

**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 A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of December, two thousand twenty-four.

PRESENT:

GUIDO CALABRESI,
ROBERT D. SACK,
JOSEPH F. BIANCO,
Circuit Judges.

BERNARDINO ZAVALA,
Petitioner,

v.

MERRICK B. GARLAND, UNITED
STATES ATTORNEY GENERAL,
Respondent.

23-6127
NAC

1 **FOR PETITIONER:** Nicholas J. Mundy, Esq., Brooklyn, NY.

2
3 **FOR RESPONDENT:** Brian M. Boynton, Principal Deputy Assistant
4 Attorney General; Erica B. Miles, Assistant
5 Director; Elizabeth M. Dewar, Trial Attorney,
6 Office of Immigration Litigation, United
7 States Department of Justice, Washington,
8 DC.

9 UPON DUE CONSIDERATION of this petition for review of a Board of
10 Immigration Appeals (“BIA”) decision, it is hereby ORDERED, ADJUDGED, AND
11 DECREED that the petition for review is DENIED.

12 Petitioner Bernardino Zavala, a native and citizen of El Salvador, seeks
13 review of a January 9, 2023 decision of the BIA, affirming a September 27, 2018
14 decision of an Immigration Judge (“IJ”), which denied his application for asylum,
15 withholding of removal, and relief under the Convention Against Torture
16 (“CAT”). *In re Bernardino Zavala*, No. A205 159 466 (B.I.A. Jan. 9, 2023), *aff’g* No.
17 A205 159 466 (Immig. Ct. N.Y. City Sept. 27, 2018). We assume the parties’
18 familiarity with the underlying facts and procedural history.

19 Under the circumstances, we have reviewed both the BIA’s and the IJ’s
20 decisions “for the sake of completeness.” *Wangchuck v. Dep’t of Homeland Sec.*, 448
21 F.3d 524, 528 (2d Cir. 2006). We review an adverse credibility determination
22 “under the substantial evidence standard,” *Hong Fei Gao v. Sessions*, 891 F.3d 67, 76

1 (2d Cir. 2018), and “the administrative findings of fact are conclusive unless any
2 reasonable adjudicator would be compelled to conclude to the contrary,” 8 U.S.C.
3 § 1252(b)(4)(B).

4 “Considering the totality of the circumstances, and all relevant factors, a
5 trier of fact may base a credibility determination on the demeanor, candor, or
6 responsiveness of the applicant or witness, . . . the consistency between the
7 applicant’s or witness’s written and oral statements (whenever made and whether
8 or not under oath, and considering the circumstances under which the statements
9 were made), the internal consistency of each such statement, the consistency of
10 such statements with other evidence of record (including the reports of the
11 Department of State on country conditions), and any inaccuracies or falsehoods in
12 such statements, without regard to whether an inconsistency, inaccuracy, or
13 falsehood goes to the heart of the applicant’s claim, or any other relevant factor.”
14 *Id.* § 1158(b)(1)(B)(iii). “We defer . . . to an IJ’s credibility determination unless,
15 from the totality of the circumstances, it is plain that no reasonable fact-finder
16 could make such an adverse credibility ruling.” *Xiu Xia Lin v. Mukasey*, 534 F.3d
17 162, 167 (2d Cir. 2008); *accord Hong Fei Gao*, 891 F.3d at 76.

18 Zavala alleged that he was threatened by members of a rival political party

1 (ARENA) because of his membership in the Farabundo Marti National Liberation
2 Front (“FMLN”), and that the police arrested and beat him. Substantial evidence
3 supports the agency’s adverse credibility determination.

4 First, the IJ reasonably relied on inconsistencies between Zavala’s written
5 and oral statements regarding his work for the FMLN. See 8 U.S.C.
6 § 1158(b)(1)(B)(iii). Zavala wrote that he was an “active member” of the FMLN
7 and “handed out flyers and cards and talked to people about the party.”
8 Certified Administrative Record (“CAR”) at 344–45. However, he testified that
9 he was more an “observer” of the party. *Id.* at 183. When asked again what he
10 did to support the FMLN, Zavala stated “just voting and just protecting people.”
11 *Id.* at 208. When asked why he did not mention that he went into communities
12 and handed out flyers, Zavala answered that he was not asked about that, and
13 then that he “did not understand.” *Id.* We give deference to the IJ’s finding that
14 Zavala’s explanation for these differing accounts of his work for the FMLN was
15 nonresponsive. See *Likai Gao v. Barr*, 968 F.3d 137, 149 (2d Cir. 2020) (deferring to
16 agency’s demeanor assessment that was based on observations that the petitioner
17 was “sometimes ‘non-responsive’ to questions”); *Majidi v. Gonzales*, 430 F.3d 77, 81
18 n.1 (2d Cir. 2005) (acknowledging that IJs are generally in the best position to

1 decide whether a witness understood questions). Moreover, Zavala's argument
2 here that his statements that he "volunteered" and "provided security" for the
3 FMLN are not inconsistent does not explain why he did not testify that he went
4 into communities and handed out flyers or why he denied engaging in any
5 activities other than observing. See *Majidi*, 430 F.3d at 80 ("A petitioner must do
6 more than offer a plausible explanation for his inconsistent statements to secure
7 relief; he must demonstrate that a reasonable fact-finder would be *compelled* to
8 credit his testimony." (internal quotation marks and citation omitted)).

9 Second, the IJ reasonably relied on an omission in evaluating the
10 persuasiveness of Zavala's account. The agency "may rely on *any* inconsistency
11 or omission in making an adverse credibility determination as long as the 'totality
12 of the circumstances' establishes that an asylum applicant is not credible." *Xiu*
13 *Xia Lin*, 534 F.3d at 167 (quoting 8 U.S.C. § 1158(b)(1)(B)(iii)). We have cautioned
14 that "in general omissions are less probative of credibility than inconsistencies
15 created by direct contradictions in evidence and testimony." *Hong Fei Gao*, 891
16 F.3d at 78 (internal quotation marks and citation omitted). However, "the
17 probative value of a witness's prior silence on particular facts depends on whether
18 those facts are ones the witness would reasonably have been expected to disclose."

1 *Id.* Zavala testified that, in 2013, he “started working with the ARENA party”
2 meaning that he “voted for them.” CAR at 182, 213. He further testified that he
3 switched parties in 2014, when he started “supporting [the FMLN],” and that this
4 support was “being with [the FMLN] and voting for them.” *Id.* at 182–83, 195.
5 Zavala did not mention this prior tie to ARENA in his asylum application. *See id.*
6 at 344–46. Zavala’s former support of ARENA, whose members were his alleged
7 persecutors, is not a minor omission, given that political persecution is the basis
8 for his claim for relief from removal. Further, the agency did not rely solely on
9 this omission but rather considered it in combination with other inconsistencies
10 relating to his political affiliation and activities. *See Hong Fei Gao*, 891 F.3d at
11 82 (“Omissions need not go to the heart of a claim to be considered in adverse
12 credibility determinations, but they must still be weighed in light of the totality of
13 the circumstances and in the context of the record as a whole.”).

14 Finally, the IJ reasonably relied on an inconsistency regarding when Zavala
15 joined the FMLN. *See Xiu Xia Lin*, 534 F.3d at 167 (“Even where an IJ relies on
16 discrepancies or lacunae that, if taken separately, concern matters collateral or
17 ancillary to the claim, the cumulative effect may nevertheless be deemed
18 consequential by the fact-finder.” (alteration adopted) (internal quotation marks

1 and citation omitted)). Zavala's affidavit states that he joined the FMLN in 2013,
2 he initially testified that he became involved with FMLN in 2012, but then stated
3 it was 2013, and then he testified that he got involved with the FMLN in 2014.
4 When confronted with this discrepancy, Zavala reiterated that he joined in 2014
5 and stated that he was "nervous" and that the affidavit's statement was a
6 "mistake." CAR at 210. The IJ was not required to credit this explanation,
7 particularly as the alleged error was made in the written statement prepared with
8 counsel, rather than at the hearing. *See Majidi*, 430 F.3d at 80.

9 In sum, given the inconsistent statements and lack of responsiveness
10 regarding Zavala's political activities and work for the FMLN, his omission of his
11 prior support or work for ARENA, and the inconsistency about when he joined
12 the FMLN, substantial evidence supports the agency's adverse credibility
13 determination. *See* 8 U.S.C. § 1158(b)(1)(B)(iii); *Likai Gao*, 968 F.3d at 145 n.8
14 ("[E]ven a single inconsistency might preclude an alien from showing that an IJ
15 was compelled to find him credible. Multiple inconsistencies would so preclude
16 even more forcefully."); *Xiu Xia Lin*, 534 F.3d at 167. The adverse credibility
17 determination is dispositive of asylum, withholding of removal, and CAT relief
18 because all forms of relief are based on the same factual predicate. *See Hong Fei*

Gao, 891 F.3d at 76. Because the credibility finding is dispositive, we do not reach the agency’s alternative findings. See *INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (“As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.”).

For the foregoing reasons, the petition for review is DENIED. All pending motions and applications are DENIED and stays VACATED.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court