06-0513-ag

To Be Argued By:
VICTORIA S. SHIN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-0513-ag

BO YU ZHU, also known as BOYU ZHU,
also known as CHANG TA LEE,
Petitioner,

-vs-

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR ALBERTO R. GONZALES ATTORNEY GENERAL OF THE UNITED STATES

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STATEMENT OF JURISDICTION

Bo Yu Zhu petitions this Court for review of an order by the Board of Immigration Appeals ("BIA") denying his motions to reconsider and reopen. He timely filed a petition within thirty days of the BIA's January 10, 2006, decision, and this Court has appellate jurisdiction under 8 U.S.C. § 1252(b).

ISSUES PRESENTED FOR REVIEW

1. Whether the BIA appropriately denied Petitioner's motion to reconsider based on its conclusion that the Immigration Judge ("IJ") permissibly declined granting a second continuance to allow Petitioner to support his claims for asylum and withholding of removal under the Immigration and Nationality Act of 1952, as amended ("INA"), after those claims had been pretermitted due to Petitioner's failure to timely submit evidence by the deadline set by the IJ?

2. Whether the BIA exercised its broad discretion in denying reopening of proceedings with respect to his claim for relief under the Convention Against Torture ("CAT") because Petitioner's belated evidentiary proffers were issued from 1998-2000, well before removal proceedings commenced before the IJ?

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Preliminary Statement

Mr. Bo Yu Zhu ("Mr. Zhu," or "Petitioner"), a.k.a. Boyu Zhu, a.k.a. Chang Ta Lee, a native and citizen of the People's Republic of China, petitions this Court for review of a decision of the BIA denying both reconsideration of

its previous decision affirming the removal order issued by an IJ, and reopening of removal proceedings.

Statement of the Case

Mr. Zhu, a native and citizen of the People's Republic of China, entered the United States on June 24, 2003. JA 256, 688, 621. On July 1, 2003, the Immigration and Naturalization Service ("INS")[1] commenced removal proceedings against Mr. Zhu by filing with the immigration court a Notice to Appear ("NTA"). JA 688.

On July 10, 2003, Mr. Zhu appeared *pro se* before IJ Kenneth Hurewitz in Miami, Florida, for a removal hearing. JA 212-13. With the assistance of a Mandarin Chinese interpreter, the IJ informed Mr. Zhu that he had a right to legal representation at the hearing. JA 214. Mr. Zhu had, in fact, retained counsel the previous day, but counsel was unprepared to appear before the IJ at the hearing. JA 214. The IJ accordingly continued the case until July 24, 2003, to enable Mr. Zhu's counsel to prepare for and attend the removal hearing. JA 214. Since Mr.

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[1] The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in various sections of the U.S.C.), eliminated the INS and reassigned its functions to subdivisions of the newly created Department of Homeland Security. *See Spina v. Dep't of Homeland Security*, No. 04-3177-pr, 2006 WL 3431918, at *1 n.1 (2d Cir. Nov. 28, 2006). However, because the proceedings in this case were commenced by the INS, the brief will uniformly refer to the pertinent agency as the INS.

Zhu's counsel was located in New York, the IJ advised Mr. Zhu that a telephonic hearing could be arranged provided that his counsel filed the appropriate documents. JA 215.

On July 24, 2003, Mr. Zhu, with counsel attending via telephone, JA 217-18, admitted allegations 1, 2, 4, and 5 in the NTA, but denied allegation 3.[2] Mr. Zhu indicated

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[2] The allegations in the NTA are as follows:

(1) You are not a citizen or national of the United States.

(2) You are a native of People's Republic of China and a citizen of People's Republic of China.

(3) On or about 6/24/03, at Miami International Airport, you sought to procure (or you procured) a visa, other documentation, or admission into the United States or other benefit provided under the Immigration and Nationality Act, by fraud or by wilfully misrepresenting a material fact, to wit: You attempted to enter the United States as an impost[e]r utilizing a Republic of China (Taiwan) passport #200602567 and a U.S. B-1/B-2 nonimmigrant visa #52154000 bearing the name Chang Ta Lee.

(4) You are an immigrant not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Immigration and Nationality Act.

(5) You are an immigrant not in possession of a valid unexpired passport, or other suitable travel document,

(continued...)

that he intended to seek asylum, and was given until August 7, 2003, to file his application. JA 219.

The removal hearing resumed on August 7, 2003, with both Mr. Zhu's counsel and a Mandarin interpreter in attendance via telephone. JA 221-22. Mr. Zhu acknowledged that he reviewed his asylum application in his native language with assistance from his counsel's office, and that the information provided in the application was true. JA 223. Mr. Zhu also conceded he was removable as charged. JA 225, 621. In addition, Mr. Zhu indicated that, upon release from detention, he would likely relocate to New York. JA 225. The IJ informed Mr. Zhu that he could seek a change of venue to New York, JA 225, and Mr. Zhu made such a request on September 12, 2003, JA 618-19, 669. The motion was granted on or about September 23, 2003, JA 668.

On November 4, 2003, Mr. Zhu appeared before IJ Alan A. Vomacka in New York, NY, for a removal hearing, JA 227-28, at which he was represented by counsel, and assisted by an interpreter. JA 228. At that hearing, Mr. Zhu indicated that he was awaiting additional evidence. JA 231. The IJ agreed to continue the removal hearing once more until February 25, 2004, JA 232, but he concurrently alerted Mr. Zhu to his concerns regarding the evidence and substance of Mr. Zhu's asylum claim in advance of the next hearing:

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[2] (...continued)
or document of identity and nationality.

JA 688.

> . . . [a]t that time, you should be ready to explain everything about why you qualify for asylum. I expect to finish the hearing that day and make a decision . . . . and you need to work with your attorney to be sure all the documents you want to rely on are filed with the Court ahead of time. . . . Now, I'd like any documents about [Mr. Zhu] or his case 30 days ahead of time. . . . Any witness list, 30 days ahead of time, and also, I'm actually concerned. I had time to read this. I'm not really sure I understand what the nature of the basis is for [Mr. Zhu]. . . . [I]n what way is the underlying policy involved with political opinion? Anybody who disagrees with the government policy has a political opinion? . . . At the present time, I really don't understand why it amounts to an asylum claim. You certainly should put it in writing and frankly, it seems to me it could have been explained before. . . . [I]n any case, why don't you file – can you file the explanation within 30 days from today? It seems to me it's basically – it's not new facts that you're waiting for. It's just to explain in what way this constitutes a protected basis.

JA 232-36. Mr. Zhu's counsel indicated that he would submit the pertinent explanation.[3] JA 235-36.

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[3] In fact, Mr. Zhu's counsel repeatedly pressed the court for the opportunity to submit a brief and supporting evidence. *See* JA 233, 235, 236.

Yet, by January 2, 2004, Mr. Zhu had neither supplied a supplemental memorandum discussing the substance of his asylum claim, nor other documentary evidence. Consequently, the IJ issued an order stating that

> Respondent's counsel agreed to file an explanation of how Respondent's asylum claim relates to any factor protected by asylum law. The explanation was due by December 5, 2003. The court has received no such explanation. The court concludes that there is no protected basis for the asylum claim, and will treat the I-589 as an application for C.A.T. relief only.

JA 657.[4] When the removal hearing resumed on March 30, 2004,[5] JA 238, Mr. Zhu's counsel[6] protested the IJ's order pretermitting his application for asylum and his request for withholding under the INA, even though he conceded that he had failed to submit a supplemental memorandum because "this is a case that unfortunately fell

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[4] It appears that the order was mailed twice, on January 5, 2004, JA 658, and on January 13, 2004, JA 654, because the earlier attempt was unsuccessful, JA 655.

[5] The final hearing had been set for February 25, 2004, JA 663, but was subsequently reset for March 30, 2004, JA 662, apparently due to a crowded docket, JA 239.

[6] At the March 30, 2004, Mr. Zhu was represented by the same law office as before, but by a different attorney. JA 239.

through the cracks at my office."[7] JA 242. The IJ, however, stressed that both Mr. Zhu and his counsel had ample notice of the requested supplemental material, JA 247-52, and moved forward with the hearing on Mr. Zhu's eligibility for relief under the CAT, JA 242, 254.

At the end of the hearing, the IJ declared in an oral decision that Mr. Zhu was removable as an alien not in possession of a valid, unexpired immigrant visa or other substitute document, or, alternatively, as an alien who by fraud or misrepresentation of a material fact has sought to procure a visa, documentation, admission, or other benefit under the INA. JA 188-89, 209. Furthermore, the IJ ruled that Mr. Zhu was ineligible for relief from removal in the form of asylum, or withholding under INA, or the CAT. JA 189. The IJ explained that Mr. Zhu's claims for asylum and withholding were no longer before the court due to his failure to submit an explanation or materials setting forth the protected basis upon which Mr. Zhu feared persecution. JA 189-94, 209. In any event, the IJ stated that, based on the evidence Mr. Zhu had submitted, his asylum and withholding claims lacked merit. JA 209.

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[7] Mr Zhu's counsel expressed concern that, having "dropped the ball on this, . . . Mr. Zhu has certainly been prejudiced by [] our failure to abide by our obligations to him and the Court in explaining why we believe that this case does rise to the level of an asylum claim . . . ." JA 247. The IJ replied, "Well, no offense . . . . Respondents suffer the consequences of their law office procedures at any time, but your client was here the last time this case was on the docket, and he should [have] be[en] aware that there was a discussion about it." JA 247.

And as an ancillary matter, with respect to those claims, the IJ was troubled by Mr. Zhu's perceived lack of credibility in both the substance and manner of his responses during his testimony. JA 202-09.

Finally, the IJ denied Mr. Zhu's request for protection under the CAT, JA 209, because Mr. Zhu had not established a well-founded fear that he would be tortured were he to return to China. JA 194-201.

On April 5, 2004, Mr. Zhu filed a notice of appeal with the BIA, JA 181, and submitted a brief on March 2, 2005, JA 145.

On September 6, 2005, the BIA affirmed the IJ's decision. JA 142-43.

On September 30, 2005, Mr. Zhu filed with the BIA a motion to reconsider its September 6, 2005, decision, as well as a motion to reopen. JA 6-7. The BIA denied the motion on January 10, 2006. JA 2-3.

Mr. Zhu filed a timely petition for review from denial of his motion to reopen and reconsider with this Court on February 3, 2006. JA 1-2.

STATEMENT OF FACTS

A. Petitioner's Illegal Entry into the United States

Mr. Zhu is a native and citizen of the People's Republic of China, JA 256, 602, who entered the United States on or about June 24, 2003, at Miami International Airport ("Miami International"). JA 256. He departed from China using his own passport, but then exchanged for a Taiwanese passport supplied by a "snakehead" when he reached Hong Kong. JA 256-57, 327-28. The snakehead also provided Mr. Zhu an airline ticket and boarding pass. JA 328. Mr. Zhu's family in China had paid the snakehead approximately $60,000 to facilitate Mr. Zhu's travel to the United States. JA 258.

Upon his arrival at Miami International on June 24, 2003, Mr. Zhu attempted to enter the United States with a fraudulent passport and visa, bearing the name Chang Ta Lee, and without any other valid entry document. JA 621, 688. On the same day, immigration officials detained him at Miami International and conducted a credible fear interview. JA 623.

B. Petitioner's Removal Proceedings

The INS initiated removal proceedings against Mr. Zhu on July 1, 2003, by filing with the immigration court an NTA. JA 688.

1. Documents Entered Into Evidence

At the removal hearings, the following documentary exhibits were submitted:

Exhibit 1: Notice to Appear. JA 688.

Exhibit 2: Record of Sworn Statement in Proceedings Under INA § 235(b)(1) of the Act (Credible Fear Hearing). JA 636-46.

Exhibit 3: Record of Determination/Credible Fear Worksheet. JA 623-25.

Exhibit 4: Motion for Change of Venue. JA 618-19.

Exhibit 5: Application for Asylum and for Withholding of Removal (I-589). JA 602-14.

Exhibit 6: Letter from Immigration Court to State Department. JA 601.

Exhibit 7: Notice of Filing of the Department of Homeland Security. JA 489-600.

Exhibit 8: Notice of Proposed Evidence. JA 423-88.

Exhibit 9: Notice of Proposed Evidence. JA 344-422.

2. Mr. Zhu's Testimony

At the hearing on March 30, 2004, Mr. Zhu testified that he was born on February 16, 1983, in China. JA 256. He was a student at Fujian Province Fuzhou Lanqi Middle School ("Lanqi Middle School"), JA 263, until his last day of attendance on May 6, 2002, JA 262. He was forbidden from returning to school thereafter because, according to Mr. Zhu, he was falsely accused by the school of illicitly living with his girlfriend.[8] JA 262.

Mr. Zhu stated that he and his then-girlfriend, Lin, Li Ping, started dating in October 2000, JA 263, and that their relationship eventually intensified to where they usually went home together, JA 267. By around February 2002, Mr. Zhu and his girlfriend noticed schoolmates following them. JA 267. In addition, a friend of Mr. Zhu informed him that people were talking about the couple, and that an instructor at the school had been paying special attention

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[8] The translated letter of dismissal reads:

Senior High School Grade Three Class Two Zhu, Bo-Yu

> Upon investigation, your female classmate Lin, Li-Ping and you fell in love in the schooling period, and then cohabited illegally, it caused very serious influence in school, and had already violated the specific request of the school's []Middle School Student Daily Conduct Standard[] regulations of the sixth clause the first article, upon school leader's investigation, had made the decision to expel you from school.

JA 453-54.

to them because Mr. Zhu was seeing Lin, Li Ping, daily. JA 267. The school's principal called Mr. Zhu to his office in April 2002, and indicated that he had been informed about Mr. Zhu's relationship with Lin, Li Ping, and that they had been living together illegally. JA 267. As Mr. Zhu understood it, "[i]t was illegal if you live with someone before you get married." JA 267-68.

The school authorities initially suspended Mr. Zhu and Lin, Li Ping, in April 2002. JA 268. The next month, however, they were told to return to class for an announcement. JA 270. According to Mr. Zhu, on the day they returned to school

> . . . my teacher and principal came to my class, and asked Lin, Li Ping and I, stand up and go to the podium and face other classmates who were sitting down in their seats, and they announced formally that because we were dating and illegally living together, and in order to recover the school reputation and in order to educate other schoolmates, the school authority decided to expel both of us.

JA 269. Following his expulsion, Mr. Zhu claimed that he was unable to transfer to another school due to his dismissal from Langqi Middle School. JA 270. Mr. Zhu testified that he was depressed because his education was limited, and his job opportunities thereby compromised, and because his friends regarded him with disfavor on account of his conduct. JA 272. His relatives therefore

suggested that he depart for America to secure a better future. JA 272.

Mr. Zhu insisted that were he to return to China, " . . . I will be detained, I will be tortured, I will be fined, and I don't see opportunity to continue my education. . . . [M]any people who have been deport[ed] back to China [] have been detained by government, brainwashed by government, and also been fined by government." JA 273.

On cross-examination, Mr. Zhu testified that he was never physically harmed by any government official in China. JA 277. Additionally, the IJ queried Mr. Zhu, and the colloquy proceeded, in part, as follows:

> Q: Was there any danger to you at the time you left China?
>
> A: I'm not quite sure. Are you asking me leaving China itself dangerous to me or –
>
> Q: No, sir. . . . Were you in any danger before you decided to leave China?
>
> A: I was not quite satisfied or happy about what the school did to me. I thought that was quite unfair to me.
>
> Q: So if I understand your answer, you were in danger of fe[e]ling unhappy, is that what you're telling me?

A: Correct.

Q: Were you in other danger before you decided to leave China?

A: The other thing I would say because this event actually, I was traumatized, and there's a big scar deep inside of me.

Q: So you were in danger of being traumatized?

A: Correct.

Q: That danger had already occurred, right?

A: Correct.
. . . . .

Q: When did you reach the conclusion that you were expelled from school as part of an effort by the government to enforce the birth control policy?

A: Because China's population is so big, so China introduces such a policy, and from this policy expanded to many field and many aspects of life and the end result is you are faced some consequences because of this.
. . . .

Q: So by the time you decided to come to the United States, [] I suppose you felt clear in your mind that the birth control policy was a reason why

you were expelled from school. It was the underlying basis for that action.

A: At that time, I had such concern.
. . . .

Q: Well, why didn't you include any references to it in your application for asylum?

A: Because at the time, I was not quite positive that it's indeed caused by it.

Q: So when did you decide, become positive that your problems were because of the birth control policy?

A: That was after I had a communication with my parents, and my parents inquired about this, and I was sure afterward.
. . . .

Q: . . . [C]an you tell me when your parents explained this to you? Was it last week? You told us it was after you filed you asylum application.

A: After I came to America. . . .

JA 299-307.

C. The IJ's Decision

At the conclusion of the removal hearing, the IJ issued an oral decision. JA 188-210. He preliminarily noted that Mr. Zhu had admitted the allegations in the NTA and conceded he is subject to removal as charged therein. JA 189. The IJ then addressed Mr. Zhu's requests for relief from removal in the forms of asylum and withholding of removal under the INA, 8 U.S.C. §§ 1158 and 1231, respectively, and for protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). JA 189.

The IJ ruled that, as declared in the January 2, 2004, order, Mr. Zhu had abandoned his asylum and withholding requests. JA 189-94. The IJ recounted that at the previous (November 4, 2003) hearing he had informed Mr. Zhu that the asylum and withholding application he had submitted lacked the facts and legal theory sufficient to articulate a protected basis on which his request for relief rested. JA 189. The IJ noted that despite this substantive shortcoming, he afforded Mr. Zhu an opportunity to salvage his asylum and withholding claims with supplemental materials to be filed within thirty days, by early December 2003. *Id.* However, Mr. Zhu submitted no additional material, JA 190, and after another month had passed, the IJ issued an order dated January 2, 2004, declaring that Mr. Zhu had effectively abandoned his claims for asylum and withholding of removal, *id.* Yet, noted the IJ, even after the order was issued, Mr. Zhu made no attempt to contest the IJ's order or to submit additional materials in advance of the final hearing to

explain to the court why his application was sufficient to present a protected basis warranting relief in the way of asylum or withholding of removal. JA 190.

The IJ was unpersuaded that Mr. Zhu's counsel alone bore responsibility for presenting the court with information relevant to Mr. Zhu's requests for relief. As the IJ explained,

> [a]s far as the Court is concerned, the respondent is responsible for the conduct of the case. . . . I do not believe that the respondent was completely in the dark about the fact that he was supposed to give a further explanation concerning his claim, and as far as the Court is concerned, it is difficult to understand how the case could have reached the Court today with only a last-minute, as I understood it, this morning, realization that there was a problem in the case of the type I have been discussing.

JA 191. Rather than assigning blame, the IJ emphasized that "the respondent and attorney are working together . . . and if one does not do what he is supposed to do, the other person has some responsibility to notice and arrange to fix that problem." JA 192. The IJ went further, explaining that

> [b]oth forms of relief require that the claim be based upon some protected factor mentioned in the definition of refugee in the Immigration Act, and

> this, as far as I am concerned, is a day too late for this issue to be raised.
>
> The Court would note in this regard that the Court is not trying to be capricious about its docket. It is two minutes after 6:00. There were two individual hearings scheduled this afternoon. There was another one scheduled this morning. There were about 12 Master Calendar cases at 10:30. The docket at this Court and I believe most Immigration Courts is extremely busy at this time, and the Court has detained respondents who are in custody at Government expense and their own inconvenience waiting for their hearings. The Court has many expedited asylum claims which have a time limit imposed by Congress. The Court is required to complete those cases within 180 days after the application is filed. As far as this Court is concerned, I simply do not have the leeway to reset this case and consider very late legal arguments explaining matters that could have been explained before[.]

JA 192-93. In particular, the IJ pointed out that Mr. Zhu's argument at the final hearing that there was a nexus between his expulsion from school and China's birth control policy was not included in Mr. Zhu's formal pleadings, JA 194; *see* JA 604-14, even though Mr. Zhu had entertained the notion at his credible fear interview in Miami. JA 193-94 (citing Credible Fear Interview Notes at 2 (Exhibit 3), JA 629). In fact, stressed the IJ, it was not until March 30, 2004, at the final removal hearing, that

Mr. Zhu suggested for the first time before the court that his asylum claim stemmed from China's birth control policy. JA 194. Consequently, the IJ found the arguments untimely and considered the merits of Mr. Zhu's request for relief under the CAT only, since it did not hinge on demonstrating a fear of harm on account of a protected basis.[9] *Id.*

The IJ determined that there was insufficient evidence to support finding that, as required for relief under the

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[9] This Court recently explained that

> Withholding of removal under the INA, 8 U.S.C. § 1231(b)(3), is a mandatory form of relief that hinges upon a petitioner demonstrating a well-founded fear of future persecution on a ground protected by the INA, *i.e.*, that it is more likely than not that his "life or freedom would be threatened in [that] country . . . on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 C.F.R. § 208.16(b). Under this standard, an applicant must prove that [i] he has a genuine fear of persecution and [ii] a reasonable person in a like position would share that fear. *See Chun Gao v. Gonzales*, 424 F.3d 122, 128 (2d Cir. 2005). When the withholding of removal analysis overlaps factually with the asylum analysis (which entails a lesser burden of proof), an alien who fails to establish his entitlement to asylum necessarily fails to establish his entitlement to withholding of removal. *Xin-Chang v. Slattery*, 55 F.3d 732, 738 (2d Cir. 1995).

Hoxhallari v. Gonzales, 468 F.3d 179, 184 (2d Cir. 2006) (per curiam).

CAT, it was probable that Mr. Zhu would be tortured if he were removed to China.[10] JA 195. The IJ, for example, noted that Mr. Zhu did not testify that he was ever physically harmed as a result of the events that had occurred at his school in China, JA 196, "nor is there any reason to think that he would be in the future, in particular because the respondent remained living in the same place in China with his parents for most of a year before he left the country[,]" *id*. Such a paucity of evidence, noted the IJ, would fall short of establishing even a well-founded fear of torture, let alone its probability. *Id.*

The IJ was not persuaded by Mr. Zhu's assertion that he feared repatriation to China because he departed for the United States with a fraudulent Taiwanese passport. JA 197. Although Mr. Zhu claimed that he would be detained, tortured, fined, brainwashed, and derided for his unauthorized departure from China, JA 273-74, the IJ declined to find that such speculative concerns implicated a probability of torture upon repatriation to China, JA 197.

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[10] ". . . [A]n individual seeking withholding of removal on the basis of a claim under the CAT must establish that 'it is more likely than not that he or she would be tortured if removed to the proposed country of removal.'" *Zhong v. United States Dep't of Justice*, 461 F.3d 101, 112 (2d Cir. 2006) (quoting *Ramsameachire v. Ashcroft*, 357 F.3d 169, 184 (2d Cir. 2004) (quoting 8 C.F.R. § 208.16(c)(2))). "'Torture' is defined, for purposes of a CAT withholding claim, as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person' by persons acting in an official capacity." *Zhong*, 461 F.3d at 112 (citing 8 C.F.R. § 208.18(a)(1)).

Moreover, even assuming that a fine was likely, the IJ declined to equate the imposition of a fine with torture.[11] JA 198.

On account of Mr. Zhu's failure to present sufficient evidence to support a claim for relief under the CAT, and his effective abandonment of his claims for asylum and withholding under the INA, the IJ ordered Mr. Zhu removed from the United States. JA 209.

D. The BIA Decision

On April 5, 2004, Mr. Zhu filed a notice of appeal, JA 181, and on March 2, 2005, filed a brief with the BIA that focused on the merits of his claims for relief under the CAT, JA 146-50, and for asylum and withholding, JA 151-66.

On September 6, 2005, the BIA adopted and affirmed the IJ's decision. JA 142-43. The BIA explained that, while the evidence suggests that Mr. Zhu might be subject to monetary sanctions were he repatriated to China, " . . . a fine itself does not constitute [t]orture." JA 143. And while there was evidence in the record that people who are

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[11] The IJ also discussed at length his skepticism about Mr. Zhu's credibility. JA 202-09. Those credibility findings, however, are not recited herein because Mr. Zhu did not administratively exhaust his remedies by challenging those findings before the BIA, and this Court therefore lacks jurisdiction to address them. *See, e.g., Hoxhallari*, 468 F.3d at 188 (citing *Gill v. INS*, 420 F.3d 82, 96 (2d Cir. 2005).

found to be involved in the trafficking of immigrants are liable to face criminal prosecution in China, the BIA observed, "[Mr. Zhu] did not indicate he is a smuggler." *Id.* The BIA therefore concluded that the IJ correctly determined that Mr. Zhu had "failed to establish that it is more likely than not that he will be tortured if returned to China and therefore, he does not qualify for protection under the [CAT]." JA 143. The BIA accordingly dismissed Mr. Zhu's appeal. *Id.*

On September 30, 2005, Mr. Zhu moved for reconsideration of the BIA's dismissal of his appeal. JA 6-7. In that regard, his sole argument was that the BIA erred in not addressing *sua sponte* whether the IJ abused his discretion when he declined to grant another continuance to allow Mr. Zhu to submit evidence or argument in support of his requests for asylum and withholding of removal. JA 6-7. In addition, the BIA construed Mr. Zhu's submission of supplemental materials on repatriation in China as a motion to reopen the proceedings on his CAT claim.[12] JA 2, *see* 9-137. On

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[12] With respect to evidence Mr. Zhu referenced in his appeal to the BIA, the BIA noted in its September 2005 decision dismissing the appeal that

> In his brief on appeal, the respondent cites to background evidence and argues that evidence located at Tabs A-P supports his claim. *See* Respondent's Brief at 14-18. We observe that the evidence cited by the respondent was not included in his brief to the Board and is not contained in the record of proceedings. The

(continued...)

January 10, 2006, the BIA denied Mr. Zhu's motions to reconsider and to reopen. The BIA rejected Mr. Zhu's remonstrance regarding the IJ's decision to decline additional evidence on his asylum and withholding claims, and to otherwise deny a further continuance to allow Mr. Zhu to substantiate those claims. *Id.* The BIA cited 8 C.F.R. § 1003.31(c) (2005), and observed that ". . . the Immigration Judge has the authority to set a deadline for filing the asylum application and supporting documentation." JA 3. On this point, the BIA recounted that

> [o]n November 4, 2003, the [IJ] informed respondent, who was represented by counsel, that [] he needed to articulate some basis and present some evidence that the harm he suffered or the harm he fears is on account of a protected ground (Tr. at 17-18). The [IJ] gave the respondent over a month to comply with his order. The respondent did not comply and the [IJ] pretermitted his application for asylum and withholding of removal. . . .

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[12] (...continued)
evidence submitted by the respondent regards Chinese family planning policies and does not address the issue of repatriation. *See* Group Exhs. 8 and 9.

JA 143 n.1. The materials Mr. Zhu attached to his motions to reconsider/reopen address, *inter alia*, Chinese repatriation policies, and appear to be the evidence he had failed to submit to the BIA with his appeal.

JA 3.

The BIA also denied Mr. Zhu's request for reopening because the materials Mr. Zhu attached to his motion, regarding Chinese repatriation policies and Chinese prisons, dated from 1998-2000, and thereby predated the proceedings before the IJ. JA 3 (citing 8 C.F.R. § 1003.2). Moreover, the BIA noted that it had addressed in its previous decision Mr. Zhu's arguments on his fears surrounding repatriation. JA 3. The BIA thus found no basis to abandon its September 6, 2005, decision dismissing Mr. Zhu's appeal, or to reopen removal proceedings. *Id.*

SUMMARY OF ARGUMENT

This Court is presented with a petition seeking review of the BIA's denial of Mr. Zhu's motions to reconsider and to reopen. That is, Mr. Zhu did not petition this Court for review of the BIA's September 6, 2005, decision affirming the decision of the IJ. Consistent with this Court's position that on a petition to review either a motion to reconsider or to reopen, the Court is "precluded from passing on the merits of the underlying exclusion proceedings[,]" *Jin Ming Liu v. Gonzales*, 430 F.3d 109, 111 (2d Cir. 2006) (per curiam), review by this Court of Mr. Zhu's petition is limited to the issues contained in the January 2006 denial by the BIA of Mr. Zhu's motions to reconsider and to reopen.

1. The BIA correctly concluded that the IJ properly exercised his broad discretion in denying Mr. Zhu a

(second) continuance to submit evidence necessary for his asylum and withholding claims under the INA – to wit, that he had a well-founded fear of persecution based on his membership within a protected category, and was thereby entitled to asylum and withholding of removal. At the request of Mr. Zhu at the November 4, 2003, hearing, the IJ had previously granted a continuance to allow Mr. Zhu – who was represented by counsel, and assisted by a Mandarin interpreter at all times relevant to this petition for review – to submit evidence to salvage what the IJ had expressly indicated was an inadequate application for asylum and withholding of removal. The IJ afforded Mr. Zhu a firm deadline, until December 5, 2003, to identify the protected category to which he ostensibly belonged. Mr. Zhu, however, failed to provide the court with this critical information either in documentary or oral form. The IJ therefore appropriately issued an order on January 2, 2004, articulating what appeared obvious, that Mr. Zhu had abandoned or waived his asylum and withholding of removal claims. At no time after the order had issued, and before the hearing on March 30, 2004, did Mr. Zhu seek rescission of the order or otherwise submit supplemental evidence to the court. Consequently, the IJ soundly exercised his discretion when, at the final removal hearing on March 30, 2004, he reaffirmed the January 2004 order, and refused to grant Mr. Zhu another continuance to provide evidence to support his asylum and withholding claims.

2. The BIA properly denied Mr. Zhu's request for reopening based on additional evidence because the proffered evidence was issued in the years 1998-2000, and

were therefore available during the pendency of removal proceedings before the IJ. Mr. Zhu's allegation that the BIA engaged in impermissible fact-finding by weighing evidence that had not been considered by the IJ is without merit. Indeed, a review of the BIA denial of reconsideration makes plain that Mr. Zhu's charge is fictitious and without any support in the record.

ARGUMENT

I. THE BIA CORRECTLY DENIED MR. ZHU'S MOTION TO RECONSIDER BASED ON ITS REASONED DETERMINATION THAT THE IJ SOUNDLY AND PERMISSIBLY EXERCISED HIS DISCRETION IN DENYING A SECOND CONTINUANCE

A. Relevant Facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing Law and Standard of Review

This Court reviews the BIA's denial of a motion to reconsider for abuse of discretion. *Jin Ming Liu*, 439 F.3d at 111. Such a decision to grant or deny either a motion to reconsider is "purely discretionary." *Ajdin v. Bureau of Citizenship & Immigration Servs.*, 437 F.3d 261, 265 n.4 (2d Cir. 2006) (per curiam) (citing 8 C.F.R. § 1003.2(a) ("The decision to grant to deny a motion to . . . reconsider is within the discretion of the Board . . . ."); *de la Llana-*

Castellon v. INS, 16 F.3d 1093, 1099-1100 (10th Cir. 1994)). Nevertheless, "[a]n abuse of discretion may be found where the BIA's decision 'provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements; that is to say, where the Board has acted in an arbitrary or capricious manner.'" *Jin Ming Liu*, 439 F.3d at 111 (quoting *Kaur v. BIA*, 413 F.3d 232, 233-34 (2d Cir. 2005) (per curiam)).

"A motion for reconsideration 'is a request that the Board reexamine its decision in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case which was overlooked.'" *Liu*, 439 F.3d at 111 (quoting *In re Cerna*, 20 I. & N. Dec. 399, 403 n.2 (BIA 1991)) (internal quotation marks omitted). Accordingly, an alien seeking reconsideration by the BIA "'shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority.'" *Id.* (quoting 8 C.F.R. § 1003.2(b)(1)).

This Court reviews an IJ's denial of a continuance for abuse of discretion. *Sanusi v. Gonzales*, 445 F.3d 193, 199 (2d Cir. 2006) (per curiam); *see* 8 C.F.R. § 1240.6 (2006) ("After the commencement of the hearing, the immigration judge *may* grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service."); 8 C.F.R. § 1003.29 (2006) ("The Immigration Judge *may* grant a motion for continuance for good cause shown.") (emphasis added). The burden of demonstrating abuse of

discretion is a difficult one to satisfy, since, according to the Court,

> [j]ust as United States District Judges have broad discretion to schedule hearings and to grant or to deny continuances in matters before them, IJs have similarly broad discretion with respect to calendaring matters. The largely unfettered discretion of a district judge to deny or to grant a continuance is evidenced in our deferential review of challenges to such decisions.

Sanusi, 445 F.3d at 199 (citing *Morris v. Slappy*, 461 U.S. 1, 11 (1983)).

"An IJ would, however, abuse his discretion in denying a continuance if '(1) [his] decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding or (2) [his] decision – though not necessarily the product of a legal error or a clearly erroneous factual finding – cannot be located within the range of permissible decisions.'" *Morgan v. Gonzales*, 445 F.3d 549, 551-52 (2d Cir. 2006) (quoting *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir. 2001)) (alterations in original).

C. Discussion

The sole issue Mr. Zhu raised in his motion to the BIA for reconsideration of its September 2005 decision was whether the IJ abused his discretion in declining to grant a (second) continuance to allow Mr. Zhu to support his

claims for asylum and withholding of removal under the INA. JA 6-7; *see* Petitioner's Brief ("Pet.'s Br.") at 8 ("The IJ's refusal to grant Mr. Zhu a continuance in order to submit . . . evidence that was submitted on appeal violated due process."). Contrary to Mr. Zhu's claim, the BIA properly exercised its discretion when it denied Mr. Zhu's request for reconsideration of the BIA's September 2005 decision. As a prefatory matter, Mr. Zhu wholly neglected to raise the continuance issue in his appeal to the BIA of the IJ's decision. *See* JA 145-66. "Although the BIA has access to the entire record, it is not obligated to search it for possibly meritorious appellate issues." *United States v. Gonzalez-Roque*, 301 F.3d 39, 47 (2d Cir. 2002). Having so failed to notify the BIA of his discontent on the continuance issue, Mr. Zhu is not reasonably in a position to insist that reconsideration is proper. *See* 8 C.F.R. § 1003.2(b)(1) ("A motion to reconsider shall state the reasons for the motion by specifying the errors *of fact or law in the prior Board decision* . . . .") (emphasis added).

The BIA, nevertheless, addressed Mr. Zhu's arguments regarding the IJ's denial of a continuance, and provided a rational explanation, aligned with established law, for its finding that the IJ was within his "authority to set a deadline for filing the asylum application and supporting documentation." JA 3 (citing 8 C.F.R. § 1003.31(c)). Indeed, according to 8 C.F.R. § 1003.31(c):

> The Immigration Judge may set and extend time limits for the filing of applications and related documents and responses thereto, if any. If an application or document is not filed within the time

> set by the Immigration Judge, the opportunity to file that application or document *shall be deemed waived*.

(Emphasis added). Even assuming that the clear language of 8 C.F.R. § 1003.31(c), or, for that matter, the IJ's January 2004 order and Mr. Zhu's failure to contest the order, did not conclusively foreclose further consideration by the agency of Mr. Zhu's asylum and withholding claims, the BIA fully chronicled the events leading up to the IJ's January 2004 order pretermitting those claims:

> On November 4, 2003, the Immigration Judge informed respondent, who was represented by counsel, that [] he needed to articulate some basis and present some evidence that the harm he suffered or the harm he fears is on account of a protected ground (Tr. at 17-18). The Immigration Judge gave respondent over a month to comply with his order. The respondent did not comply and the Immigration Judge pretermitted his application for asylum and withholding of removal.

JA 3. It stands to reason that if, as the BIA noted, the IJ had pretermitted Mr. Zhu's application in January 2004, and Mr. Zhu lacked the presence of mind to seek its rescission, the IJ was under no obligation to accept eleventh-hour submissions on the dismissed asylum and withholding claims on March 30, 2004, much less to again continue the hearing to permit Mr. Zhu to supply what he had failed to submit despite ample admonishment and opportunity.

While Mr. Zhu attempts to enrobe his pleadings to this Court in the garb of the Due Process Clause of the Fifth Amendment, *see* Pet.'s Br. at 7-13, he fails to address the more fundamental issue of the IJ's well established prerogative over calendaring matters and setting deadlines. *See Morgan*, 445 F.3d at 551 ("IJs are accorded wide latitude in calendar management, and we will not micromanage their scheduling decisions any more than when we review such decisions by district judges.").

In any event, Mr. Zhu finds no support for his asserted right to a continuance in the Due Process Clause. To be sure, there is no dispute that "the Due Process Clause applies to all 'persons, within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Nevertheless, "[a]lthough an alien in deportation proceedings is entitled to due process of law, *see Reno v. Flores*, 507 U.S. 292, 306 (1993)," *Morgan*, 445 F.3d at 552, this Court has indicated that it is "mindful that those proceedings are meant 'to provide a streamlined determination of eligibility to remain in this country, nothing more[,]'" *id.* (quoting *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984)).

The BIA referenced clear evidence in the record that, despite unequivocal warning and reasonable opportunities, Mr. Zhu failed to present evidence that he is entitled to asylum and withholding of removal under the INA. Indeed, Mr. Zhu "points to nothing in the record suggesting that [he] was denied a full and fair opportunity to present [his] claims; nor has [he] established that the IJ

or BIA otherwise deprived [him] of fundamental fairness." *Xiao Ji Chen v. DOJ*, 434 F.3d 144, 155 (2d Cir. 2006); *superseded on rehearing*, 2006 WL 3690954, at *9-*10 (2d Cir. Dec. 7, 2006) (holding that characterization of BIA's decision as failure to "apply the law" does not convert fact-based claim into constitutional or legal question subject to review). The IJ explained at length that

> The Court would note in this regard that the Court is not trying to be capricious about its docket. It is two minutes after 6:00. There were two individual hearings scheduled this afternoon. There was another one scheduled this morning. There were about 12 Master Calendar cases at 10:30. The docket at this Court and I believe most Immigration Courts is extremely busy at this time, and the Court has detained respondents who are in custody at Government expense and their own inconvenience waiting for their hearings. The Court has many expedited asylum claims which have a time limit imposed by Congress. The Court is required to complete those cases within 180 days after the application is filed. As far as this Court is concerned, I simply do not have the leeway to reset this case and consider very late legal arguments explaining matters that could have been explained before.

JA 192-93.

The BIA correctly concluded that the IJ was well within his discretion to deny Mr. Zhu a second continuance for purposes of supporting his claims for asylum and withholding of removal, and therefore properly denied Mr. Zhu's motion for reconsideration.

II. THE BIA CORRECTLY DENIED MR. ZHU'S MOTION TO REOPEN BASED ON ITS DETERMINATION THAT MR. ZHU'S PROFFERED EVIDENCE WAS PREVIOUSLY AVAILABLE

A. Relevant Facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing Law and Standard of Review

This Court reviews a motion to reopen for abuse of discretion. *Shou Yung Guo v. Gonzales*, 463 F.3d 109, 113 (2d Cir. 2006). The Board "has broad discretion to grant or deny motions to reopen," *id.*, and this Court "will find an abuse of discretion 'only in those limited circumstances where the BIA's decision (1) provides no rational explanation, (2) inexplicably departs from established policies, (3) is devoid of any reasoning, or (4) contains only summary or conclusory statements[,]" *Maghradze v. Gonzales*, 462 F.3d 150, 152-53 (2d Cir. 2006) (quoting *Song Jin Wu v. INS*, 436 F.3d 157, 161 (2d Cir. 2006) (internal quotation marks omitted).

"Motions to reopen must be based on evidence that 'is material and was not available and could not have been discovered or presented at the previous hearing.'" *Shou Yung Guo*, 463 F.3d at 114 (citing 8 C.F.R. § 1003.2(c)(3)(ii)). "'[I]n reviewing the BIA's determination of whether previously unavailable evidence supported [a petitioner's] motion to reopen, [the Court] must inquire whether the evidence could have been presented at the hearing before the IJ.'" *Singh v. United States Dep't of Justice*, 461 F.3d 290, 297 (2d Cir. 2006) (quoting *Norani v. Gonzales*, 451 F.3d 292, 294 (2d Cir. 2006)) (first alteration in *Singh*); *see* 8 C.F.R. § 1003.2(c)(1) ("A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . . .").

C. Discussion

The BIA correctly denied Mr. Zhu's request for reopening based on documents that were issued from 1998-2000. *See Zhao v. United States Dep't of Justice*, 265 F.3d 83, 90 (2d Cir. 2001) (motion that relies on new evidence, as opposed to an error of law or fact, is treated as a motion to reopen and not motion to reconsider).[13]

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[13] This Court has distinguished the function of a motion to reconsider from that of a motion to reopen:

> "A motion to reconsider asserts that at the time of the Board's previous decision an error was made." *In re*

(continued...)

Mr. Zhu conclusorily argues that exclusion of certain belated documentary proffers violated Mr. Zhu's due process rights. *See, e.g.,* Pet.'s Br. at 9 ("It was a violation of due process for the IJ to unreasonably prevent Mr. Zhu from presenting evidence in support of his claim for relief, and to thereby prevent him from fully developing the record."). However, he does not outline in what regard the IJ's decision was unreasonable or impermissible.

The evidence that Mr. Zhu asserts was improperly excluded relates to repatriation in China, and therefore to his CAT claim. On that issue, Mr. Zhu testified at the March 30, 2004, hearing about his sundry fears associated with China's repatriation policies and practices. JA 322-27. Furthermore, the BIA explained in its denial of reopening that, "[w]e addressed the respondent's claim

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[13] (...continued)

> *Cerna*, 20 I. & N. Dec. at 402. When the Board reconsiders it takes itself back in time and looks at the case as though a decision had never been entered. Thus, if it grants the motion, the Board considers the case anew as it existed at the time of the original decision. *Id.* By contrast, a motion to reopen asks that the proceedings be reopened for new evidence and a new decision, usually after an evidentiary hearing. *Id.* at 403. Such motions must state what new facts would be proven at a hearing and be supported by affidavits and other evidentiary material.

Zhao, 265 F.3d at 90. In *Zhao*, the Court deemed the petitioner's motion as one to reopen, as it was accompanied by new evidence in the form of documentation because a "critical aspect of the applicant's claim [was not] made." *Id.*

that he would be subjected to torture for exiting China illegally in our September 6, 2005, decision." JA 3. Furthermore, noted the BIA, "[t]o the extent that the respondent who failed to comply with the Immigration Judge's deadline for submission of his evidence is now seeking to use this evidence to reopen his case, we note that this evidence was previously available."[14] *Id.* (citing 8 C.F.R. § 1003.2). The foregoing rationally provides the basis for the BIA's denial of reopening, and refutes Mr. Zhu's assertion that, as with the denial of a continuance, the preclusion of belated, previously available, evidence infringed upon his due process rights.

Mr. Zhu's citations to a decision by the Seventh Circuit, *Kerciku v. INS*, 314 F.3d 913 (7th Cir. 2003) (per curiam), and an unpublished decision from the Ninth Circuit, *Cardenas-Morfin v. Ashcroft*, 87 Fed. Appx. 629, 2004 WL 94034 (9th Cir. Jan. 20, 2004)[15] in support of his

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[14] The IJ notified Mr. Zhu at the November 3, 2003, hearing that, ". . . I'd like any documents about [Mr. Zhu] or his case 30 days ahead of time. Purely secondary can be filed ten days ahead of time." JA 233.

[15] The local rules of the Ninth Circuit expressly prohibits reliance by Mr. Zhu on unpublished Ninth Circuit decisions. *See* 9TH CIR. R. 36-3. According to the foregoing provision:

> (a) Not Precedent: Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, and collateral estoppel.

(continued...)

view that the IJ deprived him of due process by excluding his belated evidence, Pet.'s Br. 10-11, are inapposite. The IJ in *Kerciku*, unlike the IJ in this case,

> did not allow [petitioner] to make *any* presentation – virtually the only testimony that the judge received was his own questioning . . . . And . . . the judge made up his mind about the case and was subsequently unwilling to listen to any testimony from [petitioner] about the claims in his written application (e.g., being sent to a labor camp as a child, not being allowed to attend university, being

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[15] (...continued)

(b) Citation: Unpublished dispositions and order of this Court may not be cited to or by the courts of this circuit, except in the following circumstances.

(i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case, res judicata, or collateral estoppel.

(ii) They may be cited to this Court or any courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.

(iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.

9TH CIR. R. 36-3

> beaten severely and held for months at a time, receiving death threats before he left for Holland).

314 F.3d at 918. Also in contrast to Mr. Zhu's situation, the petitioners in *Kerciku* submitted their documents evidencing past persecution in Albania *before* the removal hearing. *Id.* at 916. Furthermore, the IJ presiding over Mr. Zhu's hearing spelled out the precise shortcomings in his applications for asylum and withholding, and afforded him the opportunity to rectify the deficiencies. This surely was not the case in *Kerciku*.

Similarly, in *Cardenas-Morfin*, the Ninth Circuit determined that the petitioner had been denied due process because, *inter alia*,

> [a]t the hearing, the IJ repeatedly prevented [petitioner] from testifying in support of his application. For example, the IJ required [petitioner] to choose whether his two-year old daughter, Violeta, would stay in the United States or return with him to Mexico. When [petitioner] could not make such a critical decision at a moment's notice, the IJ precluded him from testifying about the hardship Violeta would suffer if separated from her father. However, the effect of a child's separation from her parents is relevant to the statutory inquiry into the possibility of an "exceptional and extremely unusual hardship."

87 Fed. Appx. at 631. Mr. Zhu offers no evidence that the IJ deprived him of a fair opportunity to present his case,

and there certainly is no basis in the record to analogize the facts of Mr. Zhu's case to *Kerciku* or *Cardenas-Morfin*.

In the judgment of the IJ and BIA, Mr. Zhu failed to state a case for relief under the CAT. But even assuming *arguendo* that the BIA determined that Mr. Zhu's belated proffers established a prima facie case for relief, the BIA cited 8 C.F.R. § 1003.2, JA 3, which features the following provision: "[t]he Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief[,]" 8 C.F.R. § 1003.2(a). In his brief to this Court, Mr. Zhu fails to demonstrate how the BIA allegedly departed from established policy, or offered merely summary reasons for its denial of reopening. *See Maghradze*, 462 F.3d at 152-53. In any event, it is undisputed that Mr. Zhu's evidentiary submissions predated the commencement of removal hearings, and were thus previously available. Accordingly, this Court should affirm the BIA's decision to deny Mr. Zhu's motion to reopen.

As a final matter, Mr. Zhu claims, "[i]ndeed, the Board's decision suggests that the proferred evidence that the Board considered on review would not have changed the outcome of the IJ's decision." Pet.'s Br. 6. After diligent review of the BIA's decision, the Government was unable to find any language corresponding to Mr. Zhu's representation.

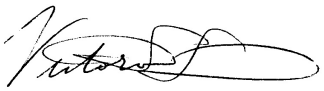
CONCLUSION

For the foregoing reasons, the judgment of the BIA should be affirmed, and instant petition accordingly should be dismissed..

Dated: December 27, 2006

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



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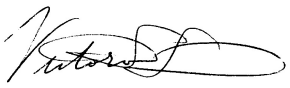
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

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 9,209 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. § 1158. Asylum (2006)

(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

(A) Eligibility

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

(B) Burden of proof

The burden of proof is on the applicant to establish that the applicant is a refugee, within the

meaning of section 1101(a)(42)(A) if this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

8 U.S.C. § 1231. Detention and removal of aliens ordered removed (2006)

(b)(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.

8 C.F.R. § 208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding or removal under the Convention Against Torture (2006)

(b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof. The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. . . .

(c) Eligibility for withholding of removal under the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

8 C.F.R. § 208.18 Implementation of the Convention Against Torture (2006)

(a)(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from or her a or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of committing, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 1003.2 Reopening or reconsideration before the Board of Immigration Appeals (2006)

(a) General. The Board may at any time reopen ot reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen, or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

(b) Motion to reconsider.

(1) A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. . . .

(c) Motion to reopen.

(1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. . . . A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. . . . .

. . . .

(3)(ii) To apply or reapply for asylum or withholding of deportation based on changed circumstancs arising in the country of nationality or the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing.

8 C.F.R. § 1003.29 Continuances (2006)

The Immigration Judge may grant a motion for continuance for good cause shown.

8 C.F.R. § 1003.31 Filing documents and applications (2006)

(c) The Immigration Judge may set and extend time limits for the filing of applications and related documents and responses thereto, if any. If an application or document is not filed within the time set by the Immigration Judge, the opportunity to file that application or document shall be deemed waived.

8 C.F.R. § 1240.6 Postponement and Adjournment of Hearing (2006)

After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.

ANTI-VIRUS CERTIFICATION

Case Name: Zhu v. Gonzales

Docket Number: 06-0513-ag

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 12/27/2006) and found to be VIRUS FREE.

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Dated: December 27, 2006