No. 11-1119

# In the Supreme Court of the United States

RUI YANG, PETITIONER

*v.*

ERIC H. HOLDER, JR., ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

DONALD B. VERRILLI, JR.
*Solicitor General*
*Counsel of Record*
STUART F. DELERY
*Acting Assistant Attorney General*
DONALD E. KEENER
JOHN W. BLAKELEY
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

Whether, in a case not governed by the REAL ID Act of 2005, Pub. L. 109-13, Div. B., 119 Stat. 302, an immigration judge must make an express credibility finding before denying an asylum application on the independent ground that the alien failed to provide reasonably available corroborating evidence.

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## OPINIONS BELOW

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

## JURISDICTION

The judgment of the court of appeals was entered on December 12, 2011. The petition for a writ of certiorari was filed on March 12, 2012 (a Monday). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. The Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security (Secretary) or the Attorney Gen-

eral "may" grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A). The INA defines "refugee" as an alien "who is unable or unwilling to" return to his country of nationality "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).

b. In 1987, the Board of Immigration Appeals (Board) observed that an "alien's own testimony may in some cases be the only evidence available" to support an asylum claim, and stated that such testimony "can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear" of persecution. *In re Mogharrabi*, 19 I. & N. Dec. 439, 445. The Board subsequently clarified that this rule did not mean "that the introduction of supporting evidence is purely an option with an asylum application in the ordinary case." *In re Dass*, 20 I. & N. Dec. 120, 124 (1989). "Rather, the general rule is that such evidence should be presented where available." *Ibid.* After those decisions, the Immigration and Naturalization Service issued a regulation providing that "testimony of the [asylum] applicant, if credible in light of general conditions in the applicant's country of nationality or last habitual residence, may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. 208.13(a) (1991); see 55 Fed. Reg. 30,683 (July 27, 1990).

In later interpreting that regulation, the Board held that aliens who fail to provide reasonably available corroborating evidence may be found to have failed to satisfy their burden of proof. *In re S-M-J-*, 21 I. & N. Dec. 722, 724-726 (1997). The Board recognized that in some

instances requiring corroboration may be unreasonable, such as when the evidence is held by the alien's persecutor. *Id.* at 725-726. In general, however, the Board concluded that "[i]mplicit" in the regulation (and its prior holdings in *Mogharrabi* and *Dass*) was "an assumption that the adjudicator will have some background information against which to measure" an applicant's claim to determine if the claim is "plausible." *Id.* at 724.

The Board thus reasoned that, "[b]ecause the burden of proof is on the alien," the alien should provide supporting evidence, "both of general country conditions and of the specific facts sought to be relied on by the applicant, where such evidence is reasonably available." *S-M-J-*, 21 I. & N. Dec. at 724. The Board held that such evidence should include "documentary support for material facts which are central to his or her claim and easily subject to verification." *Id.* at 725. At the same time, the Board explained that the applicant must be afforded an opportunity to explain the unavailability of such evidence. *Id.* at 724. After *S-M-J-*, the relevant regulation was amended to take its present form: "[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. 208.13(a); 62 Fed. Reg. 10,342 (Mar. 6, 1997); see also 8 C.F.R. 1208.13(a) (identical language governing asylum applications filed in removal proceedings).

c. In 2005, Congress enacted amendments to the INA. See REAL ID Act of 2005 (REAL ID Act), Pub. L. 109-13, Div. B., 119 Stat. 302. The Conference Committee on the amendments explained that, before those amendments, "there [were] no explicit evidentiary standards for granting asylum in the INA." H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 161 (2005) (Conference Report). As a result, "standards for determining the

credibility of an asylum applicant and the necessity for evidence corroborating an applicant's testimony ha[d] evolved through the case law of the Board of Immigration Appeals (BIA) and federal courts." *Ibid.* "Because these standards [were] not consistent across federal appellate courts," the Conference Committee explained, "different results have been reached in similar cases, depending on the court that hears the case." *Ibid.* Accordingly, Congress enacted the REAL ID Act to, among other things, "resolve[] conflicts between administrative and judicial tribunals with respect to standards to be followed in assessing asylum claims." *Id.* at 162.

As relevant here, the 2005 amendments provide that "[t]he testimony of the applicant [for asylum] may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." 8 U.S.C. 1158(b)(1)(B)(ii); see REAL ID Act § 101(a)(3), 119 Stat. 303. Congress also provided that "[w]here the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." 8 U.S.C. 1158(b)(1)(B)(ii); see REAL ID Act § 101(a)(3), 119 Stat. 303. Moreover, the statute now provides that "[t]here is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." 8 U.S.C. 1158(b)(1)(B)(iii); see REAL ID Act § 101(a)(3), 119 Stat. 303.

The Conference Committee explained that Congress enacted these amendments, which were "based upon the standard set forth" in the Board's decision in *S-M-J-*, to "bring clarity and consistency to evidentiary determinations by codifying standards for determining the credibility of applicant testimony, and determining when corroborating evidence may be required." Conference Report 165-166. The Conference Committee "anticipate[d] that the standards in [*S-M-J-*], including the [Board's] conclusions on situations where corroborating evidence is or is not required, will guide the [Board] and the courts in interpreting" the new INA provisions on credibility determinations. *Id.* at 166.

Congress provided that the amendments discussed above "shall apply to applications for asylum * * * made on or after" enactment of the statute, *i.e.*, May 11, 2005. See REAL ID Act § 101(h)(2), 119 Stat. 305; 8 U.S.C. 1158 note (Effective Date of 2005 Amendment); see also *In re S-B-*, 24 I. & N. Dec. 42, 43 (B.I.A. 2006).

2. a. Petitioner, a native and citizen of China, entered the United States in 1998, on a J-1 visa to participate in an exchange program. Pet. App. 1a-2a. He filed an application for asylum on November 28, 2001, *id.* at 2a, before the effective date of the REAL ID Act, see *id.* at 8a n.4, 19a n.1, 35a. Petitioner subsequently had his visa changed to an F-1 student visa, and shortly thereafter stopped attending school, violating the terms of that student visa. *Id.* at 2a, 24a. Consequently, the Department of Homeland Security issued a Notice to Appear alleging that petitioner was removable under 8 U.S.C. 1227(a)(1)(C)(i) for failing to maintain status. Pet. App. 24a. When petitioner failed to appear in removal proceedings, he was ordered removed in absentia. *Id.* at 2a.

The immigration judge subsequently granted a motion to reopen filed by petitioner on the ground that he did not receive a decision on his 2001 asylum application. Pet. App. 2a-3a. Petitioner then admitted the factual allegations against him, conceded his removability, and requested relief in the form of asylum, and withholding of removal under the INA and the Convention Against Torture. *Id.* at 24a. Petitioner claimed that he would be persecuted in China because of his past support for the practice of Falun Gong. *Id.* at 3a. Petitioner said that he had sent pro-Falun Gong material to his parents in China; that his parents had distributed it; and that his father had been arrested as a result. *Ibid.* Petitioner stated that his father had been detained for a year and was released "only because [his] uncle paid a bribe to government officials." *Id.* at 4a.

b. Following a merits hearing on October 31, 2008, an immigration judge denied petitioner's applications. Pet. App. 23a-42a. Without questioning petitioner's credibility, the immigration judge found that petitioner provided no documentary evidence pertaining to his father's arrest and detention, no statements from his parents or his uncle, and no charging documents related to his claim that Chinese authorities intended to arrest him. *Id.* at 35a-36a. Relying on *Dass* and *S-M-J-*, the immigration judge emphasized that "[a]n applicant for asylum is well advised that while his testimony may in some cases be sufficient to satisfy his burden, * * * corroborating evidence should be presented where available and where it is reasonable to expect." *Id.* at 36a-37a.

The immigration judge also noted that if an alien's testimony alone is insufficient to meet his burden, and if he failed to present reasonably available corroborating

evidence, then he failed to satisfy his burden of proof. Pet. App. 37a. Given petitioner's failure to corroborate his testimony with reasonably available evidence, the immigration judge concluded that he failed to demonstrate a well-founded fear of persecution. *Id.* at 37a-38a. Having failed to establish eligibility for asylum, the immigration judge necessarily found that petitioner failed to establish eligibility for withholding of removal. *Ibid.*

The immigration judge further held that another continuance to allow petitioner to attempt to gather corroborating evidence was not warranted. Pet. App. 36a. The immigration judge noted that petitioner was charged with removal "nearly three years" before his merits hearing and that he had previously received the services of two attorneys. *Ibid.* The immigration judge thus concluded that petitioner "had more than ample time to present his case before the Immigration Court." *Ibid.*

c. The Board dismissed petitioner's subsequent appeal. Pet. App. 19a. The Board agreed with the immigration judge that petitioner failed to "provide sufficient documentation to corroborate his claim." *Id.* at 20a. The Board acknowledged that petitioner's assertion that he could not provide official documentary evidence of his father's detention from the Chinese government "may be valid." *Ibid.* But it found that he could have provided statements from his parents "detailing the father's detention, the search of their house, and the alleged charge against [petitioner]," as well as a statement from his uncle "who [petitioner] claimed was the person responsible for obtaining his father's release." *Id.* at 20a-21a.

The Board concluded that such corroborating statements "were reasonably obtainable, and it was reason-

able to expect such evidence to corroborate the material aspects of [petitioner's] case." Pet. App. 21a. Thus, the Board, quoting its decision in *S-M-J*, held that petitioner "failed to meet [his] burden of proof because [he] has not provided sufficient evidence of the foundation of [his] claim." *Ibid.* (citation omitted; brackets in original).

d. The court of appeals denied a petition for review. Pet. App. 1a-17a. First, the court rejected petitioner's "argument that the [Board] can never require credible applicants for asylum to corroborate their testimony." *Id.* at 10a. The governing regulations provides that "[t]he testimony of the applicant, if credible, *may* be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. 208.13(a), 1208.16(b) (emphasis added). "Given the commonly understood meaning of the word 'may,'" the court explained, "it cannot be that all applicants who provide credible testimony have satisfied their burden of proof." Pet. App. 10a.

Second, the court held that it was reasonable for the Board to interpret its regulation to permit it to forgo a credibility determination "when [the Board] determines that corroborating evidence is reasonably available to the applicant but was not submitted." Pet. App. 13a. "Because the [Board's] interpretation permits it to deny applications for asylum based solely on their failure to provide reasonably available corroborating evidence," the court reasoned, "we would elevate form over substance if we required the [Board] to make a credibility determination when it decides that an applicant failed to provide reasonably available corroborating evidence." *Id.* at 12a.

Third, the court of appeals held that the record did not compel reversal of the Board's conclusion that corroborating evidence was reasonably available to peti-

tioner. Pet. App. 13a-14a.[1] Petitioner's court of appeals brief "[did] not argue that letters from [his] family" corroborating his claim "were unavailable, or even that they were especially difficult to obtain." *Id.* at 14a. While petitioner claimed he did not "realize he was supposed to present letters from his family members in his application because he was not represented by counsel," he "[did] not cite, and [the court's] research [did] not uncover, cases supporting the proposition that a lack of representation in an asylum proceeding excuses the duty of applicants for asylum to satisfy their burden of proof." *Id.* at 14a-15a.

Finally, the court concluded that petitioner had failed to exhaust administrative remedies with respect to any argument "that he would have obtained the required evidence if the [immigration judge] had granted him more time." Pet. App. 15a.

**ARGUMENT**

Petitioner contends that the court of appeals erred in upholding as reasonable the Board's conclusion that its regulations do not require a credibility finding when an asylum application independently fails for lack of reasonably available corroboration. While there is dis-

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[1] The INA provides that "[n]o court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence * * * unless the court finds * * * a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable." 8 U.S.C. 1252(b)(4). That provision was added by the REAL ID Act, which made the provision applicable "to all cases in which the final administrative removal order is or was issued before, on, or after" the REAL ID Act's effective date. § 101(e) and (h)(3), 119 Stat. 305-306. Because petitioner's removal order was issued after the REAL ID Act's 2005 effective date, this provision (unlike the other REAL ID Act provisions discussed in this brief) applied to him. Pet. App. 14a n.7.

agreement in the courts of appeals on that question, it is one of diminishing importance because asylum applications filed after May 11, 2005, are governed by provisions of the REAL ID Act, Pub. L. 109-13, Div. B., 119 Stat. 302, that specifically resolve the conflict on this particular issue. Review of this pre-REAL ID Act case is not warranted.

1. The court of appeals' decision is correct. Because the relevant provisions of the REAL ID Act do not apply to this case, accord Pet. 25, the question presented involves interpretation of relevant regulations and precedents of the Board. The Board's interpretation of immigration regulations must be upheld as long as it is reasonable. Pet. App. 9a; accord, *e.g.*, *Perriello* v. *Napolitano*, 579 F.3d 135, 138 (2d Cir. 2009) (citing *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)). The regulation governing eligibility for asylum provides that "[t]he burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in" the INA. 8 C.F.R. 1208.13(a). It further provides that "[t]he testimony of the applicant, if credible, *may* be sufficient to sustain the burden of proof." *Ibid.* (emphasis added).

The Board reasonably interprets these provisions to reflect "an assumption that the adjudicator will have some background information against which to measure" an applicant's claim to determine if it is "plausible." *In re S-M-J-*, 21 I. & N. Dec. 722, 724 (1997); see *Abdulai* v. *Ashcroft*, 239 F.3d 542, 552 (3d Cir. 2001) ("The regulation states that credible testimony *may* be enough to meet the applicant's burden of proof. Saying that something may be enough is not the same as saying that it is *always* enough; in fact, the most natural reading of the word 'may' in this context is that credible testimony is neither per se sufficient nor per se insufficient. In other

words, 'it depends.'"); Pet. App. 10a. Accordingly, the Board has explained that, "[b]ecause the burden of proof is on the alien," the alien should provide supporting evidence, "both of general country conditions and of the specific facts sought to be relied on by the applicant, where such evidence is available." *S-M-J-*, 21 I. & N. Dec. at 724. At the same time, the Board recognizes that requiring corroboration may be unreasonable in some cases, such as where the evidence is held by the alien's persecutor. *Id.* at 725-726. The Board has thus stated that, in such situations, an alien's own testimony alone can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear. *Id.* at 724 (citing *In re Dass*, 20 I. & N. Dec. 120, 124 (B.I.A. 1989)).

The Board has also reasonably explained, however, that where the alien fails to demonstrate that corroborating evidence is not reasonably available, the alien's own testimony, by itself, typically will not be sufficient to carry his burden. See *S-M-J-*, 21 I. & N. Dec. at 728-729. In such situations, the lack of reasonably available corroborating evidence is a sufficient ground for denying the asylum claim. Accordingly, where an alien does not provide corroboration for his claim and fails to show that such corroboration was not reasonably available (because, for example, it is not of the type that is ordinarily available in the particular country or is not accessible to the applicant or his friends, relatives, or colleagues), the Board reasonably finds that he has failed to carry his burden of eligibility for asylum, regardless of whether or not his testimony, considered alone, was credible. *Id.* at 729.

To require a credibility finding unnecessary to the result in such cases "would elevate form over substance." Pet. App. 12a. The reasonableness of the Board's interpretation of its regulation is reinforced by its consistency with normal adjudicatory practice: when a decision-maker determines that a claim fails for a legally sufficient reason, there is typically no requirement that it go on to consider whether the claim might fail for additional reasons as well. Cf. *Pearson* v. *Callahan*, 555 U.S. 223, 236-242 (2009).

2. a. Petitioner is correct that, in cases not governed by the credibility provisions of the REAL ID Act (because the asylum applications were filed before its effective date), there is a conflict in the circuits on the question presented in this case. The majority of courts of appeals to have addressed the question have concluded that no adverse credibility determination is required when the asylum applicant does not provide corroboration or an adequate reason for his failure to do so. See *Soeung* v. *Holder*, No. 10-1545, 2012 WL 1415643, at *3 (1st Cir. Apr. 25, 2012) ("[C]orroboration can be required where an applicant's testimony is disbelieved, or found only partially credible, or where no explicit credibility finding is made.") (internal citations omitted); Pet. App. 11a-12a (5th Cir.); *Marynenka* v. *Holder*, 592 F.3d 594, 600-601 (4th Cir. 2010); *Toure* v. *Attorney Gen.*, 443 F.3d 310, 326 (3d Cir. 2006) ("We have several times affirmed the rule that where an [immigration judge] or the [Board] fails to make an explicit credibility finding, we will proceed as if the applicant's testimony were credible."); see also *Haider* v. *Holder*, 595 F.3d 276, 282-283 (6th Cir. 2010) (same in the context of application for withholding of removal).

By contrast, the Seventh Circuit in pre-REAL ID Act cases "require[s] that, before denying a claim for lack of corroboration, an [immigration judge] must: (1) make an explicit credibility finding; (2) explain why it is reasonable to have expected additional corroboration; and (3) explain why the petitioner's reason for not producing that corroboration is inadequate." *Ikama-Obambi* v. *Gonzales*, 470 F.3d 720, 725 (2006) (citing *Gontcharova* v. *Ashcroft*, 384 F.3d 873, 877 (7th Cir. 2004)).

In *Diallo* v. *INS*, 232 F.3d 279, 290 (2000), the Second Circuit likewise said credibility findings were required before an asylum application could be denied for lack of corroboration. In the later-decided *Liu* v. *Holder*, 575 F.3d 193 (2009), however, the Second Circuit denied a petition for review where the Board rejected an asylum claim for failure to corroborate, notwithstanding the fact that the Board had "assum[ed] credibility" without "affirming or rejecting" the immigration judge's adverse credibility finding, *id.* at 195-199 (internal citation omitted). The Second Circuit's rule on this question is thus not clear.

b. A grant of certiorari to resolve this lopsided conflict is not warranted because Congress has effectively resolved it by statute in the REAL ID Act. Indeed, courts involved in the circuit conflict discussed above have emphasized that their resolution of the question presented turned on pre-REAL ID Act law. See *Soeung*, 2012 WL 1415643, at *2 ("In answering this question, we confine our discussion of corroboration to the law as it existed prior to the passage of the REAL ID Act of 2005"); *Marynenka*, 592 F.3d at 600 n.* ("This REAL ID Act provision does not apply in Marynenka's case because her asylum application was filed prior to

the effective date of the provision."); *Ikama-Obambi*, 470 F.3d at 725 n.2; *Toure*, 443 F.3d at 326 n.9.

By contrast, in cases to which the credibility provisions of the REAL ID Act apply, the INA now expressly provides that "[w]here the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence *must* be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." 8 U.S.C. 1158(b)(1)(B)(ii) (emphasis added); see also 8 U.S.C. 1229a(c)(4)(B). Moreover, the statute now provides that "[t]here is no presumption of credibility, however, *if no adverse credibility determination is explicitly made*, the applicant or witness shall have a rebuttable presumption of credibility on appeal." 8 U.S.C. 1158(b)(1)(B)(iii) (emphasis added); see also 8 U.S.C. 1229a(c)(4)(C).

The amended INA thus makes clear that corroborating evidence (or an adequate explanation why such evidence is not reasonably available) is mandatory when the immigration judge concludes it should be provided, even when the asylum applicant's testimony is credible. See 8 U.S.C. 1158(b)(1)(B)(ii), 1229a(c)(4)(B). Moreover, the amended INA plainly does not require immigration judges to invariably make credibility findings because it expressly contemplates cases in which "no adverse credibility determination is explicitly made." 8 U.S.C. 1158(b)(1)(B)(iii), 1229a(c)(4)(C). Rather than requiring remand in such cases (as petitioner advocates), the INA now specifies that aliens in cases in which there was no adverse credibility finding will receive the benefit of a rebuttable presumption of credibility on appeal. *Ibid.* Petitioner makes a policy argument against this portion of the REAL ID Act, see Pet. 22 n.12, but he does not

attempt to explain how it is reconcilable with his position that credibility determinations are mandatory.

In cases to which the REAL ID Act applies, the argument that an immigration judge must "make a credibility finding before demanding that an applicant provide corroborating evidence" involves "the proper construction" of the above provisions of the REAL ID Act, not just the regulation and Board decisions. See *Guta-Tolossa* v. *Holder*, 674 F.3d 57, 61 (1st Cir. 2012). And the amended statute forecloses that argument because it confirms that "corroboration is the rule, not the exception." *Id.* at 62 (discussing 8 U.S.C. 1158(b)(1)(B)(ii)).

c. Petitioner contends (Br. 16 n.10) that the REAL ID Act does not "affect[]" the circuit conflict on which he relies because both the Second and Seventh Circuits "have applied their rule to cases involving asylum applications filed after the enactment of the Act." Petitioner is mistaken. The only Second Circuit authority he cites is a non-precedential summary order, and it does not cite or discuss the REAL ID Act. *Ibid.* (citing *Jia Yan Weng* v. *Mukasey*, 272 Fed. Appx. 98 (2d Cir. 2008)). Although the Second Circuit has not had occasion to revisit this question with express reference to the REAL ID Act, it has repeatedly recognized in cases not governed by the amendments enacted in the REAL ID Act that the amendments will be relevant.[2]

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[2] See *Liu*, 575 F.3d at 197 ("It is to be expected that the [Board] will undertake in the first instance to say how [8 U.S.C. 1158(b)(1)(B)(ii), added by the REAL ID Act,] bears upon the evidentiary and procedural rules that govern in the wake of the REAL ID Act."); *Zaman* v. *Mukasey*, 514 F.3d 233, 237 & n.3 (2d Cir. 2008) (observing that circuit precedent required an immigration judge to "'decide explicitly' whether or not the candidate's testimony was credible," but explaining that "for asylum and withholding applications filed after May 11, 2005, the

The Seventh Circuit decision applying the REAL ID Act that petitioner cites, *Rapheal* v. *Mukasey*, 533 F. 3d 521 (2008); see Pet. 16 n.10, undermines, rather than advances, his contention that the REAL ID Act does not affect the circuit split. In that decision, the court of appeals observed that it had previously held that "if the Board denies asylum based on the lack of corroboration, the agency's explanation should include '(1) an explicit credibility finding; (2) an explanation of why it is reasonable to expect additional corroboration; and (3) an account of why the petitioner's explanation for not producing that corroboration is inadequate.'" *Rapheal*, 533 F.3d at 526 (quoting *Gontcharova*, 384 F.3d at 877). The Seventh Circuit noted, however, that its decision establishing that framework "came before passage of the REAL ID Act and interpreted a predecessor regulation, 8 C.F.R. [] 208.13(a)." *Id.* at 527. The court went on to conclude that "[t]he REAL ID Act * * * changed the framework for reviewing cases in which the Board rejects a petition for asylum based on the lack of corroborating evidence" and that the Seventh Circuit's previous "three-part test, established for purposes of assessing

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effective date of the REAL ID Act, * * * there is a rebuttable presumption on appeal that a witness is credible 'if no adverse credibility determination is explicitly made' by the [immigration judge]") (quoting *Diallo*, 232 F.3d at 290, and 8 U.S.C. 1158(b)(1)(B)(iii)); see also *Chen* v. *United States Att'y Gen.*, 454 F.3d 103, 107 n.2 (2d Cir. 2006) (not expressly addressing corroboration rule but acknowledging that "portions of the new statutory language" in the REAL ID Act's amendments to 8 U.S.C. 1158 "would seem to overrule" some Second Circuit decisions); *Xiu Xia Lin* v. *Mukasey*, 534 F.3d 162, 163-167 (2d Cir. 2008) (recognizing that the REAL ID Act's "uniform standard for credibility determinations" had abrogated circuit precedent) (internal quotation marks and citation omitted).

the validity of the INS's debatable interpretation of the corroboration rule, no longer controls." *Ibid.*[3]

3. Even if petitioner were correct that the circuit conflict persists even in cases to which the REAL ID Act applies, the court should await one of those cases to resolve it. The relevant amendments to the INA made by the REAL ID Act apply to all asylum applications filed after its 2005 enactment. While there remain older cases, like this one, in which the asylum application came before the REAL ID Act, see Pet. 25-27 & n.14, that is a diminishing set. And review of the question presented without consideration of directly relevant statutory provisions—which Congress specifically intended to "resolve[] conflicts between administrative and judicial tribunals with respect to standards to be followed in assessing asylum claims" and "bring clarity and consistency to evidentiary determinations," Conference Report 162, 165—would be unwarranted.

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[3] The Seventh Circuit in *Rapheal* went on to conclude that "*in this case*, the Board needed to consider [the asylum applicant's] credibility before ruling on the need for corroborative evidence" only because "in ruling that [the applicant] needed to provide corroborative evidence (given the conflicting documents in the record), the Board treated [the applicant] as if she were *not* credible." 533 F.3d at 528 (emphases added); see *ibid.* ("The credibility finding was * * * inextricably intertwined with the [immigration judge's] ruling on the need for corroborative evidence."). The court emphasized that "[t]his is not a case of the [immigration judge] ruling alternatively, i.e., holding that even if [the applicant] were credible, her petition would be denied because of the lack of corroborative evidence." *Ibid.* Such an alternative ruling, which *Rapheal* expressly countenanced as acceptable, *ibid.*, is inconsistent with petitioner's contention (Pet. 16 n.10) that, even after the REAL ID Act, the Seventh Circuit continues to follow a "rule" that an asylum application can never be denied for lack of corroboration without an express credibility finding.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
*Solicitor General*
STUART F. DELERY
*Acting Assistant Attorney General*
DONALD E. KEENER
JOHN W. BLAKELEY
*Attorneys*

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