No. 08-1216

In the Supreme Court of the United States

AMADOU BAILLO BARRY, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction to review the Board of Immigration Appeals' conclusion that petitioner failed to prove, by clear and convincing evidence, that he filed his asylum application within one year of arriving in the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, convention, statutes, regulations and rule:

Statutes, regulations, and rule—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is reprinted in 305 Fed. Appx. 631. The decisions of the Board of Immigration Appeals (Pet. App. 4a-6a) and the immigration judge (Pet. App. 7a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 2008. A petition for a writ of certiorari was filed on March 31, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA) provides that the Secretary of Homeland Security and the Attorney General may, in their discretion, grant asy-

lum to an alien who demonstrates that he is a refugee within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "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). The applicant bears the burden of demonstrating that he is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1).

An alien applying for asylum must file his application within one year of arriving in the United States, unless he demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances that materially affect his eligibility for asylum or extraordinary circumstances that excuse his failure to file the application within the one-year period. 8 U.S.C. 1158(a)(2)(B) and (D). The applicant bears the burden of demonstrating, "by clear and convincing evidence," that his application for asylum was filed within one year of his entry into the United States. 8 U.S.C. 1158(a)(2)(B); 8 C.F.R. 1208.4(a)(2)(A).

b. Under the INA, "[n]o court shall have jurisdiction to review any determination of the Attorney General" regarding the timeliness of an asylum application, including a determination regarding whether the changed or extraordinary circumstances exception applies. 8 U.S.C. 1158(a)(3). In 2005, Congress amended one subsection of the judicial review provision of the INA, 8 U.S.C. 1252(a)(2), to include the following provision:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

2. Petitioner claims to be a native and citizen of Guinea. Pet. App. 8a, 9a. He entered the United States illegally on an unknown date and at an unknown location. *Id.* at 8a, 13a-14a. He came to the attention of immigration officials after he was arrested in Atlanta, Georgia, for possessing and distributing counterfeit merchandise at a flea market. Administrative Record (A.R.) 121, 175, 261.

United States Immigration and Customs Enforcement (ICE) initiated removal proceedings against petitioner. A.R. 269-270. He was charged with being removable as an alien present in the United States without having been admitted or paroled, or who had arrived in the United States at any time or place other than one designated by the Attorney General. Pet. App. 7a; A.R. 269; see 8 U.S.C. 1182(a)(6)(A)(i).

Petitioner appeared before an immigration judge (IJ) and conceded that he was removable as charged. Pet. App. 8a; A.R. 106. He then sought asylum, withholding of removal, and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d

Sess. (1988), 1465 U.N.T.S. 85. Pet. App. 8a; A.R. 254-265.

The IJ held a hearing, at which petitioner was the sole witness. A.R. 111-172. Petitioner contended that he would be persecuted if he returned to Guinea because he and his father were political activists who opposed the ruling party. Pet. App. 9a-12a. Petitioner stated that he left Guinea in 2001, spent four years in Sierra Leone, and then went to the Gambia and on to the Netherlands before entering the United States. *Id.* at 12a-13a. He claims that he entered the United States on August 4, 2004, in Newark, New Jersey. *Id.* at 13a-14a, 20a; A.R. 146-147, 149-150. In support of that contention, petitioner presented a copy of a visa waiver departure form (Form I-94), dated August 4, 2004, which authorized a person named Henry Wija to be admitted to the United States for a period of 90 days. A.R. 102-103, 166, 266. Petitioner asserted that he used that form, along with a fraudulent Dutch passport, to gain entry into the United States. Pet. App. 14a; A.R. 146. Petitioner did not present the passport he used to enter the United States to the IJ, saying that he had destroyed it. Pet. App. 14a; A.R. 113, 146-147.

The IJ found petitioner removable as charged, A.R. 106-107, and denied his claims for asylum, withholding of removal, and CAT protection, Pet. App. 7a-26a. As a threshold matter, the IJ found that petitioner was not eligible for asylum because he failed to demonstrate, by clear and convincing evidence, that he filed his asylum application within one year of his entry into the United States. *Id.* at 19a-20a. The IJ explained that the only evidence petitioner presented regarding his date of entry was a copy of a Form I-94, which had been issued "in the name of * * * a purported Dutch citizen who en-

tered by virtue of the Visa Waiver Program," and found that the submission of that form, without more, did not "establish that [petitioner] entered as that Dutch citizen." *Id.* at 20a. The IJ noted that petitioner claimed that "he came from the Netherlands to the United States on a Dutch passport," but petitioner did not present that passport, claiming that he threw it away. *Ibid.* The IJ found petitioner's explanation for why he discarded the passport implausible, *ibid.*, and did not believe petitioner's story that he was able to enter the Netherlands "on a Dutch passport without being questioned by Dutch authorities upon presentation of the passport * * * when he does not speak one word of Dutch." *Id.* at 24a. The IJ concluded that "the evidence simply does not establish" that petitioner entered the United States on the date he claimed, and that he therefore could not show that he filed his asylum application within one year of entry. *Id.* at 20a.[1]

The IJ then rejected petitioner's claims for withholding of removal and CAT protection on the merits. Pet. App. 21a-25a. The IJ determined that petitioner was not credible due to numerous inconsistencies and implausi-

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[1] The IJ also held that, even if petitioner could prove his date of entry, he failed to file his asylum application within one year of that date because the application was not filed in open court until almost two months after the one-year deadline had passed. Pet. App. 20a-21a. The Board of Immigration Appeals (Board) did not adopt or address that holding, and thus is not part of the agency decision under review. See, *e.g.*, *Singh* v. *United States Att'y Gen.*, 561 F.3d 1275, 1278 (11th Cir. 2009).

The IJ also determined that petitioner's asylum application was "frivolous," so that he was permanently ineligible for benefits under 8 U.S.C. 1158(d)(6). Pet. App. 25a. The Board did not uphold that determination, *id.* at 6a, and it therefore is not part of the agency decision under review.

bilities in his testimony. *Id.* at 10a, 21a-25a. The IJ also noted that there was "absolutely no corroborating evidence" to support petitioner's story, not even letters from family members or friends in Guinea or testimony from friends or acquaintances in the United States. *Id.* at 24a.

The IJ determined that petitioner wholly failed to prove his identity or citizenship, which is necessary to a claim for asylum, withholding of removal, or CAT protection. Pet. App. 23a-24a. Petitioner had provided a document that he claimed was a copy of his birth certificate, but the IJ determined that it was insufficient to establish petitioner's identity because it was not signed and had not been authenticated; there was no evidence that it originated in Guinea; there was no evidence that petitioner is the person named on the birth certificate; and petitioner's story that a friend simply obtained it for him without any form of written permission was implausible. *Id.* at 16a-17a, 22a-23a.

In addition to finding that petitioner had failed to prove his identity, the IJ determined that petitioner's account of his political activities was not credible. Pet. App. 21a-25a. The IJ observed that petitioner's written narrative of events in his asylum application "differed in material respects from [his] testimony," and his claim that "he did not put everything on the [application] because he knew he had to come to Court to explain everything * * * simply [did] not pass muster." *Id.* at 21a. The IJ explained that the application had been prepared with the assistance of counsel, and it was implausible that counsel would have omitted petitioner's claimed political activities (such as organizing rallies and speaking before crowds of 300 students) from his written claim for political asylum. *Id.* at 22a. The IJ also noted

that there were several inconsistencies in petitioner's story, and when confronted with those inconsistencies, petitioner failed to provide any explanation for them. *Id.* at 25a. The IJ therefore determined that, "even if it were to be found that [petitioner] had filed the [asylum] application within a year of entry," petitioner "nonetheless failed to meet the burden of establishing eligibility for" asylum. *Ibid.* The IJ further concluded that, because petitioner's testimony about his political activities was not credible, he also failed to establish a basis for withholding of removal or CAT protection. *Ibid.*

3. The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 4a-6a. The Board affirmed the IJ's determination that petitioner failed to prove, by clear and convincing evidence, that he filed his asylum application within one year of entering the United States, explaining that petitioner's "submission of a Departure Record (Form I-94) with the name of a Dutch national is not adequate evidence to establish his date of arrival in the United States." *Id.* at 5a. The Board also affirmed the IJ's finding that petitioner was not credible, explaining that the IJ provided "specific, cogent reasons" for her decision and "offered [petitioner] an opportunity to explain the noted gaps and inconsistencies." *Ibid.* (internal quotation marks omitted). The Board also agreed with the IJ that "a copy of an uncertified, unsigned Guinean birth certificate" did not establish petitioner's identity, and held that the IJ correctly determined that petitioner was not entitled to withholding of removal and CAT protection. *Id.* at 5a-6a.

4. The court of appeals dismissed in part and denied in part petitioner's petition for review. Pet. App. 1a-3a. The court dismissed the petition with respect to petitioner's asylum claim on the ground that it lacked juris-

diction over the claim. *Id.* at 2a. The court explained that, although petitioner contended that the Board "violated his due process rights by ruling that [he] failed to prove his date of entry," the substance of petitioner's contention was that the Board erred in finding as a factual matter that his asylum application was untimely, and the court lacked jurisdiction to consider such a claim under 8 U.S.C. 1158(a)(3). Pet. App. 2a (citing *Chacon-Botero* v. *United States Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (internal quotation marks omitted)). The court also rejected petitioner's argument that the Board erred in failing to find changed circumstances that would excuse his late filing, because petitioner failed to present that argument to the Board. *Ibid.*

The court of appeals then denied the petition with respect to petitioner's claims for withholding of removal and CAT protection. Pet. App. 3a. The court determined that "substantial evidence supports the finding that [petitioner] was not credible." *Ibid.* The court noted that petitioner "provided inconsistent information to immigration officials about the date of his entry"; presented contradictory testimony about whether his father had been mistreated because of his political activities; "failed to prove his nationality"; "gave conflicting testimony about the age that he commenced his political activities"; and "provided an incredible account of a brief interview in English after he presented a Dutch passport to Dutch airport officials." *Ibid.* Because petitioner "offer[ed] no explanation for these inconsistencies that would compel a reasonable fact finder to reverse the adverse credibility finding," the court affirmed the

agency's denial of withholding of removal and CAT protection. *Ibid.*[2]

ARGUMENT

Petitioner contends (Pet. 4-13) that the court of appeals erred in holding that it lacked jurisdiction to review the Board's conclusion that he failed to prove, by clear and convincing evidence, that he filed his asylum application within one year of arriving in the United States. The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, this case is not an appropriate vehicle to consider the question presented because petitioner's asylum claim fails on the merits. Further review of petitioner's fact-bound claim is therefore unwarranted.

1. The court of appeals correctly held that it lacked jurisdiction to review petitioner's challenge to the Board's finding that his asylum application was untimely. Under 8 U.S.C. 1158(a)(3), "[n]o court shall have jurisdiction to review any determination" regarding an exception to the one-year filing deadline for asylum claims. As petitioner acknowledges (Pet. 2, 4), his petition for review challenged a determination that his asylum application was untimely. Judicial review of petitioner's claim is therefore barred under 8 U.S.C. 1158(a)(3) unless the exception for "constitutional claims or questions of law" in 8 U.S.C. 1252(a)(2)(D) applies.

As the court of appeals correctly determined, petitioner's claim does not raise any "constitutional claims or questions of law" within the meaning of Section

[2] Petitioner does not challenge the court of appeals' rejection of his claims for withholding of removal and CAT protection in his petition, and those claims therefore are not before the Court.

1252(a)(2)(D). Pet. App. 2a. First, petitioner suggests that the Board's finding that he failed to establish that his asylum application was timely filed raises a constitutional claim because it "was so arbitrary as to constitute a Due Process violation." Pet. 13. Second, he asserts that his challenge raises a question of law because, in his view, the Board did not apply "the correct standard of review" in determining whether his asylum application was timely. Pet. 2. Third, he states that his challenge presents "an issue of statutory construction" because the IJ erred in holding that his application would not be deemed filed until it was received in open court. Pet. 13-14.

As an initial matter, petitioner did not present any of these three contentions to the Board, and the federal courts therefore may not review them. See 8 U.S.C. 1252(d)(1) ("A court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right."); see also A.R. 39 (petitioner's brief to the Board argued only that "the IJ erred in finding that [petitioner] 'utterly failed' to establish that he timely filed his asylum application within one year of his arrival in the United States"). Moreover, petitioner's third contention (regarding whether an application must be filed in open court) cannot provide a basis for jurisdiction. The Board did not affirm the IJ's determination about when the asylum application was filed, instead simply holding that petitioner failed to show his entry date. Pet. App. 5a. The IJ's determination about when the application was filed therefore was not part of the agency decision that is under review. See, *e.g.*, *Singh* v. *United States Att'y Gen.*, 561 F.3d 1275, 1278 (11th Cir. 2009).

In any event, petitioner's challenges to the Board's fact-bound determination of ineligibility based on his lack of credibility does not raise a "constitutional claim[] or question[] of law" that would permit judicial review under 8 U.S.C. 1252(a)(2)(D). Whether a petition for review raises such a claim depends on the substance of the claim, not merely the label the alien appends to it. See, *e.g.*, *Jarbough* v. *United States Att'y Gen.*, 483 F.3d 184, 189 (3d Cir. 2007) (courts of appeals "are not bound by the label attached by a party to characterize a claim and will look beyond the label to analyze the substance of a claim"). Petitioner's argument is that the agency should have credited the copy of a Form I-94 issued to a different person as clear and convincing evidence of petitioner's entry into the United States on a certain date, A.R. 39, and that argument is nothing more than a challenge to the agency's factfinding, see Pet. App. 2a. Petitioner's invocation of the Due Process Clause does not change the nature of his claim, and petitioner provides no colorable argument that the agency used an incorrect legal standard in evaluating his claim.[3] If petitioner's challenge to the Board's factfinding were considered a "constitutional claim[] or question[] of law" under Section 1252(a)(2)(D), that phrase would lose all meaning. See, *e.g.*, *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.) ("We are not free to convert every immigration case into a question of law, and thereby undermine Congress's

[3] Petitioner argues (Pet. 13) that the Board must have required a higher standard of proof than clear and convincing evidence because it rejected his claim, but that is incorrect; the Board clearly explained that it rejected petitioner's claim because he failed to meet his burden of proof by supporting his claimed date of entry into the United States with an unauthenticated document issued in the name of a different person. Pet. App. 5a.

decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive."), cert. denied, 548 U.S. 906 (2006). The court of appeals therefore correctly held that it lacked jurisdiction over petitioner's asylum claim.

2. There is no circuit conflict over the question presented in this case. As the government noted in its brief in opposition (at 10-11) in *Viracacha* v. *Mukasey*, cert. denied, No. 07-1373 (Oct. 20, 2008), the courts of appeals have disagreed about whether they have jurisdiction under 8 U.S.C. 1252(a)(2)(D) to review the Board's determination that an alien failed to adduce sufficient facts to demonstrate "extraordinary circumstances" or "changed circumstances" to justify the untimely filing of an asylum application.[4] This case does not implicate that

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[4] The First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have held that such a contention normally does not raise a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). See, *e.g.*, *Usman* v. *Holder*, 566 F.3d 262, 267 (1st Cir. 2009) (extraordinary or changed circumstances); *Viracacha* v. *Mukasey*, 518 F.3d 511, 514-516 (7th Cir.), cert. denied, 129 S. Ct. 451 (2008); *Zhu* v. *Gonzales*, 493 F.3d 588, 596 n.31 (5th Cir. 2007) (extraordinary circumstances); *Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 332 (2d Cir. 2006) (changed or extraordinary circumstances); *Ferry* v. *Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006) (changed or extraordinary circumstances); *Almuhtaseb* v. *Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006) (changed circumstances); *Sukwanputra* v. *Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006) (changed or extraordinary circumstances); *Ignatova* v. *Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (extraordinary circumstances); *Chacon-Botero* v. *United States Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (extraordinary circumstances). The Ninth Circuit, in contrast, has held that an alien's challenge to the Board's determination that he has not established "changed circumstances" or "extraordinary circumstances" does raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D) when it involves the application of law to undisputed facts. See *Ramadan* v. *Gonzales*, 479 F.3d 646, 649-656 (2007) (changed circumstances).

disagreement, however, because petitioner's claim is not that the Board erred in deciding that he failed to show changed or extraordinary circumstances warranting a late filing. As the court of appeals correctly noted, petitioner did not present that argument to the Board, and the court of appeals therefore could not review it. Pet. App. 2a; see 8 U.S.C. 1252(d)(1); see also A.R. 39. Because petitioner has failed to exhaust any argument regarding circumstances that would excuse his untimely filing, and the court of appeals did not pass on any such argument, his petition does not present the question on which the circuits have disagreed.

Petitioner cites a variety of cases (Pet. 6-13) to suggest that there is a circuit conflict on the question whether a court of appeals has jurisdiction to review the Board's decision that an asylum application was not timely filed, but none of them demonstrates such a conflict. As an initial matter, the decision below is unpublished and it does not establish controlling precedent, Pet. App. 1a; see 11th Cir. R. 36-2, and it therefore does not give rise to the type of conflict in published decisions that would warrant this Court's attention.

In any event, all of the cited decisions agree that courts of appeals generally lack jurisdiction to review a challenge to a timeliness determination, unless the challenge raises a constitutional claim or question of law. And that view is wholly consistent with the decision below. Contrary to petitioner's contention (Pet. 6, 14), the court of appeals in this case did not adopt a per se rule that the courts of appeals never have jurisdiction to review a determination that an asylum application was untimely. Instead, it correctly recognized that 8 U.S.C. 1158(a)(3) generally bars review of such determinations, but that 8 U.S.C. 1252(a)(2)(D) permits them to be re-

viewed if they raise constitutional claims or questions of law. Pet. App. 2a (citing *Chacon-Botero* v. *United States Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005)).

The decision below does not conflict with any of the decisions petitioner cites. Most of the cases address claims other than the type raised by petitioner, and therefore cannot present a conflict on the question presented here. For example, several of the cases address whether an alien demonstrated "changed circumstances" or "extraordinary circumstances" to excuse an untimely asylum filing. See, *e.g.*, *Khan* v. *Filip*, 554 F.3d 681, 687-688 (7th Cir. 2009); *Purwantono* v. *Gonzales*, 498 F.3d 822, 824 (8th Cir. 2007); *Zhu* v. *Gonzales*, 493 F.3d 588, 596 n.31 (5th Cir. 2007); *Ramadan* v. *Gonzales*, 479 F.3d 646, 649-656 (9th Cir. 2007); *Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 332 (2d Cir. 2006); *Almuhtaseb* v. *Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006); *Sukwanputra* v. *Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006). That issue is not presented here. See pp. 12-13, *supra*. Another case petitioner cites, *Lorenzo* v. *Mukasey*, 508 F.3d 1278 (10th Cir. 2007), involved reinstatement of a removal order, not the timeliness of an asylum application, and it is therefore inapposite.

The remaining cases are wholly consistent with the decision below. Two of the cases are factually similar to this case. In those cases, the aliens argued that the Board erred in finding that they failed to meet their burden of showing, by clear and convincing evidence, that they filed their asylum applications in a timely manner, and the courts held that they lacked jurisdiction to consider those claims under 8 U.S.C. 1158(a)(3). See *Pan* v. *Gonzales*, 489 F.3d 80, 84-85 (2d Cir. 2007); *Vasile* v. *Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005). In those cases, as in the decision below, the courts correctly rec-

ognized that a challenge to the agency's factfinding did not raise a constitutional claim or question of law. See *Pan*, 489 F.3d at 84-85 (no jurisdiction to consider alien's claim "that the IJ simply got the facts wrong"); *Vasile*, 417 F.3d at 768 (no jurisdiction over Board's "factual determination about when [the alien] filed his asylum claim").

The remaining cases petitioner cites are distinguishable. In *Zheng* v. *Mukasey*, 552 F.3d 277 (2d Cir. 2009), for example, the court of appeals determined that the alien raised a colorable constitutional claim, which was whether the IJ's complete failure to address probative evidence of the alien's date of entry violated due process. *Id.* at 285-286. *Zheng* is nothing like this case, however, because there, the evidence was an undisputed statement by a government agent in a notice to appear that the alien had entered on a certain date, *id.* at 285, and here, the only evidence was a copy of a Form I-94 for a different person and petitioner's incredible testimony, Pet. App. 5a, 19a-25a. Moreover, in *Zheng*, the IJ wholly failed to mention the evidence, 552 F.3d at 285-286, whereas in this case there is no doubt that the agency considered petitioner's evidence and found it insufficient, Pet. App. 5a. Indeed, the *Zheng* court made clear that a case such as this one—which "essentially disputes the correctness of [the agency's] fact-finding"—would not raise a constitutional claim or question of law. 552 F.3d at 285 (internal quotation marks omitted).

Nakimbugwe v. *Gonzales*, 475 F.3d 281 (5th Cir. 2007), is likewise inapposite. In that case, there was no dispute about historical facts; rather, the issue before the court was whether the relevant federal regulation should be interpreted to permit the mailing date of an

asylum application to be considered the filing date of the application. *Id.* at 284-285. As the court explained, there was jurisdiction under 8 U.S.C. 1252(a)(2)(D) because "the IJ's determination was based entirely on his construction of a federal regulation, which is a question of law." *Id.* at 284. *Diallo* v. *Gonzales*, 447 F.3d 1274 (10th Cir. 2006), is similar. There, the alien raised a statutory-interpretation question regarding whether an alien who files an asylum application, leaves the United States, and then returns must file a new application. *Id.* at 1282. Here, in contrast to those cases, petitioner challenged only the agency's factfinding; his claim that his application was timely does not depend on any issue of statutory construction.

Finally, *Khunaverdiantis* v. *Mukasey*, 548 F.3d 760 (9th Cir. 2008), is markedly different from this case. In that case, there was no dispute in the relevant historical facts; rather, the dispute centered on whether an alien was required to demonstrate his exact date of arrival, or only that he had filed his application with one year of arrival, under 8 U.S.C. 1158(a)(2)(B). 548 F.3d at 765. Here, however, petitioner seeks review of the Board's factfinding. For that type of claim, the *Khunaverdiantis* court agreed that the courts of appeals would lack jurisdiction. *Ibid.* Petitioner has not identified any court that would find jurisdiction over a fact-bound claim such as his, and there is therefore no disagreement in the circuits warranting this Court's review.

3. Even if there were disagreement in the circuits on the question presented, this case would present a poor vehicle for considering that question, because petitioner's asylum application was untimely and because his asylum claim fails on the merits.

First, petitioner has not shown that the Board's determination that he failed to demonstrate that his asylum application was timely filed was unsupported by substantial evidence. The IJ found that petitioner failed to produce sufficient evidence to show his date of entry into the United States by clear and convincing evidence, Pet. App. 19a-20a, and the Board agreed, *id.* at 5a. Both the IJ and the Board explained that "submission of a Departure Record (Form I-94) with the name of a Dutch national is not adequate evidence," when combined with petitioner's incredible testimony, "to establish his date of arrival in the United States." *Ibid.*; see *id.* at 19a-20a. If the court of appeals were to consider the timeliness question, it would do so under the "substantial evidence" standard, *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992), and the agency's factual determinations would be "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B). On this record, petitioner could not show that the Board's fact-specific conclusions about the sufficiency of his evidence in support of his claimed date of arrival were not supported by substantial evidence. That is particularly true in light of the agency's finding that petitioner was not credible, a finding affirmed by the court of appeals, and a finding that petitioner has not challenged here.

Second, even if his application had been timely, petitioner has not demonstrated that qualifies for asylum. The IJ found that petitioner's story of his political activism was wholly incredible, Pet. App. 21a-25a; the Board agreed, *id.* at 5a; and the court of appeals upheld that finding as supported by substantial evidence, *id.* at 2a. Indeed, the agency found that petitioner did not even adduce sufficient credible evidence to prove his identity

and nationality, let alone sufficient evidence to substantiate his claimed fears of persecution, *id.* at 5a-6a, and the court of appeals affirmed that determination, *id.* at 3a. Petitioner does not challenge those holdings before this Court. Because petitioner presented no credible testimony in support of his claim for political asylum, there is no reasonable prospect that his asylum claim would succeed. Further review of petitioner's fact-bound claim is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2009