No.

In the Supreme Court of the United States

RUI YANG,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

QUESTION PRESENTED

The federal regulation on the processing of asylum applications instructs that "[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. § 1208.13(a).

The question presented in this case is whether an immigration judge must explicitly determine whether an asylum applicant's testimony is credible before denying asylum for failure of the applicant to provide evidence corroborating his or her asylum application.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—continued

Page(s)

MISCELLANEOUS

TABLE OF AUTHORITIES—continued

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Petitioner Rui Yang respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 664 F.3d 580. The decisions of the Board of Immigration Appeals (App., *infra*, 18a-22a) and of the Immigration Judge (App., *infra*, 23a-42a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on Dec. 12, 2011. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutory and regulatory provisions involved are set forth in the appendix to this petition. App., *infra*, 43a-45a.

STATEMENT

Federal law permits noncitizens to seek asylum in the United States when they have a reasonable fear of persecution in another country; a key element in assessing entitlement to asylum is a determination by an immigration judge (IJ) and the Board of Immigration Appeals (BIA) whether the applicant's testimony in support of the application is credible. But in this case, the Fifth Circuit—expressly rejecting the contrary holdings of other courts of appeals—held that the agency need *not* make "an explicit credibility determination" when ruling on and rejecting an asylum application. App., *infra*, 11a-12a.

This holding should not stand. It cannot be squared with the language and policy of 8 C.F.R. § 1208.13, the BIA's regulation governing asylum credibility determinations. It undermines the United States' commitment to protecting aliens who face persecution abroad. It greatly complicates review of IJ asylum decisions by the BIA and the courts of appeals. And it exposes applicants to deprivations of life and liberty without the procedural protections mandated by the regulatory regime. Further review by this Court accordingly is warranted.

A. Statutory And Regulatory Framework

1. Federal law has long recognized the right of a noncitizen to seek asylum in the United States if he or she has a "well-founded fear" of future persecution on account of specified grounds such as race, religion, nationality, membership in a particular social group, or political opinion. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 427-428 (1987); 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A); 8 C.F.R. § 1208.13(b). Hundreds of thousands of aliens have sought asylum protection in the United States in the past five years alone, and more than half of all applications in fiscal year 2011 were granted. U.S. Dep't of Justice, Exec. Office for Immigr. Review, *FY 2011: Statistical Year Book* I1, K1, K2 (2012) [hereinafter *FY 2011: Statistical Year Book*], *available at* www.justice.gov/eoir/statspub/fy11syb.pdf.

To establish a well-founded fear of future persecution, an applicant for asylum must show a "reasonable possibility" of suffering persecution if returned to his or her home country. 8 C.F.R. § 1208.13(b)(2)(i)(B). To make such a showing, applicants must establish that a reasonable person in

their circumstances would fear persecution. See *In re Kasinga,* 21 I. & N. Dec. 357, 366 (B.I.A. 1996); *In re Mogharrabi,* 19 I. & N. Dec. 439, 445 (B.I.A. 1987). Applicants may apply for asylum affirmatively with the United States Citizenship and Immigration Services (USCIS) or may seek asylum defensively before an IJ, during removal proceedings or after an affirmative application to USCIS is denied.

Immigration judges' asylum determinations may be reviewed by the BIA. The agency reviews an IJ's findings of fact under a "clearly erroneous" standard, while other aspects of the case are reviewed *de novo*. See 8 C.F.R. § 1003.1(d)(3)(i) ("The Board will not engage in de novo review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous."). The BIA's rulings, in turn, may be appealed to the federal courts of appeals, which review agency factual determinations under a substantial evidence standard. 8 U.S.C. § 1252(b)(4)(B) (indicating that the agency's findings of fact are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"). See also *Martinez-Buendia* v. *Holder*, 616 F.3d 711, 715 (7th Cir. 2010) (reviewing the BIA's "determination of facts * * * for substantial evidence").

2. Determination of an asylum applicant's credibility is central to this process: "'Credibility is arguably the most crucial aspect of any asylum case' and 'the single biggest substantive hurdle' facing asylum applicants." Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 Tex. Int'l L.J. 185, 186-187 (2008) (citations

omitted). Thus, a BIA regulation, unchanged since 1997, provides: "The testimony of the applicant, if credible, *may be sufficient* to sustain the burden of proof without corroboration." 8 C.F.R. § 1208.13(a) (emphasis added).[1]

In 1997, the BIA interpreted Section 1208.13(a) to allow an IJ to require an asylum applicant—even if credible—to furnish corroborating evidence to support his or her claim. See *In re S-M-J-*, 21 I. & N. Dec. 722 (B.I.A. 1997). Even if an IJ "finds an applicant to be credible," the BIA concluded, the IJ may still "find[] that she has failed to meet her burden of proof," such as when an applicant's testimony is "plausible in light of general country condition[s]" but "overly general." *Id.* at 729. This is so, the agency found, because testimony is only "part of the body of evidence which is intertwined and considered in its totality." *Ibid.*

In 2005, Congress enacted the REAL ID Act, Pub. L. 109-13, 119 Stat. 302 (2005), which in relevant part codified the existing standards governing the agency's consideration of asylum applications. See 8 U.S.C. § 1158(b)(1)(B). In particular, the statute codified the regulation's requirement that "[t]he testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration," and further provided that, "[w]here the trier of fact

---

[1] Section 1208.13(a) was first added by 55 Fed. Reg. 30,674-01, 30,683 (July 27, 1990), when it read: "The testimony of the applicant, if credible in light of general conditions in the applicant's country of nationality or last habitual residence, may be sufficient to sustain the burden of proof without corroboration." The language was put in its current form by Procedures for Asylum and Withholding of Removal, 62 Fed. Reg. 10,337, 10,342 (Mar. 6, 1997).

determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." 8 U.S.C. 1158(b)(1)(B)(ii).[2] The asylum-related provisions of the REAL ID Act apply only to asylum applications that were filed after the date of the statute's enactment, May 11, 2005. See REAL ID Act § 101(h)(2), 119 Stat. at 305 (indicating that asylum-related provisions apply to "applications for asylum * * * made on or after such date" of enactment). See also *In re S-B-*, 24 I. & N. Dec. 42 (B.I.A. 2006).

Although the REAL ID Act authorizes the agency to require an asylum applicant to furnish corroborating evidence, the Act does not address whether an immigration judge *must* make a credibility determination before demanding corroborating evidence. As discussed below, the courts of appeals have divided on this question, for asylum applications submitted both before and after enactment of the REAL ID Act.

B. Proceedings Below

1. Petitioner Rui Yang, a native and citizen of the People's Republic of China, arrived in the United States in 1998 on a cultural exchange visa to participate in a high-school exchange program. App., *infra*,

---

[2] The conference report accompanying the legislation states that "new clause 208(b)(1)(B)(ii)" is "based upon the standard set forth in the BIA's decision in *Matter of S-M-J-*" and then quotes at length from that opinion. H.R. Rep. No. 109-72, at 165-166 (2005) (Conf. Rep.). The new provisions also "codifie[d] factors identified in case law on which an adjudicator may make a credibility determination." *Id.* at 166-167.

2a. He later obtained a student visa so that he could attend college. App., *infra*, 2a, 30a.

In August 2001, Chinese authorities searched petitioner's home in China, arresting his father and detaining him for a year without bail because of his family's practice and support of Falun Gong. App., *infra*, 19a-20a, 31a, 35a. Falun Gong is a spiritual discipline that was banned by the Communist Party of China in 1999. See Thomas Lum, Cong. Res. Serv., RL 33437, *China and the Falun Gong* (2006). The U.S. State Department has recognized the persecution of followers and practitioners of Falun Gong by the Chinese government.[3] By June 2002, petitioner had to stop attending college because he and his family could no longer afford it as a result of his father's imprisonment, and petitioner lost his lawful visa status in the United States. See App., *infra*, 2a, 30a.

On November 28, 2001, a few months after his father's arrest and while he was still in legal status as a student, petitioner filed an application for asylum. App., *infra*, 2a. He explained that he feared that the Chinese government would persecute him because of his association with Falun Gong, noting that

---

[3] The State Department's *Country Report on Human Rights Practices*: *China* (released on Mar. 11, 2008), which was considered as part of the administrative record during petitioner's immigration proceedings, details the harsh treatment of practitioners of Falun Gong. A.R. 235. Since the crackdown on Falun Gong began in 1999, hundreds, if not thousands, of adherents have died in custody due to torture, abuse, and neglect. A.R. 237, 254. According to the State Department, family members of Falun Gong practitioners have also been targeted for arbitrary arrest and detention. A.R. 245. Mere possession of Falun Gong materials has often served as the basis of arrest and detention. A.R. 254.

he sent his parents pro-Falun Gong articles, including newspaper and Internet articles regarding the government's unfair treatment of Falun Gong followers, that they distributed in China. App., *infra*, 3a-4a, 19a-20a. It was discovery of the posting of these materials that caused Chinese authorities to arrest petitioner's father. App., *infra*, 3a, 19a-20a. The Chinese government also charged petitioner with "colluding with overseas reactionary forces and attempting to subvert the communist party." App., *infra,* 20a, 35a.

2. Petitioner was interviewed by the USCIS soon after applying for asylum in 2001, but he did not receive a timely decision.[4] App., *infra*, 2a; A.R. 155, 194, 204.

In 2005, four years after submitting his application, petitioner moved to Dallas from Los Angeles to find a way to support himself while his application was pending. A.R. 185. He filed a change-of-address form with the USCIS as required. A.R. 194. Still not hearing anything from the agency, he sent a letter to his Congressman in December 2006 asking for help in getting the USCIS to decide his case. A.R. 194, 204. By then, the attorney who assisted petitioner in preparing his application had ceased his representation of petitioner, having retired from immigration work. A.R. 32, 194. In 2007, petitioner obtained a second attorney, but that attorney was suspended from practice for repeated failure to appear at sche-

---

[4] The law provides that such administrative decisions "shall be completed within 180 days after the date an application is filed" in the absence of exceptional circumstances. 8 U.S.C. § 1158(d)(5)(A). Petitioner, however, did not receive a decision in his case for more than four years. A.R. 185.

duled hearings and engaging in conduct that constituted ineffective assistance of counsel, shortly after taking on petitioner's case. A.R. 33, 111; Order, *In re Mason*, Nos. D2006-215, D2007-022, D2007-098 (B.I.A. Jan. 8, 2008).[5]

Unable to work legally unless granted asylum and without support from his family because of his father's arrest, petitioner could not afford to retain another attorney and, despite what the IJ recognized to be a good-faith effort, was not able to find one from low-cost providers. A.R. 33, 119. Petitioner accordingly presented his case *pro se*. App., *infra*, 3a.

3. At his hearing on October 27, 2008, petitioner testified that he feared Chinese authorities would arrest and harm him if he returned to China. App., *infra*, 3a-4a. The IJ did not identify any inconsistencies in petitioner's written material and statements, which were also consistent with the State Department's country report regarding the treatment of supporters of Falun Gong. App., *infra*, 4a-5a. The IJ determined, however, that petitioner did not present evidence specifically corroborating his testimony regarding his father's arrest and detention. App., *infra*, 35a-36a. In particular, the IJ faulted petitioner for not obtaining letters from his family documenting his claims. App., *infra,* 4a.[6] The IJ accordingly denied

---

[5] Unfortunately, inadequate representation in immigration proceedings is common. See Robert A. Katzmann, *Deepening the Legal Profession's Pro Bono Commitment to the Immigrant Poor*, 78 Fordham L. Rev. 453, 453 (2009) (discussing the "all too frequent inadequate representation of immigrants").

[6] In his final hearing before the IJ, petitioner did not at first understand the IJ's question regarding whether he had obtained or tried to obtain letters from his family members, and he indicated that he did not think such evidence would be ac-

petitioner's application, refusing to grant a continuance for petitioner to seek letters from his family. App., *infra*, 36a.[7]

On October 31, 2008, the IJ formally denied petitioner's application for asylum, citing his failure to provide corroborating evidence—documentary evidence pertaining to his father's arrest or to his contention that Chinese authorities intended to arrest him. App., *infra*, 37a-38a. The IJ's decision made no specific finding about, and did not question, petitioner's credibility.[8]

The BIA affirmed the IJ's decision, stating that petitioner's application "did not provide sufficient documentation to corroborate his claim." App., *infra*, 20a. The BIA reasoned that statements from petitioner's family members were "reasonably obtainable" and that it was "reasonable to expect such evidence to corroborate the material aspects of [his] case." App., *infra*, 21a. The BIA did not address petitioner's credibility; instead, it rejected petitioner's argument that his testimony was itself sufficient to

---

cepted. A.R. 161. When petitioner offered to have his family write letters, the IJ responded that petitioner "had an attorney before" and therefore should have been prepared to present his corroboration. A.R. 165.

[7] Neither the IJ nor the BIA questioned petitioner's assertion that he could not provide documentary evidence of his father's detention because the Chinese government does not document such arrests. App., *infra*, 20a.

[8] The IJ's written decision suggests that petitioner "had more than ample time to present his case" in light of his having had the "services of two attorneys," but failed to note that one of those attorneys retired during the extraordinary delay following submission of petitioner's application and that the other attorney was suspended from practice shortly after taking petitioner's case. App., *infra*, 36a, 37a. See also A.R. 32, 33, 111, 194.

sustain his application "because the lack of corroborative evidence is dispositive of the appeal." App., *infra*, 21a n.3.

3. The court of appeals affirmed. App., *infra*, 1a-17a. It first held that the BIA may reject an asylum application for failure to provide corroborating material even if the applicant's testimony is otherwise credible. App., *infra*, 13a. The Fifth Circuit added, however, that it still had to decide whether the agency may deny an asylum application without making any determination as to the applicant's credibility *at all*, noting that in this case "the BIA did not make a determination regarding [petitioner's] credibility." App., *infra*, 11a.

On this, the court observed that "[t]he BIA's view that a failure to corroborate testimony is 'dispositive' seems, at first glance, to be in tension with the language of 8 C.F.R. § 1208.13(a), which explicitly allows applicants for asylum to establish their entitlement to relief without corroborating their credible testimony." App., *infra*, 11a. As the court noted,

> [t]his language seems to imply that the first step for the BIA in assessing applications for asylum should be to determine whether the applicant's testimony, by itself, satisfies the applicant's burden of proof. Despite this language, the BIA does not assess the credibility of an applicant's testimony—and therefore does not decide whether the applicant's testimony satisfies the burden of proof by itself—unless the BIA determines that corroborating evidence is not reasonably available.

App., *infra*, 11a. As a consequence, the court added, "[i]n effect, the BIA's interpretation reads in an addi-

tional clause to the language of 8 C.F.R. § 1208.13(a): 'The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration, *but only if corroboration is not reasonably available to the applicant*.'" App., *infra*, 11a. The court noted that "[t]wo circuits [the Second and Seventh] have implicitly rejected this iteration of the BIA's corroboration rule." App., *infra*, 11a.

The Fifth Circuit, however, "disagree[d] with these decisions because making an explicit credibility determination is not necessary to effectuate the meaning of the regulation." App., *infra*, 11a-12a. In the court's view, "[b]ecause the BIA's interpretation permits it to deny applications for asylum based solely on their failure to provide reasonably available corroborating evidence, we would elevate form over substance if we required the BIA to make a credibility determination when it decides that an applicant failed to provide reasonably available corroborating evidence." App., *infra*, 12a. "Accordingly," the court concluded, "the BIA need not make a credibility determination when it determines that corroborating evidence is reasonably available to the applicant but was not submitted." App., *infra*, 13a.

REASONS FOR GRANTING THE PETITION

Careful consideration and determination of an asylum applicant's credibility is essential, both to ensure the integrity of administrative decisions and to facilitate judicial review. For this reason, both the controlling regulation and the currently governing statute (which in relevant respects codifies the regulation) instruct that the credible testimony of an applicant may suffice—without corroboration—to establish his or her eligibility for asylum. 8 U.S.C. § 1158(b)(1)(B)(ii); 8 C.F.R. § 1208.13(a). Moreover,

Congress has specified a wide range of factors that may be used in evaluating an applicant's credibility, such as the applicant's demeanor, candor, and responsiveness, as well as the inherent plausibility and internal consistency of the applicant's account. 8 U.S.C. § 1158(b)(1)(B)(ii)-(iii).

Notwithstanding that an applicant's testimony alone may establish his or her eligibility for asylum, the courts of appeals—as the court below noted (App., *infra*, 11a-12a)—have sharply divided over whether the agency must explicitly determine the credibility of the applicant's testimony before denying asylum on the ground of the applicant's failure to provide corroborating evidence. Two circuits (the Second and Seventh) *require* the agency to make a credibility determination. By contrast, three circuits (the Third, Fifth, and Sixth) do not require a credibility determination and regularly uphold denials of asylum despite the agency's failure to decide whether the applicant was credible. This issue is a recurring one of great practical importance, potentially arising in every asylum case. It should be resolved by this Court.

A. The Courts Of Appeals Are Divided On Whether The IJ And BIA Must Make A Credibility Determination Before Demanding Corroborating Evidence.

1. The Second Circuit has concluded that an immigration judge *must* make an explicit determination whether an asylum applicant's testimony is credible. In *Jia Yan Weng* v. *Mukasey*, 272 F. App'x 98, 99 (2d Cir. 2008), the court ruled in relevant part that an immigration judge must "'decide explicitly' whether or not the candidate's testimony was credible (without relying exclusively on the lack of corro-

borating evidence)." *Id.* at 99 (quoting *Zaman* v. *Mukasey*, 514 F.3d 233, 237 (2d Cir. 2008)). Because the immigration judge had failed to evaluate credibility, making a finding only that the applicant's corroborating evidence failed to satisfy his burden of proof, the court remanded for "an explicit credibility finding." *Id.* at 100. See also *Zaman*, 514 F.3d at 237 ("Vague, unclear, and passing statements do not suffice to fulfill the agency's obligation to rule explicitly on the credibility of [a petitioner's] testimony." (internal quotation marks omitted)).

The Second Circuit requires a credibility determination because the agency's failure to determine an applicant's credibility both "frustrates appellate review" and is inconsistent with the statutory command that a grant of asylum may be "based on credible testimony alone." *Diallo* v. *INS*, 232 F.3d 279, 287 (2d Cir. 2000). See also *Zaman*, 514 F.3d at 237 (noting that "an explicit credibility determination is important to ensure that an alien receives the potential benefit of succeeding on credible testimony alone, as well as to ensure that appellate review of such a determination is preserved" (internal quotation marks omitted)).

The Seventh Circuit has similarly concluded that an immigration judge must make an explicit credibility determination before requiring an immigrant to produce corroborating evidence. "To ensure that IJs have the freedom to require supporting evidence, yet do not inappropriately demand it, we require that, before denying a claim for lack of corroboration, an IJ must: (1) make an explicit credibility finding; (2) explain why it is reasonable to have expected additional corroboration; *and* (3) explain why the petitioner's reason for not producing that corroboration

is inadequate." *Ikama-Obambi* v. *Gonzales*, 470 F.3d 720, 725 (7th Cir. 2006) (emphasis added) (citing *Gontcharova* v. *Ashcroft*, 384 F.3d 873, 877 (7th Cir. 2004)). See also *Tandia* v. *Gonzales*, 487 F.3d 1048, 1054-1055 (7th Cir. 2007) (same); *Hussain* v. *Gonzales*, 424 F.3d 622, 629 (7th Cir. 2005) (same).

Like the Second Circuit, the Seventh Circuit has recognized that the factfinder's failure to make a credibility determination undermines the statutory and regulatory requirement that an asylum application may be sustained on the basis of credible testimony alone. Thus, the court has explained that "the Board [of Immigration Appeals] needed to consider [the applicant's] credibility before ruling on the need for corroborative evidence," because "[t]he credibility finding was * * * inextricably intertwined with the IJ's ruling on the need for corroborative evidence." *Rapheal* v. *Mukasey*, 533 F.3d 521, 528 (7th Cir. 2008). The court emphasized that "if the Board (or IJ) had found [the applicant's] testimony credible, [the applicant] might not have been required to provide corroboration." *Ibid.*

The Seventh Circuit has also repeatedly admonished the agency that its failure to determine credibility impedes effective appellate review: "[W]hen an IJ avoids a clean determination of credibility by instead saying that an asylum applicant 'hasn't carried her burden of proof, the reviewing court is left in the dark as to whether the judge thinks the asylum seeker failed to carry her burden of proof because her testimony was not credible, or for some other reason.'" *Ikama-Obambi*, 470 F.3d at 726 (quoting *Iao* v. *Gonzales*, 400 F.3d 530, 534 (7th Cir. 2005)).

2. Other courts have taken the opposite position. The Fifth Circuit's holding below, of course, express-

ly "disagree[d] with the[] decisions [of the Second and Seventh Circuits] because making an explicit credibility determination is not necessary to effectuate the meaning of the regulation [8 C.F.R. § 1208.13(a)]," reasoning that "we would elevate form over substance if we required the BIA to make a credibility determination when it decides that an applicant failed to provide reasonably available corroborating evidence." App., *infra*, 12a. Accordingly, the court concluded that "the BIA need not make a credibility determination when it determines that corroborating evidence is reasonably available to the applicant but was not submitted." App., *infra*, 13a.

Two other circuits—the Third and Sixth—similarly decline to require the agency to make a credibility determination before denying asylum, instead generally presuming credibility for purposes of appellate review in lieu of remanding for a credibility determination when one was not made by the agency.[9] Thus, when reviewing a case lacking an agency

---

[9] The Ninth Circuit has taken inconsistent approaches in the absence of a credibility finding by the IJ, sometimes assuming the truth of the applicant's testimony and sometimes remanding so that such a determination could be made. Compare *Chunmiao Wang* v. *Keisler*, 254 F. App'x 572, 575 (9th Cir. 2007) (finding the applicant eligible for asylum after assuming the truth of her testimony), *Gu* v. *Gonzales*, 454 F.3d 1014, 1021 (9th Cir. 2006) (accepting the applicant's testimony as true because the IJ made no explicit credibility determination but nonetheless denying review), and *Kataria* v. *INS*, 232 F.3d 1107, 1113 (9th Cir. 2000) ("It is * * * well established that we must accept an applicant's testimony as true in the absence of an explicit adverse credibility finding."), with *Balwant Singh* v. *Holder*, 401 F. App'x 274, 275 (9th Cir. 2010) (remanding where the agency neither made an explicit credibility determination nor presumed the truth of the applicant's testimony) and *Balwinder Singh* v. *Gonzales*, 491 F.3d 1019, 1026 (9th Cir. 2007)

credibility determination, the Third Circuit will "determine whether the BIA's decision is supported by substantial evidence in the face of [the applicant's] assumed (but not determined) credibility." *Kayembe* v. *Ashcroft,* 334 F.3d 231, 235 (3d Cir. 2003). See also *Toure* v. *Att'y Gen. of U.S.*, 443 F.3d 310, 326 (3d Cir. 2006) ("We have several times affirmed the rule that where an IJ or the BIA fails to make an explicit credibility finding, we will proceed as if the applicant's testimony were credible.").

The Sixth Circuit takes the same approach when the agency fails to make a credibility determination, presuming credibility but not necessarily remanding. See *Maklaj* v. *Mukasey*, 306 Fed. App'x 262, 264 n.4 (6th Cir. 2009). See also *Dorosh* v. *Ashcroft*, 398 F.3d 379, 382 (6th Cir. 2004) (affirming denial of asylum for failure of the applicant to provide corroborating evidence and despite the fact that the BIA "did not indicate whether [applicant] was believable or whether her story provided adequate detail to support her application"). As we explain below, however, an appellate presumption of credibility is in no sense equivalent to an actual and express determination of credibility by the agency in the context of an agency decision to require corroboration.[10]

("Because the IJ neither made credibility findings nor analyzed Singh's testimony to see if he meets the criteria for asylum, we remand the case to the Board."). This intra-circuit confusion confirms the need for clarification of the law by this Court.

[10] This conflict, which concerns the meaning of a regulation that has not been changed since 1997, is not affected by enactment of the REAL ID Act, which in relevant part codified the existing regulatory standard. Both the Second and the Seventh Circuits have applied their rule to cases involving asylum applications filed after the enactment of the Act. See, *e.g.*, *Jia Yan*

B. An Express Determination Of Credibility Is Necessary To Satisfy Regulatory Policy And Facilitate Judicial Review.

The holding below is not only inconsistent with the decisions of other courts of appeals; it is wrong. All of the relevant considerations—the governing regulatory language, the imperatives of federal immigration policy, and the requirements for efficient appellate review of agency decisions—indicate that the IJ in petitioner's case should have made an explicit credibility determination before demanding corroborating evidence and rejecting petitioner's asylum claim.

1. The IJ's Failure To Determine Whether Petitioner Was Credible Before Demanding Corroborating Evidence Is Inconsistent With The Text Of The BIA's Regulation.

To begin with, the IJ's failure to make an explicit credibility determination in petitioner's case is inconsistent with the BIA's own regulation, which clearly contemplates the possibility that an applicant's credible testimony may serve as the sole basis for the success of a petition for asylum: "The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration * * * ." 8 C.F.R. § 1208.13(a). See also *Diallo*, 232 F.3d at 287 ("[T]he precedent of the BIA * * * would sustain a petition for asylum or withholding of deportation based on credible testimony alone * * * .").

As the court below itself recognized, the regulation appears to be premised on an expectation that

Weng, 272 F. App'x at 99 (application filed in June 2005); *Rapheal*, 533 F.3d at 524, 528 (application filed in early 2006).

the BIA will make a credibility determination in asylum cases. See App., *infra*, 11a. After all, if credible testimony alone is capable of sustaining an applicant's burden of proof, it stands to reason that the IJ should decide whether the applicant's testimony *is* credible before requiring the submission of documentary evidence. See, *e.g.*, *Bedesha* v. *BIA*, 203 F. App'x 377, 379 (2d Cir. 2006) ("When deciding a claim for asylum and related relief, an IJ must first determine whether an applicant is credible and then assess whether the applicant has met his or her burden of proof."). Moreover, even if the IJ feels that corroborating evidence is required to satisfy the applicant's burden of proof, performing a credibility assessment is necessary to determine what *type* of and *how much* corroborating evidence the applicant must present to satisfy his or her burden of proof.

For this reason, even if the BIA's decision to deny petitioner's application without requiring the IJ to make a credibility determination is based on its interpretation of Section 1208.13(a), it does not merit deference. While agencies generally receive deference when they interpret their own regulations, courts will not defer to agency interpretations that are "plainly erroneous or inconsistent with the regulations." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (citation omitted) (internal quotation marks omitted). To the extent that the BIA's resolution of petitioner's case reflects its belief that Section 1208.13(a) does not require IJs to make credibility determinations before requiring corroboration, it should be reversed.

2. Thorough And Accurate Resolution Of Asylum Applications Requires That The Factfinder Consider The Applicant's Credibility.

In addition, fair and efficient administration of the asylum process depends upon IJs making express credibility judgments, for a number of reasons. *First*, to make a formal credibility determination, the IJ must carefully consider the applicant's testimony and come to a final conclusion concerning its merit. Such an assessment is central to the resolution of an asylum case, and it is one that only the IJ can make: IJs are "'uniquely qualified to decide whether an alien's testimony has about it the ring of truth.'" H.R. Rep. No. 109-72, at 167 (quoting *Sarvia-Quintanilla* v. *INS*, 767 F.2d 1387, 1395 (9th Cir. 1985)). IJs' ability to see applicants, hear them testify, and evaluate "'[a]ll aspects of * * * [applicants'] demeanor'" enables them to decide whether the applicants are testifying truthfully or falsely. *Id.* at 168 (quoting *Mendoza Manimbao* v. *Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2003)). In short, credibility analysis is key to the proper evaluation of asylum claims: "Because direct authentication or certification of an alien's testimony is difficult, if not impossible to find, the credibility analysis is vital to determining the validity of an applicant's claim." *Diallo* v. *Ashcroft*, 381 F.3d 687, 700 (7th Cir. 2004).[11]

---

[11] This conclusion is confirmed by the REAL ID Act itself, which codifies pre-REAL ID Act case law and requires triers of fact to "[c]onsider[] the totality of the circumstances, and all relevant factors" when making credibility determinations in asylum cases. 8 U.S.C. § 1158(b)(1)(B)(iii). Triers of fact may base credibility determinations on

Second, requiring a determination of credibility imposes an essential discipline on the decision-making process. The conclusion of even the most diligent and conscientious factfinder is likely to be affected by an obligation to run through the process of carefully evaluating the applicant's credibility and articulating a conclusion about it.

And the unfortunate fact is that many participants in the agency immigration decision-making process are *not* diligent: Because the courts of appeals have been so overwhelmed with immigration (and particularly asylum) cases, and because the IJs and the BIA are themselves overworked, it is all the more important that immigration cases be governed by consistent rules, like the requirement that IJs al-

---

> the demeanor, candor, or responsiveness of the applicant * * * the inherent plausibility of the applicant's * * * account, the consistency between the applicant's * * * written and oral statements * * *,the internal consistency of each such statement, the consistency of such statements with other evidence of record * * *, and any inaccuracies or falsehoods in such statements * * *.

Ibid. See also H.R. Rep. No. 109-72, at 166-168. The creation of this elaborate mechanism for making credibility determinations presupposes that IJs *will* make such determinations. For more on the factors used in credibility assessments prior to the passage of the REAL ID Act, see generally Rempell, *supra*, at 185. Indeed, the REAL ID Act *expressly* requires IJs to determine credibility in cases involving withholding of removal. See 8 U.S.C. § 1229a(c)(4)(B) ("The immigration judge *will* determine whether or not the testimony is credible." (emphasis added)). Because the statute does not explicitly permit applicants in withholding-of-removal cases to meet their burden with credible testimony alone, although it does expressly recognize that possibility for asylum applicants, it follows *a fortiori* that credibility determinations also are required in asylum cases.

ways make explicit credibility determinations before denying an application for failure of the applicant to provide corroborating evidence. Doing so could also help address the problem, identified by judges across the courts of appeals, that "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice." *Benslimane* v. *Gonzales*, 430 F.3d 828, 829-830 (7th Cir. 2005) (Posner, J.) (noting a "staggering 40 percent" BIA reversal rate and collecting cases from across the courts of appeals complaining of inadequate agency adjudication in immigration cases, including in determining asylum applicants' credibility). See also, *e.g.*, *Chen* v. *U.S. Dep't of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (finding the IJ's credibility ruling to be "grounded solely on speculation and conjecture"); *Lopez-Umanzor* v. *Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) ("[T]he IJ's assessment of Petitioner's credibility was skewed by prejudgment, personal speculation, bias, and conjecture."); *Korytnyuk* v. *Ashcroft*, 396 F.3d 272, 292 (3d Cir. 2005) ("[I]t is the IJ's conclusion, not [the petitioner's] testimony, that 'strains credulity.'").

If IJs do not have to perform this multifactor analysis, they will have largely unfettered discretion to deny asylum or require corroborating evidence based on only vague and unconsidered impressions of applicants' credibility. This places asylum seekers at a tremendous disadvantage: A wholly credible applicant could still lose his or her case if the IJ, failing to evaluate the credibility of the applicant's testimony, demanded corroborating evidence that the applicant ultimately did not produce. See *Ikama-Obambi*, 470 F.3d at 725 (7th Cir. 2006) (holding that IJs must first explicitly assess applicants' credibility "[t]o ensure that IJs have the freedom to require supporting

evidence, yet do not inappropriately demand it"); *Zaman*, 514 F.3d at 237 (viewing explicit credibility determinations as "important to ensure that an alien receives the 'potential benefit' of succeeding on credible testimony alone" (citation omitted)).[12]

3. The Absence Of Credibility Assessments By IJs In Asylum Cases Frustrates Appellate Review.

The failure of some IJs to assess the credibility of applicants' testimony before disposing of asylum applications also greatly complicates appellate review of agency decisions in such cases.

The courts of appeal have themselves noted this problem. As a general matter, "untangl[ing] the basis for the immigration judge's decision" to reject an asy-

---

[12] The REAL ID Act specifies that, in asylum cases, "if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." 8 U.S.C. § 1158(b)(1)(B)(iii). But this rule of appellate review is no substitute for an actual determination of credibility by the IJ. The immigration judge who makes such a determination may find that an applicant's testimony is highly compelling, in a way that gives it added weight against the other evidence. Moreover, a reliance on a presumption deprives the applicant of the chance that the immigration judge will, in the thorough consideration of all parts of the testimony necessary to make a judgment about credibility, decide that some fact the judge formerly thought needed corroboration is actually unimportant in reaching a conclusion. A court of appeals applying a presumption also will be confined to the facts articulated in the testimony, without making any inferences that an immigration judge might comfortably make with the witness before him. See, *e.g.*, *Kyaw Myo Thein* v. *Holder*, 363 F. App'x 122, 124 (2d Cir. 2010) (finding that the BIA had not properly "presumed" credibility for failing to probe connections between presumptively true facts).

lum applicant's claim when the IJ's opinion fails to make an explicit credibility finding can be exceedingly difficult. *Diallo*, 381 F.3d at 699. For example, although the Seventh Circuit accords great deference to factual determinations by the BIA and IJs, it has pointed out that "the limits of our deferential standard of review are tested when we are asked to defer to findings of fact that the immigration judge has not made." *Id.* at 698. For the same reason, the Tenth Circuit criticized the BIA's practice of assuming, without deciding, credibility: "If immigration judges and the Board evaluate credibility in each case, remand will not be necessary and further delays in the processing of asylum claims can be avoided." *Krastev* v. *INS*, 292 F.3d 1268, 1279 (10th Cir. 2002) (quoting *Canjura-Flores* v. *INS*, 784 F.2d 885, 889 n.1 (9th Cir. 1985)).

By the same token, the failure of IJs to make credibility determinations frustrates appellate review of agency demands for corroborating evidence. The Seventh Circuit has called this failure "disturbing." *Ikama-Obambi*, 470 F.3d at 726 (citing *Iao,* 400 F.3d at 533-534). When an IJ avoids making a "clean determination of credibility," the reviewing court "is left in the dark as to whether the judge thinks the asylum seeker failed to carry her burden of proof because her testimony was not credible, or for some other reason." *Id.* (citation omitted). The Second Circuit has reached a similar conclusion, complaining that the lack of a credibility finding "frustrates" and "defies efficient appellate review" in this context. *Jia Yan Weng*, 272 F. App'x at 100; *Li* v. *U.S. Att'y Gen.*, 173 F. App'x 925, 926 (2d Cir. 2006).

C. The Question Of Whether IJs Must Make Credibility Determinations In Asylum Cases Is A Recurring One Of Great Importance.

There is no denying the recurring nature and practical importance of the issue presented here. Whether IJs must make credibility determinations is a question that arises in virtually every asylum case. Resolution of the circuit conflict on this question, so as to improve the accuracy of asylum decisions and bring uniformity to an important aspect of immigration law, is therefore a matter of considerable significance.

Asylum cases literally involve matters of life and death, and the United States has committed itself as a matter of national policy not to remove a foreign national to a country where his or her life or freedom would be threatened. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); 8 U.S.C. § 1158. See also *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) (discussing the importance of the 1980 Act). Regularity in the process used to resolve asylum cases therefore is essential.

And such cases comprise a signification portion of immigration cases and appeals. Asylum is the most common form of relief requested before an immigration judge. See *FY 2011: Statistical Year Book*, *supra*, at R1. The immigration courts receive more than forty thousand asylum cases each year. *Id.* at I1. And many of these cases make it to the appellate courts: More than a thousand asylum cases are appealed to the courts of appeals each year, and credibility is often a central issue on appeal. See Elizabeth Cronin, *When the Deluge Hits and You Never Saw the Storm: Asylum Overload and the Second*

Circuit, 59 Admin. L. Rev. 547 (2007); John R.B. Palmer et. al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 Geo. Immigr. L.J. 1, 44 (2005) (describing the surge in appeals of BIA decisions to the circuit courts); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 362 tbl.2 (2007) (reporting that the federal courts of appeals decided 2163 asylum cases in 2005).[13] The question presented here will arise in virtually every such case.

Finally, we note that petitioner's asylum application was filed prior to enactment of the REAL ID Act. Although, as we have indicated (at note 10, *supra*), the governing rule was not changed by the Act, it is important that the Court settle the nature of the IJ's obligation to make credibility determinations in *both* pre- *and* post-REAL ID Act cases. Many of the asylum cases now pending in or likely to come before the courts of appeals involve pre-REAL ID Act applications. A sense of the number of pre-REAL Act asylum cases still in the system can be gleaned by examining cases recently decided by the courts of appeals. Of the thirty-six asylum decisions issued since the beginning of 2012 that we could identify for which the

---

[13] More generally, more than twelve percent of all filings in the federal courts of appeals are appeals of decisions from the BIA. See Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts, 2010 Annual Report of the Director* (2011), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf. In the Second and Ninth Circuits, more than a third of the cases on appeal have been immigration cases in some recent years. See Rempell, *supra*, at 187.

date of the asylum application could be determined from the opinion, sixteen (43%) were based on asylum applications filed before May 11, 2005.[14] Given

[14] A search in WestlawNext for cases decided since the start of 2012 where the words "filed," "asylum," and "application" appeared in the same sentence returned fifty-two results (search run on March 2, 2012). In sixteen of those cases, the initial applications for asylum were filed before the enactment of the REAL ID Act. See *Arango-Moreno* v. *U.S. Att'y Gen.*, No. 11-13167, 2012 WL 676219 (11th Cir. Mar. 2, 2012) (2002 application); *Mei Juan Zheng* v. *Holder*, No. 10-3838-AG, 2012 WL 603635 (2d Cir. Feb. 27, 2012) (2001 application); *Zhao Mei Lin* v. *Att'y Gen. of U.S.*, No. 11-3265, 2012 WL 593278 (3d Cir. Feb. 24, 2012) (2002 application); *Mironenko* v. *Att'y Gen. of U.S.*, No. 11-2546, 2012 WL 581313 (3d Cir. Feb. 23, 2012) (2003 application); *Latter-Singh* v. *Holder*, No. 08-71277, 2012 WL 516055 (9th Cir. Feb. 17, 2012) (original asylum application in 1993 and a new one circa 2004); *Tambi* v. *U.S. Att'y Gen.*, No. 11-13396, 2012 WL 386289 (11th Cir. Feb. 8, 2012) (motion to reopen decision on asylum application from ten years before); *Mendoza-Pablo* v. *Holder*, 667 F.3d 1308 (9th Cir. 2012) (2003 application); *Josefina Rosales* v. *U.S. Att'y Gen.*, No. 11-11062, 2012 WL 360605, at *3 (11th Cir. Feb. 6, 2012) ("BIA cured this defect by applying the correct pre-REAL ID Act standard in its opinion."); *Sokoli* v. *Holder*, No. 10-4046, 2012 WL 313701 (6th Cir. Feb. 1, 2012) (2004 application); *Guerrero* v. *Holder*, 667 F.3d 74 (1st Cir. 2012) (1992 application); *Haxhari* v. *Att'y Gen. of U.S.*, No. 11-1973, 2012 WL 252397 (3d Cir. Jan. 27, 2012) (application filed before May 11, 2005); *Avdijaj* v. *Holder*, No. 10-1988-AG, 2012 WL 232938 (2d Cir. Jan. 26, 2012) (considering an application to reopen filed in 2009, more than five years after the BIA affirmed the IJ's denial of the asylum application); *Abdurakhmanov* v. *Holder*, 666 F.3d 978 (6th Cir. 2012) (application filed before May 11, 2005); *Cika* v. *U.S. Att'y Gen.*, No. 11-12582, 2012 WL 148646 (11th Cir. Jan. 19, 2012) (2001 application); *Mei Yu Lin* v. *Holder*, No. 10-3785-AG, 2012 WL 119117 (2d Cir. Jan. 17, 2012) (motion to reopen was filed nearly seven years after the BIA affirmed the IJ's denial of asylum application); *Chehazeh* v. *Att'y Gen. of U.S.*, 666 F.3d 118 (3d Cir. 2012) (application filed by May 2002).

these data, it is certain that there are many hundreds, and more likely thousands, of pre-REAL ID Act cases working their way through the system.

In these circumstances, and given the great importance of the question presented, review would be warranted even if the REAL ID Act were thought to have some bearing on the resolution of the question presented here. *INS* v. *St. Cyr*, 533 U.S. 289 (2001) (considering the substance of immigration relief under INA § 212(c) even after § 212(c) was repealed in 1996). This Court should therefore intervene to assure uniform application of a rule that will improve the fact-finding process and facilitate judicial review in critically important asylum cases.

The initial date of filing for fifteen of the asylum applications could not be determined from the circuit court opinion: *Sok Heng Meas* v. *Holder*, No. 08-74471, 2012 WL 678180 (9th Cir. Feb. 28, 2012); *Mejia-Fuentes* v. *Att'y Gen. of U.S.*, No. 08-2783, 2012 WL 593252 (3d Cir. Feb. 24, 2012); *Tsomo* v. *Holder*, No. 10-3810-AG, 2012 WL 556137 (2d Cir. Feb. 22, 2012); *Samad* v. *Holder*, No. 10-3728-AG(L), 2012 WL 539963 (2d Cir. Feb. 21, 2012); *Lleshi* v. *Holder*, No. 10-3716, 2012 WL 400586 (6th Cir. Feb. 8, 2012); *Jisheng Xiao* v. *Holder*, No. 11-60407, 2012 WL 373212 (5th Cir. Feb. 7, 2012); *Malam* v. *Holder*, No. 11-1614, 2012 WL 340326 (4th Cir. Feb. 3, 2012); *Obidjonov* v. *U.S. Att'y Gen.*, No. 11-12915, 2012 WL 280725 (11th Cir. Feb. 1, 2012); *Zapata* v. *Holder*, 449 F. App'x 546 (8th Cir. 2012); *Bushati* v. *Holder*, No. 10-3414, 2012 WL 284207 (6th Cir. Jan. 31, 2012); *Makbul* v. *Holder*, No. 11-1580, 2012 WL 268535 (4th Cir. Jan. 31, 2012); *Maze* v. *U.S. Att'y Gen.*, No. 11-12206, 2012 WL 178533 (11th Cir. Jan. 24, 2012); *Wanigasekara* v. *U.S. Att'y Gen.*, No. 11-12350, 2012 WL 89937 (11th Cir. Jan. 12, 2012); *Xiu Qing Chen* v. *U.S. Att'y Gen.*, No. 11-13123, 2012 WL 89892 (11th Cir. Jan. 11, 2012); *Zhenghao Liu* v. *Holder*, No. 11-60095, 2012 WL 45408 (5th Cir. Jan. 9, 2012). In twenty-one cases, the initial asylum applications were filed after May 11, 2005.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

MARCH 2012