03-4785-ag

To Be Argued By:
CAROLYN A. IKARI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-4785-ag

GAM GUN LAM,

Petitioner,

-vs-

JOHN ASHCROFT, Attorney General

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR JOHN ASHCROFT ATTORNEY GENERAL OF THE UNITED STATES

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STATEMENT OF JURISDICTION

Petitioner was ordered deported by an Immigration Judge on October 27, 1998. Although repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), section 106 of the Act, 8 U.S.C. § 1105a (1994), as modified by certain "transitional changes in judicial review," governs judicial review of deportation orders, like petitioner's, that were issued on or after October 31, 1996. *See* Pub. L. No. 104-208, Div. C, Title III-A, § 309(c)(1)(B) & (4), 110 Stat. 3009-546, 3009-625 to -626 (Sept. 30, 1996); *Henderson v. INS*, 157 F.3d 106, 117 (2d Cir. 1998) (IIRIRA transitional provisions "control deportation proceedings started prior to April 1, 1997, in which the deportation order became administratively final after October 30, 1996").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a reasonable factfinder would be compelled to reverse the Immigration Judge's adverse credibility determination, where petitioner's statements and evidentiary submissions were either implausible or internally inconsistent on material elements of his claim, and where petitioner failed to adequately explain the inconsistencies.

2. Whether difficulties in the translation of petitioner's testimony at the asylum hearing were minimal, did not preclude petitioner from fairly presenting his claim before the Immigration Judge, and therefore do not warrant reversal of the Immigration Judge's adverse credibility finding.

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Preliminary Statement

Gam Gun Lam, a native and citizen of the People's Republic of China, petitions this Court for review of a March 24, 2003, decision of the Board of Immigration Appeals ("BIA"). (Joint Appendix ("JA") 4) The BIA summarily affirmed the October 27, 1998, decision of an Immigration Judge ("IJ") (JA 30) denying petitioner's applications for asylum, withholding of removal and

voluntary departure, and ordering him removed from the United States.

Petitioner's application for political asylum states that he was arrested and imprisoned for his political actions and, following his release, that he left his home country because a warrant had been issued for his re-arrest due to these continued activities. Substantial evidence supports the IJ's determination that petitioner failed to provide credible testimony and evidence in support of these claims.

First, the IJ found that petitioner was not believable as he appeared to have memorized his testimony. Secondly, the IJ found petitioner's testimony to be inconsistent with his asylum application. Finally, the IJ found that petitioner's supporting documentation was of questionable authenticity and petitioner's failure to provide any supporting affidavits further supported a finding that his testimony was not credible.

Petitioner argues that the IJ's adverse credibility finding was the result of inadequate translation. However, the record demonstrates that the IJ's decision was not based solely upon petitioner's testimony, and petitioner fails to explain how an imperfect translation actually prejudiced the hearing. Further, petitioner was represented by counsel at the hearing and no objection was raised concerning the choice of a Fou-zhou translator or the quality of the translation. Accordingly, the petition for review should be denied.

Statement of the Case

On June 17, 1996, petitioner filed an Application for Asylum and Withholding of Removal. (JA 216-230) On August 6, 1996, petitioner was served with an Order to Show Cause and Notice of Hearing for removal proceedings. (JA 267-271)

On September 13, 1996, a removal hearing was commenced before an Immigration Judge ("IJ") at which petitioner admitted the allegations in the Order to Show Cause and conceded deportability. (JA 58)

On September 23, 1996, the removal hearing continued and petitioner was ordered removed *in absentia* when he failed to appear. (JA 64-68, 231, 245-47) The case was later re-opened and the hearing continued on July 25, 1997. (JA 70)

On October 27, 1998, the removal hearing continued and evidence was received. (JA 86-161) On that date, the IJ rendered an oral decision and issued an Order denying petitioner's applications for asylum, withholding of removal and voluntary departure, and ordering him removed from the United States. (JA 27, 30-56)

On November 6, 1998, the petitioner filed an appeal to the Board of Immigration Appeals ("BIA"). (JA 23-24) On March 24, 2003, the BIA summarily affirmed the IJ's decision. (JA 4) On April 22, 2003, the petitioner filed a petition for review with this Court.

Statement of Facts

A. Petitioner's Entry into the United States and Asylum Application

Petitioner left China on December 2, 1995 (JA 225), and entered the United States on March 24, 1996, without inspection by the INS. (JA 225, 267) On June 17, 1996, petitioner filed for political asylum. (JA 216) In his application he stated that he had disclosed governmental corruption to the public and then led public protests in May 1989. (JA 223-34) Petitioner stated that he was arrested and imprisoned as a result of these activities, and a year after his release from prison he agreed to speak at a demonstration commemorating the June 4th student movement. (JA 224-225) However, "the meeting was attacked by public security officers" and he was lucky because he "arrived at the meeting place late" due to an appointment at the hospital. (JA 225) Seeing police vehicles, he immediately went into hiding. (JA 225) He stated that a warrant for his re-arrest was subsequently issued and that this prompted his departure from China. (JA 225)

B. Petitioner's Deportation Proceedings

1. Documentary Submissions

The following documents were marked as exhibits in the record:

Exhibit 1 Order to Show Cause (JA 267-271)
Exhibit 2 Asylum Application (JA 216-225)

Exhibit 3 Country Profile dated April 14, 1998 (JA 172-215)
Exhibit 4 National Identification Card (JA 169)
Exhibit 5 Employee Identification Card (JA 167-168)
Exhibit 6 Changle Public Security Bureau Wanted Circular (JA 165-166)
Exhibit 7 Certificate of Release (JA 163-164)

Exhibit 6 and Exhibit 7 were submitted to support petitioner's claim that he had previously been imprisoned and was still wanted by authorities in China. Petitioner testified that the copy of the warrant and the release certificate were hand delivered to him from China but did not provide an affidavit or testimony from the person who brought the document to the United States. (JA 122-128) The IJ questioned the authenticity of the documents noting that they did not appear to be on official stationery and questioning the detail and references made on the wanted circular. (JA 51)

2. Petitioner's Testimony

Petitioner testified that in November 1987 he was employed at an aquatics products company in China and that he reported corruption at the company to the ruling committee. (JA 96-98) As a result of this action petitioner was suspended and finally terminated from the company. (JA 100) Petitioner testified that in May 1989 he was a leader in a student protest movement and that in June 1989 he was arrested and imprisoned as a result of this activity. He stated:

A. On May the 9th, '89, I participated in the parade at the entrance of the city government, or near the entrance of city government.

Q. And what did you do at that time?

A. I was responsible for the student movement, leading them.

(JA 102)

Later in the hearing petitioner testified that prior to this date he was not involved in the student movement. (JA 142) When questioned as to how he became a leader so quickly petitioner responded,

A. Organized in the middle of April. We organized. I don't remember.

Q. Sir, did you just state you organized in the middle of April?

A. Yes.

Q. And just two minutes ago you stated you had no involvement prior to May 9th, 1989, yes or no?

A. '89 -- when? What, September?

(JA 143)

A critical juncture in the hearing came when petitioner's attorney asked petitioner to explain the principles of the student movement:

> A. Excuse me, Your Honor. The main principle was about the promotion of democracy. I cannot quite say it in Fu-zhou, and like to say in Mandarin. Can you understand Mandarin?
>
> Q. Well, sir, why can't you say it in Fu-zhou? Isn't this your best language, sir?
>
> A. In my job I had a lot of dealing with people outside the provinces in using Mandarin.
>
> Q. Well, sir, you requested a Fu-zhou interpreter.
>
> [Interpreter] to Judge: Your Honor, as far as I'm concerned, I can do either.
>
> Judge to [interpreter]: Well, but I need to qualify him.
>
> Judge to Mr. Lam:
> Q. I'm not sure, sir. Why is it that to explain the principles of the movement you need to say it in Mandarin?
>
> A. I'm afraid that you don't understand me.
>
> Q. Well, if you speak Fu-zhou, we have a Fu-zhou interpreter. Why would the interpreter not understand you?

A. In one or two sentences I might mix it, because I wasn't sure.

Judge to [Mr. Lam's attorney]: Go ahead, Mr. Cuber.

(JA 101-02)

The hearing then continues, but petitioner does not further elaborate on the principles of the movement. Later in the hearing the judge asks petitioner:

Q. Sir, do you understand the Fu-zhou that the interpreter speaks to you?

A. Yes.

(JA 141)

Petitioner testified that he was released from prison in July 1994 and that in June 1995 he promised to speak at a commemorative demonstration. (JA 113.) He testified that the demonstration was to have taken place on June 4th at 8:00 p.m., but at 4:00 p.m. he passed his friend's house on his way to the hospital and saw that the police were there to arrest his friend and he immediately went into hiding. (JA 114-16)

The attorney for the immigration service questioned petitioner about the difference between his testimony and his written application which states that petitioner was late to the meeting because of his hospital appointment:

> Q. Luckily I had an appointment at the doctor's office for acupuncture treatment of my arthritis on that day, and I arrived at the meeting place late?
>
> A. During the interview I said luckily, because I saw the police car at Zhao Hui's place to arrest him. So, meaning lucky for me.
>
> Q. Well, what about the word late, sir? Do you know what that word means?
>
> A. I didn't say late. No I didn't say late.

(JA 149)

Petitioner testified that his brother took a wanted circular off a wall and preserved it for two years and then sent it along with petitioner's prison release certificate to the United States. (JA 119-27) Both documents were submitted as proof of petitioner's imprisonment and status as a fugitive, although the immigration service objected that there was no supporting documentation from the person who delivered these documents to petitioner. (JA 128)

3. The Immigration Judge's Decision

The IJ did not find petitioner's testimony to be credible. The IJ based this decision on petitioner's demeanor, non-responsiveness of petitioner's answers to questions, inconsistency in testimony, and the lack of corroborating evidence.

First and foremost, the IJ observed that petitioner appeared to have memorized his testimony. (JA 43) The IJ stated that petitioner testified in a monotone, and that the non-responsiveness of his answers appeared to stem from the fact that petitioner memorized his testimony rather than answering the question posed or discussing events which actually occurred. (JA 43) Further, the IJ noted that on multiple occasions petitioner inexplicably hesitated and looked at the ceiling, as if attempting to recall a fictional, memorized narrative. (JA 43-44) On another occasion, petitioner looked up at the ceiling, and, after a long pause, finally delivered a completely non-responsive answer. (JA 44)

The IJ found it very significant that petitioner was unable to discuss the principles of June 4th movement in his native language. (JA 45) After observing the alien's demeanor and listening to his testimony, the IJ determined that petitioner had memorized a speech in Mandarin, but was not prepared to speak about actual events in his own language. (JA 45) When called on to address the core principles of the political movement on which he based his claim of asylum and in which he claimed to have been a leader, petitioner could only state, "The main principle was about the promotion of democracy." (JA 45, 101)

A critical inconsistency in petitioner's testimony influenced the IJ's finding that petitioner was not testifying from actual experience. Petitioner's testimony that he went into hiding after he saw police while passing his friend's house on his way to the hospital before the scheduled demonstration differed significantly from his written asylum application. (JA 48) The IJ noted that in

the asylum application petitioner claimed to be late to the demonstration because he had come from his hospital appointment, and was lucky to miss the police entering the meeting. (JA 48, 225) By contrast, at the hearing, petitioner had testified that he fled before ever making it to the hospital. (JA 48, 115-16, 148)

Finally, the IJ noted that the authenticity of the documents submitted by petitioner was questionable, and that petitioner had failed to provide any affidavits or corroborating testimony to support his case. The opinion notes that petitioner testified that the picture on the wanted poster was taken from his house upon his arrest in 1989. (JA 51, 121) The IJ found it "unthinkable" that a Chinese government-issued poster would include the phrase "June 4th" movement. (JA 51, 165) Morever, the IJ found suspicious the poster's inclusion of, and level of detail regarding, petitioner's alleged protest, incarceration, and flight history. (JA 51) The IJ also found suspect the mismatch between the stationery and the seal and the poster's use of a personal photo allegedly confiscated six years prior. (JA 51) These observations, put together, led the IJ to conclude that the poster was of "very, very dubious authenticity." (JA 51) Further, the certificate of release which was submitted to support the fact that petitioner had been imprisoned was determined to be of questionable authenticity as it was not on any official stationery, but instead bore only the title "Certificate of Release." (JA 50, 163)

Finally, the IJ noted that the lack of any letters or statements was unusual given the fact that petitioner

claimed to be a leader in a pro-democracy movement. (JA 52-53)

For these reasons, the IJ found that petitioner failed to meet his burden of proof in establishing that he was the victim of past persecution. (JA 53) As such, the IJ did not reach the question of whether petitioner warranted a favorable exercise of discretion. (JA 54) Given that petitioner failed to meet his burden for asylum, the IJ found that he necessarily failed to meet the higher standard for withholding of deportation. (JA 54) Finally, the IJ found that petitioner's lack of a passport made a grant of voluntary departure inappropriate. (JA 54)

C. The BIA's Decision

On March 24, 2003, the BIA summarily affirmed the IJ's decision and adopted it as the "final agency determination" pursuant to 8 C.F.R. § 3.1(e)(4) (2002).[1] (JA 4) This petition for review followed.

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[1] That section has since been re-designated as 8 C.F.R. §1003.1(e)(4). *See* 68 Fed. Reg. 9824, 9830 (Feb. 28, 2003).

SUMMARY OF ARGUMENT

1. Substantial evidence supports the determination by the Immigration Judge that petitioner failed to provide credible evidence in support of his application for asylum and withholding of removal, and thus failed to establish past persecution or a well-founded fear of persecution in China on account of his claimed leadership of political protestors. Petitioner's presentation included inconsistent statements, inherently improbable assertions, unusual testimonial demeanor, and documents of dubious authenticity. For example, in his asylum application, petitioner claimed to have been prompted to flee China when, after having been "luckily" delayed by a medical appointment, he arrived *late* at the site of a scheduled protest which had already been set upon by authorities. At the hearing, by contrast, petitioner testified that he was frightened into fleeing when, on his way to the medical appointment, he passed by a fellow protestor's home and saw authorities there four hours *before* the protest was to begin. The IJ also considered, among many other factors, petitioner's staring at the ceiling before answering questions, hitting his head with his hand, proffering a supposed government document that implausibily adopted the protestors' own characterization of themselves as the "June 4th" movement, and failing to submit any corroborating testimony or affidavits from other witnesses, despite his claimed leadership status. These deficiencies are all well-supported in the record, and petitioner has not met his burden of showing that a reasonable factfinder would be compelled to conclude he is entitled to relief.

2. Petitioner, having been provided with complete and competent interpretation of the proceedings in Fu-zhou, his language and dialect of choice, does not present any basis for disturbing the IJ's determination. Difficulties with the translation of petitioner's testimony were minimal and did not prevent him from fairly presenting his claim to the IJ. Petitioner's counsel never even mentioned, much less objected to, the quality of the translation services, nor did he suggest that services in another language or dialect were needed or wanted. During the hearing, the translator occasionally stopped to clarify his translation or ask the IJ to have petitioner slow down. These exchanges are illustrative of the careful job performed by the translator. After one of these exchanges, the IJ explicitly asked petitioner if he understood the Fu-zhou that the interpreter was using and petitioner responded with an unequivocal, "Yes." Petitioner fails to identify any mistranslation that prejudiced him with respect to the hearing. He claims that the IJ improperly precluded him from responding in Mandarin to a question regarding what the aims of the student protest movement were, but has not offered any explanation why he was incapable of doing so in the language (Fu-zhou) which he best understood. Because petitioner was able to fairly present his claims before the IJ, the petition for review should also be denied on this ground.

ARGUMENT

I. THE IMMIGRATION JUDGE PROPERLY DETERMINED THAT PETITIONER FAILED TO ESTABLISH ELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL BECAUSE HE PRESENTED TESTIMONY THAT WAS NOT CREDIBLE AND DOCUMENTS OF DUBIOUS AUTHENTICITY.

A. Relevant Facts

The relevant facts are set forth in the Statement of 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.[2] *See* 8 U.S.C. §§ 1158(a), 1231(b)(3) (2004); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995). Although these types of relief are "'closely related and appear to overlap,'"

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[2] "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) (2004), cases relating to the former relief remain applicable precedent.

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-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) (2004). *See* 8 U.S.C. § 1158(a) (2004); *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) (2004); *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) (2004).

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 v. Slattery*, 55 F.3d at 737-38; 8 C.F.R. § 208.13(b)(2) (2004). 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.

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." *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) (2004). 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) (2004); *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*, Interim Dec. 3028, 19 I. & N. Dec. 439, 445, 1987 WL 108943 (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-*, Interim Dec. 3303, 21 I. & N. Dec. 722, 723-26, 1997 WL 80984 (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) (2004); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004); *Zhang v. Slattery*, 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) (2000); *Zhang v. Slattery*, 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) (2004); *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 at 71; *Chen*, 344 F.3d at 275; *Zhang v. Slattery*, 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; *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 IJ's determination[3] 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). *See Zhang v. INS*, 386 F.3d at 73 n.7. 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." *Chen*, 344 F.3d at 275 (omission in original) (quoting *Diallo*, 232 F.3d at 287).

In other words, as stated by the Supreme Court, 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." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). 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 (emphasis in original).

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[3] Although judicial review ordinarily is confined to the BIA's order, *see, e.g.*, *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001), courts properly review an IJ's decision where, as here (JA 4), the BIA adopts that decision. *See* 8 C.F.R. § 3.1(a)(7)(2004); *Secaida-Rosales*, 331 F.3d at 305; *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994). Accordingly, this brief treats the IJ's decision as the relevant administrative decision.

The scope of this Court's review under that test is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 71; *Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. "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." *Zhang v. INS*, 386 F.3d at 71 (citations omitted). 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).

This Court gives "particular deference to the credibility determinations of the IJ." *Chen*, 344 F.3d at 275 (quoting *Montero v. INS*, 124 F.3d 381, 386 (2d Cir. 1997)); *see also 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. *Id.* 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 v. INS*, 386 F.3d at 74.

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. Columbia Univ., 541 F.2d 922, 928 (2d Cir. 1976) (credibility determination reviewed to determine if it is "irrational" or "hopelessly incredible").

C. Discussion

Substantial evidence supports the IJ's determination that petitioner failed to provide credible testimony in support of his application for asylum and withholding of removal, and thus failed to establish eligibility for relief. Petitioner's account contained inconsistencies and implausibilities that went to the heart of his claims. When questioned about these implausibilities, petitioner failed to adequately explain the evidentiary deficiencies at the administrative level. As such, substantial evidence supports the IJ'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 thus petitioner has not met his burden of showing that a reasonable factfinder would be compelled to conclude he is entitled to relief.

First, petitioner failed to provide consistent testimony regarding the events that led to his decision to leave China. While petitioner's asylum application stated that he arrived to the planned demonstration *late* to find it overrun with police officers, he testified at the hearing that he saw police officers at his friend's house hours *before* the planned meeting while on his way to the hospital. (JA 225, 114-16) This inconsistency between the asylum application and verbal testimony directly undermines the credibility of petitioner's version of events.

In addition, petitioner presented questionable documentation. Petitioner testified that his brother took the presented wanted poster off a wall in 1995 and saved it for two years before sending it to the United States. (JA 119-27) The poster has a picture of petitioner in a suit which appears to be a personal photo rather than a typical "mug shot" -- to which authorities presumably would have had access, given petitioner's supposed prior arrest and incarceration. (JA 166) Petitioner testified that the police took this picture from his home when he was arrested in 1989. (JA 121) The IJ found it unlikely that the police kept this photo for six years to place on a wanted poster. (JA 51) Further, the poster describes petitioner's run-ins with the government in a way that sounds more like an asylum petition than a wanted circular: reciting that he "instigated unsophisticated students," leafleted, made speeches, served four years of "reform-through-labor rehabilitation," organized a "June 4" commemoration, and "fled in fear of prosecutions." (JA 165) Most important, it referred to the student movement in what the IJ termed an entirely "unthinkable" manner, referring to "June 4th" activities and thus implausibly endorsing the democracy movement's own terminology. (JA 51) In addition, the only other piece of evidence offered to support petitioner's story of his arrest and torture was the release certificate. (JA 164) This document was determined to be of questionable authenticity as it did not appear to be on official stationery. (JA 50)

Finally, this Court must give considerable weight to the IJ's determination that petitioner was not testifying about actual events but instead memorized a false narrative. *Zhang v. INS*, 386 F.3d at 73. The IJ based this conclusion

on 1) the fact that petitioner could not testify about the movement he led in his own dialect, and 2) his demeanor throughout his testimony. Petitioner requested a Fou-zhou interpreter and did not dispute the fact that Fou-zhou was his best language. (JA 101-02) Indeed, petitioner confirmed that he understood the Fou-zhou the interpreter spoke. (JA 141) Petitioner did not in fact request a Mandarin interpreter for the entire hearing, but rather requested only that he give that portion of his testimony relating to the student movement in Mandarin. (JA 101-02) These facts could reasonably be interpreted as indicating that petitioner was unaccountably incapable of discussing the student movement in his own language. Further, the IJ found that petitioner's demeanor throughout the hearing supported this conclusion, as petitioner's testimony was punctuated by long pauses and moments where he stared at the ceiling while composing his answers. (JA 43-44)

The insufficiency of the evidence submitted by petitioner, combined with inconsistencies and an unusual demeanor, could reasonably be interpreted as indicating false testimony. The record supports this conclusion, and under the substantial evidence test the conclusion must be upheld. The inferences made from petitioner's testimony were rational. Where an alien has failed to provide convincing documentation and cannot consistently relate a series of events, one can reasonably conclude that the events did not in fact occur. As such, there is no basis for disturbing the IJ's findings in this case.

II. Difficulties with the Translation of Petitioner's Testimony Were Minimal, Did Not Prevent Petitioner from Fairly Presenting His Claim to the IJ, and Do Not Warrant Disturbing the IJ's Adverse Credibility Determination.

A. Relevant Facts

At the outset of proceedings before the IJ, petitioner requested an interpreter who spoke Fu-zhou. (JA 59) (when asked what language petitioner "best understand[s]," counsel replies, "Fu-zhou").[4] On at least two occasions prior to the hearing at which petitioner gave testimony in support of his asylum application, brief administrative proceedings were interpreted without objection by a Fu-zhou interpreter. (JA 79-81) (March 6, 1998, hearing); (JA 83-85) (July 24, 1998, hearing). At the hearing before the IJ on October 27, 1998, a Fu-zhou interpreter was sworn in. (JA 87)

At the outset of the hearing, when petitioner began answering questions and gave his address, the interpreter stated that petitioner was using Mandarin, but that the interpreter was able to translate. (JA 88) Later, when asked by his counsel about the main principles of the student movement, petitioner said that he could not answer in Fu-zhou, only in Mandarin. (JA 101) The IJ inquired

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[4] On his Form I-589 asylum application, petitioner checked off the box "I am not fluent in English, but am fluent in:" and inserted "chinese," without specifying Mandarin, Fu-zhou, or any other dialect. (JA 216)

directly on this point and directed the examination to continue as before. The entire exchange appears *supra* at 7-8.

The Fou-zhou interpreter at times appeared to have difficulty with the speed of petitioner's testimony. For example, after petitioner's attorney posed a question, the translator interjected with a request for the IJ, "May I remind just to break -- especially mention the names so I don't miss it?" (JA 100) Later, the translator stated, "Excuse me, Your Honor. He's rambling. I failed to -- I have to ask him to separate it." (JA 140) When the alien finishes that answer, the IJ inquired, "Sir, do you understand the Fu-zhou that the interpreter speaks to you?" and petitioner answered, "Yes." (JA 141)

When the interpreter continued to have trouble keeping up, he told the IJ. Then the IJ instructed petitioner to give his answer again and to pause to give the interpreter a chance to interpret. The exchange was transcribed as follows:

> [MR. WOLF TO MR. LAM:]
>
> Q. Prior to May 9, 1989, what was your involvement with the student movement?
>
> MR. PAN TO JUDGE
>
> I can -- Your Honor, I can ever try my best to get a gist. I couldn't get every word.
>
> JUDGE TO MR. PAN

Can you ask him to repeat it and to pause in-between his testimony?

MR. PAN TO JUDGE

You want --

JUDGE TO MR. PAN

Can you ask him to repeat his answer, and to pause in-between?

MR. PAN TO JUDGE

Okay.

MR. PAN TO MR. LAM

(Untranslated)

MR. LAM TO MR. WOLF

I have to tell it all. It's hard for me to say a couple sentences. My head has been beaten before. I have a headache. If I talk too long, I will have headache.

JUDGE TO MR. LAM

Q. Sir, the question is very simple. Were you involved with the student movement prior to the day that you participated in this demonstration in May --

MR. WOLF TO JUDGE

Ninth.

JUDGE TO MR. LAM

Q. -- May 9, 1989?

A. No.

Q. Okay. Thank you.

A. May 9 -- before May 9, I did not, no.

(JA 141-42)

On several occasions the interpreter asked for permission to clarify his translation with petitioner. *E.g.,* JA 112 (confirming stay at hospital); JA 117 (confirming translation of "nephew"); JA 109-10 (confirming name of prison); JA 100 (confirming committee which terminated petitioner's employment); JA 124 (confirming name of town); JA 143 (clarifying untranslated word). At one point, the interpreter asked the judge for permission to conform a word he earlier translated to "seafood product" to a more accurate word appearing on an exhibit as "aquatic product." (JA 131-32)

At two points, the IJ asked the interpreter to re-play the audiotape to verify the accuracy of the translation when petitioner gave apparently conflicting testimony. On the first occasion, the interpreter corrected his translation to reflect that petitioner had testified that he had been

"released," not that he had been "sentenced," on a particular date. (JA 107-09) On the second occasion, the interpreter confirmed the accuracy of his translation, and that it was petitioner who had erroneously stated that an event occurred in "'85" rather than in "'95." (JA 114-15)

At no point during the hearing did petitioner's attorney question or object to the competency of the translation, nor did he request or even suggest that translation in a different language or dialect was desired or necessary.

B. Governing Law and Standard of Review

An alien has the right to competent translation of official immigration proceedings. Unless a petitioner shows that prejudice resulted from a violation of this right, the administrative finding should not be overturned.

1. Right to Competent Translation

In an asylum proceeding, an alien has certain procedural and substantive rights, grounded in statute and regulations, including the right to present evidence, cross-examine witnesses, inspect and object to evidence presented against the alien, and the right to counsel. *See Augustin v. Sava*, 735 F.2d 32, 36 (2d Cir. 1984).

Among these guarantees is the right to an accurate and complete translation of official proceedings. *Id.* Although the INA does not direct the provision of interpreters, the Attorney General has promulgated rules that provide for such services in immigration proceedings. *See* 8 C.F.R. § 1240.44 ("Any person acting as interpreter in a hearing

before an immigration judge under this part shall be sworn to interpret and translate accurately, unless the interpreter is an employee of the United States Government, in which event no such oath shall be required.") (applicable to proceedings commencing prior to April 1, 1997); *see also* 8 C.F.R. § 1230.5 (same; applicable to post-April 1, 1997, removal hearings).

Although this Court has not definitively addressed whether this right to accurate translation also arises from the Due Process Clause of the Fifth Amendment, it has strongly suggested that accurate translation "may well be required" by due process in the context of statutorily mandated withholding of deportation, though not in discretionary asylum determinations. *See Augustin*, 735 F.2d at 37; *id.* at 38 (holding that denial of accurate translation violated rights guaranteed by statute and regulation "and very likely by due process as well" where petitioner sought withholding of deportation); *see also Ahmetovic v. INS*, 62 F.3d 48, 53 (2d Cir. 1995) (because asylum is a discretionary form of relief for which there is no statutory entitlement, it cannot "give rise to a due process claim," whereas due process rights may attach to withholding of deportation which is mandated by statute in certain circumstances).[5] Other courts have held the requirement of accurate translation during immigration proceedings like the one at bar arises from the Due Process Clause of the Fifth Amendment, but have not addressed

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[5] *But cf. Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 1994) (allowing due process claim based on ineffective assistance of counsel, where counsel failed to file for discretionary relief under INA § 212(c)).

the distinction between discretionary and mandatory aspects of those proceedings. *See Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000); *Amadou v. INS*, 226 F.3d 724 (6th Cir. 2000); *cf. Marincas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996) (holding that Refugee Act required Attorney General to promulgate regulations affording "basic due process" to stowaways, including services of translator). Because petitioner seeks relief from his conceded deportability in the forms of both discretionary asylum and mandatory withholding of removal, and because this Court has already recognized a regulatory and statutory basis for the right to adequate translation in proceedings such as those in the case at bar, the Court need not address to what extent the two forms of relief may deserve differing levels of constitutionally mandated procedural safeguards.

A flawless translation of the proceedings is not necessary. Rather, the key question is whether the interpreter's services are "sufficient to enable the applicant to place his claim before the judge." *Augustin*, 735 F.2d at 37; *Nsukami v. INS*, 890 F. Supp. 170, 174 (E.D.N.Y. 1995). Accordingly, when evaluating a claim that the fundamental fairness of an immigration hearing has been impaired, a court must look not only for (1) a deprivation of the procedural right to accurate translation, but also (2) prejudice resulting from that deprivation. *See Perez-Lastor,* 208 F.3d at 780 ("the standard is whether 'a better translation would have made a difference in the outcome of the hearing'") (citing *Acewicz v. INS,* 984 F.2d 1056, 1063 (9th Cir.1993)). *Cf. Rabiu v. INS,* 41 F.3d 879, 882 (2d. Cir. 1994) (holding that to prove violation of due process guarantee of "full and fair hearing" in deportation

proceedings based on ineffective assistance of counsel, petitioner must demonstrate prejudice). It is the petitioner's burden to show specific instances of mistranslation or misunderstanding and then demonstrate a nexus with the outcome. *See Diaz-Martinez v. Ridge*, No. 04CV116, 2004 WL 2202593 at *3 (W.D.N.Y. Sept. 28, 2004); *cf.* Charles Alan Wright et al., Fed. Prac. & Proc. Evid. § 6055 (1990) (discussing Fed. R. Evid. 604: "it is accepted that the party attacking a translation has the burden of showing it deficient").

2. Standard of Review

On direct review from the BIA, when the question presented is the BIA's application of legal principles to undisputed facts, rather than its underlying determination of those facts or its interpretation of its governing statutes, the Court's review of the BIA's asylum and withholding of deportation determinations is *de novo*. *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000) (citing *Singh v. Ilchert*, 63 F.3d 1501, 1506 (9th Cir.1995)); *see also Amadou*, 226 F.3d at 726 (reviewing *de novo* claim that petitioner was denied full and fair hearing by incompetent translation).

C. Discussion

Although petitioner is correct that a deficient translation may invalidate asylum proceedings, his reliance on *Augustin*, *Amadou*, and *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003), is misplaced. All three cases are illustrative of complete breakdowns in the translation of an immigration hearing. *Augustin* makes clear that all substantive portions of the hearing must be translated, and

that a flawed translation cannot be permitted to keep a petitioner's actual claim from being presented to the judge. *Amadou* and *He* show that the translator provided must be competent in the alien's principal language. Petitioner was provided a complete and competent translation of his hearing in the language and dialect that he requested, and his claim was fully presented to the judge. Therefore, there has been no violation of petitioner's right to competent translation.

Petitioner does not present a claim approaching the severity of that involved in *Augustin*, where material portions of the immigration proceeding were not translated at all, and faulty translations prevented the petitioner from presenting his substantive asylum claim to the IJ. In that case, the petitioner's asylum application contained the erroneous assertion, based on a government-provided translator's misinterpretation, that the petitioner's asylum claim was based on his uncle's "disease," rather than the petitioner's actual claim of political persecution. 735 F.3d at 34. Later, when the petitioner's exclusion hearing convened, the *pro bono* attorney requested a continuance to prepare for the hearing with the assistance of promised, but undelivered and overdue, translation services. *Id.* at 35. The IJ denied the request and directed counsel to question the alien without preparation and to forego conferring with the client so she could identify other witnesses. At that point, the alien's attorney withdrew from representation. None of those portions of the hearing were translated for the alien. The fact of the attorney's withdrawal was not communicated to the alien, and it was clear from the testimony that was translated that the alien did not understand the purpose of the hearing itself. *Id.* Moreover,

deficiencies in the quality of the translation became apparent when the judge specifically asked if the translator was translating the judge's words, when straightforward questions yielded nonsensical answers, and when lengthy questions yielded one-word responses. *Id.*

Based on these glaring deficiencies, this Court found not only that the alien had been deprived of competent translation, but also that the deprivation of translation services precluded the petitioner from presenting his credible asylum claim before the IJ. *Id.* at 38 (as result of translation defects, "Augustin's true claim has not been given any scrutiny" by administrative authorities).

Unlike *Augustin*, in the present case petitioner has not identified any claim that was not presented to the IJ, much less one that he was precluded from raising due to faulty translation. Indeed, his brief identifies no portion of the transcript that he claims to be wrongly translated. As noted above in Part I, the IJ pointed to a number of substantial discrepancies in petitioner's testimony in drawing his adverse credibility finding -- for example, whether petitioner fled from China after arriving *late* at the meeting place for a planned protest and spotting police (as he claimed in his written asylum application, JA 225) or whether he fled because he passed by the meeting place four hours *early* and saw police gathered (as he testified before the IJ, JA 147-49). He has not questioned the accuracy of the translation in those respects, nor does the transcript in the relevant places (*e.g.,* JA 114-16) reveal garbled or disjointed translation. *See Singh v. Ashcroft*, 367 F.3d 1139, 1144 (9th Cir. 2004) ("Given the numerous specific points on which the IJ found Singh's

testimony not credible, including testimony that was neither confusing nor unintelligible, we cannot conclude that a better translation would have made any difference in the hearing's outcome."). In short, because the translation services provided in the present case were "sufficient to enable the applicant to place his claim before the judge," *id.* at 37, petitioner cannot demonstrate that he was prejudiced in violation of his procedural rights to competent translation.

Petitioner's reliance on *Amadou v. INS*, 226 F.3d 724 (6th Cir. 2000), and *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003), is likewise unavailing. Those cases dealt with the very different situation of an interpreter who could not competently translate the petitioner's language. In *Amadou*, for example, it was undisputed that the immigration hearing had been conducted in a different dialect of Fulani, a West African language, than that spoken by the alien. 226 F.3d at 725. On several occasions during Amadou's hearing, the interpreter commented that he did not understand what the alien said. *Id.* The transcript was so rife with obvious mistranslations, including during exchanges on which the IJ based her credibility determination, that the court found a due process violation and remanded for a new hearing. *Id.* at 728.

Likewise, in *He*, the IJ proceeded with the hearing with a Mandarin-speaking interpreter, even though the petitioner's native language was Foo Ching, and the petitioner explained that "it's hard for me speak Mandarin" because he had "forgot[ten]" much of the Mandarin he had learned in grade school. 328 F.3d at 596-

97. Although the petitioner had not objected to the choice of interpreter, and had agreed to "speak very slowly in Mandarin," the Court of Appeals for the Ninth Circuit pointed to lengthy, poorly translated portions of the transcript that "read like 'Who's on First.'" *Id.* at 597. In particular, the court criticized the BIA for making an adverse credibility determination based largely on the meaning of the alien's testimony that the time lapsed between two events was "for a little while." *Id.* at 602. Given that the alien had not been provided a translator for the language that he spoke, the court found it "impossible to glean a precise meaning" from such an isolated, ambiguous phrase in the record. *Id.* at 603.

Unlike *Amadou* and *He*, petitioner in the present case was provided an interpreter who spoke what petitioner himself identified as his native dialect: Fu-zhou. *See* JA 59 (petitioner's counsel represents that petitioner "best understand[s]" Fu-zhou). At no time during the hearing before the IJ did petitioner claim that the interpreter spoke a different dialect. Indeed, when directly asked by the IJ whether he understood the interpreter's Fu-zhou, the petitioner's answer was an unqualified "yes." (JA 141)

Contrary to petitioner's claim on appeal, he did *not* object to his interpreter as being a "speaker of a different sub-dialect of Fuzhou." Pet'r Br. at 14. This claim was raised for the first and only time in petitioner's notice of appeal to the BIA (JA 23), and was never pursued in petitioner's counseled brief in support of his BIA appeal (JA 1-11). The petitioner's own transcribed words at the hearing (JA 141) contradict his claim in the notice of appeal that "I also told Judge that I had a difficult of

understanding the interpreter and would like to have a Mandarin interpreter." (JA 23) *See United States v. Polanco-Gomez*, 841 F.2d 235, 237 (8th Cir. 1988) (affirming district court's ruling that deportee was afforded adequate translation, where petitioner had "acknowledged that he understood the interpreter").

Although petitioner cites a number of awkward exchanges among the IJ, petitioner, and the interpreter, most appear to be a result of the speed with which petitioner was speaking, or the rendition of names of persons and places with which the interpreter cannot be expected to have been immediately familiar. All of these instances typify the "cumbersome" stops and starts common to nearly all bilingual proceedings. *E.g., Gutierrez-Chavez v. INS*, 298 F.3d 824, 830 (9th Cir. 2002); *Cheo v. INS*, 162 F.3d 1227, 1230 (9th Cir. 1998). Indeed, the fact that there were a handful of brief untranslated conversations between the interpreter and petitioner, together with a limited number of clarifications made by the interpreter on finer points of translation (e.g., later preferring the phrase "aquatic products" to his earlier translation of petitioner's industry as involving "seafood" or "water or sea products," JA 95, 131-32) demonstrates the apparent care that the interpreter was taking, in order to ensure the accuracy of the translation.

Minor difficulties in translation that do not prevent evidence from being submitted do not rise to the level of a due process violation. *Cheo,* 162 F.3d at 1230 (finding no violation where alien's attorney made no objection and there was no allegation that evidence was not presented due to faulty translation); *cf. United States v. Guerra*, 334

F.2d 138, 143 (2d Cir. 1964) (rejecting criminal defendant's "belated" challenge to competence of interpreter at trial, where discrepancies were "of minimal significance"). An alien's complaint of erroneous translation is significantly weakened when he had a fair opportunity to relate his version of events, even if clarification or repetition was required to do so. *Kotasz v. INS,* 31 F.3d 847, 850 n.2 (9th Cir. 1994). Due process does not demand an interpreter who never stumbles or has any difficulty. Problems with translation may be remedied on the spot, for example, by the IJ's intervention to generate a clear record. For example, in *Cheo*, the interpreter occasionally spoke too softly for the microphone and had some difficulty with some questions and answers. 162 F.3d at 1230. The IJ interrupted the proceedings to ensure that the exchanges were translated, heard and understood. *Id.* Their counsel never objected, and the aliens did not identify any evidence that was missed by the translator. *Id.* Under those circumstances, the Court concluded that there was no due process violation. *Id.*

In the present case, petitioner did ask to give one answer in Mandarin, not Fu-zhou, and the IJ did not accommodate him. (JA 101) This was well within the IJ's discretion, because although petitioner offered a reasonable explanation for why he was capable of answering the question in Mandarin, he offered no reason why he could *not* do so in his own native language as well. Indeed, while the country conditions document in the record notes that Mandarin is the national language and is taught in the schools (which explains petitioner's ability to speak Mandarin), it likewise notes that Fu-zhou is spoken

in petitioner's home province of Fujian. (JA 210) It was perfectly logical for the IJ to ask petitioner to explain the basic aims of the student movement, in which he was supposedly so active, in the tongue he claimed to "best understand." Petitioner's complete failure to articulate any of those aims, aside from the promotion of democracy, was a strong indicator that he was not in fact familiar with the movement and instead had merely memorized a speech for purposes of the asylum hearing.

Petitioner's claim also fails because these minor translation difficulties do not undermine the IJ's principal findings that petitioner brought forth questionable evidence of an account fraught with inherent implausibilities. As such, a better translation would not have changed the IJ's finding that petitioner was not credible. Petitioner provided only two documents to support his story that he was imprisoned and tortured for his political beliefs. The country conditions document in the record notes that "Documentation from China, *particularly from the Fuzhou and Wenzhou areas,* as elsewhere in southeast China, is subject to widespread fabrication and fraud." (JA 204 (emphasis added)) The IJ concluded on the basis of multiple factors that neither document was reliable. (JA 50-51) In addition, petitioner's story included clearly translated, implausible details such as the claim that his brother had saved the wanted circular for two years before sending it to him, and that the photograph on that poster had been confiscated from his home, saved by the police for six years, and then published on the circular. The IJ found the lack of any affidavits or letters to be unusual for one who claimed to have led a student movement. (JA 52)

Finally, petitioner's demeanor during his testimony (long pauses, staring at the ceiling, hitting his head with his hand, JA 157) led the IJ to conclude that he was not testifying truthfully from memories of actual events but, rather, was reciting a fictional narrative. These facts stand independently from the quality of the translation at the hearing, and each supports a conclusion that petitioner did not present credible evidence of his status.

In short, there is a difference between an imperfect translation and one which prejudices the outcome of a hearing. Petitioner was represented by counsel throughout his hearing and no objection was made regarding the quality of the translation. The petitioner has failed to explain how a better translation would overcome the paucity of documentation or the questionable authenticity of the documents which were presented. The IJ's adverse credibility finding was not based solely upon petitioner's testimony. Petitioner has failed to explain how a different translator would have changed the outcome of the hearing and therefore is not entitled to relief on this ground.

CONCLUSION

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

Dated: December 1, 2004

Respectfully submitted,

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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 9,691 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)

(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 C.F.R. § 1240.44

Any person acting as interpreter in a hearing before an immigration judge under this part shall be sworn to interpret and translate accurately, unless the interpreter is an employee of the United States Government, in which event no such oath shall be required.