

No. 05-73624

PRO BONO

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**TIAN LE ZHANG,
A95-294-369**

Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

Respondent.

**BRIEF FOR AMICUS CURIAE
IN SUPPORT OF
REVERSAL AND REMAND**

On Petition for Review of a Final Order of the Board of Immigration Appeals
Agency No. A 95 294 369

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction because the Petitioner, Tian Le Zhang (Mr. Zhang), filed his petition within 30 days of a final order by the Board of Immigration Appeals (BIA).¹ The BIA dismissed Mr. Zhang's appeal of an immigration judge's (IJ) decision denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture. Administrative Record (A.R.) 2-3. Venue is also proper, as the immigration proceedings were completed in Los Angeles, California.² A.R. 29.

II. STATEMENT OF THE ISSUES

I. In denying the asylum application, the IJ found that Mr. Zhang had not filed his application within one year of his arrival in the U.S. To reach this finding, the IJ ignored documents showing that Mr. Zhang was imprisoned for his religious beliefs and given medical treatment in China eight months before the asylum application was filed. Does this Court have jurisdiction to review a timeliness ruling when critical pieces of evidence were ignored?

¹ 8 U.S.C. § 1252(a)(1); 8 U.S.C. § 1252(b)(1). The BIA's order was entered on May 19, 2005. A.R. 2-3. Mr. Zhang's Petition was filed on June 17.

² 8 U.S.C. § 1252(b)(2).

II. The applications for asylum, withholding of removal and protection under the Convention Against Torture were denied because the IJ did not find Mr. Zhang's testimony to be credible. All of the adverse credibility findings do not go to the heart of the claims of persecution, are based on speculation and conjecture, or were reached without giving Mr. Zhang an opportunity to explain. Are these adverse credibility findings supported by substantial evidence?

III. STATEMENT OF THE CASE

This case presents an important, specific question regarding this Court's jurisdiction to review erroneous timeliness determinations, as well as other issues related to the IJ's adverse credibility determinations. Mr. Zhang was smuggled into the United States from China on June 25, 2001, after two arrests in China for practicing Tibetan Buddhism. A.R. 179-180; 191; 69-70. On December 6, 2001, Mr. Zhang completed his asylum application. A.R. 181-199. On March 4, 2002, Mr. Zhang was charged with removability under § 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA). A.R. 230.

On June 18, 2003, the IJ issued a decision denying Mr. Zhang's applications and ordering him removed to China. A.R. 31-39. This decision ignored evidence showing that Mr. Zhang had been imprisoned and hospitalized in China less than one year before his application was filed, referring to this evidence only as

“unauthenticated documents from China.” A.R. 35. On May 19, 2005, the BIA dismissed Mr. Zhang’s appeal, and this petition for review followed. A.R. 2-3.

IV. STATEMENT OF THE FACTS

A. Mr. Zhang’s Testimony and Documentary Evidence

1) Mr. Zhang’s First Arrest and Hospital Stay

On April 2, 2001 Mr. Zhang was released from Tiexi Branch of the Anshan Police Station after serving an eight-day sentence for “worshipping the national traitor Dalai Lama.” A.R. 179-180. On the same day Mr. Zhang was released, he was treated by Dr. Zhan Ge Fei of the Anshan No. 2 Hospital for a head injury he received while in custody. A.R. 175-178. Approximately eight months later, while living in Los Angeles, Mr. Zhang applied for asylum, withholding of removal and protection under the Convention Against Torture. A.R. 181-199.

2) Events Leading to Mr. Zhang’s First Arrest

Mr. Zhang, who has only a middle school education (A.R. 182), worked as a driver at the Tibet Xuelian Pharmaceutical Factory, Anshan Branch starting in 1997 or 1998. A.R. 182; 189; 57-58. While working at the factory, a sales manager named “Cirendala” introduced Mr. Zhang to Tibetan Buddhism. A.R. 189; A.R. 61. Mr. Zhang began to study the Sutras, “worshipped the Buddha,” and would turn to Cirendala and others from the factory for help with things he did not understand about the religion. A.R. 189; 60-62.

On March 25, 2001, “Master Zhizhun,” Cirendala’s Buddhist teacher, held a service at Mr. Zhang’s house along with several other Lamaists. Local police raided the service, and Mr. Zhang and the other Lamaists were arrested. A.R. 62-63; 190. While he was being held at the Tiexi branch of the Anshan police station, Mr. Zhang was interrogated about his religion, accused of “believing in a traitor Dalai Lama,” and then beaten and knocked unconscious. A.R. 190-191; 64-65. By April 2, 2001, Mr. Zhang’s health had deteriorated to the point that he was released from jail and sent to the hospital to be treated for a head injury, as was discussed above. A.R. 175-180; 191; 67. By that point, he had been fired from his job. A.R. 67, 191.

3) Anshan Labor Camp Imprisonment and Escape

Despite a warning from the police that Mr. Zhang should have no more contact with the others who had been arrested with him, he spoke with Cirendala via telephone two or three days after being released from the hospital. A.R. 68; 191. During the conversation, Mr. Zhang explained what had happened to him during the previous two weeks, and stated that he “would not give up on [his] religion.” A.R. 191; 68. Mr. Zhang’s telephone conversation had been monitored by the police. A.R. 191; 68.³ Shortly thereafter, Mr. Zhang was arrested again and

³ According to the State Department’s International Religious Freedom Report 2002, the authorities in China commonly monitor telephone and other forms of communications between its citizens. A.R. 119.

sentenced to five months imprisonment at the Anshan reeducation-through-labor camp. A.R. 191; 68.⁴ Approximately one month later, he escaped from the camp, made his way to a friend's house, and then traveled to the port city of Dalian. A.R. 191; 69.

4) Escape from China

While in Dalian, Mr. Zhang stayed with a classmate who lent him money and arranged for him to be smuggled out of the country by ship. A.R. 69-70; 186. When the ship approached a port near San Francisco, Mr. Zhang was lowered into a small boat and then taken ashore. After three days in San Francisco, he was driven to Los Angeles on June 28, 2001. Less than six months later, he applied for asylum, withholding of removal, and protection under the Convention Against Torture. A.R. 186; 71; 75; 181-199.

B. The Decision of the Immigration Judge

The IJ found that Mr. Zhang failed to meet his burden of proof for asylum, withholding of removal, and protection under the Convention Against Torture, and ordered him removed to China. A.R. 31-39. Specifically, the IJ found Mr. Zhang to be statutorily ineligible for asylum because he failed to demonstrate that he

⁴ “Arbitrary arrest and detention remained serious problems [in China]. The law permits authorities, in some circumstances, to detain persons without arresting or charging them, and persons may be sentenced administratively to up to 3 years in reeducation-through-labor camps and other similar facilities without a trial.” A.R. 114.

applied for asylum within one year of his arrival in the United States,⁵ and because he couldn't establish the date, place, and manner of his entry into the country.⁶

A.R. 35, 38. The IJ's decision ignores documentary evidence (A.R. 175-180) showing that Mr. Zhang had been imprisoned and hospitalized in China less than one year before his application was filed, referring to them only as

"unauthenticated documents from China." A.R. 35. Finally, the IJ based his credibility determination mainly on the following factors:

- (1) a perceived inconsistency in Mr. Zhang's testimony regarding the type and size of guns used by the guards at the Anshan city reeducation-through-labor camp (A.R. 37);
- (2) a perceived inconsistency in Mr. Zhang's testimony regarding whether he was completely naked, or only naked from the waist up after his escape from the labor camp (A.R. 37);
- (3) the IJ's speculation that being smuggled into the U.S. via ship without detection is implausible (A.R. 38); and
- (4) the IJ's belief that Mr. Zhang is not a practicing Tibetan Buddhist. A.R. 36-38.

⁵ § 208(a)(2)(B) of the INA, 8 U.S.C. § 1158(a)(2)(B).

⁶ § 291 of the INA, 8 U.S.C. § 1361.

C. The Decision of the Board of Immigration Appeals

In its decision dismissing Mr. Zhang's appeal, the BIA agreed with the IJ that Mr. Zhang is statutorily ineligible for asylum because he failed to demonstrate that his application was filed within one year of his arrival in the United States.

A.R. 2. Regarding Mr. Zhang's application for withholding of removal, the BIA agreed with most of the IJ's adverse credibility findings. A.R. 3. However, the BIA decision does not address the IJ's finding that being smuggled into the U.S. via ship without detection is implausible. Finally, the BIA found that Mr. Zhang failed to sustain his burden of proving his eligibility for protection under the Convention Against Torture, given the fact that he "offered no basis for a fear of torture independent from his unsuccessful showing as to withholding of removal." *Id.*

V. SUMMARY OF THE ARGUMENT

The IJ ruled that Mr. Zhang did not file an asylum application within one year of arrival in the United States, and therefore barred his asylum claim. This ruling dismisses without discussion two critical pieces of evidence showing that Mr. Zhang was in China approximately eight months before his application for asylum was filed: a police report showing Mr. Zhang's imprisonment for his religious beliefs, and a hospital record showing treatment for injuries he suffered while in police custody. Although this Court typically does not have jurisdiction to

review a ruling that an application for asylum is barred by the one-year rule, no agency's actions may be arbitrary and capricious, and this Court has found jurisdiction to exist where the IJ and BIA have completely ignored arguments made by an applicant.

The IJ also denied Mr. Zhang's applications for withholding of removal and protection under the Convention Against Torture on the grounds that his testimony was not credible. To be supported by substantial evidence, these adverse credibility findings must be relevant to Mr. Zhang's claims of religious persecution. If there are any inconsistencies perceived by the IJ, Mr. Zhang must be given an opportunity to explain, and that explanation must be considered. None of these requirements were met here.

VI. ARGUMENT

A. Standard of Review and Substantive Legal Standards

The proper standard of review in immigration proceedings depends on the nature of the decision being reviewed. The IJ's factual findings (including adverse credibility findings) and denial of withholding are reviewed for substantial evidence.⁷ Questions of law, including mixed questions of law and fact, are reviewed *de novo*.⁸ This Court's review of a petition is limited to "the administrative record on which the order of removal is based."⁹

Mr. Zhang has applied for asylum, withholding of removal, and protection under the Convention Against Torture. To obtain withholding of deportation on the basis of future persecution, Mr. Zhang must demonstrate a clear probability of persecution.¹⁰ But to seek asylum as a refugee, he need only show a well-founded fear of persecution, a lesser standard.¹¹ Finally, to establish eligibility under the

⁷ See, e.g., *Manzo-Fontes v. INS*, 53 F.3d 280, 282 (9th Cir. 1995) (discussing standards); *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002) (reviewing adverse credibility findings for substantial evidence).

⁸ See, e.g., *Hernandez-Gil v. Gonzalez*, 476 F.3d 803, 804 n.1 (9th Cir. 2007); *Ramadan v. Gonzalez*, 479 F.3d 646, 648 (9th Cir. 2007).

⁹ 8 U.S.C. § 1252(b)(4)(A).

¹⁰ *INS v. Stevic*, 467 U.S. 407, 413 (1984).

¹¹ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987).

Convention Against Torture, Mr. Zhang must establish that it is more likely than not that he will be tortured if he is removed to China.¹²

B. The Flawed Timeliness Ruling is Reviewable Because the IJ Ignored Relevant Evidence.

The IJ erroneously found that Mr. Zhang did not file his asylum application within one year after his last arrival in the United States as required by §208(a)(2)(B) of the INA.¹³ In making this ruling, the IJ completely ignored evidence establishing that Mr. Zhang was in China, being persecuted for his religious beliefs, only eight months before filing his application. Specifically, the IJ failed to address the report from the Anshan Police station showing Mr. Zhang's March 25-April 2, 2001 arrest for his religious beliefs (A.R. 179-180), and the hospital record of Mr. Zhang's treatment for a head injury on the day of his release from the police station (A.R. 175-178).¹⁴

¹² 8 C.F.R. §208.16(c)(2).

¹³ 8 U.S.C. § 1158(a)(2)(B); *Hakeem v. INS*, 273 F.3d 812, 815 (9th Cir. 2001). However, "There is no statutory time limit for bringing a petition for withholding of removal." *El Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004).

¹⁴ The hospital record also shows Mr. Zhang's treatment for kidney stones during January of 2001 (A.R. 174; 177).

The English translation of the police report (A.R. 179) reads in part as follows:

Anshan Police Station
Social Security Punishment

The violator, Zhang Tian, [male], 35 years old, being addicted to participating in illegal religious gathering and worshipping the national traitor Dalai Lama. According to Social Security Punishment Rule No. 27 of People's Republic of China, Zhang Tian is being punished for 8 days in detention and 8000 RMB in fine. If the violator does not agree with the verdict, he or she could appeal to the higher police authority in 60 days.

* * *

Date: April 2, 2001

The English translation of the hospital record (A.R. 175) reads in part:

April 2, 2001

Patient complained of headache and dizziness.

Patient said that 2 hours ago his head was hit and he felt dizzy

Patient's mind is clear and he has big bump on the head....

Decision: Head injury

Treatment: Medicine

Please come back as and when required.

Seal of Doctor: Zhan Ge Fei of Anshan No. 2 Hospital

The Government attorney objected to these documents on the ground that “the translation certificate is incomplete and insufficient as to the translator’s ability to translate the document” as required by 8 C.F.R. 3.33.¹⁵ A.R. 56.

¹⁵ This regulation reads: “Any foreign language document offered by a party in a proceeding shall be accompanied by an English language translation and a certification signed by the translator that must be printed legibly or typed. Such certification must include a statement that the translator is competent to translate the document, and that the translation is true and accurate to the best of the translator’s abilities.”

One of the two identical translation certificates is reproduced here (A.R. 175):

TRANSLATION CERTIFICATE

I, Michael Fu, certify that the above is an accurate translation from the Chinese Original to the best of my knowledge.


MICHAEL FU

Date: 05/09/02

Even if there is a dispute as to the accuracy of the translation or to the contents of the translation certificate, the date on each document is written at least in part in characters that are used both in the west and in China. The hand-written date (2001. 4-2) on the medical record (A.R. 178) is reproduced below:

2001. 4-2

And the hand-written year (2001) on the police report (A.R. 180) is reproduced here:

2001

The IJ never ruled the documents to be inadmissible; and even though the Government attorney did not object to the authenticity of the police report and hospital record, the IJ referred to them only as “unauthenticated documents from China.” A.R. 35.

There are at least two principles that must be balanced here; first is the requirement that no agency action may be arbitrary and capricious. Second is the limiting language in the INA, which usually removes an appellate court's jurisdiction to review a timeliness determination made under 8 U.S.C.

§1158(a)(2)(B).¹⁶ This Court reached a balance between these two principles in *Sagaydak*, which held that where the IJ does not make a “determination”, the Court does have “jurisdiction to grant the petition and remand the case so that the agency charged with making this determination can properly do so.”¹⁷

The IJ's decision in this case focuses on § 291 of the INA, which places the burden on an applicant to establish date, place and manner of entry into the country.¹⁸ The consequence for failure to prove time, place, and manner of entry into the US is simply a presumption that the applicant entered the country illegally; this is not in dispute here.

¹⁶ 8 U.S.C. § 1158(a)(3), which reads: “(3) Limitation on judicial review. No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).” *See also, Hakeem*, 273 F.3d at 815. Of course, this Court always has jurisdiction to determine whether it has jurisdiction. *Sagaydak v. Gonzales*, 405 F.3d 1035, 1039 (9th Cir. 2005).

¹⁷ *Sagaydak*, 405 F.3d at 1037.

¹⁸ § 291 reads in relevant part: “... In any removal proceeding under chapter 5 against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States.... If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.”

Again, the IJ refers to the critically important police report and hospital record only as “unauthenticated documents from China.” But the record does not include any “evidence undermining their reliability, such that a reviewing court can objectively verify whether the IJ has a legitimate basis to distrust the documents.”¹⁹ And although IJs are given significant discretion, they “cannot reach their decisions capriciously and must indicate how [they] weighed the factors involved and how [they] arrived at [their] conclusion.”²⁰

In *Sagaydak*, this Court found jurisdiction to exist where the IJ and the BIA ignored the existence of the extraordinary circumstances exception to the one-year bar rule. A “determination” under §1158(a)(3) must necessarily include a consideration (even an erroneous one) of the relevant law and evidence; since the IJ in *Sagaydak* ignored the relevant law, no “determination” was made.²¹ This case is the complement to *Sagaydak* – no “determination” was made (and jurisdiction must exist) because critically important evidence was ignored. The INA cannot insulate from review capricious rulings based on only a selected subset of the facts.

¹⁹ *Lin v. Gonzales*, 434 F.3d 1158, 1162 (9th Cir. 2006) (internal quotation marks omitted).

²⁰ *Sagaydak*, 405 F.3d at 1040, citing *Yepes-Prado v. INS*, 10 F.3d 1363, 1370 (9th Cir. 1993) and *Dragon v. INS*, 748 F.2d 1304, 1307 (9th Cir. 1984) (internal quotations omitted).

²¹ *Sagaydak*, 405 F.3d at 1039-1040.

C. The IJ's Adverse Credibility Findings Are Not Supported by Substantial Evidence

Mr. Zhang's asylum, withholding of removal and Convention Against Torture claims were denied in part because of the IJ's adverse credibility findings. Most of the alleged inconsistencies cited by the IJ do not go to the heart of the persecution claim; for the others, Mr. Zhang was not given an opportunity to explain. These adverse credibility findings are therefore not supported by substantial evidence.

1) Mr. Zhang's testimony regarding the type and size of guns used by guards at the Anshan city reeducation-through-labor camp is not inconsistent, and does not go to the heart of his claim of religious persecution.

Minor inconsistencies that "do not relate to the basis of an applicant's alleged fear of persecution, go to the heart of the asylum claim, or reveal anything about an asylum applicant's fear for his safety are insufficient to support an adverse credibility finding...."²² Mr. Zhang's claim is that he has been persecuted in China for his Tibetan Buddhist beliefs; his testimony regarding guns, if it can be viewed as inconsistent (rather than merely a correction for a misstatement or translation error) is irrelevant. The IJ's decision (at A.R. 37) reads in part:

Respondent testified that there were two guards for 60 men. When asked if the guards were armed he testified that they carried pistols and he held his hand close together to show the size. When I showed surprise on my face the respondent changed his testimony and said they carried big guns, machine

²² *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir. 2003).

guns. I have the impression that the respondent was making up the story as we went along.

The relevant portions of the May 27, 2003 transcript (at A.R. 80-81) are reproduced below; Mr. Zhang's answers are given through an interpreter:

Q. (Indiscernible.)

A. Forty to 50 of us are working and then there were two guards guarding us.

* * *

Q. How were they armed?

A. They have some sort of revolver with them.

Q. Just a revolver?

A. Correction, some sort of a machine gun.

Q. Oh. Which is it? A revolver or machine gun?

A. A, a machine gun.

Even if this testimony regarding gun size were relevant to Mr. Zhang's claim, he must have been given a reasonable opportunity to explain any perceived inconsistencies, and that explanation must be considered by the IJ.²³ The transcript shows that the IJ did not ask for an explanation of what he perceived to be an inconsistency, and so this adverse credibility determination must be reversed.

²³ *Kaur v. Ashcroft*, 379 F.3d 876, 887 (9th Cir. 2004) (“An adverse credibility finding is improper when an IJ fails to address Petitioner’s explanation for a discrepancy or inconsistency”).

2) Mr. Zhang's testimony regarding the clothing he wore after escape from the labor camp is not inconsistent, and is irrelevant to his claim of religious persecution.

Just as with the testimony regarding gun size, even if Mr. Zhang's testimony regarding the clothing he wore after his escape from the labor camp is considered to be inconsistent (and not merely a change to correct a misstatement or translation error), it is a minor inconsistency that does not go to the heart of Mr. Zhang's claim of persecution and cannot support an adverse credibility finding.²⁴ The IJ's decision (at A.R.37) reads in part:

The respondent testified that after leaving the labor camp on the back of a truck he jumped off the truck at a railroad crossing. He then walked for two and a half or three hours to an old classmate's home. When asked if he wore a prison uniform he stated he did. When asked what happened to the prison uniform when he jumped off the truck, he said he took it off and went naked. When I again expressed surprise, he stated that he was not in fact naked, that he just took off his shirt that was part of the prison uniform.

The relevant portions of the May 27, 2003 transcript (at A.R. 82-83) are reproduced below; again, Mr. Zhang's answers are given through an interpreter:

Q. And what did you do after you jumped off the truck?

A. I follow the mountain road and then to my friend's classmate home.

* * *

Q. Were you dressed as a prisoner?

A. I disposed of all the clothing and I walked naked.

Q. So you walked naked for did you say two hours?

A. No, just a shirt. I still have my pants on.

²⁴ *Mendoza Manimbao*, 329 F.3d at 660.

Finally, even if this testimony were relevant to Mr. Zhang's persecution claim, he must have been given a reasonable opportunity to explain any perceived inconsistencies, and that explanation must be considered by the IJ. Just as with the testimony regarding gun size, the transcript shows that the IJ did not ask for an explanation of what he perceived to be an inconsistency; this perceived inconsistency therefore cannot be the basis for an adverse credibility finding.²⁵

3) The IJ's adverse credibility finding regarding Mr. Zhang's voyage to the U.S. is based on speculation and conjecture.

In his decision, the IJ found "not plausible" Mr. Zhang's testimony regarding being transported to the U.S. with the assistance of a smuggler. A.R. 38. The IJ based his credibility determination on the following: (1) Mr. Zhang did not know the name of the ship on which he traveled; (2) Mr. Zhang was not discovered while staying in a small storeroom; and (3) Mr. Zhang was not discovered while being transferred from the deck of the ship to a small boat that took him ashore. In conclusion, the IJ stated:

It is implausible that the respondent could be removed from a ship to a boat without being seen. The safety and security of a valuable ship requires constant surveillance and lookout to assure that the ship is not damaged by other passing vessels. Based upon the testimony as a whole, and the respondent's demeanor, I find that his testimony was incredible and I must deny his application for asylum. [A.R. 38]

²⁵ *Kaur*, 379 F.3d at 887.

The IJ provides no basis for these statements. As this Court held in *Shah v. INS*, “Speculation and conjecture cannot form the basis of an adverse credibility finding, which must instead be based on substantial evidence.”²⁶ Moreover, relevant portions of Mr. Zhang’s testimony (A.R. 73-75), reproduced below, show nothing inherently implausible:

Q [by the Government attorney]. What was the name of the ship that you came across to San Francisco?

A. I don't know of the name.

* * *

Q. Did you just stay in that one room the whole time [while on board the ship]?

A. Not in his room, no.

Q. No, in the room next to Dadofu’s [the smuggler]?

A. Yes. Small storage place. [A.R. 73]

* * *

Q. And so how were you lowered [into the small boat that met the ship near San Francisco]? Were you in something or was it just your body?

A. They have a lever of some sort and then they lower me down.

Q. Who lowered you?

A. Dadofu [the smuggler].

Q. And what time of day was this?

A. I believe, I believe that it was in the evening between 9 and 10 p.m.

* * *

Q. And did anyone see you?

A. No.

²⁶ 220 F.3d 1062, 1071 (9th Cir. 2000).

There are millions of illegal immigrants living in the U.S., many of whom entered the country without inspection. The reality is that drug smuggling, human smuggling, and the smuggling of other contraband are common, as is shown by countless news stories.²⁷ There is no evidence to support the IJ's speculation that shipboard smuggling and entry into the U.S. by Mr. Zhang without detection is implausible; this speculation therefore cannot form the basis of an adverse credibility finding.²⁸

There are other reasons why the adverse credibility finding on this issue is not supported by substantial evidence. Regarding the name of the ship, the record shows that Mr. Zhang was never asked if he was told the name of the ship, if he saw the name of the ship, or if the name of the ship was written in Chinese. Even if this testimony is considered to be inconsistent or implausible, this and other testimony regarding travel to the U.S. does not go to the heart of Mr. Zhang's claim of religious persecution, and cannot support an adverse credibility finding.²⁹

Finally, even if this testimony were relevant to Mr. Zhang's persecution claim, he must have been given a reasonable opportunity to explain any perceived inconsistencies, and that explanation must be considered by the IJ. Since this did

²⁷ See, e.g., http://feinstein.senate.gov/releases00/seaport_security.html.

²⁸ *Shah*, 220 F.3d at 1071.

²⁹ *Mendoza Manimbao*, 329 F.3d at 660.

not take place here, any perceived inconsistency by the IJ cannot be the basis for an adverse credibility finding.³⁰

4) Mr. Zhang was not given an opportunity to explain any perceived inconsistencies in the testimony regarding his religion.

In the IJ's decision, he states "...I do not believe that [Mr. Zhang] is a practicing Tibetan Buddhist." A.R. 37. The basis for this belief (A.R. 36-37) is as follows:

On cross-examination [Mr. Zhang] could not recite one prayer, chant, or mantra that would be used by believers. Instead, the respondent merely put his hand together as if in prayer but could not recite a single thing. When asked this question, the respondent's demeanor changed. He became hesitant and nervous. It left me with the impression that the respondent was not credible on this issue. The respondent did not present evidence to show that he practiced this religion once he arrived in the United States. He did not present a witness or documents to show that he is currently participating in this religion.

Although this Court in *Singh-Kaur v. INS* held that credibility determinations based on an applicant's demeanor are given "special deference," it also recognized that "most witnesses are uncomfortable and nervous when being cross examined and, perhaps, when being questioned by a judge."³¹ Moreover, the apparent translation difficulties, the IJ's failure to seek and consider explanation for perceived inconsistencies, and the IJ's failure to consider relevant evidence require a remand.

³⁰ *Kaur*, 379 F.3d at 887.

³¹ *Singh-Kaur v. INS*, 183 F.3d 1147, 1151 (9th Cir. 1999).

Regarding translation, this Court has “long recognized that difficulties in interpretation may result in seeming inconsistencies, especially in cases . . . where there is a language barrier.”³² One relevant portion of the hearing transcript (A.R. 76) is reproduced below; again, Mr. Zhang speaks through a translator:

Q. Sir, can you tell me what a mantra is?

A. I don't quite understand.

Q. Did you learn or chant any mantras?

A. I don't quite understand what mantra is.

Here is an earlier exchange (A.R. 42) regarding Mr. Zhang's language skills:

Q. Sir, what language do you understand the best?

A. What?

Q. What language do you speak and understand the best?

A. I don't understand.

Q. Okay, is Mandarin your best language?

A. Yes.

³² *Mendoza Manimbao*, 329 F.3d at 662.

The testimony about Mr. Zhang's ability to recite prayers (A.R. 76-77) also seems to show translation difficulties; in addition, Mr. Zhang is not asked to explain any of the inconsistencies perceived by the IJ:

Q. Or any prayers or any –

A. I, I pray. It's like giving (indiscernible) and then hoping I had the good reincarnation in future, and then hoping that I have good incarnation or the rebirth in future.

Q. Is there any particular name of a popular blessing or popular mantra that you would recite or say?

A. Some of the prayers. Because I was not highly educated so I had a limited ability to learn and then some of the religious belief I had a hard time to comprehend as well.

Q. Sir, so you don't remember any particular names of any mantras or blessings, prayers that you would recite.

A. I have to do this. It's just like, it seems like giving blessing to myself and then it seems I have to remind myself to, to do some good deeds for mankind.

Again, Mr. Zhang must have been given a reasonable opportunity to explain any perceived inconsistencies, and that explanation must be considered by the IJ. Since this did not take place here, any perceived inconsistency cannot be the basis for an adverse credibility finding.³³

³³ *Kaur*, 379 F.3d at 887.

5) Mr. Zhang was not given an opportunity to explain a perceived lack of corroborating evidence, and material corroboration provided to the IJ was ignored.

The IJ's finding that Mr. Zhang is not a practicing Tibetan Buddhist was also based in part on a lack of corroborative evidence. However, the transcript shows that Mr. Zhang was not given an opportunity to explain the failure to provide material corroboration, as this Court requires:³⁴

Q. Well what Buddhist temple do you go to here in the United States?

A. The (indiscernible) Temple.

Q. Do you have anyone here from that temple to testify today?

A. Not today, no.

Q. Do you have any documents to show that you are a Tibetan Buddhist?

A. This is some sort of Buddhist (indiscernible) that I got from the (indiscernible) Temple.

Q. But you have no documents or no one to testify that you are in fact a Tibetan Buddhist?

A. I don't. [A.R. 85]

Mr. Zhang did provide corroborating evidence that he is a Tibetan Buddhist – the police report showing his arrest for practicing Tibetan Buddhism (A.R. 179-180) that the IJ dismissed as an “unauthenticated document[] from China.” A.R. 35. Independent of the success of the asylum and CAT claims, Mr. Zhang may not be removed to China if his “life or freedom would be threatened in that country

³⁴ *Arulampalam v. Ashcroft*, 353 F.3d 679, 688 (9th Cir. 2003).

because of [his] ... religion....”³⁵ Mr. Zhang is entitled to the presumption that such a threat exists if he demonstrates that he has suffered such persecution in the past.³⁶ The police report, which shows that Mr. Zhang was arrested for practicing Tibetan Buddhism, is critical to this analysis.

Finally, since Mr. Zhang has produced credible corroborating evidence to buttress his testimony, the “IJ may not base an adverse credibility determination on [Mr. Zhang’s] failure to produce additional evidence that would further support that particular claim.”³⁷

³⁵ 8 U.S.C. § 1231(b)(3)(A).

³⁶ 8 C.F.R. § 208.16(b)(1).

³⁷ *Sidhu v. INS*, 220 F.3d 1085, 1091 (9th Cir. 2000); *see also, Gui*, 280 F.3d at 1227 (“Where, as here, Petitioner provides some corroborative evidence to strengthen his case, his failure to produce still more supporting evidence should not be held against him”).

VII. CONCLUSION

The IJ failed to consider documents (the police report and hospital record) that are relevant both to timeliness of the asylum application and to Mr. Zhang's applications for asylum, withholding of removal and protection under the Convention Against Torture. Since the BIA has not yet considered this evidence, the proper course is to vacate the BIA's order and remand to allow the BIA to consider them in the first instance.³⁸ The same is true with respect to credibility determinations; this Court must remand the case so that the BIA can determine in the first instance whether the Mr. Zhang has met the other criteria for eligibility for asylum, withholding of removal, and protection under the Convention Against Torture.³⁹ Alternatively, the Court may remand for a renewed credibility determination.⁴⁰

³⁸ *INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam).

³⁹ *He v. Ashcroft*, 328 F.3d 593, 603–04 (9th Cir. 2003).

⁴⁰ *Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998).

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Respectfully submitted,

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STATEMENT OF RELATED CASES

Amicus counsel is aware of no related cases pending before the Court.

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Frederick F. Hadidi has been appointed pro bono amicus counsel on behalf of petitioner by order of the Court dated January 23, 2008. Mr. Hadidi has no interest in this case.

BRIEF FORMAT CERTIFICATION

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionally spaced, has a typeface of 14 points and contains ___ words. Dated this 8th day of February, 2008

[TO BE COMPLETED BY
COUNSEL PRESS]

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February 2008, copies of Brief of Amicus Curiae were directed to be served on Petitioner and Respondent, via First Class Mail to the following addresses:

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