

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1           At a stated term of the United States Court of Appeals  
2 for the Second Circuit, held at the Thurgood Marshall  
3 United States Courthouse, 40 Foley Square, in the City of  
4 New York, on the 11<sup>th</sup> day of January, two thousand nineteen.

5  
6 **PRESENT:**

7           RICHARD C. WESLEY,  
8           PETER W. HALL,  
9           DENNY CHIN,  
10                         *Circuit Judges.*

11  
12 **LI LONG XING,**  
13           *Petitioner,*

14  
15           v.

17-1143  
NAC

16  
17 **MATTHEW G. WHITAKER, ACTING**  
18 **UNITED STATES ATTORNEY GENERAL,**  
19           *Respondent.*

20  
21  
22 **FOR PETITIONER:**                     Jan Potemkin, New York, NY.

23  
24 **FOR RESPONDENT:**                    Chad A. Readler, Principal Deputy  
25   Assistant Attorney General; Holly  
26   M. Smith, Senior Litigation  
27   Counsel; Nehal H. Kamani, Trial  
28   Attorney, Office of Immigration  
29   Litigation, United States  
30   Department of Justice, Washington,  
31   DC.

1           UPON DUE CONSIDERATION of this petition for review of a  
2 Board of Immigration Appeals ("BIA") decision, it is hereby  
3 ORDERED, ADJUDGED, AND DECREED that the petition for review  
4 is GRANTED.

5           Petitioner Li Long Xing, a native and citizen of the  
6 People's Republic of China, seeks review of an April 5, 2017,  
7 decision of the BIA affirming an October 27, 2015, decision  
8 of an Immigration Judge ("IJ") denying Xing's application for  
9 asylum, withholding of removal, and relief under the  
10 Convention Against Torture ("CAT"). *In re Li Long Xing*, No.  
11 A205 083 157 (B.I.A. Apr. 5, 2017), *aff'g* No. A205 083 157  
12 (Immig. Ct. N.Y. City Oct. 27, 2015). We assume the parties'  
13 familiarity with the underlying facts and procedural history  
14 in this case.

15           Under the circumstances of this case, we have reviewed  
16 both the IJ's and BIA's decisions. *Wangchuck v. Dep't of*  
17 *Homeland Sec.*, 448 F.3d 524, 528 (2d Cir. 2006). We review  
18 the agency's legal conclusions de novo and its factual  
19 findings under the substantial evidence standard. *Y.C. v.*  
20 *Holder*, 741 F.3d 324, 332 (2d Cir. 2013); *see also* 8 U.S.C.  
21 § 1252(a)(4)(B) ("[T]he administrative findings of fact are

1 conclusive unless any reasonable adjudicator would be  
2 compelled to conclude to the contrary." ).

3 Xing had the burden of establishing a well-founded fear  
4 of persecution on account of his practice of Christianity.  
5 8 U.S.C. §§ 1101(a)(42), 1158(b)(1)(B)(i). To do this, he  
6 was required to show that he subjectively fears persecution  
7 and that his fear is objectively reasonable. *Ramsameachire*  
8 *v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004). The objective  
9 component can be satisfied either by establishing "a  
10 reasonable possibility that he . . . would be singled out  
11 individually for persecution" or "that there is a pattern or  
12 practice . . . of persecution of a group of persons similarly  
13 situated to the applicant on account of . . . religion." 8  
14 C.F.R. § 1208.13(b)(2)(iii); see *Y.C.*, 741 F.3d at 332.

15 The agency concluded that Xing did not meet this burden  
16 because (1) he did not adequately corroborate his testimony  
17 regarding Chinese authorities' efforts to arrest him for  
18 attending an underground church, (2) he did not show that  
19 Chinese authorities sought to arrest him based on his church  
20 attendance in the United States, and (3) the country  
21 conditions evidence did not establish a pattern or practice

1 of persecution of similarly situated Christians. As discussed  
2 below, remand is warranted because the agency neither made an  
3 explicit adverse credibility ruling nor identified what  
4 additional corroboration was needed, the IJ made clear  
5 factual errors and required corroboration of facts not  
6 related to Xing's claim, and the BIA failed to acknowledge  
7 the IJ's errors.

8 Under the REAL ID Act, the agency may rely on any  
9 inconsistencies between an asylum applicant's testimony and  
10 other record evidence, including border interviews, to  
11 conclude that the applicant is not a credible witness. 8  
12 U.S.C. § 1158(b)(1)(B)(iii); see *Hong Fei Gao v. Sessions*,  
13 891 F.3d at 67, 77 (2d Cir. 2018). In the credibility  
14 context, the absence of reliable corroborating evidence may  
15 further undermines an alien's testimony that has already  
16 been called into question. *Hong Fei Gao*, 891 F.3d at 78;  
17 *Biao Yang v. Gonzales*, 496 F.3d 268, 273 (2d Cir. 2007)(per  
18 curiam). The agency may also deny relief on corroboration  
19 grounds even where an alien is credible, but in doing so,  
20 "[a]n IJ should 'point to specific pieces of missing,  
21 relevant documentation' and 'show that this documentation

1 was reasonably available.'" *Chuilu Liu v. Holder*, 575 F.3d  
2 193, 198 & n. 5 (2d Cir. 2009) (alterations  
3 omitted)(quoting *Jin Shui Qui v. Ashcroft*, 329 F.3d 140,  
4 153 (2d Cir. 2003)); see also 8 U.S.C. §1158(b)(1)(B)(ii);  
5 *Alvarado-Carillo v. INS*, 251 F.3d 44, 54 (2d Cir. 2001)  
6 ("As for more specific corroboration of petitioner's  
7 personal experiences, the BIA here did not identify any  
8 particular document or type of document it believed to be  
9 missing from the record . . . , much less explain why it  
10 would have been 'reasonable to expect the provision of such  
11 materials under its own standards.'" (quoting *Diallo v.*  
12 *INS*, 232 F.3d 279, 289 (2d Cir. 2000))).

13 In this case, although the IJ made a partial adverse  
14 credibility determination, the determination was limited to  
15 Xing's testimony that he disclosed a fear of religious  
16 persecution to the Border Patrol agent who apprehended him.  
17 Generally, in the absence of an explicit adverse credibility  
18 determination, an alien is entitled to a presumption of  
19 credibility on appeal. 8 U.S.C. § 1158(b)(1)(B)(iii); *Yan*  
20 *Chen v. Gonzales*, 417 F.3d 268, 271-72 (2d Cir. 2005). And  
21 here, the BIA explicitly assumed Xing's credibility.

1           Accordingly, because the BIA assumed credibility, to rely  
2 on Xing's failure to corroborate, the agency had to identify  
3 what the evidence Xing should have presented to corroborate  
4 his testimony that Chinese officials sought to arrest him for  
5 attending an underground church.       See 8 U.S.C.  
6 § 1158(b)(1)(B)(ii). Although the agency declined to credit  
7 the corroborating evidence that Xing submitted (letters from  
8 his mother, cousin, and aunt in China), it failed to identify  
9 any additional evidence that would have been reasonably  
10 available and should have been provided. This failure to  
11 identify the missing evidence frustrates judicial review:  
12 When an IJ determines that corroborating evidence is  
13 necessary, the applicant must provide the evidence "unless  
14 the applicant does not have the evidence and cannot reasonably  
15 obtain the evidence." *Id.* Where the IJ has identified the  
16 missing evidence, we may reverse the agency's decision only  
17 if "a reasonable trier of fact is compelled to conclude that  
18 such corroborating evidence is unavailable." 8 U.S.C.  
19 § 1252(b)(4); *see Yan Juan Chen v. Holder*, 658 F.3d 246, 253  
20 (2d Cir. 2011)(per curiam). If the IJ does not identify what  
21 evidence should have been presented, neither the BIA nor this

1 Court can review whether the evidence was reasonably  
2 available.

3 In addition to identifying what corroboration could or  
4 should have been provided, on remand, the agency should  
5 clarify the import of the I-213 given the BIA's assumption of  
6 credibility. As noted above, Xing's failure to disclose his  
7 fear of religious persecution in the border interview could  
8 call into question the credibility of his claim that he left  
9 China because he feared religious persecution. See  
10 *Ramsameachire*, 357 F.3d at 181-82. However, this discrepancy  
11 seemingly goes to credibility more than corroboration. See  
12 8 U.S.C. § 1158(b)(1)(B)(ii) (allowing IJ to require  
13 "evidence that corroborates otherwise credible testimony");  
14 *id.* § 1158(b)(1)(B) (iii) (listing inconsistencies between an  
15 applicant's statements as a ground for a credibility  
16 determination).

17 Finally, as Xing argues and as the Government concedes,  
18 the IJ identified missing corroboration for facts that were  
19 not related to Xing's case. Specifically, the IJ noted the  
20 absence of proof of employment, an arrest and detention, and  
21 alleged persecution of an applicant's wife. But Xing's

1 employment was never at issue, he did not allege that he was  
2 arrested or detained, and he is unmarried. Although the  
3 BIA's decision appears to rely on the correct facts, the BIA  
4 failed to either acknowledge the errors or explain why they  
5 did not require remand. See *Acharya v. Holder*, 761 F.3d 289,  
6 301 (2d Cir. 2014) ("When the [BIA] upholds questionable fact-  
7 findings, and does so using a different standard, the result  
8 may amount to impermissible fact finding by the BIA.").

9 Given the lack of clarity in the agency's reliance on  
10 credibility, the agency's failure to identify what  
11 corroborating evidence should have been presented, and the  
12 factual errors in the IJ's decision, we remand for further  
13 proceedings consistent with this order. Because remand is  
14 warranted on these grounds, we do not reach the agency's  
15 conclusion that Xing did not demonstrate a pattern or practice  
16 of persecution. See *INS v. Bagamasbad*, 429 U.S. 24, 25 (1976)  
17 ("As a general rule courts and agencies are not required to  
18 make findings on issues the decision of which is unnecessary  
19 to the results they reach.").



