

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 22 2022

FOR THE NINTH CIRCUIT

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

WEIXU WANG,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 16-72876

Agency No. A087-838-802

MEMORANDUM*

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

Submitted September 14, 2022**

Before: O'SCANNLAIN, RAWLINSON, and OWENS, Circuit Judges.

Weixu Wang, a native and citizen of China, petitions pro se for review of the Board of Immigration Appeals' ("BIA") order dismissing his appeal from an immigration judge's ("IJ") decision denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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

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

The BIA found no clear error in two factual findings the IJ relied on in support of an adverse credibility determination. Substantial evidence does not support one of these findings. Substantial evidence does not support the agency’s determination that the omission of past events in Wang’s wife’s letter is inconsistent with his testimony. *See Barseghyan v. Garland*, 39 F.4th 1138, 1143 (9th Cir. 2022) (“This alleged inconsistency does not support an adverse credibility determination because it is not, in fact, inconsistent.”). Substantial evidence does support the single remaining finding that Wang’s testimony is inconsistent with his fine receipt as to the length of his detention. *See Shrestha*, 590 F.3d at 1039-40 (inconsistency may be considered in assessing credibility under the totality of circumstances).

Because we cannot be confident that the BIA would have upheld the adverse credibility determination based on this inconsistency alone, we grant the petition and remand for the BIA to reconsider Wang’s credibility under the totality of the circumstances and for any necessary further proceedings consistent with this decision. *See Alam v. Garland*, 11 F.4th 1133, 1137 (9th Cir. 2021) (en banc)

(single-factor rule for adverse credibility determinations overruled).

We do not consider the materials referenced in Wang's opening brief that are not part of the administrative record. *See Fisher v. INS*, 79 F.3d 955, 963-64 (9th Cir. 1996) (en banc).

The parties must bear their own costs on appeal.

The temporary stay of removal remains in place until the mandate issues.

PETITION FOR REVIEW GRANTED; REMANDED.