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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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XIAOGUANG GU

Petitioner,

v.

ALBERTO GONZALES,
UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEAL

**BRIEF OF *AMICI CURIAE* IN SUPPORT OF
PETITIONER'S MOTION FOR PANEL REHEARING
AND SUGGESTION FOR REHEARING EN BANC**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae Center for Gender & Refugee Studies states that it has no parent corporations, and has not issued shares of stock to the public. Amicus curiae Harvard Immigration and Refugee Clinic states that it has no parent corporations and has not issued shares of stock to the public. Amicus curiae Human Rights First states that it is incorporated as a nonprofit corporation, it has no parent corporations, and it has not issued shares of stock to the public. Amicus curiae Jubilee Campaign USA states that it is a Non Governmental Organization, has no parent corporations, and has not issued shares of stock to the public. Amicus curiae Public Counsel states that it is a nonprofit corporation, has no parent corporations, and has not issued shares of stock to the public.

STATEMENT OF AMICI CURIAE

Pursuant to Rule 29, Fed. R. App. P., the Center for Gender & Refugee Studies, Harvard Immigration and Refugee Clinic, Human Rights First, Jubilee Campaign USA, and Public Counsel (collectively, “Amici”) submit this brief to assist the Court in considering whether to rehear, by panel or en banc, the panel’s majority decision in this case, *Gu v. Gonzales*, 429 F.3d 1209 (9th Cir. 2005). Amici support Petitioner’s request for rehearing because of their concern that the panel majority’s decision is inconsistent with international and United States law, and could undermine the ability of refugees fleeing religious and other forms of persecution to obtain asylum in this country.

The Center for Gender & Refugee Studies (“CGRS”) has a direct and serious interest in the development of immigration and refugee law, including the issues under consideration. Founded in 1999 at the University of California, Hastings College of the Law, CGRS provides legal expertise and resources to attorneys representing asylum-seekers fleeing gender-related harm and is directly involved in national asylum law and policy on a wide range of issues. With recognized expertise on asylum law and with an interest in the development of U.S. jurisprudence consistent with relevant domestic and international refugee and human rights law, CGRS deems the questions under consideration to be matters of

great consequence, involving important principles of jurisprudence and statutory construction, with broad ramifications for the uniform administration of the laws.

The Harvard Immigration and Refugee Clinic (“Clinic”) has worked with hundreds of immigrants and refugees from around the world since its founding in 1984. It combines representation of individual applicants for asylum and related relief with the development of theories, policy, and national advocacy. The Clinic has been engaged by the Justice Department in the training of immigration judges, asylum officers and supervisors on issues related to asylum law. In addition, the Clinic provides advice, support, and supplemental services to advocates around the United States representing asylum seekers.

The Clinic has an interest in the principled development and proper application of U.S. asylum law, and seeks to ensure that persecuted religious minorities receive fair and proper consideration and protection from non-refoulement under existing standards of law. The Clinic has filed amicus curiae briefs in this Court in several cases, including in *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (*en banc*) and *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir. 2005). The Clinic recently submitted an amicus curiae brief in *Li v. Gonzales*, 420 F.3d 500 (5th Cir.), *vacated and dismissed* 429 F.3d 1153 (5th Cir. 2005), involving issues of religious persecution similar to those before this Court here.

Since 1978, Human Rights First, formerly known as the Lawyers Committee for Human Rights, has worked in the United States and abroad to protect fundamental human rights, including the right to seek and obtain asylum from persecution. Human Rights First operates one of the largest pro bono legal representation programs for refugees in the United States, working in partnership with volunteer lawyers at law firms. Of the countless refugees Human Rights First assists, many have fled religious persecution abroad. As a result, Human Rights First has a direct interest in ensuring that refugees are able to obtain asylum in this country when they flee religious persecution and other human rights violations.

Jubilee Campaign USA (“Jubilee”) is a Non Governmental Organization (NGO) that promotes human rights and religious liberties for ethnic and religious minorities throughout the world. Jubilee has been granted Consultative Status by the United Nations and participates annually in the U.N. Human Rights Commission Session in Geneva, Switzerland, raising concerns of persecuted religious minorities and others from various parts of the world, including China.

Jubilee has an interest in proper application of U.S. law concerning asylum, withholding of removal and withholding under the U.N. Convention Against Torture, so that persecuted religious minorities receive fair and proper consideration under existing standards of law, and are not returned to countries where they have faced and/or are likely to face persecution, torture, or death on

account of a protected ground. Jubilee has submitted several amicus curiae briefs in asylum and immigration-related cases in the past, and will continue to do so when significant errors or decisions with dangerous implications arise.

Public Counsel is the largest pro bono law office in the United States. It is the Southern California affiliate of the Lawyer's Committee for Civil Rights Under Law. Public Counsel's Immigrants Rights Project provides legal representation to refugees seeking asylum in the United States. Public Counsel operates the largest pro bono legal representation program for refugees in Los Angeles, California, working in partnership with volunteer lawyers. Public Counsel and its attorney volunteers frequently represent persons fleeing religious persecution abroad. As a result, Public Counsel has a direct interest in ensuring that asylum is available to victims of religious persecution consistent with international and United States law, as interpreted by the Ninth Circuit. Moreover, because Public Counsel represents clients appearing before Immigration Judges who are bound by Ninth Circuit precedent, Public Counsel has a particularly strong interest in ensuring that this Court defines persecution in a consistent manner under international and U.S. law.

STATEMENT RE REHEARING AND REHEARING EN BANC

This case not only represents a marked departure from the Court’s prior decisions reviewing asylum claims based on religious persecution, but fails to adhere to the United States’ obligation to protect refugees fleeing religious persecution as required by the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”), or to safeguard the fundamental freedoms recognized by the International Religious Freedom Act of 1998 (“IRFA”), 22 U.S.C. § 6401.

While the majority’s decision errs on a number of issues, this brief addresses two issues of systemic importance: (1) the erroneous conclusion as to what threshold of harm constitutes persecution; and (2) the failure to recognize that restrictions on the ability to publicly practice religion can constitute persecution.¹

To maintain uniformity and consistency in the Court’s decisions reviewing persecution claims – particularly where, as here, fundamental human rights such as freedom of religion are at stake – further consideration by the full Court is crucial. Moreover, because this case raises an issue of both exceptional importance and first impression – this Court has not previously addressed a religious persecution case in view of IRFA’s findings and directives on religious freedom – en banc review is warranted.

¹ While the panel majority’s erroneous hearsay rule also presents an issue of systemic importance, this brief does not address that issue. However, Amici support Petitioner’s arguments on the hearsay issue and would welcome the opportunity to brief the issue if so requested by the Court.

SUMMARY OF ARGUMENTS

The findings in this case are not disputed. For the crime of publicly sharing his Christian faith and attending a home church, Chinese authorities arrested Petitioner, detained him for three days, beat him with a rod to the point of welts and bruises, forced him to sign a “confession” promising not to engage in illegal Christian activities, and then released him conditioned on weekly reports to the police. *Gu*, 429 F.3d at 1212. But that was not all. Petitioner was placed on probation at work and told by his government employer that he would be fired if he continued his Christian activities. *Id.* at 1217. Fearful, Petitioner stopped attending his house church and soon fled to the United States “to more freely practice his religion.” *Id.* at 1211.

Despite these undisputed facts, the majority, over vigorous dissent, affirmed the legally and factually flawed decisions of the Board of Immigration Appeals (“BIA”) and Immigration Judge (“IJ”) below. *Id.* at 1211. The majority’s finding that Petitioner’s suffering does not constitute “persecution” simply cannot be squared with the Court’s definition of the term; nor with the United States’ obligations under the Refugee Convention or IRFA.

What’s more, the majority’s holding in this case rests on the assumption that religious persecution can and should be avoided by practicing a prohibited religion in secrecy. *Id.* at 1219-21. That fundamentally erroneous holding imposes a

requirement this Court's law does not permit. Moreover, it fails to adhere to the specific findings and directives Congress articulated in IRFA, which reinforced principles of religious freedom found in international human rights instruments.

The error in the panel majority's analysis has profound consequences for refugees fleeing religious persecution and requires this Court's further review.

ARGUMENT

I. DETENTION, PHYSICAL ABUSE, A FORCED CONFESSION AND OTHER THREATS CONSTITUTE "PERSECUTION" UNDER THIS COURT'S DECISIONS, THE REFUGEE CONVENTION, AND IRFA

A. The Majority's Decision Does Not Adhere to International or United States Law Defining the Concept of Persecution.

The failure of the international community to protect Jews from religious persecution and Nazi genocide during World War II provided impetus for our contemporary refugee protection regime, including the Refugee Convention.²

With the Refugee Act of 1980, Congress amended the Immigration and Naturalization Act ("INA") to bring U.S. refugee laws into conformity with the Refugee Convention and its protection against persecution. 8 U.S.C. § 1101, *et seq.*, Pub. L. No. 96-212, 94 Stat. 102. *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

² The United States agreed to be bound by the Refugee Convention by acceding to the Convention's 1967 Protocol. 189 U.N.T.S. 2545, 19 U.S.T. 6223, 6224, T.I.A.S. No. 6577.

The concept of persecution includes not only threats to life and freedom, but also other serious violations of human rights, including government restrictions on religious freedom. *See* Office of the United Nations High Commissioner for Refugees (“UNHCR”) Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, (“UNHCR Handbook”), ¶ 51 (1992).³ *See also* Deborah Anker, *Law of Asylum in the United States* (3d ed. 1999), at 171, *et seq.*

Persecution has a well-settled definition in this Circuit. The Court has long defined persecution as “the infliction of suffering or harm upon those who differ ... in a way regarded as offensive.” *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (citations omitted). While there is no single list cataloguing harm qualifying as persecution,⁴ this Court’s decisions, the Refugee Convention, and IRFA all make clear that lengthy detention, interrogations, beatings, forced confessions, and other harms similar to those inflicted here constitute persecution.

³ The UNHCR Handbook is recognized by this Court as a “persuasive authority” providing “significant guidance” in construing the refugee provisions of the INA. *See Ndom v. Ashcroft*, 384 F.3d 743, 753 n.4 (9th Cir. 2004); *Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004). IRFA likewise confirms the significance of such international human rights instruments in considering violations of religious freedom, incorporating standards from those instruments into statutory definitions of international religious freedom. 22 U.S.C §§ 6401(a)(2), 6402(13).

⁴ Such flexibility is critical to ensuring the protection of asylum-seekers fleeing persecution. There “being no limits to the perverse side of human imagination, little purpose is served by attempting to list all known measures of persecution.” G. Goodwin-Gill, *The Refugee in International Law* (2d. ed. 1996), at 69.

1. En Banc Review Is Necessary to Ensure Circuit Uniformity.

While the Court's definition of "persecution" is well-established, its decisions on the issue of past persecution are not always consistent. *Compare Smolniakova v. Gonzales*, 422 F.3d 1037, 1048 (9th Cir. 2005) (single attack by unknown assailants "alone compels a finding of past persecution") with *Prasad v. INS*, 47 F.3d 336, 339 (9th Cir. 1995) (single beating during detention did not compel finding of persecution).

Petitions frequently stand or fall on the interpretation of harm as mere harassment, or suffering rising to the level of persecution. On a topic as critical as past persecution, which triggers important and often outcome determinative evidentiary presumptions, 8 C.F.R. §§ 208.13(b)(1) and 208.16(b)(1), precedential consistency is critical. *See Quan v. Gonzales*, 428 F.3d 883, 892 (9th Cir. 2005) (noting "inconsistent thresholds for finding persecution applied by different panels of this court") (O'Scannlain, J., dissenting).

The Court's definition of persecution is settled—conduct "rises to the level of 'persecution'" when it involves "the infliction of suffering or harm" "in a way regarded as offensive." *Chouchkov v. INS*, 220 F.3d 1077, 1084 (9th Cir. 2000). "Physical harm has been consistently treated as persecution." *Navas v. INS*, 217 F.3d 646, 656 n.9 (9th Cir. 2000). The Court has "consistently found persecution where, as here, the petitioner was physically harmed because of his" religion or

other protected grounds.⁵ *Duarte de Guinac v. INS*, 179 F.3d 1156, 1161-62 (9th Cir. 1999) (rejecting finding that harm was insufficient to constitute persecution).

There is no dispute below or on appeal that Petitioner was physically harmed for practicing his religion. *Gu*, 429 F.3d at 1212-14. But that was not all. The undisputed facts show that he was arrested, beaten with a rod, injured, interrogated, held for three days, forced to sign a “confession” agreeing to stop his religious activities, released on condition of weekly reports to the police, placed on work probation, and threatened with losing his job if he publicly practiced his religion.

Yet, here, the Immigration Judge painted Petitioner’s experiences as mere “difficulties” or “mistreatment.” A.R. 101-104. The majority echoed those findings, concluding that the “abuse” Petitioner suffered did not constitute persecution. The finding that such “abuse” – including detention, beating, forced confession, probation, and workplace threats – did not constitute persecution is inconsistent with this Court’s decisions. *See, e.g., Angoucheva v. INS*, 106 F.3d 781, 793 (9th Cir. 1997) (petitioner was “bullied, beaten, injured”); *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) (arrest, four-day detention, and beating constitutes past persecution). Review of this erroneous finding is necessary to maintain consistency in this Court’s precedent on past persecution.

⁵ Even so, physical harm is not required for a finding of persecution. *See, e.g., Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004); *Baballah v. Ashcroft*, 367 F.3d 1067, 1075-76 (9th Cir. 2004).

2. The Chinese Authorities Mistreatment of Petitioner Is At Least as Severe as the Persecution at Issue in *Guo*.

In considering Petitioner's past persecution claim, the panel majority looked to *Guo* and *Prasad* for guidance, finding it necessary to explain the seemingly inconsistent decisions.⁶ Despite the significant differences between this case and *Prasad*, the majority found that Petitioner's harm here more closely mirrored that alleged in *Prasad*. In so finding, the panel majority erred. This case simply cannot be compared to *Prasad*, where the petitioner was hit once in the stomach, kicked in the back during a four-to-six hour detention and never explicitly threatened to discontinue his support of a political party. *Prasad*, 47 F.3d at 339.⁷

Contrary to the majority's decision, Petitioner's case "most closely mirrors" – indeed, is virtually indistinguishable from – *Guo*. The majority states that the *Guo* petitioner showed "repeated, lengthy and severe harassment." *Guo*, 429 F.3d at 1214. Not more so than here. *Guo* was arrested at a home during prayer services,

⁶ This decision is not the first to struggle with the tension between the Court's 1995 decision in *Prasad* and its more recent 2004 decision in *Guo*. See, e.g., *Mihalev v. Gonzales*, 388 F.3d 722, 730 (9th Cir. 2004) (distinguishing *Prasad* and following *Guo* in finding that single detention involving beatings and hard labor compelled a finding of past persecution). See also *Quan*, 428 F.3d at 892 (comparing harm suffered in *Guo* and *Prasad*) (O'Scannlain, J., dissenting).

⁷ To the extent *Prasad* was correctly decided in the first place, its precedential value is very narrow. The persecution in *Prasad* has been distinguished as "a 'single, non-serious incident,' that occurred in the immediate aftermath of a coup, and 'no one in Fiji had any 'continuing interest' in persecuting Prasad beyond that one event.'" *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1134 n.3 (9th Cir. 2004) (citation omitted).

detained for a day-and-a-half, forced to admit participation in illegal religious activity, struck twice in the face, forced to do pushups, and kicked once. After signing an affidavit promising not to believe in an “evil religion again,” he was released. *Guo v. Ashcroft*, 361 F.3d 1194, 1197 (9th Cir. 2004). Based on these facts alone – physical harm, coupled with detention and a coerced statement disavowing Christianity – the Court held Guo “was persecuted during his first detention because of his religious beliefs.” *Id.* at 1203.

The harm suffered by Petitioner is at least equal to and, in fact, more severe than that suffered by Guo. Petitioner remained in custody twice as long as Guo; his beating consisted of being hit ten-plus times with a rod, whereas Guo was hit twice, kicked once, and forced to do push ups; Petitioner was not only forced to sign a statement agreeing to refrain from religion, but released on the condition of probation to ensure compliance with that coerced admission and then placed on probation at work. This case cannot be distinguished from *Guo*. *Prasad* is inapt.

3. This Court’s Definition of Persecution Does Not Depend on Medical Treatment Or Permanent Injuries.

The decisions of the IJ and panel majority emphasize that Petitioner did not seek medical treatment in finding no persecution. AR 104; 429 F.3d at 1214-15. But serious bodily injury is not a threshold to finding persecution; “it would be a strange rule if the absence or presence of a broken arm were the dispositive fact.” *Mihalev v. Ashcroft*, 388 F.3d 722, 729-30 (9th Cir. 2004) (finding past persecution

although “there is no evidence that Petitioner suffered a significant injury as a result of those beatings” in jail). There is simply no place in this Court’s decisions for analysis predicating persecution on a finding of permanent scars or injuries so severe as to require medical attention. *See, e.g., Bandari*, 227 F.3d at 1167 (finding past persecution although beating with rubber hose in custody did not cause back to bleed but only to swell); *Quan v. Gonzales*, 428 F.3d 883, 888 (9th Cir. 2005) (rejecting conclusion that beating with electrically-charged rod did not qualify as persecution because petitioner did not seek medical attention or suffer “sustained injury”); *Lopez v. Ashcroft*, 366 F.3d 799, 803 (9th Cir. 2004) (petitioner’s failure to “seek medical treatment for the burns he suffered is hardly the touchstone of whether his treatment by guerrillas amounted to persecution.”).

B. The Majority’s Decision Is Contrary to IRFA’s Description of Detention and Beatings as Persecution

In 1998, Congress – declaring that “Governments have the responsibility to protect the fundamental rights of their citizens and to pursue justice for all” – made it official United States policy to “condemn violations of religious freedoms.” 22 U.S.C. §§ 6401(a)(3), (b)(1). With this Act, “standing with the persecuted” became Congress’ statutory mandate. *Id.* at § 6401(b)(5). In IRFA, Congress included specific findings, definitions and guidelines for determining whether there is religious persecution. IRFA not only reinforced the importance of human rights instruments to asylum adjudication, but also reflected Congress’ view that the

United States' adjudication of asylum claims based on religious persecution required improvement.⁸

Of importance here, IRFA made specific findings that religious believers suffer government-sponsored violations of their rights to religious freedom, including “prohibitions against publishing, distributing, or possessing religious literature and materials” and, even “more abhorrent,” some face “*severe and violent forms of religious persecution*,” including detention, torture, beatings, and imprisonment for practicing their faith. *Id.* at §§ 6401(a)(4), (5) (emphasis added).

In so finding, Congress described detention and beatings not merely as persecution, but as particularly “severe and violent forms of religious persecution.” *Id.* The panel majority’s conclusion that Petitioner did not suffer persecution is manifestly contrary to Congress’ findings on religious persecution in IRFA.

C. The Majority Decision Fails to Recognize Restrictions on Religion as Persecution and Would Require Petitioner to Sacrifice His Fundamental Right to Publicly Share His Faith.

“The right to freedom of thought, conscience and religion is one of the fundamental rights and freedoms in international human rights law.” UNHCR Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the

⁸ To address this Congressional concern, IRFA required asylum adjudicators to receive “instruction on the internationally recognized right to freedom of religion” and “training on the extent and nature of religious persecution internationally.” 22 U.S.C. § 6473(b), (c).

Status of Refugees (“UNHCR Guidelines”), at ¶2. Those fundamental human rights, including religious freedom, are not restricted to private beliefs.

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.” Universal Declaration of Human Rights, Article 18 (emphasis added).⁹ Article 18(1) of the International Covenant on Civil and Political Rights (“ICCPR”) similarly provides that freedom of religion includes the ability to “manifest” one’s beliefs, in public or in private.¹⁰

The UNHCR Handbook confirms that “[p]ersecution for ‘reasons of religion’ may assume various forms, e.g., prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community.” UNHCR Handbook, ¶ 72 (emphasis added); *see also* UNHCR Guidelines, at ¶12. With IRFA, Congress similarly recognized that “the internationally recognized right to freedom of

⁹ G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948); *see also* 22 U.S.C. § 6401(a)(3), *available at* <http://www.un.org/Overview/rights.html>.

¹⁰ G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); *see also* 22 U.S.C. § 6401(a)(3). With IRFA, Congress made clear that instruments such as the Universal Declaration and ICCPR articulate the “universal human right” to religious belief and practice, and are relevant in defining violations of religious freedom. 22 U.S.C. §§ 6401(a)(2), 6402(13).

religion and religious belief and practice” prohibits arbitrary restrictions on peaceful assembly or “on distribution of religious literature.” 22 U.S.C. § 6402(13).

This Court has similarly recognized that restrictions on freedom of worship can constitute persecution. *See Krotova v. Gonzales*, 416 F.3d 1080, 1086 (9th Cir. 2005) (considering “serious restriction on Petitioner’s ability to practice her religion” in finding persecution); *Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996) (noting that arrest at church could have formed the basis for past persecution had petitioner not continued to worship in church after arrest). *Accord Bucur v. INS*, 109 F.3d 399, 405 (7th Cir. 1997) (“If a person is forbidden to practice his religion, the fact that he is not imprisoned, tortured, or banished, and is even allowed to attend school, does not mean that he is not a victim of religious persecution.”).

Unfortunately, the majority’s decision here fails to recognize that significant restrictions on one’s exercise of religious freedom – such as those imposed on Petitioner in China – constitute persecution. If left in place, the decision would effectively force would-be refugees to avoid persecution by sacrificing their “fundamental right” to freedom of religion.

The majority acknowledges that after his arrest and beating, Petitioner stopped attending his house church. 429 F.3d at 1215 n.2. Indeed, the record reflects that he was forced to sign a “confession” agreeing to forego religious

activities and later threatened with losing his job if he resumed his previous religious activities. A.R. 100. Yet, discounting the circumstances of the arrest, “confession,” probation and workplace threats, the majority suggests that “[o]ther than *ongoing* prohibition on distribution of contraband religious tracts, there is no evidence in the record regarding any state-imposed limitation on his right to practice his religion.” 429 F.3d at 1215 (emphasis added).

The “fatal flaw” in the decision below and majority’s affirmance lies “in the assumption—a clear error of law—that one is not entitled to claim asylum on the basis of religious persecution if . . . one can escape the notice of persecutors by concealing one’s religion.” *Muhur v. Ashcroft*, 355 F.3d 958, 960 (7th Cir. 2004) (citations omitted). That finding is not only contrary to the record, it suggests that, to avoid further persecution, Christians in China should practice their faith in secret and refrain from publicly sharing religious beliefs or materials. Such a conclusion finds no support in the law, and flouts the policies specifically articulated in IRFA.

The law does not require concealment of religious activities to avoid persecution. *See Bastanipour v. INS*, 980 F.2d 1129, 1132-33 (7th Cir. 1993) (rejecting suggestion that Iranian authorities may not discover petitioner’s apostasy as he “could conceal his apostasy only by refusing to practice his Christianity in public”). “[T]o require [petitioner] to practice his beliefs in secret is contrary to

our basic principles of religious freedom and the protection of religious refugees.”

Zhang v. Ashcroft, 388 F.3d 713, 719 (9th Cir. 2004). As the UNHCR explains:

[R]eligious belief, identity, or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution. Indeed, the Convention would give no protection from persecution for reasons of religion if it was a condition that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. Bearing witness in words and deeds is often bound up with the existence of religious convictions.

UNHCR Guidelines, at ¶ 13.

The law does not require religious adherents to abandon or conceal their faith to avoid persecution; nor does it permit an IJ to deny asylum by assuming refugees can or should conceal their religion. *Muhur*, 355 F.3d at 961. Indeed, one “aim of persecuting a religion is to drive its adherents underground in the hope that their beliefs will not infect the remaining population.” *Id.* That Petitioner here did, in fact, briefly practice in the secrecy of his home until he left in no way negates his well-founded fear of persecution upon his forced return to China.¹¹

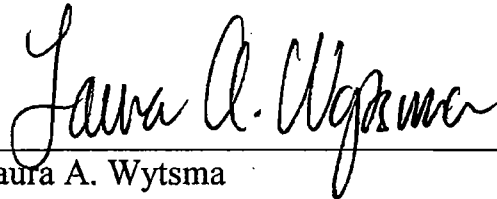
¹¹ The situation for Christians in China has not improved since Petitioner left his home. According to a 2005 report of the U.S. Commission on International Religious Freedom, “Chinese officials confirmed that unregistered activity was illegal and would continue to be suppressed.” Policy Focus on China, at p.8., available at http://uscirf.gov/countries/region/east_asia/china/ChinaPolicyBrief.pdf

Conclusion

For the reasons discussed above, rehearing or rehearing en banc is warranted here. Alternatively, depublication of the decision is respectfully requested.

Dated: March 2, 2006

Respectfully submitted,



Laura A. Wytsma

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Refugee Clinic, Human Rights First, Jubilee
Campaign USA, and Public Counsel*

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

I certify that the Brief of Amici Curiae in support of Petitioner's Motion for Panel Hearing and Suggestion for Rehearing En Banc conforms with the type specifications of Fed.R.App.P. 32(a)(5) and, pursuant to Circuit Rule 40-1, does not exceed fifteen pages.



Laura A. Wytsma

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ADDENDUM

C
Briefs and Other Related Documents

United States Court of Appeals, Ninth Circuit.
XIAOGUANG GU, Petitioner,
v.
Alberto R. GONZALES, ^{FN*} Attorney General,
Respondent.

^{FN*} Alberto R. Gonzales is substituted for his predecessor, John Ashcroft, as Attorney General of the United States, pursuant to Fed. R.App. P. 43(c)(2).
No. 02-74417.

Argued and Submitted April 2, 2004.
Filed Dec. 1, 2005.

Background: Alien, who was native and citizen of China, petitioned for review of Board of Immigration Appeals (BIA) order affirming immigration judge's (IJ's) denial of alien's application for asylum.

Holdings: The Court of Appeals, Beezer, Circuit Judge, held that:

10(1) alien failed to demonstrate past persecution based on his religious practices;


12(2) alien failed to demonstrate well-founded fear of persecution; and

16(3) hearsay statements offered by alien did not have to be automatically taken as true.

Review denied.

Pregerson, Circuit Judge, filed dissenting opinion.

West Headnotes

[1] Aliens 24  54.3(4)

24 Aliens
24III Immigration

24k52 Detention, Supervision and Deportation
24k54.3 Judicial Remedies and Review
24k54.3(2) Scope of Inquiry or Review
24k54.3(4) k. Evidence and Questions of Law or Fact. Most Cited Cases
Court of Appeals reviews for substantial evidence decision of the Board of Immigration Appeals (BIA) that an applicant has not established eligibility for asylum.

[2] Aliens 24  54.3(4)

24 Aliens
24III Immigration
24k52 Detention, Supervision and Deportation
24k54.3 Judicial Remedies and Review
24k54.3(2) Scope of Inquiry or Review
24k54.3(4) k. Evidence and Questions of Law or Fact. Most Cited Cases
Court of Appeals will affirm Board of Immigration Appeals (BIA) decision that an applicant has not established eligibility for asylum if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole; Court may reverse the decision of the Board only if the applicant shows that the evidence compels the conclusion that the asylum decision was incorrect.

[3] Aliens 24  54.3(4)

24 Aliens
24III Immigration
24k52 Detention, Supervision and Deportation
24k54.3 Judicial Remedies and Review
24k54.3(2) Scope of Inquiry or Review
24k54.3(4) k. Evidence and Questions of Law or Fact. Most Cited Cases
Strict standard of review for Board of Immigration Appeals (BIA) decision that an applicant has not established eligibility for asylum, which is highly deferential, precludes Court of Appeals from independently weighing the evidence and holding that the applicant is eligible for asylum, except in cases where compelling evidence is shown.

[4] Aliens 24  54.3(2.1)

24 Aliens
24III Immigration
24k52 Detention, Supervision and Deportation
24k54.3 Judicial Remedies and Review

24k54.3(2) Scope of Inquiry or Review
24k54.3(2.1) k. In General. Most

Cited Cases

Where Board of Immigration Appeals (BIA) opinion denying alien's asylum petition attributes significant weight to findings of immigration judge (IJ), reviewing court looks to IJ's oral decision as a guide to what lay behind the BIA's conclusion.

[5] Aliens 24  53.10(3)

24 Aliens

24III Immigration

24k52 Detention, Supervision and Deportation

24k53.10 Relief Against Exclusion or Deportation

24k53.10(3) k. Asylum and Hardship.

Most Cited Cases

Refugee status required for asylum eligibility is available if the applicant demonstrates either past persecution or a well-founded fear of persecution. Immigration and Nationality Act, § 101(a)(42)(A), § U.S.C.A. § 1101(a)(42)(A).

[6] Aliens 24  53.10(3)

24 Aliens

24III Immigration

24k52 Detention, Supervision and Deportation

24k53.10 Relief Against Exclusion or Deportation

24k53.10(3) k. Asylum and Hardship.

Most Cited Cases

A well-founded fear of future persecution, as would support a claim for asylum, must be both subjectively genuine and objectively reasonable. Immigration and Nationality Act, § 101(a)(42)(A), § U.S.C.A. § 1101(a)(42)(A).

[7] Aliens 24  53.10(3)

24 Aliens

24III Immigration

24k52 Detention, Supervision and Deportation

24k53.10 Relief Against Exclusion or Deportation

24k53.10(3) k. Asylum and Hardship.

Most Cited Cases

Credible testimony of a petitioner seeking asylum that he or she genuinely fears persecution on account of a protected ground satisfies the subjective component of the inquiry into whether petitioner has a well-founded fear of future persecution. Immigration and Nationality Act, § 101(a)(42)(A), §

U.S.C.A. § 1101(a)(42)(A).

[8] Aliens 24  53.10(3)

24 Aliens

24III Immigration

24k52 Detention, Supervision and Deportation

24k53.10 Relief Against Exclusion or Deportation

24k53.10(3) k. Asylum and Hardship.

Most Cited Cases

Aliens 24  54.1(2)

24 Aliens

24III Immigration

24k52 Detention, Supervision and Deportation

24k54.1 Evidence in Administrative or Judicial Proceedings

24k54.1(2) k. Presumptions and Burden of Proof. Most Cited Cases

The objective component of the inquiry into whether an asylum applicant has a well-founded fear of future persecution is satisfied if the applicant demonstrates past persecution, automatically giving rise to a rebuttable presumption of a well-founded fear of future persecution; in the alternative, the objective component can be satisfied by adducing credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution. Immigration and Nationality Act, § 101(a)(42)(A), § U.S.C.A. § 1101(a)(42)(A); § 8 C.F.R. § 208.13(b)(1).

[9] Aliens 24  53.10(3)

24 Aliens

24III Immigration


24k52 Detention, Supervision and Deportation

24k53.10 Relief Against Exclusion or Deportation

24k53.10(3) k. Asylum and Hardship.

Most Cited Cases

Persecution, for purposes of asylum application, is an extreme concept and thus does not include every sort of treatment society regards as offensive. Immigration and Nationality Act, § 101(a)(42)(A), § U.S.C.A. § 1101(a)(42)(A).

[10] Aliens 24  53.10(3)

24 Aliens

24III Immigration

24k52 Detention, Supervision and Deportation

24k53.10 Relief Against Exclusion or Deportation24k53.10(3) k. Asylum and Hardship.Most Cited Cases

Alien, who was citizen of China, failed to demonstrate past persecution based on his religious practices, in support of his asylum application; even if alien was detained, interrogated, and beaten by Chinese authorities, this occurred on only one occasion, alien did not require medical treatment, nor did he suffer any adverse employment consequences, and record did not demonstrate that alien was objectively unable to attend his household church after the incident. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A).

[11] Aliens 24 ↪ 54.1(4.1)

24 Aliens24III Immigration24k52 Detention, Supervision and Deportation24k54.1 Evidence in Administrative or Judicial Proceedings24k54.1(4) Sufficiency, Particular Issues24k54.1(4.1) k. In General. MostCited Cases

Erroneous statement of immigration judge (IJ) in his denial of alien's petition for asylum that alien continued to attend his house church after being interrogated and beaten by Chinese authorities was insufficient, when viewing record as a whole, to show that reasonable factfinder would have been compelled to conclude that alien was eligible for asylum based on past persecution, particularly given that Board of Immigration Appeals (BIA) neither explicitly adopted that portion of IJ's decision nor mentioned that reason as a factor in support of its denial of petition.

[12] Aliens 24 ↪ 53.10(3)

24 Aliens24III Immigration24k52 Detention, Supervision and Deportation24k53.10 Relief Against Exclusion or Deportation24k53.10(3) k. Asylum and Hardship.Most Cited Cases

Aliens 24 ↪ 54.1(4.1)

24 Aliens24III Immigration24k52 Detention, Supervision and Deportation24k54.1 Evidence in Administrative or Judicial Proceedings24k54.1(4) Sufficiency, Particular Issues24k54.1(4.1) k. In General. Most Cited Cases

Aliens 24 ↪ 54.3(4)

24 Aliens24III Immigration24k52 Detention, Supervision and Deportation24k54.3 Judicial Remedies and Review24k54.3(2) Scope of Inquiry or Review24k54.3(4) k. Evidence and Questionsof Law or Fact. Most Cited Cases

Alien, who was citizen of China, failed to demonstrate well-founded fear of persecution based on his religious practices, in support of his asylum application; even if alien had subjective fear of persecution, based on conversation with friend, who lived in China, indicating that "security people" had been looking for alien and that alien should not call alien's family anymore, neither Board of Immigration Appeals (BIA) nor reviewing court was required to accept such hearsay statement, which lacked foundation and was not subject to cross-examination, as true, and alien presented no compelling objective evidence demonstrating well-founded fear. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A); 8 C.F.R. § 208.13(b)(1).

[13] Aliens 24 ↪ 54.3(4)

24 Aliens24III Immigration24k52 Detention, Supervision and Deportation24k54.3 Judicial Remedies and Review24k54.3(2) Scope of Inquiry or Review24k54.3(4) k. Evidence and Questionsof Law or Fact. Most Cited Cases


Where immigration judge (IJ) did not render an adverse credibility finding regarding asylum applicant, in denying application, reviewing court must generally accept applicant's factual testimony as true.

[14] Aliens 24 ↪ 54.1(3)

24 Aliens24III Immigration24k52 Detention, Supervision and Deportation24k54.1 Evidence in Administrative or Judicial Proceedings

24k54.1(3) k. Admissibility. Most Cited Cases

In the immigration context, hearsay is admissible if it is probative and its admission is fundamentally fair, and hearsay evidence may not be rejected out-of-hand.

[15] Aliens 24  54.1(4.1)

24 Aliens

24III Immigration

24k52 Detention, Supervision and Deportation

24k54.1 Evidence in Administrative or Judicial Proceedings

24k54.1(4) Sufficiency, Particular Issues

24k54.1(4.1) k. In General. Most

Cited Cases

Aliens 24  54.3(4)

24 Aliens

24III Immigration

24k52 Detention, Supervision and Deportation

24k54.3 Judicial Remedies and Review

24k54.3(2) Scope of Inquiry or Review

24k54.3(4) k. Evidence and Questions

of Law or Fact. Most Cited Cases

The general principle requiring the factfinder and a court of appeals to accept an asylum applicant's factual contentions as true in the absence of an adverse credibility finding is necessarily relaxed when assessing the underlying truth of what is not the product of applicant's direct observations, but rather, mere hearsay evidence.

[16] Aliens 24  54.1(4.1)

24 Aliens

24III Immigration

24k52 Detention, Supervision and Deportation

24k54.1 Evidence in Administrative or Judicial Proceedings

24k54.1(4) Sufficiency, Particular Issues

24k54.1(4.1) k. In General. Most

Cited Cases

Where an asylum applicant's testimony consists of hearsay evidence which is not susceptible to cross-examination, the statements by the out-of-court declarant need not be automatically taken as true and, compared to non-hearsay evidence, may be accorded less weight by the trier of fact.

*1211 Joseph S. Porta, Law Offices of Cohen &

Kim, Los Angeles, CA, for the petitioner.

Daniel D. McClain, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, D.C., for the respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. Agency No. A75-653-110.

Before PREGERSON, BEEZER, and TALLMAN, Circuit Judges.

BEEZER, Circuit Judge.

Xiaoguang Gu, a native and citizen of China, petitions for review of a decision of the Board of Immigration Appeals ("BIA") affirming the Immigration Judge's denial of Gu's application for asylum.

We have jurisdiction pursuant to 8 U.S.C. § 1252. In view of our highly deferential review of the decisions of the Board of Immigration Appeals, we deny the petition.

I

Xiaoguang Gu entered the United States on May 9, 1998 on a business visa. His purported reason for entering the United States, and the reason American consular officials granted him a visa, was "to go on a business trip." According to Gu, a friend completed Gu's visa application and answered questions before American consular officials. Gu allowed his friend to fraudulently indicate that Gu wished to travel to the United States for a business purpose. Gu has since confessed that he actually never had any business to conduct in the United States, nor did he actually conduct any business in the United States. At his asylum hearing, Gu admitted that his true reason for coming to the United States was to more freely practice his religion. On March 23, 1999, only after overstaying his visa did Gu apply for asylum and reveal his true purpose for entering the United States.

*1212 Gu claims that he was persecuted by the Chinese government because he distributed Christian religious materials and attended an unofficial "house church" while living in China. At his asylum hearing, Gu testified that, in October 1997, he was arrested by Chinese authorities and detained at a police station for three days. He claimed that he was interrogated for two hours, asked where he obtained the religious materials and to whom he had distributed them. After arguing that the religious

materials would not disturb the society and refusing to disclose where he distributed the materials, Gu asserted that the police hit his back with a rod approximately ten times. Gu testified that he was in pain at the time and that the strikes left temporary red marks, but required no medical treatment. Gu testified that no scars, bruises, welts, or injuries of any kind remain. Gu was not interrogated further, nor does Gu assert that he was subject to further physical mistreatment.

Gu testified that he was released after three days, upon signing a letter admitting that he had “done wrong.” Gu testified that he decided not to return to his home church because of fear of further police action, instead choosing to read his Bible at home. After his release, the police asked him to report to the police station once a week, but after four or five visits, the police lost interest and no longer required him to report. He was warned by his government employer that if he engaged in any additional illegal activities he would be fired, but he was allowed to return to his job as a manager for the government without any negative consequences. Gu suffered no additional problems from the government while in the country, and the Chinese government allowed him to obtain a passport to leave China.

Gu speculates that if he were to return to China, “the Chinese government will arrest me again.” He states that during a phone call home in March of 1999, a friend told him not to call his family any longer because “the public security people” came to his house to look for him. Gu believes that Chinese authorities looked for him because he had sent religious materials from the United States to China.

After the hearing, the Immigration Judge acknowledged that Gu “has had some difficulties practicing his religion,” but that he did “not believe the facts ... rise to the level of persecution as intended by the immigration laws.”^{FN1} The BIA affirmed the Immigration Judge, concluding that “among the other issues cited in the Immigration Judge's decision, [Gu] testified that he did not experience further problems, was able to return to his government job, and obtained a valid passport to leave China.”

^{FN1}. The Immigration Judge also denied Gu's request for withholding of removal and protection under the Convention Against Torture. Gu did not appeal the denial of these claims to the BIA, and they are not before us.

II

A

[1] [2] [3] Our review of the BIA's determination that an applicant has not established eligibility for asylum is highly deferential. We review the decision of the Board of Immigration Appeals for substantial evidence. *INS v. Elias-Zacarias*, 502 U.S. 478, 481, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992). We will affirm the BIA's decision if it is “supported by reasonable, substantial, and probative evidence on the record considered as a whole.” *Id.* (citation omitted). We may reverse the decision of the Board only if the applicant shows that the evidence *compels**1213 the conclusion that the asylum decision was incorrect. *Kataria v. INS*, 232 F.3d 1107, 1112 (9th Cir.2000); see also *Prasad v. INS*, 47 F.3d 336, 340 (9th Cir.1995) (“Although a reasonable factfinder *could* have found this incident sufficient to establish past persecution, we do not believe that a factfinder would be compelled to do so.”). This “strict standard” precludes us from “independently weighing the evidence and holding that the petitioner is eligible for asylum, except in cases where compelling evidence is shown.” *Kotasz v. INS*, 31 F.3d 847, 851 (9th Cir.1994).

[4] Because the BIA's opinion denying Gu's asylum petition attributed significant weight to the Immigration Judge's findings, we “look to the IJ's oral decision as a guide to what lay behind the BIA's conclusion.” *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1197 (9th Cir.2000).

B

[5] To prevail on his asylum claim, pursuant to the Immigration and Nationality Act (“Act”), Gu must establish that he is a refugee. A “refugee” is defined as an alien who is unable or unwilling to return to his home country “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42)(A). Refugee status is available if the applicant demonstrates either past persecution or a well-founded fear of persecution. *Cordon-Garcia v. INS*, 204 F.3d 985, 990 (9th Cir.2000).

[6] [7] [8] A well-founded fear of future persecution must be both “subjectively genuine” and “objectively

reasonable.” Nagoulko v. INS, 333 F.3d 1012, 1016 (9th Cir.2003). A petitioner’s credible testimony that he or she genuinely fears persecution on account of a protected ground satisfies the subjective component. *See id.* The objective component is satisfied if the applicant demonstrates past persecution, automatically giving rise to a rebuttable presumption of a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(1). In the alternative, the objective component can be satisfied by “ ‘adducing credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution.’ ” Ladha v. INS, 215 F.3d 889, 897 (9th Cir.2000) (quoting Duarte de Guinac v. INS, 179 F.3d 1156, 1159 (9th Cir.1999)).

III

We turn to analyze whether Gu has established by compelling evidence either past persecution or a well-founded fear of persecution. We answer in the negative and conclude that the BIA’s decision to deny Gu’s asylum claim is supported by substantial evidence.

A

[9] Persecution is an “extreme concept,” Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir.1995), and has been defined as “the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive.” Singh v. INS, 134 F.3d 962, 967 (1998) (quoting Ghaly, 58 F.3d at 1431) (internal citation and quotation marks omitted). Because persecution is an “extreme concept,” it “does not include every sort of treatment our society regards as offensive.” Al-Saher v. INS, 268 F.3d 1143, 1146 (9th Cir.2001) (quoting Ghaly, 58 F.3d at 1431).

We have recognized that, in some circumstances, detentions combined with physical attacks which occur on account of a protected ground can establish persecution. In Guo v. Ashcroft, 361 F.3d 1194 (9th Cir.2004), the asylum applicant was arrested while he was in church. During his day-and-a-half-long detention, Guo (not to be confused with Xiaoguang Gu, the *1214 petitioner in the instant case), was struck in the face, kicked in the stomach, required to perform repeated pushups and forced to sign a document saying that he promised not to believe in Christianity. *Id.* at 1197.

Less than two weeks later, Guo tried to stop a police officer from removing a cross from a tomb. The police officer used an electrically-charged baton to subdue Guo, then two police officers held his arms and kicked his legs, causing him to fall. Guo was then taken to the police station, where he was hit in the face seven or eight times and tied to a chair and beaten with a plastic pole. Guo was released after being detained for 15 days. Shortly thereafter, Guo was fired from his job because his employer claimed that he had committed a crime. *Id.* at 1197-98. We concluded that Guo presented substantial evidence of past persecution.

We arrived at a different conclusion in Prasad. Prasad was taken to a police station, placed in jail, where he was hit in the stomach and kicked from behind. 47 F.3d at 339. Prasad was detained for four to six hours and interrogated about his political allegiances. Prasad did not require any medical treatment and was not charged with any crime. *Id.* Once he was released, Prasad assumed that unless he suppressed his political activities, he would again be arrested and beaten. The government, however, did not further harass Prasad, nor did the evidence indicate that it had any continuing interest in Prasad. *Id.* The Board of Immigration Appeals concluded that the conduct did not rise to the level of persecution, and we held that “[w]e are not permitted to substitute our view of the matter for that of the Board.” *Id.* at 340 (citation omitted). We held that “[a]lthough a reasonable factfinder *could* have found this incident sufficient to establish past persecution, we do not believe that a factfinder would be *compelled* to do so.” *Id.* (second emphasis added). The government’s conduct in Prasad was not “so overwhelming so as to necessarily constitute persecution.” 47 F.3d at 339.

The crucial difference between Guo and Prasad is whether the asylum applicant was able to demonstrate that the evidence *compelled* the conclusion that the BIA decision was incorrect. In Guo, the petitioner was able to show repeated, lengthy and severe harassment. In contrast, the BIA’s finding in Prasad was supported by substantial evidence because Prasad was unable to show more than a single, isolated encounter with the authorities.

[10] The abuse that Gu encountered most closely mirrors the circumstances discussed in Prasad. Like Prasad, Gu was detained and beaten on only one occasion, Gu’s interrogation lasted only two hours, Gu did not require medical treatment and Gu did not have any adverse employment consequences.

[11] The record also does not demonstrate that Gu was objectively unable to attend his household church. ^{FN2} Although *1215 Gu testified that he “did not dare” attend his household church after his arrest, he also testified that the authorities did not prevent him from attending the household church. While this somewhat conflicting testimony may demonstrate that he was subjectively unwilling to attend the household church after his arrest, the record does not demonstrate that he was unable to do so. Indeed, there is no suggestion in the record that Gu was disallowed from meeting with and discussing his religion with others or disallowed from praying or worshipping outside his home. Other than ongoing prohibition on distribution of contraband religious tracts, there is no evidence in the record regarding any state-imposed limitation on his right to practice his religion.

FN2. The Immigration Judge erroneously stated in his decision that Gu continued to attend his house church, which is at odds with Gu's testimony to the contrary. This isolated error of the Immigration Judge proves to be of little significance, however, because we are required to look at the “record considered as a whole” in assessing whether a petitioner established eligibility for asylum. *Elias-Zacarias*, 502 U.S. at 481, 112 S.Ct. 812. Because our inquiry is based on the record as a whole, pointing out isolated errors in either the decision of the Immigration Judge or of the Board of Immigration Appeals is insufficient to show that a reasonable factfinder would be compelled to conclude that the applicant is eligible for asylum. In addition, this isolated error of the Immigration Judge is of particular insignificance given that the BIA neither explicitly adopted this portion of the Immigration Judge's decision nor mentioned this reason as a factor in support of its denial of Gu's petition.

On these facts, we conclude that the evidence does not compel a result contrary to the BIA's finding that Gu fails to demonstrate past persecution.

B

[12] Since Gu failed to establish that the record compels the conclusion that Gu was subject to past

persecution, we turn to consider whether Gu has independently established a well-founded fear of persecution. We conclude that the BIA's determination that Gu did not establish a well-founded fear of persecution is supported by substantial evidence.

Gu's primary support for his argument that he has established a well-founded fear of persecution is his speculation that if he returns to China, the authorities will arrest him again. As evidence supporting this theory, Gu testified that after he returned to the United States, “the local police went to [his] home and asked [his] wife to ask [him] to go back to be questioned.” Apparently, Gu learned of this incident because a friend “told [him] not to call [his] family anymore because the security people came to [his] house to look for [him].” Gu testified that he believed that the “security people” would come to look for him because he sent religious material from the United States to some of his friends and fellow church members in China, although it does not appear that Gu was informed directly by either his friends or family members why the authorities came to his former home in China.

[13] [14] As a general rule, because the Immigration Judge did not render an adverse credibility finding, we must accept Gu's factual testimony as true. *Kataria*, 232 F.3d at 1114. We are presented with a unique circumstance, however, because the record does not contain testimony from any witness who personally observed the public security individuals visit Gu's residence. We have only hearsay evidence from an anonymous friend, who Gu says told him that public security visited Gu's residence. In the immigration context, hearsay is admissible if it is probative and its admission is fundamentally fair, see *Baliza v. INS*, 709 F.2d 1231, 1233 (9th Cir.1983), and hearsay evidence may not be rejected out-of-hand, see *Dia v. Ashcroft*, 353 F.3d 228, 254 (3d Cir.2003) (en banc) (holding that while hearsay evidence may be accorded less weight in immigration proceedings, “seemingly reliable hearsay evidence should not be rejected in [] a perfunctory manner”).

[15] The general principle requiring the factfinder and a court of appeals to accept a petitioner's factual contentions as true in the absence of an adverse credibility finding is necessarily relaxed when assessing the underlying truth of what is not the product of petitioner's direct observations, but rather, mere hearsay evidence. In *Murphy v. INS*, we held in the deportation context that a signed statement containing hearsay, without cross-examination was

"hardly worthy of full evidentiary weight." 54 F.3d 605, 611 (9th Cir.1995) *1216 (citing Martin-Mendoza v. INS, 499 F.2d 918, 921 (9th Cir.1974)).

We also recognized the important limits on hearsay evidence in endorsing the proposition that "[t]he hearsay nature of a given item of evidence may well have a substantial effect on the probative value of that evidence." 54 F.3d at 611 (quoting Matter of Ponco, 15 I. & N. Dec. 120, 123 (BIA 1974)).

[16] We hold that where an asylum applicant's testimony consists of hearsay evidence which is not susceptible to cross-examination, the statements by the out-of-court declarant need not be automatically taken as true and, compared to non-hearsay evidence, may be accorded less weight by the trier of fact.

Pursuant to these principles, we do not question the veracity of Gu's understanding that his friend told him that members of China's public security team came to question him. By the same token, we hold that we, and the BIA, are not required to accept the out-of-court hearsay statement of Gu's friend, which lacked foundation and was not subject to cross-examination, as true.

We conclude that the record does not compel the conclusion that Gu has established a well-founded fear of persecution were he to return to China. Even after he was detained and harassed in October 1997, after several follow-up visits to the police station, Gu did not suffer further problems with the government while he was in China. Gu was not prevented from attending religious services, he was allowed to retain his government job, and he traveled freely without interference from the Chinese authorities. Because the report that Chinese authorities visited him after he left is the product of mere hearsay evidence, we are not required to accept the underlying truth of that report. Even if it is true that the authorities looked for Gu at his former home in China, Gu did not testify that the authorities either threatened him or his family in any way. The authorities simply came to interview him. Other than this alleged visit by the authorities to interview Gu, the record is devoid of any evidence that the Chinese authorities have shown any interest or concern in Gu's activities since shortly after his brief detention in 1997.

Gu's testimony may be sufficient to satisfy the subjective component required to establish a well-founded fear of persecution. Gu has failed, however, to present compelling, objective evidence demonstrating a well-founded fear of persecution.

IV

A reasonable factfinder would not be compelled to conclude that Gu either suffered past persecution or has a well-founded fear of persecution.

REVIEW is DENIED.

PREGERSON, Circuit Judge, dissenting:

I believe that Gu has established past persecution on account of his Christian religious practices and is eligible for asylum under 8 U.S.C. § 1101(a)(42)(A). Accordingly, I dissent.

I. Factual Background

Gu testified that Chinese authorities persecuted him for expressing his Christian religious beliefs by attending an unregistered Christian church and by distributing Christian religious materials. According to his testimony, Gu first became interested in Christianity in October 1996, after his older sister, who resided in the United States, spoke to him about her conversion. A month later, Gu's sister began sending religious materials to him in China. She sent him additional materials in January 1997 and February 1997.

*1217 As his interest in Christianity developed, Gu began attending a government-controlled Christian church in January 1997 and was baptized there on March 16, 1997. Gu became disenchanted with the government-controlled church because it presented political opinions and did not adhere to the Christian gospel. Gu then began to attend a small unregistered Christian church that held services in a member's home. Gu attended services at this house church once a week and distributed copies of his sister's Christian religious materials to his fellow church members. He also distributed these materials to his co-workers at his government job.

In October 1997, Gu was arrested by public security officers and taken to the Shen Yang City Police Branch. At the police station, Gu was placed in a small interrogation room. On its walls, whips and other "things police use" were displayed. The officers interrogated Gu for two hours about the Christian religious materials he distributed. They characterized these materials as Western democracy propaganda. The officers wanted to know how Gu got the religious materials and to whom the materials

were distributed. Gu argued with the officers and refused to give them the names of the persons to whom he had given the materials. As a result, the officers beat Gu with a rod more than ten times, leaving marks on his back.

Gu was imprisoned for three days. He was conditionally released after his family posted bail. As a condition of release, Gu was required to report to the local police once a week for questioning regarding his religious activities. ^{FN1} Gu was also required to write a letter to the officers confessing that he had "done wrong" and that he agreed not to participate in any further illegal Christian religious activities. Gu agreed to write the confession letter only because he feared that his refusal would result in further detainment and additional beatings.

^{FN1}. At the hearing before the Immigration Judge ("IJ"), government counsel asked Gu, "Were there any conditions on your release?" Gu responded, "They asked me to report to [the] local police station on a weekly basis." The majority adheres to the literal translation of Gu's words when it says that the police "asked him to report to the police station once a week." Reading the statement in context, however, Gu was not simply asked to report to the police station. Reporting to the police station was a condition of his release; Gu was *required* to report to the police station.

After he was released from prison, Gu stopped attending his house church and ceased distributing religious materials because he feared that he would be arrested, detained, and beaten. He felt that the only way he could safely practice his religion was to read his Bible alone at home. During Gu's weekly visits to the local public security police, he was questioned on whether he had distributed Christian religious materials or knew anyone who had. Gu made three such visits before the police told him that he no longer needed to comply with this condition of his release. Gu also returned to his government work unit, where he was put on probation and threatened with termination if he again committed similar acts.

With the help of a friend, Le Hai Hu, Gu fled to the United States on May 9, 1998. Safe in the United States, Gu began attending Christian religious services once a week. Twice he sent religious materials back to China. In March 1999, a friend

living in China warned Gu to stop telephoning his family because public security officers—apparently believing Gu had returned from the United States—had visited the Gu family's home seeking to question him about the religious materials he sent to China from the United States. This warning, coupled with his earlier experiences, served as the basis for Gu's fear *1218 that he would be arrested by the Chinese public security officers if he were forced to return to China.

After a hearing, the IJ concluded that Gu failed to establish that he was eligible for asylum. The IJ found that after his initial arrest Gu did not experience any adverse consequences at his job. Furthermore, the IJ found that Gu continued to attend his house church, receive religious materials from his sister, and practice Christianity. As discussed below, these findings are contradicted by the record. The IJ also found it important that Gu was able to obtain a passport to travel to the United States without difficulties from the Chinese government. Ultimately, the IJ concluded that the abuse Gu endured did not rise to the level of persecution. Thus, the IJ denied Gu's request for asylum, withholding of removal, and protection under the Convention Against Torture.

The Board of Immigration Appeals ("BIA") dismissed Gu's appeal after finding that the record supported the IJ's conclusion that Gu failed to demonstrate eligibility for asylum. In support of its opinion, the BIA cited the IJ's findings that Gu experienced no further problems after his arrest, was able to return to his job, and obtained a valid passport to leave China.

II. Substantial Evidence

I disagree with the majority's conclusion that the BIA's decision is supported by substantial evidence. We must uphold the BIA's determination that an alien is not eligible for asylum only if it is "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *INS v. Elias-Zacarias*, 502 U.S. 478, 481, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992) (internal quotations omitted). The BIA's decision must be reversed where a reasonable factfinder would be compelled to conclude, based on the evidence in the record, that there was a well-founded fear of future persecution. *Id.* at 481 n. 1, 112 S.Ct. 812. The evidence here compels such a finding.

The majority opinion correctly notes that in determining eligibility for asylum, we should look at the "record considered as a whole." *Id.* at 481, 112 S.Ct. 812. The majority, however, fails to perform that analysis properly.^{FN2} A comprehensive examination of the record reveals that the decision to deny Gu asylum is not supported by substantial evidence. The IJ's decision is premised on erroneous findings that are contradicted by the administrative record. Moreover, rather than constituting what the majority deems "isolated errors," these mistakes go to the heart of Gu's asylum claim and undermine the BIA's denial of Gu's asylum application.

Contrary to the IJ's oral decision, Gu did not "concede[] that he continued to attend his unregistered church ... without prohibition, without interruption or interference by the government...."^{FN2} Instead, *1219 the record demonstrates that Gu's religious practices were indeed stopped by the government, because, after he was arrested and beaten, Gu's fear of further arrests caused him to stop attending his church. Gu testified that after his arrest he was *only* able to practice his religion by reading his Bible alone at home. Because Gu stopped attending his church, it is impossible to know what additional steps the public security police may have taken to stop him.

^{FN2}. The majority improperly downplays the IJ's blatant error by stating that the BIA "neither explicitly adopted this portion of the IJ's decision nor mentioned this reason as a factor in support of its denial of Gu's petition." Under the law of this circuit, when the BIA incorporates the IJ's decisions as its own, we treat the IJ's reasons as the BIA's. See *He v. Ashcroft*, 328 F.3d 593, 595-96 (9th Cir.2003) (examining both the oral opinion of the IJ and the written opinion of the BIA where the BIA relied on a combination of its own observations about He's testimony and "other problems noted by the IJ" when making an adverse credibility determination). In this case, the BIA did not have its own independent reasons for affirming the IJ's denial. The BIA stated:

The record supports the Immigration Judge's conclusion that the respondent failed to demonstrate eligibility for asylum. *Among the other issues cited in the Immigration Judge's decision*, the respondent testified that he did not experience further problems,

was able to return to his government job, and obtained a valid passport to leave China. (emphasis added) (citation omitted). Thus, because the BIA did, in fact, explicitly incorporate the IJ's reasons as its own, we must also review the IJ's oral decision for substantial evidence. See *He*, 328 F.3d at 595-96.

In addition, in his oral decision, the IJ stated that Gu testified that after his arrest he continued to receive religious tracts from his sister without problems from the Chinese government. This finding is directly at odds with the testimony of both Gu and his sister that she sent him religious materials in November 1996, and in January and February 1997. Based on this testimony, the last time Gu's sister sent him any religious materials was eight months *before* he was arrested and beaten by the Chinese public security police.

Finally, the IJ found it important that Gu was able to return to his government job and was not terminated after he was released from prison. This finding, however, is undercut by Gu's testimony that after he returned to that job, he was placed on probation and threatened with termination if he again engaged in such religious activities.

These erroneous factual findings are compounded by the IJ's conclusion that the public security police approved of Gu's religious activities because he was told that he no longer needed to report to the police after three weekly meetings. This conclusion misunderstands the reason for Gu's weekly reports, which was to confirm that Gu was complying with the police demand that he no longer participate in any illegal religious activities. And, as Gu testified, this is what he did: after his release from detention he stopped attending his Christian house church and stopped distributing religious materials. When Gu's actual testimony is understood, it becomes apparent that the security police lost interest in him because he was no longer participating in the prohibited activities as required by his "confession."

Similarly, the record contradicts the BIA's (and majority's) conclusion that Gu suffered no further problems with the government after his arrest. That the government did not continue to harass Gu after he ceased participating in the prohibited religious activities only demonstrates the success of the government's repression of Gu's Christian religious activities. The government did not try to stop Gu from attending his house church because Gu made no

attempt to attend. The government made no attempt to stop him from distributing religious materials because Gu made no attempt to distribute. Gu's acquiescence to the government's repression, however, does not lead to the conclusion that he would no longer be subjected to repression if he again participated in his Christian religious activities. Indeed, Gu testified that he was threatened that if he did engage in such activities again, he would be fired from his government job.

Because Gu ceased attending his house church and distributing religious materials, we cannot know whether the government would have interfered or stopped him had he continued to do so. What we do know is that when Gu was attending church and distributing religious materials he was arrested, beaten, and detained for three *1220 days. After he ceased his Christian religious activities he was not subjected to further punishment. Mere speculation that Gu would have suffered no repercussions had he continued to pursue his Christian religious activities is not substantial evidence. *See Maini v. INS*, 212 F.3d 1167, 1173 (9th Cir.2000) ("It is well-established that we will not uphold the BIA's determination if it relies on personal conjecture and speculation, which we have stressed is no 'substitute for substantial evidence.'"); *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir.1996) (noting that "conjecture" cannot "substitute for substantial evidence").

When the IJ's erroneous factual findings are set aside, there remains only the IJ's findings that Gu (1) was permitted to return to his government job-where he was put on probation and threatened with termination if he engaged in Christian religious activities again-and (2) was able to obtain a Chinese passport. Such meager findings do not constitute substantial evidence and are insufficient to support the BIA's conclusion that Gu would suffer no further problems with the government if forced to return to China.

III. Persecution

Because I believe that the denial of Gu's asylum claim is not supported by substantial evidence, the next step is to consider whether a reasonable factfinder would be compelled to conclude, based on the evidence in the record, that Gu has a well-founded fear of persecution. *See Elias-Zacarias*, 502 U.S. at 481 n. 1, 112 S.Ct. 812. In deciding whether a finding of persecution is compelled, we look at the totality of the circumstances. *Guo*, 361

F.3d at 1203 (quoting *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir.1998) ("The key question is whether, looking at the cumulative effect of all the incidents a petitioner has suffered, the treatment [he or] she received rises to the level of persecution.")). A well-founded fear of persecution must be both "subjectively genuine" and "objectively reasonable." *Nagoulko v. INS*, 333 F.3d 1012, 1016 (9th Cir.2003). Because, as the majority concedes, Gu's credible testimony that he genuinely fears persecution satisfies the subjective component, the issue here is whether Gu can satisfy the objective component by either demonstrating past persecution or by citing "credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution." *See Nagoulko*, 333 F.3d at 1016 (quoting *Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 (9th Cir.1999)).

A. Past Persecution

The majority contends that the suffering endured by Gu is more closely aligned with that of the petitioner in *Prasad v. INS*, 47 F.3d 336 (9th Cir.1995), than that of the petitioner in *Guo v. Ashcroft*, 361 F.3d 1194 (9th Cir.2004). I disagree. The majority notes that the crucial factors differentiating *Guo* and *Prasad* are the length and the persistence of harassment. However, the majority disregards key distinctions between the facts of *Prasad* and those in the instant case when it concludes that the evidence does not compel a finding of past persecution for Gu.

Prasad was detained for four to six hours. During that time, he was hit and kicked. Like Prasad, Gu was also arrested and beaten. However, that is where the similarities end. Prasad was only hit and kicked; Gu was beaten with a rod multiple times. Prasad was only detained for a few hours; Gu was detained for a substantially longer time-three days. Prasad was questioned but not threatened explicitly; Gu was interrogated about his Christian religious activities in a room where instruments of torture were displayed. Other than the arrest and beating,*1221 there were no further allegations of governmental mistreatment by Prasad.

The majority incorrectly states that Gu did not suffer any adverse employment consequences. Gu's testimony established that after he returned to his government job, he was punished with threats of termination if he ever engaged in his Christian religious activities again. Finally, even though Gu was released from prison, his release was conditioned

on his signing a "confession" promising not to engage in illegal Christian religious activities and reporting weekly to the security police.^{FN3} The extent of Gu's suffering was sufficiently long and persistent to compel a finding of past persecution.

FN3. The government argues and the majority endorses that denial of asylum is appropriate because Gu "at most" "only" suffered three days of detention and a beating with rods that left no scars or permanent injuries. This argument suggests that a similar claim from a frailer petitioner would succeed. The government has pointed to no authority supporting the proposition that the strength of a petitioner's application should be dependent upon his or her body's ability to withstand a beating.

The majority believes that Gu's testimony is somehow conflicting and cites this as support for denying his petition for review. As the basis for this conclusion, the majority points to Gu's testimony (1) that he "did not dare" attend his house church, but (2) that he was not prevented by authorities from attending the house church. Contrary to the majority's reading, this testimony does not conflict. Rather, it is entirely consistent that Gu was never *physically* prevented from attending his house church precisely because he "did not dare" attend it. The cumulative effects of the detention, beating, threats, and coerced confession enabled the Chinese government to successfully dissuade Gu from practicing his religion. When he returned to his government job, he was put on probation and threatened with termination if he participated in any more Christian activities not authorized by the state. The majority would penalize Gu for his reasonable belief that those threats, delivered after days of detention and a beating, were genuine. What the testimony in fact established is that the government's actions deterred him from attending the house church; its persecution of him was successful. No further action was necessary.

Accordingly, I believe that Gu's credible testimony establishes that he suffered past persecution on account of his Christian religious practices. See Nagoulo, 333 F.3d at 1016; Guo, 361 F.3d at 1203; see also Duarte de Guinac, 179 F.3d at 1161 (finding that detention combined with physical beatings can establish persecution). I believe that the cumulative treatment Gu was forced to endure rises to the level of and compels the conclusion that Gu suffered

persecution on account of his religion, one of the five enumerated grounds for the establishment of refugee status. See Elias-Zacarias, 502 U.S. at 481 n. 1, 112 S.Ct. 812.

B. Objectively Reasonable Fear of Future Persecution and Treatment of Hearsay in Immigration Proceedings

The majority improperly dismisses Gu's objectively reasonable fear of future persecution. Gu testified that public security officials—apparently believing Gu had returned from the United States—have visited Gu's family's home in China on at least one occasion since his departure, seeking to question Gu about religious materials he sent to China from the United States. Gu learned of this fact from a telephone conversation with a friend who was still in China. I am deeply troubled by the majority's treatment of this testimony. Although*1222 the majority claims that it has not done so, it seems apparent to me that the majority rejects Gu's testimony out of hand *simply because* it is hearsay. The majority maintains that it only accords Gu's testimony less weight, but its analysis actually accords it no weight at all. In so doing, the majority contravenes the well-established law of this circuit.

"This court recognizes the serious difficulty with which asylum applicants are faced in their attempts to prove persecution, and has adjusted the evidentiary requirements accordingly." Ladha v. INS, 215 F.3d 889, 899 (9th Cir.2000) (quoting Cordon-Garcia v. INS, 204 F.3d 985, 992-93 (9th Cir.2000)). Accordingly, in the asylum context, we have permitted full consideration of an applicant's testimony even if that testimony is "founded upon hearsay, and, at times, hearsay upon hearsay." Cordon-Garcia, 204 F.3d at 992. Disregarding clear circuit precedent, the majority discounts Gu's testimony simply because it is hearsay, ignoring that we have recognized that "it is difficult to imagine what other forms of testimony the petitioner could present other than his own statements...." McMullen v. INS, 658 F.2d 1312, 1319 (9th Cir.1981), *superseded by statute on other grounds*, 8 U.S.C. § 1253(h) (1996); see also Cordon-Garcia, 204 F.3d at 992-93; Ladha, 215 F.3d at 899-900.

The friend who told Gu that Gu's home had been visited by the security officials did not testify at the hearing—he was likely still in China. The majority's *sole* reason for concluding that the statement is untrue is merely that the statement is hearsay.

However, there is no evidence in the record that contradicts Gu's testimony. Moreover, neither the IJ nor the BIA questioned Gu's credibility. Absent a specific finding of Gu's lack of credibility, I find no reason to accord Gu's testimony less than full evidentiary weight. See Smolnikova v. Gonzales, 422 F.3d 1037, 1038 (9th Cir.2005) (citing Akinmade v. INS, 196 F.3d 951, 958 (9th Cir.1999)) (holding that in the absence of evidence that undermines the petitioner's credibility, we accept the petitioner's testimony as true).

The majority cites Murphy v. INS, 54 F.3d 605 (9th Cir.1995), as support for granting Gu's testimony less than full evidentiary weight. Murphy is inapposite. In Murphy, the Immigration and Naturalization Service ("INS") submitted an unauthenticated, undated, unnotarized, and unverified statement signed by an INS agent reporting earlier conversations regarding Murphy's alienage. See id. at 607. The INS agent did not testify at the hearing before the IJ. See id. We held that without the agent's "testimony on cross-examination, the statement is subject to speculation and hardly worthy of full evidentiary weight." Id. at 611 (citing Martin-Mendoza v. INS, 499 F.2d 918, 921 (9th Cir.1974)).

The facts in the instant case are quite different from those in Murphy. In Murphy, the hearsay declarant was an INS agent, and the party offering the testimony was the INS. The reason the Murphy court allocated less than full evidentiary weight to the INS's evidence was because it is easier for the INS to produce a hearsay declarant who works for the INS than it is for an asylum seeker to produce someone from the country he or she fled. See Saidane v. INS, 129 F.3d 1063, 1065 (9th Cir.1997) (holding that where INS made no effort to call admittedly available witness and relied on that witness's hearsay affidavit, hearing was "fundamentally unfair"). In this case, Gu offered the hearsay statement of a friend in China. Neither the government's counsel, nor the IJ, nor the BIA questioned the whereabouts of Gu's friend. Based on the testimony, *1223 Gu's friend, unlike the INS agent in Murphy, was simply not the type of witness whose presence would be expected at the hearing.

The standard applicable to situations where the government wishes to introduce hearsay evidence is markedly different from those where the alien introduces hearsay. For the government, admission depends on "whether its admission was fundamentally fair" to the alien. Saidane, 129 F.3d at 1065 (quoting Baliza v. INS, 709 F.2d 1231, 1233

(9th Cir.1983)). The majority turns this standard on its head. Insisting that the government "afford the alien a reasonable opportunity to confront the witnesses against him or her," Cunanan v. INS, 856 F.2d 1373, 1375 (9th Cir.1988), is an entirely inappropriate requirement to apply to Gu. We have repeatedly recognized that typical asylum applicants are faced with "serious difficulty ... in their attempts to prove persecution." Ladha, 215 F.3d at 899. Requiring the government to produce an INS agent to testify to his out-of-court statements is quite different from asking an asylum applicant to produce a friend from China he spoke with on the telephone. See id. at 900 (citing Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir.1984)) ("[A]uthentic refugees rarely are able to offer direct corroboration of specific threats...."). Direct evidence that the security officials had been looking for Gu would simply not be "easily available." See Guo, 361 F.3d at 1201 (citing Sidhu v. INS, 220 F.3d 1085, 1092 (9th Cir.2000)) ("[I]t is inappropriate to base an adverse credibility determination on an applicant's inability to obtain corroborating affidavits from relatives or acquaintances living outside of the United States—such corroboration is almost never easily available.")). That Gu's fear of persecution is objectively reasonable is supported by the testimony that public security officials have visited Gu's home in China. ^{FN4} See Al-Harbi v. INS, 242 F.3d 882, 888 (9th Cir.2001) (holding that "even a ten percent chance of persecution may establish a well-founded fear").

FN4. The majority ignores the context of Gu's account and belittles his experiences when it claims that the Chinese authorities "simply came to interview him." We must make "reasonable inferences" from the facts to which an alien credibly testifies. Ladha, 215 F.3d at 900. The visit occurred soon after Gu had sent Christian religious materials to his friends and fellow church members in China. Considering the circumstances of Gu's beating and detainment at the hands of security officers, the "confession" he was forced to sign, and his threatened termination, any reasonable person would infer that the "visit" to his home was in all likelihood not for the purpose of conducting a simple interview. Gu himself credibly testified that these visits serve as the basis for his fear of arrest and detainment upon return to China.

In conclusion, I believe that Gu has established that his fear of future persecution on account of his Christian religion is "subjectively genuine" and "objectively reasonable." See *Nagoulko*, 333 F.3d at 1016. The BIA's decision was not supported by substantial evidence. Evidence of his past experiences and the fact that his house in China has been visited by Chinese authorities since his departure compel a finding of a well-founded fear of future persecution.

For the foregoing reasons, I dissent.

C.A.9,2005.

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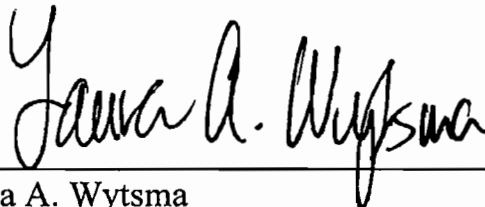
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CERTIFICATE OF SERVICE

I certify that on March 2, 2006, I caused the **BRIEF OF *AMICI CURIAE***
IN SUPPORT OF PETITIONER'S MOTION FOR PANEL REHEARING
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Terri J. Scadron, Esq.
U. S. Department of Justice
Civil Division
Office of Immigration Litigation
P. O. Box 878, Benjamin Franklin Station
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