U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY

Date: JUN 10 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gary J. Yerman, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture; cancellation of removal under section 240A(b) of the Act

The respondent, a native and citizen of the People's Republic of China ("China"), appeals the Immigration Judge's decision dated May 30, 2018, denying the respondent's application for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3); his request for protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16-.18; and his application for cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b). The appeal will be dismissed.

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent does not assert that he suffered past persecution in China. Rather, he seeks asylum and related relief and protection from removal based on his practice of Christianity, which began after he entered the United States in 2001, and which he claims he will continue in China (IJ at 4; Tr. at 21; Exh. 3, Respondent's Statement). The Immigration Judge found the respondent's testimony regarding his conversion to Christianity in the United States credible (IJ at 3). In denying the respondent's application for asylum and withholding of removal under the Act, the Immigration Judge found the respondent did not meet his burden of establishing that he has a well-founded fear or clear probability of future persecution on account of his religion (IJ at 8). The respondent challenges these findings on appeal (Respondent's Br. at 8-15).

To demonstrate a well-founded fear of future persecution, the respondent must establish that he would be singled out individually for persecution in China or prove that there exists a pattern or practice of persecution of a group of persons similarly situated to himself and his inclusion and identification with that group. *See* 8 C.F.R. § 1208.13(b)(2)(iii); *Shi Jie Ge v. Holder*, 588 F.3d 90, 95-96 (2d Cir. 2009); *Hongsheng Leng v. Mukasey*, 528 F.3d 135, 143 (2d Cir. 2008). The Immigration Judge found the respondent did not satisfy his burden of establishing that he has a well-founded fear of persecution because his fear is not objectively reasonable (IJ at 4-7). *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004) (a well-founded fear of future persecution must be both subjectively credible and objectively reasonable); *Matter of J-H-S-*, 24 I&N Dec. 196 (BIA 2007) (the respondent must prove that he has a subjectively genuine and objectively reasonable well-founded fear of persecution). We agree.

The respondent argues that his fear is objectively reasonable because the authorities are likely to become aware of his religious activities and target him (Respondent's Br. at 9-10). The Immigration Judge found the respondent did not meet his burden to establish that the government is likely to become aware of his religious activities because he did not establish that he would hand out leaflets or attend church on a regular basis in China (IJ at 6; Tr. at 23, 27-28; Exh. 6, page 138). The respondent argues on appeal that he does not attend church frequently in the United States or engage in activities related to spreading the gospel outside of church because of his busy work schedule and his wife's illness (Respondent's Br. at 8). However, the Immigration Judge correctly determined that it is speculative that the respondent will alter his approach to practicing his religion upon his return to China. (IJ at 5-6; Tr. at 22-24 28). *See Tianqi Fu v. Barr,* 794 F. App'x 38, 39 (2d Cir. 2019) (the petitioner's "limited church attendance in the United States made his assertions regarding any possible future church attendance in China speculative."). (IJ at 6; Tr. at 22-24). We discern no clear error in the Immigration Judge's factual prediction. *See Hongsheng Leng v. Mukasey*, 528 F.3d at 142-43; *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015); 8 C.F.R. § 1003.1(d)(3)(i).

Turning to a pattern or practice of persecution of a group similarly situated, we agree with the Immigration Judge that the respondent did not meet his burden because the record indicates local authorities in the respondent's home province of Fujian focus on the leaders of religious organizations rather than all who attend religious meetings (IJ at 6; Exh. 3, page 4 (I-589); Exh. 4, page 11, 24-27). *See Y.C. v. Holder*, 741 F.3d 324, 335 (2d Cir. 2013) (a member who occasionally cleaned and filed papers and published a single editorial is not similarly situated with a "high profile" individual); *see also Yuxian Li v. Barr,* 795 F. App'x 853, 855 (2d Cir. 2020) (finding that alien did not establish that Chinese authorities are likely to become aware of her religious practices because the State Department Report stated that there were an estimated 45 million Christians in China not affiliated with the government-sponsored church); *Wen Chen v. Sessions,* 717 F. App'x 76 (2d Cir. 2018) (respondent failed to show a sufficient possibility of harm if she continued to proselytize in China given a lack of evidence of persecution for proselytizing in the province of Fujian). Thus, we affirm the Immigration Judge's determination that the respondent did not establish a well-founded fear of future persecution on account of his religion and is therefore ineligible for asylum under section 208 of the Act.[1]

Inasmuch as the respondent has not met the burden necessary to establish eligibility for asylum, it follows that he has also not satisfied the higher standard required for withholding of removal (IJ at 4). *See INS v. Cardoza-Fonseca,* 480 U.S. 421 (1987). The respondent also did not meet his burden of proof for protection under the Convention Against Torture (IJ at 8-9). On appeal

[1] It is undisputed that the respondent entered the United States on November 17, 2001, but did not file his I-589 until July 2, 2013, well past the 1-year filing deadline (Exh. 3). The Immigration Judge did not address whether the respondent established an exception to the filing deadline, and instead adjudicated his asylum application. The respondent raises arguments on appeal that he qualifies for an exception to the 1-year filing deadline due to the changed circumstance of his religious conversion (Respondent's Br. at 5). For the purposes of this decision, we assume without deciding a that the respondent established an exception to the 1-year filing deadline.

respondent generally argues he has satisfied his burden but did not provide specific supporting rationale (Respondent's Br. at 16). He has not shown that he will more likely than not be tortured by or at the instigation or with the consent or acquiescence of a public official or other individual acting in an official capacity (including willful blindness) upon his return to China. *See* 8 C.F.R. §§ 1208.16-.18.

Turning to the respondent's application for cancellation of removal under section 240A(b) of the Act, the Immigration Judge found that the respondent did not meet his burden of establishing that his removal would result in exceptional and extremely unusual hardship to his qualifying relative, his United States citizen wife, daughter, and stepdaughter (IJ at 11). *See* sections 240A(b)(1)(D) of the Act. The respondent challenges this finding on appeal (Respondent's Br. at 16-18).

We affirm the Immigration Judge's finding that the respondent did not establish that his United States citizen wife, child, or stepchild will suffer exceptional and extremely unusual hardship upon his removal to China (IJ at 11). *See Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). The respondent's wife was previously diagnosed with cancer while living in the United States, but she elected to return to China for treatment (IJ at 9; Tr. at 37-38; Exh. 6, pages 100-124). At the time of the underlying proceedings her cancer was in remission and is monitored with blood tests in the United States (IJ at 10; Tr. at 12; Exh. 6, pages 125-136). Absent evidence that the respondent's wife's cancer cannot be treated in China, the record does not establish that such health issues are so serious that they rise to the level of exceptional and extremely unusual hardship. *See Matter of J-J-G-*, 27 I&N Dec. 808 (BIA 2020) (to establish exceptional and extremely unusual hardship the respondent must show that adequate medical care is not reasonably available in the country of removal).

Further, the respondent argues that his two daughters will fall behind in school because they are unable to read and write in Chinese and they would be unable to register for public school or obtain subsidized medicine (Respondent's Br. at 17-18). While this may be the case, there is inadequate evidence they will be deprived of an education or that the cumulative hardships his daughters will experience constitute exceptional and extremely unusual hardship as contemplated by the Act. Significantly, both daughters have previously lived in China with relatives (IJ at 11; Tr. at 39-40). *See Matter of Andazola*, 23 I&N Dec. at 323. As such, we agree with the Immigration Judge that the respondent has not established eligibility for cancellation of removal. *See* section 240(A)(b)(1)(D) of the Act.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order

of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

Anne J. Greer

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A(b) (6) New York, NY

Date: MAY - 8 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Zhen Liang Li, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of China, appeals from an Immigration Judge's decision dated May 3, 2018, denying his applications for asylum and withholding of removal under sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A) and 1231(b)(3)(A), and for protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16(c), 1208.18. The appeal will be dismissed.

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

We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). The factual findings of the Immigration Judge are not clearly erroneous, and we agree that the respondent did not meet his burden to establish eligibility for his asylum, withholding of removal, and Convention Against Torture claims (IJ at 3-14).

We are not persuaded by the respondent's arguments on appeal. He contends that he established past persecution based on his wife's sterilization, the fine imposed for violation of China's coercive population control policies, and his 1-day detention (Respondent's Br. at 6-8). We agree with the Immigration Judge's determination that the respondent did not establish past persecution. *See Matter of T-Z-*, 24 I&N Dec. 163, 170-75 (BIA 2007) (providing the framework for evaluating when "nonphysical forms of suffering or harm" amount to persecution); *see also Hua Quiang Chen v. Holder*, 773 F.3d 396, 407 (2d Cir. 2014) (stating that "economic persecution occurs only when a person is deprived of the necessities of life or rendered impoverished," and requiring that the applicant demonstrate this level of harm); *Guan Shan Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 70 (2d Cir. 2002) (holding that whether a fine constitutes persecution turns on the applicant's financial circumstances, and instructing that the applicant bears the burden to demonstrate the effect a fine will have on his financial circumstances). Therefore, for the reasons stated in her decision, we agree with the Immigration Judge that the respondent has not suffered physical or economic harm in China rising to the level of persecution (IJ at 9-11).

In addition, the respondent contends that he established a well-founded fear of persecution on account of his religion (Respondent's Br. at 8-11). For the reasons cited in the Immigration Judge's decision, we agree with her determination on this issue, as well (IJ at 12-14). *See Ramsameachire*

v. Ashcroft, 357 F.3d 169, 178 (2d Cir. 2004). The objective component requires, in pertinent part, the respondent to "make some showing that authorities in his country of nationality are either aware of his activities or likely to become aware of his activities." *Hongsheng Leng v. Mukasey*, 528 F.3d 135, 143 (2d Cir. 2008).

Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY

Date: JUN - 2 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Zhou M. Wang, Esquire

APPLICATION: Asylum; withholding of removal

The respondent, a native and citizen of China, appeals from an Immigration Judge's decision dated June 8, 2018, denying his applications for asylum and withholding of removal under sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A) and 1231(b)(3)(A).[1] The appeal will be dismissed.

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

We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). The factual findings of the Immigration Judge are not clearly erroneous, and we agree that the respondent did not meet his burden to establish eligibility for his asylum and withholding of removal claims (IJ at 4-10).

The respondent's arguments on appeal do not overcome the Immigration Judge's determination that his application for asylum was time-barred under section 208(a)(2)(B) of the Act, because he did not file for asylum within 1 year of his last arrival (Respondent's Br. at 7-9; IJ at 4-5). In addition, the respondent did not an exception to the filing deadline in the form of changed circumstances or otherwise establish a basis to waive the filing deadline (*Id.*). *See* section 208(a)(2)(D) of the Act; *Matter of A-M-*, 23 I&N Dec. 737, 738 (BIA 2005); 8 C.F.R. § 1208.4(a)(4)(i)(A). Therefore, the respondent is not eligible for asylum.

We affirm the Immigration Judge's alternate burden of proof denial of asylum (IJ at 5-9). The respondent's arguments do not establish clear error in the Immigration Judge's factual findings underlying his internal relocation determination, and we agree that the Department of Homeland Security rebutted the presumption of a well-founded fear of persecution in this matter (Respondent's Br. at 10; IJ at 6-9). *See* 8 C.F.R. 1208.13(b)(l).

[1] The respondent does not meaningfully challenge the denial of his Convention Against Torture claim, and thus, we deem this claim waived on appeal. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (failure to substantively appeal an issue addressed in an Immigration Judge's decision renders that issue is waived on appeal).

Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) New York, NY

Date: JUN - 5 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Peter D. Lobel, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of China, appeals from the Immigration Judge's decision dated May 14, 2018, denying his applications for asylum pursuant to section 208(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(A), withholding of removal pursuant to section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), and protection under the Convention Against Torture pursuant to 8 C.F.R. §§ 1208.16(c), 1208.18.[1] The Department of Homeland Security ("DHS") has not responded to the appeal. The appeal will be dismissed.

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

The respondent seeks relief and protection from removal based on religion.[2] The respondent testified that while in the United States, he became a Christian, and if he is returned to China, he will continue being a Christian (IJ at 4-5; Tr. at 23-25, 27). The Immigration Judge found the respondent to be a credible witness but concluded that he did not meet his burden to demonstrate eligibility for asylum or withholding of removal (IJ at 3, 5-6).

The respondent is not eligible for asylum because he did not meet his burden to establish that he suffered past persecution or that he has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* section 208(b)(1)(B)(i) of the Act.

[1] Because the respondent does not meaningfully challenge the Immigration Judge's denial of his application for protection under the Convention Against Torture, we deem this application waived on appeal. *See e.g.*, *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012).

[2] The respondent's claim was initially based on religion and political opinion (Exh. 4 at 7). However, before the Immigration Judge, the respondent, through counsel, explained that he was no longer pursuing a claim based on political opinion (IJ at 3; Tr. at 20-21).

The Immigration Judge determined that the respondent did not suffer past persecution in China (IJ at 5). The respondent has not meaningfully challenged this determination, and we consider the opportunity to do so to have been waived. *See Matter of R-A-M-*, 25 I&N Dec. at 658 n.2.

The respondent also has not demonstrated that he has a well-founded fear of persecution in China. Because he did not establish that he suffered past persecution, he is not entitled to a presumption that he has a well-founded fear of persecution. 8 C.F.R. § 1208.13(b)(1). Establishing a well-founded fear of persecution requires the applicant demonstrate he has "a subjective fear that is objectively reasonable." *See Hong Fei Gao v. Sessions*, 891 F.3d 67, 76 (2d Cir. 2018) (internal citation omitted); *see also Matter of Z-Z-O-*, 26 I&N Dec. 586, 591 (BIA 2015) (explaining that de novo review is employed when determining whether an asylum applicant has established an objectively reasonable fear of persecution). The respondent testified that he would attend an underground church in China, not a government-sponsored church (IJ at 4; Tr. at 27). The respondent also testified that he does not know anyone in China who attends either a government-sponsored church or one that is not approved by the government (IJ at 4; Tr. at 27-31). The respondent further testified that he would hand out flyers in China, and then people would seek him out to tell him about where the underground churches are so he could attend (IJ at 4; Tr. at 28-31).

The Immigration Judge found that the government of China engages in oppressive behavior against some underground churches, in particular against the leaders of those churches; however, the government of China does not engage in such behavior against the majority of individuals who attend underground churches throughout China, and the respondent does not claim that he is a religious leader or pastor (IJ at 5; Exh. 6 at 25-27). On appeal, the respondent cites a document explaining local authorities in many areas punish members of underground churches, including individuals who distribute religious materials (Respondent's Br. at 7-8). However, the document quoted by the respondent was not made part of the record, and it is insufficient to demonstrate clear error in the Immigration Judge's factual findings. *See Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) (describing that on clear error review, "[a] finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern."); *Matter of A-B-*, 27 I&N Dec. 316, 341 (A.G. 2018) (explaining that the Board may only find clear error where the findings of fact are illogical or implausible, or without support in inferences that may be drawn from the facts in the record) (internal citations omitted). To the extent the respondent argues that he will be forbidden from practicing Christianity, he has not demonstrated that the government in China forbids individuals from practicing that religion (Respondent's Br. at 9-10, 13). Thus, based upon the Immigration Judge's factual findings and our review of the record evidence, we agree that the respondent has not established an objectively reasonable fear of persecution as his fear is too speculative because it relies on his attendance of an underground church, arrest for that attendance, mistreatment after being arrested, and the mistreatment to rise to the level of persecution (IJ at 5-6). *See Shao v. Mukasey*, 546 F.3d 138, 160 (2d Cir. 2008) (applying *Jian Xing Huang v. INS*, 421 F.3d 125, 129 (2d Cir. 2005) in recognizing the need for "solid" evidence to demonstrate that a professed fear of persecution is objectively reasonable and not merely speculative).

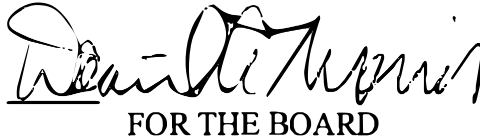
For the foregoing reasons, we affirm the Immigration Judge's denial of the respondent's applications for asylum. Because the respondent did not meet his burden of proof for asylum, it

follows that he did not satisfy the more stringent standard for withholding of removal. *See Yan Juan Chen v. Holder*, 658 F.3d 246, 254 (2d Cir. 2011).

In light of the foregoing, the respondent's appeal will be dismissed. The following order will be entered.

ORDER: The respondent's appeal is dismissed.

NOTICE: If the respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspired to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) New York, NY

Date: MAY - 6 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Eric Y. Zheng, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture; remand

The respondent, a native and citizen of China, appeals from the Immigration Judge's April 6, 2018, decision pretermitting and denying her application for asylum, and denying her applications for withholding of removal under the Immigration and Nationality Act and the Convention Against Torture.[1] *See* sections 208 and 241(b)(3) of the Act, 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. § 1208.16(c). The respondent also requests remand for further proceedings. The appeal will be dismissed, and the request for remand will be denied.

We review for clear error the findings of fact, including any credibility determination, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including issues of law, discretion, and judgment. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent seeks asylum and related relief from removal based on her religion. Specifically, she claims that she converted to Christianity in the United States in 2013, and fears future persecution in China, where she intends to worship and attend an underground church (IJ at 7; Tr. at 30-31; Respondent's Br. at 16; Exh. 3).

We affirm the Immigration Judge's determination that, even assuming the respondent's asylum application was timely filed, the evidence does not establish that the respondent has a well-founded fear of persecution in China based on her religion (IJ at 5-10).

On appeal, the respondent maintains that she demonstrated a well-founded fear of persecution based on her Christian faith (Respondent's Br. at 16-24). The respondent argues that the Chinese government will become aware that she is a Christian if she is removed to her native Fujian province because she will attend an underground church (Respondent's Br. at 16; Tr. at 30). However, she neither claimed nor demonstrated that the Chinese officials are aware of her religious practice, church attendance, baptism, or of her intentions to practice her Christian faith in an

[1] The respondent did not meaningfully challenge the Immigration Judge's denial of her request for protection under the Convention Against Torture, therefore, we deem it waived on appeal. *See Matter of W-Y-O- & H-O-B-*, 27 I&N Dec. 189, 193 n.5 (BIA 2018); *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (failure to substantively appeal an issue addressed in an Immigration Judge's decision renders that issue is waived on appeal).

underground church (IJ at 7; Tr. at 30-31, 44). As the Immigration Judge noted, the respondent did not indicate how she would locate an underground church in China, or how she would otherwise continue to practice her religion upon return (IJ at 7; Tr. at 30-31, 44). Although the respondent may subjectively fear being persecuted in China based on her Christian faith and practice of her religion, on this record her fears are speculative in nature and not objectively reasonable (IJ at 7).[2] *See Hongsheng Leng v. Mukasey*, 528 F.3d 135, 143 (2d Cir. 2008) (stating that in order to establish a well-founded fear of persecution as required for asylum in the absence of any evidence of past persecution, an alien must make some showing that authorities in his or her country of nationality are either aware of his or her activities or likely to become aware of his or her activities); *see also Jiayang Xu v. Sessions*, 710 F. App'x 474, 476 (2d Cir. 2018) (finding alien's testimony that Chinese officials would become aware of her activities because she would worship at an unauthorized church was *speculative*) (emphasis added). Therefore, the Immigration Judge correctly concluded that the respondent did not establish that she will face harm rising to the level of persecution upon her return to China if she elects to attend an underground church (IJ at 7).

Moreover, even if the Chinese government were likely to become aware of the respondent's religious activities, the respondent did not establish a pattern or practice of persecution against similarly situated Christians (IJ at 8-10). *See* 8 C.F.R. § 1208.13(b)(2)(iii)(A); *Matter of A-M-*, 23 I&N Dec. 737, 741 (BIA 2005). Based on a thorough review of the country reports, the Immigration Judge observed the uneven implementation of religious restrictions nationwide by Chinese authorities (IJ at 9; Exh. 4, Tab A and B). *See Jinwen Zheng v. Barr*, 779 F. App'x 796, 798 (2d Cir. 2019) (explaining that country reports did not establish a pattern or practice of persecution of Christians attending unregistered churches in China given the uneven implementation of policies, focus on targeting prominent church members, and varying regional restrictions). Given Chinese authorities' uneven implementation of religious restrictions nationwide, it is notable that the respondent's evidence, including the State Department Religious Freedom Report, does not discuss her "native Fujian Province as an area of specific concern for Christians" (IJ at 9; Exh. 2, Tab C-G; Exh. 4, Tab A and B). *See Mei Xiang Weng v. Sessions*, 710 F. App'x 480, 483 (2d Cir. 2018) (finding that State Department reports reflected that Chinese authorities harassed and detained some Christian practitioners, but did not reflect a nationwide pattern or practice of persecution of Christians or any incidents of persecution of Christians in alien's home province of Fujian). Therefore, the evidence does not denote "systemic or pervasive" persecution of Christians. *See Matter of A-M-*, 23 I&N Dec. at 741. Rather, it reveals that Christians are harmed in China on a sporadic basis due to policies that are not implemented evenly across provinces.

Based on the foregoing, we affirm the Immigration Judge's determination that the respondent did not meet her burden of proving eligibility for asylum. *See* 8 C.F.R. § 1208.13(a). Because the respondent has not satisfied the lower burden of proof required for asylum, she necessarily has

[2] We are also unpersuaded by the respondent's citation to multiple cases arising outside of the jurisdiction of the controlling United States Court of Appeals for the Second Circuit for the proposition that requiring an individual to practice their religious beliefs in private can amount to persecution (Respondent's Br. at 20-24).

also not satisfied the clear probability standard of eligibility required for withholding of removal. *See* 8 C.F.R. § 1208.16(b); *Matter of Mogharrabi*, 19 I&N Dec. 439, 445-46 (BIA 1987).

Lastly, we find no basis to remand the record for further proceedings. The respondent argues that the Immigration Judge did not consider pertinent parts of her testimony, and seeks a remand for proper review of the record and to offer additional material evidence (Respondent's Br. at 15, 25). However, the Immigration Judge properly reviewed and considered the evidence of record, including the respondent's testimony. As such, we find no reason to remand the record for the purposes suggested by the respondent. *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); 8 C.F.R. § 1003.2(c)(1).

Accordingly, the following orders are entered.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: The respondent's motion to remand the record for further proceedings is denied.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY

Date: MAY 19 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Alexa T. Torres, Esquire

APPLICATION: Termination; asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of the People's Republic of China (China), appeals the Immigration Judge's decision dated May 2, 2018, denying his applications for asylum and withholding of removal pursuant to sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A), 1231(b)(3)(A), as well as his request for protection under the Convention Against Torture.[1] 8 C.F.R. §§ 1208.16(c), 1208.18. The respondent has also filed a motion to terminate his removal proceedings. The Department of Homeland Security (DHS) has not filed a response to the appeal or to the motion. The appeal will be dismissed and the motion will be denied.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

As an initial matter, the respondent argues that his removal proceedings should be terminated because his charging document, the notice to appear, included the location but not the date and time at which his removal proceeding would be held (Exh. 1; Respondent's Mot. (unpaginated)). The respondent's argument is foreclosed by *Banegas Gomez v. Barr*, 922 F.3d 101 (2d Cir. 2019), which directly addresses the issue the respondent has raised in his motion. The respondent in this case, like the alien in *Banegas Gomez*, was sent a notice of hearing, subsequent to the service of the notice to appear, indicating the time, date, and place of his initial hearing before the Immigration Court. *See Matter of Rosales Vargas and Rosales Rosales*, 27 I&N Dec. 745, 753 (BIA 2020) (noting that the time, place, and date of a hearing are permitted by regulation "to be excluded from the notice to appear, if later provided"). Further, the respondent did, in fact, appear before the Immigration Court as scheduled in the notice of hearing, and the respondent has received a full opportunity to present his case. In sum, the Immigration Court properly maintained subject matter jurisdiction over the respondent's removal proceedings, and termination of these

[1] The respondent has not challenged the Immigration Judge's denial of his request for protection under the Convention Against Torture, and as such, we deem that issue to be waived on appeal. *See Matter of Y-I-M-*, 27 I&N Dec. 725, 729-30 n.2 (BIA 2019) (recognizing that the failure to address on appeal an issue raised in the Immigration Judge's decision results in a waiver of the issue).

proceedings is unwarranted. *See Matter of Rosales Vargas and Rosales Rosales*, 27 I&N Dec. at 753 (explaining that the regulations governing the commencement of proceedings in Immigration Court do not impact the Immigration Court's subject matter jurisdiction; rather, such regulations are more appropriately characterized as internal docketing or claim-processing rules). Therefore, the respondent's motion to terminate is denied.

Turning now to the respondent's applications for asylum and withholding of removal, we note the respondent is seeking relief and protection from removal based on his claim that he suffered past persecution in China on account of his religion (IJ at 1-2; Tr. at 22; Exh. 2). Specifically, he claims that on one occasion, the police interrupted a house church meeting that he was attending (IJ at 1-2; Tr. at 23-25). He claims that the police beat him with a billy club but was able to escape the encounter, fleeing to a friend's home where he remained for two months (IJ at 1-2; Tr. at 23-27). He testified that during the time he remained in his friend's home, he was never arrested and he did not have further encounters with the police (Tr. at 26-27, 64-66). He believes that if he were to return to China he would be arrested and jailed for practicing his religion (Tr. at 33).

We will affirm the decision of the Immigration Judge. Given the Immigration Judge's consideration of the evidence of record and the respondent's testimony—which she deemed credible—she properly determined that the respondent did not meet his burden to establish that he suffered past persecution or has a well-founded fear of persecution on account of a protected ground (IJ at 2-3). *See Hui Lin Huang v. Holder*, 677 F.3d 130, 135 (2d Cir. 2012) (stating that the Board reviews the Immigration Judge's conclusion that an applicant has not met his burden of proof under the de novo standard).

Specifically, we agree with the Immigration Judge's determination that the harm the respondent suffered was not sufficiently severe to constitute persecution within the meaning of the Act (IJ at 2; Respondent's Br. at 6-9). *Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 340-41 (2d Cir. 2006); *Jian Qui Liu v. Holder*, 632 F.3d 820 (2d Cir. 2011). We acknowledge the respondent's argument that under the precedent of the United States Court of Appeals for the Second Circuit, even a "minor" beating in detention may rise to the level of persecution (Respondent's Br. at 8). *Beskovic v. Gonzales*, 467 F.3d 223, 226 (2d Cir. 2006). However, the beating the respondent described did not occur in the context of a detention; rather, the respondent testified that he escaped from his encounter with the police, that he was never arrested, and that he had no further contact with police while he was in China (Tr. at 22-27, 61-62, 64-66). *See Vafaev v. Mukasey*, 298 F. App'x 51, 54 (2d Cir. 2008) (distinguishing *Beskovic* and determining, based on the record in that case, that an alien who "was beaten by police who were trying to break up a demonstration in which he was participating," but who was not "beaten or otherwise mistreated" while in detention, did not establish harm rising to the level of persecution); *see also Wang Zhen v. Sessions*, 746 F. App'x 75, 76-77 (2d Cir. 2018) (deciding that the Board did not err in determining that an individual—who was punched, kicked, and beaten by police officers with batons, causing him to bleed, but who escaped the encounter when other church members intervened and was neither arrested nor detained—did not experience past persecution).

While we do not condone the treatment the respondent experienced in China, we discern no clear error in the Immigration Judge's assessment of the evidence in this case. 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260, 263 (BIA 2007) (reiterating that "a

factual finding is not 'clearly erroneous' merely because there are two permissible views of the evidence") (citing *United States v. Nat'l Ass'n of Real Estate Bds.*, 339 U.S. 485, 495 (1950)). Therefore, given the Immigration Judge's consideration of the respondent's testimony about the past harm the respondent experienced in China, we will affirm the Immigration Judge's determination that the respondent did not suffer past persecution within the meaning of the Act (IJ at 2; Tr. at 22-27, 61-62, 64-66)

To the extent the respondent challenges the Immigration Judge's well-founded fear determination, we note that the Immigration Judge's determination is heavily reliant on predictive factual findings (IJ at 2; Respondent's Br. at 9-12). *See Huang v. Holder*, 677 F.3d 130, 134 (2d Cir. 2012) ("A determination of what will occur in the future and the degree of likelihood of the occurrence has been regularly regarded as fact-findings subject only to clear error review."); *see also Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015) (establishing that an Immigration Judge's predictive findings of what may or may not occur in the future are findings of fact reviewed for clear error). The Immigration Judge considered that the respondent was able to depart from China with his own passport and with no issue, and determined that it militated against a finding that the respondent would be sought out by authorities for harm in the future should he return to China (IJ at 2; Tr. at 59). While the respondent advocates for a different view of the evidence—one that would support his view that he will be harmed should he return to China—we cannot say that the Immigration Judge's prediction as to the likelihood of future harm to the respondent is clearly erroneous (IJ at 2; Respondent's Br. at 9). *Matter of Z-Z-O-*, 26 I&N Dec. at 590; *see also Siewe v. Gonzales*, 480 F.3d 160, 167 (2d Cir. 2007) (remarking that "decisions as to . . . which of competing inferences to draw are entirely within the province of the trier of fact") (internal quotation marks omitted); *Matter of D-R-*, 25 I&N Dec. 445, 453-55 (BIA 2011) (holding that an Immigration Judge's choice between plausible alternative interpretations of the record is not clearly erroneous). Thus, as the respondent has not demonstrated clear error in the Immigration Judge's predictive findings, which support her overall legal conclusion, we will affirm the Immigration Judge's determination that the respondent has not established a well-founded fear of persecution in China (IJ at 2).

Based on the foregoing, the respondent has not met his burden of proof to demonstrate his eligibility for asylum, and his application was properly denied. 8 C.F.R. § 1208.13(a). As the respondent has not satisfied the lower burden of proof required for asylum, he necessarily has not met the higher and more stringent standard of proof required for withholding of removal (IJ at 2). 8 C.F.R. § 1208.16(b); *Paul v. Gonzales*, 444 F.3d 148, 155-57 (2d Cir. 2006); *see also Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 399 (2d Cir. 2005) (explaining that because asylum and withholding of removal "are factually related but with a heavier burden for withholding, it follows that an applicant who fails to establish his eligibility for asylum necessarily fails to establish eligibility for withholding.") (citation omitted).

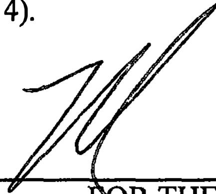
Accordingly, the following orders will be entered.

ORDER: The motion to terminate is denied.

FURTHER ORDER: The appeal is dismissed.

A(b) (6)

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) New York, NY

Date: MAY 1 2 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL and MOTION

ON BEHALF OF RESPONDENT: John Chang, Esquire

APPLICATION: Cancellation of removal; remand

The respondent, a native and citizen of China, appeals from the Immigration Judge's July 13, 2018, decision denying her applications for asylum and withholding of removal pursuant to sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3), for protection under the Convention Against Torture, and for cancellation of removal pursuant to 240A(b) of the Act, 8 U.S.C. § 1229b(b).[1] While this appeal was pending, the respondent filed a motion to remand. The appeal will be dismissed and the motion will be denied.

We review for clear error the findings of fact, including any credibility determination, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including issues of law, discretion, and judgment. 8 C.F.R. § 1003.1(d)(3)(ii).

We adopt and affirm the decision of the Immigration Judge. *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). Specifically, we agree with the Immigration Judge that the respondent has not established that her removal would result in exceptional and extremely unusual hardship to her qualifying family member, her United States citizen daughter. *See Matter of Monreal*, 23 I&N Dec. 56, 59-62 (BIA 2001) (finding that, by requiring exceptional and extremely unusual hardship, Congress intended to limit cancellation to truly exceptional and compelling cases, where the qualifying relatives would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the alien's removal); *see also Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *cf. Matter of Retinas*, 23 I&N Dec. 467 (BIA 2002).

Contrary to the respondent's appellate arguments, the Immigration Judge properly considered the evidence of record. To the extent the respondent argues her daughter may get sick again in China, the respondent has not established that medication or treatment would not be reasonably

[1] The respondent does not challenge the denial of her asylum application as untimely filed (IJ at 12-13). *See* sections 208(a)(2)(B) and (D) of the Act (setting forth the 1-year filing deadline and providing that changed or extraordinary circumstances may be exceptions to this deadline). Nor does she challenge the denial of her withholding of removal applications under the Act and the Convention Against Torture because she did not testify in support of those applications (IJ at 13). We consider those issues waived. *See Matter of R A-M*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (stating that when a respondent fails to appeal an issue addressed in an Immigration Judge's decision, that issue is waived before the Board).

available (IJ at 10). *Matter of J-J-G*, 27 I&N Dec. 808 (BIA 2020) (for a claim based on a qualifying relative's health, the applicant must show that the relative has a serious medical condition and, if she is relocating to the country of removal, that adequate medical care for the claimed condition(s) is not reasonably available in that country).

While this appeal was pending the respondent filed a motion to remand to afford her the opportunity to apply for asylum. A motion to remand for the purpose of presenting additional evidence must conform to the same standards as a motion to reopen and will only be granted if the evidence was previously unavailable and would likely change the result in the case. *See Matter of L-A-C-*, 26 I&N Dec. 516, 526 (BIA 2015). The respondent claims that she converted to Christianity after her July 2018 removal hearing. She fears she will be persecuted in China by the authorities for attending a house church. Her motion is supported by an asylum application, her statement, and several articles discussing the mistreatment of Christians in China.

The respondent's statement and news articles are insufficient to establish her *prima facie* eligibility for asylum or withholding of removal based on a well-founded fear of persecution. *See Poradisova v. Gonzales*, 420 F.3d 70, 78 (2d Cir.2005) (to establish *prima facie* eligibility for asylum, a petitioner must establish "a realistic chance" that he will be able to establish eligibility). The respondent has not shown an objectively reasonable fear that she would be persecuted in China on account of her religion. *See Hongsheng Leng v. Mukasey*, 528 F.3d 135, 143 (2d Cir.2008) ("Put simply, to establish a well-founded fear of persecution in the absence of any evidence of past persecution, an alien must make some showing that authorities in his country of nationality are either aware of his activities or likely to become aware of his activities"). The respondent's documentation does not show that she has been harmed or that Chinese authorities are aware of her Christian activities in the United States or are likely to become aware of her activities. Nor has she established prima facie eligibility for protection under the Convention Against Torture as she has not claimed that she will be tortured in China. The following orders will be entered.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: The motion to remand is denied.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – Philadelphia, PA Date: MAY 28 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Nicole Pedicino
Assistant Chief Counsel

APPLICATION: Termination; adjustment of status; cancellation of removal

The respondent, a native and citizen of China, appeals from an Immigration Judge's April 19, 2018, decision denying her application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo questions of law, discretion, and judgment, and all other issues in appeals from an Immigration Judge's decision. 8 C.F.R. § 1003.1(d)(3)(ii).

We adopt and affirm the Immigration Judge's April 19, 2018, decision which incorporated by reference her interlocutory decision and order dated December 28, 2017. Specifically, we affirm the Immigration Judge's determination that the respondent is ineligible for cancellation of removal because she did not establish the requisite hardship to her United States citizen daughter (born in October 2002) who resided and attended school in China at the time of the hearing (IJ at 5-7; Exh. 12). *See Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001); *cf. Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002). We also affirm the Immigration Judge's decision that the respondent is removable as charged and ineligible for adjustment of status. And, we affirm the Immigration Judge's denial of the respondent's request for a continuance (IJ Interlocutory Dec. at 5-8; Respondent's statement on appeal).

On appeal, the respondent states that she was incompetent and was not represented before the Immigration Judge (Notice of Appeal, Attachment). The record reflects that the Immigration Judge found the respondent competent to participate in the removal proceedings, but she nonetheless instituted appropriate safeguards, namely, providing a Mandarin interpreter for the hearings (IJ Interlocutory Dec. at 4-5). The respondent has not challenged the sufficiency of the safeguards on appeal. *See Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011). In terms of representation, the record reflects that the Immigration Judge informed the respondent that if she was not represented she should collect the required documents and submit them herself. The Immigration Judge informed her of the types of documents needed to support a cancellation application (IJ Interlocutory Dec. at 8).

A(b) (6)

To the extent the respondent, who is pro se, is arguing that she did not receive a full and fair hearing, the record shows otherwise. To prevail on procedural due process claims arising from removal proceedings, a respondent must show "substantial prejudice," that is that "the infraction has the *potential* for affecting the outcome of the deportation proceedings." *Serrano-Alberto v. Att'y Gen.*, 859 F.3d 208, 213 (3d Cir. 2017) (alteration omitted) (internal quotation marks and citation omitted). A review of the record reveals no infraction or prejudice. Based on the foregoing, the appeal will be dismissed.

ORDER: The respondent's appeal is dismissed.

NOTICE: If the respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself at the time and place required for removal by the DHS, or conspires to or take any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondents are in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A(b) (6) New York, NY

Date: MAY 14 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Norman Kwai-Wing Wong, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of the People's Republic of China ("China"), appeals from an Immigration Judge's May 11, 2018, decision which denied his applications for asylum and withholding of removal under sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A) and 1231(b)(3)(A), as well as his alternative request for protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16(c) and 1208.18. The Department of Homeland Security ("DHS") has not responded to the appeal. The appeal will be dismissed.

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

The Immigration Judge found that the respondent's claim was not credible, and denied his applications based on his claim of past harm on this basis (IJ at 4-10). On appeal, the respondent challenges the Immigration Judge's adverse credibility finding (Respondent's Br. at 3-4). However, considering "the totality of the circumstances, and all relevant factors," the respondent has not established clear error in the Immigration Judge's credibility assessment. *See* sections 208(b)(1)(B)(iii), 241(b)(3)(C) of the Act; 8 C.F.R. § 1003.1(d)(3)(i); *see also* section 240(c)(4)(C) of the Act, 8 U.S.C. § 1229a(c)(4)(C); *Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 163 (2d Cir. 2008) (post-REAL ID Act case holding that, in evaluating an asylum applicant's credibility, an Immigration Judge may rely on omissions and inconsistencies, even if they do not directly relate to the applicant's claim of persecution, as long as the totality of the circumstances establishes that the applicant is not credible); *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007).

The Immigration Judge observed that the respondent and his wife provided inconsistent testimony concerning myriad aspects of the respondent's claim, including whether the respondent's wife accompanied him to the clinic the day after he was ostensibly released from an alleged 5-day detention; whether the respondent had told his wife that he was attending an underground church prior to his alleged arrest and detention; whether the respondent had returned home after his purported detention alone or accompanied by a friend; and whether his wife had attempted to visit him during his alleged period of detention (IJ at 2-10). The respondent was confronted with the inconsistencies between his and his wife's versions of events and provided an opportunity to explain the discrepancies (IJ at 4-9; Tr. at 52-73, 131-37, 141-42). After carefully

considering the inconsistencies between the witnesses' statements and the explanations provided, the Immigration Judge determined that the respondent did not provide a credible claim regarding his alleged past harm in China (IJ at 4-10). *See Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011) (an Immigration Judge is not required to accept an alien's assertions, even if plausible, where there are other permissible views of the evidence based on the record).

The respondent asserts that any inconsistencies cited by the Immigration Judge either are not present in the record or are "minor" (Respondent's Br. at 3-4). However, the record supports the Immigration Judge's findings of fact concerning the cited inconsistences, and "an [Immigration Judge] may rely on omissions and inconsistencies that do not directly relate to the applicant's claim of persecution as long as the totality of the circumstances establish that the applicant is not credible." *Xiu Xia Lin v. Mukasey*, 534 F.3d at 163.

The respondent's appellate assertion that the inconsistencies in the record are due to his flawed memory, or confusion (Respondent's Br. at 3-4), does not establish clear error in the Immigration Judge's adverse credibility finding, particularly as the respondent did not claim to be confused or to have trouble remembering the details of his claim until after he was confronted with the discrepancies between his and his wife's testimony (IJ at 6-7, 9; Tr. at 133-37, 141-42; *compare, e.g.*, Tr. at 44-45, 47, 49, 87 *with* Tr. at 103-04, 108-09, 112-14, 116-17). *See generally id.*; *see also Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). Moreover, counsel's assertions that the respondent's wife may have been mistaken with respect to whether a friend accompanied the respondent home after his alleged detention, and that the various discrepancies in the record may be due to "human nature" or imperfect recollections (Respondent's Br. at 4), likewise do not establish clear error in the Immigration Judge's credibility finding (IJ at 4-10; Tr. at 52-73, 137; *compare, e.g.*, Tr. at 87, 137 *with* Tr. at 116-117). *See Matter of Mayen*, 27 I&N Dec. 755, 758 n.4 (BIA 2020) ("Counsel's arguments are not evidence . . . ." (citation omitted)). In view of the foregoing, we affirm the Immigration Judge's determination that the respondent did not establish his eligibility for any form of relief or protection from removal based on his claim of past harm (IJ at 10). *See Majidi v. Gonzales*, 430 F.3d 77, 81-82 (2d Cir. 2005) (affirming denial of asylum and withholding of removal based on adverse credibility finding); *see also Paul v. Gonzales*, 444 F.3d 148, 157 (2d Cir. 2006) ("[A] petition for [Convention Against Torture] relief may fail because of an adverse credibility ruling rendered in the asylum context where the factual basis for the alien's [Convention Against Torture] claim was the same as that rejected in his asylum petition.").

The respondent further contends that notwithstanding the Immigration Judge's adverse credibility finding as to his claim of past harm, he is eligible for relief and protection from removal in light of his risk of future harm based on his religious practice in the United States (Respondent's Br. at 4-8). However, the respondent has not demonstrated that he has an objectively reasonable fear of persecution, or faces a clear probability of persecution or torture, based on his activities at a church in the United States, where the record does not reflect that he will likely be singled out for persecution or torture upon return to China on this basis (IJ at 10-12; *cf.* Respondent's Br. at 4-8).

In that regard, contrary to the respondent's appellate argument, the Immigration Judge's decision reflects that she appropriately analyzed whether the Chinese authorities "are either aware of his activities or likely to become aware of his activities" relating to his religious practice in the

United States (*see* IJ at 10-11). *Hongsheng Leng v. Mukasey*, 528 F.3d 135, 143 (2d Cir. 2008). While the respondent highlights general background evidence regarding suppression of some religious activities in China, he does not point to evidence that there is a "reasonable possibility" that the authorities in China will discover his activities and subject him to persecution on such ground (Respondent's Br. at 4-7). *Id.*; *see also Jian Xing Huang v. INS*, 421 F.3d 125, 129 (2d Cir. 2005) ("In the absence of solid support in the record . . . [an applicant's] fear is speculative at best."). Moreover, the background evidence cited by the respondent does not reflect sufficiently widespread persecution of similarly situated individuals such that the respondent could establish his eligibility for relief from removal based on a pattern or practice of persecution (IJ at 11; *see generally* Respondent's Br. at 4-7). *See generally Hongsheng Leng v. Mukasey*, 528 F.3d at 142.

In sum, the record supports the Immigration Judge's determination that, in the absence of a credible claim of past harm, the respondent has not established a well-founded fear of persecution, or a clear probability of persecution or torture based on his United States religious practice (IJ at 10-12; *see, e.g.*, Tr. at 86). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the DHS, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY

Date: MAY 26 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Joan Xie, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of the People's Republic of China ("China"), appeals from the Immigration Judge's April 13, 2018, decision denying the respondent's application for asylum and withholding of removal, and request for protection under the Convention Against Torture. *See* sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A), 1231(b)(3)(A); 8 C.F.R. §§ 1208.16(c), 1208.18. The Department of Homeland Security has not responded to the appeal. The appeal will be dismissed.

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

The respondent alleged past harm and a fear of future harm on account of his Christian religion (IJ at 3, 8; Tr. at 37-41). The Immigration Judge found the respondent's claim of past harm not credible, and that he had not met his burden of proof to establish a well-founded fear of persecution or a pattern or practice of persecution, and denied the asylum application (IJ at 4-12).

We affirm te Immigration Judge's adverse credibility finding as it is not clearly erroneous (IJ at 4-8). *See* 8 C.F.R. § 1003.1(d)(3)(i); *Wu Lin v. Lynch*, 813 F.3d 122, 126-27 (2d Cir. 2016) (discussing at length the meaning of "clear error" review, and noting the Board has concluded it means that "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed") (internal quotations omitted); *Matter of A-B-*, 27 I&N Dec. 316, 341 (A.G. 2018) ("[W]here credibility determinations are at issue . . . even greater deference must be afforded to the [I]mmigration [J]udge's factual findings."). The Immigration Judge based his credibility finding on specific and cogent reasons (IJ at 4-8). *See* section 208(b)(1)(B)(iii) of the Act (under the REAL ID Act, an Immigration Judge may, considering the totality of the circumstances, base a credibility finding on the applicant's "demeanor, candor, or responsiveness," the plausibility of his [or her] account, and inconsistencies in his [or her] statements, without regard to whether they go "to the heart of the applicant's claim"); *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *see also Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 167 (2d Cir. 2008) (per curiam) (reasoning that an Immigration Judge "may rely on *any* inconsistency or omission in making an adverse credibility determination").

For example, the Immigration Judge found that the respondent indicated during his credible fear interview that the police came to his home and pushed his mother down to the floor, yet omitted any reference during his testimony to such conduct or his mother's presence (IJ at 6; Tr. at 37-41; Exh. 5 at 7). In addition, the Immigration Judge found that the respondent provided inconsistent statements regarding his church attendance in the United States (IJ at 7-8; Tr. at 31, 33, 47-49).

The Immigration Judge was not required to accept the respondent's explanations for his inconsistencies or other problems with is testimony when there are other plausible views of the evidence. *Matter of D-R-*, 25 I&N Dec. 445, 453-55 (BIA 2011), *clarified on other grounds by Matter of D-R-*, 27 I&N Dec. 105 (BIA 2017). The Immigration Judge is permitted to make reasonable inferences among the plausible possibilities and explanations for discrepancies in the record, and she did so. *Id.* at 454 (drawing inferences from direct and circumstantial evidence is a routine and necessary task of any fact finder, and in the immigration context, the Immigration Judge is the fact finder). We have considered all of the respondent's explanations on appeal and we do not find them to be persuasive or to adequately reconcile the inconsistencies in the record (Respondent's Br. at 4-6).

As the respondent's credibility was in question, the Immigration Judge properly looked to the respondent's corroborating evidence to determine whether he could meet his burden of proof. *See Jin Yan Sun v. Sessions*, 691 F.App'x 28, 29 (2d Cir. 2017) (citations omitted). The Immigration Judge found that the statement from the respondent's brother omitted any reference to the respondent being persecuted in the past or his church attendance in the United States (IJ at 8; Exh. 4, Tab C at 20). In addition, the Immigration Judge found that the affidavit of the respondent's wife did not mention the respondent's mother being present during the police visits or her being pushed to the ground by the police (IJ at 6; Exh. 3, Tab H). On appeal, the respondent does not meaningfully identify any record evidence that rehabilitates his discredited testimony.

The inconsistencies and omissions cited by the Immigration Judge were present in the record and were relevant to the respondent's claim of past persecution, and under the standards set out by the REAL ID Act, the adverse credibility finding cannot be said to be clearly erroneous (Respondent's Br. at 4-5). *Wu Lin v. Lynch*, 813 F.3d at 126-27; *see also Tu Lin v. Gonzales*, 446 F.3d 395, 402 (2d Cir. 2006) ("[E]ven where an IJ relies on discrepancies or lacunae that, if taken separately, concern matters collateral or ancillary to the claim, the cumulative effect may nevertheless be deemed consequential by the fact-finder.").

We also affirm the Immigration Judge's alternative determination that, even assuming the respondent has regularly attended a church in the United States, he has not satisfied his burden of demonstrating a well-founded fear of future persecution on account of his practice of Christianity in the United States (IJ at 8-12).

The respondent asserts on appeal that the Immigration Judge did not address "that any past persecution presumably established" the respondent's well-founded fear of persecution (Respondent's Br. at 6). However, because the respondent did not demonstrate past persecution, he has the burden to establish an objectively reasonable fear of future persecution (Respondent's Br. at 6). *See* 8 C.F.R. § 1208.13(b)(1), (2); *Mei Xiang Weng v. Sessions*, 710 F.App'x 480, 481

(2d Cir. 2018) (citation omitted). To meet this standard, an applicant must demonstrate that "[he or] she would be singled out individually for persecution," or that there is "a pattern or practice" of persecution of persons similarly situated to him. *Hongsheng Leng v. Mukasey*, 528 F.3d 135, 142 (2d Cir. 2008) (citation omitted); *see* 8 C.F.R. § 1208.13(b)(2)(iii).

The respondent's evidence that he would be singled out for persecution was based on his claim of past harm. As the Immigration Judge concluded, and we affirmed, the respondent did not meet his burden of proof on this point because his allegation of past persecution was not credible (IJ at 4-8). Section 208(b)(1)(B)(i) of the Act; *Xiu Xia Lin v. Muksey*, 534 F.3d at 167 (per curiam).

In addition, the respondent contends that the Immigration Judge assumed that the respondent "would give up his religion" if he returned to China, merely because his underground church may cease to exist (Respondent's Br. at 6). However, as the respondent bears the burden of proof, and he did not indicate if his prior underground still operates or how he would find another church upon his return, the Immigration Judge reasonably found as speculative the respondent's intent to attend an underground church upon return to China (IJ at 9). *Jian Xing Huang v. INS*, 421 F.3d 125, 129 (2d Cir. 2005) (absent "solid support" in the record that his or her fear is objectively reasonable, an alien's general claim that he or she fears future persecution is "speculative at best.").

We uphold the Immigration Judge's determination that the respondent did not establish that there exists a pattern or practice of persecution of a group of persons similarly situated to himself (IJ at 10-12). *See* 8 C.F.R. §§ 1208.13(b)(2)(iii); 1208.16(b)(2); *Mufied v. Mukasey*, 508 F.3d 88, 91 (2d Cir. 2007); *Kyaw Zwar Tun v. INS*, 445 F.3d 554 (2d Cir. 2006); *Matter of A-M-*, 23 I&N Dec. 737 (BIA 2005). The respondent asserts on appeal that the country conditions evidence establishes a pattern or practice of persecution of individuals who practice Christianity in China (Respondent's Br. at 6-7). We disagree. The respondent did not submit any evidence of country conditions (IJ at 11). The Immigration Judge took administrative notice of the Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, International Religious Freedom Report for 2016 (IJ at 10-12). The Immigration Judge acknowledged that the report indicated that some members of unregistered churches are arrested and mistreated, but the report did not identify the respondent's home community as "an area of special concern" (*Id.* at 12). *See Mei Xiang Weng v. Sessions*, 710 F. App'x at 483 (finding that State Department reports reflected Chinese authorities harassed and detained some Christian practitioners, but did not reflect a nationwide pattern or practice of persecution of Christians or any incidents of persecution of Christians in alien's home province of Fujian).

In addition, the Immigration Judge acknowledged the uneven implementation of religious restrictions nationwide by Chinese authorities (IJ at 11). *See Xiaoxiang Li v. Lynch*, 650 F.App'x 59, 61 (2d Cir. 2016) (finding that although underground Christian groups were targeted in parts of China, such targeting was not uniform throughout China); *Feng Li v. Lynch*, 649 F.App'x 20, 23 (2d Cir. 2016) (finding that in parts of China, "local authorities tacitly approved of or did not interfere with activities of unregistered groups."). Further, the Immigration Judge noted that the China's constitution "states that citizens have freedom of religious belief" (IJ at 10). *See Mei Xiang Weng v. Sessions*, 710 F.App'x at 483 (finding that State Department reports reflected that Chinese authorities harassed and detained some Christian practitioners, but did not reflect a nationwide pattern or practice of persecution of Christian or any incidents of

persecution of Christians in alien's home province of Fujian); *see also Santoso v. Holder*, 580 F.3d 110, 112 (2d Cir. 2009) (upholding finding that no pattern or practice existed where country reports indicated persecution was not countrywide).

Based on the Immigration Judge's factual findings, which are not clearly erroneous, we agree that the respondent has not met his burden of establishing a well-founded fear of future persecution. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Wu Lin v. Lynch*, 813 F.3d at 126-27; *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (2d Cir. 2015).

Because the respondent did not establish the lower burden of proof required for asylum, he necessarily did not establish his eligibility for withholding of removal, which carries a higher burden of proof (IJ at 12). 8 C.F.R. § 1208.16(b); *see Matter of N-C-M-*, 25 I&N Dec. 535, 536 n.1 (BIA 2011).

We also uphold the Immigration Judge's denial of the respondent's request for protection under the Convention Against Torture (IJ at 12; Respondent's Br. at 7). The respondent relied upon the same facts that supported his asylum claim, which were found to lack credibility, and has not presented individualized evidence relating to his claim for protection under the Convention Against Torture. There is no clear error in the Immigration Judge's finding that it is not more likely than not the respondent will be tortured in China (IJ at 12). The respondent's articulated circumstances fail to demonstrate his burden of proving that it is more likely than not that he will be tortured by, or "at the instigation of or with the consent or acquiescence of or [willful blindness] of a public official or other person acting in an official capacity" upon removal to China. 8 C.F.R. §§ 1208.16(c), 1208.18(a); *Paul v. Gonzales*, 444 F.3d 148, 157 (2d Cir. 2006) (a petition for Convention Against Torture protection may fail because of an adverse credibility finding in the asylum context where the factual basis for the Convention Against Torture claim is the same as that rejected in the asylum petition); *see also Hong Fei Gao v. Sessions*, 891 F.3d 67, 76 (2d Cir. 2018).

In view of the foregoing, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324; 8 C.F.R. § 280.53(b)(4).

FOR THE BOARD

File: A(b) (6) – New York, NY

Date: MAY 19 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Adedayo O. Idowu, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of China, has appealed from an Immigration Judge's April 13, 2018, decision denying his applications for asylum, withholding of removal and protection under the Convention Against Torture. The appeal will be dismissed.

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

We adopt and affirm the Immigration Judge's decision. *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). The respondent has not shown that the Immigration Judge's adverse credibility finding is clearly erroneous (IJ at 4-5). *See Lin v. Mukasey*, 534 F.3d 162, 165 (2d Cir. 2008) (affirming Immigration Judge's adverse credibility finding under totality of circumstances); *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007).

The Immigration Judge noted that the respondent gave contradictory testimony about the identity of the legal representative to whom he gave his fine receipt in the United States in connection with his asylum application, and that the fine receipt was never submitted into evidence (IJ at 8-9). Furthermore, he gave inconsistent testimony regarding whether his alleged mistreatment was by the police or the auxiliary police (IJ at 9-10).

The respondent alleges on appeal that the inconsistencies were not material (Respondent's Br. at 13-15). However, we conclude that the inconsistencies are material in one involves inconsistencies regarding the location of the fine receipt which related to its reliability. The other involves who mistreated him. *See* section 208(b)(1)(B)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)(iii), 8 C.F.R. § 1208.13(a). Moreover, the Immigration Judge found the respondent was not truthful regarding his plans when he obtained his tourist visa at a time when he was not fleeing persecution. In addition, his case is controlled by the standards of the REAL ID Act and consequently it is not necessary for any inconsistencies cited by the Immigration Judge to relate to the heart of the claim. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The Immigration Judge made a negative demeanor assessment which is afforded a high degree of deference. He noted that the respondent appeared to testify in a perfunctory manner, did not seem upset when he recounted his alleged mistreatment by the police, and did not exhibit any

sadness when recalling the alleged abortion of his child against his wishes (IJ at 12). *See Matter of A-H-*, 23 I&N Dec. 774, 787 (A.G. 2005) (demeanor assessments are within Immigration Judge's authority); *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998) (adverse inference drawn from alien's demeanor generally should be accorded high degree of deference); *see also Lin v. U.S. Dep't of Justice*, 453 F.3d 99, 109 (2d Cir. 2006) (particular deference accorded to adverse credibility determinations which are based upon adjudicator's observation of alien's demeanor); *Majidi v. Gonzales*, 430 F.3d 77, 81 n.1 (2d Cir. 2005) (demeanor is valid factor in adverse credibility determinations); *Shu Wen Sun v. Board of Immigration Appeals*, 510 F.3d 377, 381 (2d. Cir. 2007) (alien's evasive and unresponsive manner suggested untruthfulness rather than nervousness or difficulty in comprehending proceedings).

Finally, the Immigration Judge found that the corroboration submitted by the respondent did not rehabilitate his credibility. An asylum applicant is expected to submit reasonably obtainable evidence that corroborates the material elements of his claim. Section 208(b)(1)(B)(ii) of the Act; *Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015). An applicant's claim can be denied for failing to provide reasonably obtainable corroborative evidence to support his claim, or to adequately explain his failure to produce such evidence. *Id*; *see also Liu v. Holder*, 575 F.3d 193, 196-98 (2d Cir. 2009) (failure to corroborate can suffice, without more, to support finding that alien has not met burden of proof in immigration proceedings); *Yang v. Gonzales*, 496 F.3d 268, 273 (2d Cir. 2007) (absence of corroboration makes an applicant unable to rehabilitate testimony already called into question). The Immigration Judge noted that the respondent did not submit medical records to corroborate his claim that he requested and received treatment after being released by the police, and that he did not submit an abortion certificate (IJ at 13).

Because the respondent's request for protection under the Convention Against Torture was based upon the same facts as his asylum application, and he was properly found not credible, he is unable to satisfy his burden of proof for this claim as well (IJ at 17). *See Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 340 (2d Cir. 2006) (holding that where alien "relies largely on testimonial evidence to establish her CAT claim, and does not independently establish a probability of torture from her stated fear, an adverse credibility finding regarding that testimonial evidence may provide a sufficient basis for denial of CAT relief."). The evidence of record does not independently establish the respondent's protection claim. Therefore, the Immigration Judge properly denied the respondent's request for protection under the Convention Against Torture.

Inasmuch as we have decided the appeal on the preceding basis, it is not necessary to address the respondent's remaining contentions on appeal. *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (as a general rule, courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order

of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY

Date: JUN - 8 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jim Li, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of China, appeals from the Immigration Judge's August 12, 2019, decision denying his application for asylum, withholding of removal, and protection under the Convention Against Torture. Sections 208(a), 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a), 1231(b)(3); 8 C.F.R. 1208.16(c). The appeal will be dismissed in part and the record will be remanded.[1]

We review findings of fact, including credibility findings, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, or judgment, and all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent alleged past harm and a well-founded fear of future harm on account of his Christian religion and imputed political opinion (IJ at 1-2). The Immigration Judge found he was not credible and denied all the applications (IJ at 4-7).

The respondent argues that the Immigration Judge made an adverse credibility finding based, in part, on the respondent's admission that he was untruthful regarding his criminal history during bond proceedings (Respondent's Br. at 8-9). The respondent asserts that the Immigration Judge did not make a particularly serious crime finding, and thus his credibility regarding his criminal history was not relevant (Respondent's Br. at 8-9).

The Immigration Judge was not required to make a finding regarding whether the respondent had been convicted of a particularly serious crime. Rather, it was appropriate for the Immigration Judge to include the respondent's admission that he had previously lied about his criminal history under oath in bond proceedings as part of the credibility analysis (IJ at 4-5). With regard to the respondent's religion-based asylum claim, the Immigration Judge considered this factor as well as additional factors, which the respondent has not addressed, in finding the respondent not credible under the totality of the circumstances. We do not discern clear error in the adverse credibility finding relating to the respondent's religion claim. *See Wu Lin v. Lynch*, 813 F.3d 122, 126-27 (2d Cir. 2016).

[1] The respondent's request that we consider his late filed brief is granted.

A(b) (6)

Finally, the respondent argues the Immigration Judge did not make clear findings regarding his alleged imputed political opinion claim (Respondent's Br. at 10-11). We will remand for the Immigration Judge to make all necessary findings on this claim. *See Matter of A-B-*, 27 I&N Dec. 316, 340-41 (A.G. 2018) (emphasizing the importance of Immigration Judge's as fact-finders); *Matter of A-P-*, 22 I&N Dec. 468, 473 (BIA 1999) (vesting the Immigration Judge with the responsibility for ensuring the "substantive completeness of the decision").

On remand, the Immigration Judge should enter all findings necessary for the review of this claim, including whether the adverse credibility finding applies to the respondent's imputed political opinion claim, and if so, whether the objective corroborating evidence in the record is sufficient to establish a claim. *See Yan Juan Chen v. Holder*, 658 F.3d 246, 252 (2d Cir. 2011); *Biao Yang v. Gonzales*, 496 F.3d 268, 273 (2d Cir. 2007); *see also Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir. 2004) (stating an adverse credibility finding may not apply to a torture claim based on entirely different facts as the claim found to be not credible). The Immigration Judge may hold additional hearings if necessary, and accept additional relevant evidence from the parties as needed.

Accordingly, the following orders are entered.

ORDER: The appeal is dismissed as to the respondent's religion claim.

FURTHER ORDER: The record is remanded for the entry of a new decision consistent with this decision.

FOR THE BOARD

File: A(b) (6) – New York, NY Date: MAY - 4 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Todd E. Henry, Esquire

APPLICATION: Reopening

This case was last before us on May 22, 2018, when we denied the respondent's second motion to reopen. The final order in these proceedings was entered by the Board on March 4, 2005, when we dismissed the respondent's appeal from an Immigration Judge's decision denying the respondent's application for asylum, withholding of removal, and for protection under the Convention Against Torture. On October 1, 2007, we denied the respondent's first motion to reopen to re-apply for asylum based on the birth of her second child in the United States. On November 12, 2019, the respondent filed a motion to reopen to re-apply for asylum. The Department of Homeland Security (DHS) has not filed a response to the respondent's motion. The motion will be denied.

With certain exceptions, a motion to reopen in any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision. Section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). Furthermore, an alien may file one motion to reopen. Section 240(c)(7)(A) of the Act; 8 C.F.R. § 1003.2(c)(2). There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for asylum, withholding of removal based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceedings. 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), *aff'd Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008).

A party seeking to reopen removal proceedings must state the new facts she intends to establish, supported by affidavits or other evidentiary material. 8 C.F.R. §§ 1003.2(c), 1003.23(b)(3); *INS v. Jong Ha Wang*, 450 U.S. 139 (1981); *Matter of Leon-Orosco and Rodriguez-Colas*, 19 I&N Dec. 136 (BIA 1984; A.G. 1984); *Matter of Reyes*, 18 I&N Dec. 249 (BIA 1982). A motion to reopen will not be granted unless it establishes a prima facie case of statutory and discretionary eligibility for the underlying substantive relief sought. *See INS v. Doherty*, 502 U.S. 314 (1992); *INS v. Abudu*, 485 U.S. 94 (1988); *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

The respondent is a native and citizen of China. In her current motion, she seeks reopening based on her claim that she is facing future persecution because of her pro-democracy activities on social media and her political opinions against the government of China, which became public in 2019. The respondent also states that her parents and father-in-law are lawful permanent residents, and her mother-in-law is a United States citizen. She indicates that her father-in-law

suffers from poor health and she has been paying for his medical bills. The respondent states that she has two minor United States citizen children who also depend on her.

The respondent has submitted several documents in support of her asylum claim (Respondent's Motion to Reopen, Tabs 5-7). However, the respondent has not submitted a new asylum application with her motion as required by regulation. 8 C.F.R. § 1003.2(c)(1). She also has not submitted an affidavit in support of her motion. Therefore, we are not persuaded that the respondent's alleged fear of harm in China is adequately supported. *See INS v. Abudu*, 485 U.S. 94, 104 (1988) (a motion to reopen may be denied if alien does not establish prima facie case for the relief sought); *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) (to prevail on a motion to reopen an alien must establish that "the new evidence offered would likely change the result in the case").

The respondent also has not shown that there has been a material change in country conditions in China since the Board dismissed her appeal in March 2005. *See* section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. §§ 1003.2(c)(3)(ii). *See also Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007) (noting that in evaluating changed country conditions for purposes of evaluating a motion to reopen, we compare evidence of country conditions submitted with the motion to those that existed at the time of the hearing). The respondent's submissions, reflecting continued harsh conditions for dissidents in China, do not compare conditions in 2005 to conditions currently prevailing. As the respondent has not established changed country conditions arising in China since the date of her removal order, she is not exempt from the 90-day time limitation with respect to reopening her proceedings. *See Zheng v. United States Dept. of Justice*, 416 F.3d 129, 130 (2d Cir. 2005); section 240(c)(7)(C)(i) of the Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). Furthermore, an alien may file one motion to reopen. Section 240(c)(7)(A) of the Act; 8 C.F.R. § 1003.2(c)(2). The motion will be denied as untimely and numerically barred.

Accordingly, the following order will be entered.

ORDER: The motion to reopen is denied.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A(b) (6) – New York, NY

Date: MAY - 1 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gary J. Yerman, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of China, appeals the decision of the Immigration Judge of July 16, 2018. In her decision, the Immigration Judge denied the respondent's applications for asylum and withholding of removal under sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A) and 1231(b)(3)(A), and for protection under the Convention Against Torture pursuant to 8 C.F.R. § 1208.16(c)(2). The Department of Homeland Security has not responded to the appeal. The appeal will be dismissed.

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

We adopt and affirm the decision of the Immigration Judge. *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). The respondent did not meet his burden of proving his eligibility for asylum, withholding of removal, and protection under the Convention Against Torture (IJ at 5-7). *See* sections 208(b)(1)(B)(i), 241(b)(3) of the Act; 8 C.F.R. §§ 1208.13, 1208.16.

The Immigration Judge found the respondent credible (IJ at 4-5). The respondent testified that he reported quality control issues relating to cement produced by his employer to his city's quality control department. In turn, he was accused of corruption, arrested and beaten, and ultimately fired. He was released upon payment of a fine. The respondent was informed by his employer that he pays money to the police officials for protection and is also a former classmate to one of them (Tr. at 19-28).

We agree with the Immigration Judge that the respondent has not met his burden of establishing he qualifies for asylum due to a lack of nexus (IJ at 5-7). The respondent has not shown that he suffered past persecution from the Chinese authorities or has a well-founded fear of persecution, on account of his actual or imputed political opinion (IJ at 5-7). *See* section 208(b)(1)(B)(i) of the Act; *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007) (applicant must establish that a protected ground was or will be at least one central reason for persecuting the applicant, and the protected ground cannot be incidental, tangential, superficial, or subordinate to another reason for harm under the REAL ID Act). The Immigration Judge's finding is not clearly erroneous (IJ at 5-7). *See Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011) (stating that the motive of a persecutor is a finding of fact to be determined by the Immigration Judge and reviewed for clear error).

In making the nexus determination in a case premised upon an opposition to corruption, the following factors are relevant: (1) whether and to what extent the alien engaged in activities that could be perceived as expressions of anticorruption beliefs; (2) any direct or circumstantial evidence that the persecutor was motivated by the alien's actual or perceived anticorruption belief, and (3) any evidence regarding the pervasiveness of corruption within the governing regime. *Matter of N-M-*, 25 I&N Dec. 526, 532-33 (BIA 2011).

While opposition to corruption may constitute the expression of a political opinion if it represents a challenge to state-sanctioned behavior, the respondent has not demonstrated that his expressed complaint about the quality of the cement produced by his employer was an expression of a political opinion (IJ at 6). *See Ruqiang Yu v. Holder*, 693 F.3d 294, 298-99 (2d Cir. 2012); *Yueging Zang v. Gonzales*, 426 F.3d 540, 547-48 (2d Cir. 2005).

The respondent did not persuade the Immigration Judge that he was imprisoned and beaten because the government imputed an anticorruption opinion to the respondent (IJ at 6). *See Matter of N-M-*, 25 I&N Dec. at 532-33. Rather, the respondent testified he was told by his employer that the authorities punished him because they were accepting bribes from him and were his former school mates (IJ at 6; Tr. at 26-27) .

The respondent's case is more analogous to an instance where a persecutor tries to suppress a challenge to an "isolated aberrational" act of corruption. *See Yueging Zang v. Gonzales*, 426 F.3d at 548. In particular, the respondent did not refer to any other incidents of corruption that he raised with the authorities. *Cf. Rugiang Yu v. Holder*, 693 F.3d at 298 (respondent refers to recurring acts of corruption to authorities, not just one "aberrational" instance of corruption). The respondent did not demonstrate that his activities were or would be perceived as expressions of anticorruption beliefs or that the Chinese authorities were motivated by the respondent's actual or perceived anticorruption beliefs. *See Matter of N-M-*, 25 I&N Dec. at 532-33.

Therefore, we agree with the Immigration Judge's conclusion that the respondent did not demonstrate past persecution or a well-founded fear of persecution, and thus did not satisfy the burden of proof required for asylum (IJ at 6-9) 8 C.F.R. § 1208.13(a). As the respondent has not satisfied the burden of proof for asylum, it follows he has also not satisfied the higher burden of proof for withholding of removal under section 241(b)(3) of the Act (IJ at 9-10). 8 C.F.R. § 1208.16(b); *INS v. Stevic*, 467 U.S. 407 (1984).

We also agree with the Immigration Judge's decision to deny the respondent's application for protection under the Convention Against Torture. The respondent has not met his burden of establishing that it is more likely than not that he will be subject to torture that is "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" if returned to China, and we affirm the decision of the Immigration Judge for the reasons set forth therein. *See* 8 C.F.R. §§ 1208.16, 1208.17, 1208.18(a)(1)-(5); *Matter of J-F-F-*, 23 I&N Dec. 912, 917 (A.G. 2006); *Matter of M-B-A-*, 23 I&N Dec. 474 (BIA 2002). In this regard, we discern no clear error in the Immigration Judge's finding that the police will not aim to find and torture the respondent upon his return to China. *See Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015) (an Immigration Judge's predictive findings of what may or may not occur

in the future are findings of fact subject to a clearly erroneous standard of review). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY

Date: MAY 1 1 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Thuy Pham, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

This case was last before the Board on April 3, 2018, when we remanded the record to the Immigration Judge. The respondent, a native and citizen of the People's Republic of China, appeals the Immigration Judge's May 16, 2018, decision denying his applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3), as well as protection under the Convention Against Torture, 8 C.F.R. § 1208.16(c). The Department of Homeland Security has not responded to the appeal, which will be dismissed.

We review the Immigration Judge's factual findings, including credibility determinations, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, and judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent argues that he cannot meaningfully challenge the Immigration Judge's adverse credibility finding because a transcript of the September 27, 2017, hearing was not provided to him (Respondent's Br. at 3-4, 6-10). The respondent further contends that record evidence demonstrates that the Immigration Judge committed clear error in finding the respondent's testimony not credible (Respondent's Br. at 9).

First, we address the respondent's contention that he did not receive a transcript of the September 27, 2017, hearing. Although the transcriber was initially unable to transcribe this hearing, it was subsequently transcribed and mailed to the respondent on or about November 15, 2019, with the briefing schedule in this case. Thus, the respondent's argument is moot.

Even if the respondent had not received a copy of the September 27, 2017, transcript, such an error would not require remand. The Immigration Judge held an Individual Hearing for this case on June 7, 2017, at which time all testimony was provided. On September 27, 2017, the parties reconvened for the Immigration Judge to issue an oral decision. When the respondent appealed the decision to the Board, the transcriber could not transcribe the September 27, 2017, hearing, including the Immigration Judge's oral decision (BIA, Apr. 3, 2018). Thus, we remanded the case for the Immigration Judge to complete the record, and if necessary, redo this hearing.

At a hearing on May 16, 2018, the Immigration Judge played the digital recordings of all the hearings involved in the case, leading both parties to agree that no testimony was taken at the

September 27, 2017, hearing (Tr. at 7, May 16, 2018).[1] On this basis, both parties agreed that the Immigration Judge need only reissue his oral decision to complete the record, which is exactly what occurred (Tr. at 7-8, May 16, 2018). Under these circumstances, the respondent's inability to review the September 27, 2017, hearing transcript would not impede him from challenging the Immigration Judge's adverse credibility finding, which was based on testimony taken exclusively from the June 7, 2017, Merits Hearing, which has been properly transcribed since the respondent's initial appeal. Thus, we are unpersuaded by the respondent's many arguments relating to his alleged inability to defend the credibility of his testimony.

Next, we consider the respondent's assertion that the Immigration Judge clearly erred in finding the respondent and his witness's testimony not credible. Although the Immigration Judge cited many cogent examples to support her adverse credibility finding, the respondent only explicitly challenges one such example: the respondent contends that the Immigration Judge clearly erred when finding the respondent's testimony, that his mother had schizophrenia, inconsistent with a letter from (b) (6) (IJ at 5; Respondent's Br. at 9). We agree. The respondent testified that while his mother was hospitalized for schizophrenia, his father's friend, (b) (6), visited them at the hospital to proselytize the Roman Catholic faith (Tr. at 18-20). The respondent testified that his father's name was (b) (6) (Tr. at 60). A letter from (b) (6) confirms that he went to the hospital to visit (b) (6)'s wife because she had schizophrenia (Exh. 5, Tab P at 209). Thus, the Immigration Judge clearly erred when finding that (b) (6)'s letter claimed that the respondent's wife, rather than the respondent's mother, had schizophrenia.

This isolated error, however, does not establish that the Immigration Judge's adverse credibility finding is clearly erroneous. *See* 8 C.F.R. § 1003.l(d)(3)(i); *see also see Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (stating that a finding is "clearly erroneous" only when based on the entire evidence the reviewing court is left with "the definite and firm conviction that a mistake has been committed"). To the contrary, the Immigration Judge cited many cogent examples, which were not clearly erroneous, of internal inconsistencies in the respondent's testimony, inconsistencies between the respondent's and the witness's testimonies, inconsistencies between the respondent's testimony and documentary evidence, and demeanor indicative of incredible testimony. *See Majidi v. Gonzales*, 430 F.3d 77, 81 (2d Cir. 2005) ("We hold that an [Immigration Judge] may rely on an inconsistency in an asylum applicant's account to find that applicant not credible—provided the inconsistency affords "substantial evidence" in support of the adverse credibility finding—without soliciting from the applicant an explanation for the inconsistency."); section 208(b)(l)(B)(iii) of the Act (authorizing an Immigration Judge to base an adverse credibility determination on the internal inconsistencies in an applicant's testimony, the inconsistencies between an applicant's and another witness's testimonies, the inconsistencies between the applicant's testimony and documentary evidence, and an applicant's demeanor); *see also Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 166 (2d Cir. 2008) (noting that an Immigration Judge must provide specific and cogent reasons for the adverse credibility finding). These inconsistencies demonstrate that the Immigration Judge's adverse credibility determination was well-supported and based on the totality of the evidence.

[1] Our review of the transcript of the September 27, 2017, hearing confirms that neither party provided additional testimony or legal argument.

First, the Immigration Judge found the respondent's testimony about when he first attended church in China to be internally inconsistent as well as inconsistent with documentary evidence (IJ at 5). This finding is not clearly erroneous. The respondent initially testified that he began attending church in October 2004 (Tr. at 18-20). He subsequently testified that he first visited church in August 2004 (Tr. at 27). Then the respondent testified that his first visit to church occurred in September 2004, but that his "official" attendance began in October 2004, when he joined the church (Tr. at 30). When asked to explain why a letter from the respondent's church in China claimed that he first visited the church in October 2004, the respondent testified that the author of the letter must have remembered the timeline incorrectly (Tr. at 36; Exh. 5, Tab N at 200). The respondent did not explain why he initially said that he attended church in August.

Second, the Immigration Judge found, without clear error, that the respondent's testimony about his communication with church members in China was internally inconsistent and inconsistent with documentary evidence (IJ at 5-6). The respondent testified that he recently communicated with a member of his church in China, (b) (6) (Tr. at 38). Later on, however, the respondent claimed that he hadn't communicated with (b) (6) since 2013 (Tr. at 40). The respondent also stated that in 2012 or 2013, (b) (6) provided the respondent with a letter of support, which was the only letter (b) (6) ever sent (Tr. at 42). This letter, however, was dated (b) (6) (Exh. 5, Tab Q). When confronted with this inconsistency, the respondent stated that he "probably forgot the timeline," which does not adequately explain the above inconsistencies (Tr. at 42-43).

Third, the Immigration Judge found, without clear error, that the respondent's testimony about his confirmation was inconsistent with documentary evidence (IJ at 6). The respondent testified that only two people participated in his confirmation ceremony—(b) (6) and (b) (6) (Tr. at 72-73). However, the respondent's confirmation certificate indicated that (b) (6) confirmed the respondent, and makes no mention of (b) (6) (Exh. 3, Tab I at 32). When confronted with this inconsistency, the respondent stated that he couldn't remember the event clearly (Tr. at 73-74).

Fourth, the Immigration Judge found that the respondent's and his witness's testimonies were inconsistent (IJ at 6-7). We agree. (b) (6) identified the respondent's baptismal name as (b) (6), but the baptismal certificate identifies the respondent's baptismal name as (b) (6) (Tr. at 90; Exh. 3, Tab I at 32). When confronted with this contradiction, (b) (6) claimed that he knows his parishioners by their Chinese name (Tr. at 104). Nevertheless, (b) (6) identified the respondent's Chinese name as (b) (6) (Tr. at 90). Although (b) (6) claimed that the names (b) (6) and (b) (6) have similar sounds in Chinese, the Court interpreter denied this assertion (Tr. at 104). The respondent's counsel contributed these inconsistencies to the witness's age, which was 86 at the time of the hearing; however, the Immigration Judge found, without clear error, that (b) (6)'s testimony was cogent and did not otherwise show signs of a forgetful memory, which was not clearly erroneous (IJ at 7; *see, e.g.*, Tr. at 92-94). We are unpersuaded by the respondent's appellate argument that the Immigration Judge should have applied these facts to find his witness's testimony not credible, rather than himself (Respondent's Br. at 6-7).

Fifth, the Immigration Judge found, without clear error, that the respondent's testimony about his most recent visit to see (b) (6) was inconsistent with the witness's testimony (IJ at 7). The respondent testified that his most recent visit to (b) (6) occurred the Monday before the individual hearing (Tr. at 78). The respondent claimed that during this visit, (b) (6) baptized a baby from the (b) (6) family, and that the respondent participated in the baptism by reading from the Bible as well as reading from another paper (Tr. at 79-80). Nevertheless, (b) (6) testified that the last time he saw the respondent was the Sunday before the hearing (Tr. at 92). When specifically asked, (b) (6) claimed that he most recently performed a baptism on the Monday before the hearing, but stated that the baby belonged to the (b) (6) family and that the respondent was absent from this ceremony due to work (Tr. at 98).

Sixth, the Immigration Judge found that the respondent's demeanor during the witness's testimony undermined the respondent's credibility (IJ at 7). The Immigration Judge specifically found that the respondent became increasingly agitated during the witness's testimony, clasping his hands and turning red in the face (IJ at 7). As previously explained, the respondent's appellate argument that he could not challenge this assertion without the September 27, 2017, hearing transcript is unconvincing given that the respondent had the transcript of the June 7, 2017, hearing, which was when the respondent and his witness testified (Respondent's Br. at 7-8). Although the Immigration Judge did not raise her concern about the respondent's demeanor at the hearing, this factor may be cited to support an adverse credibility finding, and the respondent does not deny the Immigration Judge's observations. *See* section 208(b)(l)(B) of the Act.

Based on the foregoing examples and considering the totality of the evidence, we discern no clear error in the Immigration Judge's determination that the respondent's testimony was not credible. *See Matter of J-Y-C-*, 24 I&N Dec. 260, 263-65 (BIA 2007). Because the respondent's testimony was the primary basis for his application for asylum, as well as withholding of removal under the Act and the Convention Against Torture, we affirm the denial of all requested relief from removal (IJ at 9). *See Paul v. Gonzales*, 444 F.3d 148, 156 (2d Cir. 2006); *Yang v. U.S. Dep't of Justice*, 426 F.3d 520, 523 (2d Cir. 2005).

Accordingly, the following order is entered.

ORDER: The respondent's appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY

Date: MAY 28 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gary J. Yerman, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of China, appeals from the Immigration Judge's May 23, 2018, decision denying his applications for asylum and withholding of removal under sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A), 1231(b)(3)(A), and for protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16(c)-1208.18. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo questions of law, discretion, and judgment, and all other issues in appeals from the Immigration Judge's decision. 8 C.F.R. § 1003.1(d)(3)(ii).

We agree with the Immigration Judge that the respondent has not met his burden of proof necessary to establish asylum. The Immigration Judge found the respondent had testified credibly overall, but that he had not provided sufficiently persuasive and detailed testimony to independently demonstrate that he is a refugee (IJ at 5). *See Wei Sun v. Sessions*, 883 F.3d 23, 28 (2d Cir. 2018) ("[A]n applicant's testimony may be credible and sufficiently detailed and persuasive to prove eligibility without corroboration; in some cases, however, an applicant may be generally credible but his testimony may not be sufficient to carry the burden of persuading the fact finder of the accuracy of his claim of crucial facts[.]"). The Immigration Judge also gave diminished weight to portions of the respondent's evidentiary submissions, and found that the respondent had not adequately corroborated his claim of future persecution in China on account of his Christian religion (IJ at 5-6). *See Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015). The respondent does not contest the Immigration Judge's findings, and, thus, we deem the issues waived. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012).

Based on the aforementioned findings, the Immigration Judge reasonably determined that respondent had not established a well-founded fear of future persecution on account of his religion (IJ at 9). *See Hongsheng Leng v. Mukasey*, 528 F.3d 135, 143 (2d Cir. 2008) (to establish a well-founded fear of persecution in the absence of any evidence of past persecution, an alien must make some showing that authorities are either aware of his activities or likely to become aware of his activities). On appeal, the respondent asserts that his credible testimony was enough to meet his burden of proof (Respondent's Br. at 6-7). However, we agree with the Immigration Judge that the respondent did not sufficiently corroborate critical aspects of his claim, such as the Chinese government's awareness of his Christian practice and his public religious activities (IJ at 9; Tr. at

31-34, 81-86, 91-95, 97). Thus, the Immigration Judge's prediction regarding the likelihood of future harm based on the respondent's Christianity is not clearly erroneous (IJ at 9). 8 C.F.R. § 1003.1(d)(3)(i); *Hui Lin Huang v. Holder*, 677 F.3d 130, 134-35 (2d Cir. 2012); *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590-91 (BIA 2015).

The respondent has also not established a pattern or practice of persecution of persons similarly situated to the respondent (IJ at 9-10). *See* 8 C.F.R. § 1208.13(b)(2)(iii)(A); *see also Matter of A-M-*, 23 I&N Dec. 737 (BIA 2005). The Immigration Judge considered the country conditions evidence, including among other items, the United States Department of State Country Reports on Human Rights Practices for China for 2016 and 2015 and the International Religious Freedom Report for 2016 (IJ at 9).[1] The Religious Freedom Report noted that harm inflicted and the level of tolerance for religious activities varied significantly across provinces (IJ at 9; Religious Freedom Report at 1-2). The Immigration Judge observed that punishments ranged from restricting adherents' activities and confiscating property to detaining individuals (IJ at 9). However, the record contains only one account of a religious adherent who was arrested while distributing religious flyers, and there are no reports of notable abuses rising to the level of persecution in the respondent's home community of Fuzhou City, Fujian Province (IJ at 9; Exh. 3; Religious Freedom Report at 8-26). The Religious Freedom Report also showed that in several provinces authorities tacitly approved of or did not interfere with the religious activities of unregistered groups (Religious Freedom Report at 17). On the present record, we agree with the Immigration Judge that the threat of harm to Christians like the respondent in China is not systemic or pervasive as to amount to a pattern or practice of persecution (IJ at 9-10). *See Weng v. Sessions*, 710 F. App'x 480, 482-83 (2d Cir. 2018) (finding that State Department reports reflected that Chinese authorities harassed and detained some Christian practitioners, but did not reflect a nationwide pattern or practice of persecution of Christians or any incidents of persecution of Christians in alien's home province of Fujian).

Thus, based on the record before us, the respondent did not establish a well-founded fear of persecution on account of his religion and did not meet his burden of proof for asylum. Inasmuch as the respondent has not satisfied the lower burden of proof required for asylum, it follows that he has also not satisfied the clear probability standard of eligibility required for withholding of removal. *See Y.C. v. Holder*, 741 F.3d 324, 332 (2d Cir. 2013).

Finally, based on the entirety of the record, we agree that the respondent did not establish his eligibility for protection under the Convention Against Torture inasmuch as he did not show sufficient individualized risk of torture upon removal to China, for any reason, even considering country conditions (IJ at 10-11). The Immigration Judge's finding regarding the likelihood that the respondent will more likely than not be subjected to torture in China is not clearly erroneous. *Matter of Z-Z-O-*, 26 I&N Dec. at 590-91. Consequently, we are unpersuaded by the respondent's arguments on appeal that he carried his burden to establish eligibility for protection under the Convention Against Torture (Respondent's Br. at 14).

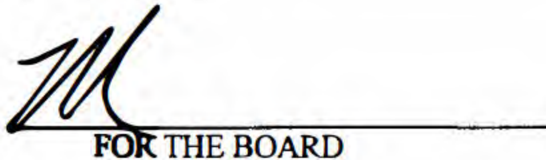
[1] Although included in the index for Exhibit 3, these reports are not part of the administrative record. We take administrative notice of the reports. *See* 8 C.F.R. § 1003.1(d)(3)(iv); *Shao v. Mukasey*, 546 F.3d 138, 166 (2d Cir. 2008).

A(b) (6)

Accordingly, the following order is entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) New York, NY

Date: JUN 1 1 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Theodore N. Cox, Esquire

APPLICATION: Reopening; asylum; withholding of removal; Convention Against Torture

The respondent has filed a motion to reopen seeking to apply for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158 (2012); withholding of removal pursuant to section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3); and protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16(c)-1208.18. The motion will be denied.

This case has a complex procedural history. After being placed in removal proceedings in 2007, the respondent filed an asylum application claiming past persecution and a well-founded fear of persecution on account of political opinion, as well as in connection with his wife's having undergone a forcible abortion. On January 6, 2009, an Immigration Judge denied the respondent's application and ordered him removed. The Board dismissed the respondent's appeal from this decision on May 31, 2011.

On August 26, 2011, the respondent filed a motion to reopen, claiming that he had divorced his wife and married a lawful permanent resident who filed a visa petition, Form I-130, on his behalf. The Board denied the respondent's motion on January 31, 2012, because the respondent had not included the appropriate application for relief and all supporting documentation. *See* 8 C.F.R. § 1003.2(c)(1). We further concluded that the respondent had not established prima facie eligibility for adjustment of status in light of his criminal conviction for conspiracy to defraud the United States.

Several years later on May 8, 2017, the respondent filed a second motion to reopen. Indicating that his spouse had naturalized as a United States citizen, the respondent sought sua sponte reopening so he could pursue adjustment of status based on her approved visa petition. The respondent also asserted materially changed circumstances with respect to his political asylum claim given that a witness was now willing to testify regarding persecution that he claimed to have suffered in China. This matter was last before the Board on October 24, 2017, when we denied this motion to reopen. We concluded that the respondent had not submitted a new asylum application or evidence demonstrating changed country conditions, as opposed to evidence corroborating other evidence already presented. Furthermore, we held that the respondent did not demonstrate an exceptional situation warranting sua sponte reopening.

The respondent filed the motion to reopen at issue on November 29, 2019, over 8 years after the entry of our final administrative order on May 31, 2011. It is also his third motion to reopen.

Therefore, the motion is time- and number-barred. *See* 8 C.F.R. § 1003.2(c)(2) (a party may file only one motion to reopen no later than 90 days after the date on which the final administrative decision was rendered).

The respondent asserts that he qualifies for the exception to the time and numerical bars to apply for asylum based on changed circumstances arising in the country to which removal has been ordered because the Chinese government has intensified persecution of Christians since Xi Jinping came to power (Respondent's Mot. at 7-18).[1] *See* 8 C.F.R. § 1003.2(c)(3)(ii). In this regard, the respondent claims that he has established prima facie eligibility for asylum and related relief because he was baptized in the United States on (b) (6), and he regularly attends church and spreads the Gospel to others in this country (Respondent's Mot. at 19-22).

The respondent's recent conversion to Christianity and religious practice in the United States is a change in personal circumstances, which does not fit under the exception at 8 C.F.R. § 1003.2(c)(1). *See Zheng v. U.S. Dep't of Justice*, 416 F.3d 129, 130-31 (2d Cir. 2005); *Matter of C-W-L-*, 24 I&N Dec. 346, 350-53 (BIA 2007).

Moreover, "[i]n determining whether evidence accompanying a motion to reopen demonstrates a material change in country conditions that would justify reopening, we compare the evidence of country conditions submitted with the motion to those that existed at the time of the merits hearing below." *Matter of S-Y-G-*, 24 I&N Dec. 247, 253 (BIA 2007). The respondent asserts that he has produced many of the same background documents which the court in *Liying Qiu v. Sessions*, 870 F.3d 1200 (10th Cir. 2017), found demonstrated a material change in country conditions (Respondent's Mot. at 18-19). *Liying Qiu* is not binding in this matter, which arises within the jurisdiction of the United States Court of Appeals for the Second Circuit. *See Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989).

In any event, the respondent has presented only one background document predating his hearing on January 6, 2009: the *China Profile of Asylum Claims and Country Conditions*, U.S. Department of State, Bureau of Democracy, Human Rights and Labor, dated May 2007 (Respondent's Mot., Exh. BB). This document illustrates longstanding restrictions by the Chinese government on practice of Christianity, which varies by locality and whether the practice in question is sanctioned or unsanctioned. We have reviewed the documents describing recent demolition of churches and raids on house churches in the respondent' native Jiangxi Province (Respondent's Mot., Exhs. B-E, H-N). We also have reviewed the more generalized reports discussing persecution of Christians in China in particular since Xi Jinping took power (Respondent's Mot., Exhs. A, F-G, O-AA). Upon review of all evidence presented, we conclude that the respondent has shown a continuation of conditions facing Christians in China, as opposed to a material change in country conditions warranting reopening given his individual circumstances.

Accordingly, the following order is entered.

[1] All citations to the respondent's motion are to the one filed on November 29, 2019.

ORDER: The motion is denied.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY

Date: JUN - 2 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gregory Kuntashian, Esquire

APPLICATION: Asylum; withholding of removal, Convention Against Torture

The respondent, a native and citizen of the People's Republic of China, appeals from the Immigration Judge's decision dated March 26, 2018, denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture. *See* sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. § 1208.16(c).[1] The Department of Homeland Security has not filed a response to the respondent's appeal. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo questions of law, discretion, and judgment, and all other issues in appeals from an Immigration Judge's decision. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent claims that he entered the United States in 2004, was baptized in 2011, regularly attended one church and then another since his baptism, and fears that if he were removed to the People's Republic of China, he would face harm on account of his Christian faith (IJ at 2-3; Respondent's Br. at 9-11; Tr. at 16, 20-25, 27, 39).

The Immigration Judge denied the respondent's applications for relief and protection from removal because neither the respondent nor his witness testified credibly and the respondent did not provide sufficient corroborative evidence to otherwise carry his burden of proof (IJ at 5-10). *See* sections 208(b)(1)(B)(i)-(iii) of the Act. This appeal followed.

We discern no clear error in the Immigration Judge's determination that the respondent and her witness did not provide credible testimony. *See Cooper v. Harris*, 137 S. Ct. 1455, 1468, 1474 (2017) (stating that under clear error review, reversal is appropriate only when "left with the definite and firm conviction that a mistake has been committed," and explaining that where there

[1] The respondent did not meaningfully challenge the Immigration Judge's denial of his application for protection under the Convention Against Torture, so that issue is not before us. *See Matter of J-J-G-*, 27 I&N Dec. 808, 808 n.1 (BIA 2020); *see also Karaj v. Gonzales*, 462 F.3d 113, 119 (2d Cir. 2006) (finding the Karajs's request that the Board reverse the Immigration Judge's denial of withholding of removal, unsupported by argument to substantiate that relief or an assertion of error in the ruling on that claim, waived the issue).

are "two permissible" views of the evidence, the factfinder's choice between them cannot be clearly erroneous) (citations omitted); 8 C.F.R. § 1003.1(d)(3)(i); *see also Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 338 n.19 (2d Cir. 2006) (finding an Immigration Judge "did not err in stressing the cumulative impact of [minor] inconsistencies in making his adverse credibility determination").

The Immigration Judge did not clearly err in finding that the respondent and his witness, his wife, testified inconsistently with regard to the date of his alleged baptism—the impetus of his claim (IJ at 5). The respondent testified that he was baptized on (b) (6), and sought to substantiate that claim with a baptismal certificate (IJ at 5; Tr. at 27; Exh. 2B). However, the respondent's wife testified that he was baptized in April of 2006 (IJ at 5; Tr. at 56). When pressed, the respondent's wife changed her response to claim that she "forgot" when he was baptized (IJ at 5; Tr. at 58).[2]

The respondent argues that his wife's incorrect assertion should be excused because she did not attend the baptism or consider the event particularly memorable (Respondent's Br. at 11-12; Tr. at 60). That explanation is unpersuasive as the respondent's wife did not initially testify that she did not remember the date because she did not find it important; instead, the respondent's wife provided an unprovoked assertion of the date of his baptism (Tr. at 56 ("Your husband attended the first church in April of 2006? No. That was when he was baptized.")). Thus, we discern no clear error in the Immigration Judge's finding that the respondent's wife's shifting responses indicated that her testimony was not candid and, coupled with the inconsistency between the testimonies, weighed against the respondent's and his wife's credibility (IJ at 5; Tr. at 56). *See Li Hua Lin v. U.S. Dep't of Justice*, 453 F.3d 99, 109 (2d Cir. 2006) (granting particular deference to credibility findings based on an applicant's demeanor); *Majidi v. Gonzales*, 430 F.3d 77, 79-81 (2d Cir. 2005) (holding that an Immigration Judge is not required to credit an explanation for an inconsistency unless a reasonable fact finder would be compelled to do so); *Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011) (explaining that an Immigration Judge need not accept a respondent's assertions, even if plausible, where there are other permissible views of the evidence based on the record).

The Immigration Judge also correctly found that the respondent's testimony regarding his wife's church attendance was internally inconsistent and inconsistent with his wife's testimony (IJ at 5-6). The respondent provided the following varying testimonies: his wife rarely attended church, never attended church with him, and attended the (b) (6) with him a few times but has not attended the (b) (6) with him (IJ at 6; Tr. at 29, 68-69). In contrast, the respondent's wife provided the following varying testimonies: she never attended church with the respondent, rarely attended church with him but did so at the (b) (6) in the last 6 months, and has not attended church with the respondent but has taken her children to church on Sundays without the respondent's knowledge (IJ at 6; Tr. at 53-55, 62-63, 74-77).

[2] When called to testify a second time, the respondent's wife provided yet another answer: the respondent was baptized 4 or 5 years prior to the 2018 hearing (Tr. at 59).

The respondent argues that his wife attended the (b) (6) without his knowledge and years ago, attended the (b) (6) with the respondent, but testified that she never attended church with him solely in reference to the (b) (6) (Respondent's Br. at 12). Even so, this explanation does not resolve the inconsistency between the respondent's testimony that his wife never attended church with him and his amended testimony, after confrontation with her testimony, that she attended the (b) (6) with him, but not the (b) (6) (Tr. at 68). The explanation also does not resolve the inconsistency between the respondent's testimony that his wife attended the (b) (6) with him and his wife's testimony that she has never attended church with him (Tr. at 68-69, 76-77). Thus, the Immigration Judge did not clearly err in finding that these shifting responses, coupled with the inconsistency between the testimonies, weighed against the respondent's and his wife's credibility as well (IJ at 6). *See Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 167 (2d Cir. 2008) ("[A]n IJ may rely on *any* inconsistency or omission in making an adverse credibility determination as long as the 'totality of the circumstances' establishes that an asylum applicant is not credible" (quoting section 208(b)(1)(B)(iii) of the Act) (emphasis in original)).

For the foregoing reasons, the Immigration Judge's adverse credibility finding was not clearly erroneous. *See* section 208(b)(1)(B)(iii) of the Act; 8 C.F.R. § 1003.1(d)(3)(i).

We discern no error in the Immigration Judge's determination that the respondent did not provide sufficient corroboration to otherwise carry his burden of proof (IJ at 7-10). *See* section 208(b)(1)(B)(ii) of the Act; 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent claims that he began attending the (b) (6) in 2012, but he did not sufficiently corroborate that claim (IJ at 6-7). In support of that claim, the respondent presented unreliable testimony and a document purporting that he attended church services between July of 2017 and January of 2018 (IJ at 5-8; Tr. at 26; Exh. 4, Tab C). The respondent argues that he did not view logging his attendance at church services as critical to his practice and that it is reasonable that he only began to do so once he recognized the importance of documenting his asylum claim (Respondent's Br. at 13; Tr. at 35-36). Even crediting those assertions, the respondent's explanation that he was initially not motivated to accrue evidence does not alleviate his burden of proof. *See* section 208(b)(1)(B)(i)-(ii); *Liu v. Holder*, 575 F.3d 193, 198-99 (2d Cir. 2009) ("[T]he alien bears the ultimate burden of introducing [] evidence without prompting."). In addition, the respondent filed his asylum application in 2012, and should have been aware of his burden to corroborate his claim as of that date (Exh. 2).

The respondent also presented 3 letters of support asserting his attendance at church services as of 2012, but the letters lack detail and were unsupported by their authors' testimony (IJ at 7; Exh. 3, Tabs E, G; Exh. 4, Tab A). The respondent argues that the Immigration Judge erred in according those documents less weight because fellow church members, unlike family members, may not be interested parties (Respondent's Br. at 13). We disagree. *See Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 215 (BIA 2010) (explaining that "the letters from relatives *and friends* submitted by the respondent do not provide substantial support for her contention . . . . [because the] authors of the letters are interested witnesses who were not subject to cross-examination" (emphasis added)), *abrogated on other grounds by Hui Lin Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012). Moreover, the respondent does not contest that the letters lack detail, and we

discern no clear error in the Immigration Judge's finding in that regard (IJ at 7; Exh. 3, Tabs E, G; Exh. 4, Tab A). In addition, we are unpersuaded that the several photographs, even when coupled with the other documentary evidence, establish that the Immigration Judge erred in determining that the respondent did not meet his burden of proof to establish eligibility for asylum (IJ at 7; Respondent's Br. at 13; Exh. 3, Tab A).

Because the respondent's testimony was not credible, and the respondent's other evidence was insufficient to independently support his claim, the respondent has not met his burden of proof to show that he is eligible for asylum. *See Matter of M-S-*, 21 I&N Dec. 125, 129 (BIA 1995) (stating that a persecution claim that lacks veracity cannot satisfy the burden of proof necessary to establish eligibility for asylum).

Because the respondent did not meet the burden of proof for asylum, he necessarily has not met the higher burden of proof for withholding of removal under the Act. *See Paul v. Gonzales*, 444 F.3d 148, 155 (2d Cir. 2006) (citing *Abankwah v. INS*, 185 F.3d 18, 21-22 (2d Cir. 1999)). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* section 274D of the Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) New York, NY

Date: MAY 19 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Adedayo O. Idowu, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of China, appeals from the Immigration Judge's May 29, 2018, decision denying his application for asylum, withholding of removal, and protection under the Convention Against Torture. Sections 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a), 1231(b)(3); 8 C.F.R. 1208.16(c). The appeal will be dismissed.

We review findings of fact, including credibility findings, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, or judgment, and all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent alleged past harm and a well-founded fear of future harm on account of his Christian religion (IJ at 3-5). The Immigration Judge found he was not credible and denied all the applications (IJ at 3-17).

The Immigration Judge's adverse credibility finding is not clearly erroneous. *See Gurung v. Barr*, 929 F.3d 56, 61 (2d Cir. 2019); *Wu Lin v. Lynch*, 813 F.3d 122, 126-27 (2d Cir. 2016). The Immigration Judge found the respondent's testimony was vague, sounded rehearsed, and his corroboration did not rehabilitate his testimony. *See Biao Yang v. Gonzales*, 496 F.3d 268, 273 (2d Cir. 2007) (stating the absence of corroboration makes an applicant unable to rehabilitate testimony that has already been called into question).

For example, the Immigration Judge found the respondent's testimony regarding how he came to the United States was vague and unsupported by documentation (IJ at 11-12). The respondent testified that he travelled from Honduras to the Bahamas by vehicle, but did not list the Bahamas on his asylum application (IJ at 7-9; Tr. at 40; Exh. 2). When it was pointed out that the Bahamas are islands, the respondent changed his testimony to include travel by boat (IJ at 7-9; Tr. at 41). On appeal, the respondent alleges that "Guatemala" and "Bahamas" sound similar (Respondent's Br. at 12). However, this does not explain why the respondent changed his testimony to match the situation, testifying first he traveled by vehicle and then changing it to by boat (*Compare* Tr. at 40, *with* Tr. at 41). The Immigration Judge properly found this testimony inconsistent.

Additionally, the respondent testified he had never been to Japan, but his passport included stamps from Japan (IJ at 12; Tr. at 43).[1] The respondent explained that the smuggler he had used may have manipulated his passport (IJ at 12; Tr. at 46). The respondent also provided inconsistent testimony regarding whether he obtained stamps in Honduras or Panama (IJ at 12; Tr. at 45-47; Exh. 2A, 10). When asked to explain, the respondent testified he was "dizzy" during travel, it was long ago, and he had trouble remembering (IJ at 7-8, 12, 14; Tr. at 42, 46). The Immigration Judge found these explanations unconvincing, given the respondent's ability to remember precise dates of harm which occurred even longer ago (IJ at 7-9, 11-14).

The Immigration Judge found the respondent's unreliable testimony regarding his travel to the United States, and his lack of reliable documentation, were insufficient to establish by clear and convincing evidence that he had filed within one year of arrival (IJ at 11-12). The respondent has not responded to this finding on appeal. We affirm the finding that the respondent is ineligible for asylum as he has not established that he timely filed his application. Section 208(a)(2)(B) of the Act.

The Immigration Judge found that the respondent's testimony appeared rote and rehearsed, as he had difficulty answering basic questions about how he practiced his religion (IJ at 13-14; Tr. at 30). The respondent testified his employer asked where he had been, after his alleged 9-day detention, but then testified his employer knew the situation anyway (IJ at 3-5, 13; Tr. at 26-27). The respondent has not identified clear error in these findings. *See Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) (holding that on clear error review, "[a] finding that is 'plausible' in light of the full record—even if another is equally or more so must govern.")

Moreover, the Immigration Judge found that the letters from the respondent's family and friends were similarly worded, and the authors were unavailable for cross-examination, and so were due little weight (IJ at 14-16; Exh. 5). The dismissal letter from the respondent's employer was not contemporaneous and the respondent was unable to explain how it had been obtained (IJ at 5; Exh. 2C). The respondent's pastor in the United States was too busy to provide testimony on his behalf, such that the baptism certificate was due less weight (IJ at 15; Tr. at 28; Exh. 2D). The respondent brought in a church friend as a witness, but she did not have evidence of her own church attendance or baptism, had not witnessed the respondent's baptism, and had a pending asylum case of her own based on similar facts (IJ at 15; Tr. at 59-60). On appeal, the respondent argues these documents were due more weight and establish his eligibility for asylum (Respondent's Br. at 16). However, we agree that these documents were due minimal weight, for the reasons provided by the Immigration Judge. *See Xiao Ji Chen v. U.S. Dep't of Justice,* 471 F.3d 315, 342 (2d Cir.2006) (stating that the weight to be accorded to documentary evidence lies largely within the agency's discretion); *see also Qin Wen Zheng v. Gonzales*, 500 F.3d 143, 146-48 (2d Cir. 2007).

[1] The respondent argues these cannot be relied upon because they were not properly translated (Respondent's Br. at 14). However, the respondent was given the opportunity to testify about this issue (Tr. at 42-47). The Immigration Judge relied upon the stamps as evidence the respondent was unable to explain his travel to the United States, and thus had not met his burden for timely filing of his asylum application. For the purpose of showing the respondent was unable to explain his travel, reliance on these stamps was appropriate.

The Immigration Judge's adverse credibility finding is not clearly erroneous and applied to all of the respondent's applications. *See Hong Fei Gao v. Sessions*, 891 F.3d 67, 76 (2d Cir. 2018) ("Where the same factual predicate underlies a petitioner's claims for asylum, withholding of removal, and protection under the CAT, an adverse credibility determination forecloses all three forms of relief." citing *Paul v. Gonzales*, 444 F.3d 148, 156-57 (2d Cir. 2006)). The decision of the Immigration Judge is affirmed.

Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY

Date: MAY 27 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Felipe Alexandre, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of China, appeals the Immigration Judge's May 10, 2018, decision, denying his application for asylum, withholding of removal, and protection under the Convention Against Torture. *See* sections 208(b)(1)(A), 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A), 1231(b)(3)(A); 8 C.F.R. §§ 1208.13, 1208.16-1208.18. The Department of Homeland Security has not responded to the appeal. The appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

We affirm the Immigration Judge's decision denying the respondent's application for asylum, withholding of removal, and for protection under the Convention Against Torture. The Immigration Judge determined that the respondent was not a credible witness (IJ at 3-10). In support of her adverse credibility finding, the Immigration Judge identified various inconsistencies among the respondent's in-court testimony, his asylum application, and other evidence in the record, as well as a demeanor finding (IJ at 3-10). *See* sections 208(b)(1)(B)(iii) and 241(b)(3)(C) of the Act; 8 C.F.R. § 1003.1(d)(3)(i); *Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 167 (2d Cir. 2008).

On appeal, the respondent does not directly challenge the numerous inconsistencies noted by the Immigration Judge in her decision; rather, the respondent argues that the Immigration Judge incorrectly relied on the respondent's demeanor to find him not credible (Respondent's Br. at 9-10). However, the Immigration Judge's demeanor finding was only one basis among many for the Immigration Judge's adverse credibility finding. Specifically, the Immigration Judge indicated that the respondent's testimony was "hesitant" and that his demeanor was "stilted and deliberate," based upon her observations of the respondent while he was testifying (IJ at 3, 10). We conclude that the Immigration Judge's demeanor finding warrants deference. *See Lin v. Gonzales*, 446 F.3d 395, 400-01 (2d Cir. 2006) (finding that demeanor is virtually always evaluated subjectively and intuitively and the Immigration Judge therefore is accorded great deference); *Matter of A-H-*, 23 I&N Dec. 774, 787 (A.G. 2005) (finding that assessments of credibility related to demeanor and sincerity as a witness are uniquely within the ken of the Immigration Judge).

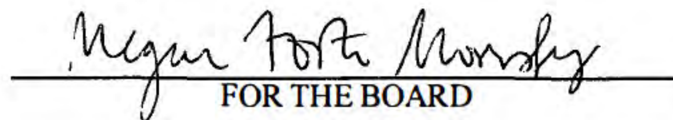
Inasmuch as the respondent has not meaningfully challenged the existence of the numerous inconsistencies identified by the Immigration Judge and considering the Immigration Judge's observations regarding the respondent's demeanor, we conclude that the respondent has not demonstrated clear error in the Immigration Judge's adverse credibility determination (IJ at 3-10). Additionally, the respondent does not appeal the Immigration Judge's determination that he did not rehabilitate his lack of credible testimony with reliable corroborating documents, and thus we find the issue to be waived. *Matter of Y-I-M-*, 27 I&N Dec. 724, 729-30 n.2 (BIA 2019) (recognizing that a failure to address an issue on appeal results in a waiver of that issue).

As an adverse credibility finding is dispositive to all of the respondent's claims for relief and protection, we need not address the respondent's remaining appellate arguments. *See Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018) (noting that if a respondent's application is fatally flawed in one respect, an Immigration Judge or the Board need not examine the remaining elements of the claim); s*ee also Hong Fei Gao v. Sessions*, 891 F.3d 67, 76 (2d Cir. 2018) ("Where the same factual predicate underlies a petitioner's claims for asylum, withholding of removal, and protection under the CAT, an adverse credibility determination forecloses all three forms of relief.") (internal citation omitted).

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A(b) (6) – New York, NY

Date: MAY 1 1 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Thomas V. Massucci, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of China, appeals the Immigration Judge's May 17, 2018, decision denying his application for asylum, withholding of removal, and protection under the Convention Against Torture. Sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A), 1231(b)(3)(A); 8 C.F.R. §§ 1208.16(c), 1208.18. The appeal will be dismissed.

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

We will affirm the Immigration Judge's adverse credibility finding, as it is not clearly erroneous (IJ at 4-6; Respondent's Br. at 4-10). 8 C.F.R. § 1003.1(d)(3)(i). The Immigration Judge noted numerous discrepancies in the record to support her adverse credibility finding. First, she noted the respondent's long pauses and non-responsive answers on cross-examination, including when the respondent discussed his criminal record in the United States (IJ at 4). The Immigration Judge's findings are supported by the record, and we generally afford "great deference" to Immigration Judge's demeanor findings (Tr. at 33, 35, 40, 43, 46, 50, 55-60). *Lin v. Gonzales*, 446 F.3d 395, 400 (2d Cir. 2006); *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998). The respondent has not adequately explained the demeanor discrepancies noted by the Immigration Judge, and we are unpersuaded that we should not defer to the Immigration Judge's demeanor findings because there was no "dramatic demeanor change" between the respondent's direct examination testimony and his cross-examination testimony (Respondent's Br. at 6).[1]

The Immigration Judge also considered discrepancies in the respondent's corroborating evidence (IJ at 4-6). For example, although the respondent's mother could specifically state the dates the respondent allegedly attended a house church and was arrested many years ago in China, she could not recall in any specificity the recent threats the respondent received (IJ at 5; Tr. at 39-43; Exh. 9 at Tab P). Contrary to the respondent's appellate assertion otherwise, this is not a "trivial omission" as the recent threats serve as the basis of the respondent's continuing fear of

[1] For similar reasons, we affirm the Immigration Judge's demeanor and credibility findings for the respondent's wife and brother (IJ at 4, 6; Tr. at 76, 79-80, 88-89; Respondent's Br. at 6-7).

returning to China (Respondent's Br. at 8). *See Singh v. BIA*, 438 F.3d 145, 148 (2d Cir. 2006) (relying on omissions in the applicant's corroborating documents to support an adverse credibility determination). Further, the Immigration Judge properly considered that the respondent's mother's letter, as well as the letter from the respondent's friend, were unsworn (IJ at 6; Exh. 9 at Tabs N, P).

Finally, the Immigration Judge considered the lack of corroborating evidence submitted in support of the respondent's application (IJ at 5-6). Specifically, although the respondent claims he has been attending a church two to three times a month since 2012, he presented only one photo and a baptismal certificate from July 2012 to corroborate that claim (IJ at 5-6; Tr. at 26-29, 43-45; Exh. 3 at Tabs F, G). *See Yang v. Gonzales*, 496 F.3d 268, 273 (2d Cir. 2007) ("An applicant's failure to corroborate his or her testimony may bear on credibility, because the absence of corroboration in general makes an applicant unable to rehabilitate testimony that has already been called into question."). The respondent did not adequately explain why he did not submit more evidence to corroborate his claim that he continues to practice his religion and attend church in the United States (Respondent's Br. at 9).

The totality of the circumstances presented supports the Immigration Judge's conclusion that the respondent was not credible (IJ at 4-6). *See* section 208(b)(1)(B)(iii) of the Act; *Matter of J-Y-C-*, 24 I&N Dec. 260, 262-63 (BIA 2007). Therefore, the Immigration Judge's adverse credibility finding is not clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i). Because the respondent's claims share the same factual predicate, the adverse credibility determination is dispositive of his application for asylum, withholding of removal, and protection under the Convention Against Torture (IJ at 6-7). *See Paul v. Gonzales*, 444 F.3d 148, 155-57 (2d Cir. 2006). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) New York, NY

Date: MAY - 6 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Adedayo O. Idowu, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of China, appeals the Immigration Judge's June 26, 2018, decision denying her application for asylum, withholding of removal, and protection under the Convention Against Torture. *See* sections 208(b)(1)(A), 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A), 1231(b)(3)(A); 8 C.F.R. §§ 1208.13, 1208.16-1208.18. The appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge determined that the respondent did not meet her burden of proof for her applications of relief and protection through corroborating documentation (IJ at 3-6). We agree. The respondent testified that she converted to Christianity in 2011, was baptized in 2013, and attends church in the United States about once a month (IJ at 2, 4). The respondent also asserts that spoke to her father about her faith (IJ at 5). The respondent submitted a letter from her village counsel in China stating they have become aware of the respondent's religious activities (IJ at 5; Exh. 4 at 41).

The Immigration Judge determined that the respondent did not provide sufficient objective evidence to sustain her burden of proof that the respondent has a well-founded fear of future persecution in China on account of her Christian faith (IJ at 3). *See Hongsheng Leng v. Mukasey*, 528 F.3d 135, 143 (2d Cir. 2008) (stating that an applicant who is seeking asylum "based exclusively on activities undertaken after [her] arrival to the United States" needs to demonstrate that officials in her home country are either aware of the applicant's activities, or likely to become aware of her activities to demonstrate a well-founded fear of persecution). We discern no clear error in the following factual findings from the Immigration Judge. *See Wu Lin v. Lynch*, 813 F.3d 122, 126-27 (2d Cir. 2016) (discussing at length the meaning of "clear error" review, and noting the BIA has concluded it means that "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (internal quotations omitted)). The Immigration Judge first found that there was insufficient evidence of her regular attendance in a church in the United States, noting that the while the respondent submitted a letter from the church regarding the respondent's attendance in 2012, the respondent did not submit a recent, updated letter (IJ at 4). While the respondent stated that she has a card issued to her from her

church to substantiate her attendance, the Immigration Judge noted that the card was not provided into the record (IJ at 4). The respondent additionally submitted pictures of her attendance at the church, but when asked, the respondent could not testify as to when the pictures were taken (IJ at 4; Tr. at 34-37).

The Immigration Judge also considered the testimony from the respondent's friend, who testified in regard to the respondent's church attendance (IJ at 4). The witness's testimony differed from the respondent's regarding when they saw each other at the church, while they both testified they saw each other the day before the individual hearing, any time before that occurrence differed. The witness testified that they sat together 2 weeks before the individual hearing on Easter, while the respondent could not remember specifically when she attended church with the witness in the year proceeding the individual hearing (IJ at 4). Finally, the Immigration Judge determined that the letters the respondent admitted from her father in China and from the village counsel in China stating they are aware of her activities are unreliable, as they are unsworn statements that came from individuals who are not unavailable for cross-examination. *See Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 341-42 (2d Cir. 2006) (holding that the weight afforded to evidence lies largely within the Immigration Judge's and Board's discretion); *see also Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 215 (BIA 2010) (holding that letters from friends and relatives were entitled to less weight when written by interested witnesses not subject to cross-examination), *rev'd on other grounds by Hui Lun Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012).

The respondent argues that her credible testimony alone should be sufficient to meet her burden of proof (Respondent's Br. at 12-13). However, an Immigration judge may require corroboration that is reasonably available even when the responded testifies credibly. *See Yan Juan Chen v. Holder*, 658 F.3d 246, 252 (2d Cir. 2011). The respondent was given an opportunity to explain the lack of corroboration, and the Immigration Judge gave specific reasons for rejecting the explanation. *See Zhi Wei Pang v. Bureau of Citizenship Immigration Serv.*, 448 F.3d 102, 108 (2d Cir. 2006). Further, while the respondent offers additional explanations why certain evidence was not submitted to into the record, these appellate arguments were not made before the Immigration Judge and do not convince us of any clear error in fact or law in the Immigration Judge's determination that she did not meet her burden of proof. Therefore, we agree with the Immigration Judge that the respondent did not meet her burden of proof to show that she has an objectively reasonable well-founded fear of future persecution. *See Jian Xing Huang v. INS*, 421 F.3d 125, 129 (2d Cir. 2005) ("In the absence of solid support in the record" a fear of persecution is not objectively reasonable and is "speculative at best").

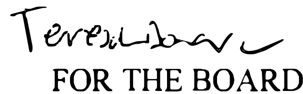
As the respondent did not meet her burden of establishing eligibility for asylum, her application was properly denied (IJ at 4-7). 8 C.F.R. § 1208.13(a). Further, because the respondent did not satisfy the lower burden of proof required for asylum, it follows that she failed to satisfy the higher and more stringent standard of proof required for withholding of removal (IJ at 7). 8 C.F.R. § 1208.16(b).

Turning to the respondent's application for protection under the Convention Against Torture, contrary to the respondent's arguments on appeal, a review of the record reveals that there is no clear error in the Immigration Judge's determination that the respondent has not shown that it is more likely than not that she will be tortured by or at the instigation of or with the consent or

acquiescence (including the concept of willful blindness) of a public official or other person acting in an official capacity upon her return to China (IJ at 8; Respondent's Br. at 16-17). *See* 8 C.F.R. §§ 1208.16(c), 1208.18(a); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). Therefore, in light of the fact that there is no clear error in the Immigration Judge's factual findings, we affirm her decision denying the respondent's application for protection under the Convention Against Torture. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY

Date: MAY 11 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Keith S. Barnett, Esquire

APPLICATION: Asylum

In a July 13, 2018, decision, the Immigration Judge denied the respondent's application for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, but granted his application for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3). The respondent, a native and citizen of the People's Republic of China, appeals from the denial of his application for asylum. The Department of Homeland Security did not file a response to the respondent's appeal. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo questions of law, discretion, and judgment, and all other issues in appeals from an Immigration Judge's decision. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge's uncontested factual findings that the respondent entered the United States in 1998 and first filed an asylum application (Form I-589) in 2010 are not clear error (IJ at 1-2; Tr. at 32; Exh. 4; Respondent's Br. at 2). Thus, we agree with the undisputed determination that the respondent's asylum application was untimely filed. *See* section 208(a)(2)(B) of the Act (An asylum application shall be filed within 1 year after the date of arrival in the United States.); 8 C.F.R. § 1208.4(a)(2)(i)(A).

The respondent argues on appeal that his untimely filing should be excused because he amended his asylum application within a reasonable period to address changes in his circumstances which materially affected his eligibility for asylum (Respondent's Br. at 1, 15-16). *See* section 208(a)(2)(D) of the Act; 8 C.F.R. § 1208.4(a)(2)(i)(B) (The respondent bears the burden to establish an exception to the filing deadline.), (4)(i)(B) (describing "changed circumstances"), (4)(ii) (requiring that the asylum application be filed "within a reasonable period" given the changed circumstances). We disagree.

The Immigration Judge properly determined that the respondent did not demonstrate that his asylum application was filed within a reasonable period of time, in light of the alleged changed circumstances (IJ at 2-3). The record reflects that the respondent filed a statement on April 21, 2014, indicating that he began practicing Christianity in 2012 and was baptized in March of 2014 (IJ at 2; Exh. 8, Tab A). The Immigration Judge determined that respondent's decision to practice Christianity in 2012 was the "relevant change in circumstances" and that his application should have been updated within a reasonable period of time following his decision to practice

Christianity. *See* 8 C.F.R. § 1208.4(a)(2)(i)(B) (providing that "changed circumstances" are those that materially affect the applicant's eligibility for asylum). Specifically, the Immigration Judge noted that record does not indicate that the Chinese government distinguishes between persons attending religious services and those who have been baptized in its persecutory practices (IJ at 3). As a result, the Immigration Judge found that the respondent's filing was untimely because he did not address the changed circumstances within a reasonable period (IJ at 2). *See Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193, 193 (BIA 2010) (In most cases, a 1-year delay in filing after changed circumstances would not justify the tardiness of an asylum application).

The respondent argues that his 2014 baptism is the relevant change in circumstances and that later date should control for calculating whether his application was amended within a reasonable period of such changed circumstances (Respondent's Br. at 15-16).[1] The respondent seeks to support his argument by positing that when he was first introduced to Christianity in 2012, he merely read the bible and attended Christian meetings in the location of his detention (Respondent's Br. at 15-16). The respondent asserts in his brief that he could not understand these Christian meetings while he was detained because they were held in English (Respondent's Br. at 16). However, this argument is inconsistent with the respondent's statement that "everything was simultaneously translated into Chinese on the screen" during the services (Exh. 8, Tab A). Thus, we do not consider this argument persuasive. He also asserts that it was not until his baptism that he considered himself a true Christian, so that date should prevail (Respondent's Br. at 16). However, the respondent indicates that he was eager to attend religious services after being introduced to Christianity in the detention center and described himself as transformed (IJ at 3; Exh. 8, Tab A).

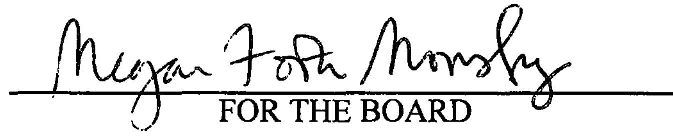
We agree with the Immigration Judge because he did not clearly err in finding that the record does not show that the Chinese government distinguishes the baptized in targeting those who practice Christianity (IJ at 3, 5-7). The respondent does not contest this finding and it is dispositive in this matter. The respondent's baptism did not materially affect his asylum eligibility because the Chinese government was no more likely to persecute him for practicing Christianity because he was baptized or considered himself a true Christian—his mere practice of the religion and attending meetings renders him a target (IJ at 2-3, 5-7). *See* 8 C.F.R. § 1208.4(a)(4)(i)(B). Thus, the Immigration Judge properly denied the respondent's asylum application because he did not establish its filing within a reasonable period given the changed circumstances.[2] Accordingly, the following order will be entered.

[1] The respondent does not argue that he should prevail even if the earlier date is controlling because his case is a "rare case[] in which a delay of one year or more may be justified because of particular circumstances," so that argument is waived. *See id.*; *see also Matter of R-A-M-*, 25 I&N Dec. 657, 658 n. 2 (BIA 2012).

[2] Because the respondent's asylum application was properly denied as untimely, we need not address the respondent's argument that the Immigration Judge erred in alternatively denying the application as a matter of discretion (Respondent's Br. at 17-22). *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) ("As a general rule, courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.").

A(b) (6)

ORDER: The appeal is dismissed.



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A(b) (6) – New York, NY

Date: MAY 1 1 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Shihao Bao, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of the People's Republic of China, appeals the Immigration Judge's decision dated June 5, 2018, denying his applications for asylum under section 208(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(A), withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), and protection under the Convention Against Torture pursuant to 8 C.F.R. § 1208.16(c).[1] The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo questions of law, discretion, and judgment, and all other issues in appeals from an Immigration Judge's decision. 8 C.F.R. § 1003.1(d)(3)(ii).

We adopt and affirm the Immigration Judge's decision. *Matter of Burbano,* 20 I&N Dec. 872, 874 (BIA 1994). The factual findings of the Immigration Judge are not clearly erroneous, and we agree that the respondent did not meet his burden to establish eligibility for asylum (IJ at 6-8).

First, we discern no clear error in the Immigration Judge's adverse credibility finding (IJ at 6-7). *See Wu Lin v. Lynch*, 813 F.3d 122, 126-27 (2d Cir. 2016) (discussing at length the meaning of "clear error" review, and noting the BIA has concluded it means that "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed") (internal quotation marks and citation omitted). The Immigration Judge noted that the respondent's personal statement asserts that he was arrested on (b) (6), while he testified that he was instead arrested on (b) (6) (IJ at 6; Tr. at 20-21, 61, 65, 74, 82-83; Exhs. 2A). Further, the respondent testified that his wife and children have resided in the same home in Cang Shang District since 2013, which contradicts his wife's statement which notes that she has been in hiding "here and there" in Fuzhou (IJ at 6; Tr. at 31, 74-75; Exh. 4, Tab H). The Immigration Judge additionally observed that the respondent omitted that he was harmed during his detention in his direct testimony and personal statement, and did not reveal that he was physically beaten by

[1] The respondent does not meaningfully challenge the Immigration Judge's denial of his application for withholding of removal or his request for protection under the Convention Against Torture, and we deem the issue to be waived (IJ at 8-9). *See Zhang v. Gonzales*, 426 F.3d 540, 545 n.7 (2d Cir. 2005); *Matter of Y-I-M-,* 27 I&N Dec. 724, 729-30 n.2 (BIA 2019).

the police until questioned by the Court (IJ at 6-7; Tr. at 94-95). Finally, the Immigration Judge found implausible the respondent's contention that he was able to escape detention by jumping out of a window and outrunning three or four officers (IJ at 5, 7; Tr. at 69-72; Exh. 2A).

The respondent argues that the Immigration Judge relied on "immaterial discrepancies" (Form EOIR-26, Notice of Appeal from a Decision of an Immigration Judge). However, an Immigration Judge "'may rely on *any* inconsistency or omission in'" assessing credibility, so "'long as the totality of the circumstances establishes that an asylum applicant is not credible.'" *See Hong Fei Gao v. Sessions*, 891 F.3d 67, 77 (2d Cir. 2018) (quoting *Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 167 (2d Cir. 2008)) (second internal quotation marks and citation omitted); *see also Tu Lin v. Gonzales*, 446 F.3d 395, 402 (2d Cir. 2006).

The respondent further contends that he was not asked specific questions and that the Immigration Judge held the respondent to an unreasonable standard of consistency (Form EOIR-26, Notice of Appeal from a Decision of an Immigration Judge). Nonetheless, the respondent bears the burden of proof to establish his claim before the Immigration Judge, and he has not satisfactorily explained the inconsistencies or omissions in the record, or the implausibility identified by the Immigration Judge. *See* section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A) (providing that an alien applying for relief or protection from removal has the burden of proof to establish that he or she satisfies the applicable eligibility requirements).

Based on the record, we are not persuaded that the Immigration Judge's adverse credibility finding is clearly erroneous (IJ at 6-7). *See Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) (holding that on clear error review, "[a] finding that is 'plausible' in light of the full record – even if another is equally or more so – must govern"); *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985) (holding that "[w]here there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous").

Second, the respondent argues that the Immigration Judge erroneously found that the harm he suffered did not rise to the level of persecution because the Immigration Judge did not consider the respondent's experience of escaping detention and fleeing family planning officers (Form EOIR-26, Notice of Appeal from a Decision of an Immigration Judge). We agree with the Immigration Judge's determination that the respondent did not establish that the harm he suffered, including a brief detention and minor beating (which the respondent conceded was not severe), even considered in the aggregate, was sufficiently severe to rise to the level of persecution (IJ at 5-6, 7-8; Tr. at 95). *See Jian Qiu Liu v. Holder*, 632 F.3d 820, 822 (2d Cir. 2011) (holding that an alien who suffered "only minor bruising" which "required no formal medical attention and had no lasting physical effect" did not show that the mistreatment he suffered rose to the level of persecution); *see also Joaquin-Porras v. Gonzales*, 435 F.3d 172, 182 (2d Cir. 2006) (holding that a brief detention did not constitute persecution); *cf. Beskovic v. Gonzales*, 467 F.3d 223, 226 (2d Cir. 2006). The respondent's appellate contentions regarding what may have occurred if he did not escape does not establish that he has met his burden of proof to demonstrate that he suffered harm rising to the level of persecution.

Additionally, the Immigration Judge found that the respondent did not establish that he has a well-founded fear of persecution (IJ at 8). *See* 8 C.F.R. § 1208.13(b)(2). Apart from stating on

appeal that the respondent established a subjective fear of future harm, the respondent has not identified any error in the Immigration Judge's holding that his fear of future harm upon his return on account of "other resistance" to China's coercive population control program is not objectively reasonable (IJ at 8; Respondent's Br. at 8). *See Hong Fei Gao v. Sessions*, 891 F.3d at 75-76. We therefore conclude that the respondent has waived any argument that the Immigration Judge erred by not concluding that his fear of future harm is objectively reasonable. *See* 8 C.F.R. § 1208.13(b)(2)(i); *Matter of Y-I-M-*, 27 I&N Dec. at 729-30 n.2. For these reasons, we affirm the denial of asylum.

Accordingly, the following order is entered.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY

Date: MAY 15 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Alexa T. Torres, Esquire

ON BEHALF OF DHS: Francisco Prieto
Assistant Chief Counsel

APPLICATION: Termination of proceedings; asylum; withholding of removal

In a July 20, 2018, decision, the Immigration Judge denied the respondent's applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3), and protection under the Convention Against Torture, 8 C.F.R. § 1208.16(c). The respondent, a native and citizen of the People's Republic of China, appeals the denial of his applications for relief and moves for termination of proceedings.[1] The Department of Homeland Security opposed the respondent's motion, but did not respond to the respondent's appeal. The respondent's motion will be denied and his appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo questions of law, discretion, and judgment, and all other issues in appeals from an Immigration Judge's decision. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge found that the respondent's testimony was too vague to independently sustain his burden of proof (IJ at 2). *See* section 208(b)(1)(B)(i)-(ii) of the Act (stating that an asylum applicant's burden of proof may be met by credible, persuasive, and fact-specific testimony); *see also Urgen v. Holder*, 768 F.3d 269, 273 (2d Cir. 2014). Specifically, the respondent testified that he spent years in the Christian church in China, and was arrested while attending a church, but could not recall the full name of a single church-goer he met at such gatherings (IJ at 3; Tr. at 36-39, 50-52, 57-58, 66-67).[2] The Immigration Judge considered the respondent's explanation, that cultural norms required that he refer to elders only by honorifics, such as "aunt" or "uncle," but found the explanation unpersuasive given his allegedly significant ties to Christian churches in China (IJ at 2-3 (citing Exh. 5 at 227-28); Respondent's Br. at 6-7).

[1] The respondent does not contest the denial of his application for protection under the Convention Against Torture, so the issue is waived. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012).

[2] The respondent recalled only the name of his neighbor, who he testified was Christian and took care of him after his grandparents were no longer able to do so (Tr. at 36-37, 167).

We discern no clear error in this credibility determination notwithstanding the respondent's protest as he points to no evidence that undermines it. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) ("[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (citing *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948))).

Because the respondent's testimony was insufficient to independently carry his burden, the Immigration Judge properly considered whether the respondent submitted sufficient documentary evidence to establish his claim (IJ at 3-4). *See Wei Sun v. Sessions*, 883 F.3d 23, 28 (2d Cir. 2018) ("Where, as here, 'the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.'" (quoting section 208(b)(1)(B)(ii) of the Act)), *cert. denied*, 139 S. Ct. 413 (2018); *Liu v. Holder*, 575 F.3d 193, 197 (2d Cir. 2009) ("[A]n IJ, weighing the evidence to determine if the alien has met his burden, may rely on the absence of corroborating evidence adduced by an otherwise credible applicant unless such evidence cannot be reasonably obtained.").

Regarding the respondent's practice of Christianity in China and his past persecution claim, the Immigration Judge found the respondent's uncle's letter unpersuasive because it contained little detail and the respondent's mother's letter and testimony lacking foundation because the respondent's mother did not have direct knowledge of the respondent's activities in China (IJ at 3; Exh. 4 at 17, 29). We add that the respondent's uncle and mother are both "interested witnesses" in agreeing that this evidence, even coupled with the respondent's vague testimony, is insufficient to meet the respondent's burden. *See Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 215 (BIA 2010), *remanded on other grounds sub nom. Hui Lin Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012). We are unpersuaded by the respondent's conclusory assertion that he met his burden of proof in this regard, absent citation to further evidence or authority (Respondent's Br. at 7-8).

Regarding the respondent's practice of Christianity in the United States and claim of a well-founded fear of future persecution, the Immigration Judge found that "testimony from persons attesting to Respondent's current church attendance was reasonably attainable" but not provided, such that the respondent did not sufficiently corroborate his claim (IJ at 3). Given that the respondent filed a letter from his church (Exh. 4 at 26), 2 photographs involving church activities (Exh. 4 at 25), and a baptism certificate (Exh. 3, Tab C), we agree that the respondent's explanation that his pastor was busy is insufficient to explain why he could not produce any witness to attest to first-hand knowledge of his attendance in a church in this country (IJ at 3; Tr. at 43). We are unpersuaded by the respondent's conclusory assertion of error in this regard as well (Respondent's Br. at 10). For the foregoing reasons, we agree that the respondent's vague testimony and unreliable or insufficient evidence did not meet his burden of proof to establish eligibility for asylum or withholding of removal under the Act. *See* sections 208 and 241(b)(3) of the Act.

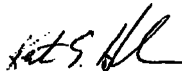
The respondent moves for termination of proceedings because the Notice to Appear (NTA) served to him did not include the date and time of his removal hearing, so, he argues, it could not vest the Immigration Judge with jurisdiction (Respondent's Motion to Terminate (unpaginated)

(citing *Pereira v. Sessions*, 138 S. Ct. 2105 (2018)). However, we have since distinguished *Pereira v. Sessions* from the issue of jurisdiction and held in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), that an NTA that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings so long as a notice of hearing specifying this information is later sent to the alien. The respondent contests the validity of this two-step process, but we are not persuaded to overturn our precedential decision and note that the United States Court of Appeals for the Second Circuit has upheld it. *See Banegas Gomez v. Barr*, 922 F.3d 101, 112 (2d Cir. 2019). Thus, because the respondent was subsequently served with a hearing notice listing the date and time of his hearing, the NTA was not defective and jurisdiction vested with the Immigration Judge over these removal proceedings (Notice of Hearing in Removal Proceedings, Dec. 14, 2015). Accordingly, the following orders will be entered.

ORDER: The motion is denied.

FURTHER ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY

Date: JUN 1 1 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Garry Pogil, Esquire

ON BEHALF OF DHS: Ada G. Guillod
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture; remand

The respondent, a native and citizen of China, appeals from the Immigration Judge's May 29, 2018, decision. The Immigration Judge denied the respondent's application for asylum as a matter of discretion, but granted her application for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3). The respondent argues that the Immigration Judge erred in denying her application for asylum. She alternately requests remand of the record for further proceedings. The Department of Homeland Security has filed a brief in opposition. The respondent's motion to remand for further proceedings will be denied, her appeal will be dismissed, and the record will be remanded for background and security checks.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge concluded that the respondent suffered past persecution in China (IJ at 2-3). However, the Immigration Judge denied the respondent's application for asylum as a matter of discretion in light of her criminal record, which includes two arrests (IJ at 1-2). The record reflects that a 2015 charge for engaging in conduct related to prostitution in violation of N.J. Stat. Ann. § 2C:34-1.1(b)(2) resulted in a finding of guilt and a conditional dismissal (Exh. 4 at 28). The respondent was arrested for a second time in New York City in 2016 while working in a massage parlor (IJ at 2; Tr. at 35-36). The respondent did not provide a disposition for the criminal charge(s) resulting from her 2016 arrest. Given the respondent's criminal record, the Immigration Judge concluded that a grant of asylum was not an appropriate exercise of discretion. However, the Immigration Judge concluded that the respondent demonstrated eligibility for withholding of removal under section 241(b)(3) of the Act, which does not have a discretionary component.

We affirm the Immigration Judge's discretionary denial of asylum. An asylum applicant bears the burden to demonstrate that a grant of asylum is warranted as a matter of discretion. *Matter of A-B-*, 27 I&N Dec. 316, 345 n.12 (2018). An alien's criminal history is an appropriate discretionary factor in considering an asylum application. *Huang v. I.N.S.*, 436 F.3d 89, 98

(2d Cir. 2006). Although the respondent argues that she was not engaged in activity related to prostitution (Tr. at 26-29; Respondent's Br. at 3), a finding of guilt was made by a criminal court with respect to her 2015 charge and it is well-established that questions of guilt or innocence are not re-litigated in immigration proceedings. *See Matter of Roberts*, 20 I&N Dec. 294, 301 (BIA 1991). The respondent also argues that the record should be remanded so that she may obtain a disposition record for her second arrest. However, we are not persuaded that remand for this purpose is warranted as the respondent has not established that documentation pertaining to this 2016 arrest has not previously been available to her. *See Matter of Coelho*, 20 I&N Dec. 464, 470-72 (BIA 1992); 8 C.F.R. § 1003.2(c).

For the aforementioned reasons, the respondent's appeal will be dismissed and her motion to remand for further proceedings will be denied. The record will be remanded solely for completion of the background and security checks required for the Immigration Judge's grant of withholding of removal.

ORDER: The respondent's motion to remand is denied.

FURTHER ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY

Date: JUN - 2 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gregory Kuntashian, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of the Republic of China, appeals the decision of the Immigration Judge dated March 29, 2018. The Immigration Judge denied the respondent's claims for asylum, withholding of removal under the Immigration and Nationality Act, and protection under the Convention Against Torture. The respondent's appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

An adverse credibility finding may be based on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the 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 falsehood in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the claim. Section 208(b)(1)(B)(iii) of the Act, 8 U.S.C. § 1158(b)(1)(B)(iii). *See Sun v. BIA*, 510 F.3d 377, 378 (2d Cir. 2007); *Liang Chen v. U.S. Atty. Gen.*, 454 F.3d 103, 106 n. 2 (2d Cir 2006); *Matter of J-Y-C-*, 24 I&N Dec. 260, 262 (BIA 2007). Each inconsistency or omission must be evaluated in light of the totality of the circumstances, including any explanations offered by the respondent. *See Gao v. Sessions*, 891 F.3d 67, 79, 81 (2nd Cir. 2018).

The respondent claims he was persecuted in China on account of his religion as practicing Christianity in an underground church. We agree with the Immigration Judge that there are material inconsistencies that are central to the respondent's claim for asylum and insufficient explanations for those inconsistencies were provided (IJ at 4-6). Moreover, the respondent did not provide sufficient corroborative evidence to support his claims and overcome the inconsistencies (IJ 6-7).

As the Immigration Judge found, the respondent's testimony regarding the harm he alleges he suffered by Chinese authorities is inconsistent with his claims in his asylum application (Form I-589). In his statement with his asylum application, the respondent claimed that he and his grandmother were "brutally beaten" by Chinese authorities in 2009 when they tried to prevent the arrest of the respondent's grandfather. He also claimed he was "tortured for a week" after the

Chinese police detained him on (b) (6). However, the respondent testified that the only time he was beaten by Chinese authorities was after he was detained on (b) (6) (IJ at 6; Tr. at 42-44, 74-75). When confronted with this inconsistency, the respondent's initial answer was unresponsive and then he stated that he was "nervous" and had "difficulty speaking" (Tr. at 75). We agree with the Immigration Judge that this is a major omission and the respondent's explanation is unpersuasive (IJ at 6).

In addition, the respondent provided internally inconsistent testimony about the length of his detention, whether it lasted for one day and he was released later on (b) (6), or he was detained for one week and released on (b) (6) (IJ at 4, 6; Tr. at 42, 47, 56, 63). The Chinese certificate of detention he submitted notes the "detention time" as (b) (6) (IJ at 6; Exh. 5, Tab E). This indicates one day, not one week, and the day of detention being (b) (6), not (b) (6) In addition, the respondent initially testified that he received this document on (b) (6), yet when he was confronted with the fact that the document indicates it was not issued until (b) (6), he tried to explain that he was shown this certificate on (b) (6) (IJ at 6; Tr. at 62, 67, 70). That explanation is unpersuasive.

Further, the evidence is inconsistent regarding the claimed injuries the respondent sustained during the alleged detention. He testified that the police broke several of his ribs and hit him in the face, causing swelling (IJ at 4; Tr.at 42-44). However, the respondent submitted a medical certificate noting that he was treated for "multiple soft tissue injuries over the body," with no mention that he had any broken ribs (Exh. 3, Tab H).

Moreover, the Immigration Judge found inconsistencies and lack of sufficient corroboration regarding the respondent's claimed practice of Christianity in the United States (IJ at 5, 6-7). Although the respondent submitted a Certificate of Baptism from the (b) (6), dated in 2011 (Exh. 3, Tab F), he testified that he began to attend church at the (b) (6) in the United States in 2012 and did not testify that he had attended any other church earlier in the United States (IJ at 6; Tr. at 45-46). Additionally, the statements from two church member in the United States claimed that they met the respondent in April and May 2017, and they attend church together every week (IJ at 6-7; Exh. 5, Tab A, C). Contrary to that evidence, the respondent testified that he attends church in the United States every other week or once a month (IJ at 7; Tr. at 45).

Contrary to the respondent's argument on appeal, as demonstrated above, the Immigration Judge's adverse credibility finding is not erroneous and is supported by specific, cogent reasons or inconsistent statements by the respondent. We affirm the Immigration Judge's adverse credibility finding and lack of sufficient corroborative evidence, both of which support the Immigration Judge's determination that the respondent has not met his burden of proof to demonstrate that he suffered past persecution in China by the government on account to his religion (IJ at 10).

Because the respondent has not demonstrated past persecution, there is no presumption that he has a well-founded fear of future persecution. Due to the adverse credibility finding, the respondent has not demonstrated that the Chinese authorities continued to look for him after he left that country and that they will arrest, detain, and mistreat him in the future if he returns to

China (IJ at 11). Based on the adverse credibility finding, we agree with the Immigration Judge that the respondent did not meet his burden to establish his eligibility for relief in the form of asylum. Moreover, because his applications for withholding of removal under the Immigration and Nationality Act and protection under the Convention Against Torture are based on the same facts that the Immigration Judge found not credible, those applications were properly denied as well (IJ at 11-12).

The evidence supports the Immigration Judge's adverse credibility finding and his decision denying the claims for asylum, withholding of removal under the Act, and protection under the Convention Against Torture, for lack of credibility and corroboration. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) New York, NY

Date: MAY 21 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Irwin Berowitz, Esquire

ON BEHALF OF DHS: Luciana Dubuc
Assistant Cheif Counsel

APPLICATION: Reopening

On September 4, 2002, the Board dismissed the respondent's appeal from the Immigration Judge's July 9, 1999, decision denying her application for asylum, withholding of removal, and protection under the Convention Against Torture.[1] *See* sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A), 1231(b)(3)(A); 8 C.F.R. §§ 1208.13, 1208.16-18. Subsequently, the respondent filed one motion to reconsider, and two motions to reopen, before the Board that we denied on February 9, 2005, June 30, 2005, and April 23, 2008. The respondent, a native and citizen of China, has filed a motion requesting reopening. The Department of Homeland Security (DHS) opposes the respondent's motion. The motion will be denied.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

In light of the foregoing, the respondent's motion does not comply with the numerical and time limitations on filing a motion to reopen. 8 C.F.R. § 1003.2(c). However, section 240(c)(7)(C)(ii) of the Act, 8 U.S.C. § 1229a(c)(7)(C)(ii), permits an alien to apply or reapply for asylum and withholding of removal based on evidence of changed country conditions arising in the country of nationality if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding. *See* 8 C.F.R. § 1003.23(b)(4)(i). The respondent requests reopening based on changed circumstances in China related to her practice of Christianity (Respondent's Motion at 2-16).

Specifically, the respondent argues that her motion establishes prima facie eligibility for asylum because she will face persecution upon return to China due to her practice of Christianity (*Id.*). She further argues that there has been a change in country conditions in China related to the

[1] Our records reflect that the respondent's case was previously consolidated with a family member (A(b) (6)); however, the respondent is the only party included in the instant motion.

treatment of Christians since the time of the Immigration Judge's decision in 1999, that there is a pattern or practice of persecution against Christians in China, and that she has a well-founded fear of persecution if she attends an unauthorized church (*Id.*). She has submitted documentary evidence with the instant motion, including country conditions evidence, in support of her assertions (*Id.*, Attached Evidence at Tabs A-T).

Based on a careful review of the record, we are not persuaded that the respondent has submitted evidence of changed circumstances sufficient to establish that reopening is warranted. First, we note that the respondent's start of her religious practice in the United States is a change in personal circumstances, and not a change in country conditions (*Id.* at 4-6). *See Zheng v. U.S. Dep't of Justice*, 416 F.3d 129, 130-31 (2d Cir. 2005) (explaining that a change in the petitioner's personal circumstances in the United States does not constitute a changed circumstance in the country of origin).

Further, the respondent's evidence demonstrates that concerns regarding religious freedom have been ongoing for many years, including at the time of the Immigration Judge's decision in 1999 (*Id.* at 7-15, Attached Evidence at Tabs Q-T). *See generally Wang v. Board of Immigration Appeals*, 437 F.3d 270, 275 (2d Cir. 2006) (rejecting the implication that when considering motions of this type, the Board "must expressly parse or refute on the record each individual argument or piece of evidence offered by the petitioner") (internal quotations omitted). The Department of State's 1999 Report on International Religious Freedom, included with the respondent's motion, reflects that government authorities sought to restrict religious practices to government-sanctioned activities and targeted Protestant "house churches" (*Id.* at Tab R). The Department of State's 2018 Report on International Religious Freedom notes that China has been designated as a "Country of Particular Concern" since 1999 (*Id.*, Attached Evidence at 123). To the extent that the respondent's documentary evidence demonstrates some change in the treatment of individuals who practice Christianity in China, "[c]hange that is incremental or incidental does not meet the regulatory requirements for late motions of this type." *Matter of S-Y-G-*, 24 I&N Dec. 247, 257 (BIA 2007). Therefore, upon careful review of the record, and the respondent's motion, the respondent has not established a change in country conditions in China sufficient to merit reopening of her proceedings under section 240(c)(7)(C)(ii) of the Act.

The respondent further makes various claims that she states are not relevant to her instant motion (Respondent's Motion at 3-4). Specifically, she asserts that she has diligently pursued her immigration case, suffered from ineffective assistance of counsel, was incorrectly charged as entering without inspection on the Notice to Appear (NTA), is the beneficiary of an approved visa petition, and has a child who relies on her care (*Id.*).

First, we note that the respondent's motion does not reflect compliance with the requirements of *Matter of Lozada,* 19 I&N Dec. 637, 638 (BIA 1988), nor has she established prejudice from her prior attorneys' actions. *See Garcia-Villeda v. Mukasey*, 531 F.3d 141, 149 (2d Cir. 2008) ("Parties claiming denial of due process in immigration cases must, in order to prevail, allege some cognizable prejudice fairly attributable to the challenged process."). Regarding the respondent's assertion that she is the beneficiary of an approved visa petition, she has not submitted an application for adjustment of status with the instant motion nor has she established her prima facie eligibility for such relief. *See* 8 C.F.R. § 1003.2(c)(1) ("A motion to reopen proceedings for the

purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation."); *see also Matter of Coelho*, 20 I&N Dec. 464, 472 (BIA 1992). Regarding the respondent's assertion that her manner of entry was improperly alleged on the NTA, the record reflects that the respondent, through counsel, admitted the allegations and conceded the charge of removability as contained in the NTA (Tr. at 14-15). The respondent's assertions in the instant motion regarding the removability charge do not persuade us that her removability should be addressed as she previously conceded the charge of removability and has not established a claim of ineffective assistance of counsel. *See Ali v. Reno*, 22 F.3d 442, 446 (2d Cir. 1994) (concluding that the appellant is bound by counsel's admission). Further, the respondent has not established that a motion to reopen is the proper venue to raise claims that could have been presented in prior proceedings. *Matter of Cerna*, 20 I&N Dec. 399, 402-03 (BIA 1991) (explaining the difference between a motion to reconsider and a motion to reopen).

Finally, to the extent that the respondent's assertions are a request that we exercise our sua sponte authority to reopen proceedings, we are not persuaded that such an exercise is warranted. Sua sponte authority may be exercised to reopen in "truly exceptional situations" where the interest of justice would be served. *Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999). This sua sponte authority "is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship." *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). The respondent has the burden of demonstrating truly exceptional circumstances and must show "a substantial likelihood that the result in his case would be changed if reopening is granted." *Matter of Beckford*, 22 I&N Dec. 1216, 1219 (BIA 2000). Upon careful consideration of the record, and the respondent's assertions in her motion, we are not persuaded that she has demonstrated such exceptional circumstances.

Accordingly, the following order will be entered.

ORDER: The motion is denied.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY

Date: MAY 18 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Benjamin P. Birchenall, Esquire

APPLICATION: Cancellation of removal under section 240A(b)(1); asylum; withholding of removal; Convention Against Torture; remand

The respondent, a native and citizen of China, appeals the Immigration Judge's decision on June 27, 2018, denying her applications for asylum, withholding of removal, and protection under the Convention Against Torture. *See* sections 208(b)(1)(A), 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A), 1231(b)(3)(A); 8 C.F.R. §§ 1208.13, 1208.16-1208.18. The respondent additionally appeals the Immigration Judge's denial of her application for cancellation for removal under section 240A(b)(1) of the Act, 8 U.S.C. § 1229b(b)(1). Additionally. the respondent has filed evidence on appeal which we will construe as a motion to remand. The appeal will be dismissed and the motion will be denied.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent argues that the Immigration Judge violated her due process rights by not admitting into evidence the documentary evidence he submitted untimely.[1] We disagree. It is well-established that an Immigration Judge may set filing deadlines for evidence and may deem the opportunity to file such evidence waived if not timely filed. *See* 8 C.F.R. § 2003.31(c); *Matter of C-B-*, 25 I&N Dec. 888, 890 (BIA 2012) (noting the importance of managing a docket while being "mindful of a respondent's invocation of procedural rights and privileges"); *Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010) (stating that Immigration Judges have broad discretion to set filing deadlines).

The Immigration Judge excluded evidence that was filed past the 30-day filing deadline. The respondent had time to assemble the evidence before the filing deadline as the Immigration Judge noted, the respondent's counsel was informed of the filing deadline, and the respondent' filed the first packet of evidence 3 days after the deadline without a motion to accept the late filing, and again attempted to file additional evidence several days before the individual hearing, again

[1] We note that the respondent's brief is unpaginated and not in conformance with the Board's Practice Manuel. *See* BIA Prac. Man. Ch. 3.3(c)(iii) ("Briefs and other submissions should *always* be paginated." (emphasis original)).

without a motion to accept the late filing (IJ at 5; Tr. at 43, 51-52). Further, we note that the respondent has been in removal proceedings since 2009, and thus had ample time to assemble evidence on her behalf.

Additionally, even if the Immigration Judge erred in excluding the evidence, the respondent has not sufficient shown how she was prejudiced by exclusion. *See Matter of Santos*, 19 I&N Dec. 105, 107 (BIA 1984) (requiring a showing of prejudice to establish a due process violation). On appeal, the respondent submits evidence she states she would have submitted into the record to corroborate her claim that a qualifying relative would suffer exceptional and extremely unusual hardship upon her removal. However, the respondent does not substantively assert how the exclusion of the evidence prejudiced her, other than generally stating that the evidence would have corroborated her claim for relief. We note that the Immigration Judge considered the respondent's credible testimony concerning her husband's medical condition, and the Immigration Judge did not state that he needed further corroboration concerning his diagnosis (IJ at 12-13; Tr. 101-105). Further, the Immigration Judge also denied the respondent's application for cancellation of removal for a lack of good moral character. The respondent does not assert that the evidence would establish that she was a person of good moral character during the relevant time period, and thus the respondent has not shown that she was prejudiced from the exclusion of the attached evidence so that it materially impacted her claim.

Insofar as the respondent is also appealing the denial of her request for a continuance pending the adjudication of the visa petition filed on her behalf, we agree with the Immigration Judge that the respondent did not establish that she is prima facie eligible for the relief that she seeks.[2] *Matter of L-A-B-R- et al.*, 27 I&N Dec. 405, 412 (A.G. 2018) (holding that when considering a continuance to pursue collateral relief, the immigration judge must consider primarily the likelihood that the collateral relief will be granted and will materially affect the outcome of the removal proceedings). As noted by the Immigration Judge, the United States Citizenship and Immigration Services (USCIS) has determined that no immigrant petition could be approved on behalf of the respondent, because she had previously sought to be accorded immediate relative status as the spouse of a United States citizen by reason of a marriage determined to have been entered into for the purpose of evading the immigration laws (Exh 9). *See* section 204(c) of the Act, 8 U.S.C. § 1154(c). Therefore, the Immigration Judge properly found that the respondent is not eligible for the visa petition that she has filed with USCIS, and therefore, a continuance of her removal proceedings was not appropriate.

We note that the respondent has not otherwise meaningfully appealed the denial of her applications for asylum, withholding of removal, and protection under the Convention Against Torture, nor did she meaningfully appeal the Immigration Judge's determination that she was not a person of good moral character in order to establish eligibility for cancellation of removal under section 240A(b)(1) of the Act. Thus we find these issues to be waived. *Matter of Y-I-M-*, 27 I&N Dec. 724, 729-30 n.2 (BIA 2019) (recognizing that a failure to address an issue on appeal results in a waiver of that issue).

[2] We note that the respondent has provided evidence on appeal that USICS has since denied the visa petition filed on her behalf, and that she is current pursuing an appeal of that denial.

A(b) (6)

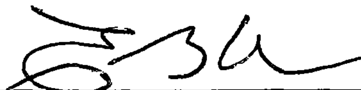
Additionally, we will construe the evidence the respondent submitted on appeal as a motion to remand. The respondent submitted evidence concerning her husband's medical condition, asserting that he would suffer exceptional and extremely unusual hardship upon her removal. However, as we already determined, the evidence is not likely to alter the outcome of the proceedings if a remand is granted, as she has not demonstrated how the Immigration Judge erred in determining that she is not a person of good moral character in order to establish prima facie eligibility for the relief that she seeks. *Matter of Coehlo*, 20 I&N Dec. 464 (BIA 1992) (explaining that a party seeking remand bears the "heavy burden" of demonstrating that the new evidence presented is likely to alter the outcome of proceedings).

Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed

FURTHER ORDER: The respondent's motion to remand is denied.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).



FOR THE BOARD

File: A(b) (6) – New York, NY

Date: MAY 13 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ling Li, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of the People's Republic of China, appeals from the Immigration Judge's May 9, 2018, decision denying his application for asylum and withholding under the Immigration and Nationality Act, as well as his request for protection under the Convention Against Torture. *See* sections 208 and 241(b)(3) of the Act, 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. §§ 1208.13, 1208.16-18. The appeal will be dismissed.

We review findings of fact, including credibility findings, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent's claim relates to alleged harm he suffered when the Chinese government offered him compensation for the demolition of his house that was significantly less than what he believed the house was worth (IJ at 3-4; Tr. at 15-18). The respondent alleges that this was his ancestral home (IJ at 7; Tr. at 46, 63). He asserts that his resistance to accepting the offered compensation, which included demonstrating in front of the village head's home and sending a letter of complaint, led Chinese authorities to seek his arrest (IJ at 3-5; Tr. at 20-22, 24-27). The Respondent's claim is also related to his conversion to Christianity while in the United States and his fear of returning to China as a Christian (IJ at 6; Tr. at 31).

The Immigration Judge denied the respondent's applications as she found the respondent not credible and that he had not sufficiently corroborated his claim (IJ at 17-22). For the following reasons, we find that the Immigration Judge's adverse credibility finding is not clearly erroneous. *See* section 208(b)(1)(B)(iii) of the Act; *Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 163-66 (2d Cir. 2008) (explaining that an adverse credibility determination may be based on any inconsistencies, falsehoods, or any other relevant factor based on an examination of the totality of the circumstances). We also find no clear error in the Immigration Judge's determination that the respondent's inability to sufficiently corroborate his claim undermined his credibility. *See* Section 208(b)(1)(B)(ii) of the Act; *Wei Sun v. Sessions*, 883 F.3d 23, 28-30 (2d Cir. 2018), *cert. denied* 139 S. Ct. 413 (2018).

The Immigration Judge found contradictions between the respondent's testimony and documents in the record. Specifically, the respondent testified that he had lived at his ancestral home since he was a small child (IJ at 7; Tr. at 46). However, the certificate of civil mediation, which dissolved the marriage between the respondent's parents when he was in high school, did

not mention the ancestral home at all in dividing up the marital assets (IJ at 8, 21; Tr. at 68; Exh. 5 at 7-9). Furthermore, the certificate of civil mediation did not indicate that either of the respondent's parents lived at the ancestral home at the time of the divorce (IJ at 21; Exh. 5 at 7). When confronted with this document, the respondent insisted that he lived at the ancestral home at this time, and that his national identification card proves it (Tr. at 77). We note that the respondent did not produce his national identification card (IJ at 7 & n.1; Tr. at 53-54). The respondent also indicated that he had no explanation for why the ancestral home was never mentioned in the division of marital assets (Tr. at 79). Furthermore, the respondent's mother's household register appears to indicate that the respondent and his family moved from the ancestral home on (b) (6) (IJ at 7; Exh. 4, Tab N at 269-74). When presented with this evidence, the respondent insisted that he lived at the ancestral home nearly all of his life (IJ at 7; Tr. at 50).

The record also demonstrates that the respondent's address in the United States is the same one that his stepfather used in an I-130 petition filed on behalf of the respondent in 2004, yet the respondent testified as having never seen him (IJ at 22; Tr. at 111-12; Exhs. 2 & 5 at 1). Further, the I-130 and a Chinese government certificate indicating that the respondent was the stepson of his stepfather list the respondent as living at an address in China other than that of the ancestral home (Exh. 5 at 1, 14).

We next turn to the Immigration Judge's finding that the respondent's demeanor changed significantly on cross-examination and that he claimed ignorance and was reluctant to answer even simple questions (IJ at 17). An Immigration Judge's adverse credibility findings, including those based on demeanor, must be "'tethered to the evidentiary record.'" *Gurung v. Barr*, 929 F.3d 56, 61 (2d Cir. 2019) (quoting *Siewe v. Gonzales*, 480 F.3d 160, 169 (2d Cir. 2007)). Here, the Immigration Judge cited specific examples of the respondent's demeanor change and evasiveness. The respondent was reluctant to state his stepfather's name (IJ at 17; Tr. at 69). He indicated that he did not know whether his mother was still married to his stepfather (IJ at 8; Tr. at 72). The respondent further testified that he recalled going to an interview with his mother, and that it may have dealt with immigration, but he was not sure of the exact purpose (IJ at 8; Tr. at 71). The I-130 petition related to the interview was approved in 2004, when the respondent would have been in his late teens (Exh. 5 at 1). He testified that he was focused on his studies and did not pay attention to other things (IJ at 8; Tr. at 71). These specific instances of evasiveness and change in demeanor, coupled with the inconsistencies between the respondent's testimony and the documentary record discussed above, tethers the Immigration Judge's adverse credibility determination to the evidentiary record. *Gurung v. Barr*, 929 F.3d at 61.

We observe no clear error in the Immigration Judge's finding the respondent did not adequately corroborate his claim (IJ at 19-22). The letters of support submitted by the respondent were all undated (IJ at 20; Tr. at 89-90). When asked why this was the case, the respondent was unable to explain (Tr. at 89-90). He did not present any evidence of ownership of the ancestral home, including his national identification card (IJ at 7, 20; Tr. at 53-54). The respondent also did not produce photos of the ancestral home prior to its demolition (IJ at 20; Tr. at 98). Likewise, he provided no way to authenticate that the photos, which he purported to be of his demolished ancestral home, were, in fact, of that property (IJ at 20; Tr. at 98; Exh. 4, Tab E at 166). This supports the Immigration Judge's conclusion that the respondent did not adequately corroborate his claim.

Regarding the respondent's recent conversion to Christianity, we find no clear error in the Immigration Judge's conclusion that the respondent did not adequately corroborate his claim (IJ at 19). The respondent submitted a baptismal certificate and two photographs in support of this portion of his claim (Exh. 4, Tab J at 189-90). He testified that the individual who had taken him to church for the first time could not come to court and that his pastor would not write a letter on his behalf until he had been at the church for one year (IJ at 10; Tr. at 93-94). The lack of additional corroborating evidence, such as letters from fellow churchgoers, attendance records, or a letter from the individual who had taken him to church for the first time, supports the Immigration Judge's finding. *See Wei Sun v. Sessions*, 883 F.3d at 26 (listing ways an individual might corroborate church attendance).

As the respondent did not testify credibly or adequately corroborate his claim, he did not meet his burden of showing past persecution or a well-founded fear of future persecution for purposes of asylum under section 208 of the Act. Because the respondent has not established that he has a well-founded fear of persecution on account of a statutorily enumerated ground, he necessarily does not qualify for withholding of removal under section 241(b)(3) of the Act (IJ at 23). *See Lecaj v. Holder*, 616 F.3d 111, 119-20 (2d Cir. 2010).

Generally, an alien's claim for protection under the Convention Against Torture may not be denied solely on the basis that his or her testimony is not credible. *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 184 (2d Cir. 2004). Here, however, the respondent's claim under the Convention against Torture is not analytically separate from his asylum claim. *See Xue Hong Yang v. U.S. Dep't of Justice*, 426 F.3d 520, 523 (2d Cir. 2005). Accordingly, the adverse credibility determination is dispositive. *See Paul v. Gonzales*, 444 F.3d 148, 156-57 (2d Cir. 2006). The respondent has not established that that he will more likely than not be subjected to torture if he is returned to China. *See* 8 C.F.R. § 1208.16(c)(2).

Accordingly, the following order is entered.

ORDER: The respondent's appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) New York NY

Date: MAY - 7 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of China, appeals from the Immigration Judge's May 18, 2018, decision denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture. Sections 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a), 1231(b)(3); 8 C.F.R. § 1208.16(c). The appeal will be dismissed.[1]

We review findings of fact, including credibility findings, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, or judgment, and all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent alleged past harm on account of his Christian religion and practice in an underground house church; he further stated he is a practicing Christian in the United States (IJ at 2; Respondent's Br. at 4-5). The Immigration Judge found the respondent not credible as to his past religious practice in China and denied all the applications (IJ at 2-7).

The Immigration Judge's adverse credibility finding is not clearly erroneous. *See Wu Lin v. Lynch*, 813 F.3d 122, 126-27 (2d Cir. 2016) (discussing at length the meaning of "clear error" review, and noting the BIA has concluded it means that "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (internal quotations omitted)). The Immigration Judge found the respondent's testimony was inconsistent with his documentation, and he did not have a plausible or reasonable explanation for the inconsistencies (IJ at 5). *See Gurung v. Barr*, 929 F.3d 56, 61 (2d Cir. 2019) (requiring that inconsistencies relied upon in adverse credibility findings be "tethered to the evidentiary record" and not based on "trivial differences in word choices" (internal quotations and citation omitted)); *Zhi Wei Pang v. Bureau of Citizenship & Immigration Serv.*, 448 F.3d 102, 108 (2d Cir. 2006) ("Although the IJ is not required to credit [an alien's] explanation, the IJ is required to present specific, cogent reasons for rejecting it.").

[1] On appeal, the respondent does not meaningfully challenge the Immigration Judge's denial of protection under the Convention Against Torture (IJ at 7). 8 C.F.R. 1208.16(c). We consider the opportunity to do so to be waived. *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012).

Specifically, the Immigration Judge found that the evidence showed that the respondent's initial asylum application, filed at the asylum office in 2012, was signed by his attorney, Freddy Jacobs (IJ at 3, 5; Exh. 5). On (b) (6), attorney Jacobs was convicted of immigration fraud based on acts he committed between 2010 and 2012 (IJ at 4; Exhs. 10A at 6, 10B). Among other overt acts, attorney Jacobs was charged with fabricating stories of persecution purportedly suffered in China by clients, including claims of harm in China based on Christianity (IJ at 4; Exh. 10A at 6-7). The respondent's original asylum application was accompanied by a statement that was translated by (b) (6); the address of the translator was the same as the address for attorney Jacobs (IJ at 3; *Compare* Exh. 4 at 9 *with* Exh. 4A). After the respondent's attorney was convicted of fraud, the respondent obtained new counsel who submitted a substantially similar asylum application and statement; the new statement was identical to the original, but listed a new translator (IJ at 4; *Compare* Exhs. 4, 4A *with* Exhs. 8, 8A).

The respondent testified that neither attorney Jacobs nor anyone in his office prepared the asylum application (IJ at 4; Tr. at 30-34). The Immigration Judge found that this testimony was contradicted by the documentary evidence: attorney Jacobs signed the asylum application as the preparer, and the translator for the statement had come from the same office (IJ at 3, 5; *Compare* Tr. at 30-33 *with* Exhs. 4 at 9, 4A). The respondent was unable to provide a plausible explanation for why their names appeared on his documents (IJ at 5).

Rather, the respondent testified that he only used the assistance of a translator named Mr.(b) (6) to prepare his application (IJ at 4; Tr. at 34-35). However, the Immigration Judge found that this testimony was also inconsistent with the documentary evidence (IJ at 4-5). The evidence showed that Mr (b) (6) translated the supporting documents that accompanied the original asylum application, not the asylum application information or the original statement (IJ at 3-5; *Compare* Tr. at 34-35 *with* Exhs. 4A, 5S). The Immigration Judge further found that the documents translated by Mr. (b) (6) were submitted under attorney Jacobs' letterhead (IJ at 5; Exh. 5). The inconsistencies, between the respondent's testimony and his documents, are present in the record and the Immigration Judge appropriately relied upon them. *See Hong Fei Gao v. Sessions*, 891 F.3d 67, 77 (2d Cir. 2018).

The Immigration Judge considered the other evidence of record and found it did not rehabilitate the respondent's testimony (IJ at 5-7). *See Biao Yang v. Gonzales*, 496 F.3d 268, 273 (2d Cir. 2007) (stating that the absence of corroboration makes an applicant unable to rehabilitate testimony that has already been called into question). For example, the respondent's pastor in the United States testified that the respondent began attending his church in May 2011, and the respondent told him about religious persecution he suffered in China but the pastor did not know any details (IJ at 5-6; Tr. at 78-80). The Immigration Judge found the testimony established the respondent attends a Christian church in the United States, but did not establish past harm given the pastor's knowledge of events in China was based only on what the respondent had told him (IJ at 6; Tr. at 79-80; Exh.5I).

The respondent submitted a fine receipt and medical examination notes dated (b) (6), which the Immigration Judge appropriately gave limited weight to because the documents were not authenticated (IJ at 6; Exhs. 5M, 5N). The respondent also submitted letters from his mother and church friend in China (IJ at 6; Exhs. 5O, 5P). The Immigration Judge appropriately gave limited weight to these statements of individuals from China because the individuals were not

made available for cross examination (IJ at 6; Exh. 5). *See Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d at 342 (stating that the weight to be accorded to documentary evidence lies largely within the agency's discretion); *Qin Wen Zheng v. Gonzales*, 500 F.3d 143, 146-48 (2d Cir. 2007) (permitting the agency to reject unauthenticated documents when an applicant's testimony has been called into question).

On appeal, the respondent argues that he only worked with translator (b)(6) in the preparation of his application and that "it might be that cases in [attorney] Jacobs' office were not 100% accurate but this is not one of those cases" (Respondent's Br. at 3, 8, 10). However, the respondent identifies no documents to show that he only worked with, or had an arrangement with Mr (b)(6) nor does he provide an explanation for Mr (b) (6) use of attorney Jacobs' business letterhead (IJ at 5).

The Immigration Judge considered the plausibility of the respondent's explanation of who prepared his asylum application, the relevancy of the discredited attorney's conviction for immigration fraud during the period that the respondent's application was submitted, and the documentation in the record that showed the discredited attorney's signature as the application preparer and supporting documentation submitted under the discredited attorney's letterhead (IJ at 3-5). These considerations were proper. *See Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 167-68 (2d Cir. 2008); *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 337, n.19 (2d Cir. 2006); *see also Matter of J-Y-C-*, 24 I&N Dec. 260, 263 (BIA 2007) (citing *United States v. Nat'l Ass'n of Real Estate Bds.*, 339 U.S. 485, 495 (1950) (explaining that a factual finding is not "clearly erroneous" merely because there are two permissible views of the evidence)). Based on the foregoing, the respondent has not shown that the adverse credibility finding was clearly erroneous. *See Wu Lin v. Lynch*, 813 F.3d at 129.

The Immigration Judge found the respondent credible as to his church attendance in the United States (IJ at 6-7). However, the respondent has not established a well-founded fear of persecution on account of his Christian religion as he has not sufficiently established the authorities were or would likely become aware of his religious practice. *See Y.C. v. Holder*, 741 F.3d 324, 332 (2d Cir. 2013) ("[T]o establish a well-founded fear of persecution in the absence of any evidence of past persecution, an alien must make some showing that authorities in his country of nationality are either aware of his activities or likely to become aware of his activities." quoting *Hongsheng Leng v. Mukasey*, 528 F.3d 135, 143 (2d Cir.2008) (per curiam)).

Here, the respondent has not sufficiently shown that the Chinese government was aware or is likely to become aware of his practice of Christianity in the United States. *See Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015) (employing a de novo standard to review an Immigration Judge's determination that the respondent did not meet his burden of proof). The respondent's claim that authorities were aware of his practice of Christianity in China was found not credible (IJ at 3, 6). The respondent has not sufficiently identified any other reliable evidence suggesting the authorities are aware of his practice of Christianity, nor has he explained how they are likely to become aware. Thus, the respondent has not established a well-founded fear of future persecution. *See Cao He Lin v. U.S. DOJ*, 428 F.3d 391, 399 (2d Cir. 2005) ("Because [withholding of removal and asylum] are factually related but with a heavier burden for

A(b) (6)

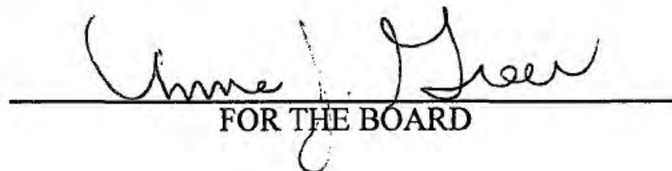
withholding, it follows that an applicant who fails to establish his eligibility for asylum necessarily fails to establish eligibility for withholding." (internal quotation and citation omitted)).[2]

Finally, the respondent has not established eligibility for protection under the Convention Against Torture. Notably, he was found not credible as to his alleged past harm. *See Hong Fei Gao v. Sessions*, 891 F.3d 67, 76 (2d Cir. 2018) ("Where the same factual predicate underlies a petitioner's claims for asylum, withholding of removal, and protection under the CAT, an adverse credibility determination forecloses all three forms of relief." citing *Paul v. Gonzales*, 444 F.3d 148, 156-57 (2d Cir. 2006)). As to his current practice of Christianity, the respondent has not met his burden of proof to establish that he would, individually, be singled out for torture. The respondent has not identified evidence to the contrary. Thus, the respondent has not met his burden of proof for any of his applications

Accordingly, the following order shall be entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).



FOR THE BOARD

[2] Although the respondent may establish eligibility for asylum based on a finding that there is a pattern or practice of persecution against similarly situated individuals, he has not raised such an argument here, and we find the opportunity to have been waived. *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012).

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY

Date: MAY 20 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Wei Gu, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of China, appeals the Immigration Judge's July 3, 2018, decision denying her applications for asylum, withholding of removal, and protection under the Convention Against Torture. Sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. § 1208.16(c). The appeal will be dismissed.

We review for clear error the findings of fact, including any credibility determination, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including issues of law, discretion, and judgment. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent's claim is based on her alleged experience of forced sterilization in China (IJ at 2-3). She testified that after giving birth to her second child in 2006, she was sterilized without her knowledge (IJ at 2-3; Tr. at 20-22). The Immigration Judge found the respondent not credible, which was not otherwise resolved by corroborative evidence (IJ at 3-6).

The Immigration Judge's adverse credibility finding is not clearly erroneous (IJ at 3). *See Cooper v. Harris*, 137 S. Ct. 1455, 1468, 1474 (2017) (under clear error review, the Board may reverse only when "left with the definite and firm conviction that a mistake has been committed," and where there are "two permissible" views of the evidence, the factfinder's choice between them cannot be clearly erroneous) (citations omitted); *Lin v. Lynch*, 813 F.3d 122, 126-27 (2d Cir. 2016) (discussing clear error review). The Immigration Judge provided specific and cogent reasons to support the adverse credibility finding (IJ at 3-4).

In particular, the respondent testified that she had to pay a (15,000 RMB) fine to include her second child in the household register and for the child to be able to attend school because this child's birth violated Chinese family planning policies (Tr. at 22-23, 35, 44). However, neither the respondent nor her husband included this information in their written statements (IJ at 3-4; Tr. at 44-45; Exh. 2). When asked to explain the omissions, the respondent indicated that she and her husband focused on the sterilization, and that the fine was voluntary. However, the Immigration Judge did not find the explanation persuasive given the significance of the fine to her claim. *See Pang v. Bureau of Citizenship & Immigration Serv.*, 448 F.3d 102, 108 (2d Cir. 2006) (although not required to credit an alien's explanation, the Immigration Judge must provide specific, cogent reasons for rejecting it).

We also agree with the Immigration Judge's determination that the respondent's documentary evidence did not sufficiently corroborate her claim or independently satisfy her burden of proof (IJ at 4-7). The respondent did not provide contemporaneous evidence of the events in 2006, including hospital records that she claimed to have had, but misplaced. Although the respondent provided a medical record from 2014 reflecting that she had a tubal ligation, there is no indication that the doctor who provided the information had independent knowledge of the date or location of the procedure, or whether it was forced or voluntary (IJ at 8; Exh. 2). Thus, we affirm the Immigration Judge's determination that the overall evidence did not sufficiently corroborate her claim, nor independently satisfy her burden of proof (IJ at 4-7).

Inasmuch as the respondent has not met her burden as required for asylum, she has also not satisfied the higher standard as required for withholding of removal (IJ at 7). *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Gao v. Sessions*, 891 F.3d at 76 (where the same facts underlie claims for related relief and protection, an adverse credibility finding forecloses all forms of relief) (citation omitted). Further, for the reasons set forth by the Immigration Judge, we similarly affirm the denial of the respondent's request for protection under the Convention Against Torture (IJ at 7). *Id.* at 76.

Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

Anne J. Greer

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A(b) (6) – New York, NY

Date: MAY 1 9 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Daniel Walter Worontzoff, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of the People's Republic of China, has filed a motion to reopen so he may re-apply for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158; withholding of removal pursuant to section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3); and protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16(c)-1208.18. The motion will be denied.

After being placed in removal proceedings in March 2016, the respondent filed an asylum application claiming past persecution and a well-founded fear of persecution on account of the fact that his mother underwent a forced abortion in 2000, when the respondent was 7 years old (Exh. 2). *See* section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42). The respondent stated that he witnessed the authorities take away his mother, which caused "lifelong damage to my young mind" (Exh. 2, Asylum Statement para. 10). His attorney stated that he believed that the respondent was eligible for asylum because "the respondent suffered mentally" due to his mother's forced abortion (Tr. at 18). On August 15, 2017, an Immigration Judge addressed this claim and denied the respondent's application on the basis that he had not met his burden of proof for the relief sought. The Board dismissed the respondent's appeal on August 14, 2018.

On January 13, 2020, the respondent filed a motion to reopen, reasserting eligibility for asylum based on medical evidence of depression, in addition to a new claim based on his conversion to Christianity in 2016. The respondent's motion is time-barred, as he filed the instant motion to beyond 90 days after the entry of our final administrative decision on in August 2018. *See* 8 C.F.R. § 1003.2(c)(2).

The respondent claims that he qualifies for an exception to the time bar based on evidence of changed circumstances in China, which is material and could not have been discovered or presented at the prior hearing. *See* 8 C.F.R. § 1003.2(c)(3)(ii). In this regard, the respondent presented a doctor's letter stating that he suffers from depression and other, unspecified "psychological disorders" relating to his mother's abortion in China. (Respondent's Mot. at 9; Exh. H at 49). He also asserts that he has been attending a Christian church in New York since 2016 and was baptized that same year, although he acknowledges that "[t]his was not properly brought to the Court's attention" at the time of his prior proceedings (Respondent's Mot. at 10).

However, neither of these circumstances meets the requirement for this exception. Becoming a Christian in the United States constitutes a change in personal circumstances in the United States

rather than changes in country conditions or circumstances in China where no evidence is presented showing that the authorities are aware of his activities. *See Leng v. Mukasey*, 528 F.3d 135 (2d Cir. 2008).

The respondent's medical evidence does not reflect a changed circumstance in China, but rather constitutes evidence to support his prior claim. This evidence is cumulative to that which was presented to the Immigration Judge regarding events in his childhood. The respondent has not explained why he did not seek treatment until several years after the hearing, particularly given that he was represented before the Immigration Judge and based his claim on this issue. *See* 8 C.F.R. § 1003.2(c)(1) (stating that "[a] motion to reopen proceedings shall not be granted unless it appears that the evidence sought to be offered is material and could not have been discovered or presented at the former hearing"); *Matter of Coelho*, 20 I&N Dec. 464, 471 (BIA 1992). Accordingly, the respondent has not met the requirements for reopening.

Based on the foregoing, the following order will be entered.

ORDER: The motion is denied.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY

Date: MAY 1 1 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Zhong Yue Zhang, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of China, appeals the Immigration Judge's May 25, 2018, decision denying her applications for asylum, withholding of removal, and protection under the Convention Against Torture. *See* sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A), 1231(b)(3)(A); 8 C.F.R. §§ 1208.16(c), 1208.18. The Department of Homeland Security has not responded to the appeal. The appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge found the respondent's testimony not credible (IJ at 3-8). We uphold this determination, as it is not clearly erroneous. *See Matter of J-Y-C-*, 24 I&N Dec. 260, 262-66 (BIA 2007); 8 C.F.R. § 1003.1(d)(3)(i). The Immigration Judge, when considering the totality of the circumstances and all relevant factors, based his adverse credibility finding on specific and cogent reasons, including the respondent's rehearsed demeanor and nonresponsive answers, as well as the implausibility of her testimony. *See* section 208(b)(1)(B)(iii) of the Act (noting that an adverse credibility determination may be based on the applicant's demeanor and the plausibility of the applicant's testimony); *Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 166 (2d Cir. 2008) (noting that an Immigration Judge should identify specific and cogent reasons for an adverse credibility determination).

The Immigration Judge based his adverse credibility determination in large part on the respondent's demeanor. Adverse credibility determinations based on the Immigration Judge's observations of the applicant's demeanor are afforded particular deference. *See Lin v. U.S. Dep't of Justice*, 453 F.3d 99, 109 (2d Cir. 2006). An Immigration Judge is "in the best position to discern, often at a glance . . . whether a witness who hesitated in a response was nevertheless attempting truthfully to recount what he recalled of key events or struggling to remember the lines of a carefully crafted 'script'." *Zhang v. U.S. INS*, 386 F.3d 66, 73 (2d Cir. 2004), *overruled in part on other grounds by Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007). The Immigration Judge found based on personal observations of the respondent that her testimony appeared rehearsed, as if she were reciting a memorized account rather than describing actual events in her life (IJ at 3). The Immigration Judge identified a specific instance in which the respondent appeared to give a pre-prepared answer of "2006" because she

was anticipating a specific question from her counsel, and then changed her answer when she realized he had asked a different question (IJ at 4; Tr. at 11-12). The Immigration Judge also identified instances in which the respondent struggled to provide coherent answers to unexpected questions that were outside of the information provided in her asylum application and personal statement, such as why she had not married the boyfriend with whom she planned to have a child and what she did after she discovered she was pregnant (IJ at 4-5; Tr. at 13, 25).

The Immigration Judge also based his adverse credibility determination on the implausibility of the respondent's testimony (IJ at 6-7). We discern no clear error in the Immigration Judge's finding that, given the specific facts in the respondent's case, her testimony that coworkers reported her to family planning officials because they suspected she was pregnant was implausible (IJ at 6-7). The respondent testified that at the time of the claimed forced abortion, she was single, 41 years old, and only 50 days pregnant (Tr. at 14-20). She further testified that she was not visibly pregnant and that the only symptom of pregnancy she had experienced while at work was occasional nausea when someone brought in greasy food for lunch (Tr. at 16, 30-31). When questioned how any of her coworkers would have been aware that she was feeling nauseous, the respondent claimed that they may have seen her put her hand up to her mouth on two or three occasions (Tr. at 29-30). When further asked by the Immigration Judge whether it was common for women of child-bearing age to be reported to the authorities for possible pregnancy because they covered their mouth three times over the course of several days or weeks, the respondent did not directly answer the question (Tr. at 30).

We are not persuaded by the respondent's argument that the Immigration Judge's implausibility finding is based on improper speculation regarding the actions of family planning officials and other individuals in China. Immigration Judges are permitted to make inferences based on record facts viewed in light of common sense and ordinary experience. *Siewe v. Gonzales*, 480 F.3d 160, 168-69 (2d Cir. 2007). Given the improbability of the scenario described by the respondent, the fact that the medical document she submitted indicates that she did not have significant nausea, and her avoidance of the Immigration Judge's question regarding whether it is common for people in China to report women for alleged pregnancies based on such little evidence, we discern no clear error in the Immigration Judge's finding that the respondent's testimony regarding how family planning officials discovered her pregnancy was implausible and undermined the credibility of her testimony (IJ at 6-7; Exh. 2, Tab A). *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Yan v. Mukasey*, 509 F.3d 63, 67 (2d Cir. 2007) (per curiam) (stating that the Court of Appeals for the Second Circuit will not disturb an inherent plausibility finding where the Immigration Judge's finding is "tethered to record evidence, and there is nothing else in the record from which a firm conviction of error could properly be derived").

The Immigration Judge's findings regarding the respondent's demeanor and the implausibility of her account undermine the veracity of her claim of persecution and sufficiently support the Immigration Judge's adverse credibility finding. *See Xiu Xia Lin v. Mukasey*, 534 F.3d at 166. To the extent the Immigration Judge based his adverse credibility determination on other aspects of the respondent's testimony, we need not address these issues because we conclude, based on the totality of the evidence and all relevant factors, that the Immigration Judge did not clearly err in finding that the respondent's testimony was not credible (IJ at 3-8). *See Matter of J-Y-C-*, 24 I&N Dec. at 263-66; 8 C.F.R. § 1003.1(d)(3)(i).

Having discerned no clear error in the Immigration Judge's adverse credibility determination, we affirm the Immigration Judge's denial of the respondent's applications for asylum and withholding of removal (IJ at 9). *See Matter of M-S-*, 21 I&N Dec. 125, 129 (BIA 1995) (noting that a persecution claim that lacks veracity cannot satisfy the burden of proof necessary to establish eligibility for asylum and withholding of removal). The documentary evidence in the record is insufficient on its own to satisfy the respondent's burden of proving that she suffered past persecution in China. *See* 8 C.F.R. § 1208.13(b)(1). The medical document in the record notes only that the respondent had an abortion, but does not indicate that the abortion was forced (IJ at 8-9; Exh. 2, Tab A). Although the record contains a letter from the respondent's brother indicating that the respondent told him she had a forced abortion, the Immigration Judge did not err in giving this letter limited weight because the brother was not available for cross examination (IJ at 9; Exh. 4, Tab H). *See Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 215 (BIA 2010) (giving diminished weight to letters from friends and family who are not available for cross examination), *abrogated on other grounds by Hui Lin Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012). Thus, this letter even when considered with the medical document and the country conditions evidence in the record is insufficient to satisfy the respondent's burden of proof for asylum and withholding of removal (Exh. 5; Exh. 4, Tab H; Exh. 2, Tab A). *See* 8 C.F.R. §§ 1208.13(a), 1208.16(b).

Turning to the respondent's application for protection under the Convention Against Torture, we agree with the Immigration Judge that the documentary evidence alone is insufficient in this case to satisfy the respondent's burden of proving that she will more likely than not be tortured in China by, at the instigation of, or with the consent or acquiescence of a public official (IJ at 9; Exh. 5; Exh. 4, Tab H; Exh. 2, Tab A). *See* 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a). The medical document stating that the respondent had an abortion and the respondent's brother's letter indicating that she told him it was a forced abortion are insufficient to establish that the respondent suffered past torture in China (Exh. 4, Tab H; Exh. 2, Tab A). *See* 8 C.F.R. § 1208.16(c)(3)(i). Likewise the general country conditions evidence in the record is insufficient to demonstrate that the respondent will more likely than not be tortured upon her return to China (IJ at 9; Exh. 5). *See* 8 C.F.R. § 1208.16(c)(2). Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) New York, NY

Date: MAY 28 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Stuart Altman, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of China, has appealed from an Immigration Judge's May 10, 2018, decision denying her applications for asylum, withholding of removal, and protection under the Convention Against Torture. The Department of Homeland Security has not filed a response to the respondent's appeal. The appeal will be dismissed.

We review findings of fact, including credibility findings, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, or judgment, and all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent alleges she suffered persecution in China in April 2005 when Chinese authorities forced her to have an abortion (Tr. at 24-25; Exh. 2). The Immigration Judge found that the respondent did not comply with the requirements to submit her fingerprints and biometrics and terminated her applications for asylum, withholding of removal, and protection under the Convention Against Torture pursuant to 8 C.F.R. § 1208.10 (IJ at 7-8). In the alternative, the Immigration Judge also found that the respondent did not establish by clear and convincing evidence that she filed her asylum application within 1 year of her arrival in the United States (IJ at 9-10). The Immigration Judge further found the respondent's claim of forced abortion not credible because her testimony was general about the material details of the alleged abortion (IJ at 10). Moreover, the Immigration Judge found that the respondent did not adequately corroborate her claim and thus did not meet her burden of proof that she was a victim of a forcible abortion (IJ at 11-12).

We determine that the Immigration Judge erred in concluding that the respondent abandoned her applications for relief for failure to have fingerprints taken or otherwise complete the biometrics requirement. The record does not show that the Immigration Judge complied with the procedural prerequisites for such an order, as outlined in *Matter of D-M-C-P-*, 26 I&N Dec. 644, 649-50 (BIA 2015). The hearing transcript does not reflect that there was any discussion on the record to show that the respondent was informed of the deadline for completing the biometrics requirement or the consequences of non-compliance, including the possibility that her applications for relief would be deemed abandoned. As such, we conclude that the respondent did not abandon her applications for relief.

However, we agree with the Immigration Judge that the respondent did not meet her burden of proof for asylum or withholding of removal. While we acknowledge the Immigration Judge's

concerns with regard to the respondent's credibility, we need not reach this issue (IJ at 10). Nor do we need to reach the Immigration Judge's finding that the respondent did not meet her burden of showing that she filed a timely asylum application (IJ at 9-10). Rather, we agree with the Immigration Judge that even assuming, for purposes of this appeal, that the respondent filed a timely asylum application and was credible, she has not met her burden of proof with respect to her requests for asylum and withholding of removal.[1] The Immigration Judge did not find the respondent's testimony sufficient to meet her burden of proof where the respondent did not provide reasonably available evidence to corroborate the material facts underlying her claim (IJ at 11-12). *See* section 208(b)(1)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)(ii); *Matter of L-A-C-*, 26 I&N Dec. 516, 518-19 (BIA 2015) (regardless of whether a respondent is deemed credible, he has the burden to corroborate the material elements of his claim where evidence is reasonably available).

The respondent asserts that she suffered past persecution when family planning officials forced her to have an abortion after she became pregnant at age 16 as a result of a relationship with her former boyfriend (IJ at 11; Respondent's Br. at 4-5). However, she has not provided proof of the alleged relationship with her former boyfriend or proof of the forced abortion and interactions with family planning officials even though she admitted that documentation exists in China (IJ at 11-12; Tr. at 39-41). Nor did she present evidence to support her claim that after the forced abortion she became pregnant again, was prevented from marrying her boyfriend under the marriage law, and that she gave birth to a baby with the help of an underground midwife, but her boyfriend took the baby away (IJ at 11-12; Tr. at 28-30, 39).

We agree with the Immigration Judge that it was reasonable to expect the respondent to obtain credible documentation that would corroborate the material aspects of her claim. *See Liu v. Holder*, 575 F.3d 193, 197-198 (2d Cir. 2009).[2] An Immigration Judge may require corroboration and deny an application based on the failure to provide such corroboration, if the evidence is reasonably available. *See Yan Juan Chen v. Holder*, 658 F.3d 246, 251-52 (2d Cir. 2011). We discern no clear error in the Immigration Judge's finding that the respondent did not show that the evidence was not reasonably available and that she did not adequately corroborate her claim. Thus, we affirm the Immigration Judge's decision that the respondent did not meet her

[1] As we conclude that the respondent did not adequately corroborate her asylum claim, we need not reach the Immigration Judge's finding that the respondent did not testify credibly that, upon the advice of a snakehead, she lied to an immigration officer about how long she had been in the United States when she was arrested in August 2013 (IJ at 9-10; Tr. at 39).

[2] We affirm the Immigration Judge's refusal to admit into evidence documents the respondent filed with the Immigration Court on April 12, April 27, and April 30, 2018, because the documents were untimely, and the respondent did not make a timely motion to extend the filing deadline or otherwise provide sufficient reasons to excuse the late filings (IJ at 8-9; Tr. at 18-19). While the respondent has challenged on appeal the Immigration Judge's refusal to grant a continuance so that she could complete the biometrics requirements, she has not challenged on appeal the Immigration Judge's finding that she waived her right to submit the untimely filed documents (IJ at 9).

burden of proving eligibility for asylum and withholding of removal. *See Matter of Y-B-*, 21 I&N Dec. 1136, 1139 (BIA 1998).

The respondent's application for protection under the Convention Against Torture was also properly denied (IJ at 12). 8 C.F.R. § 1208.16(c). The respondent's claim is supported by the same factual predicate as she claimed for asylum, which lacked adequate corroboration. She has not alleged what evidence supports her claim that she will be tortured upon her return to China. Moreover, we discern no legal error or clear factual error in the Immigration Judge's finding that she has not shown that she was tortured in the past and that she will more likely than not be tortured by or at the instigation of, or with the consent or acquiescence of, a public official, or other person acting in an official capacity (to include the concept of willful blindness). 8 C.F.R. §§ 1208.16(c)(2) and 1208.18(a)(1).

Accordingly, the following order is entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

Board Member Anne J. Greer respectfully dissents without opinion.

Decision of the Board of Immigration Appeals

Files: A(b) (6) – New York, NY
A(b) (6)

Date: MAY 26 2020

In re: (b) (6)
(b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Keith S. Barnett, Esquire

APPLICATION: Asylum; withholding of removal

The respondents,[1] natives and citizens of the People's Republic of China, appeal from the Immigration Judge's July 3, 2018, decision denying their applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3).[2] The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo questions of law, discretion, and judgment, and all other issues in appeals from an Immigration Judge's decision. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge rendered adverse credibility findings based on "striking inconsistencies between the testimony of the respondents at trial and their individual credible fear interview[s] and statements" (IJ at 6-9). Because the Immigration Judge's adverse credibility findings are not clearly erroneous, we deny the respondents' request to overturn them. *See* section 208(b)(1)(B)(iii) of the Act; *Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 164 (2d Cir. 2008) (holding that an immigration judge "may rely on omissions and inconsistencies that do not directly relate to the applicant's claim of persecution as long as the totality of the circumstances establish that the applicant is not credible"); 8 C.F.R. § 1003.1(d)(3)(i).

The respondents argue that the Immigration Judge should have accorded limited weight to their credible fear interview records because the Department of Homeland Security (DHS) did not present the interviewing asylum officers' testimony (Respondent's Br. at 19-20). However, it is the respondents' burden to establish eligibility for relief from removal, not the DHS's burden to

[1] The respondents are a husband (A(b) (6)) and wife ((b) (6)), who we will refer to as the respondent and the co-respondent, respectively.

[2] The Immigration Judge also denied the respondents' applications for protection under the Convention Against Torture, 8 C.F.R. § 1208.16(c), but the respondents do not meaningfully challenge the denial of those applications, so those issues are not before us. *See Matter of J-J-G-*, 27 I&N Dec. 808, 808 n.1 (BIA 2020).

disprove eligibility, and the respondents did not establish that the DHS infringed upon their rights in their proceedings. *See* sections 208(b)(1)(B)(i), 240(b)(4), 240(c)(4)(A)(i) of the Act. The respondents do not point to any instance in the record in which they sought to call the asylum officers as witnesses and were prevented from doing so. *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 190 (BIA 2018) (explaining that the Board "generally will not consider an argument or claim that could have been, but was not, advanced before the Immigration Judge" because "'[t]he Board is an appellate body whose function is to review, not to create, a record'" (quoting *Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984))). In addition, the respondents, through counsel, declined to object to any documents in the record (Tr. at 24). Thus, the Immigration Judge's reliance on those records was not misplaced. *See Matter of J-C-H-F-*, 27 I&N Dec. 211, 212 (BIA 2018) ("Generally, there is a presumption of reliability of Government documents.").

Regarding the respondent's credibility, the Immigration Judge found his testimony in court inconsistent with his previous sworn statements during his credible fear interview (IJ at 7-8). For example, in his prior statement, the respondent did not mention his wife's presence during the police raid of the underground church he attended in China (IJ at 7; Exh. 10 at 4-5), yet the respondent testified in court that his wife was present for the police raid (IJ at 7; Tr. at 41-42). This inconsistency is further solidified by the respondent's statement in his credible fear interview that his wife joined him in hiding after "people" came to his home looking for him following the police raid (IJ at 7; Exh. 10 at 5).

The respondents argue that the Immigration Judge clearly erred in finding these statements inconsistent because the asylum officer that conducted the credible fear interview did not specifically ask whether the respondent's wife was present during the police raid and because the respondent did not testify that his wife was with him in hiding (Respondents' Br. at 25). Regarding the latter argument, the respondent unambiguously testified that he and his wife fled the police raid together to the home of a friend who hid them, but he previously asserted in his credible fear interview that his wife joined him in hiding later (IJ at 7; Tr. at 44-47; Exh. 10 at 5). Regarding the former argument, for purposes of analyzing credibility, omissions and inconsistencies are "functionally equivalent." *See Lin v. Mukasey*, 534 F.3d 162, 166 n.3 (2d Cir. 2008). Moreover, even if the respondent identified some ambiguity in the record, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985); *Matter of Y-I-M-*, 27 I&N Dec. 724, 726-27 (BIA 2019) ("[A]n Immigration Judge is not required to adopt an applicant's explanation for an inconsistency if there are other permissible views of the evidence based on the record." (citing *Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011), *pet. for review granted and remanded on other grounds by Radojkovic v. Holder*, 599 F. App'x 646 (9th Cir. 2015))).

The Immigration Judge also found the respondent's prior statement during his credible fear interview that he did not know of any "illegal churches" other than the one he attended inconsistent with his testimony that his wife previously attended another underground church (IJ at 7; Tr. at 32-35; Exh. 10 at 5). The respondent argues that this finding is clearly erroneous because the respondent did not know that the gatherings were illegal until the police raid, and at the time of the credible fear interview the respondent might not have known of the other church his wife attended or whether it remained open (Respondent's Br. at 25-26). The first argument is

unpersuasive because it misstates the premise — the respondent was asked whether he knew of other illegal churches in the present tense, rather than whether he knew of them at some point prior to the police raid (Exh. 4 at 5 ("[D]o you know of any other illegal churches[?]")). The second argument is similarly problematic — the respondent testified that he was contemporaneously aware that his wife attended another church in China, but that he did not learn that it was an underground church until later (Tr. at 33). The third argument is speculative absent factfinding that exceeds the scope of our review. Furthermore, where, as here, such an issue is first raised on appeal, we will not rely on it to discern clear error in the Immigration Judge's factfinding. *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. at 190; 8 C.F.R. § 1003.1(d)(3)(iv) ("[T]he Board will not engage in factfinding in the course of deciding appeals."). Thus, we affirm the Immigration Judge's finding that the respondent did not testify credibly, as his analysis is not clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Xia Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 338 n.19 (2d Cir. 2006) (finding an Immigration Judge "did not err in stressing the cumulative impact of [minor] inconsistencies in making his adverse credibility determination").

Regarding the co-respondent's credibility, the Immigration Judge also found her testimony in court inconsistent with her prior credible fear interview (IJ at 6-7). In her previous statement, the co-respondent described fleeing the police raid with her husband before the police entered the underground church, but she testified in court that she was present for the "chaos" which ensued once the police entered the church (IJ at 7; Tr. at 100-01 (describing herself as "hiding in a corner" while the police "started to punch people"); Exh. 11 at 8 (stating that she "ran away and left before anything happened")).

The co-respondent argues that she was detained and nervous and was using a telephonic interpreter when she gave her credible fear interview statement, whereas she had the benefit of 2 years' reflection and the assistance of counsel at trial (Respondent's Br. at 23, 26; Tr. at 121-24).[3] As to reflection, we are unpersuaded that the co-respondent's recollection of events improved with time absent some further explanation. As to the assistance of counsel, we note that the co-respondent elected to waive her counsel's presence at her credible fear interview (Exh. 11 at 1, 6).

Insofar as the co-respondent argues that her detainment, nerves, or telephonic interpreter hampered her ability to participate in the interview, we are unpersuaded that the respondent's only asserted instance of miscommunication justifies the determination that the entire record of the interview is unreliable (Respondents' Br. at 23). Specifically, the co-respondent was asked twice whether her husband was ever harmed and she answered "Because of this we were just so afraid to go home" the first time and "No" the second time (Exh. 11 at 8). We agree that these responses raise some concern, but determine that this concern is overcome by the remainder of the interview, which contains questions designed to elicit the details of the claim, follow-up questions to develop

[3] The co-respondent also argues that a close reading of the credible fear interview establishes that there was no inconsistency, but we discern no more support in the evidence for the co-respondent's reading than for the Immigration Judge's finding (IJ at 7; Respondents' Br. at 21-23; Tr. at 100-01; Exh. 11 at 8). Thus, we discern no clear error because an Immigration Judge is not required to accept an alien's interpretation of the evidence, even if plausible, where there are other permissible views of the evidence based on the record. *See Matter of D-R-*, 25 I&N Dec. at 455.

the co-respondent's account, generally responsive answers, and no indication that the co-respondent was apprehensive due to prior interrogation experiences in her home country (IJ at 6). *See Zhang v. Holder*, 585 F.3d 715, 725 (2d Cir. 2009) (applying the *Ramsameachire v. Ashcroft*, 357 F.3d 169, 179-80 (2d Cir. 2004), factors to analyze the reliability of a credible fear interview). Thus, we discern no clear error in the Immigration Judge's finding that the co-respondent did not testify credibly. *See* 8 C.F.R. § 1003.1(d)(3)(i).[4]

As the respondents do not contest the weight that the Immigration Judge accorded to the remaining evidence, and we discern no error in that regard, we affirm the Immigration Judge's decision to deny the respondents' applications for asylum and withholding of removal under the Act. *See Matter of M-S-*, 21 I&N Dec. 125, 129 (BIA 1995) (stating that "[a] persecution claim which lacks veracity cannot satisfy the burden[] of proof ... necessary to establish eligibility for asylum"); *see also Kambolli v. Gonzales*, 449 F.3d 454, 457 (2d Cir. 2006) ("Because Kambolli did not demonstrate his eligibility for asylum, the [Immigration Judge] did not err in determining that Kambolli failed to meet his burden to establish entitlement to withholding of removal under the INA") (citing *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999))). Consequently, we need not reach the respondents' remaining appellate arguments regarding eligibility for asylum or withholding of removal under the Act (Respondents' Br. at 33-36). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

[4] Even accepting the respondents' argument that the respondent's father's letter is not inconsistent with their testimony, we still find no clear error in the Immigration Judge's determination that the respondents did not provide sufficiently credible testimony (Respondent's Br. at 27). *Diallo v. Bd. of Immigration Appeals*, 548 F.3d 232, 234 n.1 (2d Cir. 2008) (noting that credibility determinations should consider the totality of the circumstances).

Matter of H-Y-Z-, Respondent

Decided November 13, 2020

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Absent a showing of prejudice on account of ineffective assistance of counsel, or a showing that clearly undermines the validity and finality of the finding, it is inappropriate for the Board to favorably exercise our discretion to reopen a case and vacate an Immigration Judge's frivolousness finding.

FOR RESPONDENT: Jan Potemkin, Esquire, New York, New York

FOR THE DEPARTMENT OF HOMELAND SECURITY: Gregory Mayer, Assistant Chief Counsel

BEFORE: Board Panel: KELLY, COUCH, Appellate Immigration Judges; PEPPER, Temporary Appellate Immigration Judge

COUCH, Appellate Immigration Judge:

In a decision dated June 28, 2004, an Immigration Judge denied the respondent's applications for asylum and related relief and ordered her removed from the United States.[1] We dismissed the respondent's appeal on October 27, 2005, and we denied her motion to reconsider our decision and reopen the proceedings on December 22, 2005. The respondent filed a second motion to reopen on November 12, 2019. The motion will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of the People's Republic of China. In proceedings before the Immigration Judge, she conceded that she is removable, and she applied for relief from removal. The Immigration Judge found that the respondent's testimony was not credible and, after advising her of the adverse consequences of knowingly filing a frivolous asylum

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[1] The respondent also applied for withholding of removal and requested protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988).

application, determined that "material elements" of her claim were "deliberately fabricated," as required for a frivolousness finding under 8 C.F.R. § 1208.20 (2004).[2]

The respondent's first attorney who represented her at trial timely appealed that ruling, alleging as one of the four reasons for the appeal that the "Immigration Judge erred in finding the Respondent's application to be frivolous as it was not fabricated." The respondent's second counsel prepared and filed the respondent's appellate brief, which did not address the frivolous application finding. We dismissed the respondent's appeal, and specifically affirmed the Immigration Judge's determinations that she lacked credibility and submitted a frivolous application for asylum.

A third counsel filed a petition for review of our decision, which the United States Court of Appeals for the Third Circuit denied on December 18, 2006.[3] *Zhou v. Att'y Gen. of U.S.*, 206 F. App'x 237, 239 (3d Cir. 2006). Quoting the Immigration Judge's finding that the respondent's asylum application was frivolous, the court concluded that there was "no basis to reject the findings of either the [Immigration Judge] or the [Board]." *Id.*

On November 28, 2005, while the respondent's petition for review was pending, the same attorney also filed a motion to reconsider our decision and reopen the removal proceedings based on an alleged mistranslation of a foreign document that was previously submitted and considered as evidence by the Immigration Judge. We denied the motion, which was not appealed.

We now address the respondent's second motion to reopen, filed by her fourth attorney 14 years after we dismissed her appeal and denied her motion, which seeks to vacate the Immigration Judge's finding that she knowingly filed a frivolous asylum application in an effort to overcome the statutory bar

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[2] The Immigration Judge appropriately based his findings on the respondent's lack of credibility and poor demeanor while testifying within the context of other contradictory evidence in the record. *See Matter of Y-L-*, 24 I&N Dec. 151, 155 (BIA 2007) (recognizing that "the serious consequences of a frivolousness finding" require Immigration Judges to afford asylum applicants certain procedural safeguards under the regulation); *see also Matter of B-Y-*, 25 I&N Dec. 236, 240 (BIA 2010) ("[W]hile some incorporation by reference from the adverse credibility findings and analysis is permissible, the Immigration Judge's frivolousness determination should separately address the respondent's explanations in the context of how they may have a bearing on the materiality and deliberateness requirements unique to that determination.").

[3] The respondent has made no reference in her current motion to the fact that our 2005 decision was later affirmed by the Third Circuit. Although a supplemental filing made a passing reference to the denial of her petition for review, her current counsel has not provided the official citation to the case. Counsel is admonished that a moving party "*shall* state whether the validity of the . . . removal order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status." 8 C.F.R. § 1003.2(e) (2020) (emphasis added).

to benefits in section 208(d)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1158(d)(6) (2018). She also seeks reopening based on the fact that on January 27, 2014, her husband filed a petition to accord her derivative status as a U nonimmigrant under section 101(a)(15)(U) of the Act, 8 U.S.C. § 1101(a)(15)(U) (2012).[4]

II. ANALYSIS

The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. *See* 8 C.F.R. § 1003.2(a) (2020). In order to sustain his or her burden on a motion to reopen, an alien must establish that the ultimate relief they seek would be merited as a matter of discretion. *See Matter of Coelho*, 20 I&N Dec. 464, 472 (BIA 1992). Motions to reopen are disfavored and strict limits are enforced in removal proceedings where every delay works to the advantage of an alien illegally residing in the United States who wishes to remain. *INS v. Doherty*, 502 U.S. 314, 323 (1992); *INS v. Abudu*, 485 U.S. 94, 107 (1988); *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 131 (3d Cir. 2001); *Matter of S-Y-G-*, 24 I&N Dec. 247, 252 (BIA 2007). The respondent has the heavy burden of demonstrating that the "new evidence offered would likely change the result in the case." *Matter of S-Y-G-*, 24 I&N Dec. at 251 (quoting *Matter of Coelho*, 20 I&N Dec. at 473).

There are three principal grounds on which an Immigration Judge or the Board may deny a motion to reopen immigration proceedings: (1) the movant has failed to establish a prima facie case for the relief sought, (2) the movant has failed to introduce previously unavailable material evidence that justified reopening, or (3) in cases in which the ultimate grant of relief being sought is discretionary, the Board can pass by the first two bases for denial and determine that even if they were met, the movant would not be entitled to the discretionary grant of relief.[5] *Filja v. Gonzales*, 447 F.3d 241, 255 (3d Cir. 2006) (citations omitted).

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[4] The only relief the respondent seeks relates to her derivative status claim, so we need not address the effect of the section 208(d)(6) bar on a claim to withholding of removal under the Act or the Convention Against Torture. *See* 8 C.F.R. § 1208.20 ("[A] finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal.").

[5] A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. *See* 8 C.F.R. § 1003.2(a). With limited exceptions, a motion to reopen must be filed within 90 days of the date of entry of a final administrative order of deportation or removal. *See* section 240(c)(7)(C)(i) of the Act, 8 U.S.C. § 1229a(c)(7)(C)(i) (2018); 8 C.F.R. § 1003.2(c)(2). Absent certain exceptions

In her motion to reopen, the respondent requests we vacate the Immigration Judge's determination that she knowingly filed a frivolous application for asylum, so she may overcome the statutory bar precluding her from receiving any immigration benefit under section 208(d)(6) of the Act. Through counsel, the respondent contends that the Immigration Judge habitually made erroneous frivolousness findings in asylum cases like hers, which she was unable to overcome on appeal due to her second attorney's ineffective assistance of counsel in the preparation and filing of her appellate brief. *Cham v. Att'y Gen. of U.S.*, 445 F.3d 683 (3d Cir. 2006).

A claim of ineffective assistance of counsel, if properly established, may constitute proper grounds for reopening removal proceedings. *Xu Yong Lu*, 259 F.3d at 131–32. In the case of untimely motions to reopen, ineffective assistance of counsel can serve as the basis for equitable tolling of the time limit for filing only if it is substantiated and accompanied by a showing of due diligence. *Alzaarir v. Att'y Gen. of U.S.*, 639 F.3d 86, 90 (3d Cir. 2011) (per curiam) (citing *Mahmood v. Gonzales*, 427 F.3d 248, 252 (3d Cir. 2005)). The Board's "sua sponte" authority to reopen or reconsider cases is limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations. *Chehazeh v. Att'y Gen. of U.S.*, 666 F.3d. 118, 140 (3d Cir. 2012) (citing *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997)).

A.

A finding that an application for asylum is frivolous, "unlike a determination in regard to eligibility for [other] form[s] of relief . . . , is a preemptive determination which, once made, forever bars an alien from any benefit under [section 208(d)(6) of] the Act." *Matter of Y-L-*, 24 I&N Dec. 151, 157 (BIA 2007). We appreciate the severity of the consequences accompanying a finding of frivolousness, which has been described as a "death sentence" for an asylum-seeker's hopes of securing permanent, lawful residence in the United States. *Luciana v. Att'y Gen. of U.S.*, 502 F.3d 273, 278 (3d Cir. 2007) (citation omitted). And as the Attorney General emphasized when 8 C.F.R. § 1208.20 was promulgated in 1997, the regulatory standards for the frivolousness finding were formulated "with the severity of the consequences in mind." *Matter of Y-L-*, 24 I&N Dec. at 158 (citation omitted).

"The bar on relief due to the filing of a frivolous asylum application becomes 'effective as of *the date of a final determination* on such application.'" *Ribas v. Mukasey*, 545 F.3d 922, 931 (10th Cir. 2008) (quoting

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not applicable to this case, section 240(c)(7)(A) of the Act limits an alien ordered removed to filing only one motion to reopen. *See Luntungan v. Att'y Gen. of U.S.*, 449 F.3d 551, 557 (3d Cir. 2006).

section 208(d)(6) of the Act). Therefore, the subsequent filing of a motion to reopen, even one that challenges a frivolousness finding, has no effect on the statutory bar to immigration benefits. *Id.* (holding that a frivolousness finding was final despite the Board's erroneous grant of a motion to reopen that did not address that finding). This is consistent with the regulation regarding motions to reopen before the Immigration Judge at 8 C.F.R. § 1003.23(b)(4)(i) (2020), which states that if an "asylum application was denied based upon a finding that it was frivolous, then the alien is ineligible to file either a motion to reopen or reconsider"). Because the respondent's frivolousness finding was upheld by the Board and the Third Circuit, it is final, and section 208(d)(6) of the Act renders her ineligible for any relief.

Absent a showing of prejudice on account of ineffective assistance of counsel, or a showing that clearly undermines the validity and finality of the finding, it is inappropriate for the Board to favorably exercise our discretion to reopen a case and vacate an Immigration Judge's frivolousness finding. Otherwise, cases could be reopened for the sole purpose of avoiding the adverse consequences of the statutory bar to any immigration benefit imposed by the Act. Indeed, without such prejudice, to allow an asylum applicant to relitigate a finding of frivolousness "would undermine both the plain language of, and the policy behind, section 208(d)(6)—as well as the potency of the required warnings." *Matter of X-Y-C-*, 25 I&N Dec. 322, 325–26 (BIA 2010). An alien, such as the respondent, who filed a frivolous application as determined by an Immigration Judge "could escape the consequences deliberately chosen by Congress to prevent such abuse of the system" if we permit her to later relitigate the issues which led to those consequences simply because she may be eligible for legal status through some alternate means. *Id.* at 326; *see also Matter of G-D-*, 22 I&N Dec. 1132, 1135–36 (BIA 1999) ("Engaging in such a readjudication would be tantamount to granting reconsideration, with its concomitant expenditure of adjudicatory resources, even if we were ultimately to determine that the new precedent did not alter the outcome.").

Applying section 208(d)(6) of the Act to this case, the Immigration Judge's frivolousness finding became final on October 27, 2005, when we dismissed the respondent's appeal of his decision. 8 C.F.R. § 1208.20. The consequences of this finding should have been apparent to the respondent at the time because she was advised of them during the conduct of her removal proceedings, and through a warning printed on the asylum application (Form I-589) she signed under oath. Thus, the respondent had both constructive and actual notice that she was statutorily barred from receiving any immigration benefit at the time her husband filed a Petition for Qualifying Family Member of U-1 Recipient (Form I-918, Supplement A) on January 27, 2014. The respondent therefore fails to establish prima facie eligibility

for U nonimmigrant status under section 101(a)(15)(U) of the Act, because at the time her husband filed his petition, the respondent was subject to a statutory bar from such relief based on her previous filing of a frivolous asylum application. *See Tchuinga v. Gonzales*, 454 F.3d 54, 60 (1st Cir. 2006) (citing 8 U.S.C. § 1158(d)(6)).

B.

The respondent's motion does not demonstrate an exceptional situation that would warrant the exercise of our discretionary authority to reopen her proceedings. *See Sang Goo Park v. Att'y Gen. of U.S.*, 846 F.3d 645, 650 (3d Cir. 2017) (citing 8 C.F.R. § 1003.2(a)). In this case, the respondent seeks to reopen her proceedings based on equities that were acquired while she remained illegally in the United States after being ordered removed. Equities established in this manner generally do not constitute such truly exceptional circumstances as to warrant discretionary reopening. *See Matter of J-J-*, 21 I&N Dec. at 984 (citing former 8 C.F.R. § 3.2(a) (1997)).

Nor do we consider the respondent's claim of ineffective assistance of counsel to be a valid basis to reopen her removal proceedings and vacate the frivolousness finding. *See* 8 C.F.R. § 1003.2(a). Based upon the record presented, we are not persuaded that the filing deadline should be equitably tolled because the respondent was prejudiced by the ineffective assistance of her second counsel resulting from the appellate brief he filed in 2005.

Although the respondent has substantially complied with the procedural requirements for a claim of ineffective assistance of counsel as outlined in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), she did not establish that the deficiency in the appellate brief filed was prejudicial to her case. *Id.* at 640; *see also Fadiga v. Att'y Gen. of U.S.*, 488 F.3d 142, 155 (3d Cir. 2007). The respondent's previous counsel had already explicitly disputed the frivolousness finding on her Notice of Appeal (Form EOIR-26). Contrary to the respondent's contention, this Board considered both the adverse credibility and frivolousness findings on the merits. Moreover, a third counsel filed a timely motion to reconsider, which again set forth numerous arguments contesting the adverse credibility finding, but the motion was denied.

On these facts, we find no reasonable likelihood that the outcome of the respondent's proceedings would have been different if counsel had challenged the frivolousness finding in the appellate brief he prepared and filed for the respondent. *See Gui Ying Chen v. Att'y Gen. of U.S.*, 488 F. App'x 607, 609–10 & n.2 (3d Cir. 2012) (per curiam) (rejecting the alien's assertion that the outcome of her asylum claim would have been different but for counsel's ineffective assistance in failing to expressly address a

frivolousness finding on appeal); *see also Zheng v. Gonzales*, 422 F.3d 98, 107 & n.6 (3d Cir. 2005) (holding that counsel's failure to file a brief was not prejudicial because the alien's motion to reopen showed no reason to believe that the denial of asylum might otherwise have been reversed). Therefore, no prejudice has been established. *Matter of Lozada*, 19 I&N Dec. at 638-–39; *cf. Huai Cao v. Att'y Gen. of U.S.*, 421 F. App'x 218, 220–21 (3d Cir. 2011) (finding prejudice from ineffective assistance of counsel for failure to expressly challenge a frivolousness finding on appeal).

Despite the various efforts of the three attorneys who represented the respondent, she has also not explained why she apparently made no inquiries regarding the frivolousness finding or took any steps to contest it between the years 2005 and 2019. This inaction for the nearly 14-year period between our administratively final order and the filing of her current motion demonstrates a lack of due diligence. *Alzaarir*, 639 F.3d at 91.

Even assuming that the time and number bars may be equitably tolled, the Third Circuit has declined to apply that remedy in the absence of some unfairness surrounding a previous motion to reopen, because if an alien was provided "a fair chance to be heard," there is no equitable reason to permit another motion. *Luntungan v. Att'y Gen. of U.S.*, 449 F.3d 551, 557–58 (3d Cir. 2006) (per curiam). Since the respondent's first motion to reopen gave her a fair opportunity to allege any impropriety in regard to her application for asylum, we are unpersuaded that the time and number bars should be equitably tolled based on her claim of ineffective assistance of counsel.

III. CONCLUSION

For the reasons set forth above, we conclude that the respondent is ineligible for any immigration benefit under section 208(d)(6) of the Act. The respondent has not made a persuasive claim for ineffective assistance of counsel that constitutes exceptional circumstances which clearly undermines the validity or finality of the Immigration Judge's frivolousness finding. We therefore decline to exercise our discretionary authority to reopen these proceedings as the respondent has not demonstrated prima facie eligibility for the relief sought. *Filja*, 447 F.3d at 255 (citing *Doherty*, 502 U.S. at 323, and *Abudu*, 485 U.S. at 105) (other citations omitted). Accordingly, the respondent's motion to reopen will be denied.

ORDER: The motion to reopen is denied.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland

Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $813 for each day the respondent is in violation. *See* Section 274D of the Act, 8 U.S.C. § 1324d (2018); 8 C.F.R. § 280.53(b)(14) (2020).

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) New York, NY

Date: MAY - 5 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Morris Wu, Esquire

APPLICATION: Continuance

The respondent, a native and citizen of China, has appealed the Immigration Judge's decision dated July 18, 2018, denying the request for a continuance and finding that all applications for relief were deemed abandoned. The Department of Homeland Security (DHS) has not filed a response to the appeal. The appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent contends that he requested a brief continuance to allow him to marry his lawful permanent resident fiancé to permit her to file a visa petition on his behalf. The respondent asserts that his prior counsel incorrectly advised him that the individual hearing on July 18, 2018, had been changed to a master calendar hearing. The respondent claims that he was not asked to prepare in advance for the individual hearing, nor was he asked to submit any evidence or required documentation to the Immigration Court. The respondent states on appeal that he did not realize that he had to file a complaint in order to file an appeal. The respondent has filed an affidavit on appeal.

An Immigration Judge may grant a continuance where good cause is shown. *See* 8 C.F.R. §§ 1003.29, 1240.6; *see also Matter of L-A-B-R- et al.*, 27 I&N Dec. 405, 406 (A.G. 2018); *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009); *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009). Furthermore, a failure to request relief in accordance with a schedule set by the Immigration Judge constitutes a waiver of the opportunity to file for such relief. 8 C.F.R. § 1003.31(c) (stating that if an application is not filed within the time limit set by the Immigration Judge, the opportunity to file that application shall be deemed abandoned). The Board has long held that applications for benefits under the Act are properly denied as abandoned when the alien fails to timely file them. *See Matter of R-R-*, 20 I&N Dec. 547, 549 (BIA 1992); *Matter of Jean*, 17 I&N Dec. 100, 102 (BIA 1979).

On de novo review pursuant to 8 C.F.R. § 1003.1(d)(3)(ii), we agree with the Immigration Judge's decision denying the respondent's motion to continue. We find that the Immigration Judge's decision to proceed with the hearing on July 18, 2018, was appropriate under the circumstances. The decision whether to grant a continuance is committed to the sound discretion

of the Immigration Judge, if good cause is shown. 8 C.F.R. §§ 1003.29 and 1240.6. Thus, an Immigration Judge's denial of a continuance request will not be overturned on appeal unless the respondent establishes that the denial deprived him of his due process right to a full and fair hearing. *See Matter of Luviano*, 21 I&N Dec. 235, 237 (BIA 1996) (citing *Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987)). The alien must show that actual prejudice materially affecting the outcome of the case resulted from the denial of the continuance. *See Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983).

The Immigration Judge noted that on July 16, 2018, the respondent filed a motion for a continuance (IJ at 2). The Immigration Judge denied the motion for a continuance on July 16, 2018, stating that the case had been calendared for a merits hearing over two years earlier, and finding that the respondent had a reasonable period of time within which to obtain corroborating evidence in support of his request for relief.[1] *Id.*

The Immigration Judge indicated that the respondent is engaged to his law permanent resident fiancé and she would be eligible to apply for naturalization in the year 2019. *Id.* The Immigration Judge considered the respondent's request for a continuance to marry his fiancé so that a visa petition could be filed by his finance once they married (IJ at 2-3). The Immigration Judge noted that the DHS counsel opposed any further adjournment of the case, and indicated that the parties had not identified any finite date on which they would expect to be married. Moreover, as the respondent's fiancé is a lawful permanent resident, the respondent is not eligible to adjust at this time, and the respondent has never submitted to fingerprints and/or complied with the biometrics requirements (IJ at 3). The Immigration Judge found that the respondent did not establish good cause for a continuance, noting that the events raised by the respondent are speculative as the respondent and his fiancé are not married, she is not a United States citizen, and the respondent has failed to comply with the fingerprinting and biometrics requirements under the Act and regulations. *Id.*

We agree with the Immigration Judge that the respondent was given sufficient time to comply with the biometrics requirements pursuant to *See* 8 C.F.R. § 1003.47. *See Matter of D-M-C-P-*, 26 I&N Dec. 644, 647-49 (BIA 2015) (finding that an Immigration Judge must provide proper notice of the biometrics requirements to a respondent). The Immigration Judge correctly denied the respondent's motion to continue for failure to establish good cause for a continuance. 8 C.F.R. §§ 1003.29 and 1240.6; *see Matter of L-A-B-R- et al.*, 27 I&N Dec. 405, 407 (A.G. 2018) (the use of continuances as a dilatory tactic is particularly pernicious in the immigration context, as persons illegally present in the United States who wish to remain have "a substantial incentive to prolong litigation in order to delay physical [removal] for as long as possible." (*quoting INS v. Rios-Pineda*, 471 U.S. 444, 450 (1985)); *Matter of Sanchez-Sosa*, 25 I&N Dec. 807, 815 (BIA 2012) (recognizing that a continuance should not be granted where it is being sought "as a dilatory tactic to forestall the conclusion of removal proceedings"). Furthermore, the respondent has not demonstrated that the Immigration Judge's decision to deny a continuance caused him prejudice.

[1] The record reflects that the respondent filed his application for asylum on February 4, 2016 (Tr. at 6-7; Exh. 2).

See Matter of Sibrun, 18 I&N Dec. 354, 356-57 (BIA 1983) (noting that an alien must show that the denial of the continuance caused actual prejudice).

Although the respondent asserts on appeal that he had ineffective assistance of counsel, he has not complied with all of the requirements in support of such a claim. *See Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988) (requiring that an alien file an affidavit detailing his agreement with former counsel and submit proof that he notified former counsel and the proper disciplinary authority of his allegations). The respondent claims that his former counsel incorrectly advised him that the individual hearing on July 18, 2018, had been changed to a master calendar hearing.

We note that the respondent has submitted an affidavit on appeal. However, the respondent has not submitted evidence that he informed his prior counsel of the allegations of ineffective assistance of counsel and provided him with an opportunity to respond, nor has the respondent submitted any evidence that a complaint has been filed with the appropriate disciplinary authority regarding such representation, and if not, why not. *See Twum v. INS*, 411 F.3d 54, 59 (2d Cir. 2005) (substantial compliance is required to deter meritless claims and to provide a basis for determining whether counsel's assistance was in fact ineffective); *see also Zheng v. U.S. Dep't of Justice*, 409 F.3d 43, 46-47 (2d Cir. 2005) (failure to comply substantially with the *Lozada* requirements constitutes forfeiture of an ineffective assistance claim); *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). The respondent has not complied with the procedural requirements for raising an ineffective assistance of counsel claim. Therefore, the respondent has not established ineffective assistance by his former counsel, and he has not established that the Immigration Judge erred in denying his request for a continuance.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY Date: MAY 2 6 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Michael Y. Zhang, Esquire

APPLICATION: Reopening; termination

This matter was last before the Board on July 29, 2011, when we denied the respondent's untimely motion to reopen. The Board entered the final administrative order in this matter on April 12, 2002, when we summarily dismissed the respondent's appeal of the Immigration Judge's August 9, 2002, decision. The respondent filed the present motion to reopen and terminate proceedings on November 15, 2019. The motion will be denied.

The respondent seeks sua sponte reopening and termination of the proceedings because he has obtained lawful permanent resident status. The respondent cites to *Matter of Yauri*, 25 I&N Dec. 103 (BIA 2009), but that case does not control this situation. The respondent states that, after these proceedings concluded, he departed the United States, was granted status at the United States Consulate at Guangzhou, China, and was then admitted to the United States as a lawful permanent resident. However, the respondent does not allege or show "exceptional circumstances" which would warrant sua sponte reopening and termination of these proceedings. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). The respondent's argument that his prior order of removal in these proceedings "may still cause problems and complexities," are hypothetical circumstances which do not amount to exceptional circumstances. Accordingly, the following order will be entered.

ORDER: The respondent's motion is denied.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) New York, NY

Date: MAY - 5 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: David X. Feng, Esquire

APPLICATION: Reopening; termination

The respondent is a native and citizen of China. On June 7, 2002, the Board affirmed the Immigration Judge's February 17, 1998, decision without opinion. On September 15, 2004, and September 28, 2007, the Board denied motions to reopen. On December 4, 2019, the respondent filed an untimely, number-barred motion to reopen and terminate because his petition for U Nonimmigrant status was approved for a period of 4 years. Section 240(c)(7) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c). The motion will be denied.

The respondent has not demonstrated that a statutory or regulatory exception to the time and number limitations apply, and the Department of Homeland Security has not agreed to a joint motion. *See* INA § 240(c)(7) of the Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c). *See also* 8 C.F.R. § 214.14(c)(5)(i) (A petitioner who is subject to an order of removal may file a motion to reopen and terminate, and DHS counsel may agree, as a matter of discretion, to join such motion to overcome any applicable time and numerical limitations of 8 C.F.R. § 1003.2). We decline to exercise our sua sponte discretionary authority to reopen proceedings because the respondent has not demonstrated an extraordinary situation justifying the exercise of our sua sponte authority. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997); 8 C.F.R. § 1003.2(a).

The respondent has been granted nonimmigrant status for a period of 4 years, and he is eligible to submit an application for adjustment of status after he has been physically present in the United States for a continuous period of at least 3 years after admission as a U-1 nonimmigrant. Considering the governing provisions of 8 C.F.R. § 214.14, the regulatory scheme addressing aliens with final orders who have been granted temporary status, and the circumstances presented in this case, we decline to exercise our discretionary sua sponte authority to reopen this proceeding. Accordingly, the respondent's motion to reopen will be denied. The following order will be issued.

ORDER: The motion is denied.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day

the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d: 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY

Date: MAY 1 3 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Theodore N. Cox, Esquire

APPLICATION: Reopening

The Board issued the final administrative order in this matter on May 21, 2002, which affirmed the Immigration Judge's denial of the respondent's application for asylum and withholding of removal. This matter was most recently before the Board on June 12, 2014, when we denied the respondent's previous untimely and number-barred motion to reopen his removal proceedings. On January 15, 2020, the respondent, a native and citizen of the People's Republic of China, filed the current motion to reopen based upon an approved visa petition (Form I-130), which was filed by his United States citizen son. The Department of Homeland Security has not filed a response to the motion. The motion will be denied.

The respondent's instant motion to reopen is untimely and number-barred. *See* sections 240(c)(7)(A), (C)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(c)(7)(A), (C)(i); 8 C.F.R. 1003.2(c)(2). Pursuant to section 240(c)(7)(C)(i) of the Act and 8 C.F.R. § 1003.2(c)(2), with certain exceptions not pertinent here, a motion to reopen in any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision. Here, the respondent's motion to reopen was filed well beyond the 90-day deadline and it is the third motion to reopen filed. *See* sections 240(c)(7)(A), (C)(i) of the Act. It has not been shown that any exception to the filing restrictions apply to this motion. *See generally* 8 C.F.R. § 1003.2(c)(3)(i)-(iv).

Sua sponte reopening is not warranted. We understand the respondent is the beneficiary of an approved Form I-130. He also claims his removal would result in extreme hardship to his United States citizen children and lawful permanent resident parents. While we recognize the respondent's removal will likely result in some hardship to his family and him, we emphasize that the Board invokes its sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and numerical limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations. *See Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (stating that "[t]he power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship"). The evidence offered with his motion is not indicative of a truly exceptional situation. Moreover, becoming potentially eligible for adjustment of status based on the approval of a Form I-130 filed long after the issuance of the respondent's final administrative order (18 years), is insufficient to warrant sua sponte reopening. *See Matter of Yauri*, 25 I&N Dec. 103, 105 (BIA 2009). We are not persuaded the motion demonstrates an exceptional situation such that sua sponte

reopening is warranted. *See Matter of G-D-*, 22 I&N Dec. at 1133-34. Accordingly, the respondent's untimely and number barred motion to reopen removal proceedings will be denied and the following order entered.

ORDER: The motion to reopen is denied.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A(b) (6) – New York, NY

Date: MAY 2 7 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Henry Zhang, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of China, was on September 16, 2004, ordered removed from the United States. On September 28, 2007, the Board dismissed his appeal from that decision. The respondent, on December 27, 2007, filed a motion to reopen that the Board denied on March 31, 2008. On January 13, 2020, the respondent filed a second motion to reopen. The motion will be denied.

The respondent's January 13, 2020, motion to reopen is both time and number-barred from consideration. *See* 8 C.F.R. § 1003.2(c)(2). In addition, the respondent presumably contends that he established an exceptional situation to reopen these proceedings sua sponte. *See Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) (holding that the Board's and the Immigration Judge's power to reopen or reconsider cases sua sponte is limited to exceptional situations and is not meant to cure filing defects or circumvent the regulations, where enforcing them might result in hardship). He states that on (b) (6), he married a United States citizen, and she filed a Petition for Alien Relative on his behalf. He further states that his spouse is in poor health, and she would suffer hardship if he were removed from the United States.

However, an alien's potential eligibility to become a lawful permanent resident of the United States is not, in and of itself, an exceptional situation to reopen a proceeding sua sponte. *See Matter of Yauri*, 25 I&N Dec. 103, 105 (BIA 2009) (becoming potentially eligible for adjustment of status is generally not a basis for granting an untimely motion to reopen); *Matter of G-D-*, 22 I&N Dec. 1132, 1137 (BIA 1999) (an alien's ability to become eligible for adjustment of status due to the passage of time after a failure to voluntarily depart is not an exceptional situation). In addition, the respondent has resided in the United States for more than 12 years since the time that his order of removal became final. Moreover, the respondent is an arriving alien in removal proceedings, and the Immigration Judge does not have jurisdiction to adjust his status to a lawful permanent resident of the United States. *See Matter of Yauri*, 25 I&N Dec. at 103. In addition, the respondent does not need for these removal proceedings to be reopened to apply for a provisional unlawful presence waiver with U.S. Citizenship and Immigration Services. In light of the foregoing, we decline to reopen these proceedings sua sponte.

Accordingly, the following order will be entered.

ORDER: The motion is denied.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A(b) (6) – New York, NY

Date: MAY - 8 2020

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Wendy Tso, Esquire

APPLICATION: Reconsideration

The respondent, a native and citizen of the People's Republic of China, moves for reconsideration of the Board's decision dated January 29, 2020. The Department of Homeland Security (DHS) has not replied to the motion. The motion will be denied.

In 1995, the Immigration Judge denied the respondent's application for relief from deportation; we dismissed the appeal of that decision in 1998. In 2010, the respondent filed a motion to reopen in order to reapply for relief; we denied that motion in 2011. The respondent filed a second motion to reopen on October 24, 2019, in order to pursue adjustment of status based on an approved Form I-130, Petition for Alien Relative, filed on her behalf by her United States citizen son. We denied the motion, finding that it was both untimely and numerically barred; that no exception to the time and number limits for filing a motion to reopen applied; that the respondent did not establish that equitable tolling was proper because she did not comply with the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1998), *aff'd* 857 F.2d 10 (1st Cir. 1988), concerning the alleged ineffective assistance of counsel or demonstrate that she exercised due diligence in pursuing her rights; and that the respondent did not establish a basis to reopen sua sponte. The current motion seeks reconsideration of that decision.

We will deny the motion to reconsider. The respondent has not shown any error of fact or law in our January 29, 2020, decision. 8 C.F.R. § 1003.2(b)(1). She addresses only our due diligence determination, asserting that she asked the DHS to join in a motion to reopen when the visa petition was filed and again when it was approved and that she was unaware of the alleged ineffective assistance of counsel and had divorced in the relevant time period and struggled to raise her children alone. Respondent's Motion at 2-3, Tabs B, C.

As we stated in our January 29, 2020, decision, the motion to reopen did not provide any reason for the delay between the approval of the visa petition and the filing of the motion to reopen. The motion to reconsider does not identify any relevant portion of the motion to reopen or associated evidence that we overlooked in addressing this issue. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). The submission of the new evidence of correspondence with the DHS is not a basis to reconsider our prior decision. *Id.* at 57-58. Inasmuch as that evidence may be construed as another motion to reopen, that motion is itself untimely and numerically barred. 8 C.F.R. § 1003.2(c)(2). Moreover, even if she last inquired with the DHS about joining in a motion to reopen in September 2017, the respondent does not specify when she learned that the DHS would

not join in the motion or otherwise offer further explanation for why she did not file the unilateral motion to reopen until October 24, 2019.

With respect to ineffective assistance of counsel, we stated in our January 29, 2020, decision that the respondent did not explain when she learned of the alleged ineffective assistance, and we determined that she knew or reasonably should have known about the alleged errors by prior counsel by May 7, 2003, based on a notice the DHS sent to her. Again, the motion to reconsider does not identify any relevant portion of the motion to reopen or associated evidence that we overlooked in addressing this issue. *Matter of O-S-G-*, 24 I&N Dec. at 58. The current assertions about respondent's personal circumstances continue to provide no insight about what steps she took between May 2003 and her divorce on (b) (6), concerning prior counsel's errors and her immigration proceedings.

In conclusion, the respondent has not demonstrated a basis to reconsider our January 29, 2020, decision. Accordingly, the following order will be entered.

ORDER: The motion is denied.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A(b) (6) – Falls Church, VA

Date: JUN - 2 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Tina Y. Howe, Esquire

APPLICATION: Reconsideration

This case was last before us on January 10, 2020, when we dismissed the respondent's appeal of an Immigration Judge's May 17, 2018, decision finding the respondent to be removable as charged and denying his application for cancellation of removal pursuant to section 240(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). The Immigration Judge also incorporated by reference his prior March 17, 2016, decision denying the respondent's applications for asylum and withholding of removal pursuant to sections 208 and 241(b)(3) of the Act, 8 U.S.C. §§ 1158 and 1231(b)(3), respectively, and protection under the Convention Against Torture pursuant to 8 C.F.R. § 1208.16(c)(2), and ordering the respondent removed. The respondent has now filed a motion that is styled as a motion to reconsider/reopen. The motion will be denied.

A motion to reconsider shall specify the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. *See* 8 C.F.R. § 1003.2(b)(1). We do not grant motions to reconsider that present arguments that either were already raised or could have been raised on direct appeal. *See Matter of O-S-G-*, 24 I&N Dec. 56, 57-58 (BIA 2006). We have considered the respondent's assertions in his motion, but determine that our prior decision was correct.

In our prior decision, we specifically found that the respondent had made no arguments challenging the Immigration Judge's denial of his applications for asylum, withholding of removal, or protection under the Convention Against Torture. Thus, we deemed those issues waived (BIA at 1). In his motion, the respondent now offers several arguments regarding the Immigration Judge's denial of these claims. However, the respondent does not assert that the Board erred in finding that he had not appealed these issues, and that those issues were therefore waived. Accordingly, the respondent has not shown any errors of fact or law in our prior decision that would allow us to now consider those waived issues.

As to the Board's decision affirming the denial of cancellation of removal, the respondent does not allege any error of fact or law in our prior decision. Accordingly, the motion to reconsider will be denied.

Insofar as the respondent submits new material that was not previously part of the record and seeks relief on the basis of the supplemented record, his motion is properly construed as a motion to reopen. *See Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991); 8 C.F.R. § 1003.2(c)(1). Reopening requires evidence of material new facts to be proven at a new hearing. *See* 8 C.F.R. § 1003.2(c)(1); *see also Matter of Coelho*, 20 I&N Dec. 464, 472-73 (BIA 1992) (explaining that a party who

seeks to reopen proceedings before the Immigration Judge bears a "heavy burden" of proof that the new evidence will likely change the result in the case, and that the Board may deny reopening for failure to establish a prima facie case for the relief sought). The respondent has not established that this newly-submitted evidence would likely change the result in this case.

The respondent has submitted recent treatment records for his son showing that he has suffered from a cough and fever (Respondent's Mot. at unpaginated 3; Tab A). However, in our prior decision, we observed that there was no dispute that the respondent's son (as well as his daughter) would remain in the United States in the event the respondent were to be removed to China, and we found no clear error in the Immigration Judge's finding that all treatment for the children's medical and developmental issues was, and would continue to be, covered by Medicaid or other public assistance (BIA at 2). While the respondent also asserts that his wife "underwent surgery" and was thus unable to provide an affidavit, he has not stated when this surgery was performed, what condition it was for, or how her surgery affects his claim for cancellation of removal.[1] While he stated that the surgery prevented her from submitting an affidavit, the issue of an affidavit (or lack thereof) was not at issue in our prior decision.

Accordingly, the following order will be entered.

ORDER: The motion is denied.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

[1] The respondent's wife is not a qualifying relative for cancellation purposes, such that any hardship to her because of the respondent's removal cannot be considered.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A(b) (6) – New York, NY

Date: JUN - 4 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Eric Y. Zheng, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of the People's Republic of China, filed a motion to reopen this Board's decision dated September 30, 2003, to allow him to apply for cancellation of removal, under section 240A(b)(1) of the Act, 8 U.S.C. § 1229b(b)(1). The motion will be denied.

On September 30, 2003, the Board dismissed the respondent's appeal from the Immigration Judge's decision, dated May 28, 2002, which denied his applications for asylum, withholding of removal, and protection under the Convention Against Torture. On October 2, 2019, the respondent filed an untimely motion seeking to reopen and remand the record to the Immigration Judge for consideration of an application for cancellation of removal. The respondent asserts that in light of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the Immigration Judge lacked jurisdiction over this matter, because the Notice to Appear (NTA) in this case did not specify a date and time for the initial removal hearing. The motion is untimely and will be denied. *See Matter of Cerna*, 20 I&N Dec. 399, 402 n.2 (BIA 1991) (discussing the characteristics of motions to reopen and motions to reconsider).

The jurisdictional issue raised in this motion is foreclosed by *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018). In that case, we established that a NTA that does not specify the time and place of an alien's initial removal hearing still vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act, 8 U.S.C. § 1229(a), as long as a Notice of Hearing (NOH) specifying this information is later sent to the alien. *See also Matter of Mendoza-Hernandez and Capula-Cortes*, 27 I&N Dec. 520, 523 (BIA 2019) (citing *Banegas Gomez v. Barr*, 922 F.3d 101, 112 (2d Cir. 2019) (holding that jurisdiction vests with the Immigration Court when the initial notice to appear does not specify the time and place of the proceedings, but notices of hearing served later include that information)). In the respondent's case, the record reveals he was personally served with the NTA, and, later, his attorney filed a motion to change venue from Texas to New York State, which was granted on July 31, 2001 (Exh. 2). He was later properly served on several occasions with a Notice of Hearing, and actually appeared before the Immigration Judge on May 28, 2002, for his asylum hearing.

Furthermore, as the Board explained in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), the Supreme Court described the dispositive question presented in *Pereira v. Sessions* as "narrow" and related to whether the "stop-time" rule that is applicable to cancellation of removal applications would be triggered by a NTA that lacked specific information about the time and

location of the hearing. The United States Court of Appeals for the Second Circuit recently found in *Banegas Gomez v. Barr*, 922 F.3d 101, 110 (2d Cir. 2019), the "stop-time" rule does not void jurisdiction in cases in which the NTA omits a hearing time or place. Here, as stated earlier in this decision, the Immigration Court established jurisdiction, and the respondent actually attended his hearings. Thus, the "stop-time" rule is inapplicable here. Additionally, the respondent has offered no persuasive argument for the Board to revisit our decision in *Matter of Bermudez-Cota*.

In *Matter of Mendoza-Hernandez*, 27 I&N Dec. 520, 529 (BIA 2019), we determined "that in cases where a notice to appear does not specify the time or place of an alien's initial removal hearing, the subsequent service of a notice of hearing containing that information perfects the deficient notice to appear, triggers the 'stop-time' rule, and ends the aliens period of continuous residence or physical presence in the United States." Here, the respondent entered the United States on or about May 27, 2001, was issued a notice to appear on May 28, 2001, which designated a place to appear for Immigration Court, but not a time (Exh. 1). On July 31, 2001, the Immigration Judge from the Harlingen, Texas Immigration Court granted the respondent's motion to change venue, and on August 1, 2001, the New York, New York Immigration Court mailed a hearing notice to the respondent's attorney. Hence, the respondent period of physical presence ended on August 1, 2001, when the notice of hearing was mailed to the respondent's counsel, and the respondent is unable to establish prima facie eligibility for cancellation of removal, because he did not establish 10 years of physical presence in the United States prior to the issuance of a notice to appear, or, in this case, a notice of hearing. *Id.* at 535.

Finally, the respondent has not established that these removal proceedings should be reopened sua sponte (Respondent's Br. at 4). *See Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999). We have considered the entirety of the respondent's arguments. Nonetheless, these claims, cumulatively considered, do not amount to an exceptional situation justifying sua sponte reopening. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). Accordingly, the respondent's untimely motion to reopen and remand will be denied.

ORDER: The motion is denied.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD