

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

June 7, 2023

Christopher M. Wolpert
Clerk of Court

PREM BAHADUR GURUNG,

Petitioner,

v.

MERRICK B. GARLAND, United States
Attorney General,

Respondent.

No. 22-9521
(Petition for Review)

ORDER AND JUDGMENT*

Before **MORITZ, EID**, and **ROSSMAN**, Circuit Judges.

Prem Bahadur Gurung, a native and citizen of Nepal, petitions for review of the Board of Immigration Appeals’ (BIA) decision affirming the immigration judge’s (IJ) denial of asylum, withholding of removal, and protection under the Convention Against Torture (CAT). The IJ found Mr. Gurung’s testimony was not credible and denied relief. The BIA dismissed his appeal. Exercising jurisdiction under 8 U.S.C. § 1252(a)(1), we deny the petition for review.

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties’ request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. BACKGROUND

A. *CBP Interview*

On March 15, 2016, Mr. Gurung entered the United States and surrendered to Customs and Border Protection (CBP) officials. Two days later, he gave a sworn statement to a customs officer—the first of several different versions of the events surrounding his departure from Nepal. He denied “any current health or medical problems that would prevent [him] from taking part in [the] interview.” R. at 185.

Mr. Gurung said that in 2007, he left Nepal and went to work driving a truck at a United States Army base in Baghdad, Iraq. In 2010, he returned to Nepal for one month, and then went to New Delhi, India, to work at a restaurant called “Ashoka.” *Id.* at 187. He said that he had negotiated a \$10,000 annual salary, but after he arrived, the restaurant offered to pay him just half that amount. Two months later, he bought an airline ticket and returned home.

Mr. Gurung lived and worked in Nepal until January 1, 2016, when he left the country and eventually came to the United States. He gave several reasons for leaving Nepal. First, “[w]hile I was working in Iraq, I met a lot of Americans. I learned that there is a lot of security and independence here. Since then, I have dreamt to come here.” *Id.* at 191. Further, he was poor, afraid of the Maoists, and lost his home in an earthquake: “I am from a poor family. I never got [an] education. I worked as a farmer. . . . [While working in] Kat[h]mandu . . . [as] a driver[,] . . . I was threatened by the Maoists. [Also], [m]y house was collapsed by the earthquake in April of 2015.” *Id.*

Regarding the threats from the Maoists, Mr. Gurung did not go to the police because “[t]he Maoists told me if I went anywhere for help, they would kill my family.” *Id.* at 192. He denied taking part in any political demonstrations or participating with the government. Mr. Gurung was referred to an interview with an asylum officer.

B. *Credible-Fear Interview*

A month later, Mr. Gurung was interviewed by an asylum officer. During his credible-fear interview, Mr. Gurung provided a few more details about his life in Nepal. He said he was a member of the National Democratic Party (NDP) and described two incidents when he was beaten by members of a Maoist organization called the Youth Communist League (YCL).

The first incident occurred on January 24, 1999. Mr. Gurung said he went into the forest at night to gather firewood and leaves for his cattle when fighting broke out between Maoist insurgents and Nepali government forces. He hid from the fighting and was not harmed; however, the next morning the Maoists came to the village and accused him of telling the Nepali army about their location. The Maoists then beat him. He received a cut above his right eye that required stitches.

The second incident occurred on November 13, 2013. Mr. Gurung was campaigning door-to-door on behalf of a pro-democracy candidate when he got into a disagreement with some members of the YCL, who beat him and threatened to kill him. He said he was targeted by the YCL because “I was like a leader in our village for the NDP. I was able to convince people to support our party.” *Id.* at 334.

Shortly after the 2013 incident, Mr. Gurung left his village. “After I went to the city[,] [w]hen [the Maoists] would see me they would tell me . . . not to return to the village. That if I returned that I would be in danger. These were the same people that beat me in my village.” *Id.* The Maoists also went to Mr. Gurung’s home and warned his family that he should not return home.

The asylum officer asked if there were any other incidents; Mr. Gurung said no. He said that he did not report either incident to the authorities because “the police is a great distance from my village.” *Id.* However, later in the interview, he said he did not report the attacks because the police have ties to the Maoists.

The government charged Mr. Gurung with being removable. He conceded the charge, and applied for asylum, withholding of removal, and CAT relief.

C. Asylum Application

In his July 2016 asylum application, Mr. Gurung claimed to be a member of the pro-democratic Rastriya Prajantra Party Nepal (RPPN) and listed his occupation as “Politician.” *Id.* at 306. In addition to the incidents in 1999 and 2013, Mr. Gurung reported a third encounter with the Maoists: “On July 7, 2010, [the Maoists] broke into my home and dragged me from my bed while beating and threatening me.” *Id.* at 307.

Mr. Gurung listed his addresses during the previous five years as:

(1) November 1980 to December 2013, Dahakhani, Nepal; (2) December 2013 to July 2014, Bharatpur, Nepal; (3) July 2014 to April 2015, Pokhara, Nepal; and (4) April 2015 to December 2015, Kathmandu, Nepal.

D. Affidavit and Exhibits

In May 2018, Mr. Gurung filed a list of witnesses and proposed exhibits for the merits hearing. Included as an exhibit was Mr. Gurung's sworn affidavit in which he described himself as a long-standing member of the RPPN. He said that his father was "the village chairman of the party for 10 years," and that he had been "attend[ing] the political meetings and activities with [his] father since [he] was a child." *Id.* at 200. "My father and I were widely known as being anti-Maoists in our village." *Id.* "In 2004, I was promoted to secretary of [the RPPN in my] region, which contained nine villages." *Id.* at 201.

In addition to his political activities, Mr. Gurung was busy as a community activist. "Over time I became well-known in the villages for my leadership skills and success at fundraising." *Id.* He said that he taught the elderly "at night to help with their education . . . started a cleaning campaign . . . to make the surroundings look nice, built toilets for visitors, and built a nice school building with the help of funds from the villagers." *Id.*

Also, Mr. Gurung's affidavit identified for the first time a fourth incident involving the Maoists: "On February 7, 2005, our party arranged a public gathering in support of the RPP[N]." *Id.* Not only had Mr. Gurung "taken leadership of organizing the gathering," he also claimed to have given "a speech against the Maoist party," which made him "a target." *Id.*

Ten days later, "[o]n February 17, 2005, five Maoists forcibly entered the back door of my home at around 11:00 p.m. when my entire family was asleep. They beat

me and accused me of spying on them and speaking against them.” *Id.* “After this incident I became very angry with the Maoists and began to openly oppose them even more.” *Id.* As a result, the “Maoists sent letters warning me not to get involved in the RPP[N] activities and to leave the . . . party and to leave the village.” *Id.*¹

Mr. Gurung also changed the details of the July 7, 2010 incident. In his 2016 asylum application, Mr. Gurung said the Maoists “broke into my home and dragged me from my bed while beating and threatening me.” *Id.* at 307. But nearly two years later, he remembered the incident differently and in greater detail: “On July 7, 2010 at around 8:00 p.m., I was at home watching TV with my family when a group of five or six Maoists again broke into my house. They were carrying bamboo canes, rods and sticks.” *Id.* at 201. “They . . . pushed me, and I fell on the ground so they started to kick me. After that [they] started to beat me with the sticks and rods. . . . Some of the Maoists threw bricks through my window.” *Id.* “[W]hen my wife tried to help me, . . . the Maoists pushed her and slapped her in the face.” *Id.* “[T]he Maoists ran away screaming that they would kill me the next time.” *Id.* “I was covered in blood and . . . [m]y eyes were closed shut from the beatings.” *Id.* at 201-02. He was taken by friends to a local clinic for medical treatment.²

¹ There is no evidence, and Mr. Gurung does not argue, that his decision to leave Nepal in 2007 and go to work in Iraq had anything to do with threats from the Maoists.

² Mr. Gurung’s new recitation of the July 7, 2010, attack is nearly identical to how his wife described the incident in her declaration, which was filed at the same time as his affidavit. *See R.* at 237-39.

Mr. Gurung stated he decided to leave Nepal after the 2013 incident:

After [the 2013] incident, I became very afraid to live in the village . . . [so] I left . . . and went to Bharatpur where I stayed with friends for a while. I was still scared there, so I left and lived for a while in Kathmandu, . . . then [in] Pokhara, [and eventually went to] New Delhi, India.

Id. at 202. “I was allowed to enter and stay temporarily in India. However, I was not granted permanent status nor a work permit.” *Id.*

When he returned from India to Nepal in late 2015, Mr. Gurung decided to move to Brazil. “My cousin . . . found an agent who helped me get a visa to Bolivia. I paid that agent \$7,000. However, when I arrived in Bolivia, I wasn’t able to get a visa to enter Brazil, so I decided to come to the United States.” *Id.*

According to Mr. Gurung, he endured a dangerous trip through nine countries before he crossed the border into the United States at San Ysidro, California. “I faced many difficulties during this journey, including hunger, homelessness, sleepless nights, pain, and unknown people and places.” *Id.* He described his initial interview with the customs officer as “a very different and uncomfortable situation . . . and I was suffering from mental and physical exhaustion and distress, fear and anxiety, so I did not tell many of the details to the officer.” *Id.* at 202-03.

In addition to his affidavit, Mr. Gurung submitted several exhibits, including: (1) statements with translations from relatives and friends in Nepal; (2) documents purporting to be a police report and medical treatment notes concerning the 2010 incident; and (3) background evidence about Maoist violence in Nepal.

E. Merits Hearing Testimony

At the June 2018 merits hearing, Mr. Gurung testified that he came from a village called Dahakhani. His wife and teenage daughter moved to the city of Bharatpur after their house was destroyed in the April 2015 earthquake. He told the IJ that he spoke to his wife the night before the hearing and the Maoists were still demanding money and threatening to kill him.

He also testified at length about his political activities, the incidents involving the Maoists, and the on-going threats. And he also revealed some new information. For example, despite having previously denied making any reports to the police, he testified that he reported the 2010 attack and the police said they would prosecute the attackers; however, he never followed up to learn what happened.

Mr. Gurung also revealed for the first time that after he moved to Bharatpur in December 2013, some unspecified Maoists called him on his cell phone and said they knew he was hiding there, and they intended to find and kill him. He further testified that he continued to receive death threats on his phone when he lived in Kathmandu and Pokhara. By January 2015, Mr. Gurung was so concerned about the calls that he moved to New Delhi, India, even though he was unable to work and had no means of support. “There, I had a friend named Rajan Gurung . . . he owned a hotel . . . [and] was the first one who supported me while I was in India.” *Id.* at 128. But the Maoists also called him in India and threatened to kill him, so he returned to Nepal in late November, and lived in hiding.

On cross-examination, counsel for the Department of Homeland Security (DHS) asked Mr. Gurung about having lived and worked in Iraq. When the IJ heard this question, she asked whether Mr. Gurung mentioned that he had lived in Iraq in his asylum application. Mr. Gurung’s attorney responded: “It’s the first I’ve heard of it.” *Id.* at 150. And when DHS counsel asked Mr. Gurung about his work status when he went to India in 2010 for the job at the restaurant Ashoka, Mr. Gurung was flummoxed:

In 2010, I went to work there? I didn’t know about that. *During the interview with the California Border Patrol, as I explained before, I was not physically and mentally feeling well at that time. What else I said at that time, I don’t know. And I ask for forgiveness if there was something different said, because I was not in the right condition.*

Id. at 151 (emphasis added). He testified that what he told the customs officer “may not [have been] true,” and blamed fatigue and a “constant fear that . . . the officer would send me back to Nepal,” as the reasons for making up the story about going to India in 2010. *Id.* He did confirm, however, that one reason he came to the United States was because he was “the victim of the [Gorkha] earthquake,” which happened in April 2015. *Id.* at 156.

When the IJ asked Mr. Gurung where he was when the earthquake hit, he said that he could not remember, although he remembered feeling it. Later during his testimony, he remembered that he was at his house in Dahakhani—which is about three to three-and-a-half hours by car from the epicenter of the earthquake. The earthquake was so strong that it caused his house to collapse, and he sent his wife and daughter to live with her parents in Bharatpur.

IMMIGRATION JUDGE:

And where did you go?

MR. GURUNG:

When I think about those incidents and the Maoists attacks and my family members, I feel very difficult to express or speak out.

IMMIGRATION JUDGE:

Surely, you must remember where you went to live right after that huge earthquake? Sir, did you stay in Nepal?

MR. GURUNG:

At that time, I went to Pokhara, I think. . . .

IMMIGRATION JUDGE:

And what was there? And where did you stay there, in Pokhara?

MR. GURUNG:

In Pokhara, there was a place named Rambazar. I stayed there [with a friend for] three to four months.

Id. at 165-66.

But Mr. Gurung reconfirmed that he went to live with his friend in India beginning in January 2015, and that he did not return to Nepal until late November. When confronted with the fact that his timeline would have placed him living in India in April 2015, Mr. Gurung suggested he was confused about the dates because Nepal does not use the Gregorian calendar. When questioned further, he said “it’s been a long time.” *Id.* at 169.

When the IJ asked why he failed to include the time he spent in Iraq in his asylum application, Mr. Gurung said: “I could not include everything that happened

in my life and those things what happened a long time before. And I am very worried still,” speaking about his wife and daughter who were being harassed by the Maoists. *Id.* at 174. “And I’m having, like, physically, mentally, I’m having problems. I think I’m the unluckiest person in this world. That’s why I keep forgetting.” *Id.*

II. AGENCY DECISIONS

The IJ denied Mr. Gurung’s application for asylum, withholding of removal, and protection under the CAT. The IJ found “numerous inconsistencies . . . combined with [his] evasive testimony and lack of candor, convince the Court to find that [Mr. Gurung] is not credible.” R. at 77. Further, the IJ found Mr. Gurung’s documentary evidence did not aid his credibility. Without other evidence to meet his burden of proof, the IJ denied relief and ordered Mr. Gurung removed to Nepal.

As to the inconsistencies, the IJ noted that Mr. Gurung’s story about the nature of the harm and the number of times he was attacked by the Maoists changed over time. During his credible-fear interview, he said he only encountered the Maoists on two occasions; however, by the time of the merits hearing, the number of attacks had increased to four. He was also inconsistent about whether he reported any of the incidents to the police.

The IJ also found “significant discrepancies . . . regarding [Mr. Gurung’s] sequence of residences and living arrangements within Nepal.” *Id.* at 75. For example, the IJ noted that in his asylum application, Mr. Gurung indicated when he left Dahakhani, he first lived in Bharatpur, then Pokhara, and finally Kathmandu; however, at the merits hearing he testified he went to Bharatpur, then Kathmandu,

and finally to Pokhara. And the IJ also observed his testimony as “to the approximate amount of time that he lived in each individual city . . . is at odds with [the] timeline [in his asylum application].” *Id.*

Relatedly, the IJ found that, “[i]nitially, [Mr. Gurung] could not recall where he was when the [Gorkha] earthquake hit.” *Id.* Later, however, he “testified that he was in his house, which had collapsed.” *Id.* And only after “long pauses and seemingly evasive answers,” the IJ explained, “[Mr. Gurung] eventually testified that he went to Pokhara to stay with his friend for three to four months following the April 2015 earthquake, despite stating in his application that he lived in Kathmandu for eight months during the same time.” *Id.* “Given the magnitude of the Gorkha earthquake and resulting devastation, the Court concludes that it would be reasonable for [Mr. Gurung] to know where he was at the time of the event, and finds it further concerning that [he] provided inconsistent answers about his whereabouts.” *Id.* at 76.

Also, the IJ found inconsistencies and omissions about Mr. Gurung’s international residences. Specifically, Mr. Gurung’s asylum application omitted he lived and worked in Iraq for two to three years, and lived for several months in India in 2010, where he “work[ed] in a restaurant named Ashoka.” *Id.* Mr. Gurung tried to “explain[] the inconsistencies between the CBP interview and his testimony by stating that he was physically and mentally exhausted from the journey to the United States”; however, the IJ found this “argument largely unconvincing in light of the extensive detail that he provided throughout the entirety of his CBP interview” and

his failure to “adequately explain why he would create a completely false narrative of his timeline during the CBP interview.” *Id.*

The IJ also found Mr. Gurung provided inconsistent information about his employment. In his CBP interview, he denied participating in any political demonstrations or having any involvement with the Nepali government and he told both the CBP and asylum officers that he worked as a driver in Nepal and Iraq. However, in his asylum application, he listed his occupation as “Politician,” *id.* at 306, and testified extensively at the merits hearing about his activities as a political and community activist.

In addition to the inconsistencies, the IJ determined Mr. Gurung “was . . . evasive for portions of the testimony, especially when questioned about his time in India in 2010 and living situation during and after the Gorkha earthquake,” and “lacked candor, especially concerning his time living and working in Iraq.” *Id.* at 76.

Further, the IJ found the declarations from his friends and relatives in Nepal “did little to corroborate many unconfirmed portions of [his] testimony, such as [his] circumstances during and after the 2015 earthquake or his time in India and Iraq.” *Id.* at 77. And last, the IJ afforded little weight to the statements because the declarants were “unavailable for cross-examination and it is unclear whether they had first-hand knowledge of the events described therein.” *Id.*

The BIA upheld the IJ’s adverse credibility finding as not clearly erroneous and dismissed the appeal. *See* 8 C.F.R. § 1003.1(d)(3)(i) (stating the BIA must defer

to the IJ’s factual findings, including findings as to the credibility of testimony, unless they are clearly erroneous). Mr. Gurung now seeks review.³

III. LEGAL FRAMEWORK

A. *Scope and Standard of Review*

“On appeal of a BIA order, the scope of our review is governed by the form of the BIA decision.” *Htun v. Lynch*, 818 F.3d 1111, 1118 (10th Cir. 2016) (brackets and internal quotation marks omitted). When, as in this case, a single member of the BIA dismisses an appeal and issues a decision, “we review the order as the final agency determination and limit our review to the grounds relied upon by the BIA.”

Id. However, “when seeking to understand the grounds provided by the BIA, we are not precluded from consulting the IJ’s more complete explanation of those same grounds.” *Id.* (internal quotation marks omitted).

“When it comes to questions of fact . . . the [Immigration and Nationality Act] provides that a reviewing court must accept ‘administrative findings’ as ‘conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.’” *Garland v. Ming Dai*, 141 S. Ct. 1669, 1677 (2021) (quoting 8 U.S.C.

³ Mr. Gurung also argues the adverse credibility determination is not supported by substantial evidence and must be reversed. As a result, he maintains his testimony—viewed as credible—is sufficient meet his burden of proving his eligibility for asylum, withholding of removal, and protection under the CAT. *See* Pet’r’s Br. at 32-37. But we need not address the issue because we affirm the agency’s adverse credibility determination. *See In re M-S-*, 21 I. & N. Dec. 125, 129 (B.I.A. 1995) (concluding that a persecution claim that lacks veracity cannot satisfy burdens of proof necessary to establish eligibility for asylum and withholding of removal); *Ismaiel v. Mukasey*, 516 F.3d 1198, 1206 (10th Cir. 2008) (affirming denial of CAT protection based on the IJ’s adverse credibility determination).

§ 1252(b)(4)(B)). “This is a highly deferential standard.” *Id.* (internal quotation marks omitted).

“The IJ’s credibility assessment is a factual finding . . . and will ordinarily be given great weight.” *Htun*, 818 F.3d at 1118-19 (internal quotation marks omitted). It should not be reversed “unless the record demonstrates that any reasonable adjudicator would be compelled to conclude to the contrary.” *Id.* at 1119 (internal quotation marks omitted). “Under this standard, we do not weigh evidence or independently assess credibility.” *Id.* “[E]ven if we disagree with the BIA’s conclusions, we will not reverse if they are supported by substantial evidence and are substantially reasonable.” *Id.* (brackets and internal quotation marks omitted).

B. *Statutory Framework*

i. Asylum

The Attorney General has discretion to grant asylum to an applicant who proves that he is a “refugee.” 8 U.S.C. § 1158(b)(1)(A). “The applicant bears the burden of proof of establishing eligibility for asylum.” *Zhi Wei Pang v. Holder*, 665 F.3d 1226, 1230 (10th Cir. 2012). To establish refugee status, Mr. Gurung must demonstrate that he suffered past persecution or has “a well-founded fear of [future] persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42)(A).

ii. Withholding of Removal

The Attorney General may not remove an applicant to a country if he determines that the applicant’s “life or freedom would be threatened” on account of a

protected ground, such as the applicant’s “political opinion.” 8 U.S.C.

§ 1231(b)(3)(A). To obtain such relief, the applicant must establish a “clear probability of persecution on account of” a protected ground. *Uanreroro v. Gonzales*, 443 F.3d 1197, 1202 (10th Cir. 2006) (internal quotation marks omitted). A “clear probability” is defined as “more likely than not.” *Id.*

iii. Convention Against Torture

An applicant seeking CAT protection must prove “that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.” 8 C.F.R. § 1208.16(c)(2). “Torture is an extreme form of cruel and inhuman treatment,” that is “inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official . . . or other person acting in an official capacity.” *Id.* § 1208.18(a)(1), (2). A showing of past torture does not give rise to a presumption of future torture, but past torture is one factor to consider in determining whether there is a clear likelihood of torture. *See id.* § 1208.16(c)(3)(i).

C. *Burden of Proof*

An applicant can meet the burden of proof for asylum, withholding of removal, or CAT relief based solely on his or her credible testimony. *See* 8 U.S.C. § 1158(b)(1)(B)(ii) (asylum); *id.* § 1231(b)(3)(C) (withholding of removal); 8 C.F.R. § 1208.16(c)(2) (CAT relief). “[A]lthough an applicant’s testimony may be sufficient, without corroboration, to meet the burden of proof on any of the forms of relief, the applicant’s testimony must also be found credible and persuasive, and refer to specific facts sufficient to demonstrate that the applicant is a refugee.” *Uanreroro*,

443 F.3d at 1205 (internal quotation marks omitted) (asylum). Likewise, the IJ evaluates the testimony of an applicant seeking withholding of removal or CAT protection to “determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant’s burden of proof.” 8 U.S.C. § 1229a(c)(4)(B).

“[A] trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant,” and also “the consistency between the applicant’s . . . written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made)” whether the “statement [is consistent] with other evidence of record . . . , and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim, or any other relevant factor.” *Id.* § 1158(b)(1)(B)(iii) (asylum); *see id.* § 1229a(c)(4)(C) (withholding of removal and CAT protection).

IV. ANALYSIS

Nothing in the record compels reversal of the agency’s findings. As an overarching matter, the record reflects that the underlying premise of Mr. Gurung’s claim changed over time. It began with Mr. Gurung’s description of his life as a farmer and driver who lost his home in an earthquake but then changed into claims of persecution based on his alleged role as an outspoken leader in RPPN, who had several violent encounters with the Maoists, and was forced to leave Nepal to avoid being killed.

The IJ found Mr. Gurung’s “narrative regarding the Maoist attacks and threats varied significantly.” R. at 75. “During his asylum interview, [he] clearly articulated that Maoists threatened him on only two occasions, which [he] explained in greater detail during his testimony.” *Id.* “However, [he] testified about two additional Maoist[] attacks and numerous threats over the phone that he did not previously disclose in his asylum interview.” *Id.*

Mr. Gurung does not dispute the accuracy of these factual findings; instead, he says the omissions should be excused for two reasons. First, there is literature in the field of immigration—“*Winning Asylum Cases*”—that suggests asylum applications may ““contain erroneous or incomplete information”” because of ““inadequate time to prepare”” or ““language problems.”” Pet’r’s Br. at 21. While we do not doubt this could be true as a general matter, there is no such evidence in this case.

Second, he maintains “it would stand to reason he would forget details of the events that occurred to him in Nepal” because “he was suffering from his arduous journey when he was interviewed *by the asylum officer.*” *Id.* at 22 (emphasis added). But the record shows Mr. Gurung’s testimony about being fatigued related to his initial interview by the customs officer, which occurred two days after he arrived—not the credible-fear interview conducted a month later. *See* R. at 151 (“During the interview *with the California Border Patrol*, as I explained before, I was not physically and mentally feeling well at that time.” (emphasis added)). Also, his claims of mental and physical impairments are inconsistent with his claim that he did

not have any “current health or medical problems that would prevent [him] from taking part in [the] interview.” *Id.* at 185.

These omissions were not insignificant; instead, we agree with the government that they “went to the crux of [Mr. Gurung’s] case: The number of times he was supposedly persecuted, if he received death threats, and how he supposedly fled.” Resp. Br. at 28-29. More to the point, the agency may base its credibility determination on “*any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim, or any other relevant factor.*” 8 U.S.C. § 1158(b)(1)(B)(iii) (asylum); *id.* § 1229a(c)(4)(C) (withholding of removal and CAT protection). And we review the inconsistencies, falsehoods, and omissions in context. *Ismaiel*, 516 F.3d at 1205-06. Viewed in context, Mr. Gurung’s failure to remember even “incidental” matters is relevant to his honesty, ability to remember, and overall persuasiveness. *See Uanreroro*, 443 F.3d at 1205 (recognizing that to meet the burden of proof, the IJ must find the applicant’s testimony credible and persuasive).

Similarly, the IJ was not required to credit Mr. Gurung’s explanations for his omissions and inconsistencies. *See Matter of D-R-*, 25 I. & N. Dec. 445, 455 (B.I.A. 2011) (“An [IJ] is not required to accept a respondent’s assertions, even if plausible, where there are other permissible views of the evidence based on the record.”). Here, it was permissible for the IJ to disregard Mr. Gurung’s explanation that he misspoke about working at the restaurant Ashoka in India because he was fatigued, when there

was no evidence he had any medical or health problems at the time he gave this account, and he was able to provide the customs officer with detailed information.

Mr. Gurung argues next that “it is reasonable to assume since the matter of him being in Iraq is not related to the persecution he suffered in Nepal, that he would not have listed it in his asylum application.” Pet’r’s Br. at 28-29. He offers the same explanations for his failure to disclose the time he spent in India. *See id.* at 29. We reject this argument because it is not based on any evidence in the record. Instead, it was first advanced by counsel at the BIA, which noted that “*counsel’s* statements on appeal are not evidence.” R. at 4-5 (emphasis added). We agree. *See Luevano v. Holder*, 660 F.3d 1207, 1213 (10th Cir. 2011).⁴

Also, we agree with the government that Mr. Gurung’s reliance on different calendars to explain his whereabouts during the earthquake “is a red herring.” Resp. Br. at 36. “The [IJ’s] concerns were based on inconsistent *chronology* of where [he] was living after supposedly leaving due to the earthquake that he admitted was part of his reason for leaving Nepal—not the specific dates.” *Id.* Moreover, it was not wrong for the agency to consider the inconsistent information about his employment

⁴ Mr. Gurung failed to challenge at the BIA the IJ’s finding regarding his demeanor as a witness—namely, that he “was . . . evasive for portions of the testimony, especially when questioned about his time in India in 2010 and living situation during and after the Gorkha earthquake,” and that he “generally lacked candor, especially concerning his time living and working in Iraq.” R. at 76. This unchallenged finding was another legitimate reason for the agency’s adverse credibility determination. “[A]n IJ may find a witness not to be credible because of his or her testimonial demeanor.” *Elzour v. Ashcroft*, 378 F.3d 1143, 1152-53 (10th Cir. 2004); *see also* 8 U.S.C. § 1158(b)(1)(B)(iii) (asylum); *id.* §1229a(c)(4)(C) (withholding of removal and CAT protection).

as a part of its credibility determination. Mr. Gurung's occupation changed from farmer to driver to politician without any explanation.

Mr. Gurung also suggests generally that a poor memory is to blame for the omissions, falsehoods, and inconsistencies. But there is no evidence that this same poor memory would make him a more reliable testimonial witness at his merits hearing, which took place more than two years after he entered the United States.

Last, Mr. Gurung maintains that the IJ improperly found that the evidence from his friends and relatives was insufficient to aid or rehabilitate his credibility. He argues the IJ's decision "to negate a substantial portion of [the evidence because] the authors of said submissions were unavailable for cross-examination . . . is illogical. The authors of said submissions are residents of a foreign country and would not have been able to [testify in person.]" Pet'r's Br. at 31-32.

But Mr. Gurung misstates the IJ's decision. The IJ considered the submissions and then explained why she was giving them limited *weight*. First, the IJ found "*they did little to corroborate many unconfirmed portions of [Mr. Gurung's] testimony, such as [his] circumstances during and after the 2015 earthquake or his time in India and Iraq.*" R. at 77 (emphasis added). "Furthermore, the Court *does not give significant evidentiary weight* to these submissions, given that the individuals who wrote the statements were unavailable for cross-examination *and* it is unclear whether they had first-hand knowledge of the events described therein." *Id.* (emphasis added). An IJ has broad discretion to accept and assign evidentiary weight to evidence. *See Matter of H-L-H- & Z-Y-Z-*, 25 I. & N. Dec. 209, 215 (B.I.A. 2010)

(recognizing that IJ could properly give diminished weight to letters from relatives and friends because they “are interested witnesses who were not subject to cross-examination.”))).

And in considering whether to grant the petition for review, “it is not our prerogative to reweigh the evidence, but only to decide if substantial evidence supports the IJ’s decision.” *Yuk v. Ashcroft*, 355 F.3d 1222, 1236 (10th Cir. 2004).

In sum, the IJ’s decision, as affirmed by the BIA, identified a number of concerns with Mr. Gurung’s credibility. Reversal is not warranted here, particularly under the highly deferential standard of review. *See Ming Dai*, 141 S. Ct. at 1677.

V. CONCLUSION

The petition for review is denied.

Entered for the Court

Veronica S. Rossman
Circuit Judge