05-4569-ag

To Be Argued By:
MICHAEL J. GUSTAFSON

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FOR THE SECOND CIRCUIT

Docket No. 05-4569-ag

United States Court of Appeals

A
Z
AM AHMED

Petitioner,

-vs-

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR ALBERTO R. GONZALES ATTORNEY GENERAL OF THE UNITED STATES

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STATEMENT OF JURISDICTION

This Court has jurisdiction under § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (2005), to review the petitioner's challenge to the Bureau of Immigration Appeals' final order dated August 4, 2005, denying him asylum and withholding of removal. The petitioner filed a timely petition for review on August 30, 2005. *See* 8 U.S.C. § 1252(b)(1) (establishing 30-day filing deadline).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether substantial evidence supports the Board of Immigration Appeals' rejection of the petitioner's asylum and withholding of removal claims where a reasonable factfinder would not be compelled to reverse the adverse credibility determination in light of the unexplained inconsistencies and contradictions regarding material elements of his claims.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-4569-ag

AZAM AHMED,

Petitioner,

-vs-

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR ALBERTO R. GONZALES ATTORNEY GENERAL OF THE UNITED STATES

Preliminary Statement

Azam Ahmed ("Ahmed" or the "petitioner"), a native and citizen of Bangladesh, petitions this Court for review of a decision of the Board of Immigration Appeals ("BIA") dated August 4, 2005 (Joint Appendix 2) ("JA"). The BIA reopened the petitioner's original proceeding and affirmed the oral decision of an Immigration Judge ("IJ") dated June 25, 1999, denying the petitioner's application

for asylum and withholding of removal under the Immigration and Nationality Act of 1952, as amended ("INA") and ordering him removed from the United States. (JA 2-4 (BIA's decision and order) and JA 243-258 (IJ's decision and order)).

Substantial evidence supports the BIA's determination that Ahmed failed to provide credible testimony and evidence in support of his claim for asylum and withholding of removal. The BIA identified several inconsistencies and discrepancies in Ahmed's testimony, and noted that Ahmed had been unable to provide a satisfactory explanation for these discrepancies when confronted with them at his hearing. Furthermore, the BIA noted the documents Ahmed submitted did not assist his claim. For these reasons, the petition for review should be denied.

Statement of the Case

Ahmed entered the United States at New York, New York without having been admitted or paroled on approximately December 25, 1993. (JA 431). He filed a request for asylum and withholding of removal, which was received by the Immigration and Naturalization Service Center Director on May 23, 1994. (JA 395-399). On November 12, 1997, he had an asylum interview. (JA 341-342).

On approximately November 14, 1997, the former Immigration and Naturalization Service (the "INS" or the

"government") issued a Notice to Appear initiating these proceedings.[1] (JA 431).

Between approximately March 4, 1998, and June 25, 1999, an IJ conducted removal hearings. Ahmed testified during the June 25, 1999, removal hearing. (JA 286-340). On the same day, the IJ issued an oral decision denying Ahmed's application for asylum, withholding of removal under the INA, withholding of removal under the Convention Against Torture,[2] and voluntary departure. The IJ ordered Ahmed removed from the United States to Bangladesh. (JA 241-258).

On August 26, 2002, the BIA summarily affirmed the IJ's decision. (JA 187). The petitioner subsequently filed on September 25, 2002, a motion to Reopen/Reconsider and Stay of Deportation of the BIA decision (JA 163-185),

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[1] The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in various sections of the U.S.C.), eliminated the INS and reassigned its functions to subdivisions of the newly created Department of Homeland Security. *See Spina v. Department of Homeland Security*, 470 F.3d 116, 119 n.1 (2d Cir. 2006). However, because all of the relevant actions in this case were undertaken by the INS, this brief will uniformly refer to the pertinent agency as the INS.

[2] Although Ahmed pursued a claim for relief under the Convention Against Torture before the agency, he does not mention that claim in his brief to this Court and thus has waived any challenge to the denial of that claim. *See Yueqing Zhang v. Gonzales*, 426 F.3d 540, 542 n.1 (2d Cir. 2005) (holding that alien abandoned claim for relief under CAT by failing to mention claim in his brief).

which was denied by the BIA on December 27, 2002. (JA 154). Ahmed then filed a petition for review in the United States Court of Appeals for the Second Circuit, which was dismissed on November 16, 2004, in accordance with the parties' stipulation to vacate the BIA's decision dated December 27, 2002, and remand for a new decision based on Ahmed's motion to reconsider dated September 25, 2002. (JA 150-152).

On remand, the parties submitted briefs to the BIA in April 2005. (JA 8-147).

On August 4, 2005 the BIA reopened the proceedings, affirmed the IJ's denial of Ahmed's application for asylum and withholding of removal once again, and dismissed Ahmed's appeal. (JA 2-4). This petition for review followed.

Statement of Facts

A. Ahmed's Entry into the United States and Applications for Asylum and Withholding of Removal

Ahmed is a native and citizen of Bangladesh. He entered the United States without having been admitted or paroled on December 25, 1993. (JA 295). On approximately May 23, 1994, he submitted an initial Request for Asylum. (JA 395-399). In that application, he requested asylum based on his belief that, if he returned to Bangladesh, he would be killed by the Awami League, a political party in Bangladesh, as a result of his refusal to

join them. (JA 394). Ahmed was interviewed by an asylum officer on November 12, 1997. (JA 341-342).

The INS determined Ahmed to be deportable from the United States and placed him in removal proceedings, serving him with a Notice to Appear, and filing the Notice with the immigration court on November 14, 1997. (Form I-862) (JA 431-432). The INS charged that Ahmed was removable under § 212(a)(6)(A)(I) of the INA, for having entered the United States without being admitted or paroled after inspection. (JA 431).

B. Ahmed's Removal Proceedings

On March 4, 1998, Ahmed appeared with counsel before an IJ in New York City, conceded that he was removable as charged by the INS, and stated that he was seeking relief in the form of asylum and withholding of deportation and, alternatively, voluntary departure. (JA 263). The hearing was adjourned until May 6, 1998, to allow Ahmed to supplement his asylum application and submit original documents. (JA 265). The hearing on May 6, 1998, was adjourned until May 13, 1998, to allow Ahmed to submit additional documentation. (JA 267). The May 13, 1998, hearing was in turn adjourned until November 23, 1998. (JA 268-271). At the November 23, 1998, hearing the IJ marked Exhibits and adjourned until March 24, 1999, to permit verification of additional documents. (JA 272-281). The March 24, 1999, hearing was adjourned until June 25, 1999. (JA 282-285).

At the June 25, 1999 hearing, Ahmed, through his attorney, identified his 1997 application for asylum as

supplemented, confirmed that he reviewed and understood its contents, and stated that the application was true and correct. (JA 292-293). Having confirmed through his attorney that Ahmed had read and adopted the revised asylum application, the IJ accepted the asylum application as supplemented and certain other documentary materials offered in support of Ahmed's application. (JA 294).

The INS objected to the admission of certain documents, however, including documents purported to be court proceedings from Bangladesh, which had been marked for identification (at a prior hearing) as Exhibits 5, 6, 7, and 8. (JA 276). The IJ postponed a final ruling on their admissibility until after hearing testimony. (JA 289).

1. Documentary Submissions

The IJ marked several documents into evidence including an application for asylum, withholding of removal and Convention Against Torture relief.

Ahmed submitted several documents to the IJ during the removal hearing.[3] The INS objected to the admission of some documents, as noted above, and the IJ withheld a final evidentiary ruling.

In his original asylum application (Exhibit 2, JA 395), Ahmed stated:

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[3] Several of the documents were written in Bangla, for which English translations were provided.

By the dynamic leadership and patriotic activities of General Ershad, I was convinced at the politics and decided to joined (sic) the Jatio (sic) Party as a general member from Keranigonj unit at Dhaka in 1987. Due to my hard working for the party and various development activities I was promoted as Publicity Secretary from the same unit in 1989 which I hold (sic) until my departure to the United States.

As an (sic) Publicity Secretary my was (sic) to arrange public meetings, and publish the party image in the society. I was also involved with the movement to free our leader General Ershad.

After the fall of the regime, leaded (sic) by General Ershad in December 1990, the Jatio Party members and the leaders became the police target for harassment and brutality. Bangladesh Nationalist Party (BNP) unleashed its members to intimidate JP members. I was beaten on several occasions by BNP workers but the police never took any action against them.

On August 1993 BNP attacked me while I was coming back after attending a JP meeting. I tried to defend myself, but was outnumbered and beaten severely. I went to the polie (sic) station to file a complain (sic) against those BNP workers. Instead, police arrested me for trying to raise my voice to free our leader. I was bleeding from my nose and mouth, but didn't get any medical assistance from polie (sic). I requested them to take me to the

> hospital because of severe head and back pain, but they didn't pay any attention to my request. Next day, when I asked them the reasons for arresting me, they started torturing me again and told me to shut my mouth. I was locked for 20 days and every day police tortured me. It was the worst time in my life.
>
> When my family visited me at the police station they were informed that the police filed charges against me for trying to raise my voice to free our leader. As I told my family the fact (sic) they were worried about my future safety. Police asked my family to pay an amount of taka 50,000/- for my release. My family had no other choice but to pay the bribe; otherwise, police would have registered the false and fabricated charges against me. I was release (sic) as soon as my family paid the bribe.
>
> After my release, I went into hiding as the police extort more money by arresting me again and again. I kept hiding for a while and started making arrangements to leave the country because I found no other alternative for my freedom and safety.
>
> Now a days, I am struggling a lot for my survival. Without having a legal work permit, I can not even find a minimum wage job. Thst's (sic) why I applied for political asylum.

(JA 396).

Ahmed was allowed to supplement his application with an additional statement in which he expanded upon his original Request for Asylum. (Exhibit 2-A, JA 393-394).

In support of the application, Ahmed also submitted the following documents: a letter dated February 16, 1996, translated from Bangla to English from the Acting Chairman of the JP Central Committee (Exhibit 9, JA 383); a Release Letter dated November 26, 1992, translated from Bangla to English from the Registrar of Dhaka Medical College (Exhibit 10, JA 388); a copy of Ahmed's passport dated October 28, 1994, issued by the Bangladesh Consulate in New York City (Exhibit 4, JA 401-403, 417); and a letter in English from Ahmed's attorney in Bangladesh dated December 24, 1995 (Exhibit 3, JA 400).

In addition, the following documents were submitted by Ahmed, which related to Ahmed's trial in the Court of Chief Metropolitan Magistrate, Dhaka (all in English): Warrent (sic) for Arrest of Ahmed Azam dated January 31, 1994 (Exhibit 6, JA 406); Charge Sheet for State vs. Azam Ahmed dated November 14, 1993 (Exhibit 7, JA 407); First Information Report dated August 26, 1993 (Exhibit 5, JA 408); and Order Sheet (Exhibit 8, JA 409-413).

The government submitted documents relating to human rights conditions in Bangladesh: (1) U.S. Department of State Country Report on Human Rights Practices for 1998 for Bangladesh (Exhibit 12, JA 343-365); and (2) Bureau of Democracy, Human Rights and Labor (February 1998) report entitled "Bangladesh: Profile of Asylum Claims and Country Conditions" (Exhibit 11,

JA 366-382). Those documents describe generally free and fair elections in 1996 with full participation by all political parties, including the JP. (JA 356, 358).

The government also submitted the Assessment/Referral Memo dated November 12, 1997, from Ahmed's interview with Officer L. Gollub. This document (Ex. 13) was marked for identification only. (JA 341-342).

2. Ahmed's Testimony

At the June 25, 1999, hearing, Ahmed testified that in Bangladesh he worked as a store owner selling iron rods and cement. (JA 295). Ahmed inherited the business from his father. On March 5, 1987, Ahmed joined the Jatiya Party. (JA 296). By June 1989, Ahmed was made a publicity secretary for the party. His duties included arranging demonstrations and meetings. (JA 298-299). In February 1991, Ahmed actively campaigned door to door for the JP in a national election. (JA 300).

Ahmed testified that on account of his political affiliation and activity, he was assaulted four times, detained for twenty days, and ultimately sentenced in absentia to a seven-year jail term. (JA 300-320).

With respect to the assaults, Ahmed testified that he was first beaten on March 7, 1991. Specifically, Ahmed testified that he was at a JP meeting attended by fifteen to twenty party members that was broken up by eight to ten BNP workers. Ahmed fled, but not before being struck by

a stick. He sustained a cut on his hand that was treated with a stitch. (JA 301, 303-305).

Ahmed further testified that on August 15, 1992, BNP members attacked him a second time. Although Ahmed lost consciousness, he did not seek medical attention. Instead, colleagues took him to the shade of a nearby tree and poured water on his head. Ahmed's parents then took him home. (JA 305-308).

Ahmed also testified to a third assault, which occurred on November 23, 1992, as he was announcing an upcoming JP event over a microphone. (JA 308-310). Between eight to twelve BNP members hit Ahmed with a hockey stick and administered knife wounds to his chest, cheek and hand. He was hospitalized for three days and then discharged with a prescription for "some tablets and some liquid medicine[.]" (JA 312).

Although all of these instances were reported to the police, no official action was taken.

Ahmed further testified that on August 26, 1993, he organized a procession of between 100 and 200 people. (JA 312). BNP sympathizers and members of the police attacked the group. Ahmed ran to his house. Later that evening, Ahmed went to the police station to report the incident. Ahmed testified that while at the station he was charged with destruction of government property and making anti-government statements. Ahmed was jailed for three days. The police confined Ahmed to a small cell and beat him all three days. (JA 315). Thereafter, Ahmed was transferred to a central jail and detained for seventeen

more days. Although he was not beaten in the 2½ week period, Ahmed testified that he was housed in a dirty cell and not fed well. Ahmed was, however, given two bail hearings. On September 16, 1993, a judge set bail at 15,000 taka for Ahmed. (JA 312-317).

Ahmed began living with an uncle in Dhaka. Ahmed came to the United States in December 1993. At some point, officials in Bangladesh learned that Ahmed was no longer in the country. On April 13, 1994, a Bangladesh court sentenced Ahmed to seven years of imprisonment. Ahmed testified that his lawyer called him in America to advise him of this development on that same day. (JA 317-319).

Ahmed testified that he had no further contact with his attorney after the April 13, 1994, telephone conversation. (JA 327). With respect to the documents Ahmed presented at the hearing (exhibits 5-8), he testified that his father told the lawyer to send them. (JA 327). When asked why the attorney's cover letter referenced a letter from Ahmed, the petitioner denied ever writing the attorney directly. Rather, Ahmed testified that he had asked his father to write and request the documents. (JA 327-328).

Ahmed also testified that on April 27, 1994, he went to the Bangladeshi consulate in New York City to obtain a Bangladeshi passport for work authorization. Ahmed conceded that, at the time, he was aware of the outstanding seven year jail term hanging over his head. Ahmed explained, however, that he applied for the passport on an emergency basis in order to prevent officials from

discovering his fugitive status. When confronted with the fact that his passport was not issued in April 1994, but instead on October 28, 1994, Ahmed amended his testimony to claim that he applied for and received an emergency passport on October 28 – not April 27. (JA 329-332).

With respect to the political situation in Bangladesh, Ahmed testified that in June 1999 (the time of the hearing) the Awami League, which he believed was affiliated with the BNP, had been in power since 1996. Ahmed acknowledged, however, that during the Awami League's reign, two JP leaders – including former President Hossain Mohammad Ershad – had been released from jail. (JA 320). Ahmed testified, nonetheless, that he feared that members of the BNP would kill him if he returned to Bangladesh. In addition, Ahmed testified that he would be imprisoned on the seven year jail sentence.

C. The Immigration Judge's Decision

At the conclusion of the June 25, 1999, hearing, the IJ issued an oral decision denying Ahmed's applications for asylum and withholding of removal and ordering him removed to Bangladesh. After summarizing Ahmed's testimony (JA 245-251), the IJ found that it was not credible. (JA 251). The IJ further found that even if Ahmed's testimony were deemed credible, it did not establish eligibility for asylum or withholding of removal. (JA 254).

The IJ recognized that Ahmed sought asylum and withholding of removal on the grounds that he faces

persecution due to his political membership in JP. (JA 244). Based on her observation of Ahmed's testimony and demeanor, the IJ did not find Ahmed credible, noting that "I have grave doubts about [Ahmed's] testimony." (JA 251).

First, the IJ explained that Ahmed's documents did not corroborate his testimony and, in fact, undercut his claims. For example, Exhibit 9 was purportedly a letter dated February 1996 from a JP official indicating that Ahmed was a member of the JP party. As the IJ noted, the letter lacked specificity about the assaults on Ahmed, his detention in jail, or the seven year prison sentence issued by the Bangladesh courts in 1994. (JA 252). The IJ similarly concluded that Exhibit 3, a purported letter from Ahmed's attorney in Bangladesh, raised questions about Ahmed's testimony. (JA 252). The IJ noted that although Ahmed testified that his last contact with his attorney was a telephone call in early 1994 (JA 327-328), the attorney's letter plainly references Ahmed's written request to the attorney dated September 14, 1995. The IJ did not credit Ahmed's attempt to explain the inconsistency. (JA 252-253).

Second, the IJ questioned whether Ahmed truly faces a seven year prison term in Bangladesh for although he is wanted in Bangladesh, he presented himself to the country's consulate in New York City to apply for a passport. In the view of the IJ, this action defied common sense because it has the obvious affect of alerting the authorities as to Ahmed's whereabouts. (JA 253).

Nor did the IJ find credible the purported documentation from the Bangladesh government (Exhibits 5, 6, 7, and 8) concerning Ahmed's conviction and sentence. Despite notice that the INS was questioning the authenticity of the Bangladesh court documents, Ahmed made no attempt to buttress the authenticity of the documents. (JA 252).

Notwithstanding the IJ's adverse credibility finding, the IJ addressed the merits of Ahmed's asylum and withholding applications. Even assuming Ahmed was credible, the IJ determined that he had failed to meet his burden of establishing his eligibility for asylum and withholding of removal. (JA 254-255).

First, the IJ concluded that Ahmed does not have a reasonable fear of future persecution. (JA 254). Accepting Ahmed's testimony that he was assaulted on three separate occasions over a two year period, and detained for twenty days during which he was mistreated on three of those days, the IJ noted that Ahmed did not seek medical treatment upon his release from jail in September 1993. (JA 254). Continuing, the IJ explained that while the injustices endured by Ahmed – if true – constituted mistreatment, they did not rise to the level of persecution even if considered in the aggregate. (JA 254).

The IJ also concluded that Ahmed did not have a reasonable fear of future persecution if he returned to Bangladesh. (JA 255). First, he had been out of the country for six years at the time of the hearing. (JA 255). In that time period, Bangladesh had moved forward politically. The leader of the JP, former Bangladesh

President Ershad, had been released from prison, elected to Parliament and permitted to travel abroad. (JA 255). Prior murder charges had been dropped against the former President. (JA 255). The IJ concluded that against this backdrop, Ahmed – who was merely a local publicity secretary of the JP – did not have a reasonable fear of the government or future persecution.

Because the IJ found that Ahmed had not suffered past persecution and did not have a reasonable fear of future persecution, she concluded that Ahmed was not statutorily eligible for political asylum. (JA 256). Because Ahmed did not meet the standard for political asylum, he also failed to meet the more stringent burden of establishing his eligibility for the withholding of removal or relief under the CAT. (JA 256-257).

D. Interim Proceedings: Summary Affirmance, Denial of Motion to Reopen, and Remand by Second Circuit

The BIA summarily affirmed the IJ's decision on August 26, 2002. (JA 187). The petitioner then moved to reopen and reconsider the BIA's decision on September 25, 2002. (JA 163-185). The BIA denied Ahmed's motion on December 27, 2002. (JA 154).

Ahmed then filed a petition for review in the United States Court of Appeals for the Second Circuit. *See Ahmed v. INS*, No. 03-4148-ag. The petition was dismissed on November 16, 2004, however, as the parties stipulated to vae the BIA's decision and remand to the

BIA for a new decision based on Ahmed's motion to reconsider dated September 25, 2002. (JA 150-152).

E. The Board of Immigration Appeals' Decision

On August 4, 2005, pursuant to the stipulated remand from this Court, the BIA reopened and reconsidered Ahmed's original proceeding that resulted in the IJ's ruling of June 25, 1999. (JA 2-4).

The BIA upheld the IJ's finding that Ahmed's testimony was at best questionable and insufficient to carry his burden, identifying several examples of "questionable" testimony. First, the BIA identified the discrepancy between Ahmed's testimony that he had no contact with his attorney in Bangladesh after a telephone conversation on April 13, 1994, and a letter from that attorney (Exhibit 3) indicating otherwise. (JA 3).

Second, the BIA identified two instances where Ahmed's testimonial account of being assaulted diverged from his written submissions. In the first instance, the BIA noted that Ahmed claimed in his application that he was assaulted by twenty to thirty assailants whereas when he testified before the IJ, Ahmed put the number of assailants at eight to ten. Similarly, the BIA pointed to Ahmed's testimony that another attack occurred at a demonstration involving 100 to 200 people, whereas his application stated that 400 people were present at the demonstration. (Exhibit 2-A, JA 3).

Third, the BIA found significance in Ahmed's inconsistent accounts regarding the timing and circumstances surrounding his obtaining of a passport. Ahmed testified that he obtained a passport on April 27, 1994, on an emergency basis. Juxtaposed to this account is the passport (Exhibit 3), which was issued October 28, 1994. (JA 3).

And fourth, the BIA placed emphasis on Ahmed's divergent representations concerning the bribe his parents paid the police. In his application, Ahmed claimed the bribe was paid to secure his release (Exhibit 2); when testifying before the IJ, Ahmed claimed the bribe was paid to stop the police from torturing him. (JA 3).

The BIA noted that although Ahmed was confronted on these discrepancies during his hearing, he did not adequately explain them. (JA 3).

Given that Ahmed's testimony was "questionable and . . . insufficient . . . to support his claim to asylum[,]" (JA 3), the BIA looked to the additional evidence Ahmed submitted. In this regard, the BIA expressly found that the IJ should have admitted the documents – mostly Bangladeshi court documents – that Ahmed initially proffered. In the final analysis, however, the BIA concluded that the documents were entitled to "little if any weight[]" (JA 3) because Ahmed never authenticated the papers even though he had been given notice in 1998 that "authentication would be important[.]" (JA 3). In addition, Ahmed did not explain his failure to authenticate the documents notwithstanding that he carries the burden of proof. (JA 3).

Thus, because Ahmed's testimony and documents were "of limited credibility and lacking in detail and plausibility," the BIA denied Ahmed's application for asylum and withholding of removal for failure to meet the burden of proof. (JA3). On the same basis, the BIA concluded that Ahmed had not demonstrated his eligibility for relief under the CAT. (JA 4).

This petition for review followed.

SUMMARY OF ARGUMENT

Substantial evidence supports the BIA's conclusion that Ahmed failed to provide credible testimony in support of his claim for asylum and withholding of removal. Multiple inconsistencies and contradictions between Ahmed's testimony and other parts of the record exist. The BIA noted the following examples from the record: (1) Ahmed testified that after April 1994 he had no contact with his attorney in Bangladesh, yet in a letter from that attorney it appears that Ahmed wrote to the attorney in September 1995 (Exhibit 3, JA 327, 400); (2) Ahmed testified that he was first assaulted on March 7, 1991, by eight to ten assailants, whereas in his application for asylum he stated that twenty to thirty men attacked him (Exhibit 2-A, JA 301, 303-305); (3) Ahmed testified that on August 26, 1993, he organized a procession of between 100 and 200 people that was attacked by members of the BNP and local police, whereas his application stated that 400 people were present (Exhibit 2-A, JA 3); (4) Ahmed testified that he obtained a passport on April 27, 1994, on an emergency basis, but his passport was issued October 28, 1994 (Exhibit 3, JA 3); and (5) Ahmed testified that

his parents bribed his jailors in order to stop them from torturing him, but in his application Ahmed claimed the bribe was paid to secure his release from jail (Exhibit 2, JA 3). Ahmed was given the opportunity to explain these inconsistencies, but was unable to provide satisfactory explanations.

Furthermore, the BIA found that documents Ahmed submitted in support of his claim were insufficient to corroborate his claim. Thus, substantial evidence supports the BIA's denial of Ahmed's claims for failing to meet his burden of proof.

Finally, Ahmed's claim that he is entitled to relief based on changed country conditions lacks merit. On remand from this Court, the BIA reopened Ahmed's proceedings and reconsidered, in full, Ahmed's application for asylum and withholding of removal. The BIA rejected Ahmed's applications for relief, finding that he had failed to meet his burden of proving his claims. Because Ahmed had not established his claim of persecution on the basis of political opinion, his argument based on changed country conditions with respect to those political opinions is simply irrelevant.

ARGUMENT

I. A REASONABLE FACTFINDER WOULD NOT BE COMPELLED TO GRANT THE PETITIONER ASYLUM OR WITHHOLDING OF REMOVAL

A. Relevant Facts

The relevant facts are set forth in the Statement of the Facts above.

B. Governing Law and Standard of Review

Two forms of relief are potentially available to aliens claiming that they will be persecuted if removed from this country: asylum and withholding of removal.[4] *See* 8 U.S.C. §§ 1158(a), 1231(b)(3) (2005); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995). Although these types of relief are "'closely related and appear to overlap,'" *Carranza-Hernandez v. INS*, 12 F.3d 4, 7 (2d Cir. 1993) (quoting *Carvajal-Munoz v. INS*, 743 F.2d 562, 564 (7th Cir. 1984)), the standards for granting asylum and withholding of removal differ, *see INS v. Cardoza-*

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[4] "Removal" is the collective term for proceedings that previously were referred to, depending on whether the alien had effected an "entry" into the United States, as "deportation" or "exclusion" proceedings. Because withholding of removal is relief that is identical to the former relief known as withholding of deportation or return, *compare* 8 U.S.C. § 1253(h)(1) (1994) *with id.* § 1231(b)(3)(A) (2005), cases relating to the former relief remain applicable precedent.

Fonseca, 480 U.S. 421, 430-32 (1987); *Osorio v. INS*, 18 F.3d 1017, 1021 (2d Cir. 1994).

1. Asylum

An asylum applicant must as a threshold matter establish that he is a "refugee" within the meaning of 8 U.S.C. § 1101(a)(42) (2005). *See* 8 U.S.C. § 1158(a) (2005); *Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 66 (2d Cir. 2002). A refugee is a person who is unable or unwilling to return to his native country because of past "persecution or a well-founded fear of persecution on account of" one of five enumerated grounds: "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (2005); *Liao*, 293 F.3d at 66.

Although there is no statutory definition of "persecution," courts have described it as "'punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.'" *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995) (quoting *De Souza v. INS*, 999 F.2d 1156, 1158 (7th Cir. 1993)); *see also Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (stating that persecution is an "extreme concept"). While the conduct complained of need not be life-threatening, it nonetheless "must rise above unpleasantness, harassment, and even basic suffering." *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000). Upon a demonstration of past persecution, a rebuttable presumption arises that the alien has a well-founded fear of future persecution. *See Melgar de Torres v. Reno*, 191

F.3d 307, 315 (2d Cir. 1999); 8 C.F.R. § 208.13(b)(1)(I) (2005).

Where an applicant is unable to prove past persecution, the applicant nonetheless becomes eligible for asylum upon demonstrating a well-founded fear of future persecution. *See Zhang*, 55 F.3d at 737-38; 8 C.F.R. § 208.13(b)(2) (2005). A well-founded fear of persecution "consists of both a subjective and objective component." *Gomez v. INS*, 947 F.2d 660, 663 (2d Cir. 1991). Accordingly, the alien must actually fear persecution, and this fear must be reasonable. *See id.* at 663-64.

"An alien may satisfy the subjective prong by showing that events in the country to which he . . . will be deported have personally or directly affected him." *Id.* at 663. With respect to the objective component, the applicant must prove that a reasonable person in his circumstances would fear persecution if returned to his native country. *See* 8 C.F.R. § 208.13(b)(2) (2005); *see also Zhang*, 55 F.3d at 752 (noting that when seeking reversal of a BIA factual determination, the petitioner must show "'that the evidence he presented was so compelling that no reasonable factfinder could fail'" to agree with the findings (quoting *INS v. Elias-Zacarias*, 502 U.S 478, 483-84 (1992)); *Melgar de Torres*, 191 F.3d at 311.

The asylum applicant bears the burden of demonstrating eligibility for asylum by establishing either that he was persecuted or that he "has a well-founded fear of future persecution on account of, *inter alia*, his political opinion." *Wu Biao Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003); *Osorio*, 18 F.3d at 1027. *See* 8 C.F.R.

§ 208.13(a)-(b) (2005). The applicant's testimony and evidence must be credible, specific, and detailed in order to establish eligibility for asylum. *See* 8 C.F.R. § 208.13(a) (2005); *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999); *Melendez v. U.S. Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991) (stating that applicant must provide "credible, persuasive and . . . . specific facts" (internal quotation marks omitted)); *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA June 12, 1987), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647-48 (9th Cir. 1997) (applicant must provide testimony that is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account").

Because the applicant bears the burden of proof, he should provide supporting evidence when available, or explain its unavailability. *See Zhang v. INS*, 386 F.3d 66, 71 (2d Cir. 2004) ("[W]here the circumstances indicate that an applicant has, or with reasonable effort could gain, access to relevant corroborating evidence, his failure to produce such evidence in support of his claim is a factor that may be weighed in considering whether he has satisfied the burden of proof."); *see also Diallo v. INS*, 232 F.3d 279, 285-86 (2d Cir. 2000); *In re S-M-J-*, 21 I. & N. Dec. 722, 723-26 (BIA Jan. 31, 1997).

Finally, even if the alien establishes that he is a "refugee" within the meaning of the INA, the decision whether ultimately to grant asylum rests in the Attorney General's discretion. *See* 8 U.S.C. § 1158(b)(1) (2005); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004); *Zhang*, 55 F.3d at 738.

2. Withholding of Removal

Unlike the discretionary grant of asylum, withholding of removal is mandatory if the alien proves that his "life or freedom would be threatened in [his native] country because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (2005); *Zhang*, 55 F.3d at 738. To obtain such relief, the alien bears the burden of proving by a "clear probability," *i.e.*, that it is "more likely than not," that he would suffer persecution on return. *See* 8 C.F.R. § 208.16(b)(2)(ii) (2005); *INS v. Stevic*, 467 U.S. 407, 429-30 (1984); *Melgar de Torres*, 191 F.3d at 311. Because this standard is higher than that governing eligibility for asylum, an alien who has failed to establish a well-founded fear of persecution for asylum purposes is necessarily ineligible for withholding of removal. *See Zhang v. INS*, 386 F.3d 66, 71 (2d Cir. 2004); *Wu Biao Chen*, 344 F.3d at 275; *Zhang*, 55 F.3d at 738.

3. Standard of Review

This Court reviews the determination of whether an applicant for asylum or withholding of removal has established past persecution or a well-founded fear of persecution under the substantial evidence test. *Zhang v. INS*, 386 F.3d at 73; *Wu Biao Chen*, 344 F.3d at 275 (factual findings regarding asylum eligibility must be upheld if supported by "reasonable, substantive and probative evidence in the record when considered as a whole") (internal quotation marks omitted); *see Secaida-Rosales v. INS*, 331 F.3d 297, 306-07 (2d Cir. 2003); *Melgar de Torres*, 191 F.3d at 312-13 (factual findings

regarding both asylum eligibility and withholding of removal must be upheld if supported by substantial evidence). "Under this standard, a finding will stand if it is supported by 'reasonable, substantial, and probative' evidence in the record when considered as a whole." *Secaida-Rosales*, 331 F.3d at 307 (quoting *Diallo*, 232 F.3d at 287).

Where an appeal turns on the sufficiency of the factual findings underlying the agency's determination that an alien has failed to satisfy his burden of proof, Congress has directed that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B) (2004). *Zhang v. INS*, 386 F.3d at 73. Accordingly, this Court "will reverse the immigration court's ruling only if 'no reasonable fact-finder could have failed to find . . . past persecution or fear of future persecution." *Wu Biao Chen*, 344 F.3d at 275 (omission in original) (quoting *Diallo*, 232 F.3d at 287); *Siewe v. Gonzales*, 480 F.3d 160, 166 (2d Cir. 2007).

The scope of this Court's review under that test is "exceedingly narrow." *Zhang*, 386 F.3d at 74 ("Precisely because a reviewing court cannot glean from a hearing record the insights necessary to duplicate the fact-finder's assessment of credibility what we 'begin' is not a *de novo* review of credibility but an 'exceedingly narrow inquiry' . . . to ensure that the IJ's conclusions were not reached arbitrarily or capriciously") (citations omitted); *Siewe*, 480 at 166; *Wu Biao Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as

adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992). For example, in *Siewe*, this Court recently explained that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. . . . Rather, a reviewing court must defer to that choice so long as the deductions are not 'illogical or implausible.'" *Id*. at 167 (citing *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985))."

Indeed, the IJ's and BIA's eligibility determination "can be reversed only if the evidence presented by [the asylum applicant] was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." *Elias-Zacarias*, 502 U.S. at 481. In other words, to reverse the BIA's decision, the Court "must find that the evidence not only *supports* th[e] conclusion [that the applicant is eligible for asylum], but *compels* it." *Id.* at 481 n.1

This Court gives "particular deference to the credibility determinations of the IJ." *Wu Biao Chen*, 344 F.3d at 275 (quoting *Montero v. INS*, 124 F.3d 381, 386 (2d Cir. 1997)); *see also Siewe,* 480 F.3d at 168 (noting that district court's findings of fact are reviewed for "clear error" and IJ's findings are reviewed for "substantial evidence" and that "[t]hese standards of review bespeak no lesser

deference to an IJ than to a district judge when each draws inferences from the evidence as a finder of fact."); *Qiu v. Ashcroft*, 329 F.3d 140, 146 n.2 (2d Cir. 2003) (the Court "generally defer[s] to an IJ's factual findings regarding witness credibility"). This Court has recognized that "the law must entrust some official with responsibility to hear an applicant's asylum claim, and the IJ has the unique advantage among all officials involved in the process of having heard directly from the applicant." *Zhang v. INS*, 386 F.3d at 73.

Because the IJ is in the "best position to discern, often at a glance, whether a question that may appear poorly worded on a printed page was, in fact, confusing or well understood by those who heard it," this Court's review of the fact-finder's determination is exceedingly narrow. *Zhang*, 386 F.3d at 74; *see also id.* ("'[A] witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression.'") (quoting *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946) (citation omitted); *Sarvia-Quintanilla v. United States INS*, 767 F.2d 1387, 1395 (9th Cir. 1985) (noting that IJ "alone is in a position to observe an alien's tone and demeanor . . . [and is] uniquely qualified to decide whether an alien's testimony has about it the ring of truth"); *Kokkinis v. District Dir. of INS*, 429 F.2d 938, 941-42 (2d Cir. 1970) (court "must accord great weight" to the IJ's credibility findings). The "exceedingly narrow" inquiry "is meant to ensure that credibility findings are based upon neither a misstatement of the facts in the record nor bald speculation or caprice." *Zhang*, 386 F.3d at 74.

An IJ may rely on an inconsistency concerning a single incident in an asylum applicant's account to find that applicant not credible, "provided the inconsistency affords 'substantial evidence' in support of the adverse credibility finding." *Majidi v. Gonzales*, 430 F.3d 77, 81 (2d Cir. 2005) (upholding adverse credibility finding based on discrepancies between applicant's written application and oral testimony; IJ is not required to solicit from applicant an explanation for inconsistencies in his evidence). Where an IJ's adverse credibility finding is based on specific examples in the record of inconsistent statements made by an asylum applicant about matters material to the asylum claim, "a reviewing court will . . . not be able to conclude that a reasonable adjudicator was compelled to *find* otherwise." *Lin v. U.S. Dep't. of Justice*, 413 F.3d 188, 191 (2d Cir. 2005) (emphasis in the original) (holding that petitioner's inability to remember basic personal information, such as whether she was married in the spring or fall, supported adverse credibility determination).

In reviewing credibility findings, courts "look to see if the IJ has provided 'specific, cogent' reasons for the adverse credibility finding and whether those reasons bear a 'legitimate nexus' to the finding." *Id.* (quoting *Secaida-Rosales*, 331 F.3d at 307). Credibility inferences must be upheld unless they are "irrational" or "hopelessly incredible." *See, e.g.*, *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002) ("we defer to the fact finder's determination of . . . the credibility of the witnesses, and to the fact finder's choice of competing inferences that can be drawn from the evidence") (internal marks omitted); *NLRB v. Bangladesh Univ.*, 541 F.2d 922, 928 (2d Cir.

1976) (credibility determination reviewed to determine if it is "irrational" or "hopelessly incredible").

Although "corroboration is not always required where the applicant's testimony is credible and detailed," *Diallo*, 232 F.3d at 287, this Circuit agrees that "where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided or an explanation should be given as to why such information was not presented." *Diallo*, 232 F.3d at 285. "An applicant may be required to provide any reasonably available documentation to corroborate the elements of her claim, or explain why such documentation is unavailable, and an IJ may rely on the failure to do so in finding that the applicant has not met her burden of proof." *Kyaw Zwar Tun v.U.S. I.N.S.*, 445 F.3d 554, 563 (2d Cir. 2006); *Diallo*, 232 F.3d at 285.

C. Discussion

1. The BIA properly dismissed Ahmed's appeal because he failed to present credible testimony in support of his claims

Substantial evidence supports the BIA's determination that Ahmed failed to provide credible testimony in support of his application for asylum and withholding of removal and thus failed to establish eligibility for such relief. Ahmed's account contained inconsistencies and contradictions, including inconsistencies and contradictions concerning his descriptions of the attacks

on him and his detention by the Bangladesh police that went to the heart of his claims. Further, when questioned about those contradictions or about his failure to recall specific events, Ahmed failed to adequately explain his testimony, opting instead to either rely on his confusion of events or, in other instances, to blame his interpreters. Nor did he attempt to explain the inconsistencies between his testimony and the documentary evidence offered. Accordingly, substantial evidence supports the BIA's decision, *see, e.g.*, *Qiu*, 329 F.3d at 152 n.6 ("incredibility arises from 'inconsistent statements, contradictory evidence, and inherently improbable testimony'" (quoting *Diallo*, 232 F.3d at 287-88)), and Ahmed has not met his burden of showing that a reasonable fact-finder would be compelled to conclude he is entitled to relief.

The BIA identified five examples of inconsistencies and discrepancies in Ahmed's testimony that supported the determination that Ahmed's testimony lacked credibility. For example, as the BIA noted, Ahmed's testimony concerning his contact with his attorney in Bangladesh did not match any of the documents he submitted. Ahmed testified that he last had contact with his attorney in Bangladesh on April 13, 1994 – the day his seven year sentence and 15,000 taka fine were handed down by the Bangladesh court – when his attorney telephoned him to inform him of his sentence. (JA 327). However, Exhibit 3, a letter from his attorney in Bangladesh dated December 24, 1995, states that the attorney is responding to Ahmed's letter of September 14, 1995. In the letter, the attorney informs Ahmed of the sentence, the fine and a new arrest warrant. He encloses a certified copy of the court transcripts. The attorney also states that "[p]olice are

looking for you as your family has informed me of the matter over the phone." (Exhibit 3, JA 400).

When confronted with this discrepancy, Ahmed denied that he sent a letter to his attorney dated September 14, 1995. Ahmed claimed that he had his father request the court documents from the attorney via telephone. The attorney then forwarded the court documents to Ahmed in New York City. (JA 328). Ahmed testified that he sent a letter to his father requesting the documents, but not to his attorney. The IJ heard this explanation but chose not to credit it.[5] (JA 249, 253). Although Ahmed contends that his explanation was reasonable, the IJ was not required to accept it, and Ahmed provides no reason for this Court to overturn the agency's decision on this point. *Chen v. United States Attorney General*, 454 F.3d 103, 106 (2d Cir. 2006) (credibility determination supported by substantial evidence even if a reasonable factfinder "*could* have disagreed with the IJ's ultimate assessment of petitioner's responses").

The BIA also noted that other documents provided by Ahmed – most notably his application for asylum – also conflicted with his testimony and further impaired his credibility. For instance, at his hearing, Ahmed testified that he was attacked on August 26, 1993, after leading a JP

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[5] The IJ noted a further discrepancy about Ahmed's alleged conviction. If, as Ahmed testified, his lawyer informed him of his conviction and sentence in April 1994, it was implausible that he would present himself at the Bangladeshi Embassy to apply for a passport several months later. (JA 249-250, 253).

procession of 100-200 people to protest the government. (JA 313). Ahmed's asylum application, however, indicates the JP procession was comprised of 400 JP workers. (Exhibit 2-A, JA 393). When advised of the considerable gap in his accounts, Ahmed blamed the discrepancy on the confusion he experienced when he first entered the United States. (JA 324). Ultimately, Ahmed could not offer any more information to explain the contradiction.

Similarly, with respect to the assault of March 7, 1991, Ahmed testified that eight to ten men attacked him (JA 303), whereas in his application Ahmed averred that "while we were conducting a meeting in our office, around 4:30 p.m. suddenly we were attacked by 20/30 BNP gangsters in the middle of the meeting." (Exhibit 2-A, JA 393).

Another discrepancy noted by the BIA concerned Ahmed's accounts of the bribe his parents paid to Bangladeshi officials. Here, Ahmed testified that his father paid a 50,000 taka bribe to the police in Bangladesh to stop the torture Ahmed was experiencing at the police station: "My, my father had to bribe the police 50,000 taka so that they do not touch me any more because during the time I stayed in police station, they tortured me inhumanly. So my father gave them 50,000 taka."[6] (JA

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[6] Although the BIA did not note this fact, Ahmed's testimony regarding the physical abuse he suffered in jail also lacks credibility given the limited details and contradictions in his story. He states in both his supplemental statement and his (continued...)

317). In stark contrast to this account, Ahmed stated in his request for asylum that the 50,000 taka bribe "helped me to leave the police station through the back door[]" (Exhibit 2-A; JA 394; *see also*, Exhibit 2, JA 396) – testimony that is belied by Ahmed's acknowledgment in another part of the record that he obtained bail of 15,000 taka. (Exhibit 8, JA 409-413). Again, Ahmed had no coherent explanation for these discrepancies when confronted, and instead placed the blame on his interpreter. (JA 333).

The fifth discrepancy noted by the BIA related to Ahmed's testimony about the issuance of his passport. Ahmed testified that he submitted his passport application on April 27, 1994, and received his passport that same day. (JA 330). In point of fact, there is no dispute that the passport was issued six months later on October 28, 1994. (Exhibit 3). When confronted with this discrepancy between his testimony and the documentary evidence, Ahmed offered no explanation except that he had made a mistake. (JA 330). The IJ did not accept this explanation, and again, Ahmed offers no reason why this Court would be required to do so either.

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[6] (...continued)
initial request for asylum that he was held for the entire twenty days of his detention in the local jail and beaten every day. "*I was locked (sic) for 20 days and every day police tortured me.*" (Exhibit 2, JA 396 (emphasis added)). At his hearing, however, Ahmed admitted that he was held for only three days in the local jail where the alleged beatings occurred. (JA 314). For the remaining seventeen days he was held in the central jail where he admits that he was not beaten. (JA 316).

When these glaring discrepancies are considered, either individually or in the aggregate, the IJ and BIA properly concluded that Ahmed was not credible. Taken together, rather than viewed in isolation as Ahmed suggests the Court do, the IJ in the first instance, and the BIA thereafter, provided "specific, cogent" reasons for the adverse credibility findings.

While Ahmed labels the inconsistencies in his testimony as "minor," he blithely ignores that those inconsistencies are important to judging his overall credibility and claims – that he was persecuted because of his political position and opinions. Furthermore, as this Court explained in *Chen*, the agency "need not consider the centrality *vel non* of each individual discrepancy or omission before using it as the basis for an adverse credibility determination." 454 F.3d at 107. "Rather, the [agency] may rely upon the 'cumulative impact of such inconsistencies,' and may conduct an 'overall evaluation of testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence.'" *Id.* (quoting *Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 160 n.15 (2d Cir. 2006)).

Here, on the basis of numerous inconsistencies, the BIA found that Ahmed's testimony was "questionable" and of "limited credibility." (JA 3). Because these conclusions rest on specific and cogent facts in the record, there is no basis for this Court to disturb the BIA's findings. *See id.* ("In reviewing [an agency's credibility determination], we will not 'weigh the inconsistencies for ourselves to see if we would reach the same conclusions as the [agency].'") (quoting *Zhang*, 386 F.3d at 77). Just as

in *Chen*, "because the discrepancies and omissions cited by the [BIA], taken together, would allow a 'reasonable adjudicator,' . . . to disbelieve petitioner's account of his persecution," there is no error "in the agency's determination of adverse credibility." *Id.*

Ahmed counters by suggesting alternative readings of the record, but in so doing, Ahmed misconstrues the standard of review. The substantial evidence standard requires Ahmed to offer more than a plausible alternative theory to the adverse credibility findings reached by the BIA. To the contrary, Ahmed "must demonstrate that a reasonable fact-finder would be compelled to credit his testimony." *Chen*, 344 F.3d at 275-76 (citation omitted). As the Supreme Court has held, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 523 (1981) (internal quotation marks omitted). *Accord Mar Oil, S.A. v. Morrissey*, 982 F.2d 830, 837-38 (2d Cir. 1993). It is not the role of the reviewing court to re-weigh the inconsistencies "to see if we would reach the same credibility conclusions as the IJ." *Zhang*, 386 F.3d at 77. Accordingly, the only relevant question here is whether substantial evidence exists to support the conclusion that the BIA reached in light of Ahmed's testimony and other documentary evidence. *See Elias*, 502 U.S. at 481 n.1. Thus, even if Ahmed has offered a plausible interpretation of his testimony that could explain his conflicting statements, the record as a whole does not compel such a reading. *See id.*

Finally, the BIA properly found that the petitioner had failed to present sufficient corroborating evidence to support his claim. The BIA noted that corroborating evidence is not always required, (JA 3) (citing *Diallo*), and that the IJ in this case had erred in failing to admit Ahmed's court documents into evidence.[7] Nevertheless, in its review of the record, the BIA gave Ahmed's court documents "little, if any, weight," because they were not authenticated court documents. (JA 3). Ahmed argues that he should have been excused from providing authenticated copies because the government undertook to verify these documents on its own, but the fact that the government has initiated its own investigation into the authenticity of an alien's documents does not relieve the alien of his burden of proving his eligibility for asylum. And contrary to Ahmed's argument, the mere fact that the documents were admitted into evidence does not mean that

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[7] The BIA did not discuss all of the documents that Ahmed submitted, but no legal requirement exists that the BIA specifically mention each item of evidence that a party deems significant. *See Chen v. Gonzales*, 471 F.3d 315, 341 (2d Cir. 2006) (holding that IJ "need not enumerate and evaluate on the record each piece of evidence, item by item"). Furthermore, a remand to allow consideration of those documents would be futile because the documents Ahmed submitted did not assist his claim. As noted above, several of the documents contradicted the claims made in Ahmed's testimony. And as the IJ noted, the letter from the JP official does not provide any details to corroborate Ahmed's claims of persecution. (JA 252).

the agency was required to conclude that they corroborated Ahmed's claims.[8]

2. Ahmed's claim for relief based on changed country conditions lacks merit

Ahmed argues that he is entitled to asylum and withholding of removal based on the new evidence about changed country conditions submitted with his motion to reopen and reconsider. This argument is without merit. As a preliminary matter, the BIA *did* reopen Ahmed's proceedings and considered his claims for relief anew. *See* JA 2 (upon remand from Second Circuit on the petition for review from the denial of motion to reopen, "[t]o avoid any question as to our jurisdiction over this case, we also reopen and reconsider the respondent's original proceeding in which, on August 26, 2002, we affirmed the Immigration Judge's denial of the respondent's application for asylum and withholding of removal").

Furthermore, on the record before the BIA, Ahmed's argument on changed country conditions was simply irrelevant. The BIA found that Ahmed had failed to meet his burden of proving past persecution or a well-founded fear of future persecution because his testimony lacked

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[8] At points in his brief, Ahmed argues that the IJ and BIA erred in not admitting the court documents into evidence. *See, e.g.,* Brief for Petitioner at 19. The BIA acknowledged, however, that the IJ erred in declining to admit those documents into evidence (JA 3), and expressly considered those documents in its decision. Thus, this argument is misplaced.

credibility and was "lacking in detail and plausibility." (JA 3). In other words, the BIA found that Ahmed had not shown he was persecuted based on his political opinion. Thus, any evidence submitted by Ahmed to show changed political conditions in Bangladesh or allegedly continued persecution of political activists is simply irrelevant to Ahmed's case.

CONCLUSION

For each of the foregoing reasons, the petition for review should be denied.

Dated: April 30, 2007

Respectfully submitted,

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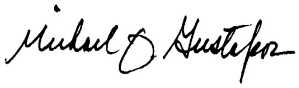

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(c)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,510 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

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Addendum

8 U.S.C. § 1101(a)(42) (2005). Definitions.

(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.

8 U.S.C. § 1158(a)(1), (b)(1)-(2) (2005). 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.

. . . .

(b) Conditions for granting asylum

(1) In general

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

8 U.S.C. § 1231(b)(3)(A)-(B) (2005). Detention and removal of aliens ordered removed.

(b) Countries to which aliens may be removed

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

8 C.F.R. § 208.13 (2005). Establishing asylum eligibility.

(a) Burden of proof. The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.

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

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

(I) Discretionary referral or denial. Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of

an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

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

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

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

(iii) Grant in the absence of well-founded fear of persecution. An applicant described in paragraph (b)(1)(i) of this section who is not

barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

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

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

(2) Well-founded fear of persecution.

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

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

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

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

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

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

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

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

. . . .