

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 SUMMARY ORDER
5

6 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL
7 REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO
8 THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION
9 OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS
10 CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF
11 COLLATERAL ESTOPPEL OR RES JUDICATA.
12

13 At a stated term of the United States Court of Appeals
14 for the Second Circuit, held at the Daniel Patrick Moynihan
15 United States Courthouse, 500 Pearl Street, in the City of
16 New York, on the 27th day of October, two thousand six.
17

18
19 PRESENT: HON. DENNIS JACOBS,
20 Chief Judge,
21 HON. ROBERT D. SACK,
22 HON. PETER W. HALL,
23 Circuit Judges.
24

25 - - - - -X
26 MING YANG,

27
28 Petitioner,

29
30 -v.-

03-40002-ag
NAC

31
32 UNITED STATES DEPARTMENT OF JUSTICE,
33 Alberto Gonzales, Attorney General,¹
34

35 Respondent.
36 - - - - -X
37
38
39

40 FOR PETITIONER: DAVID X FENG, New York, New York

41
42 FOR RESPONDENT: LINDA R. ANDERSON, Assistant United
43 States Attorney (Dunn Lampton,

¹Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Alberto Gonzales is automatically substituted for former Attorney General John Ashcroft as the respondent in this case.

1 United States Attorney for the
2 Southern District of Mississippi,
3 on the brief), United States
4 Attorney's Office for the Southern
5 District of Mississippi, Jackson,
6 Mississippi.
7

8 Petition for review from the Board of Immigration
9 Appeals ("BIA").
10

11 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
12 **AND DECREED** that the petition be **DENIED**.
13

14 Petitioner Ming Yang ("Yang"), a native and citizen of
15 the People's Republic of China, seeks review of a May 1,
16 2003 order of the BIA affirming, without opinion, the
17 January 23, 2002 decision of Immigration Judge ("IJ") Sandy
18 Hom denying petitioner's application for asylum,
19 withholding of removal, and relief under the Convention
20 Against Torture ("CAT"). In re Yang, Ming, No. A 79 312
21 257 (BIA May 1, 2003), aff'g No. A 79 312 257 (Immig. Ct.
22 N.Y. City Jan. 23, 2002). We assume the parties'
23 familiarity with the underlying facts, the procedural
24 history, and the issues presented on appeal.
25

26 Where (as here) the BIA affirms the decision of the IJ
27 without issuing an opinion, see 8 C.F.R. § 1003.1(e)(4), we
28 review the IJ's decision as the final agency determination.
29 Twum v. INS, 411 F.3d 54, 58 (2d Cir. 2005). We review
30 the agency's factual findings, including adverse
31 credibility determinations, under the substantial evidence
32 standard, treating them as "conclusive unless any
33 reasonable adjudicator would be compelled to conclude to
34 the contrary." 8 U.S.C. § 1252(b)(4)(B); Zhou Yun Zhang v.
35 INS, 386 F.3d 66, 73 & n.7 (2d Cir. 2004).
36

37 Substantial evidence supports each of the three
38 grounds upon which the IJ relied in denying Yang's petition
39 for asylum: (1) conflicting and non-detailed testimony
40 regarding material elements of his claim, (2) inauthentic
41 documents, some of which conflicted with his testimony; and
42 (3) an adverse credibility finding.
43

44 (1) Substantial evidence supports the IJ's conclusion
45 that Yang failed to offer consistent and detailed
46 testimony, including: (a) Yang's failure to provide details
47 concerning his anti-revolutionary speech; (b) his assertion
48 that, despite being a fugitive at the time, he was able to

1 depart China with (forged) travel documents in his own
2 name, and (c) his inconsistent testimony regarding the
3 details of his departure from China.
4

5 (2) Substantial evidence supports the IJ's conclusion
6 that Yang submitted inauthentic documentary evidence: (a)
7 the documents were not contemporaneously dated with the
8 events detailed therein (b) Yang failed to explain how his
9 wife came into possession of the documents, (c) despite
10 admittedly being in contact with his wife, Yang failed to
11 procure a statement from her detailing the alleged forced
12 abortion,² (d) though Yang testified that he was a
13 "construction work[er]," his registration listed his
14 occupation as "farmer" (which would have allowed his wife
15 to bear the second child that Yang claims was aborted), and
16 (e) Yang submitted two marriage certificates dated five
17 years apart, but each displayed the very same photograph of
18 Yang and his wife.
19

20 (3) The IJ made an adverse credibility finding,
21 concluding that Yang's "testimony was an example of rote
22 memorization rather than an attempt to translate from
23 memory as to events that had occurred to him." "When a
24 factual challenge pertains to a credibility finding . . .
25 we afford 'particular deference' in applying the
26 substantial evidence standard, mindful that the law must
27 entrust some official with responsibility to hear an
28 applicant's asylum claim, and the IJ has the unique
29 advantage among all officials involved in the process of
30 having heard directly from the applicant." Zhang, 386 F.3d
31 at 73 (quoting Montero v. INS, 124 F.3d 381, 386 (2d Cir.
32 1997) (internal citations omitted)).
33

34 Substantial evidence supports the IJ's adverse
35 credibility finding, including the IJ's observations that:
36 (a) when asked to provide details of his factual
37 assertions, Yang "shift[ed] in the witness chair,"
38 "fidget[ed]," was "hesitant," and "engaged in constant
39 throat clearing," (b) he delayed answering questions in
40 order to "seek[] an opportunity to formulate an answer,"
41 (c) he was unable to provide a lucid explanation for the
42 inconsistency between his household registration and

²Where "it is reasonable to expect corroborating evidence . . . such evidence should be provided or an explanation should be given as to why such information was not presented." Diallo v. INS, 232 F.3d 279, 285 (2d Cir. 2000) (internal quotation marks omitted).

1 testimony, and (d) he could not explain the applicability
2 of the local family planning policy to his situation.

3
4 (4) Yang failed to raise his claims for withholding of
5 removal or relief under CAT in his appeal to the BIA; he
6 only appealed from the IJ's denial of asylum.³ His
7 failure in that regard bars consideration of his
8 withholding and CAT claims by this Court. "A court may
9 review a final order of removal only if . . . the alien has
10 exhausted all administrative remedies available to the
11 alien as of right." 8 U.S.C. § 1252(d)(1). "Failure to
12 exhaust [these remedies] constitutes a clear jurisdictional
13 bar." Foster v. INS, 376 F.3d 75, 77 (2d Cir. 2004)
14 (internal citation and quotation marks omitted).

15
16 Finally, the IJ's denial of asylum "is supported by
17 'reasonable, substantial, and probative' evidence in the
18 record when considered as a whole." Secaida-Rosales v.
19 INS, 331 F.3d 297, 307 (2d Cir. 2003) (quoting Diallo v.
20 INS, 232 F.3d 279, 287 (2d Cir. 2000)).

21
22 For the reasons set forth above, the petition is
23 hereby **DENIED**. Having completed our review, the pending
24 motion for a stay of removal in this petition is **DENIED** as
25 moot.

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27
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29 FOR THE COURT:
30 ROSEANN B. MACKECHNIE, CLERK
31 By:

32
33
34 _____
35 Oliva M. George, Deputy Clerk

³In his submission to the BIA, Yang asserted that:
"Although Respondent's case included minor inconsistencies in
his oral testimony, Respondent [sic] testified consistently
with his application, and his case is substantial enough to
warrant a grant of asylum." (**emphasis added**). He makes no
mention of his withholding of removal or CAT claims.
Similarly, in his Notice of Appeal to the BIA, Yang argued
only that he "made out a Prima Facia [sic] case for Asylum."
(**emphasis added**).