03-40358-ag(L)

To Be Argued By:
JAMES J. FINNERTY

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-40358-ag(L)
03-40362-ag(CON)

MANUELA SARMIENTO, RAFAEL SARMIENTO, RAFAEL ALBERTO SARMIENTO A76-245-875, HAIDER ANTONIO SARMIENTO A76-245-876, JEYMYS ISABEL SARMIENTO A76-245-877, and their Minor Children,

Petitioners,

-vs-

ALBERTO GONZALES, Attorney General,

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR ALBERTO GONZALES ATTORNEY GENERAL OF THE UNITED STATES

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STATEMENT OF JURISDICTION

This Court has jurisdiction under § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (2005), to review the petitioner's challenge to the Bureau of Immigration Appeals' final order dated July 25, 2003, denying him asylum and withholding of removal.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether substantial evidence supported the Immigration Judge's rejection of the petitioner's asylum and withholding of removal claims, (1) where a reasonable factfinder would not be compelled to reverse the Immigration Judge's adverse credibility determination, in light of the unexplained inconsistencies and contradictions regarding material elements of his claims, and (2) even assuming the petitioner were credible, where the vague and unfulfilled threats to which the petitioner was allegedly subjected did not rise to the level of persecution.

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MANUELA SARMIENTO, RAFAEL SARMIENTO, RAFAEL ALBERTO SARMIENTO A76-245-875, HAIDER ANTONIO SARMIENTO A76-245-876, JEYMYS ISABEL SARMIENTO A76-245-877, and their Minor Children,

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BRIEF FOR ALBERTO GONZALES[1]

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[1] Pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Attorney General Gonzales has been substituted as the Respondent in this matter.

Preliminary Statement

Rafael Sarmiento ("Sarmiento" or the "petitioner"), a native and citizen of Colombia, petitions this Court for review of a decision of the Board of Immigration Appeals ("BIA") dated July 25, 2003 (Amended Joint Appendix 2) ("JA"). [1] The BIA summarily affirmed the oral decision of an Immigration Judge ("IJ") dated December 15, 1999, denying petitioner's applications for asylum and withholding of removal under the Immigration and Nationality Act of 1952, as amended ("INA"), and ordering him removed from the United States. (JA 2 (BIA's decision), 44, 46-62 (IJ's decision and order)).[2]

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[1] The petitioner originally filed with his brief a Joint Appendix. The Joint Appendix contained only pages 46-169 of the Certified Administrative Record. An Amended Joint Appendix was later filed, including the omitted pages(1-45 and 170-665). To avoid confusion, the Government refers to both the Joint Appendix and the Amended Joint Appendix as "JA" and follows the numbering convention used in those documents.

[2] Sarmiento is married to Manuela Sarmiento, who entered the United States in 1992. (JA 152-153). Manuela Sarmiento initially filed her own application for asylum and withholding of removal, but subsequently withdrew it. (JA 73, 77, 90, 91). The Sarmientos have three minor children, each of whom entered the United States in 1995. (JA 159). The removal proceedings concerning Manuela Sarmiento and the children were consolidated and their requests for asylum and withholding of removal proceeded under Sarmiento's application. (JA 70).

Sarmiento claims that he fled Colombia in 1988 -- leaving behind his wife and three children -- after allegedly receiving several telephone calls from unidentified individuals describing themselves as members of Movimiento 19 de Abril, also known as M-19, a leftist guerrilla group then active in Colombia, seeking his assistance in obtaining information and recruiting members to join the group. He claims that he refused to assist the group and that he was then verbally threatened with death if he refused to do so. He seeks asylum and withholding of removal on the grounds that, twelve years after leaving Colombia, he will be subject to persecution by M-19 as a result of his refusal to assist that organization in the mid-1980s when he was a trade union treasurer.[3]

Substantial evidence supports the IJ's determination that Sarmiento failed to provide credible testimony and evidence in support of his claim for asylum and withholding. First, as the IJ properly found, Sarmiento offered conflicting and confusing testimony about his employment and position as union treasurer – casting doubt on whether he even held the position that allegedly exposed him to threats. Second, as the IJ also properly noted, the petitioner's evidence concerning the time frame, sequence, and contents of the allegedly threatening telephone calls was vague and non-specific. Third, the

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[3] At the time of the IJ's decision in December 1999, Sarmiento had left Colombia approximately twelve years earlier. Since the IJ's decision, an additional six years have passed. Sarmiento thus has resided outside Colombia for approximately eighteen years at the time of the filing of this brief.

petitioner's testimony concerning the alleged threats was contrary to statements he made in his original asylum application. Thus, substantial evidence supported the IJ's adverse credibility determination. Because a reasonable factor-finder would not be compelled to draw a different conclusion, this Court should deny the petition for review.

Alternatively, even assuming that Sarmiento's testimony was credible, as the IJ did, the IJ properly concluded that the evidence of such vague and unfulfilled threats failed to establish that Sarmiento was either persecuted or had a well-founded fear of persecution due to his employment and position as a trade union treasurer.

Statement of the Case

Sarmiento entered the United States without inspection via Mexico on approximately April 20, 1988. (JA 629). On approximately March 3, 1992, he filed a request for asylum and, on March 31, 1992, had an asylum interview. (JA 629-633).

On approximately January 12, 1998, the former Immigration and Naturalization Service (the "INS" or the "government") issued a Notice to Appear initiating these proceedings. (JA 664).

Between approximately March 26, 1998, and December 15, 1999, an IJ conducted removal hearings. On December 15, 1999, Sarmiento and his wife testified during the removal hearing. (JA 100-150) (Rafael Sarmiento Test.); (JA 151-164) (Manuela Sarmiento Test.) On the same day, the IJ issued an oral decision denying

Sarmiento's application for asylum and withholding of removal. (JA 47-61).

On July 25, 2003, the BIA summarily affirmed the IJ's decision. (JA 1-2). The petitioner subsequently filed on August 18, 2003, a petition for review of the BIA decision in the United States Court of Appeals for the Second Circuit.

Statement of Facts

A. Sarmiento's Entry into the United States and Applications for Asylum and Withholding of Removal

Sarmiento is a native and citizen of Colombia. He entered the United States without inspection via Mexico on approximately April 20, 1988. (JA 629). On approximately March 3, 1992, he submitted an initial Request for Asylum. (JA 629-633). In that application, he requested asylum based on his belief that, if he returned to Colombia, he would be killed by a Colombian terrorist organization as a result of his refusal in October 1987 to assist the group. (JA 631, 633). Sarmiento was interviewed by an asylum officer on March 31, 1992. (JA 629).

The INS determined Sarmiento to be deportable from the United States and placed him in removal proceedings, serving him with a Notice to Appear. (Form I-862) (JA 664-665). The INS charged that Sarmiento was removable under § 212(a)(6)(A)(i) of the INA, for having entered the

United States without being admitted or paroled after inspection. (JA 664).

B. Sarmiento's Removal Proceedings

On January 12, 1998, the INS commenced removal proceedings against Sarmiento by filing with the immigration court a Notice to Appear charging that Sarmiento was removable as an alien who entered the United States without being admitted or paroled after inspection by an Immigration Officer. (JA 664).

On March 26, 1998, Sarmiento appeared with counsel before an IJ in New York City, conceded that he was removable as charged by the INS, and stated that he "was seeking relief in the form of asylum in the United States, and withholding of deportation under 243(h), and alternatively voluntary departure." (JA 66). At that hearing, Sarmiento stated that his children would proceed under his original 1992 application, as supplemented (JA 70), and that his wife's application should be consolidated with his application as well. (JA 73). On April 14, 1998, Manuela Sarmiento's application was consolidated with her husband's matter. (JA 77).

On August 2, 1999, a combined removal hearing was scheduled. (JA 79-84). It was postponed without testimony. (JA 84). On December 15, 1999, a second removal hearing was held. (JA 85-169). As a preliminary matter, Manuela Sarmiento withdrew her asylum application and elected to proceed based on her husband's application. (JA 90-91).

At the December 15, 1999, hearing, Sarmiento identified his 1992 application for asylum, confirmed that he reviewed and understood its contents, and stated that the application was true and correct. (JA 92). Similarly, Sarmiento confirmed that he understood the contents of an affidavit dated November 24, 1998, filed in support of his application and that the affidavit was true and correct. (JA 92). Having confirmed that Sarmiento had read and adopted the revised asylum application, the IJ accepted the asylum application and affidavit and certain other documentary materials offered in support of Sarmiento's application. (JA 92-99).

The INS objected to the admission of certain documents, however, including a marriage certificate, Sarmiento's children's birth certificates, an identification card from the Colombian Federation of National Coffee Workers ("FEDE-CAFÉ") , an employment contract dated October 1, 1985, an insurance agreement dated June 8, 1984, and a life insurance agreement dated December 17, 1978. (JA 94-97). The IJ marked those documents for identification and postponed a final ruling on their admissibility until after hearing testimony.

The hearing then continued, first with the testimony of Rafael Sarmiento and then with Manuela Sarmiento's testimony.

1. Documentary Submissions

Sarmiento submitted several documents to the IJ during the removal hearing.[4] The INS objected to the admission of some documents, as noted above, and the IJ withheld a final evidentiary ruling.

Sarmiento first submitted without objection a supplemental application seeking asylum and withholding of removal. In the original application, the defendant stated:

> In October of 1987, I was working in the National Federation of Coffee Pickers in Barranquilla, Colombia for which I was the treasurer. In those days a terrorist group called M-19 had infiltrated into the National Federation of Coffee Pickers. [This] terrorist group tried to presure (sic) me into collaborating with their terrorist activities and to recruit people for their purpose. I declined every time so they began threats on my life.
>
> First, they threatened me by phono (sic), then they sent me threat letters, and finaly (sic) they placed on (sic) explosive artifact (sic) in the sindicate (sic) office. They then gave me an ultimatun (sic). In February of 1988, I decided to leave the country to save my life.

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[4] The documents were written in Spanish. English translations were provided.

(JA 631).

Sarmiento supplemented his application with an affidavit dated November 24, 1998. (JA 625-628). In that affidavit, he stated that "although my prior application was essentially accurate, I now submit this affidavit to correct some information and to supplement the application and more fully outline my claim." (JA 625).

Sarmiento explained that he began working directly for Federacion Nacional De Cafeteros De Colombia ("FEDE-CAFÉ"), a coffee trade union in Colombia, in 1984 and that, in 1986, he was appointed treasurer of the Baranquilla branch of the trade union. (JA 626). Sarmiento stated that "right after" he became the trade union treasurer he started receiving telephone calls at his residence from men identifying themselves only as "M-19." (JA 626). Sarmiento stated that he "would have his wife answer the phone and always say that [he] wasn't home." (JA 626). He also stated in the affidavit that, "at the same time, I began getting calls from men whom I didn't know, who identified themselves as M-19 and who told me that, as local union leader, I must help them recruit union members to assist their movement, to help them financially and to fight and commit acts of violence with them in an effort to gain power for their group." (JA 626). According to Sarmiento, after he refused to provide that assistance, he was "threatened with violence, and [he] was told that if [he] did not assist them, [he] would be apprehended and very likely killed." (JA 626). He thus left Colombia. (JA 626).

Sarmiento also stated in the affidavit that, after he left, his wife received "threatening" telephone calls at her residence during which men identifying themselves only as "M-19" "continued to press [her] regarding [his] whereabouts." (JA 627). According to Sarmiento, his wife told the callers that he was no longer in Colombia. (JA 627). Sarmiento stated that his wife feared for her safety and decided to leave Colombia after "these phone calls continued for some time and increased in frequency." (JA 627).

In support of the application, Sarmiento also submitted without objection an Internal Revenue Service printout relating to the filing of his tax returns (JA 601-604), and a series of documents relating to human rights violations in Colombia. (JA 249-590). Sarmiento also submitted copies of passports and employment authorizations. (JA 615-624).

Sarmiento submitted documents relating to human rights conditions in Colombia. Those documents, which describe violent terrorist activities in certain sections of Colombia, mention "M-19" in passing. One document notes that "M-19" was an urban guerrilla movement that became a political party and took part in negotiations leading to the 1991 constitutional assembly in Colombia (JA 523), while a second document notes that M-19 disarmed and entered electoral politics in the 1980s (JA 533). Indeed, a Journal of Interamerica Studies and World Affairs article published in Summer 1997 does not include M-19 as one of the three main guerrilla movements in Colombia. (JA 564).

Sarmiento also sought to admit into evidence other documents at the removal hearing. The INS objected to the admission of (a) a marriage certificate, (b) Sarmiento's children's birth certificates, (c) an identification card from FEDE-CAFÉ (JA 599-600) (d) an employment contract dated October 1, 1985 (JA 597-598), (e) an Institute of Social Security document dated June 8, 1984 (JA 593-594), and (f) a life insurance agreement dated December 17, 1978 (JA 591-592). The IJ marked those documents for identification pending additional testimony.

a. The FEDE-CAFÉ Identification Card

The identification card contains a photograph, and notes that it was issued to Rafael A. Sarmiento Rodriguez. (JA 599-600). It identifies Sarmiento as a coffee roaster. The card bears an expiration date of December 31, 1987.

b. Employment Contract dated October 1, 1985

The contract, which is dated October 1, 1985, states that it is an employment contract for an indefinite term between Sarmiento and FEDE-CAFÉ and that Sarmiento is employed as a coffee roaster at a monthly salary of 3,849 pesos. (JA 595-598) It notes that Sarmiento has been employed since July 2, 1985, pursuant to an employment contract for a fixed term.

c. Institute of Social Security Notice of Entrance of Employee dated June 8, 1984

This document identifies Sarmiento as a coffee roaster and notes that the date that he began with the organization is June 5, 1984. (JA 593-594). It notes that his "renumeration" is "13,065.15/month."

d. Insurance Certificate dated December 17, 1978

This document identifies Sarmiento as an insured under the terms of a life insurance policy purchased by an organization identified as "Almacafe." (JA 591-592). Several sections of the insurance certificate, such as the policy number, effective date, and amount of insurance, are blank. The document is dated December 17, 1978.

2. Sarmiento's Testimony

At the December 15, 1999, hearing, Sarmiento testified that he was born in Barranquilla, Colombia in 1956 and that he entered the United States in 1988 at Tijuana, Mexico. (JA 100-101). According to Sarmiento, while residing in Colombia, he initially worked unloading coffee trucks. (JA 102). He testified that he "started to work" with FEDE-CAFÉ, which he described as a company that "obtains all the coffee that is in the whole country," in 1980 and that he "was promoted to work for them in 1984." (JA 102). Sarmiento also testified that he joined the labor union automatically when he started to work for FEDE-CAFÉ. (JA 103).

When asked to describe his employment, Sarmiento testified that he worked as a "machine operator" and was asked to become the treasurer in 1984, "exactly, I don't know." (JA 103). He described his responsibilities as "to handle the money, to take care of the money, to watch the money." (JA103).

In response to a question about his salary as a machine operator, he stated that "it was along time ago," but that he received "17,000 to 20,000 pesos, Colombian pesos." (JA 105). He also testified that he was not paid for acting as union treasurer. (JA 105).

Sarmiento testified that, after he became union treasurer, he started receiving telephone calls at home from "a group which identified themselves as M-19 . . . a guerrilla group." (JA 106). He further testified that "they told me they wanted me to help them . . . I refused to do that." (JA 106). Sarmiento stated that "my wife used to say that I was not at home." (JA 106).

In response to the IJ's questions as to when the first telephone call occurred, Sarmiento twice stated that he did not remember. When pressed an additional time by his own attorney, he stated that the telephone calls started "perhaps five or six months" after he became treasurer. (JA 106-107). The IJ questioned Sarmiento's inability to provide a time, stating that "you're claiming persecution . . . I would think some of these things would be clear in [your] mind." (JA 106). Sarmiento agreed, but simply stated that "it's been so many years." (JA 106).

Sarmiento testified that "the first time they called me and I told them no. . . . They told me that since I was a member, they wanted to talk to me to, to meet them, and they wanted me to help them to recruit people to join their movement." (JA 107-108). In response to his lawyer's question whether anything occurred after Sarmiento refused the caller's request, Sarmiento replied negatively except that "they kept calling, and I was getting afraid." (JA 108). Sarmiento estimated that he received "three to four" calls and that the callers continued to tell him "that they wanted to meet me . . . meet them, and help them. (JA 108-109).

In response to his lawyer's specific question about whether he received telephone calls from individuals identifying themselves as M-19 other than at home, Sarmiento stated that "the first time, they called me at work, and then at home." (JA 109). Sarmiento testified that, during that telephone call, the caller again asked to meet and for his help, and that he refused. (JA 109). Sarmiento then stated that he was told "that if I would not help them, they were going to kill me." (JA 110).

When asked to explain his belief that he would be killed if he did not assist M-19, Sarmiento stated that "in Colombia, when this group tells you they are going to kill you, they will kill you . . . . You can see the television, and that had been happening then." (JA 109). Further, in response to a question about whether Sarmiento believed the callers were "serious," he stated: "In Colombia, all the guerrillas, when they talk to you they are serious, and they do it." (JA 110).

Sarmiento also testified that he was uncertain about the length of time that passed between receiving the last telephone call and his leaving Colombia: "Well, the truth, about six months, I don't remember exactly." (JA 112). When questioned about waiting six months before deciding to leave Colombia, Sarmiento did not address the question. Rather, he stated that "when they told me that they were going to kill me, I was thinking about my children also. They were young, and my wife, so I said, well, I told her, I think I have to leave . . . . Well, they told me that they were going to kill me, so that's why I left the country. There was, there was quick decision." (JA 112).

Sarmiento further testified that he left his wife and children in the same house in which he had resided. (JA 113).

He testified that, after leaving Colombia, he learned from his wife that she received a "few" calls "asking for me" and that she told the callers that Sarmiento "was not there." (JA 113-114). According to Sarmiento, "that's what she told me. That was the only thing she told me. And she was also afraid." (JA 114). Sarmiento then testified that, although the guerrillas never took "reprisals" against his wife, she was afraid and "decided to leave the country." (JA 114).

Sarmiento testified that his wife did not work in Colombia and that he supported the family by remitting to Colombia money he earned in the United States. (JA 115). Sarmiento explained that he and his wife had no money to bring the children to the United States so they stayed with a relative. (JA 114).

In response to his lawyer's question concerning why he came to the United States, Sarmiento stated: "I came here because I was being persecuted in my country, and they were going to kill me." (JA 115). Again, in response to his lawyer's question about what Sarmiento believed would happen if he returned to Colombia, Sarmiento stated: "Well, I am afraid, because they could kill me. And over there they do not respect human rights. They don't respect anybody." (JA 117). In response to his lawyer's question about why Sarmiento believed that, "after all these years, these people would still be looking for you," Sarmiento responded that "they could take reprisal because I couldn't -- I didn't want to help them and I left the country." (JA 117). When asked whether he knew whether the "people are still around in Barranquilla," Sarmiento responded: "Well, that I'm aware of, I don't know. But through the television, the news, I know that they are still in Barranquilla." (JA 117). He further explained that he could not live elsewhere in Colombia because "they are all over the country." (JA 117).

Sarmiento also was asked questions about several documents that the IJ admitted for identification only.

As to his marriage certificate, Sarmiento initially stated that his wife sent it to him many years ago. Under cross-examination by the INS lawyer, and after having agreed that his wife arrived in the United States in March 1992 and that his marriage certificate was issued on November 2, 1993, Sarmiento stated that he was not sure whether his wife or a family member sent it. (JA 119-120). The IJ

sustained the INS lawyer's foundation objection to the admission of the document. (JA 120).

Similarly, Sarmiento was asked questions about his children's birth certificates. He initially stated that he "always had them" with him in the United States, but then, after having their issuance date pointed out to him -- a time after he arrived in the United States -- he admitted that a family member forwarded the documents after he requested asylum. (JA 120). The IJ again sustained the INS lawyer's foundation objection. (JA 122).

Sarmiento also presented a FEDE-CAFÉ identification card. He identified it as representing that he worked for FEDE-CAFÉ as a coffee roaster, explaining "[t]hat is an ID to work with the machines." (JA 124). Sarmiento testified that he asked someone in Colombia to send him the card during the asylum proceedings. (JA 124). In response to questions about the December 31, 1987, expiration date on the card, Sarmiento said that the company gave a new card annually and that he did not have a 1988 identification card because "they didn't find it, so they sent that one." (JA 126). In response to further questions about the expiration date of the identification card, he stated that he received another identification card after the 1987 card expired even though he testified that he stopped working in 1987. (JA 126). He testified: "I am sure that they gave me my ID card. But I left it there, I continued working. . . . Excuse me. The card expired in December at the end of the year. So, for the beginning of the month, they give you a new card. And it was in that year that I, then that I came here." (JA 126).

Over the INS lawyer's objection, the IJ admitted the identification card into evidence, noting that it had not been authenticated, however. (JA 128).

Sarmiento also testified about an employment contract dated October 1, 1985. Referring to FEDE-CAFÉ, Sarmiento explained "when you work there, when you start to work there, they prepare a document for five, six months, and they change it every time." (JA 128). He testified that his sister-in-law forwarded the contract to him during the asylum process, that he did not read before giving it to his lawyer, and that he could not remember when he executed the contract. (JA 128-129). He testified that FEDE-CAFÉ first gave him a contract in 1984 when he started to work there. (JA 129). He initially testified that he received 20,000 pesos annually as a "starting salary" and that he earned the same amount during his entire employment. (JA 129). Addressing the IJ, Sarmiento then testified that he "was telling you about the money when I came here. But you start with 15,000 pesos, you know, and then they give you an increase. Besides, I was a machine operator, and I earned a little bit more." (JA 130). He subsequently testified that he earned 8,000 "and something" pesos per month in 1985 and then again between approximately "8,000 and 9,000" per month. (JA 130). He finally testified that he earned the amount identified in the contract in 1985 on a monthly basis and that immediately before he left Colombia for the United States he was earning 20,000 pesos per month, explaining that he "worked all the time." (JA 131).

The IJ sustained the INS lawyer's objection to the admission of the document into evidence. (JA 132).

Sarmiento also testified about a document identified on the letterhead as from the Institute of Social Security. He identified the card as representing that he and his family had medical insurance when he was employed by FEDE-CAFÉ. (JA 133). He testified that his sister-in-law forwarded the document to him during the asylum process. (JA 134). When questioned about the portion of the document indicating "renumeration" of 13,065.15 pesos a month, Sarmiento testified that it represented "what is deducted from you. This is like if you are paid, you are contributing something to -- for that health insurance." (JA 136). Sarmiento's additional testimony concerning this document exhibited his confusion as to whether the "renumeration" represented a monthly salary or an amount deducted from his salary. (JA 136-137).

The IJ sustained the INS lawyer's objection to its admission. (JA 138).

Sarmiento next testified about a life insurance contract which he identified as having been given to him by FEDE-CAFÉ. (JA 138). When questioned about the date of December 17, 1978, Sarmiento testified that he "worked for them" on the date. (JA 141). He further testified that "since the '70s and I had been working for them already . . . I had worked with the coffee trucks." (JA 141).

When asked whether he was changing his testimony concerning his employment, Sarmiento stated: "I'm not changing that. But exactly -- because sometimes -- I don't remember the exact dates, I've been here for so long. Many years." (JA 141).

The IJ again sustained the Government's objection to the admission of the document into evidence. (JA 141).

On cross-examination, Sarmiento testified that the "guerrillas" never came to his house and never physically harmed either him or anyone in his family. (JA 144, 145). Sarmiento also testified that the callers identified themselves only as "M-19" and never by name and that he did not know whether the callers remained in Colombia. (JA 145-146). Sarmiento testified, however, that he was aware that the "movement" still existed in Colombia as a result of news reports. (JA 147).

3. Manuela Sarmiento's Testimony

Manuela Sarmiento testified that she had been married to Rafael Sarmiento for eighteen years and that she entered the United States in 1992. (JA 152, 153). She testified that she left Colombia "because I had received some calls, telephone calls . . . . They were asking for my husband . . . They identified themselves as M-19." (JA 153). According to Manuela Sarmiento, she told the callers that Rafael was not home and "they kept calling." (JA 153). She further explained that "they threatened" her and "said that they were looking for him. . . . Because they wanted [Rafael] to participate with them." (JA 154). When asked the basis of her knowledge of the callers' intentions, she responded that "they told me." (JA 154).

Manuela Sarmiento testified that Rafael Sarmiento began working for FEDE-CAFÉ in 1984. (JA 155). In response to a question about what Rafael Sarmiento did before 1984, Manuela Sarmiento testified that "he was

working the same thing, but he was not with the company" and then "it was the same company, but he didn't work . . . ." (JA 155). During her answer, her lawyer interrupted her and asked a different question. In response, she testified that she married Rafael in 1981 and that, at that time, he "was working related to coffee, something that has to do with coffee." (JA 155). She further testified that in 1984 Rafael "began work, and then after he started to work with them -- and then after he was promoted is when the problems started." (JA 155). She testified that Rafael became treasurer of the union in 1986 "more or less" and after he became treasurer "we had threats and problems." (JA 156).

She explained that they received "several calls, several days" at their residence and that each time "they asked for him, and I said he is not here." (JA 156). Manuela Sarmiento testified that she became "very nervous" as a result of the calls. (JA 157). According to Manuela Sarmiento, Rafael Sarmiento left Colombia "because their threat was that they were going to kill him if he would not collaborate with them." (JA 158).

According to Manuela Sarmiento, Rafael was not working at FEDE-CAFÉ when he left Colombia "because they were looking for him." (JA 159).

In response to several questions from counsel, Manuela Sarmiento testified that, after Rafael Sarmiento left Colombia, "they threatened us by saying that they were looking for him, that they want to find him." (JA 157). As a result of these calls, Manuela Sarmiento left Colombia in 1992, leaving behind her children with a

family member because she did not believe that M-19 would harm young children. (JA 158). The children entered the United States in 1995. (JA 159).

In response to a question about what she thought might happen if she and her family returned to Colombia, Manuael Sarmiento initially testified: "Well, I don't know what to say, what would happen to us." (JA 160). When pressed, she testified that she did not "know if they would bother us again, because they are all over." (JA 161).

On cross-examination, Manuela Sarmiento testified that, before Rafael Sarmiento left Colombia, he received "several calls." (JA 162). When asked the number, Manuela Sarmiento testified that he received "six, five." (JA 162). She further testified that she received two telephone calls from M-19 in 1992, the year she left Colombia (JA 163), and that she received additional telephone calls during the four-year period after Rafael Sarmiento left Colombia. (JA 163). She could not recall the date of the last telephone call she received. (JA 163).

C. The Immigration Judge's Decision

At the conclusion of the December 15, 1999, hearing, the IJ issued an oral decision denying Sarmiento's applications for asylum and withholding of removal and ordering him and his family removed to Colombia. After summarizing the Sarmientos' testimony, the IJ found that Rafael Sarmiento's testimony was not credible. (JA 54). The IJ further found that, even if the testimony was deemed credible, it did not establish eligibility for asylum or withholding of removal. (JA 56).

The IJ recognized that Sarmiento sought asylum and withholding of removal on the grounds that he faces persecution due to his trade union membership. (JA 54). The IJ noted inconsistencies, however, in Sarmiento's testimony concerning his employment and documents submitted in support of his application observed. First, the IJ that Sarmiento's testimony concerning his salary did not match any of the documents he submitted. (JA 55). For example, Sarmiento testified that he earned 20,000 pesos annually, but the October 1985 employment contract stated a wage of 3,000 pesos a month and the insurance card reflected what Sarmiento described as a deduction of 13,000 pesos for medical insurance. (JA 55). The IJ concluded that the "figures do not add up." (JA 55).

Second, the IJ noted that the insurance policy that Sarmiento sought to introduce stated that it was issued in 1978, but that Sarmiento testified that he began working for the company in 1980. (JA 55). Moreover, Manuela Sarmiento testified that Rafael began working for FEDE-CAFÉ in 1984. (JA 55) Although the IJ recognized that Manuela Sarmiento could have been confused about the year of first employment and the year that Rafael Sarmiento had became union treasurer, Rafael Sarmiento provided no clear explanation concerning how he could have been insured by FEDE-CAFÉ in 1978 when he did not start to work there until 1980. (JA 55).

The IJ thus concluded "there are discrepancies in the documents that he seeks to enter into the record to prove that he was this union treasurer and his own testimony." (JA 55). Later in her oral ruling, the IJ again returned to the documents, finding that

> the documents that respondents submitted do not corroborate his testimony that he was the treasurer and member of this union. As a matter of fact, they contradict him. The insurance policy that he submits is not even filled out, does not give a date when it was given, does not say how much was the insured for (sic), by says it was issued in 1978, two years before he testified he went to work there.
>
> He has not been able to corroborate his salary or his employment contract. He has one card identifying him and associating with his employment that expired in 1987.

(JA 59).

Third, the IJ found Sarmiento's testimony concerning when Sarmiento left his employment "confusing, and [] again an example of why I found him not to be credible." (JA 59). Pointing to Sarmiento's testimony concerning his FEDE-CAFÉ identification card bearing an expiration date of December 31, 1987, the IJ noted that Sarmiento's testimony concerning whether he worked at FEDE-CAFÉ in 1988 was contradictory. The IJ stated:

> I asked him specifically why did this card end in 1987, and he said that they give you a new card; and I asked him if they gave him and new card and he said, yes. Then he alternatively said that he was not working there in 1988 or that [he] was working there in 1988, and again, for those reasons I found his testimony, coupled with the fact that his

> documents do not corroborate what he told me, not to be credible.

(JA 59-60).

Fourth, the IJ found the witnesses' testimony concerning the content and number of threatening calls "vague." (JA 56). The IJ observed:

> [I]f the gravamen of the complaint is that these people were so afraid that they could not live in their own country, that they would come to another country leaving everything or whatever they had behind them, it would seem to me that they would be able to remember what happened to them, when it happened, what was said.

(JA 57).

The IJ concluded that neither witness "seem[ed] able to recall with specificity anything that allegedly happened to them." (JA 57). The IJ thus found that the claims were "simply too vague and unsubstantiated by reference to specific facts." (JA 57).

Notwithstanding the IJ's adverse credibility finding, the IJ addressed the merits of Sarmiento's asylum and withholding applications. To that end, she assumed that the witnesses' testimony was credible. Even so, the IJ concluded that Sarmiento had failed to meet his burden of establishing his eligibility for asylum and withholding of removal. (JA 58).

The IJ first addressed the asylum claim. She noted that neither Sarmiento nor his family were ever harmed and that no one ever appeared at his work or residence during his tenure as union treasurer. (JA 56). The IJ also noted that Sarmiento presented no testimony concerning whether receiving those calls affected his family's daily life, including their ability to go out in public, to go about performing various responsibilities, or to attend school. (JA 58).

The IJ also found that receiving "three or four" telephone calls as a result of Sarmiento's employment "does not reveal a level of mistreatment that can be characterized as past persecution." (JA 58). The IJ stated "even if he did receive these calls, I do not think receiving threatening calls, while it might be a frightening event, rises to the level of persecution envisioned by the statute." (JA 56).

The IJ also addressed the withholding of removal application. Addressing counsel's argument that the passage of time explained the witnesses' failure to provide more detailed testimony, the IJ stated:

> It did happen a long time ago, which is another reason which would lead me to believe that events that happened twelve years ago by unnamed person[s] who never gave their names may not result in future persecution.

(JA 57).

The IJ also noted that she reviewed the background materials submitted concerning general conditions in Colombia. She found, however, that Sarmiento did not demonstrate a nexus "between what is going on there and their situation in Colombia." (JA 58).

In conclusion, the IJ concluded that the record before her did not establish a well-founded fear of persecution if the Sarmientos were returned to Colombia or, for withholding purposes, a clear probability of persecution. She thus denied Sarmiento's applications for asylum and withholding of removal and granted his application for voluntary departure.

D. The Board of Immigration Appeals' Decision

On July 25, 2003, the BIA summarily affirmed the IJ's decision and adopted it as the "final agency determination" under 8 C.F.R. § 1003.1(e)(4)(2003). (JA 1-2). This petition for review followed.

SUMMARY OF ARGUMENT

First, substantial evidence supported the IJ's conclusion that Sarmiento failed to provide credible testimony in support of his claim for asylum and withholding of removal. The IJ identified multiple inconsistencies and contradictions between Sarmiento's testimony and the documents offered to support his applications. For example, the IJ noted that Sarmiento provided contradictory testimony concerning when he first began employment with FEDE-CAFÉ, his salary during

his tenure there, and when he ended his employment. Additionally, the IJ observed that both Rafael and Manuela Sarmiento's testimony concerning the number, timing, and content of the allegedly threatening telephone calls was vague and non-specific.

Second, substantial evidence supports the IJ's determination that, even assuming Sarmiento had testified credibly, he had failed to demonstrate either past persecution or a well-founded fear of future persecution. As the IJ noted, the mere receipt of threatening telephone calls absent any indication that the callers might act to carry out the threat does not rise to the level of persecution. Further, Sarmiento agreed that no one physically harmed, or attempted to physically harm, either him or his family members during the four years after he started receiving the allegedly threatening phone calls and before he left Colombia. In fact, Sarmiento presented no evidence that his daily activities changed in any manner after he received the telephone calls. Additionally, given the passage of twelve years between Sarmiento's leaving Colombia and the removal proceedings, the IJ properly concluded that little likelihood existed that the unidentified callers identifying themselves as M-19 would pose a threat to Sarmiento based on his prior tenure as a union treasurer. This conclusion was supported by information in the background materials presented at the removal hearing reflecting that M-19 had entered the political process in the late 1980s.

Finally, because the IJ properly found Sarmiento ineligible for asylum, *a fortiori*, Sarmiento was ineligible for withholding of removal.

ARGUMENT

I. A REASONABLE FACTFINDER WOULD NOT BE COMPELLED TO FIND THAT THE PETITIONER TESTIFIED CREDIBLY OR THAT HIS TESTIMONY DEMONSTRATED PAST PERSECUTION OR A WELL-FOUNDED FEAR OF FUTURE PERSECUTION

A. Relevant Facts

The relevant facts are set forth in the Statement of the Facts above.

B. Governing Law and Standard of Review

Two forms of relief are potentially available to aliens claiming that they will be persecuted if removed from this country: asylum and withholding of removal.[2] *See* 8 U.S.C. §§ 1158(a), 1231(b)(3) (2005); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995). Although these types of relief are "'closely related and appear to overlap,'" *Carranza-Hernandez v. INS*, 12 F.3d 4, 7 (2d Cir. 1993) (quoting *Carvajal-Munoz v. INS*, 743 F.2d 562, 564 (7th

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[2] "Removal" is the collective term for proceedings that previously were referred to, depending on whether the alien had effected an "entry" into the United States, as "deportation" or "exclusion" proceedings. Because withholding of removal is relief that is identical to the former relief known as withholding of deportation or return, *compare* 8 U.S.C. § 1253(h)(1) (1994) *with id.* § 1231(b)(3)(A) (2005), cases relating to the former relief remain applicable precedent.

Cir. 1984)), the standards for granting asylum and withholding of removal differ, *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987); *Osorio v. INS*, 18 F.3d 1017, 1021 (2d Cir. 1994).

1. Asylum

An asylum applicant must, as a threshold matter, establish that he is a "refugee" within the meaning of 8 U.S.C. § 1101(a)(42) (2005). *See* 8 U.S.C. § 1158(a) (2005); *Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 66 (2d Cir. 2002). A refugee is a person who is unable or unwilling to return to his native country because of past "persecution or a well-founded fear of persecution on account of" one of five enumerated grounds: "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (2005); *Liao*, 293 F.3d at 66.

Although there is no statutory definition of "persecution," courts have described it as "'punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.'" *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995) (quoting *De Souza v. INS*, 999 F.2d 1156, 1158 (7th Cir. 1993)); *see also Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (stating that persecution is an "extreme concept"). While the conduct complained of need not be life-threatening, it nonetheless "must rise above unpleasantness, harassment, and even basic suffering." *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000). Upon a demonstration of past persecution, a rebuttable presumption arises that the alien has a well-founded fear

of future persecution. *See Melgar de Torres v. Reno*, 191 F.3d 307, 315 (2d Cir. 1999); 8 C.F.R. § 208.13(b)(1)(i) (2005).

Where an applicant is unable to prove past persecution, the applicant nonetheless becomes eligible for asylum upon demonstrating a well-founded fear of future persecution. *See Zhang*, 55 F.3d at 737-38; 8 C.F.R. § 208.13(b)(2) (2005). A well-founded fear of persecution "consists of both a subjective and objective component." *Gomez v. INS*, 947 F.2d 660, 663 (2d Cir. 1991). Accordingly, the alien must actually fear persecution, and this fear must be reasonable. *See id.* at 663-64.

"An alien may satisfy the subjective prong by showing that events in the country to which he. . . . will be deported have personally or directly affected him." *Id.* at 663. With respect to the objective component, the applicant must prove that a reasonable person in his circumstances would fear persecution if returned to his native country. *See* 8 C.F.R. § 208.13(b)(2) (2005); *see also Zhang*, 55 F.3d at 752 (noting that when seeking reversal of a BIA factual determination, the petitioner must show "'that the evidence he presented was so compelling that no reasonable factfinder could fail'" to agree with the findings (quoting *INS v. Elias-Zacarias*, 502 U.S 478, 483-84 (1992)); *Melgar de Torres*, 191 F.3d at 311.

The asylum applicant bears the burden of demonstrating eligibility for asylum by establishing either that he was persecuted or that he "has a well-founded fear of future persecution on account of, *inter alia*, his political opinion." *Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003);

Osorio, 18 F.3d at 1027. *See* 8 C.F.R. § 208.13(a)-(b) (2005). The applicant's testimony and evidence must be credible, specific, and detailed in order to establish eligibility for asylum. *See* 8 C.F.R. § 208.13(a) (2005); *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999); *Melendez v. U.S. Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991) (stating that applicant must provide "credible, persuasive and . . . . specific facts" (internal quotation marks omitted)); *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA June 12, 1987), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647-48 (9th Cir. 1997) (applicant must provide testimony that is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account").

Because the applicant bears the burden of proof, he should provide supporting evidence when available, or explain its unavailability. *See Zhang v. INS*, 386 F.3d 66, 71 (2d Cir. 2004) ("[W]here the circumstances indicate that an applicant has, or with reasonable effort could gain, access to relevant corroborating evidence, his failure to produce such evidence in support of his claim is a factor that may be weighed in considering whether he has satisfied the burden of proof."); *see also Diallo v. INS*, 232 F.3d 279, 285-86 (2d Cir. 2000); *In re S-M-J-*, 21 I. & N. Dec. 722, 723-26 (BIA Jan. 31, 1997).

Finally, even if the alien establishes that he is a "refugee" within the meaning of the INA, the decision whether ultimately to grant asylum rests in the Attorney General's discretion. *See* 8 U.S.C. § 1158(b)(1) (2005); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004); *Zhang*, 55 F.3d at 738.

2. Withholding of Removal

Unlike the discretionary grant of asylum, withholding of removal is mandatory if the alien proves that his "life or freedom would be threatened in [his native] country because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (2005); *Zhang*, 55 F.3d at 738. To obtain such relief, the alien bears the burden of proving by a "clear probability," *i.e.*, that it is "more likely than not," that he would suffer persecution on return. *See* 8 C.F.R. § 208.16(b)(2)(ii) (2005); *INS v. Stevic*, 467 U.S. 407, 429-30 (1984); *Melgar de Torres*, 191 F.3d at 311. Because this standard is higher than that governing eligibility for asylum, an alien who has failed to establish a well-founded fear of persecution for asylum purposes is necessarily ineligible for withholding of removal. *See Zhang v. INS*, 386 F.3d 66, 71 (2d Cir. 2004); *Wu Biao Chen*, 344 F.3d at 275; *Zhang*, 55 F.3d at 738.

3. Standard of Review

This Court reviews the determination of whether an applicant for asylum or withholding of removal has established past persecution or a well-founded fear of persecution under the substantial evidence test. *Zhang v. INS*, 386 F.3d at 73; *Wu Biao Chen*, 344 F.3d at 275 (factual findings regarding asylum eligibility must be upheld if supported by "reasonable, substantive and probative evidence in the record when considered as a whole") (internal quotation marks omitted); *see Secaida-Rosales v. INS*, 331 F.3d 297, 306-07 (2d Cir. 2003); *Melgar de Torres*, 191 F.3d at 312-13 (factual findings

regarding both asylum eligibility and withholding of removal must be upheld if supported by substantial evidence). "Under this standard, a finding will stand if it is supported by 'reasonable, substantial, and probative' evidence in the record when considered as a whole." *Secaida-Rosales*, 331 F.3d at 307 (quoting *Diallo*, 232 F.3d at 287).

Where an appeal turns on the sufficiency of the factual findings underlying the IJ's determination[6] that an alien has failed to satisfy his burden of proof, Congress has directed that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B) (2004). *Zhang v. INS*, 386 F.3d at 73. This Court "will reverse the immigration court's ruling only if 'no reasonable fact-finder could have failed to find . . . past persecution or fear of future persecution." *Wu Biao Chen*, 344 F.3d at 275 (omission in original) (quoting *Diallo*, 232 F.3d at 287).

The scope of this Court's review under that test is "exceedingly narrow." *Zhang*, 386 F.3d at 74 ("Precisely because a reviewing court cannot glean from a hearing

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[6] Although judicial review ordinarily is confined to the BIA's order, *see, e.g.*, *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001), courts properly review an IJ's decision where, as here, the BIA adopts that decision. *See* 8 C.F.R. § 1003.1(a)(7) (2005); *Secaida-Rosales*, 331 F.3d at 305; *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994). Accordingly, this brief treats the IJ's decision as the relevant administrative decision.

record the insights necessary to duplicate the fact-finder's assessment of credibility what we 'begin' is not a *de novo* review of credibility but an 'exceedingly narrow inquiry' . . . to ensure that the IJ's conclusions were not reached arbitrarily or capriciously") (citations omitted); *Wu Biao Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992).

Indeed, the IJ's and BIA's eligibility determination "can be reversed only if the evidence presented by [the asylum applicant] was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). In other words, to reverse the BIA's decision, the Court "must find that the evidence not only *supports* th[e] conclusion [that the applicant is eligible for asylum], but *compels* it." *Id.* at 481 n.1

This Court gives "particular deference to the credibility determinations of the IJ." *Wu Biao Chen*, 344 F.3d at 275 (quoting *Montero v. INS*, 124 F.3d 381, 386 (2d Cir. 1997)); *see also Qiu v. Ashcroft*, 329 F.3d 140, 146 n.2 (2d Cir. 2003) (the Court "generally defer[s] to an IJ's factual findings regarding witness credibility"). This Court has

recognized that "the law must entrust some official with responsibility to hear an applicant's asylum claim, and the IJ has the unique advantage among all officials involved in the process of having heard directly from the applicant." *Zhang v. INS*, 386 F.3d at 73.

Because the IJ is in the "best position to discern, often at a glance, whether a question that may appear poorly worded on a printed page was, in fact, confusing or well understood by those who heard it," this Court's review of the fact-finder's determination is exceedingly narrow. *Zhang*, 386 F.3d at 74; *see also id.* ("'[A] witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression.'") (quoting *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946) (citation omitted); *Sarvia-Quintanilla v. United States INS*, 767 F.2d 1387, 1395 (9th Cir. 1985) (noting that IJ "alone is in a position to observe an alien's tone and demeanor . . . [and is] uniquely qualified to decide whether an alien's testimony has about it the ring of truth"); *Kokkinis v. District Dir. of INS*, 429 F.2d 938, 941-42 (2d Cir. 1970) (court "must accord great weight" to the IJ's credibility findings). The "exceedingly narrow" inquiry "is meant to ensure that credibility findings are based upon neither a misstatement of the facts in the record nor bald speculation or caprice." *Zhang*, 386 F.3d at 74.

An IJ may rely on an inconsistency concerning a single incident in an asylum applicant's account to find that applicant not credible, "provided the inconsistency affords 'substantial evidence' in support of the adverse credibility finding." *Majidi v. Gonzales*, 430 F.3d 77, 81 (2d Cir.

2005) (upholding adverse credibility finding based on discrepancies between applicant's written application and oral testimony; IJ is not required to solicit from applicant an explanation for inconsistencies in his evidence). Where an IJ's adverse credibility finding is based on specific examples in the record of inconsistent statements made by an asylum applicant about matters material to the asylum claim, "a reviewing court will . . . not be able to conclude that a reasonable adjudicator was compelled to *find* otherwise." *Lin v. U.S. Dep't. of Justice*, 413 F.3d 188, 191 (2d Cir. 2005) (emphasis in the original) (holding that petitioner's inability to remember basic personal information, such as whether she was married in the spring or fall, supported adverse credibility determination).

In reviewing credibility findings, courts "look to see if the IJ has provided 'specific, cogent' reasons for the adverse credibility finding and whether those reasons bear a 'legitimate nexus' to the finding." *Id.* (quoting *Secaida-Rosales*, 331 F.3d at 307). Credibility inferences must be upheld unless they are "irrational" or "hopelessly incredible." *See, e.g.*, *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002) ("we defer to the fact finder's determination of . . . the credibility of the witnesses, and to the fact finder's choice of competing inferences that can be drawn from the evidence") (internal marks omitted); *NLRB v. Colombia Univ.*, 541 F.2d 922, 928 (2d Cir. 1976) (credibility determination reviewed to determine if it is "irrational" or "hopelessly incredible").

C. Discussion

Substantial evidence supports the IJ's determination that Sarmiento failed to provide credible testimony in support of his application for asylum and withholding of removal and thus failed to establish eligibility for such relief. Sarmiento's account contained inconsistencies and contradictions concerning his employment and position as union treasurer that went to the heart of his claims. Further, when questioned about those contradictions or about his failure to recall specific events, Sarmiento failed to adequately explain his testimony, simply relying on the passage of time. Nor did he attempt to explain the inconsistencies between his testimony and the documentary evidence offered. Additionally, leaving aside their inability to identify the number or sequence of telephone calls, neither Rafael Sarmiento nor his wife were able to describe with any particularity the content of the allegedly threatening telephone calls. Accordingly, substantial evidence supports the IJ's decision, *see, e.g.*, *Qiu*, 329 F.3d at 152 n.6 ("incredibility arises from 'inconsistent statements, contradictory evidence, and inherently improbable testimony'" (quoting *Diallo*, 232 F.3d at 287-88)), and Sarmiento has not met his burden of showing that a reasonable fact-finder would be compelled to conclude he is entitled to relief.

For example, as the IJ noted, Sarmiento's testimony concerning his employment did not match any of the documents he submitted. Sarmiento testified that he started to work with FEDE-CAFÉ in 1980 and that he was "promoted to work for them" in 1984. (JA 102) He then testified that he was a "machine operator" and that in 1984

he was selected to become union treasurer. (JA 103). Yet, in response to questions concerning the life insurance agreement he submitted to support his employment at FEDE-CAFÉ, which identified his date of initial employment as 1978, he stated that he was "working for them since that time." (JA 141). Moreover, the employment contract dated October 1, 1985, states that Sarmiento had been "lending his services since July 2, 1985, with an employment contract for a fixed term." (JA 597). The health care insurance document contains an entirely different starting date of employment: June 5, 1984. (JA 594).

As the IJ also noted, Manuela Sarmiento's testimony contradicts her husband's testimony concerning his period of employment. She testified that Rafael Sarmiento started working for FEDE-CAFÉ in 1984 and that he become union treasurer in 1986 "more or less." (JA 154-155).

Likewise, in response to questions concerning when he last worked at FEDE-CAFÉ, Sarmiento's testimony again was inconsistent. He alternatively testified that he stopped working at FEDE-CAFÉ in 1987 and then in 1988. (JA 126-127). For example, Sarmiento testified that he left his employment at FEDE-CAFÉ in 1987 (JA 126), but that he received a new identification card after the expiration of the 1987 identification card, at the very least implying that he was employed in 1988 and left his job in that year. (JA 126-127).

Similarly, Sarmiento's testimony concerning his salary varied. For example, Sarmiento testified that he earned

between 17,000 and 20,000 pesos annually as a machine operator, a position to which he was promoted in 1984. (JA 105). But the October 1985 employment contract states a monthly wage of 3,849 pesos "basic plus benefits" (JA 597), while the health care insurance document dated June 8, 1984, reflected what Sarmiento described as a deduction of 13,000 pesos for medical insurance (JA 594). The IJ correctly concluded that the "figures do not add up." (JA 55).

Although Sarmiento suggests that a statement about the conflicting evidence regarding his salary does not provide a sufficient basis for an adverse credibility finding, he mistakenly attributes that statement to the IJ. *See* Pet. Br. at 17. In fact, Sarmiento's own lawyer also found that "something's not adding up" concerning Sarmiento's testimony about his salary. (JA 130).

Finally, as the IJ properly found, Sarmiento did not clearly, and consistently, articulate specific facts concerning the alleged threatening phone calls. Sarmiento alternatively testified that he "started receiving telephone calls at home" (JA 106), and that "the first time, they called me at work and then at home." (JA 109).

Sarmiento also testified that, after he told the callers that he would not assist them, that "nothing happened, but then, when I told them no. But then they kept calling." (JA 108). In response to another question from his lawyer about whether the callers said "anything else other than they would like you to help them," Sarmiento again answered that "they just told me that they wanted to meet me -- meet them, and to help them." (JA 108). But, in

response to yet another question, Sarmiento testified that, when he refused to assist the callers, he was told "that if I would not help them, they were going to kill me." (JA 110).

Sarmiento's testimony concerning the nature of the alleged threats directly contradicts his description of the threats contained in his 1992 asylum application. In that application, he claims that he received threatening phone calls, threatening letters, and that an explosive device was placed in the union office. (JA 633).

Taken together, rather than viewed in isolation as Sarmiento suggests the Court do, the IJ provided "specific, cogent" reasons for her adverse credibility findings.

Sarmiento labels the inconsistencies in his testimony as "minor." Yet, those inconsistencies go directly to the heart of his claim -- that he was employed at FEDE-CAFÉ and appointed union treasurer and, as a result of his appointment, received telephone calls threatening death if he did not assist the guerrilla group. The IJ's rejection of Sarmiento's attempts to use the passage of time to explain his vague and inconsistent testimony on those points is well-founded. For example, in *Zhang*, 386 F.3d at 77, this Court similarly rejected a petitioner's claim that inconsistencies concerning when he learned about wife's forced sterilization were "minor and isolated." The Court stated:

> The purported sterilization of his wife was, presumably, an event of major importance to Zhang, not only to his persecution claim but also to

> his marriage. A fact-finder might reasonably expect him to have had a clear recollection of when and how he learned such distressing information. Thus, the fact that Zhang repeatedly testified that his wife told him of her sterilization in February 1993, while he otherwise dated the procedure months later, in June 1993, rendered his account of key events incoherent, raising legitimate concerns about his veracity.

Id.

The same reasoning holds true here. Sarmiento's failure to coherently articulate specific facts relating to the timing, sequence, and content of the allegedly threatening telephone calls, the dates of his employment, and the salary he received during that employment raise legitimate concerns about his veracity.

Additionally, in suggesting an alternative reading of the record and offering the passage of time as an answer to the deficiencies in his testimony, Sarmiento misconstrues the standard of review applicable here. The substantial evidence standard requires Sarmiento to offer more than a plausible alternative theory to the IJ's adverse credibility findings. To the contrary, Sarmiento "must demonstrate that a reasonable fact-finder would be compelled to credit his testimony." *Chen*, 344 F.3d at 275-76 (citation omitted). As the Supreme Court has held, "the possibility of drawing two inconsistent conclusion from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 523 (1981)

(internal quotation marks omitted). *Accord Mar Oil, S.A. v. Morrissey*, 982 F.2d 830, 837-38 (2d Cir. 1993). It is not the role of the reviewing court to re-weigh the inconsistencies "to see if we would reach the same credibility conclusions as the IJ." *Zhang*, 386 F.3d at 77. Accordingly, the only relevant question here is whether substantial evidence exists to support the conclusion that the IJ in fact reached in face of Sarmiento's testimony and other documentary evidence. *See Elias*, 502 U.S. at 481 n.1. Thus, even if Sarmiento has offered a plausible interpretation of his testimony that could explain his conflicting statements, the record as a whole does not compel such a reading. *See id.*

Even assuming that Sarmiento was a credible witness, as the IJ alternatively did, substantial evidence supports the IJ's determination that Sarmiento failed to meet his burden of proof supporting asylum or withholding of removal.

First, the IJ properly concluded that threatening phone calls, though certainly frightening, do not rise to the level of persecution. Vague or unfulfilled threats generally do not constitute persecution. *See Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000) (mere unfulfilled threats without harm or suffering do not constitute past persecution); *Roman v. INS*, 233 F.3d 1027, 1034 (7th Cir. 2000) (surveillance, threats and harassment prior to overthrow of Romanian government did not amount to persecution); *Nelson v. INS*, 232 F.3d 258, 264 (1st Cir. 2000) ("harassment and annoyance," including three episodes of solitary confinement of less than 72 hours, each accompanied by physical abuse and regular harassment in the form of

periodic surveillance, threatening phone calls, occasional stops and searches, and visits to alien's workplace are not persecution); *Rucu-Roberti v. INS*, 177 F.3d 669 (8th Cir. 1999) (per curiam) (vague testimony regarding threats made by guerrillas in Guatemala was insufficient to show past persecution, even where the alien testified that those threats were accompanied by violence). In *Lim*, for example, the Ninth Circuit explained that "[t]hreats standing alone . . . constitute past persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual 'suffering or harm.'" 224 F.3d at 936 (quoting *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997)). Even threats of death do not automatically qualify as persecution. *See, e.g., Marquez v. INS*, 105 F.3d 374, 379-80 (7th Cir. 1997) (affirming BIA ruling that petitioners failed to prove past persecution despite testimony that army officer issued death threats at family's home and wife's office, but threats were never carried out).

The evidence here does not compel a finding that the Sarmientos suffered past persecution on account of Rafael Sarmiento's union position. As the IJ correctly noted, neither Sarmiento was ever physically mistreated and no one ever visited Sarmiento's office or home in connection with the threatening phone calls between 1984 and 1988, when Sarmiento left Colombia. (JA 144, 145).

At best, the telephone calls conveyed unfulfilled threats and certainly did not cause "significant actual suffering or harm." Indeed, Sarmiento presented no evidence that his or his family members' daily activities changed at all in response to the allegedly threatening phone calls. Further,

leaving aside the vagueness of Sarmiento's description of the contents of the calls, Sarmiento agreed that no one made any attempt to physically harm him or his family members even after he refused to cooperate. As such, the alleged threats do not constitute persecution. *See Lim*, 224 F.3d at 929; *Meghani v. INS*, 236 F.3d 843(7th Cir. 2001); *Roman*, 233 F.3d at 1027; *Nelson*, 232 F.3d at 258; *Rucu-Roberti*, 177 F.3d at 669

Second, the IJ also properly concluded that, given the vague nature of the threats, the passage of twelve years between the making of the threats and the removal proceeding, the absence of any attempt to harm Sarmiento or his family members during the four years he was union treasurer and refused to provide assistance to M-19, and the absence of any "nexus" between the information contained in the background material provided to the court and Sarmiento's situation, Sarmiento failed to establish a clear probability of persecution if he were to return to Colombia.

Contrary to Sarmiento's statement in his brief that the IJ did not consider the country-specific background materials submitted during the hearing, *see* Pet. Br. at 17, the IJ stated:

> Make no mistake, I have reviewed the background documents submitted and they are extensive. I am aware of the general conditions in Colombia, but I do not find either of these respondents has made a nexus between what is going on there and their situation in Colombia.

(JA 58).

The documentary evidence in this case supports that conclusion. Those documents extensively describe terrorist activities in certain sections of Colombia perpetrated by groups other than M-19, such as FARC and ELN and certain para-military rightist groups. They mention M-19 only in passing, however, principally in connection with the violent ending of its take-over of the Colombian Supreme Court building in 1985. Moreover, information contained in some documents directly contradicts Sarmiento's testimony -- based on his awareness of news reports -- that M-19 still operates as a terrorist group in Colombia. For example, one document notes that M-19 was an urban guerrilla movement that became a political party and took part in negotiations leading to the 1991 constitutional assembly in Colombia. (JA 523). Another document notes that M-19 disarmed and entered electoral politics in the 1980s. (JA 533). Finally, a Journal of Interamerica Studies and World Affairs article published in Summer 1997 does not include M-19 as one of the three main guerrilla movements in Colombia. (JA 564). [7]

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[7] The Government recognizes that the Court cannot consider information outside the certified administrative record. It is instructive, however, that a February 2005 United States Department of State Background Note for the Republic of Colombia states that Democratic Alliance of 19 April, also known as AD/M-19, the successor to M-19, was successfully incorporated into the political process during the late 1980s. See http://www.state.gov/r/pa/ei/bgn/35754.htm. *See also* (continued...)

Additionally, no legal requirement exists that, in making findings of fact, an IJ must specifically mention each item of evidence that a party deems significant. In *Chen v. Gonzales*, 434 F.3d 144, 163 (2d Cir. 2006), this Court held that an IJ "need not enumerate and evaluate on the record each piece of evidence, item by item . . . ." Such a requirement would be particularly cumbersome in a case such as this, where the parties have submitted a large amount of documentary evidence containing facts that support each party's argument. In such a case, the IJ may properly weigh the evidence as a whole and, without expressly discussing each individual document, explain why she finds one side or the other more persuasive. That is precisely what the IJ did in this case. *Cf. United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005) (noting that a statutory duty to "consider" matters relevant to sentencing does not require "robotic incantations" by district judges).

In sum, a reasonable factfinder would not be compelled to find that Sarmiento testified credibly or that his testimony demonstrated past persecution or a well-founded fear of future persecution.

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[7] (...continued)
MIPT Terrorism Knowledge Base, http://tkb.org/Group.jsp?groupID+26 (stating that M-19 essentially ceased to exist in 1990 after agreeing to disarm permanently and transforming itself into AD/M19); hhttp://news.nationalgeographic.com/news/2002/06/0605_020605_colombia-2.html (National Geographic News article noting that in 1990 Colombian government executed peace agreement with M19 guerrilla group).

CONCLUSION

For each of the foregoing reasons, the petition for review should be denied.

Dated: February 28, 2006

Respectfully submitted,

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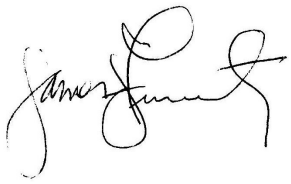

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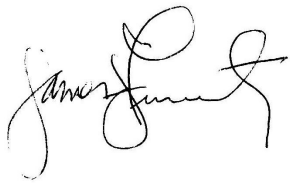
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,523 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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Addendum

8 U.S.C. § 1101(a)(42) (2005). Definitions.

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure,

refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

8 U.S.C. § 1158(a)(1), (b)(1)-(2) (2005). Asylum.

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

. . . .

(b) Conditions for granting asylum

(1) In general

The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that--

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

8 U.S.C. § 1231(b)(3)(A)-(B) (2005). Detention and removal of aliens ordered removed.

(b) Countries to which aliens may be removed

(1) Aliens arriving at the United States

Subject to paragraph (3)--

(A) In general

Except as provided by subparagraphs (B) and (C), an alien who arrives at the United States and with respect to whom proceedings under section 1229a of this title were initiated at the time of such alien's arrival shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States.

. . . .

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that--

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion; . . . .

8 U.S.C. § 1252(b)(4) (2005). Judicial review of orders of removal.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)--

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

8 C.F.R. § 208.13 (2005). Establishing asylum eligibility.

(a) Burden of proof. The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.

(b) Eligibility. The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

(1) Past persecution. An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or

she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

(i) Discretionary referral or denial. Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on

account of race, religion, nationality, membership in a particular social group, or political opinion; or

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) Burden of proof. In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.

(iii) Grant in the absence of well-founded fear of persecution. An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

(B) The applicant has established that there is a reasonable possibility that he or

she may suffer other serious harm upon removal to that country.

(2) Well-founded fear of persecution.

(i) An applicant has a well-founded fear of persecution if:

(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

(ii) An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

. . . .

8 C.F.R. § 1003.1 (e)(4) (2004) Affirmance without opinion.

(i) The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or

(B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

(ii) If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. 1003.1(e)(4)." An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial.

ANTI-VIRUS CERTIFICATION

Case Name: Sarmiento v. Gonzales

Docket Number: 03-40358-ag(L)

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 2/28/2006) and found to be VIRUS FREE.

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Record Press, Inc.

Dated: February 28, 2006