the applicant must provide an explanation if such evidence is not reasonably available." 26 I. & N. Dec. at 520. The Seventh Circuit has also observed that "the REAL ID Act clearly states that corroborative evidence may be required, placing immigrants on notice of the consequences for failing to provide corroborative evidence." *Rapheal v. Mukasey*, 533 F.3d 521, 530 (7th Cir. 2008).

With respect to an opportunity to respond, the statute does not provide any indication that there must be a continuance so that the applicant can produce additional corroborating evidence. We thus conclude that the statute is ambiguous as to the procedure an IJ must follow when an applicant fails to provide corroborating evidence, and so we move to the second step in the *Chevron* analysis.

Second, we determine that the agency's interpretation of § 1158(b)(1)(B)(ii) is reasonable and entitled to deference. As noted above, the BIA's interpretation of the REAL ID Act affords the same

protection as this Court's pre-REAL ID Act case law regarding the corroboration requirement.

We explained in *Liu v. Holder*, a pre-REAL ID Act case, that when an IJ determines that the applicant failed to meet his burden of proof based on the failure to provide corroborating evidence, the IJ should perform the following analysis: (1) point to specific pieces of missing evidence and show that it was reasonably available, (2) give the applicant an opportunity to explain the omission, and (3) assess any explanation given. 575 F.3d 193, 198 (2d Cir. 2009) (citations omitted). We noted, however, that "though we require an IJ to specify the points of testimony that require corroboration, we have not held that this must be done *prior* to the IJ's disposition of the alien's claim." *Id.* (emphasis in original). We reasoned that "a factfinder may not be able to decide sufficiency of evidence until all the evidence has been presented" and "the IJ has had an opportunity to weigh the evidence and prepare an opinion." *Id.* Finally, "the alien bears the ultimate burden of introducing such evidence without prompting from the IJ." *Id.* As such, it is reasonable not to require that applicants receive a second opportunity to present their case after the IJ identified the specific evidence they need to prevail.

The IJ's analysis comported with these procedures. *See* Special App'x at 6-7 (identifying missing evidence and evaluating Sun's explanation). *See also Matter of L-A-C*, 26 I. & N. Dec. at 521-22 (describing how IJ should (1) identify evidence that should have been submitted, (2) give applicant opportunity to explain why he could not reasonably obtain evidence, and (3)

use her discretion in whether to grant continuance based on the explanation given). We therefore conclude that the BIA's interpretation of § 1158(b)(1)(B)(ii) is reasonable and entitled to deference, and that the IJ followed an appropriate procedure. Accordingly, we reject Sun's argument that the agency erred in its interpretation of the statute.

B. Continuance

Finally, Sun requests that this Court rule that a continuance and an additional hearing were required to allow for the submission of the evidence identified by the IJ, even if we reject the Ninth Circuit's interpretation of § 1158(b)(1)(B)(ii). Pet. Br. at 25-26. We deny this request.

First, Sun did not seek a continuance from the IJ despite being asked to explain why the corroboration identified by the IJ was missing. *See* Cert. Admin. Rec. at 98-102; *Matter of L-A-C-*, 26 I. & N. Dec. at 527 ("[I]f a continuance is requested, [the IJ should] decide whether there is good cause to continue the proceedings for the applicant to obtain the evidence."). Second, as the agency correctly observed, Sun had more than six years from filing of his application to collect necessary documentation, and yet he failed to corroborate his faith-based claim with any evidence other than a baptism certificate. Additionally, he failed to corroborate that he was still sought by police, which he could have done by presenting a statement from his wife in China, who he is in contact with and who supposedly had the last contact with police. Such evidence is not unique with respect to an asylum claim, and thus Sun cannot be said to have been unaware of

evidence "essential to meeting the burden of proof." *Matter of L-A-C-*, 26 I. & N. Dec. at 522. Accordingly, we reject his argument that he should have been granted a continuance regardless of the interpretation of the statute.

CONCLUSION

For the foregoing reasons, the petition for review is DENIED.

Appendix B

U.S. Department of Justice Executive Office for Immigration Review	Decision of the Board of Immigration Appeals
Falls Church, Virginia 20530	

File: A099 904 966 - New York, NY — Date: JUN 26 2015

In re: WEI SUN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: David J. Rodkin, Esquire

APPLICATION: Asylum, withholding of removal; Convention Against Torture

The respondent, a native and citizen of the People's Republic of China, has appealed from the Immigration Judge's decision dated March 24, 2014, denying his applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1231(b)(3), and for protection under the Convention Against Torture ("Convention"). The appeal will be dismissed.

The Board defers to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion,

subject to applicable governing standards, regarding questions of law and the application of a particular standard of law to those facts. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii). Because the respondent's application for relief from removal was filed after May 11, 2005, it is subject to the REAL ID Act of 2005. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

We agree with the Immigration Judge's determination that the respondent testified in a vague manner, and he did not submit sufficient evidence to corroborate his testimony (I.J.at 6-9). *See* section 208(b)(1)(B)(ii) of the Act, 8 U.S.C. § 1158(b)(1)(B)(ii) (providing that the testimony of an alien may be sufficient to sustain the alien's burden without corroboration, but only if the alien satisfies the trier of fact that the alien's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the alien is a refugee); *Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015). For instance, the respondent did not corroborate that he attended an underground church in China, was mistreated for his attendance, and that he attends a Christian church in the United States (I.J. at 6-7). In his appellate brief, the respondent argues that he was not notified that the submission of corroboration would be required. However, the respondent was represented at the hearing by his current counsel who is presumably aware of the respondent's burden of proof under the REAL ID Act. The Immigration Judge is not required to identify the specific evidence necessary for the respondent to meet his burden of proof and continue the proceedings for him to gather the evidence prior to rendering a decision

on the application. *See Matter of L-A-C-*, *supra*. In addition, we disagree with the respondent's assertion on appeal that translation difficulties were the reason for why the Immigration Judge perceived the respondent's testimony to have been vague (Resp. Brief at 2). In light of the foregoing, the respondent has not established eligibility for asylum, withholding of removal, and protection under the Convention.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

/s/
FOR THE BOARD

Appendix C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
NEW YORK, NEW YORK

File: A099-904-966 — March 24, 2014

In the Matter of	)	
WEI SUN	)	IN REMOVAL
RESPONDENT	)	PROCEEDINGS
	)	

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act, non-immigrant overstay.

APPLICATIONS: Asylum, withholding of removal under Section 241(b)(3), withholding of removal under the Convention Against Torture.

ON BEHALF OF RESPONDENT: DAVID RODKIN

ON BEHALF OF DHS: MR. THOMPSON

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 55-year-old, married, male, native and citizen of the People's Republic of China (China). The United States Department of Homeland Security (DHS or Government) has brought these

removal proceedings against the respondent under the authority of the Immigration and Nationality Act (the Act or INA). Proceedings were commenced with the filing of the Notice to Appear with the Immigration Court on July 31, 2007. *See* Exhibit 1.

The respondent admitted the factual allegations in the Notice to Appear, and conceded that he is removable as charged under Section 237(a)(1)(B) of the Act, in that after admission as a non-immigrant under Section 101(a)(15) of the Act, he remained in the United States for a time longer than permitted. On the basis of the respondent's admissions and concession, he was found to be removable as charged. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8. As removability has not been challenged, it will not be addressed further.

The respondent declined to designate a country of removal, and China was directed by the Court upon the Government's recommendation. The respondent applied for relief from removal in the form of asylum under Section 208(a) of the Act, which is also considered as an application for withholding of removal under Section 241(b)(3) of the Act. The respondent also requested withholding of removal under the Convention Against Torture (CAT or Convention).

ASYLUM FILING DEADLINE

The respondent in this case has satisfied the requirement of showing by clear and convincing evidence that he applied for asylum within one year of his last arrival in the United States. *See* 8 C.F.R. § 1208.4(a)(2).

Respondent was advised by this Court of the consequences of knowingly filing a frivolous application for asylum. *See* 8 C.F.R. § 1208.18. Prior to admission of the application, the respondent was given an opportunity to make any necessary corrections, and then affirmed before this Court that the contents of the application were all true and correct to the best of his knowledge.

SUMMARY OF CLAIM

Respondent testified that his wife was forcibly aborted in China in 1995. After this experience, respondent and his family were in a lot of pain. Respondent was introduced to an underground Christian church by a neighbor who convinced respondent to attend the church with him.

Respondent testified that while attending this underground church on February 11, 2007, he and the other worshippers were arrested by the police, and taken to the police station. Respondent was accused of such things as conducting cult activities, disturbing social order, and spreading overseas reactionary thought. Respondent was interrogated the next morning after his detention. Respondent indicated that he was also accused of opposing the one-child family planning policy. Respondent denied the allegations made during the interrogation, and thus, he was made to squat down, and not allowed to stand up until he admitted the accusations. He was also kicked. Respondent stated that he could no longer bear this torture, so he signed an accusation letter against him. He was detained for a total of 10 days. Respondent was then told to go home and wait for his sentencing. He

was also required to report to the police station once a week, on Fridays.

Respondent reported to the police station approximately 12 times in total. He was never sentenced because he managed to escape China before the sentencing occurred. He left China on May 13, 2007.

Respondent first lived in Los Angeles after he came to the United States. He attended a church in Los Angeles from 2007 until 2012. He was baptized in that church as well. Respondent moved to New York sometime in 2012, and began attending a church here in New York sometime in 2012 as well.

STATEMENT OF THE LAW

Respondent bears the burden of proof to establish that he is eligible for asylum or withholding of removal under Section 241(b)(3) of the Act, or under the Convention. The provisions of the REAL ID Act of 2005 apply to the respondent's application as it was filed after May 11, 2005.

To qualify for withholding of removal under Section 241(b)(3) of the Act, the respondent's facts must show a clear probability that his life or freedom would be threatened in the country directed for removal on account of race, religion, nationality, membership in a particular social group, or political opinion. *See INS v. Stevic*, 467 U.S. 407 (1984).

To qualify for asylum under Section 208 of the Act, respondent must show that he is a refugee within the meaning of Section 101(a)(42) of the Act. *See* INA

§ 208(a). To meet that definition, respondent must demonstrate either that he suffered past persecution, or that he has a well-founded fear of future persecution in his country of nationality on account of one of the five statutorily protected grounds. The REAL ID Act specifies that the applicant must establish that one of the five grounds was or will be at least one central reason for persecuting him. To establish a well-founded fear of future persecution, the respondent must show that he has a subjective fear of persecution, and that the fear has an objective basis. The well-founded fear standard required for asylum is more generous than the clear probability standard of withholding of removal. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Finally, an applicant must also establish that asylum is warranted in the exercise of discretion.

The applicant for withholding of removal under the Convention bears the burden of proving that it is more likely than not that he would be tortured as defined in the regulations if removed to the proposed country of removal. 8 C.F.R. § 1208.16(c)(2). The torture must be inflicted by or at the instigation of, or with the consent or acquiescence of a public official, or other person acting an official capacity. 8 C.F.R. § 1208.18(a)(1). Acquiescence requires that the public official have prior awareness of the activity, and thereafter breach his or her legal responsibility to intervene to prevent such activity. 8 C.F.R. § 1208.18(a)(7).

ANALYSIS AND DISCUSSION

In coming to a decision, the Court has considered the entire record, including all of the documents, whether or not they are specifically mentioned.

CREDIBILITY

The testimony of the applicant may be sufficient to sustain his burden without corroboration, but only if he satisfies the trier of fact that his testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether he has met his 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 it. As will be discussed further, this is a type of case contemplated by this requirement as respondent gave generally credible, if somewhat vague testimony, but provided very little corroboration to support his claim.

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, the inherent plausibility of his account, the consistency between his written and oral statements, the internal consistency of each such statement, the consistency of such statements with other evidence of record, and any inaccuracies or falsehood 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. *See* INA § 208(b)(1)(B)(iii); *see also Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 165-66 (2d Cir. 2008). There is no presumption of credibility. However, if no adverse credibility determination is

explicitly made, the applicant shall have a rebuttable presumption of credibility on appeal.

The Court is required to make an explicit determination as to the respondent's credibility. *See* INA § 208(b)(1)(B)(iii). In making that determination, the Court has considered the totality of the circumstances, including the respondent's demeanor while testifying, his responsiveness to the questions that were asked, the inherent plausibility of his claim, and the consistency of his statements and documentary evidence. *See* INA § 208(b)(1)(B)(iii); *see also Xiu Xia Lin*, 534 F.3d, 165-66 (2d Cir. 2008).

Based on the Court's review of the entire record, it will enter a positive credibility determination overall in the sense that respondent's testimony was internally consistent, and mostly consistent with his written statement. The testimony, however, was at times vague and lacking in detail, such that the testimony alone was not sufficient to sustain respondent's burden of proof.

For example, while respondent put his own church attendance in the United States into question to demonstrate his continuing piety, and bolster his well-founded fear, respondent could not provide any details at all about the location of the church he attended in Los Angeles from 2007 until 2012, a rather lengthy period of time. In addition, respondent's testimony as to when he started attending church in New York varied widely from March to October, a period of approximately seven months. These were just two instances where his testimony was not detailed or

specific enough to meet his burden of proof standing alone.

Having found respondent's testimony to be insufficiently persuasive to carry his burden of proof, the Court looked to the record and found not a shred of objective corroboration to support respondent's claim that he attended an underground church in China and was persecuted, or that he is a devout Christian, as demonstrated by his purported church attendance in the United States where he is free to worship as he pleases. For example, there was no testimony from the pastor of his church that he currently attends because the pastor was apparently too busy to come to court, and the pastor was apparently unable to locate anyone else to come testify on respondent's behalf. This undercuts respondent's own claimed piety and devotion. The Court notes that it regularly hears testimony of church officials where the churches are located within New York City, like respondent's church.

Further, respondent did not bring any fellow parishioners as witnesses to testify either. Similarly, there are no written statements from his pastor in New York or in Los Angeles, or from any fellow worshipers either. There were also no attendance records either from the church in New York that respondent has attended for a year or from the church in Los Angeles, which he purportedly attended for over four years.

Respondent did not provide an explanation for why such letters, records, or parishioner witnesses could not be produced. Respondent, in fact, indicated that he could bring a church letter to another hearing. Thus,

such a document was reasonably available to him, but was not obtained. Respondent's asylum application was filed on June 19, 2007, and finally adjudicated on March 24, 2014, over six years later, which should have been ample time to collect any and all necessary documentation.

There was also no evidence of past persecution presented based on respondent's faith. The Court notes that he did not pursue any family planning-related claim in this court. There was no letter from respondent's wife, for example, who had the last contact with the Chinese police in 2007. Respondent testified that he does have contact with her over the telephone, such that it was reasonable for her to have provided her own letter, especially since she did obtain a few other documents for respondent.

Alternatively, respondent failed to establish an objectively well-founded fear of future persecution in China. The Chinese police have not contacted his wife or son in over six years, or subjected the wife or son to any mistreatment in the intervening years since respondent's departure from China. Thus, it appears that the Chinese government has lost any interest that it may have had in respondent in the past. *See Melgar de Torres v Reno*, 191 F.3d 307, 313 (2d Cir. 1999). (Finding that where asylum applicant's mother and daughter has continued to live in petitioner's native country unmolested, the claim of well-founded fear of persecution was diminished). While respondent thinks that there is an open criminal case pending against him in China, this appears to be speculation on his part at this point so many years after his departure.

Accordingly, the Court finds that respondent's asylum application must be denied.

WITHHOLDING OF REMOVAL UNDER INA § 241(b)(3)

Inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it necessarily follows that he has failed to satisfy the more stringent clear probability of persecution standard required for withholding of removal.

WITHHOLDING UNDER CAT

Here, respondent has not established that it is more likely than not that he would be tortured in China. 8 C.F.R. § 1208.18. Because respondent's CAT claim was based on the same facts, and lacking in the same evidence as that presented for asylum and withholding of removal, the Court must also deny that claim. *See Paul v. Gonzales*, 444 F.3d 148, 157 (2d Cir. 2006). The Chinese government has not shown any interest in respondent since his departure in 2007. Thus, he has not demonstrated that that government would torture him or acquiesce in his torture by another party.

ORDER

IT IS HEREBY ORDERED that the respondent's application for asylum be denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to China based on the charge contained in the Notice to Appear.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal under Section 241(b)(3) of the Act to China be denied.

IT IS FURTHER ORDERED that the respondent's request for withholding of removal to China under the Convention Against Torture be denied.

Please see the next page for electronic signature

AVIVA L. POCZTER
Immigration Judge

Appendix D

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of February, two thousand and eighteen.

Before: Pierre N. Leval,
Debra Ann Livingston,
Denny Chin,
Circuit Judges,

Wei Sun,

Petitioner,

JUDGMENT
Docket No. 15-2342

v.

Jefferson B. Sessions III, United States Attorney General

Respondent.

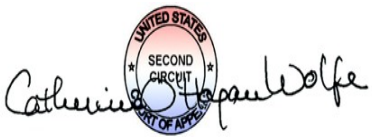
The petition for review in the above captioned case of a decision of the Board of Immigration Appeals

("BIA") was submitted on the BIA's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the petition for review is DENIED.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court



A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

MANDATE ISSUED ON 04/18/2018

Appendix E

U.S. Department of Justice
Executive Office for Immigration Review
United States Immigration Court

In the Matter of File: A099-904-966

WEI SUN	)	
	)	IN REMOVAL
	)	PROCEEDINGS
RESPONDENT	)	
	)	Transcript of Hearing

Before AVIVA L. POCZTER, Immigration Judge

Date: March 24, 2014 Place: NEW YORK, NY

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[Admin Record 98]

JUDGE TO MR. SUN

Q. I have a couple questions. Let me just see one thing. Sir, what's the name of the person who brought you to your church in Flushing for the first time?

A. Cao Ji Hui.

*****

JUDGE TO MR. SUN

Q. Did you ask that person to write you a letter to the Court to tell us that this person brought you to church?

A. No, I do not anticipate that I will be asked for this letter. If that is needed next time when I come back here, I can bring it.

Q. Sir, you attended a church in Los Angeles for over three years. Is that correct?

A. Yes.

Q. How come I don't have any church records from that church, other [Admin Record 99] than your baptism, to demonstrate your attendance?

A. That, I don't know, but I did attend that every week. I don't know why they don't have anything.

Q. Did you ask them to give you something?

A. No.

Q. Why not?

A. I thought the one baptismal certification would be sufficient enough.

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