No. 22-_____

IN THE

Supreme Court of the United States

XIAOJIE HE,

Petitioner,

v.

MERRICK GARLAND,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

NADIA ANGUIANO-WEHDE
Counsel of Record
SEIKO M. SHASTRI
JAMES H. BINGER
CENTER FOR NEW AMERICANS
UNIVERSITY OF MINNESOTA LAW SCHOOL
190 Mondale Hall
229 19th Avenue South
Minneapolis, MN 55455
Tel: (612) 625-5515
angui010@umn.edu

Counsel for Petitioner

QUESTIONS PRESENTED

Under the Immigration and Nationality Act, an individual who meets the statutory definition of a "refugee" may be eligible for asylum, which is granted at the discretion of the Attorney General. 8 U.S.C. § 1158(b)(1). This definition includes any individual outside his or her country of nationality who is unwilling or unable to return to that country "because of persecution on account of * * * religion[.]" 8 U.S.C. § 1101(a)(42)(A).

The questions presented are:

1. Whether courts of appeals review *de novo*—as a question of law—or for substantial evidence—as a question of fact—a Board of Immigration Appeals' determination that established facts do not rise to the level of persecution.

2. Whether being prohibited by government officials from freely and openly practicing one's religion constitutes persecution as a matter of law.

PARTIES TO THE PROCEEDING

Petitioner Xiaojie He was the petitioner below.

Respondent Merrick Garland, Attorney General of the United States, was the respondent below.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

- *He v. Garland*, No. 20-1328 (8th Cir. Feb. 4, 2022), *rehearing denied* (June 7, 2022)
- *In re He*, A205-263-028 (BIA January 16, 2020)
- *In re He*, A205-263-028 (Omaha, Nebraska Immigration Ct. May 24, 2018)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Xiaojie He respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals denying the petition for review (Pet.App.1a) is published at 24 F.4th 1220. The order denying rehearing en banc (Pet.App.48a) is unpublished. The orders of the Board of Immigration Appeals (Pet.App.14a) and the immigration judge (Pet.App.18a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2022. Pet.App.1a. He's timely petition for rehearing and rehearing en banc was denied on June 7, 2022. Pet.App.48a. On August 18, 2022, Justice Kavanaugh extended the time for filing this petition until November 4, 2022. No. 22A151 (U.S.). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 8 U.S.C. § 1101(a)(42)(A) states: "The term 'refugee' means (A) any person who is outside any country of such person's nationality * * * 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."

2. 8 U.S.C. § 1252(b)(4)(B) states, in relevant part: "With respect to review of an order of removal * * * the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary[.]"

3. 8 C.F.R. § 1003.1(d)(3)(i) states: "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."

4. 8 C.F.R. § 1003.1(d)(3)(ii) states: "The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges de novo."

Other pertinent provisions are set forth in the appendix to the petition at page Pet.App.50a.

STATEMENT

This petition presents two independently important questions that have sharply divided the circuits. The first is whether a circuit court applies *de novo* review to a Board of Immigration Appeals' determination that a particular set of facts established by an asylum applicant does not rise to the level of "persecution"—because it is a question of law—or under the substantial evidence standard—because it is an agency "finding[] of fact." 8 U.S.C.

§ 1252(b)(4)(B). In its decision below erroneously concluding that the appropriate standard is substantial evidence, the Eighth Circuit went squarely against the holdings of multiple circuits and reinforced a well-recognized and entrenched conflict on this question. See, *e.g.*, *Xue v. Lynch*, 846 F.3d 1099, 1105 n.11 (10th Cir. 2017) ("The circuits are split as to the standard of review applicable to the question whether an undisputed set of facts constitute persecution."). It is no surprise, then, that as recently as August 2022, circuit judges have explicitly called for this Court's "guidance on this important, recurring topic, on which the circuits have taken inconsistent positions." *Fon v. Garland*, 34 F.4th 810, 819 (9th Cir. 2022) (Graber, J., concurring); *id.* at 823 (Collins, J., concurring). This Court should grant the petition and resolve the question.

The second question this case presents is whether being prohibited by government officials from freely and openly practicing one's religion, as Petitioner Xiaojie He indisputably was, constitutes persecution as a matter of law under the Immigration and Nationality Act (INA). The Eighth Circuit answered "no," again putting it squarely in conflict with published decisions from at least three other circuits. In the precise way that He urged the Eighth Circuit to do, the Seventh, Ninth, and Eleventh Circuits have recognized that "an extreme and egregious suppression of * * * religious practice," like what He endured at the hands of the Chinese government, constitutes religious persecution under this country's asylum laws. *Shi v. U.S. Att'y Gen.*, 707 F.3d 1231, 1235 (11th Cir. 2013). This Court's intervention is imperative to resolve this conflict as well.

Xiaojie He is a devout Christian who has found the freedom to practice his religion in the United States. The facts of what the Chinese government subjected He to are not in material dispute. The Chinese government prevented He from freely practicing his religion by interrupting religious services he attended, violently arresting him, and incarcerating him twice for multiple weeks. Deeply afraid, He sought asylum in the United States.

The immigration judge (IJ) found all of He's factual assertions to be true. Pet.App.25a. Nevertheless, she concluded that the established facts did not, as a matter of law, rise to the level of persecution under the INA. Pet.App.26a. On appeal, the Board of Immigration Appeals (BIA or Board) reviewed He's claim of past persecution *de novo* and affirmed the IJ's determination. Pet.App.15a.

The Eighth Circuit denied He's petition for review. It summarily brushed aside "circuit court decisions supporting [He's] contention" that it must review his past persecution claim *de novo* since the material facts were undisputed. Pet.App.7a. The Eighth Circuit instead applied the deferential substantial evidence standard of review that 8 U.S.C. § 1252(b)(4)(B) imposes only on "agency findings of fact." Pet.App.8a. On the merits, despite acknowledging that He endured "government interference that would be intolerable in this country," the Eighth Circuit concluded that substantial evidence supported the agency's conclusion that the harm He suffered "does not rise to the level of persecution." Pet.App.9a-10a.

The Eighth Circuit's decision—both on the standard of review and on the merits—is not only wrong, it is in square conflict with multiple decisions

from other circuits. Six circuits have all correctly held that the ultimate question of "whether certain events, if they occurred, would constitute persecution as defined by the INA is a question of law." *Huo Qiang Chen v. Holder*, 773 F.3d 396, 403 (2d Cir. 2014). And for *that* question, the correct standard of review is *de novo*. *Id.* In addition, at least three circuits have correctly concluded that being prohibited from freely practicing one's religion, as He indisputably was—starting with his first arrest, beating, and incarceration—constitutes persecution under the INA.

The questions presented are important, recurring, and involve deep conflict among the circuits. This Court should grant the petition and resolve both questions.

I. STATUTORY AND REGULATORY BACKGROUND.

Under the INA, a noncitizen may be granted asylum if he or she meets the definition of a "refugee" found at 8 U.S.C. § 1101(a)(42)(A). 8 U.S.C. § 1158(b). Congress defined the term "refugee" to include a noncitizen outside his or her home country of nationality 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). This definition reflects Congress's explicitly stated purpose in enacting the current-day scheme of U.S. refugee and asylum law: to "respond to the urgent needs of persons subject to persecution in their homelands" by providing such individuals with the

opportunity to apply for asylum. Refugee Act of 1980, P.L. No. 96-212, 94 Stat. 102.

IJs are the triers of fact that adjudicate asylum claims in removal proceedings. By statute, IJs are the administrative officials responsible for receiving and assessing evidence, determining the credibility of witnesses, and making findings of fact. See 8 U.S.C. § 1229a(b)(1); 8 C.F.R. § 1003.10(b). These facts include the who, what, when, and where underlying an applicant's claim—"what happened" to the applicant. *Matter of A-S-B-*, 24 I. & N. Dec. 493, 497 (BIA 2008). IJs are also empowered to reach conclusions about whether those facts rise to the level of persecution—determinations that the agency has long understood to be legal rather than factual. *Id.*

The BIA reviews IJ asylum decisions and applies differing standards of review to different types of determinations. The Board applies a deferential standard of review to IJ findings of fact, reviewing these only for clear error. 8 C.F.R. § 1003.1(d)(3)(i). In contrast, the Board reviews all "questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*." 8 C.F.R. § 1003.1(d)(3)(ii).

Under this regulatory scheme, the agency has long understood that whether established facts amount to past persecution is a question of law that the BIA reviews *de novo*. Both the Supplementary Information accompanying the final rule that created 8 C.F.R. § 1003.1(d) and subsequent BIA decisions confirm that standard of review. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,890 (Aug. 26, 2002); *Matter of A-S-B-*, 24 I. & N. Dec. 493, 497-98 (BIA

2008) (holding that whether uncontested facts are sufficient to establish a well-founded fear of persecution is a question of law not subject to clear error review); *Matter of Z-Z-O-*, 26 I. & N. Dec. 586, 590-91 (BIA 2015) ("[W]hether an asylum applicant has established an objectively reasonable fear of persecution based on the events that the Immigration Judge found may occur upon the applicant's return to the country of removal is a legal determination that remains subject to de novo review.").

An applicant denied asylum may seek judicial review of the agency's decision. 8 U.S.C. § 1252(a)(1). The judicial review statute only provides a specific standard of review for "administrative findings of fact." 8 U.S.C. § 1252(b)(4)(B). The statutory language directs courts of appeals to uphold the agency's "findings of fact" as conclusive "unless any reasonable adjudicator would be compelled to conclude to the contrary." *Id.* This standard of review is also known as the "substantial evidence" standard. *Nasrallah v. Barr*, 140 S. Ct. 1683, 1692 (2020).

II. FACTUAL AND PROCEDURAL BACKGROUND.

1. Petitioner Xiaojie He is a devout Christian who fled China to escape religious persecution at the hands of a totalitarian government that "strictly controls" core aspects of religious life in China. A.R. 270-71. As established by the U.S. government's own official reports, China systematically suppresses religious freedom by coercively prohibiting religious worship outside of state-controlled churches. A.R. 209. China surveils and regulates government-sanctioned churches through a pervasive network of "state-

sanctioned 'patriotic religious associations'" that suppress the content and manner of religious expression and punishes "unauthorized" worship with harassment, incarceration, and violent force. A.R. 205, 217. Christians who refuse to attend state-controlled churches where Chinese Communist Party-sanctioned "doctrine [and] theology" are imposed have turned to illegal worship in underground or "house" churches. See, *e.g.*, A.R. 205, 217. "Because they are not registered with the Chinese government, which strictly controls the content of approved religions, house churches are illegal." *Xue*, 846 F.3d at 1101 n.2.

He found Christianity in 2011 as a teenager when a friend brought him to an underground "house church" for the first time. Pet.App.21a. The Chinese government met He's Christian practice with violence, arrest, detention, and explicit orders that he cease participation in such "illegal gatherings." *Id*. While He worshiped with the congregation, "[f]our or five police officers soon charged in, said the gathering was illegal, and took He and other * * * attendees to a police station, where an officer punched He in the chest once and kicked He in the knees and shins." Pet.App.2a. "The police detained He for approximately 15 days, then warned him 'not to participate in illegal gatherings anymore.'" *Id*.

For a period of three months after his first arrest, beating, and 15-day incarceration, He "did not go [to church] because of the first detention." Pet.App.3a. Although there were government-controlled churches in his hometown, he "did not attend any because 'after being beaten up he was afraid,' [and] because 'he had heard that if you go to these churches you do not learn anything[.]'" *Id*.

Despite his fears and the serious risks involved, He returned to the same house church a second time. Pet.App.3a. His attendance was again met with harsh government repression. "Again police broke up the meeting, this time detaining He for approximately 30 days," and, "[o]n release, officers advised He to report [to the police station] weekly." *Id.* Deeply afraid, He fled China.

2. He entered the United States without inspection in April 2012 and was taken into immigration custody by the Department of Homeland Security (DHS). While in DHS custody, an asylum officer conducted a preliminary assessment, called a "credible fear interview," to determine if He's claims were sufficiently credible for further review by an IJ. 8 C.F.R. §§ 235.3(b)(4), 208.30(d)-(f). The asylum officer determined that He had established the requisite credible fear of religious persecution and referred the issue to the immigration court. 8 C.F.R. §§ 208.30(e)-(f). He was thus issued a Notice to Appear for removal proceedings before an IJ pursuant to 8 U.S.C. § 1229a. He then formally applied for asylum.

3. At He's asylum hearing, which occurred more than six years after his arrival, the IJ credited He's testimony about the harms the Chinese government inflicted on him. Pet.App.3a, 25a. She also credited his testimony about his continued Christian practice in the United States, noting his baptism, regular church attendance, prayer, and Bible study. Pet.App.22a, 24a. Nevertheless, the IJ concluded that the facts He established did not, as a matter of law, "rise to the level of persecution as contemplated by the INA." Pet.App.26a. To reach that conclusion, the IJ declared that the "harm" He suffered was limited to his two

arrests, his 15-day and 30-day detentions, and his assault by the police. *Id*. The IJ denied asylum and ordered He removed. Pet.App.28a.

4. In a two-page order, the BIA "adopt[ed] and affirm[ed]" the IJ's decision. Pet.App.15a. Like the IJ, the BIA focused only on He's "detentions" and "arrests." It characterized the harm he suffered solely as being "arrested at an unregistered house church on two occasions," noting he was "punched once on the chest and on the leg and held 15 days" the first time and "not physically mistreated but * * * held [for] 30 days" the next time. *Id.* The BIA then agreed that, as a matter of law, that harm "did not rise to the level of persecution." Pet.App.13a.

5. He petitioned the Eighth Circuit for review, challenging the agency's conclusion that the facts he established did not constitute persecution. He argued that the court must review his claim *de novo*, as long recognized by circuit precedent. See *Njong v. Whitaker*, 911 F.3d 919, 923 (8th Cir. 2018) (concluding that "whether undisputed facts meet the legal definition of persecution" is a "question of law" reviewed *de novo*). On the merits, He challenged how the agency myopically focused on his detentions and single assault all while brushing aside the "extreme and egregious suppression of his religious practice," beginning "with the interruption of a private church service and end[ing] with an attempt to coerce [him] to abandon his religious convictions and to promise to never again attend a church meeting like the one that led to his detention in the first place." *Shi*, 707 F.3d at 1236.

The Eighth Circuit rejected both of He's contentions. Summarily dismissing circuit court

decisions mandating *de novo* review, the Eighth Circuit instead relied on this Court's decades-old decision in *INS v. Elias-Zacarias* to apply the substantial evidence standard of review. 502 U.S. 478 (1992); Pet.App.7a. Although *Elias-Zacarias* had nothing to say about past persecution, let alone the standard of review that would apply to that question, the Eighth Circuit claimed that *Elias-Zacarias* "determined that the ultimate question of past persecution * * *, as well as the findings underlying that determination, are judicially reviewed under the substantial evidence standard that applies to agency findings of fact." Pet.App.6a-7a.

The Eighth Circuit then upheld the agency's determination that the Chinese government had not persecuted He. Pet.App.13a. Contrary to decisions by sister circuits, the Eighth Circuit rejected He's claim that being prohibited from openly and freely practicing one's religion is *itself* religious persecution. Pet.App.10a-11a. The Eighth Circuit downplayed the Chinese government's use of "'administrative detention' to pressure religious believers to affiliate with government-controlled churches" and held that "the IJ could reasonably find" the harm He suffered "fell in the category of low-level intimidation and harassment." Pet.App.10a.

The Eighth Circuit also faulted He for his lack of precise knowledge about the Christianity he was practicing because "he could only identify [it] as Christian based on what a friend told him." *Id.* And, again contrary to decisions by sister circuits, the Eighth Circuit faulted He for "ma[king] no further attempt to attend one of the many Christian churches"

in China, including those that are indisputably controlled by the Chinese government. Pet.App.11a.

He petitioned the Eighth Circuit for rehearing or rehearing en banc. The Eighth Circuit denied He's petition over the votes of four judges—Judges Gruender, Benton, Kelly, and Grasz—to grant rehearing en banc. Pet.App.28a.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition to resolve one or both of the two independently important questions this case presents: whether a court of appeals reviews *de novo* or for substantial evidence an agency's conclusion that established facts do not rise to the level of persecution, and whether being prohibited by government officials from freely and openly practicing one's religion constitutes persecution as a matter of law.

I. THE COURT SHOULD RESOLVE WHETHER A COURT OF APPEALS REVIEWS *DE NOVO* OR FOR SUBSTANTIAL EVIDENCE THE AGENCY'S CONCLUSION THAT ESTABLISHED FACTS DO NOT CONSTITUTE PERSECUTION.

A. The circuits are split over this question.

There is a well-recognized and irreconcilable circuit conflict as to the standard of review circuit courts must apply to the question of whether an undisputed set of facts rises to the level of persecution under the INA. See, *e.g. Matumona v. Barr*, 945 F.3d 1294, 1300 n.5 (10th Cir. 2019) (noting that "the circuits are split on the standard of review applicable to the issue [of past persecution]"); *Xue*, 846 F.3d at 1105 n.11 (same); *Fon*, 34 F.4th at 819 (Graber, J., concurring) (noting that "circuits have taken inconsistent positions" on this "important, recurring topic" and calling for this Court's intervention). Four circuits incorrectly treat the agency's conclusion about the existence of persecution, as well as the underlying facts supporting it, as a *factual finding* subject to the

"substantial evidence" standard of review Congress mandated for "agency findings of fact," 8 U.S.C. § 1252(b)(4)(B). See, *e.g.*, *Tarraf v. Gonzales*, 495 F.3d 525, 534 (7th Cir. 2007). On the other hand, the remaining seven circuits have all correctly acknowledged in published decisions that "whether undisputed facts meet the legal definition of persecution * * * is a question of law" reviewed *de novo*. See, *e.g.*, *Njong*, 911 F.3d at 923. Despite this unequivocal acknowledgement, however, these same circuits—including the Eighth Circuit in its decision below—have *also* applied the substantial evidence standard of review to this same question. Pet.App.6a-9a. These conflicting decisions have created entrenched confusion and intolerable inconsistency. As a circuit judge adeptly put it, "caselaw on this subject is a bit of a mess." See, *e.g.*, *Fon*, 34 F.4th at 823 (Collins, J., concurring).

1. Four circuits—the **First, Fifth, Seventh,** and **Tenth Circuits**—incorrectly apply the substantial evidence standard of review to the ultimate question of whether an established set of facts constitutes persecution. These courts are overinclusive as to what they treat as a finding of fact under 8 U.S.C. § 1252(b)(4)(B), deferentially reviewing not only the *actual* findings of historical fact—the who, what, when, and where—but also "the ultimate determination whether an alien has demonstrated persecution." *Vicente-Elias v. Mukasey*, 532 F.3d 1086, 1091 (10th Cir. 2008). That is so "even if the underlying factual circumstances are not in dispute and the only issue is whether those circumstances qualify as persecution." *Id.*; *Sompotan v. Mukasey*, 533 F.3d 63, 68 (1st Cir. 2008) (describing the issue of whether the established harm "experienced by a

petitioner amount[s] to persecution * * * [as a] question[] of fact"); *Gjetani v. Barr*, 968 F.3d 393, 396 (5th Cir. 2020) (characterizing the BIA's determination whether undisputed facts amount to persecution as a "factual conclusion" subject to the "substantial evidence" standard of review); *Tarraf*, 495 F.3d at 534 ("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.").

Judges within these circuits, however, have sharply criticized the correctness of these precedents, especially in light of this Court's recent decisions. For example, in his dissent in *Gjetani v. Barr*, Judge Dennis faulted the majority for characterizing the agency's persecution determination, based on undisputed facts, as itself a "factual conclusion." 968 F.3d at 400 (Dennis, J., dissenting). Judge Dennis explained that the Fifth Circuit's erroneous rule "was abrogated by [this Court's] recent affirmance of the basic principle that 'the application of a legal standard to undisputed or established facts' is a 'question of law' within the meaning of the Immigration and Nationality Act." *Id.* at 401 n.1 (quoting *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068 (2020)).

Similarly, the Tenth Circuit has firmly questioned the validity of its own rule applying the substantial evidence standard. In *Xue*, the court expressed strong reservations about "review[ing] for substantial evidence a determination the BIA itself has concluded is legal in nature," explaining that "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." 846 F.3d at 1104-

05 & nn.9 & 11. And as the court further explained, "the statute empowering review of asylum rulings in the circuit courts of appeals[, 8 U.S.C. § 1252(b)(4)(B),] does not contemplate the application of a substantial evidence standard to any determinations that are not factual in nature." *Id.* at 1106.

2. The remaining circuits—the **Second, Third, Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits**—have all, in published decisions, unequivocally stated that the ultimate question of whether established facts meet the legal definition of persecution is not itself a factual question, but rather a question of law requiring the application of legal principles to facts. And for *that* question, the correct standard of review is *de novo*. *Mirzoyan v. Gonzales*, 457 F.3d 217, 220 (2d Cir. 2006) (explaining that whether "the facts * * * meet the legal definition of persecution in the INA * * * is a mixed question of law and fact, which [courts] review *de novo*"); *Blanco v. Att'y Gen.*, 967 F.3d 304, 310, 315 (3d Cir. 2020) (reviewing *de novo* "both pure questions of law and applications of law to undisputed facts" and reversing the agency's conclusion of no past persecution (citing *Herrera-Reyes v. Att'y Gen.,* 952 F.3d 101, 106 (3d Cir. 2020))); *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 247 & n.3 (4th Cir. 2017) (holding that established facts constituted persecution on *de novo* review and explaining that "th[e] Court is entitled to draw its own legal conclusions from the undisputed facts in the record that was created by the Board of Immigration Appeals" (citation omitted)); *Mapouya v. Gonzale*s, 487 F.3d 396, 405 (6th Cir. 2007) (noting that when the court reviews the agency's "application of legal principles to undisputed facts, rather than its underlying determination of those facts * * *, the

review * * * is *de novo*." (citation omitted)); *Padilla-Franco v. Garland*, 999 F.3d 604, 606 (8th Cir. 2021) ("The extent of [a petitioner's] harm is a factual determination, but whether that harm rises to 'the legal definition of persecution' is a legal issue we review *de novo*." (citation omitted)); *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005) ("*Whether particular acts constitute persecution for asylum* purposes is a legal question, which we review de novo." (emphasis in original)); *Mejia v. U.S. Att'y Gen.*, 498 F.3d 1253, 1257 (11th Cir. 2007) (reviewing *de novo* "whether, as a matter of law, what [the applicant] endured constitutes past persecution" and concluding that it did).

Despite these decisions clearly characterizing the agency's determination that established facts did not constitute persecution as a *legal* question subject to *de novo* review, each of these circuits *also* has conflicting decisions characterizing this same determination as *factual* and subject to substantial evidence review. *Scarlett v. Barr*, 957 F.3d 316, 336 (2d Cir. 2020) ("The agency's decision to deny [applicant] withholding and CAT relief based on the conduct of former police supervisors is supported by substantial evidence that the past conduct did not rise to the level of 'persecution[.]'"); *Thayalan v. Att'y Gen.*, 997 F.3d 132, 137 n.1 (3d Cir. 2021) ("[W]e apply the substantial-evidence standard to an agency determination that an alien did not suffer harm rising to the level of persecution even where the underlying facts about how an alien was mistreated are undisputed."); *Lin-Jian v. Gonzales*, 489 F.3d 182, 192 (4th Cir. 2007) (concluding that "the denial of [applicant's] claim of past persecution is not supported by substantial evidence"); *Gilaj v. Gonzales*, 408 F.3d 275, 285 (6th

Cir. 2005) ("[T]he IJ's decision that the incidents described by petitioners do not rise to the level of persecution is not supported by substantial evidence."); *Sharma v. Garland*, 9 F.4th 1052, 1060 (9th Cir. 2021) ("We also review for substantial evidence the BIA's particular determination that a petitioner's past harm 'do[es] not amount to past persecution.'" (alteration in original) (citation omitted)); *Martinez v. U.S. Att'y Gen.*, 992 F.3d 1283, 1292 (11th Cir. 2021) ("Substantial evidence supports the BIA's conclusion that the cumulative mistreatment to which [applicant] testified did not rise to * * * persecution[.]").

In its erroneous decision below, the Eighth Circuit reinforced this legal disarray. Eighth Circuit precedent dating back nearly 20 years established that the court must review *de novo*—not for substantial evidence—whether an undisputed set of harms meets the statutory standard of "persecution." *Eusebio v. Ashcroft*, 361 F.3d 1088, 1091 (8th Cir. 2004). Yet the decision below chose a different rule for He's case, holding instead that "the ultimate question of past persecution * * * [is] judicially reviewed under the substantial evidence standard that applies to agency findings of fact." Pet.App.8a.

That *all* circuits have considered this issue and a majority have diametrically-opposing precedent is convincing evidence that this question is beyond resolution by the circuit courts. Waiting for every circuit to engage in en banc review would be futile considering the breadth and depth of this split. It is untenable that asylum claims may be reviewed under different standards simply depending on the circuit where those claims are brought—or, worse yet, even

depending on the particular panel that decides the case. Only this Court can provide the vital guidance to resolve this entrenched and acknowledged split and bring about much-needed uniformity on this critical issue.

This case is an attractive vehicle to do so. The pertinent facts about the past harm He experienced are clear and undisputed, cleanly presenting the standard of review question. Additionally, language in the Eighth Circuit's opinion suggests that the panel recognized that the standard of review it chose could impact the outcome of the case. Pet.App.8a. This case is the perfect opportunity for this Court to heed circuit court judges' calls for intervention and provide much needed clarity.

B. Because *de novo* is the correct standard of review, the Eighth Circuit's decision is wrong.

The Eighth Circuit was wrong to review for substantial evidence the distinct question of law He presented: whether the facts established in his administrative record meet the legal standard for persecution.

1. The decision below is wrong as a simple matter of statutory interpretation. In setting forth the standard of review courts apply to immigration petitions for review, Congress mandated *only* that "the administrative findings of fact" be reviewed for substantial evidence. 8 U.S.C. § 1252(b)(4)(B). Under this Court's precedents, the statutory term "finding[] of fact" cannot encompass the application of a legal standard to settled facts. Just three terms ago, this Court squarely held that "the application of a legal

standard to undisputed or established facts" qualifies as a "question of law" under the INA. *Guerrero-Lasprilla*, 140 S. Ct. at 1067. If the application of law to settled facts is a "question of law" under the statute, it cannot *also* be a "finding[] of fact" under that very same statute. See, *e.g.*, *Gjetani*, 968 F.3d at 401 n.1 (Dennis, J., dissenting) ("*Guerrero-Lasprilla*'s holding that the BIA's application of a legal standard to undisputed facts is a question of law therefore unequivocally settles the question of what standard of review we should apply to such conclusions.").

2. The Eighth Circuit's decision also contravenes this Court's recent precedents about standards of review. In *Google LLC v. Oracle Am., Inc.*, this Court explained that when confronted with questions involving both legal and factual components, "a reviewing court should try to break such a question into its separate factual and legal parts, reviewing each according to the appropriate legal standard." 141 S. Ct. 1183, 1199 (2021). Breaking up the separate factual and legal parts here only confirms that courts of appeals must review *de novo* whether historical facts rise to the level of persecution.

The question of whether an asylum applicant has suffered "persecution" within the meaning of the INA involves, at the outset, findings of "'basic' or 'historical' fact—addressing questions of who did what, when or where, how or why." *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018). The statute and regulations entrust IJs with responsibility for finding those historical facts. See 8 U.S.C. § 1229a(b)(1); 8 C.F.R. § 1003.10(b). The BIA then reviews the IJ's factual findings deferentially—for clear error. 8 C.F.R.

§ 1003.1(d)(3)(ii). Circuit courts, in turn, *also* review the agency's "factual findings" deferentially—deeming them "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B).

But the question of whether the historical facts as found by the IJ meet the legal standard of persecution is entirely distinct—and "it is plainly an issue of law." *Liang v. Att'y Gen.*, 15 F.4th 623, 627 (3d Cir. 2021) (Jordan, J., with whom Ambro, J., joins, concurring). Indeed, the agency *itself* views this question as a distinctly legal one. *Matter of A-S-B-*, 24 I. & N. at 497-98. And as courts of appeals have recognized, "[it] is certainly odd, to say the least, for [circuit courts] to review for substantial evidence a determination the BIA itself has concluded is legal in nature." *Xue*, 846 F.3d at 1105. Treating the question of whether established facts rise to the level of persecution "as a 'factual finding[]' subject to [§ 1252(b)(4)(B)] would effectively require us to say that what is concededly a question of law in the BIA somehow transmogrifies into a question of fact when the case leaves the BIA and comes before [circuit] court[s]. That does not make much sense." *Fon*, 34 F.4th at 823 (Collins, J., concurring) (first alteration in original). Accordingly, as a "question of law," circuit courts must review whether established facts meet the legal definition of persecution *de novo*, not for "substantial evidence" as an agency finding of fact.

3. In reaching the opposite conclusion, the Eighth Circuit "rel[ied] uncritically"—and solely—"on [this Court's] twenty-plus-year-old decision in *INS v. Elias-Zacarias*[.]" *Xue*, 846 F.3d at 1105 n.11 (criticizing multiple courts for their reliance on *Elias-Zacarias* to

determine the standard of review applicable to past persecution determinations); Pet.App.7a-8a. But *Elias-Zacarias* in no way involved the distinct element of persecution, much less the standard of review that would apply to that issue. That case analyzed only the element of "nexus"—or whether persecution was *on account of* a protected ground. *Elias-Zacarias*, 502 U.S. at 482; see *Gjetani*, 968 F.3d at 400 (Dennis, J., dissenting) ("[I]n *INS v. Elias-Zacarias*, the Supreme Court applied the substantial evidence standard to the question of whether the alien had established that any persecution he would face was *because of* his political opinion. This is because what motivates a group or individual—including a persecutor—is a classic example of a question of fact." (citation omitted)). As such, the Eighth Circuit's holding that *Elias-Zacarias* "addressed and resolved th[e] standard of review issue" this case presents is simply wrong. Pet.App.7a.

C. The question of what standard of review applies is critically important.

Whether courts of appeals should apply a *de novo* or substantial evidence standard of review when determining if established facts rise to the level of persecution is a question of critical importance that this Court should resolve. The question of the proper standard of review arises in *every* asylum case in *every* circuit, thus potentially affecting thousands of noncitizens seeking asylum in the United States. Crucially, standards of review can be outcome determinative, meaning the current circuit split creates inconsistent outcomes depending on geography—and perhaps even depending on the specific panel within the circuit deciding the case. Such inconsistency should especially give this Court

pause considering the frequency with which courts of appeals review asylum cases and the extraordinarily grave nature of what is at stake in an asylum case. For He, those stakes include the freedom to practice his religion openly and freely, without reprisal, fear, or harm.

1. It is axiomatic that standards of review matter to courts of appeals, lower courts subject to their review, and litigants and their advocates. Standards of review are so significant to the appellate process that petitioners are required to identify them for each issue argued in an opening brief. Fed. R. App. P. 28(a)(8)(B). This prominence is unsurprising: standards of review "indicate[] to the reviewing court the degree of deference that it is to give to the actions and decisions under review." Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 47 (2000). But though discerning the applicable standard of review is intrinsic and fundamental to the role of appellate judicial bodies, the circuit courts have floundered in ascertaining how to review whether established facts fulfill the legal definition of past persecution.

2. The Court's resolution of this conflict is especially important because standards of review can be outcome determinative. For example, in *Diallo v. Ashcroft*—an asylum case—the Seventh Circuit explained that "[w]ere we reviewing Diallo's claim *de novo*, we might be inclined to find that * * * Diallo was the victim of past persecution." 381 F.3d 687, 697 (7th Cir. 2004). However, concluding that the more deferential substantial evidence standard of review applied, the Seventh Circuit declined to reverse the

BIA's past persecution determination and held that Diallo was ineligible for asylum. *Id.* at 698. Standards of review often lead to split decisions, with a majority perhaps affirming under the deferential substantial evidence standard and a dissenting judge reaching a different conclusion under *de novo* review. See, *e.g.*, *Gjetani*, 968 F.3d at 401. Such split decisions acutely demonstrate the outcome determinative power of standards of review.

The upshot of the potential for standards of review to be outcome determinative is that an individual's asylum eligibility (or lack thereof) may be preordained based on what circuit they live in. Considering the high stakes involved in removal cases, and especially in asylum claims that often involve matters of life and death, such disparate treatment based solely on geography is intolerable. See *Judulang v. Holder*, 565 U.S. 42, 59 (2011) ("[D]eportation decisions cannot be made a 'sport of chance.'" (citation omitted)); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation "may result" in the loss of "all that makes life worth living"); *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996) ("The basic procedural rights Congress intended to provide asylum applicants under the Refugee Act are particularly important because an applicant erroneously denied asylum could be subject to death or persecution if forced to return to his or her home country."). This Court's review is therefore necessary to ensure a uniform rule for how courts of appeals review asylum claims based on past persecution.

3. Resolution of the question presented would directly impact many of the thousands of individuals every year that seek circuit court review of BIA decisions. Over the past five years, an average of more

than 5,400 petitions for review of BIA decisions have been filed each year. *Table B.3, U.S. Courts of Appeals–Sources of Appeals, Original Proceedings, and Miscellaneous Applications Commenced, by Circuit, During the 12-Month Periods Ending September 30, 2017 through 2021*, U.S. COURTS (September 30, 2021), https://tinyurl.com/yser8emk. A significant number of these cases is likely to involve agency denials of asylum because courts of appeals have broader jurisdiction to review asylum decisions than many other forms of discretionary relief from removal. See 8 U.S.C. § 1252(a)(2)(B)(ii). Judicial review of agency conclusions that an asylum applicant's past experiences did not rise to the legal standard for persecution will therefore continue to be a frequent issue at the courts of appeals. This Court should thus provide guidance about the standard of review circuit courts should apply to such claims.

II. THE COURT SHOULD RESOLVE WHETHER BEING PROHIBITED BY GOVERNMENT OFFICIALS FROM FREELY AND OPENLY PRACTICING ONE'S RELIGION CONSTITUTES PERSECUTION AS A MATTER OF LAW.

A. The circuits are divided over this issue.

The courts of appeals are intractably divided about whether being prohibited by government officials from freely and openly practicing one's religion constitutes religious persecution as a matter of law under the INA. At least three circuits so far—the Seventh, Ninth, and Eleventh Circuits—have answered "yes." In reaching a contrary conclusion below, the Eighth

Circuit joined the Tenth Circuit's erroneous position on this question.

1. In at least three published decisions, the **Seventh Circuit** has squarely recognized the principle that "if you are forbidden to practice your religion, that is religious persecution." *Bucur v. INS*, 109 F.3d 399, 405 (7th Cir. 1997). In *Muhur v. Ashcroft*, for example, the court held that being forced to "practice[] [one's] religion in secret" constitutes religious persecution. 355 F.3d 958, 960-61 (7th Cir. 2004). In reviewing the petitioner's claim, the court reasoned that the IJ committed a "clear error of law" in assuming 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.* It thus rejected as an "analytical error" the IJ's suggestion that the noncitizen could, and should, avoid persecution by "abandon[ing] or successfully conceal[ing] her religion." *Id.* at 961.

The Seventh Circuit has reaffirmed *Muhur*'s reasoning in subsequent cases. In *Iao v. Gonzales*, for instance, the court reiterated that "the fact that a person might avoid persecution through concealment of the activity that places her at risk of being persecuted"—for example, by concealing attendance at Christian house churches, as in He's case—"is in no [way] inconsistent with her having a well-founded fear of future persecution." 400 F.3d 530, 532 (7th Cir. 2005) (granting petition for review). Later, in *Shan Zhu Qiu v. Holder*, the Seventh Circuit again granted a petition for review after reiterating that requiring the applicant to "avoid persecution" by "ceas[ing] the practice of [his religion] or hop[ing] to evade discovery * * * runs contrary to the language and purpose of our

asylum laws." 611 F.3d 403, 409 (7th Cir. 2010). In that case, the agency denied asylum on the ground that "the reports showed that hundreds of thousands of people still practice Falun Gong in their homes"—which is illegal in China—"and that punishment for Falun Gong practice depends on the facts of each case." *Id.* at 406. The court rejected the agency's reasoning, stressing that the evidence in fact showed that "the Chinese do not tolerate 'private' Falun Gong practice" and "the only way for [the applicant] to avoid punishment is to cease practicing Falun Gong or work even harder to avoid discovery." *Id.* at 407. And that in any event, "[a]sylum exists to protect people from having to return to a country and conceal their beliefs." *Id.* at 408.

The **Ninth Circuit** has reached the same conclusion. In *Zhang v. Ashcroft*, the court rejected the agency's determination that the noncitizen could "avoid persecution * * * by practicing [his religion] in the privacy of his own home." 388 F.3d 713, 719 (9th Cir. 2004). The Ninth Circuit explained that "to require [the applicant] to practice his beliefs in secret" to avoid punishment "is contrary to our basic principles of religious freedom and the protection of religious refugees." *Id.* It therefore granted the applicant's request for withholding of removal, as he "[h]ad 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. Similarly, in *Guo v. Sessions*, the Ninth Circuit determined that where "the local police forbade [the applicant] from attending his home church and from thus *practicing* his religion," such action constituted

ongoing persecution. 897 F.3d 1208, 1215-16 (9th Cir. 2018). The court forcefully "reject[ed] the proposition that the existence of state-sanctioned congregations—a notion antithetical to the freedom of religion—somehow mitigates the persecution that [the applicant] suffered." *Id.* at 1216 n.5.

Finally, the **Eleventh Circuit** expressly agreed with the Seventh Circuit's *Muhur* decision "that having to practice religion underground to avoid punishment is itself a form of persecution." *Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1354 (11th Cir. 2009) (citing *Muhur*, 355 F.3d at 960-61). The court remanded for the agency to consider whether someone in the noncitizen's position must "practice underground and *suffer * * * that form of persecution* to avoid detection and punishment."[1] *Id.* at 1354-55 (emphasis added).

2. In its erroneous decision below, the **Eighth Circuit** joined the **Tenth Circuit** in rejecting the holdings and reasoning of the Seventh, Ninth, and

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[1] In a powerful concurrence, Judge Marcus wrote separately to "underscore [that] * * * it is legal error to deny asylum on the basis of well-founded fear of religious persecution on the theory that an individual may escape discovery by abandoning his faith or hiding it and practicing his religion underground." *Kazemzadeh*, 577 F.3d at 1356 (Marcus, J., specially concurring). He reiterated that "[t]o the extent the BIA's decision turns in any way on the idea that Kazemzadeh could avoid persecution by abandoning his faith, that is not an acceptable consideration. And, to the extent that its decision turns on the suggestion that Kazemzadeh could practice his Christian faith 'underground,' and thereby elude discovery, that too may not be factored into the calculus of risk associated with a well-founded fear analysis. * * * [T]he requirement that an asylum petitioner abandon his faith, or practice only in the dead of night, amounts to religious persecution." *Id.*

Eleventh Circuits. Like the Tenth Circuit in *Xue*, the Eighth Circuit rejected the principle that being "forb[idden] * * * from openly and freely practicing [one's] religion" is persecution as a matter of law. Pet.App.10a; *Xue*, 846 F.3d at 1108 (holding that it was "obligated to reject" that principle under its precedents). Using reasoning the Seventh, Ninth, and Eleventh Circuits have expressly rejected, the Eighth Circuit essentially held that He could not claim asylum on the basis of religious persecution because he could simply attend a state-controlled church where doctrine is tightly controlled by the Chinese government. Pet.App.10a-11a. In other words, the Eighth Circuit erroneously concluded that He could, and should, avoid persecution by "abandon[ing] or successfully conceal[ing]" his religious beliefs. *Muhur*, 355 F.3d at 961.

Because three sister circuits would not tolerate the Eighth Circuit's disposition of religious persecution claims like He's, this Court's intervention is imperative.

B. The Eighth Circuit's decision on this important question involving religious freedom is wrong.

He's particular claim of past religious persecution—supported by his credible testimony that he would not worship in a state-controlled church, and that he risked and suffered violent government suppression and *repeated* episodes of incarceration for choosing to attend a "home" church operating underground—presents a question of exceptional importance that the Eighth Circuit answered in error

and in conflict with the reasoned precedent of the Seventh, Ninth, and Eleventh Circuits.

Under the law of these circuits, an asylum applicant like He would be held to have suffered past persecution, recognizing that the basis for his claim is "an extreme and egregious suppression of his religious practice." *Shi*, 707 F.3d at 1235. These courts recognize that such suppression began, as here, "with the interruption of a private church service" and culminated, again as in this case, with orders that petitioners "never again attend a church meeting like the one that led to [their] detention in the first place." *Id.* at 1236. Additionally, these circuits *further* recognize that Chinese Christians like He, who have been targeted by their government, have no genuine option to exercise their actual faith in strictly state-controlled churches, and that the Hobson's choice of state-controlled worship that the Chinese government imposes is *itself* an aspect of religious suppression that cannot be a basis for denying asylum claims under the INA. See *Guo*, 897 F.3d at 1216 n.5. Yet the Eighth Circuit erroneously affirmed the denial of He's asylum application on this ground, while also acknowledging that his treatment "would be intolerable in this country." Pet.App.11a (faulting He for not attending a state-controlled church).

The Eighth Circuit's decision is wrong. It plainly contravenes asylum law and the very principles of religious freedom on which this country was founded, which are reflected in the INA. While drafting the Refugee Act of 1980—which incorporated the asylum provisions at issue here into law—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." *Shi*, 707 F.3d at 1236 (quoting *Kazemzadeh*, 577 F.3d at 1359-60 (Marcus, J., specially concurring)). Indeed, "the Refugee Act was created in no small measure as a response to some of the world's largest contemporary refugee crises; the hearings focused on the need to protect Soviet Jewish refugees, Middle Eastern Christian refugees, and Iranian minorities from religious persecution." *Kazemzadeh*, 577 F.3d at 1360 (Marcus, J., specially concurring). And "[t]he apparent view that a petitioner is not entitled to asylum on account of religious persecution so long as he can mitigate the atrocities of his situation by hiding his faith and practicing only in darkness cannot be squared with the asylum statute."[2] *Id.*

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[2] The United Nations' *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1959), which this Court has held "provides significant guidance * * * to which Congress sought to conform" in giving effect to the 1967 Protocol Relating to the Status of Refugees, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 & n.22 (1987), only underscores this point. It provides that "religious 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. Indeed, 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." U.N. High Comm'r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection 126, U.N. Doc HCR/1P/4/ENG/REV.4 (Feb. 2019); see also *Matter of S-P-*, 21 I. & N. Dec. 486, 492 (BIA 1996) ("In enacting the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 [amending the INA], Congress sought to bring the Act's definition of 'refugee' into conformity with the United Nations Convention and Protocol Relating to the Status of Refugees and, in so doing, give 'statutory

What is more, since the days of our founding, the ability to practice one's faith openly and freely has been a core notion of religious liberty. *Shi*, 707 F.3d at 1236 ("It is no exaggeration to say that, since its founding, the United States has abhorred the notion that governments may constrain a citizen's right to practice one's faith, let alone break up a church meeting, seize religious materials, and incarcerate all of the worshippers." (quotation omitted)). "The framers of the Constitution worried greatly about religious persecution" and "defined free exercise as free practice, observing that '[t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.'" *Kazemzadeh*, 577 F.3d at 1359 (Marcus, J., specially concurring) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in FOUNDING THE REPUBLIC: A DOCUMENTARY HISTORY 90 (John J. Patrick ed., 1995)). And, "relying in no small measure on the writings of James Madison and Thomas Jefferson," this "Court has consistently regarded the freedom to practice religion openly and notoriously to be at the heart of our government's structure and the founding ideas of free exercise." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

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meaning to our national commitment to human rights and humanitarian concerns.'" (citation omitted)).

Respectfully submitted,

NADIA ANGUIANO-WEHDE
Counsel of Record
SEIKO M. SHASTRI
JAMES H. BINGER CENTER
FOR NEW AMERICANS
UNIVERSITY OF
MINNESOTA LAW SCHOOL
190 Mondale Hall
229 19th Avenue South
Minneapolis, MN 55455
Tel: (612) 625-5515
angui010@umn.edu

Counsel for Petitioner

NOVEMBER 2022

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 20-1328

Xiaojie He
Petitioner

v.

Merrick B. Garland,[1]
Attorney General of the United States
Respondent

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

Submitted: November 17, 2021
Filed: February 4, 2022

Before LOKEN, SHEPHERD, and STRAS,
Circuit Judges

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[1] Merrick B. Garland has been appointed to serve as Attorney General of the United States, and is substituted as respondent pursuant to Federal Rule of Appellate Procedure 43(c).

LOKEN, Circuit Judge.

Xiaojie He, a twenty-eight-year-old native of China, entered the United States in April 2012 without inspection. The Department of Homeland Security (DHS) initiated removal proceedings. He conceded removability and applied for asylum, withholding of removal, and relief under the Convention Against Torture (CAT), claiming past persecution and a well-founded fear of future persecution and torture in China because of his Christian faith. After a hearing at which He testified, the Immigration Judge (IJ) denied relief. The Board of Immigration Appeals (BIA) affirmed with an opinion. He seeks judicial review of the final order of removal. See 8 U.S.C. § 1252. He does not challenge the denial of his application for relief under the CAT. We deny the petition for review.

I. The Administrative Proceedings

At the May 24, 2018 removal hearing, He testified that he had two encounters with local Chinese officials that are central to his claim of religious persecution. The first occurred in October 2011 when He first attended a house-church meeting at a friend's invitation. Four or five police officers soon charged in, said the gathering was illegal, and took He and the other seven or eight attendees to a police station, where an officer punched He in the chest once and kicked He in the knees and shins. He did not seek medical attention for these minor injuries. The police detained He for approximately 15 days, then warned him "not to participate in illegal gatherings anymore."

He was not given enough to eat while in detention. In January 2012, He attended a house-church service for the second time. Again police broke up the meeting, this time detaining He for approximately 30 days, but inflicting no physical harm. On release, officers advised He to report weekly. Instead, his father arranged for "snakeheads" to transport He to Mexico's border with the United States (via Russia and Cuba, using a Chinese passport), where he illegally entered the United States to seek asylum.

The IJ found He's testimony credible. In denying relief, the IJ's Decision summarized He's testimony in detail, further noting: (i) He does not know the denomination of the faith that was practiced during the two gatherings he attended. "He thinks that it was a Christian faith because his friend told him that it was." (ii) In between the two gatherings, He talked to his friend about going to church but did not go because of the first detention. In his hometown He knew there were Christian churches, but He did not attend any because "after being beaten up he was afraid," because "he had heard that if you go to these churches you do not learn anything," and because "he just planned with his dad on how to come to the United States." (iii) He does not know anyone who attended a Catholic church in China. He has heard of people "encountering problems" when they attend Christian gatherings in a home but has never heard of anyone getting in trouble for attending a Christian government-authorized church.

The administrative record includes a lengthy United States Department of State report titled "China (Includes Tibet, Hong Kong, and Macau) 2016 International Religious Freedom Report." The Report estimated there were 657 million religious believers in China at that time, including over 70 million Christians. The People's Republic of China constitution permits "freedom of religious belief but limits protections for religious practice to 'normal religious activities' and does not define 'normal.'" Catholic and Protestant are two of the five "patriotic religious associations" that may register with the government and hold officially permitted worship services. But some Chinese Christians practice their faith in unregistered "home churches" that are not recognized by the Chinese government. "Religious affairs officials and security organs" scrutinize and restrict the religious activities of registered and unregistered religious groups. There were continued reports of detention, physical abuse, imprisonment, and harassment of religious group adherents for activities related to their beliefs and practices. "Local authorities pressured religious believers to affiliate with patriotic associations and used administrative detention . . . to punish members of unregistered religious or spiritual groups." The State Administration for Religious Affairs says that family and friends may worship together at home without registering, but "authorities still regularly harassed and detained small groups that did so." Religious regulations vary by province. "[I]n some areas, members of unregistered churches said they had more freedom than in the past to conduct religious services,

as long as they gathered only in private and kept congregation numbers low," but in some areas, "authorities also shut down churches that tried to maintain a low profile."

The IJ found that He is not eligible for asylum because he failed to establish either past persecution or a well-founded fear of future persecution. Specifically, the IJ found that the evidence of the harm He described during the two detentions, "taken together" and including "the assault by the policeman," "does not rise to the level of persecution as contemplated by the [Immigration and Nationality Act]." The IJ further found that He failed to demonstrate a well-founded fear of future persecution. He's statement that he will not attend a Christian church in China because "you do not learn much there . . . is pure conjecture as he has never attended a Christian church in China and he only heard this from a friend." His assertion that "the Chinese government will continue to look for him if he is returned" is speculation. He "was allowed to leave China in 2012 with a Chinese passport," has been away from China for over six years at the time of the hearing, and "presented no evidence that . . . anyone associated with the Chinese government is looking for him, or that he would be harmed or persecuted . . . if he practices his Christian religion in China." Nor has He "shown that he could not reasonably relocate within China to avoid any future harm if necessary to do so."

The BIA adopted and affirmed the IJ's decision in a two-page opinion. The BIA agreed with the IJ that

the harm to He from his two detentions "did not rise to the level of persecution"; that He "did not meet his burden of establishing a well-founded fear of persecution on account of his religion" based on information in the above-summarized State Department 2016 Report; and that, "[e]ven if Chinese government officials have asked about [him] following his departure 7 years ago, [He] has not shown that a reasonable person in his circumstances would fear persecution, rather than discrimination or harassment, if he is returned to China." The BIA added, "Nor does the evidence show a 'pattern or practice' of persecution of adherents to unregistered Christian house churches," citing Woldemichael v. Ashcroft, 448 F.3d 1000, 1004 (8th Cir. 2006).

He petitions for review of the BIA's final decision. Relying for the most part on decisions from other circuits, he argues the BIA erred in ruling that he failed to demonstrate past persecution and a well-founded fear of future persecution, making him eligible for exercise of the Attorney General's discretion under the Immigration and Nationality Act (INA) to grant asylum to a noncitizen who qualifies as a refugee. See 8 U.S.C. § 1158(b)(1).

II. Discussion

A. The Standard of Review. The INA defines refugee as a noncitizen who 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). "Persecution is the infliction or threat of death, torture, or injury to one's person or freedom on account of a statutory ground such as religion." Rife v. Ashcroft, 374 F.3d 606, 612 (8th Cir. 2004) (quotation omitted). At the outset, He argues that we review the BIA's persecution determinations de novo because they are questions of law. Though there are circuit court decisions supporting this contention, it is contrary to controlling Supreme Court precedents.

In INS v. Cardoza Fonseca, 480 U.S. 421 (1987), the Court noted that § 1101(a)(42) was added to the INA in the Refugee Act of 1980, which codified the procedures for granting asylum and established that eligibility "depends entirely on the Attorney General's determination that an alien is a 'refugee' . . . . Thus, the 'persecution or well-founded fear of persecution' standard governs the Attorney General's determination whether an alien is eligible for asylum." Id. at 427-28.[2]

In INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992) (emphasis added), the Court addressed and resolved this standard of review issue:

> The BIA's determination that Elias-Zacarias was not *eligible* for asylum must be upheld if 'supported by reasonable, substantial, and

[2] The Court further noted that the Attorney General has discretion to deny asylum to an alien who meets the definition of refugee. Id. at 428 n.5. That is not at issue. He was denied asylum and withholding of removal based on the BIA's finding that he is not *eligible* for the exercise of discretion.

> probative evidence on the record considered as a whole.' 8 U.S.C. § 1105a(a)(4). 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.

In other words, the Court determined that the ultimate question of past persecution or well-founded fear of future persecution, as well as the findings underlying that determination, are judicially reviewed under the substantial evidence standard that applies to agency findings of fact. As the Court subsequently observed, "[w]ithin broad limits the law entrusts the agency to make the basic asylum eligibility decision here in question." INS v. Orlando Ventura, 537 U.S. 12, 16 (2002).

Though a well-founded fear was the persecution standard at issue in Elias-Zacarias, the Court expressly adopted the substantial evidence standard of review for both of the asylum eligibility standards identified in Cardoza Fonseca -- "persecution or well-founded fear of persecution." It is irrelevant that the BIA, for internal agency reasons, reviews the IJ's determination of past persecution *de novo*.[3] Thus, as the majority of Eighth Circuit opinions have recognized, our standard of review is whether

[3] In Xue v. Lynch, 846 F.3d 1099, 1105-06 n.11 (10th Cir. 2017), the Tenth Circuit suggested that this is an important new administrative procedure that casts doubt on "the Supreme Court's twenty-plus-year-old decision in" Elias-Zacarias. With all due respect, we conclude that is not a proper basis for a circuit court to ignore controlling Supreme Court precedent.

"substantial evidence in the administrative record supports the BIA's finding that [He] failed to prove past persecution," as well as the finding that He failed to establish a well-founded fear of future persecution. Martin Martin v. Barr, 916 F.3d 1141, 1144-45 (8th Cir. 2019).

B. Past Persecution. It is well-established that "[p]ersecution is an extreme concept that involves the infliction or threat of death, torture, or injury to one's person or freedom, on account of a protected characteristic." Id. at 1144 (quotation omitted); see Alavez-Hernandez v. Holder, 714 F.3d 1063, 1065-67 (8th Cir. 2007) (religiously-motivated physical attacks in a village not "severe enough to rise to the level of persecution"). "Low-level intimidation and harassment does not rise to the level of persecution." Eusebio v. Ashcroft, 361 F.3d 1088, 1090-91 (8th Cir. 2004). Neither do brief detentions accompanied by beatings. See Njong v. Whitaker, 911 F.3d 919, 923 (8th Cir. 2018), and cases cited. "Threats alone constitute persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual suffering or harm." Padilla-Franco v. Garland, 999 F.3d 604, 608 (8th Cir. 2021) (quotation omitted). Likewise, religious or ethnic discrimination generally does not qualify as persecution. See Fisher v. INS, 291 F.3d 491, 494-95, 497 (8th Cir. 2002).

Here, the BIA adopted the IJ's finding that the evidence of He's two detentions, taken together and including the initial assault by a policeman, "does not

rise to the level of persecution." That determination is consistent with our prior past persecution decisions. He properly notes that his detentions -- fifteen and thirty days -- were longer than the detentions in Eusebio and Njong. Length of detention is certainly relevant and in this case seems excessive. But the totality of the circumstances is determinative. The 2016 International Religious Freedom Report stated that use of "administrative detention" to pressure religious believers to affiliate with patriotic associations was not uncommon. He presented no evidence of what efforts were made to gain his release, and without more the IJ could reasonably find that the detentions fell in the category of low-level intimidation and harassment. Thus, as in Yang v. Gonzales, 413 F.3d 757, 759-60 (8th Cir. 2005), He's "vague claim that he was detained and interrogated for one month . . . does not describe conduct severe enough to establish past persecution."

He further argues that he suffered past persecution "*per se*" because the Chinese government, by making him sign a paper in which he promised to abandon his religious practice (a paper he did not read), forbade him from openly and freely practicing his religion. Consistent with the fact-specific teaching of Elias-Zacarias, we have not recognized *per se* persecution. Moreover, the facts of this case would not support the claim even if we did. He testified that he made two attempts to sample a new faith -- one that he could only identify as Christian based on what a friend told him. Both gatherings were forcibly interrupted by local police, government interference

that would be intolerable in this country. But it was also at least facially contrary to the Chinese government's constitution and laws, and He made no further attempt to attend one of the many Christian churches, registered and unregistered, that approximately 70,000,000 Chinese were attending. Instead, he packed his bags and entered this country illegally to seek asylum. On these thin facts, we have no difficulty concluding that substantial evidence on this administrative record supports the BIA's past persecution determination.

C. Well-Founded Fear of Future Persecution. He next contends that the BIA erred in finding he lacked a well-founded fear of future persecution. This eligibility criterion has both an objective and subjective component. See Singh v. Gonzales, 495 F.3d 553, 556 (8th Cir. 2007). Neither the IJ nor the BIA questioned He's subjective fear of being returned to China.

Having failed to establish past persecution, He is not entitled to a presumption that he has a well-founded fear. See 8 C.F.R. § 1208.16(b)(1)(i). "Without the aid of the presumption, an asylum applicant may prove a well-founded fear of future persecution by showing an objectively reasonable fear of *particularized* persecution," or by showing a pattern or practice of persecution. Woldemichael, 448 F.3d at 1004, citing 8 C.F.R. § 208.13(b)(2)(iii).

The IJ found that He failed to establish an objective well-founded fear because his fear of religious persecution if he returns to China is

"speculative." The BIA agreed, citing portions of the 2016 International Religious Freedom Report -- that there are more than 70,000,000 Catholic and Protestant adherents in China, and that house church groups in some areas "had more freedom than in the past to conduct religious services, as long as they gathered only in private and kept congregation numbers low." The BIA found that a letter from He's father stating that Chinese police were searching for He within months of the May 2018 hearing, six years after his departure, did not show "that a reasonable person in his circumstances would fear persecution, rather than discrimination or harassment, if he is returned to China."

He argues that other statements in the 2016 Report contradict the sentence the BIA relied on, and that his prior arrests and detentions for attending house-church gatherings show that "[i]t is more than objectively reasonable to expect that he would face the same treatment if he returns to China," as evidenced by his father's letter. But that is not our governing standard of review. Rather, "to obtain judicial reversal of the BIA's determination, [He] must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution. That he has not done." Elias-Zacarias, 502 U.S. at 483-84. As in Yan Zhang v. Sessions, a factually similar case, "[s]ubstantial evidence supports the BIA's and IJ's finding that [He] failed to establish fear of future persecution." 681 F. App'x 554, 560 (8th Cir. 2017).

The BIA also found, based on the 2016 Report, that He did not show a pattern or practice of persecution of "adherents to unregistered Christian house churches," only harassment and brief detentions of some group gatherings at unregistered churches, actions that do not rise to the level of persecution. "A pattern or practice of persecution must be systemic, pervasive, or organized." Ngure v. Ashcroft, 367 F.3d 975, 991 (8th Cir. 2004). He argues the 2016 Report combined with his prior detentions support a finding of pattern or practice. Once again, however, that contrary finding is not compelled by the evidence in the administrative record.

As He failed to establish eligibility for asylum, he "necessarily cannot meet the more rigorous standard of proof for withholding of removal." Martin Martin, 916 F.3d at 1145 (quotation omitted). Accordingly, we deny the petition for review.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals
File: A205-263-028 – Omaha, NE
Date: January 16, 2020

In re: Xiaojie HE
IN REMOVAL PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT:
Gerald Karikari, Esquire

ON BEHALF OF DHS:
Anna L. Speas
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of China, has appealed from the decision of the Immigration Judge dates May 24, 2018, denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture. Sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A) and 1231(b)(3)(A). The Department of Homeland Security (DHS) opposes the appeal. The appeal will be dismissed.

We review factual findings made by the Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

We adopt and affirm the decision of the Immigration Judge. *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). Persecution "is an 'extreme concept' that involves the infliction or threat of death, torture, or injuries to one's person or freedom, on account of a protected characteristic" but "does not include low-level intimidation and harassment." *Singh v. Lynch*, 803 F.3d 998, 991 (8th Cir. 2015) (quotations omitted). Here, the respondent was arrested at an unregistered house church on two occasions. The first time, he was punched once on the chest and on the leg and held 15 days, and the next time, he was not physically mistreated but was held for 30 days (IJ at 3-5, 7; Tr. at 26-31, 36-39, 52). The harm to the respondent did not rise to the level of persecution.

In the absence of a showing of past persecution, the respondent did not meet his burden of establishing a well-founded fear of persecution on account of his religion or any other protected ground. Section 208(b)(1)(B)(i) of the Act; 8 C.F.R. § 1208.13(b)(2)(i). The State Department's 2016 International Religious Freedom Report for China indicates that there are an estimated 657 million religious adherents in China,

including 9 million Catholics (5.7 million of whom are affiliated with a state-sanctioned organization) and 68 million Protestants (23 million of whom are affiliated with a state-sanctioned organization) (Exh. 3 at 44). While the government did not recognize unregistered or house churches and regularly harassed such groups in some areas, members of such groups in other areas reported that they "had more freedom than in the past to conduct religious services, as long as they gathered only in private and kept congregation numbers low" (Exh. 3 at 58). Even if Chinese government officials have asked about the respondent following his departure 7 years ago, the respondent has not shown that a reasonable person in his circumstances would fear persecution, rather than discrimination or harassment, if he is returned to China (Tr. at 34; Exh. 3 at 33-34). Nor does the evidence show a "pattern or practice" of persecution of adherents to unregistered Christian house churches. *See Woldemichael v. Ashcroft*, 448 F.3d 1000, 1004 (8th Cir. 2006) (quotation omitted) ("A pattern or practice of persecution must be systemic, pervasive, or organized").

Because the respondent did not establish the lower burden of proof applicable to asylum, he necessarily did not establish his eligibility for withholding of removal, which carries a higher burden of proof. 8 C.F.R. § 1208.16(b); *see Bracic v. Holder*, 603 F.3d 1034, 1035 (8th Cir. 2010); *Matter of N-C-M-*, 25 I&N Dec. 535 n.1 (BIA 2011).

The respondent also contests the Immigration Judge's denial of his application for protection under the Convention Against Torture (IJ at 9; Respondent's Br. at 11-13). Based on the entirety of the record, the respondent, who has not been tortured in the past, has not established that it is more likely than not that he will be tortured following his return to China. 8 C.F.R. § 1208.18(a)(1). The likelihood of torture is a question of fact that we review for clear error. *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015) (stating that an Immigration Judge's predictive findings of what may or may not occur in the future are findings of fact, which are subject to a clearly erroneous standard of review). "Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture." 8 C.F.R. § 1208.18(a)(2). Here, the Immigration Judge's finding that the respondent has not shown a likelihood of torture is not clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i). Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ [Illegible]

FOR THE BOARD

APPENDIX C*

***The decision of the Immigration Judge reproduced in Appendix C at Pet.App.18a incorporates Attachment 1, General Statement of Law. This attachment is reproduced immediately following the decision at Pet.App.29a.**

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
OMAHA, NEBRASKA

File: A205-263-028
May 24, 2018

In the Matter of
XIAOJIE HE
Respondent
IN REMOVAL PROCEEDINGS

CHARGES: 212(a)(7)(A)(i)(I)

APPLICATIONS: Asylum, withholding of removal, withholding of removal under the Convention Against Torture (CAT)

ON BEHALF OF RESPONDENT: GERALD KARIKARI
Karikari and the Associates, P.C.
84 Bowery, 5th Floor
New York, New York 10013

ON BEHALF OF DHS: ANNA SPEARS
Assistant Chief Counsel

U.S. Department of
Homeland Security
1717 Avenue H
Omaha, Nebraska 68110

ORAL DECISION OF THE IMMIGRATION JUDGE

INTRODUCTION

The respondent is a 24-year-old male, single, native, and citizen of China. He entered the United States without inspection. See Exhibit 1. On August 2, 2012, Department of Homeland Security (DHS) commenced removal proceedings by filing a Notice to Appear (NTA) with the Eloy, Arizona Immigration Court. Venue was changed to the New York Immigration Court by respondent's motion on August 6, 2012. Venue was then changed to the Omaha Immigration Court by respondent's motion on November 13, 2012. The respondent previously admitted the allegations in his NTA so removal has been proven by clear and convincing evidence. He also admitted the charge of removability. The Court designated China as the country of removal should that become necessary. As relief from removal, respondent has applied for asylum, withholding of removal, and protection under the CAT. See Exhibit 2. Today, May 24, 2018, the Court held an individual hearing on the merits of his application.

STATEMENT OF LAW

In reference to the law applicable to this hearing in this order, the Court hereby incorporates

attachment 1, general statement of law, to this oral decision. A copy of the statement of law will be provided to both counsel at the conclusion of this decision.

CLAIM AND EVIDENCE PRESENTED

EXHIBITS

The exhibits in this hearing included the following: Exhibit 1, Notice to Appear, filed August 2, 2012; Exhibit 2, I-589, filed February 2013; Exhibit 3, respondent's proposed exhibits, filed May 9, 2018. The Court has considered all of the evidence submitted on the record. Even if a specific piece of the evidence or portion of testimony is not described with particularity, it does not mean that it was not carefully reviewed or considered.

TESTIMONY

The respondent testified in support of his application for relief and his testimony is summarized as follows: He is 24 years old. He is single. He has no children. He was born in China. He came to the United States in April of 2012 because he asserted he had been oppressed by the Chinese government. He has been here since then. He did live in York, Nebraska and in New York for a while, and he currently lives in North Platte, Nebraska. He has been there since three years ago. He is currently a chef at a restaurant in North Platte and he lives in North Platte with an employee of the same restaurant in which he works. He has his relatives, that is his mother's sisters, that live here in the United States. His parents and his

sister live in China. The highest education he reached was middle school.

He is applying for asylum because in China he was persecuted by the Chinese government. At that time, he had been attending a Christian meeting with friends. This was on October 12, 2011. There were approximately seven to eight people there. They prayed at this meeting. He did not know at the time that the gathering was not authorized by the government but he later found out that it was not. At this gathering, they read the Bible. At some point, approximately 15 minutes after he got there, four to five people charged in and said that the gathering was illegal. He was then taken to a police station. During the initial detention, all of the group were together but later they were separated. He was held there for approximately 15 days and while there he did not get enough food to eat. Also while detained, he was assaulted by the police and they used bad language toward him. They also told him that his attitude was bad. He was punched in the chest and the lower leg. He did not require medical treatment.

Once released, he did go to another Christian gathering. This was on January 22, 2012. He was arrested again at this gathering and detained for 30 days. During this time, he was held in a small room by himself. He was never allowed to see a Judge. He was eventually released. He was approximately 17 or 18 at this time. He was also not allowed to call his parents and he was fearful while being detained.

He was able to leave China through his father calling friends who eventually called snakeheads. In

coming to the United States, he traveled through Russia, Cuba, and Mexico.

He attends a Christian church here in Nebraska. He walks to this church and he goes on Sundays. He also was baptized in January. He was baptized to wash away his original sins.

If returned to China, he thinks that the Chinese officials will continue to look for him. He is afraid. He thinks that even moving to a different place in China that he would still be found because he thinks the police and the government in China will track him down. There are government-authorized Christian churches in China; however, they are controlled by the government and he does not think that people learn much there. He does not know the name of the gathering that he was at when he was arrested. The building that he was in was not a church, it was someone's home. There was a leader but he does not know if this person was a pastor. He also does not know the denomination of the faith that was practiced during this meeting. Everyone had a Bible. He did not pay attention to whether or not there were any other Christian materials. He only attended this type of gathering twice. He did not have much chance to talk to them because the police came in approximately 15 minutes after he got there. He thinks that it was a Christian faith because his friend told him it was.

He had been arrested twice in China. The first time was the first time he went to a Christian gathering and at that time he was held for 15 days. He was not fed enough food and during this detention, he was punched in the chest and legs. During the detention that lasted 30 days, he was never harmed. This

occurred on January 22. He initially stated 2013. He later stated, based on other evidence, that it was very likely 2012.

In between these two gatherings, he did not attend any other church or any other Christian gathering. He did not do so because he was fearful of the first time that he had been apprehended. He did talk to his friend about going to church but he did not go to any church. Although Exhibit 3, page 44, states that there are approximately seven million Christians in China, he does not know if this is necessarily true. This exhibit also states that there are nine million Catholics and 68 million Protestants in China but he did not go to a church in China so he does not understand exactly how many there are. He also did not understand about the churches when he was in China. Growing up he did not practice a religion. His sister and parents still do not practice a religion.

In the hometown in which he lived there were Christian churches. They had a big cross in front. He did not know how many Christian churches there were. He did not go to any of these churches because after being beaten up he was afraid. He also did not attend any of these churches because he had heard that if you go to these churches you do not learn anything. He also did not attend any church meetings because he just planned with his dad on how to come to the United States.

He was not aware that religious regulations vary by region in China. He does not know anyone who attended a Catholic church in China. He only knew people that went to the gathering at a friend's house such as what he attended. He has heard of people

encountering problems when they attend a Christian gathering at a home but, however, regarding the Christian government-authorized churches, he has never heard of anyone getting in trouble for attending one of those.

He stated that he did not attend a government-authorized Christian church in China because he had heard that you cannot learn much at these churches. He thinks that he learned this during conversations with a friend. He said that he does not think that he could go to another province in China and be safe because he thinks he will be found out. He said there is no point of going to an authorized Christian church in China because one cannot learn much.

In the United States he attends a Christian church. He does not know the denomination.

When he came to the United States, he was assisted by a snakehead. However, this snakehead did not give him any documents. He merely went to where this snakehead told him to go. To board the plane when he left China, he used his Chinese passport and he was allowed to leave without any problems. The passport had his name on it.

The church that he currently attends is by his work in North Platte. He has been attending that church for approximately two years. He attends when he can and he usually attends on Wednesdays. Between 2012 and 2016, he attended a church in York. When at the Wednesday services he reads the Bible and he prays. He owns a Bible. He reads the Bible when he has the time.

Having considered the respondent's testimony, the Court finds that the respondent was a credible witness.

STATEMENT OF THE ISSUES

With regard to the requested applications for relief the issues before the Court are (1) whether the respondent experienced harm that rises to the level of persecution on account of a protected ground. In this case he asserts it is religion; (2) whether the respondent demonstrated a well-founded fear on account of his religion; and (3) whether the respondent has shown that he will more likely than not be tortured in China with the consent or acquiescence of the Chinese government.

The respondent stated that he was introduced to his Christian faith in 2011. And in October 2011 while participating in a Christian gathering at a friend's home, the police entered, said the gathering was illegal, and took him to a police station. At the police station he was hit by a policeman on his chest and on his legs and he was detained for 15 days. Upon release and while there, he did not require any medical attention. In January 2012, while again participating in a church activity held at a home, he was detained by police. This time he was kept in a police station for approximately 30 days. In April of 2012 he came to the United States. The evidence also reflected that there are millions of Christians both Catholic and Protestant in China; that is, there is a total of approximately 657 million religious believers in China. See Exhibit 3, page 44. The evidence also showed that many individuals in China, that is

Christians, practice their faith. The respondent testified that although there was a government-authorized Christian church in his hometown he did not attend this church and he will not attend this church if returned to China because he had heard that one does not learn much in these churches.

PAST PERSECUTION

Persecution is extreme and it does not include low level intimidation or harassment. Minor beatings and isolated violence are not enough. Here the respondent testified that he was initially detained while attending a Christian gathering at a home for 15 days. And then again, after being found at another one of these Christian gatherings, he was detained for 30 days. He also testified that during the 15 days' detention he was hit on the chest and legs by a policeman. The Court finds that this evidence taken together does not rise to the level of persecution as contemplated by the INA. The harm that the respondent described, including the assault by the policeman, does not rise to the level of persecution.

However, the inquiry does not necessarily stop here as the respondent may still be eligible for relief if he can demonstrate that he has an independent well-founded fear of future persecution. Here the respondent claims that he will be persecuted in China if returned there on account of his Christian faith. The Court finds this assertion speculative. The respondent stated that he did not attend a Christian church in China when there and that he will not do so if he is returned to China because, as he stated, you do not learn much there. This is pure conjecture as he has

never attended a Christian church in China and he only heard this from a friend. He also asserted that the Chinese government will continue to look for him if he is returned there. This assertion too, is speculation. He was allowed to leave China in 2012 with a Chinese government-issued passport with his name on it. There was no evidence presented to the Court that anyone in China is still looking for the respondent nor that they will do so if he returns there or that they will even do so if he returns to China and attends a Christian church. Therefore, the Court finds that the respondent has not shown that it is more likely than not that he would face persecution in China on account of a protected ground. That is, his religion.

WELL-FOUNDED FEAR

To be eligible for relief, the respondent must demonstrate now that he has a well-founded fear of future persecution. The Court finds that he has not done so. The respondent suggests that he will be persecuted in China if he practices his Christian religion. The Court finds that this evidence is speculative. The respondent has been away from China for over six years and he presented no evidence that anyone in China is looking for him, anyone associated with the Chinese government is looking for him, or that he would be harmed or persecuted if he attends a Christian church in China or if he practices his Christian religion in China. The respondent has also not shown that he could not reasonably relocate within China to avoid any future harm if necessary to do so. The respondent also has not shown that he

would be singled out for harm in China, or that he would more likely than not be tortured in China without the consent of the Chinese government. This has not been shown.

Therefore, based on all of these reasons, the Court enters the following orders:

ORDERS

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

IT IS FURTHER ORDERED, that respondent's application for withholding of removal be denied.

IT IS FURTHER ORDERED, that respondent's application for protection under the Convention against Torture be denied.

IT IS FURTHER ORDERED, that the respondent be removed to China.

NANCY J. PAUL
Immigration Judge

//s//
Immigration Judge NANCY J. PAUL
i:05.t | doj federation services rp-sts | nancy.j.paul@usdoj.gov on July 22, 2019 at 3:06 PM GMT

ATTACHMENT 1*

***This General Statement of Law contains many typographical errors. These errors have been reproduced without alteration.**

General Statement of Law (Post-REAL ID Act of 2005[1]) on Asylum, Withholding of Removal, Convention Against Torture

I. Asylum

An alien requesting asylum bears the evidentiary burdens of proof and persuasion in connection with any application under section 208 of the Immigration and Nationality Act ("INA" or "the Act"). INA § 208(b)(l)(B); 8 C.F.R. § 1208.13(a). To qualify for a grant of asylum, the applicant must credibly demonstrate that he or she is a "refugee" within the meaning of INA § 10l(a)(42)(A). INA § 208(b)(l). To do this, the applicant must establish that he or she is unable or unwilling to return to, or avail himself or herself of the protection of, the applicant's country of nationality or, if the applicant is stateless, the country

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[1] The credibility determinations included in the REAL ID Act of 2005 apply to applications for asylum, withholding, and other relief from removal that were *initially* filed on or after May 11, 2005, whether with an asylum officer or an Immigration Judge. See Matter of S-B-, 24 I&N Dec. 42 (BIA 2006) (emphasis added) (finding that the REAL ID Act provisions were not applicable to credibility determinations made in adjudicating the respondent's applications where the respondent filed his applications for relief with an asylum officer prior to May 11, 2005, the effective date of the Real ID Act, and later renewed his applications in removal proceedings before an Immigration Judge subsequent to May 11, 2005).

of last habitual residence. INA § l0l(a)(42)(A). This inability or unwillingness to return must be because the applicant experienced past persecution in that country or has a well-founded fear of future persecution, and such persecution must be on account of the applicant's "race, religion, nationality, membership in a particular social group, or political opinion." *Id.* Finally, the alien must demonstrate that he or she does not fall into any of the mandatory denial categories, *see* INA § 208(b)(2); 8 C.F.R. § 1208.13(c), and that he or she is eligible for asylum as a matter of discretion. *See* INA § 208(b)(l)(A); 8 C.F.R. § 1208.14. *See also INS v. Cardoza-Fonseca,* 480 U.S. 421, 423 (1987).

A. One Year Bar

Asylum is not available unless the applicant demonstrates by clear and convincing evidence that the application has been filed within one year after the date of the applicant's arrival in the United States. INA § 208(a)(2)(B). The asylum applicant must either demonstrate by clear and convincing evidence that he or she complied with the filing deadline, or demonstrate to the court's satisfaction that his or her failure to do so is excused by either changed or extraordinary circumstances relating to the filing delay. INA § 208(a)(2)(D); 8 C.F.R §§ 1208.4(a)(2)(i), (a)(4)-(5). The one-year period begins to run from the date of the applicant's most recent entry to the United States, regardless of the aggregate length of the applicant's time in the country. See 8 C.F.R. § 1208.4(a)(2). "Changed circumstances" can include

changes in the country of removal, changes in the applicant's circumstances (including changes in relevant law), or reaching the age of 21. *Id.; Goromou v. Holder,* 721 F.3d 569 (8th Cir. 2013). "Extraordinary circumstances" must directly relate to the failure to timely file and include "serious illness or mental or physical disability," "legal disability," ineffective assistance of counsel, maintenance by the applicant of special immigration status within a reasonable period prior to filing, the rejection of a timely-filed application for improper service, or the death, serious illness, or incapacitation of the applicant's legal representative or immediate family member. 8 C.F.R. § 1208.4(a)(5)(i)-(vi); *Goromou,* 721 F.3d 569. In either case, the alien must still file for asylum within a "reasonable" period following the change. 8 C.F.R § 1208.4(a)(4)(ii). *See also Matter of M-A-F-*, 26 I&N Dec. 651 (BIA 2015); *Bernal-Rendon v. Gonzales,* 419 F.3d 877 (8th Cir. 2005).

B. Credibility

It is the applicant's burden to satisfy the Immigration Judge that his testimony is credible. See *Fesehaye v. Holder,* 607 F.3d 523,526 (8th Cir. 2010). An applicant's own testimony is sufficient to meet his or her burden of proving his or her asylum claim if it is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his or her fear. 8 C.F.R. § 1208.13(a). The following factors, taking into consideration the "totality of the circumstances," may be considered in the assessment of an applicant's credibility: demeanor, candor,

responsiveness of the applicant, the inherent plausibility of the claim, the consistency between oral and written statements, the consistency of such statements with evidence of record, and any inaccuracy or falsehoods in such statements, even if those inaccuracies or falsehoods are not centrally related to the applicant's claim. INA § 208(b)(l)(B)(iii). Testimony is not considered credible when it is inconsistent, contradictory with current country conditions, or inherently improbable. *See Fofana v. Holder,* 704 F.3d 554, 558 (8th Cir. 2013) (concluding that the lack of corroboration and consistency are cogent reasons to question an applicant's believability); See also Matter of S-M-J-, 21 I&N Dec. 722, 729. While omissions of facts in an asylum application or during testimony might not, in themselves, support an adverse credibility determination, the omission of key events coupled with numerous inconsistencies may provide a specific and cogent reason to support an adverse credibility finding. *Manani v. Filip,* 552 F.3d 894, 90I (8th Cir. 2009) (concluding that inconsistencies or omissions that relate to the basis of persecution are not minor and may support an adverse credibility finding). The Court may properly base a credibility finding on the implausibility of an alien's testimony, as long as there are specific and cogent reasons for disbelief. *Ombongi v. Gonzales,* 417 F.3d 823, 825-26 (8th Cir. 2005). Specific, cogent reasons include presenting testimony that does not match the alien's application or the testimony of other witnesses. *Litvinov v. Holder,* 605 F.3d 548, 555 (8th Cir. 2010).

Where it is reasonable to expect corroborating evidence for certain specific elements of an applicant's claim, such evidence should be provided. *See also Matter of S-M-J-, 21 I&N Dec. 722, 725-26.* Although lack of corroborative evidence is not necessarily fatal to an asylum application, if an Immigration Judge or other 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. INA § 208(b)(l)(B)(ii). If such evidence is unavailable, the applicant must explain its unavailability, and the Immigration Judge must ensure that the applicant's explanation is included in the record. *See Matter of S-M.J-*, 21 I&N Dec. at 724-26. If the Court encounters inconsistencies in the testimony, contradictory evidence, or inherently improbable testimony, the absence of corroboration can lead to a finding that an applicant has failed to meet his or her burden of proof. *See Rucu-Roberti v. INS*, 177 F.3d 669, 670 (8th Cir. 1999) (indicating that when an applicant makes implausible allegations and fails to present corroborating evidence, an adverse credibility determination may be warranted); *Matter of J-Y-C-*, 24 I&N Dec. 260, 266 (BIA 2007); *Zewdie v. Ashcroft*, 381 F.3d 804 (BIA 2004); *Matter of S-M-J-*, 21 I&N Dec. at 725-26.

A. Qualifying Persecution

Asylum is only available to applicants who have experienced past persecution or have a well-founded fear of future persecution on account of the applicant's

race, religion, nationality, membership in a particular social group, or political opinion. *See* INA § 10l(a)(42)(A).

1. Forms of Persecution

The meaning of "persecution," as developed through United States case law, contemplates harm or suffering inflicted upon an individual in order to punish him or her for possessing a belief or characteristic that the persecutor seeks to overcome. *Matter of Acosta,* 19 I&N Dec. 211, 222-23 (BIA 1985), *overruled in part on other grounds.* Stated differently, persecution is the infliction or threat of death, torture, or injury to one's person or freedom for a proscribed reason. *Agha v. Holder,* 743 F.3d 609, 614 (8th Cir. 2014); *Cubillos v. Holder*, 565 F.3d 1054, 1057 (8th Cir. 2009). An applicant for asylum must show evidence of persecution that is sufficiently specific or imminent. *Supangat v. Holder*, 735 F.3d 792, 795 (8th Cir. 2013).

Persecution is "the infliction or threat of death, torture, or injury to one's person or freedom." *Barillas-Mendez v. Lynch*, 790 F.3d 787, 789 (8th Cir. 2015) (quoting *Regalado-Garcia v. INS*, 305 F.3d 784, 787 (8th Cir. 2002)) (internal quotation marks omitted). Persecution is "extreme" and does not include "low-level intimidation and harassment." *Id.* (quoting *Alavez-Hernandez v. Holder*, 714 F.3d 1063, 1067 (8th Cir. 2013)) (internal quotation marks omitted). "Minor beatings" and "isolated violence" are not enough. *Id.* (quoting *Garcia-Colindres v. Holder*, 700 F.3d 1153, 1157 (8th Cir. 2012)). Beyond physical harm,

persecution may also present itself as "the deliberate imposition of severe economic disadvantage or the deprivation of liberty food ... or other essentials of life." *Id.* (quoting *Ngengwe v. Mukasey*, 543 F.3d 1029, 1036 (8th Cir. 2008)) (ellipsis in original). Low-level intimidation and harassment alone do not rise to the level of persecution, *Matul-Hernandez v. Holder*, 685 F.3d 707, 711 (8th Cir. 2012), nor does harm arising from general conditions such as anarchy, civil war, or mob violence. *Agha,* 743 F.3d at 617. Even minor beatings or limited detentions do not usually rise to the level of past persecution. *Bhosale v. Mukasey,* 549 F.3d 732, 735 (8th Cir. 2008); *Kondakova v. Ashcroft,* 383 F.3d 792, 797 (8th Cir. 2004).

Although persecution does not normally include unfulfilled threats of physical injury, *Setiadi v. Gonzales,* 437 F.3d 710, 713 (8th Cir. 2006), credible threats may contribute to a well-founded fear of future persecution, *See Ngengwe v. Mukasey,* 543 F.3d 1029, 1036 (8th Cir. 2008); *Shalla v. Gonzales,* 492 F.3d 946, 951 (8th Cir. 2007). Threats that "are exaggerated, nonspecific, or lacking in immediacy" may be insufficient to establish persecution. *Lav. Holder,* 701 F.3d 566, 571 (8th Cir. 2012). Discrimination generally does not qualify as persecution, except in extraordinary cases. *See Berte v. Ashcroft*, 396 F.3d 993, 996-97 (8th Cir. 2005); *Fisher v. I.N.S.,* 291 F.3d 491, 497-98 (8th Cir. 2002).

2. Private Actors

In order to qualify for asylum purposes, the persecution must be inflicted by the government of a

country or by persons or an organization that the government is unwilling or unable to control. *Quinteros v. Holder,* 707 F.3d 1006, 1009 (8th Cir. 2013). To establish persecution by private actors, the applicant must show more than just that the government has difficulty controlling private behavior, rather he or she must demonstrate that the government condoned the private behavior or at least demonstrated a complete helplessness to protect the victims. *Salman v. Holder,* 687 F.3d 991, 995 (8th Cir. 2012); In particular,“ ‘the fact that police take no action on a particular report does not necessarily mean that the government is unwilling or unable to control criminal activity, because there may be a reasonable basis for inaction.’ ” *Id.* (citation omitted).

3. Qualifying Reasons for Persecution, including Membership in a Particular Social Group

In order to qualify for asylum, the persecution in question must be on account of at least one of five specially protected grounds: race, religion; nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A). Although the protected ground does not need to be the sole reason for the persecution, it must be at least one central reason. *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 212-14 (BIA 2007). In other words, the protected ground cannot be “incidental, tangential, superficial, or subordinate to another reason.” *Id.* at 214. In addition, the applicant need not actually possess the characteristic that the persecutor is targeting, as long

as the persecutor has or will impute that characteristic to the applicant. *Id.* at 211. In other words, if a persecutor believes that the applicant holds a particular political belief, the applicant is not ineligible for asylum simply because the persecutor is mistaken in this belief.

One qualifying type of persecution is persecution on account of the applicant's membership in a particular social group. A cognizable particular social group is: (1) composed of members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014); see also *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014).

An immutable characteristic is one "that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of Acosta,* 19 I&N Dec. at 233. The term "particular social group" has been construed to mean a group of persons who "hold an immutable characteristic, or common trait such as sex, color, kinship, or in some cases shared past experiences." *Davila-Mejia*, 531 F.3d at 628 (*citing Matter of Acosta*, 19 I&N Dec. 211,233 (BIA 1985)). A characteristic is immutable when it either cannot be changed or forcing change on a respondent would alter his fundamental identity or conscience. *See W-G-R-*, 26 I&N Dec. at 212 (quoting *Acosta*, 19 I&N Dec. at 233).

Social distinction is not determined by the persecutor's perception but "exists where the relevant society perceives, considers, or recognizes the group as a distinct social group." *See W-G-R.* at 217-18. Social distinction does not require "ocular" visibility. *Id* at 216.

This particularity inquiry may require looking into the culture and society of the respondent's home country to determine if the class is discrete and not amorphous. *Matter of W- G-R-*, 26 I&N Dec. at 214-15. A cognizable particular social group is particularized by characteristics that clearly benchmark membership therein. *See M-E-V-G-*, 26 I&N Dec. at 239. A group with sufficient particularity is not amorphous, diffuse, overbroad, or subjective. *Id.* (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005)). A group that has "discrete and ... definable boundaries" will satisfy the particularity requirement. *M-E-V-G-*, 26 I&N Dec. at 239. A particular social group also cannot be circularly defined by the fact that it suffers persecution. *Matter of C-A-*, 23 I&N Dec. 951, 958 (BIA 2006).

The INA does not provide a definition for the term "particular social group." *Hernandez-Montiel*, 225 F.3d at 1091. The BIA has interpreted the term to mean a group with members who "share a common, immutable characteristic" that "members of the group either cannot change, or should not be required to change because *666 it is fundamental to their individual identities or consciences." *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985); *In re C-A-*, 23

I. & N. Dec. 951, 955-56 (BIA 2006) (quoting the *Acosta* formulation and affirming continued adherence to it). The BIA has explained that "[t]he shared characteristic might be an innate one such as sex, color, or kinship ties," which would make the fact of membership "something comparable to the other four grounds of persecution under the Act,[4] namely, something that is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed." *In re C-A-*, 23 I. & N. Dec. at 955 (quoting Acosta, 19 I. & N. Dec. at 233-34). The BIA also has clarified that a group must have "social visibility" and adequate "particularity" to constitute a protected social group. *In re A-M-E & J-G-U-*, 24 I. & N. Dec. 69, 75-76 (BIA 2007).

The BIA, however, does not "generally require a 'voluntary associational relationship,' 'cohesiveness,' or strict 'homogeneity among group members.' " *Id.* at 74. The BIA has not yet specifically addressed in a precedential decision whether gender by itself could form the basis of a particular social group. It has, however, recognized as a "particular social group" women who belong to a particular tribe and who oppose female genital mutilation because that group is defined by characteristics that cannot be changed or should not be changed. *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 366 (BIA 1996). Whether females in a particular country, without any other defining characteristics, could constitute a protected social group remains an unresolved question for the BIA.

Perdomo v. Holder, 611 F.3d 662, 665-66 (9th Cir. 2010)

In order to clarify that the "social visibility" element required to establish a cognizable "particular social group" does not mean literal or ""ocular" visibility, that element is renamed as "social distinction." *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007); and *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), clarified. (2) An applicant for asylum or withholding of removal seeking relief based on "membership in a particular social group" must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. (3) Whether a social group is recognized for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor. Matter of M-E-V-G-, 26 I. & N. Dec. 227, 227 (BIA 2014)

Depending on the facts and evidence in an individual case, "married women in Guatemala who are unable to leave their relationship" can constitute a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal under sections 208(a) and 24l(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ l 158(a) and l23l(b)(3) (2012). Matter of A-R-C-G-, 26 I. & N. Dec. 388, 388 (BIA 2014)

4. Past Persecution/ Well-Founded Fear of Future Persecution

An applicant may qualify for asylum by showing either that he or she has suffered persecution as described above in the past or that the applicant has a well-founded fear of such persecution in the future, and by showing that this persecution has made the applicant unable or unwilling to return to that country. 8 C.F.R. § 1208.13(b)(l); *see also* INA § 101(a)(42)(A). The persecution must have occurred, or be feared to occur, in the applicant's country of nationality or, if the applicant is stateless, in the applicant's country of last habitual residence. *See* INA § 101(a)(42)(A). As discussed above, the persecution must be "on account of" the applicant's race, religion, nationality, membership in a particular social group, or political opinion. *See* INA § 10l(a)(42)(A).

An applicant who is found to have established such past persecution shall also be presumed to have a well-founded fear of future persecution on the basis of the original claim. 8 C.F.R. § 1208.13(b)(l). However, this presumption may be rebutted if the Service establishes by a preponderance of the evidence that either: (1) there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution; or (2) the applicant could avoid future persecution by relocating to another part of the country that the applicant is seeking asylum from, and, under the circumstances, it

would be reasonable to expect the applicant to do so.[2] *See* 8 C.F.R. § 1208.13(b)(l)(i)-(ii). A fundamental change in circumstances may involve either changed conditions in the home country, such as a new political climate, or a change in personal circumstances such that the applicant no longer has a well-founded fear of persecution. *See Karim v. Holder*, 596 F.3d 893, 898 (8th Cir. 2010); *Mambwe v. Holder*, 572 F.3d 540, 548 (8th Cir. 2009); *Ixtlilco-Morales v. Keisler*, 507 F.3d 651, 654-55 (8th Cir. 2007).

In cases where an applicant has established past persecution but the Service has rebutted the presumption of a well-founded fear of persecution, the Immigration Judge shall deny the asylum application in the exercise of his or her discretion. *See* 8 C.F.R. § 1208.13(b)(l)(i)-(ii). But if an applicant who has suffered past persecution can demonstrate compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution or establish that there is a reasonable possibility that he or she may suffer some other serious harm upon removal to that country, the Immigration Judge may grant the applicant asylum in his or her discretion even in the absence of a well-founded fear of persecution. 8 C.F.R § 1208.13(b)(l)(iii). When granting discretionary asylum based on the severity of past persecution, the degree of harm suffered, the length of time over which the harm was inflicted, and evidence of psychological

[2] Some factors used to assess whether internal relocation is reasonable are listed in 8 C.F.R. § 1208.13(b)(3), but adjudicators are not limited to these factors.

trauma resulting from the harm, among other factors, should be considered. *Abrha v. Gonzales,* 433 F.3d 1072, 1076 (8th Cir. 2006).

If the applicant's fear of persecution is unrelated to past persecution, the applicant bears the burden of establishing that the fear is well-founded. See 8 C.F.R. § 1208.13(b)(l). An applicant has a well-founded fear of future persecution if: (1) 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; (2) there is a reasonable possibility of suffering such persecution if he or she were to return to that country; and (3) 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. 8 C.F.R. § 1208.13(b)(2)(i). A well-founded fear of persecution does not exist where the applicant could avoid persecution by relocating to another part of the country and such relocation would be reasonable. 8 C.F.R. § 1208.13(b)(2)(ii). In other words, the applicant's fear of persecution must be country-wide. *Mohamed v. Ashcroft,* 396 F.3d 999, 1003 (8th Cir. 2005); *Matter of Acosta,* 19 I&N Dec. at 235.

To establish a well-founded fear of persecution, an applicant must present credible evidence that demonstrates that the feared harm is of a level that amounts to persecution, that the harm is on account of a protected characteristic, that the persecutor could become aware or already is aware of the

characteristic, and that the persecutor has the means and inclination to persecute. *Matter of Y-B-*, 21 I&N Dec. 1136, 1149 (BIA 1998). A well-founded fear of persecution must be both subjectively genuine and objectively reasonable. *Yu An Li v. Holder*, 745 F.3d 336, 340 (8th Cir. 2014). To demonstrate a subjective fear of persecution, an applicant must demonstrate a genuine apprehension or awareness of the risk of persecution. *Matter of Acosta*, 19 I&N Dec. at 221. To satisfy the objective element, the applicant's subjective fear must be supported by " 'credible, direct, and specific evidence that a reasonable person in the alien's position would fear persecution if returned to the alien's country.' " *Damkan v. Holder*, 592 F.3d 846, 850 (8th Cir. 2010) (quoting *Mamana v. Gonzales*, 436 F.3d 966, 968 (8th Cir. 2006)). A ten percent chance of future persecution can be sufficient to meet the asylum requirements. *Cardoza-Fonseca,* 480 U.S. at 431; *Bellido v. Ashcroft,* 367 F.3d 840, 845 n.7 (8th Cir. 2004).

In evaluating whether the applicant has sustained his or her burden of proving that the applicant has a well-founded fear of persecution, the applicant is not required to provide evidence that he or she would be singled out individually for persecution if the applicant establishes that there is a pattern or practice of persecution of persons similarly situated to the applicant on account of one of the enumerated grounds and that the applicant is a member of and identified with that group. 8 C.F.R. § 1208.13(b)(2)(iii). *See also Matter of S-M.J-*, 21 I&N Dec. 722, 731. However, to constitute a "pattern or

practice," the persecution of the group must be "systemic, pervasive, or organized." *Ngure v. Ashcroft,* 367 F.3d 975, 991 (8th Cir. 2004).

B. Discretion

An applicant for asylum must also establish that he or she is eligible for asylum as a matter of discretion, as asylum may be denied in an exercise of discretion even if the applicant is statutorily eligible. See INA § 208(b)(1); 8 C.F.R. § 1208.14. If an applicant has committed crimes, especially crimes that are dangerous or violent, the application may be denied as a matter of discretion even though those crimes fall outside of the mandatory denial categories listed above.

II. Withholding of Removal under INA § 241(b)(3)

If a respondent has failed to establish a well-founded fear of persecution on account of a protected ground for asylum, he also fails under the more stringent standard of proof required for withholding of removal. *See Prokopenko v. Ashcroft,* 372 F.3d 941, 944 (8th Cir. 2004).

As with asylum, a threshold determination must be made as to the credibility of the applicant for withholding of removal. INA § 241(b)(3)(C); *see also* INA § 208(b)(l)(B)(ii)-(iii). An applicant must establish that there is a "clear probability" that his or her life or freedom would be threatened on account of the applicant's race, religion, nationality, membership in a particular social group, or political opinion. *See* INA

§ 241(b)(3)(C); *Antonio-Fuentes v. Holder,* 764 F.3d 902, 904 (8th Cir. 2014). Put another way, withholding of removal will be granted only if an applicant proves that it is more likely than not that he or she would be persecuted upon return to the applicant's country. *Goswell-Renner v. Holder,* 762 F.3d 696, 700 (8th Cir. 2014). An applicant who fails to establish a well-founded fear of persecution also fails under the more stringent standard of proof required for withholding of removal. *Khrystotodorov v. Mukasey,* 551 F.3d 775, 781 (8th Cir. 2008).

A conviction for a particularly serious crime will render an applicant statutorily ineligible for withholding of removal under INA § 241(b)(3). INA § 241(b)(3)(B)(ii). Aggravated felony convictions are considered particularly serious crimes if the term of imprisonment equals or exceeds five years, either separately or in the aggregate. INA § 241(b)(3)(B). However, in cases where aggravated felony sentences do not equal or exceed five years, the Court is authorized to determine whether a conviction constitutes a particularly serious crime. INA § 24l(b)(3)(B). When determining if a crime is "particularly serious," the Court looks " 'to such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed.' " *Tian v. Holder,* 576 F.3d 890, 897 (8th Cir. 2009) (quoting *Matter of Frentescu*, 18 I&N Dec. 244,247 (BIA 1982)). The BIA has also noted that "[c]rimes against persons are more likely to be categorized as 'particularly serious crimes,' " although some crimes against property

might also be particularly serious. *Matter of Frentescu,* 18 I&N Dec. at 247.

Withholding of removal is also unavailable for: 1) aliens who ordered, incited, assisted or otherwise participated in the persecution of an individual on account of one of the protected grounds; 2) aliens who the Court has reason to believe committed a serious nonpolitical crime outside of the United States; and 3) aliens who the Court has serious reasons for believing are a danger to the security of the United States, including aliens described in INA § 237(a)(4)(B) (regarding terrorist activities). INA § 24l(b)(3)(B).

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 20-1328

Xiaojie He

Petitioner

v.

Merrick B. Garland,

Attorney General of the United States

Respondent

National Immigrant Justice Center

Amicus on Behalf of Petitioner

Petition for Review of an Order of the

Board of Immigration Appeals

(A205-263-028)

ORDER

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

Judges Gruender, Benton, Kelly, and Grasz would grant the petition for rehearing *en banc*.

June 7, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

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s/Michael E. Gans

APPENDIX E

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 previously 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 otherwise 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 aggravated 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 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) 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 under 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 title, 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. § 1003.1(d)(3) provides:

Organization, jurisdiction, and powers of the Board of Immigration Appeals

(d) Powers of the Board –

*****

(3) Scope of review.

(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.

(ii) The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*.

(iii) The Board may review all questions arising in appeals from decisions issued by Service officers *de novo*.

(iv)

(A) The Board will not engage in factfinding in the course of deciding cases, except that the Board may take administrative notice of facts that are not reasonably subject to dispute, such as:

(1) Current events;

(2) The contents of official documents outside the record;

(3) Facts that can be accurately and readily determined from official government sources and whose accuracy is not disputed; or

(4) Undisputed facts contained in the record.

(B) If the Board intends to rely on an administratively noticed fact outside of the record, such as those indicated in paragraphs (d)(3)(iv)(A)(1) through (3) of this section, as the basis for reversing an immigration judge's grant of relief or protection from removal, it must provide notice to the parties of its intent and afford them an opportunity of not less than 14 days to respond to the notice.

(C) The Board shall not *sua sponte* remand a case for further factfinding unless the factfinding is necessary to determine whether the immigration judge had jurisdiction over the case.

(D) Except as provided in paragraph (d)(6)(iii) or (d)(7)(v)(B) of this section, the Board shall not remand a direct appeal from an immigration judge's decision for additional factfinding unless:

(1) The party seeking remand preserved the issue by presenting it before the immigration judge;

(2) The party seeking remand, if it bore the burden of proof before the immigration judge,

attempted to adduce the additional facts before the immigration judge;

(3) The additional factfinding would alter the outcome or disposition of the case;

(4) The additional factfinding would not be cumulative of the evidence already presented or contained in the record; and

(5) One of the following circumstances is present in the case:

(i) The immigration judge's factual findings were clearly erroneous;

(ii) The immigration judge's factual findings were not clearly erroneous, but the immigration judge committed an error of law that requires additional factfinding on remand; or

(iii) Remand to DHS is warranted following de novo review.

(v) The Board may affirm the decision of the immigration judge or the Department of Homeland Security on any basis supported by the record, including a basis supported by facts that are not reasonably subject to dispute, such as undisputed facts in the record.