

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAN 22 2013

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NEGASI TEWELDE-DESTA,

Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

No. 10-70489

Agency No. A088-346-796

ORDER

Before: WARDLAW, CLIFTON, and N.R. SMITH, Circuit Judges.

The memorandum disposition filed on September 17, 2012, is withdrawn.

An amended memorandum disposition is being filed concurrently with this order.

With this amendment, respondent's petition for panel rehearing is denied.

No further petitions for rehearing will be entertained in this closed case.

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NOT FOR PUBLICATION

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No. 10-70489

Agency No. A088-346-796

AMENDED MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted September 10, 2012**

Before: WARDLAW, CLIFTON, and N.R. SMITH, Circuit Judges.

Negasi Tewelde-Desta, a native and citizen of Eritrea, petitions for review of the Board of Immigration Appeals’ order dismissing his appeal from an immigration judge’s decision denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture (“CAT”). We have

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction under 8 U.S.C. § 1252. We review for substantial evidence the agency's factual findings, applying the new standards governing adverse credibility determinations created by the REAL ID Act, *Shrestha v. Holder*, 590 F.3d 1034, 1039-40 (9th Cir. 2010), and we grant the petition for review and we remand.

The agency denied Tewelde-Desta's claims based on an adverse credibility determination. Substantial evidence does not support the agency's non-responsive demeanor finding because the record shows that Tewelde-Desta answered the questions he was asked during cross-examination. *See Garrovillas v. INS*, 156 F.3d 1010, 1014-15 (9th Cir. 1998). Substantial evidence does not support the agency's finding that Tewelde-Destas' testimony and corroborating evidence were inconsistent regarding when he completed his military service. *See Shrestha*, 590 F.3d at 1044 (“[U]nder the REAL ID Act, IJs must provide specific and cogent reasons in support of an adverse credibility determination.”) (internal quotation marks omitted). In addition, Tewelde-Desta's statement that he received his national service certificate in April 2007 appears to be an “innocent mistake.” *See Ren v. Holder*, 648 F.3d 1079, 1087 (9th Cir. 2011). Finally, the agency's finding that Tewelde-Desta gave inconsistent descriptions of the container in which he was detained is not supported because it is based on a mischaracterization of his

testimony. *See id.* at 1086; *Tekle v. Mukasey*, 533 F.3d 1044, 1052 (9th Cir. 2008). Accordingly, substantial evidence does not support the agency's adverse credibility determination. *See Ren*, 648 F.3d at 1089.

We grant the petition for review and remand to the agency to determine in the first instance whether, accepting Tewelde-Desta's testimony as true, he is eligible for asylum, withholding of removal, or CAT relief. *See INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam).

PETITION FOR REVIEW GRANTED; REMANDED.