04-3185-ag

To Be Argued By:
H. GORDON HALL

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-3185-ag

HUI RU GAO,

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

This Court has jurisdiction to review the decision of the Board of Immigration Appeals under Section 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (2002).

On May 20, 2004, the Board of Immigration Appeals entered a final order affirming, without opinion, an Immigration Judge's denial of petitioner's applications for asylum and withholding of removal. On June 17, 2004, petitioner filed a timely petition for review with this Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a reasonable factfinder would be compelled to reverse the Immigration Judge's adverse credibility determination, where petitioner's testimony and documentary submissions contained several inconsistencies concerning material elements of petitioner's claim.

2. Whether a reasonable factfinder would be compelled to reverse the Immigration Judge's finding that petitioner did not establish that it is more likely than not that she would tortured upon return to China, where there was no substantial evidence in the record that she would be tortured?

3. Whether the Board of Immigration Appeals properly exercised its discretion in summarily affirming, without opinion, the Immigration Judge's decision.

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Preliminary Statement

Hui Ru Gao ("Gao"), a native and citizen of the People's Republic of China,[1] petitions this Court for

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[1] For ease of reference to the record in this case, (continued...)

review of a May 20, 2004, decision of the Board of Immigration Appeals ("BIA"). Joint Appendix (Certified Administrative Record) ("JA") 2. The BIA summarily affirmed the May 8, 2003, decision of an Immigration Judge ("IJ"), JA24, denying Gao's applications for asylum and withholding of removal under the Immigration and Nationality Act of 1952, as amended ("INA"), and rejecting her claim for protection under the Convention Against Torture ("CAT"),[2] and ordering her removed from the United States. JA1-2; JA 24.

The IJ expressly based her decision on her determination that petitioner was not a credible witness. Substantial evidence supports the IJ's conclusion. Gao claims she was subject to past persecution on account of her association with her father, a practitioner of Falun Gong ("FLG") and a book vendor who sold FLG materials. She claims she was taken into custody by police at the bookstore, which she was tending for her father, and interrogated in a harsh manner intermittently for two days as a result of this association and her failure or refusal to disclose the whereabouts of her father. She also claims that she was not provided with adequate food

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[1] (...continued)
however, the Government will refer to petitioner's home country as PRC throughout.

[2] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46 (annex, 39 U.N. GAOR Supp. No. 51 at 197), U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987; for United States Apr. 18, 1988).

during her incarceration, and that she escaped after two days in custody through an open window or door. She states that she then became a fugitive, hiding at the home of a person she described variously as a friend, and as someone she did not know, for some three months. She claims that police came to her family's home to search either every day, or every two or three days after she was taken into custody. In January 2002, after learning that her mother had died, she states that she left PRC with the financial assistance of the friend with whom she had been hiding. When Gao left PRC, she states that she passed through Hong Kong for ten days, France for five days and England for ten days and did not seek refuge. Based on these and other improbabilities, and inconsistencies in her testimony, and between her testimony and statements she made in her application and her credible fear interview, as well as a lack of other seemingly available corroborative evidence, the IJ properly found that petitioner's claim of past persecution lacked credibility.

Substantial evidence further supports the IJ's conclusion that Gao failed to establish it is more likely than not she will be tortured if returned to PRC. The IJ found petitioner's claim in this regard to lack credibility, and on this basis does not warrant withholding of removal under the Torture Convention. As a reasonable factfinder would not be compelled to conclude otherwise, this Court should deny Gao's petition for review.

Finally, the BIA acted properly and within its discretion in summarily affirming the IJ's decision in this case, without opinion, pursuant to 8 C.F.R. § 1003.1(a)(7) (2004). This Court has held that the BIA's summary

affirmance procedures do not violate the Due Process Clause.

Statement of the Case

On January 26, 2002, Gao entered the United States at Tampa, Florida. JA207. On February 4, 2002, 1998, Gao was interviewed by an INS asylum officer. JA242.

On February 4, 2002, Gao was issued a Notice to Appear for removal proceedings. JA240-241. Through counsel, she then moved for a change of venue from Miami, Florida to New York, New York, citing her residence with her cousin, Min Zhi Zheng, at 22 1/2 Catherine Street, New York, New York, and admitting the allegations in the Notice to Appear and removability. JA220-221. On April 17, 2002, July 3, 2002, and September 4, 2002, petitioner appeared for a merits hearing before an IJ in New York, which was continued each time. JA43-54. On September 3, 2002, petitioner filed an Application for Asylum and Withholding of Removal and an affidavit in support of the application. JA207. On February 4, 2003, a merits hearing was held before an IJ. JA55-102. The IJ rendered an oral decision denying Gao's applications for asylum and withholding of removal, and rejecting her request for protection under the Torture Convention. JA26-42.

On May 27, 2003, the petitioner filed a timely appeal of the IJ's decision to the BIA. On May 20, 2004, the BIA summarily affirmed the IJ's decision. JA1-2. On June 17, 2004, the petitioner filed a petition for review with this Court.

Statement of Facts

A. Petitioner's Entry into the United States and Application for Asylum and Withholding of Removal

Petitioner Gao is a native and citizen of PRC, who was admitted into the United States at Tampa, Florida, on January 26, 2002. JA207.

1. Petitioner's Application for Admission

Upon her arrival at Tampa, Florida on January 26, 2002, Gao was interviewed under oath by an Immigration Inspector. JA248. At that time, she told the Inspector that her purpose in entering the United States was to apply for asylum, and that she possessed $900 in U.S. currency. JA249. She stated that she had never been arrested before at any time or place. JA250. She stated that she left China on January 3, 2002, and reached the United States after traveling to Hong Kong, then to France for five days, then to London, then to Tampa. She stated that she first saw her passport on the January 25. JA250. She stated that her friend helped her obtain her travel documentation, and that it did not cost any money. JA 251. She told the Inspector that she left her home country because her father practices FLG and the authorities were after him, so she ran away. She said that if she were returned to her home country, she feared she would be put in jail because the government is after her father and her. She noted that she does not practice FLG. She further stated that she feared that she would be harmed if she were returned to her home country. JA252.

2. Petitioner's Asylum Interview

On February 4, 2002, Gao was interviewed by an asylum officer for a determination of whether she possessed a credible fear of persecution or torture if she were returned to PRC. JA242. In response to a question as to why she left her home country, Gao stated that the authorities wanted to arrest her father and all who were associated with his book store, where he sold FLG materials. She stated that she did not wish to be arrested, but the police took her from the book store and held her for several days in jail. She claimed that she saw an opportunity to escape while the guard was changing shifts, and she ran from an open door. JA254. In response to a question as to whether she fears harm from anyone in her home country, Gao stated that she would be punished for her escape and fined and jailed for selling FLG materials, as the authorities do not permit their sale. JA254. When asked if she had a sponsor in the United States, she stated that she was sponsored by her father's friend, Ming Zhi Zheng, but did not know this person's address. JA254.

3. Petitioner's Asylum Application

Gao filed her Application for Asylum and Withholding of Removal on September 3, 2002, more than seven months after her entry into the United States. JA207, 215. In her asylum application, Gao claimed she was persecuted in PRC and would be subject to future persecution if returned there on account of her association with her father, who was a practitioner of FLG. JA211, 216. More particularly, Gao claimed that in May 2000,

her father, a bookseller, began practicing FLG and selling FLG-related materials at his book shop. She stated that her father practiced secretly, as the practice of FLG was illegal, and that her father did not dare sell the materials publicly, but only to people to whom he had been introduced. JA216. She claimed that in October 2001, she was tending the shop for him in his absence when police entered the shop, searched it, and seized FLG materials. She claimed that she was taken to police headquarters, where she was beaten and not fed properly. JA216. She stated that, two days later, she escaped while the guards changed shifts. She claimed that she fled to the home of a friend and hid there. She claimed that her friend said he had thought of a way to send her to America, and that she would be able to obtain protection in the United States. JA216. She claimed that she remained in contact with her family during her stay with her friend, and that her brother reported that the police came to the family's house every two or three days to search. JA216. She claimed that her brother told her that her mother, who had been in poor health, died on January 2, 2002, and that she then left PRC on January 3 and arrived in the United States on January 26, 2002. JA216.

B. Petitioner's Removal Proceedings

On or about February 4, 2002, the INS commenced removal proceedings against Gao by filing with the immigration court a Notice to Appear. JA240-241.

Gao appeared before an IJ on April 17, 2002 with counsel, but her hearing was continued to allow her time to complete and file an asylum application. JA46. She

appeared with counsel again on July 3, 2002, but her hearing was continued, as her attorney had not completed the correct asylum application form. JA48. Gao appeared with counsel again on September 4, 2002, and her attorney advised the IJ that her asylum application had been filed. Both parties indicated they were ready to proceed, so an individual merits hearing was set for February 4, 2003. JA53.

At the merits hearing on February 4, 2002, documents provided by Gao through her counsel were marked into evidence, including Gao's Application for Asylum and Withholding of Removal[3] and affidavit in support. JA64.

1. Documentary Submissions

Gao submitted several documents in support of her claim during the merits hearing. As noted, she submitted her Application for Asylum and Withholding of Removal dated September 3, 2002, and a supporting affidavit dated April 17, 2002. JA64; JA207-217. In support of her asylum claim, Gao also submitted the following: her resident identification, her notarial birth certificate, her household registration, her father's business license, an attesting letter from her brother and her brother's resident identification. JA64; JA178-206. The INS submitted State Department Country Reports, JA65; JA110-176, and Credible Fear materials and a statement given by Gao at the airport after her arrival in Tampa. JA75; JA242-254.

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[3] An asylum application also serves as an application for relief under CAT. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8485 (Feb. 19, 1999).

2. Petitioner's Hearing

a. Background and Seizure in PRC

On direct examination, Gao testified that she left PRC on January 3, 2002, and arrived in the United States on January 26, 2002, having stayed in France for five days and in London for eight days. JA66-67. She indicated that she did not apply for asylum in France or England because she had no friends or relatives in either of them, and did not speak the languages spoken there. JA67.

Gao testified that she left PRC due to persecution by the Chinese government. JA67. She explained that her father operated a bookstore, and due to poor health, began practicing FLG. JA67-68. In May of 2000, he was approached by the leader of the local FLG station who asked him to sell FLG materials from the bookstore, and he agreed to do this. JA68. According to Gao, she began to help her father by tending the bookstore when he was not there two or three days a week beginning in May 2001. JA70-71.

In October 2001, JA70, while she was alone in the bookstore, four police officers came to the store and demanded to see the operator. When Gao told them she did not know where her father was, the police began to search the store, and they seized five or six FLG books. Gao testified that the police confronted her with the books "in a very mean manner," and told her it is illegal to sell them. They then forcibly took her to the police station and sealed the bookstore. JA69.

Gao testified that, at the police station, she was questioned "in a very mean manner," and that she was kept there for two days. JA71-72. She said the police told her she could be imprisoned or otherwise punished for selling FLG materials. When she told them she did not know where her father was, they hit her, and told her they would continue to beat her until she told them his whereabouts. She also claimed that the police did not provide her with adequate food. JA72.

b. Escape and Flight from PRC

Gao testified that after two days at the police station, around midnight, the person guarding her was to change shifts. At that time, she told the police that she needed to go to the bathroom. She stated that, after she went to the bathroom and while her guard was not paying attention to her, she escaped through a window and out to a large, busy street where she hailed a taxi. JA 72-73. She went directly to her "friend's" home, and arrived there at about one in the morning. JA73. There, she called her mother and told her that she had escaped from the police and that the police were looking for her father. She said that she would need to hide at her friend's home for a period, and that her friend told her that "he or she" might be able to help Gao go to the United States. JA73.

While she was in hiding, Gao stated, she remained in telephone contact with her mother until December 2001. After that, she called home and her brother answered the telephone. He told her that their mother had died on January 2, 2002. He also told her that the police came to the home every day looking for Gao and her father, and

searching for FLG materials. JA74-76. Gao testified that she remained in contact with her family after she arrived in the United States and that, as of the date of the hearing, her father remained in hiding with a friend. JA76. When asked whether the police had arrested her brother, Gao replied that they had not, because he had not assisted in selling the FLG materials. JA76-77.

Toward the conclusion of the direct examination of Gao, she was asked why the household register in the record did not reflect the death of her mother. She responded that she did not know how the register was compiled. JA77-78. She was also asked why she had responded in the negative when she was asked at her airport interview whether she had previously been arrested. She replied that her seizure in PRC was a detention, and not a formal arrest. JA78. She also testified that she had never practiced FLG. JA78. When asked what she thought would happen to her if she returned to PRC, she replied that she would be arrested by the Chinese government and sentenced because she escaped from detention at the police station, and her father is still in hiding so she would be implicated because of him. JA78-79.

c. Cross-examination

On cross-examination, Gao was asked why she had testified that she had remained in England for eight days, but that in her application for asylum she indicated the period was 15 days. She replied that she did not know. JA80. She testified that she did not know that FLG was illegal until her "arrest," yet she stated that those materials

were not displayed openly at her father's store. JA81. When Gao was asked why she wrote in her personal statement that she and her father did not dare to sell the materials publicly, she replied that she wrote this because her father had told her that the materials were a secret. JA 82.

With respect to her escape from custody, Gao testified that she escaped through a window from a first-floor bathroom. JA83. When she was confronted with her airport statement that she escaped through an open door, she testified that first she went through a window, then through the main door of the police station. JA85. The IJ asked her whether there was a grating or screen over the window, and she replied there was not. When the IJ suggested to Gao that it seemed unlikely that a window in a bathroom used by prisoners in a police station would not have bars or any impediment to escape, Gao stated that there was a "single metal placed horizontally on the window . . . . which left enough space for a person . . . my size to get through." JA87-88. When the IJ asked her, in sum, why she had not told about the metal bar when first asked, Gao replied, "Because the metal was placed over here, but there was nothing outside the window." JA88. The IJ then asked Gao about the details of her escape route:

> Q: All right. Now this window opened up into the lobby of the building and then you had to go through the lobby to get out the main door; is that how it was?
>
> A: No. Right outside of the window, well,

basically you, you - okay, there was a small road right outside of the window, but then you have to go through this small trail in order to get to the main entrance door in order to get out to the big street.

Q: I'm sorry. So right outside the window was a road and you have to go down the trail of the road to get back into the building and our the door?

A: Outside of it, it was just empty, an empty ground.

* * *

Q: And then you have to go back inside?

A: With open ground, you have to go through a, the main entrance door in order to get outside.

JA88-89.

Gao was asked why she said in her personal statement that the police came to her family's house to search every two or three days, but testified on direct examination that the police came every day. She replied that she learned this information from her brother and her mother, and they told her both versions. When she was then asked why she had not said this on direct examination, instead of that the police came every day, she replied, "Well, I didn't know." JA89-90.

Gao explained on cross-examination that she had never

planned to travel to the United States before her arrest in October 2001, and only considered this after her escape from the police. JA92. She was then confronted with the fact that she had obtained a notarial birth certificate in July 1999 which was in English and Chinese, and asked why she had obtained it:

> A: Well, I don't know about that exactly why would I need a notarial birth certificate for, but you know there's always a need to apply for one notarial birth certificate in China. I don't know why but there are a lot of people are applying for such a document in China.
>
> Q: Who applied for your notarial birth certificate?
>
> A: With the help of my father, I went to apply for it myself.
>
> Q: So you applied for it in 1999 in July, but you have no idea why you applied for it?
>
> A: I thought - I wasn't given any reasons about why I should go apply for the notarial birth certificate. I just know that back then a lot of people are applying for you and normally you, you know, it's pretty, it's very easy for you to obtain one.
>
> Q: So the time you applied for it, you had no purpose in mind for which you'd use the notarial birth certificate.

A: No, no purpose.

Q: Any particular reason you chose to have it issued in English and Chinese?

* * *

A: Because when you apply for a notarial birth certificate, they will always issue the document in English and Chinese.

Q: So to the best of your knowledge, Chinese nationals who need a notarial birth certificate say to emigrate to Spain would get one in English and Chinese?

A: I don't know.

JA93-94.

The cross-examination then turned to the relationship between Gao and the friend to whose home she fled upon escaping from police custody. Gao testified that she came to know the friend, whom she knows as Xiao Li, "by introduction of classmates," and that she met him the night of her escape. JA95. When asked whether she had met him before the night of her escape, Gao replied, "Not very acquainted with him." When asked why she would take a taxi to his house after escaping, she replied, "Because my friend told me." JA95. When asked why she would choose to go to Xiao Li's house on the night of her escape, she said that after she arrived at his house, he told her she could hide at his house because it is a "very secretive

place." JA96. Returning to Gao's decision to go to Xiao Li's house from the police station, the cross-examnation continued:

> Q: Okay. How did you come to decide to go to Xiao Li's house that night?
>
> A: After I get into the car of the taxi, I told the taxi driver, I provided him a address. And then the taxi driver took me to the address that I, the home of the address that I provided to him.
>
> Q: And that was Xiao Li's home?
>
> A: Yes.
>
> Q: And this was a person you had never met before that night? How did you know his address?
>
> A: I heard about him before. I don't really know him, but I heard about him from my friends.
>
> Q: So you remembered about him and you remembered his address?
>
> A: Yes.
>
> Q: And when you escaped from police custody you thought it would be good to go and stay with a perfect stranger?
>
> A: Well, I didn't think that much.

Q: Is Xiao Li a smuggler?

A: No. I don't know. I'm not sure; I don't think so.

Q: Why did you pick his house to run to that night?

A: Well that night I was extremely nervous and I could only recall one address so I didn't think that much. I just go. I just go whatever address I can recall.

Q: So you're so nervous you couldn't remember your own address and the addresses of your family; you just remembered a stranger's address?

A: Well I was afraid if I go to - since I escaped from detention, I was afraid if I go to a relative or a friend's home and, you know I will create trouble for them.

Q: And what made you think that this perfect stranger Xiao Li would harbor you after you had escaped from police custody?

A: Well Xiao Li is not that acquainted with me.

Q: So why would he protect you after you escaped from police custody?

A: I don't know why.

Q: And why would you trust him to do that?

A: I don't know why I would trust him back then.

Q: And you stayed at his house for two and a half months.

A: Stayed at his house for two and a half months.

JA97-99.

With respect to payment for Gao's travel to the United States, she testified that Xiao Li initially told her not to worry about anything, and did not discuss with her any fee for sending her. JA99. However, she stated that after she arrived in the United States, she was told by Xiao Li that her trip had cost him a lot of money, and that she had to repay him in the amount of $60,000. JA 99-100.

At the conclusion of cross-examination, there was no re-direct examination, no further witnesses were called by Gao, and her counsel made no argument, resting instead on the record. JA101.

C. The Immigration Judge's Decision

On May 8, 2003, the IJ rendered an oral decision denying Gao's applications for asylum, withholding of removal, and protection under CAT, and ordered Gao removed to PRC. The IJ based the denial on her express determination that Gao was not believable and her claim was implausible. In this regard, the IJ stated

> I have carefully observed the respondent's testimony and demeanor while testifying and I'm unable to find that testimony to be in any way credible. The respondent's testimony is riddled with implausibilities. Perhaps any one single implausibility could be disregarded, but in this case the implausibilities are so numerous that taken cumulatively they completely undercut the respondent's credibility. The respondent's testimony is also internally inconsistent and inconsistent with her testimony at her credible fear interview at Krome [at the airport at Tampa].

JA40.

In her decision, the IJ reviewed what she apparently felt were critical portions of Gao's testimony and carefully explained why she felt they included implausibilities and serious inconsistencies.

The IJ first noted that Gao testified that, during her journey to the United States, she traveled through Hong Kong, France and Britain. Gao stated that she sought political asylum in the United States, but not in the other countries she traveled through. When asked why not, she testified that she had no friends or relatives in those countries, and she was not able to speak the languages spoken there. JA 30-31. The IJ specifically found that her reason for not having applied for asylum in Britain was implausible, as she applied for asylum in the United States not speaking English, but claimed she didn't apply in Britain because she could not speak English. JA31.

The IJ went on to comment on Gao's testimony to the effect that, when she began selling FLG materials, she did not know it was illegal to do so, and only learned of this upon her arrest in October 2001. JA34. Observing that the Country Report on Human Rights Practices for 2001 outlines the extremely harsh measures the Chinese government has taken to suppress the FLG movement, which it banned in 1999, the IJ found Gao's testimony "completely implausible." JA33-34. The IJ explained that her conclusion was supported in the record by Gao's testimony that the FLG materials were not openly displayed at her father's store, and were sold only to people who specifically asked for them. In this regard, the IJ also cited Gao's statement in her asylum application that she and her father did not "dare" to sell the FLG materials publicly. JA34. She also cited Gao's testimony that her father had told her the books had to be sold secretly. In light of this statement and the others she cited, the IJ found it completely implausible that Gao would not have known that it was illegal to sell the books, especially since "Falun Gong by that time had been widely criticized and persecuted by the Chinese government as an evil cult." JA35.

The IJ next turned to Gao's testimony regarding her escape from the police station. The IJ noted the apparent conflict between Gao's statement in her credible fear interview that she had escaped through an open door, and her testimony in which she stated she had escaped through an open bathroom window. JA35. When asked to reconcile the two versions, Gao testified that she first climbed through an open bathroom window, and then went through the main entrance door, which was ajar. JA35.

When asked why she had not mentioned the door in her initial testimony, she said she thought the open window was the most important part; when she was asked why, if that was the case, she had not mentioned the window in her credible fear interview, she stated that she was nervous when she gave that interview. The IJ found that Gao's explanation did not resolve the discrepancy. JA 35-36.

The IJ also noted that, in her own questioning of Gao regarding the window, Gao provided conflicting information. The IJ asked Gao if there was a grating or screen over the window, and Gao replied that there was not. JA36. When the IJ suggested to Gao the unlikelihood that a window in a bathroom used by prisoners would not have an impediment to escape, Gao stated that there was a "single metal" placed horizontally, but that it left room for a person of Gao's stature to squeeze through. JA36. The IJ noted that, based on her experience with male and female Chinese citizens over the years, Gao was of normal size, and found it implausible that a police station in China would have a window in a first-floor bathroom used by prisoners equipped with one bar placed in such a way that an average-sized woman would be able to squeeze through it. JA36. The IJ observed that, when she reminded Gao that Gao had answered "no" when asked if there was a grating or screen over the window, but then changed her testimony to say there was a bar, Gao stated that she failed to mention the bar at first "because the metal was placed 'over here,' there was nothing outside the window." The IJ found that Gao's explanation did not resolve the testimonial discrepancy. JA36.

The IJ cited Gao's testimony that the police came to

and searched her family's home every day after her escape, and contrasted it with Gao's statement in support of her asylum application that they came every two or three days. When asked to resolve the discrepancy, Gao stated that members of her family had told her both versions. When asked why she did testified that they came everyday, she responded that she did not know. The IJ found that this did not resolve the inconsistency. JA37.

The IJ pointed out that Gao testified she had never considered leaving China prior to her escape in October 2001, yet had obtained a notarial birth certificate in English and Chinese on July 26, 1999. The IJ observed that when Gao was asked why she had obtained the certificate in English in 1999, she stated that she did not know back then what she would need one for, that a lot of other people were applying for them, and that she wasn't given any reason for doing so, and that she had no purpose in mind in obtaining it. JA37. The IJ specifically found it implausible that someone would take the time and trouble to apply for a government document for which they had no need just because others were applying for it. JA37-38. The IJ noted that, when asked why she chose to have the certificate issued in English and Chinese, Gao testified that notarial birth certificates are always issued in English and Chinese. The IJ stated that, in her experience, this is not correct. JA38.

Finally, the IJ discussed Gao's testimony about her actions following her escape from the police station in October 2001. Gao testified that she had not met Xiao Li, the individual to whose home she fled immediately after her escape at midnight, before her escape. The IJ related

the answers Gao provided to questions about why she went to his house and how she knew his address if she had not met him previously: that she took a taxi to his house because a friend told her; that she told the taxi driver to take her there, and that many people knew of Xiao Li. JA38.

The IJ noted that, when she was again asked directly why she chose to go to Xiao Li's house on the night of her escape, she at first answered unresponsively, and then said that after she arrived there, he told her that he could provide a place for her because his home was a "very secretive place." JA38. The IJ observed that, when Gao was once again asked to clarify why she went to Xiao Li's house, she said that she gave the taxi driver the address when she got into the taxi. Gao was then asked how she got his address, and she replied that she heard about him from a friend and remembered his address. She was then asked why she would decide to stay with a stranger after her escape, and Gao replied that she could only remember his address. When Gao was then asked why a stranger like Xiao Li would hide her after her escape from the authorities, she replied that he is not that acquainted with her. The IJ noted that this colloquy did not resolve the "inherent implausibility of her testimony." JA39.

Finally, the IJ related that toward the conclusion of Gao's testimony, she was asked why she thought Xiao Li would protect her after her escape, and she replied that she did not know; and that when Gao was then asked why she would trust him to do that, she again answered that she did not know. JA39.

In light of the referenced portions of testimony, the IJ found

> the entire testimony with regard to her alleged escape from police custody, her hailing a taxi and going to Xiao Li's house and the reasons why she would have gone to Xiao Li's house and trusted a complete stranger when she was fleeing the police in an authoritarian country to be completely implausible.

JA39-40.

Because she determined that she "cannot find that the respondent has testified credibly in this case," the IJ found that Gao had not met her burden of demonstrating that she was eligible for and deserving of the relief she requested. JA40. The IJ found that Gao had not established that she suffered past persecution or that she had a well-founded fear of persecution on one of the five statutory bases. JA40. The IJ also found that Gao had not met the higher standard for withholding of removal to PRC, and that there was no support in the record for relief under the CAT. JA41. Accordingly, the IJ denied the application for asylum and the applications for withholding of removal, and ordered Gao removed from the United States to PRC. JA41.

D. The BIA's Summary Dismissal

On May 20, 2004, 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). JA2. This petition for review followed.

SUMMARY OF ARGUMENT

I. The IJ properly denied Gao's application for asylum and withholding of removal. Substantial evidence supports the IJ's determination that Gao was not a believable witness and that her persecution claim was not credible, and the IJ's decision properly reflects specific, cogent reasons for the adverse credibility determination which bear a legitimate nexus to that finding. Gao's testimony on a number of critical topics was variously vague, unresponsive, internally inconsistent or patently implausible. Gao claims to have fled PRC to avoid persecution because of her association with FLG, yet she traveled through France and Britain without seeking asylum. The reason she advanced for failing to do so was that she did not speak the languages spoken in those countries. However, Gao does not speak the language spoken in the United States, either, which is virtually the same as the language spoken in Britain, which she traveled through. Gao testified that she was unaware of the illegality of FLG in China until her arrest in October 2001, yet, as the IJ noted, the Country Report makes it clear that the persecution of FLG adherents by the government of PRC was harsh and widespread, and had been in full swing since 1999. This, together with statements about the secret sale of FLG materials in her father's bookstore seriously undercut Gao's credibility on this issue. Gao's testimony about the circumstances of her escape from police custody was not only internally inconsistent, but inconsistent with the version she rendered in her credible fear interview and her personal statement. In her prior statements, she claimed to have escaped through an open

door; in her testimony, it was a window. When confronted with the inconsistency, Gao said it was both. Regarding the window, Gao at first said it was unobstructed. When given to understand that the IJ did not credit this, she said there was a "metal" across it, but situated so she could squeeze through. Her credibility on the escape is extremely suspect. Her admission that she testified inaccurately regarding the frequency of claimed visits by the police to her family's home renders her account of these matters dubious as well. Her claim that she had no plans to travel to the United States before October 2001 is belied by the English/Chinese notarial birth certificate she obtained in July 1999, and her complete inability to explain why she obtained it at that time, together with her strained explanation for its containing an English translation, reinforce the IJ's unwillingness to credit this testimony. Finally, her testimony that, following her claimed escape from police custody in the dead of night, she fled by taxi to the home of a man she did not know, for reasons she could not articulate, who then harbored her for two and one-half months from the government authorities of the PRC, and then paid for her journey to Hong Kong, France, England and, finally, the United States, is facially preposterous. Having necessarily found Gao to be not credible in any way, the IJ properly found that she had failed to establish past persecution or a well-founded fear of persecution on a recognized ground upon her return to PRC. Because a reasonable factfinder would not be compelled to find otherwise, the denial of asylum and withholding of removal should be upheld, and the instant petition should be denied.

II. The IJ's denial of protection under the Torture

Convention also finds substantial support in the record. Having already found Gao's claims to be incredible or implausible, the IJ properly did not credit the only evidence in the record that would arguably support her claim that she would be imprisoned upon return to PRC on any basis: Gao's own testimony that she believed she would be prosecuted and sentenced for her escape from custody and "implicated" because of her father. Further, the IJ properly concluded the record is utterly lacking in any evidence that Gao would be tortured within the meaning of the Torture Convention based on that claimed criminal violation. Accordingly, the IJ properly denied Gao protection under the CAT.

III. Gao's final claim, that the BIA's decision to summarily affirm the IJ's decision in accordance with its streamlined review process was not supported by the record, must fail in light of the record, and in light of this Court's decision in *Zhang v. United States Dep't of Justice*, 362 F.3d 155, 157 (2d Cir. 2004) (per curiam), upholding the streamlined review process.

ARGUMENT

I. Substantial Evidence Supports the Immigration Judge's Determination That Gao Failed To Establish Eligibility for Asylum & Withholding of Removal Since Her Testimony Was Not Credible, and the Decision of the Immigration Judge Sets Forth Specific Reasons for this Credibility Determination

A. Relevant Facts

The relevant facts are set forth in the Statement of 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.[4] *See* 8 U.S.C. §§ 1158(a), 1231(b)(3) (2004); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995). Although these types of relief are "closely related and appear to overlap,"

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[4] "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) (2000), cases relating to the former relief remain applicable precedent.

Carranza-Hernandez v. INS, 12 F.3d 4, 7 (2d Cir. 1993) (citation and internal marks omitted), 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) (2000). *See* 8 U.S.C. § 1158(a) (2004); *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) (2004); *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 *DeSouza 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. *Melgar de Torres v. Reno*, 191 F.3d 307, 315 (2d Cir. 1999); 8 C.F.R. § 208.13(b)(1)(i) (2004).

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) (2004). 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. *Id*.

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*. 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) (2004); *Zhang*, 55 F.3d at 737-38 (noting that when seeking reversal of a BIA factual determination, petitioner must show "'that the evidence he presented was so compelling that no reasonable factfinder could fail'" to agree) (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)

(per curiam); *Osorio*, 18 F.3d at 1027. *See* 8 C.F.R. § 208.13(a) (2004). 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)(2004); *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) (applicant must provide testimony that is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account"), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647-48 (9th Cir. 1997).

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) ("where 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) (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) (2004); *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)(1) (2004); *INS v. Stevic*, 467 U.S. 407, 429-430 (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 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 ("we must uphold an administrative finding of fact unless we conclude that a reasonable adjudicator would be compelled to conclude to the contrary.") (citations omitted); *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); *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); *Ali v. Reno*, 237 F.3d 591, 596 (6th Cir. 2001) (same standard applicable to Torture Convention).

Where an appeal turns on the sufficiency of the factual findings underlying the IJ's determination[5] 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). 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." *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 v. INS*, 386 F.3d at 74 ("Precisely because a reviewing court cannot glean from a hearing record the insights necessary to duplicate the

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[5] 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, JA2, the BIA adopts that decision. 8 C.F.R. § 3.1(e)(4)(2002); *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.

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); *see also 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 (emphasis in original).

This Court gives "particular deference to the credibility determinations of the IJ." *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. *Id.*; *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) (the 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 v. INS*, 386 F.3d at 74.

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. Columbia 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 Gao failed to provide credible testimony in support of her application for asylum and withholding of removal, and thus failed to establish eligibility for relief. Because Gao's testimony was found to be not credible, as it was vague, internally inconsistent, or contradicted by her prior statements, she failed to meet her burden of proof in establishing her status as a refugee. Furthermore, because Gao failed to sustain her burden in proving eligibility for asylum, she necessarily failed to meet her burden for withholding of removal. *See Chen*, 344 F.3d at 275. *Accord Zhang v. INS*, 386 F.3d at 71.

Contrary to Gao's claim on appeal, Petitioner's Brief at 14, *ff.*, the IJ "provided 'specific, cogent' reasons for the adverse credibility finding and . . . those reasons bear a 'legitimate nexus' to the finding." *Zhang v. INS*, 386 F.3d at 74 (quoting *Secaida-Rosales*, 331 F.3d at 307). Gao's reading of the IJ's decision is narrow and artificial, and her assertion that this Court's review should be confined to the section of the decision entitled "Analysis" is without any basis. Taken as a whole, as it should and must be, the

decision of the IJ provides crystal-clear, common-sense and eminently proper reasons for the adverse credibility determination.

First, the IJ found that the reasons given by Gao for not having applied for asylum in Britain were implausible. JA31. Gao testified that, on her way from PRC to the United States, she traveled through Hong Kong, France and England. JA66-67. She stated that she did not apply for asylum in France or England because she did not have relatives or friends in either country,[6] and did not speak the languages spoken there. JA67. In rejecting this testimony, the IJ reasoned that Gao does not speak the language spoken in the United States, where she has applied for asylum, and she did not apply for asylum in England, where, as here, English is spoken. JA31.

The next significant credibility issue arises concerning Gao's testimony that, until her arrest in October 2001, she was unaware that FLG was illegal in PRC. JA81. The IJ found this testimony completely implausible. JA34. In her opinion, she cited the Country Report on Human Rights Practices for 2001, which made clear that the Chinese government had waged a harsh and comprehensive campaign against FLG practitioners since 1999. JA120, *ff*. She also relied on Gao's testimony that the FLG materials were not openly displayed in the store

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[6] Gao did not testify regarding friends or relatives she has in the United States. However, in the record, there is reference to only one such person, Min Zhi Zheng, who is variously described as Gao's cousin, JA220, and as her father's friend, JA254.

and were sold only to persons who requested them, and that her father told her that the FLG materials had to be sold in secret. JA82. Finally, the IJ cited Gao's asylum statement, in which she stated that she and her father would not "dare" to sell the FLG materials publicly. JA216.

One of the most telling areas in which the IJ specifically found Gao to be incredible was her description of her escape from police custody and her flight to the home of a "friend."

In her testimony about the escape, Gao told the IJ that, after two days of captivity, during a shift change at midnight, she asked to use the bathroom. Once she had done this, she stated that she escaped through an open window and out to a large, busy street where she hailed a taxi. JA72-73, 83. When confronted with her statement in her credible fear interview that she had escaped through an open door, Gao changed her testimony. She recast the escape as having taken her through an open window, and then through the main door to the police station, which had been ajar. JA85. When asked why she had not mentioned the door in her initial testimony, Gao said she thought the most important part was the window; when Gao was asked why, if that was the case, she had not mentioned the window in her credible fear interview, she stated that she was nervous when she gave the interview. JA85-86. In discounting the credibility of Gao's account(s), the IJ found that Gao's explanation did not resolve the discrepancy beween her airport statement and her testimony. JA35-36. The IJ went on to note other implausible or conflicting information provided by Gao in

her testimony. The IJ personally questioned Gao regarding certain particulars of the escape. The IJ asked Gao whether there was a grating or screen over the window, and Gao replied there was not. When the IJ suggested she thought this unlikely, Gao changed her testimony and stated there was a metal bar placed horizontally across the window, which still left enough room for Gao to escape. JA87-88. When the IJ asked Gao why she had not mentioned the metal bar in the first place, Gao provided an unresponsive answer, JA88, which the IJ appropriately found did not resolve the discrepancy in her testimony. JA36.

Another area of Gao's testimony which was of concern to the IJ was her statement that, after she was arrested, the police came to her family's home every day to search for her. JA74-76. As the IJ pointed out in her ruling, Gao had related in her personal statement that the police came every two or three days. JA216. When Gao was asked at the hearing to resolve the discrepancy, she testified that members of her family had related both versions to her. When she was asked why she did not testify to this effect in the first place, she replied, "Well, I didn't know." JA88-89. The IJ found, again appropriately, that this explanation did not resolve the inconsistency. JA37.

Gao testified that, prior to her escape from the police station in October 2001, she had never considered traveling to the United States. JA92. When she was confronted with the fact that she had obtained a notarial birth certificate in English and Chinese in July 1999 and asked why she had done this, she stated that she did not know back then what she would need one for, that a lot of

other people were applying for them, that she wasn''t given any reason for doing so, and that she had no purpose in mind in obtaining it. JA93-94. The IJ found it implausible that someone would take the time and trouble to apply for a government document for which they had no need just because others were applying for it. JA37-38. When Gao was asked why she chose to have the certificate issued in English and Chinese, Gao testified that all notarial birth certificates were issued in English and Chinese. The IJ found this to be simply incorrect. JA38.

In her opinion, the IJ discussed Gao's testimony about her actions following her escape from the police station in October 2001. Gao testified that she had not met Xiao Li, the individual to whose home she fled immediately after her escape at midnight, before her escape. JA95. Asked why she went to his house and how she knew his address if she had not met him previously, she offered a series of answers: that she took a taxi to his house because a friend told her; that she told the taxi driver to take her there; and that many people knew of Xiao Li. JA95-96.

When she was again asked directly why she chose to go to Xiao Li's house on the night of her escape, she at first answered unresponsively, and then said that after she arrived there, he told her that he could provide a place for her because his home was a "very secretive place." JA96. When Gao was once again asked to clarify why she went to Xiao Li's house, she said that she gave the taxi driver the address when she got into the taxi. JA97. Gao was then asked how she got his address, and she replied that she heard about him from a friend and remembered his address. JA97-98. She was then asked why she would

decide to stay with a stranger after her escape, and Gao replied that she could only remember his address. JA98. When Gao was then asked why a stranger like Xiao Li would hide her after her escape from the authorities, she replied that he is not that acquainted with her. JA98. The IJ noted that this colloquy did not resolve the "inherent implausibility of her testimony." JA39.

Finally, toward the conclusion of Gao's testimony, she was asked why she thought Xiao Li would protect her after her escape, and she replied that she did not know; and when Gao was then asked why she would trust him to do that, she again answered that she did not know. JA99.

Based on the record in this case, a reasonable factfinder would not be compelled to find that Gao established a well-founded fear of persecution if returned to PRC. *Elias-Zacarias*, 502 U.S. at 481 n.1. Moreover, in cases like the instant one, where the decision turns on the IJ's credibility determination, this Court's review is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 73. *See also Qiu,* 329 F.3d at 146 n.2 (the Court "generally defer[s] to an IJ's factual findings regarding witness credibility"). Where, as here, "the IJ's adverse credibility finding is based on specific examples in the record of 'inconsistent statements' by [petitioner] about matters material to her claim of persecution, [and] on 'contradictory evidence' . . . [the Court] will generally not be able to conclude that a reasonable adjudicator was compelled to find otherwise." *Zhang v. INS*, 386 F.3d at 74 (internal quotation marks and citations omitted). *See also id.* ("the court may not itself hypothesize excuses for the inconsistencies, nor may it justify the contradictions or

explain away the improbabilities. Its limited power of review will not permit it to 'reverse the BIA [or IJ] simply because [it] disagree[s] with its evaluation of the facts.") (internal quotation marks and citations omitted). Indeed, the IJ's rejection of Gao's testimony regarding the reason she left PRC and the consequences she would face if she returned to the country is an implicit rejection of her sworn statements on the same subjects at her asylum interview. JA 252. This in itself is sufficient to bar her from withholding of removal. *See*, *Medina v. Gonzales*, 404 F.3d 628, 637 (2d Cir. 2002) (false oral statements made under oath during an asylum interview constitutes false testimony and renders the applicant ineligible for suspension of deportation on the ground that she lacks "good moral character").

In sum, the record evidence substantially supports the IJ's determination that petitioner's testimony was not credible and that she failed to establish eligibility for asylum and withholding of removal. In addition, the IJ's decision cites specific inconsistencies and implausibilities in the testimony and supporting materials advanced by the petitioner, and explains why they undercut her credibility. Accordingly, this Court should deny the petition.

II. Substantial Evidence Supports the Immigration Judge's Determination That Gao Failed to Establish Eligibility for Protection Under the Convention Against Torture Since She Failed To Provide Sufficient Credible Evidence She Would Be Tortured Upon Return to PRC, and the Decision of the Immigration Judge Sets Forth Specific Reasons for this Credibility Determination

A. Relevant Facts

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

B. Governing Law and Standard of Review

1. Deferral of Removal Under the Torture Convention

Under Article 3 of the Torture Convention, the United States cannot return an alien to a country where he more likely than not would be tortured by, or with the acquiescence of, government officials acting under color of law. *See Wang v. Ashcroft*, 320 F.3d 130, 133-34, 143-44 & n.20 (2d Cir. 2003); *Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001); *In re Y-L-, A-G-, R-S-R-*, 23 I. & N. Dec. 270, 279, 283, 285, 2002 WL 358818 (A.G. Mar. 5, 2002); 8 C.F.R. §§ 208.16(a), 208.17(a), 208.18(a) (2004).

To establish eligibility for relief under the Torture Convention, the applicant bears the burden of proof to

"establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2) (2004); *see also Najjar v. Ashcroft*, 257 F.3d 1262, 1304 (11th Cir. 2001); *Wang*, 320 F.3d at 133-34, 144 & n.20 (noting that this burden of proof is higher than that required of those seeking asylum). The applicant must show that someone in "his particular alleged circumstances" has a greater than 50% chance of torture. *Wang*, 320 F.3d at 144.

The Torture Convention defines "torture" as " 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, punish[ment] . . . , 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.' " *Ali*, 237 F.3d at 597 (citing 8 C.F.R. § 208.18(a)(1) (2002)).

Because "[t]orture is an extreme form of cruel and inhuman treatment," even cruel and inhuman behavior by officials may not warrant Torture Convention protection. *Sevoian v. Ashcroft*, 290 F.3d 166, 175 (3d Cir. 2002) (citing 8 C.F.R. § 208.18(a)(2)). The term "acquiescence" requires that "the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 208.18(a)(7) (2004). Under the Torture Convention, an alien's removal may be either permanently withheld or temporarily deferred. *See* 8 C.F.R. §§ 208.16, 208.17 (2004).

2. Standard of Review

This Court also reviews the determination of whether an alien is eligible for protection under the Torture Convention under the "substantial evidence" standard. *See Saleh v. U.S. Dep't of Justice*, 962 F.2d 239, 238 (2d Cir. 1992) (same); *Ali,* 237 F.3d at 596 (Torture Convention); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 353 (5th Cir. 2002) (Torture Convention). Measured against this stringent standard, petitioner's challenge to the BIA's and IJ's determination clearly fails.

C. Discussion

Substantial evidence supports the IJ's determination that petitioner is not eligible for protection under the Torture Convention. The IJ declined to credit any significant portion of Gao's testimony or materials submitted in support of her application for relief. Having already found not credible Gao's claim to be a political dissident or to have escaped from police custody, the IJ properly concluded that there is no credible evidence in the record she would be tortured if she were returned to PRC. JA41. Indeed, absent any credible evidence that petitioner had ever previously attracted the attention of the Chinese authorities, there is no basis for concluding that she would be singled out for any maltreatment, much less torture.

In sum, substantial evidence in the record supports the IJ's determination that Gao did not demonstrate that she will "more likely than not" be tortured upon return to

PRC. Accordingly, the IJ properly denied Gao's request for protection under the Torture Convention.

III. The Board of Immigration Appeals Properly Affirmed the Immigration Judge's Decision, Without Opinion, Pursuant to Its Summary Affirmance Procedures

A. Relevant Facts

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

B. Governing Law and Standard of Review

The streamlining regulation at issue in this case -- 8 C.F.R. § 1003.1(a)(7)(2004) -- authorizes a single member of the BIA to affirm, without opinion, the results of an IJ's decision, when that Board Member determines:

> (1) that the result reached in the decision under review was correct;
> (2) that any errors in the decision under review were harmless or nonmaterial; and
> (3) that (A) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve that application of precedent to a novel fact situation; or (B) the factual and legal questions raised on appeal are so insubstantial that three-Member [Board] review is not warranted.

8 C.F.R. § 1003.1(a)(7) (2004). Once the Board Member has made the determination that a case falls into one of these categories, the Board issues the following order: "The Board affirms, without opinion, the results of the decision below. The decision is, therefore, the final agency determination. 8 C.F.R. § 1003.1(a)(7) (2004).[7] In keeping with the spirit of resource-conservation that was the impetus for the streamlining process, the regulation explicitly prohibits Board Members from including in their orders their own explanation or reasoning. *Id.*; *see* 64 Fed. Reg. 56,137 (Oct. 18, 1999) (stating that one reason for the streamlining initiative was the fact that "[e]ven in routine cases in which Panel Members agree that the result reached below was correct, disagreements concerning the rationale or style of a draft decision can require significant time to resolve"). Consequently, the regulation designates the decision of the IJ, and not the BIA's summary affirmance, as the proper subject of judicial review. *See* 64 Fed. Reg. 56,137 ("[t]he decision rendered below will be the final agency decision for judicial review purposes").

This Court has joined the majority of circuits in holding that the BIA's decision to summarily affirm an IJ's decision, without opinion, in accordance with its streamlined review process "does not deprive an asylum applicant of due process." *Zhang v. United States Dep't of Justice*, 362 F.3d 155, 157 (2d Cir. 2004) (per curiam). *See also Shi v. Board of Immigration Appeals,* 374 F.3d

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[7] The regulation clarifies that an affirmance without opinion "does not necessarily imply approval of all of the reasons of" the decision below. *Id.*

64, 66 (2d Cir. 2004) (the BIA did not abuse its discretion in summarily affirming decision of IJ, without opinion, pursuant to streamlining regulations).

C. Discussion

As noted above, this Court has held that the streamlining regulation at issue in this case, 8 C.F.R. § 1003.1(a)(7) (2004), expressly authorizing a single member of the BIA to summarily affirm an IJ's decision without opinion, does not violate due process. *Zhang,* 362 F.3d at 157 ("because nothing in the immigration laws requires that administrative appeals from IJ decisions be resolved by three-member panels of the BIA through formal opinions that 'address the record,' the BIA was free to adopt regulations permitting summary affirmance by a single Board member without depriving an alien of due process."). *See also Guentchev v. INS*, 77 F.3d 1036, 1037 (7th Cir. 1996) ("The Constitution does not entitle aliens to administrative appeals."). This Court has long upheld the authority of the BIA to summarily affirm the IJ's decision even prior to promulgation of the streamlining regulations, provided "'the immigration judge's decision below contains sufficient reasoning and evidence to enable [the Court] to determine that the requisite factors were considered,'" *Shi,* 374 F.3d at 66 (quoting *Arango-Aradondo v. INS,* 13 F.3d 610, 613 (2d Cir. 1994)). *See also Zhang,* 362 F.3d at 158 ("Because the BIA streamlining regulations expressly provide for the summarily affirmed IJ decision to become the final agency order subject to judicial review, we are satisfied the regulations do not compromise the proper exercise of our [8 U.S.C.] § 1252 jurisdiction.") (footnote omitted).

As in *Shi* and *Zhang,* the IJ's decision in this case clearly provides sufficient reasoning for review by this Court. The oral decision of the IJ recites the testimony of the witness, and summarizes the pertinent documentary evidence. *See* JA30-40. The decision also contains a recitation of the legal standard the IJ was required to follow in assessing petitioner's asylum, withholding of removal and CAT claims, JA28-30, as well as an analysis of the record evidence and the law. JA40-41. Finally, the IJ's decision contains "'specific, cogent' reasons for [her] adverse credibility finding and . . . those reasons bear a 'legitimate nexus' to the finding." JA31, 33-40; *see Zhang v. INS*, 386 F.3d at 74 (quoting *Secaida-Rosales*, 331 F.3d at 307). Thus, the IJ's decision provides ample basis for review by this Court.

In her brief, the petitioner claims that summary affirmance was inappropriate in this case because the IJ's oral decision allegedly is not supported by substantial evidence and because the findings contained in it are erroneous. Pet. Brief at 20. However, the petitioner has not demonstrated that the IJ's decision contained any errors, *see supra* Points I and II, nor does she point to any controlling Board or federal court precedent that she claims the IJ ignored. *See* 8 C.F.R. § 1003.1(a)(7)(ii)(A) (2004). Petitioner claims that "the IJ has utterly failed to explain what it is about [Gao's] testimony she finds implausible, other than her own personalized disbelief in Gao's testimiony." Pet. Brief at 18. However, just because petitioner refuses to accept the reasons given by the IJ for her decision throughout its text does not mean the decision does not provide sufficient reasoning for judicial review. Accordingly, the BIA acted well within its discretion in

adopting the IJ's decision as the "final agency determination" in adjudicating the petitioner's appeal.

CONCLUSION

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

Dated: August 4, 2005

Respectfully submitted,

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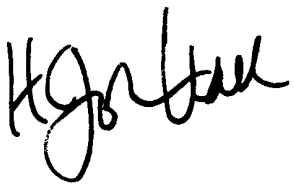

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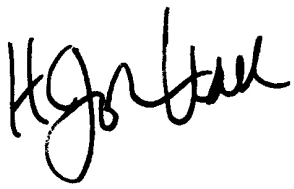
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

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 12,534 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) (2004). 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. . . .

8 U.S.C. § 1158(a)(1), (b)(1) (2004). 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.

8 U.S.C. § 1231(b)(3)(A) (2004). Detention and removal of aliens ordered removed.

(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 U.S.C. § 1252(b)(4) (2004). 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. § 3.1(a)(7) (2002)

(7) Affirmance without opinion.

(i) The Chairman may designate, from time-to-time, permanent Board Members who are authorized, acting alone, to affirm decisions of Immigration Judges and the Service without opinion. The Chairman may designate certain categories of cases as suitable for review pursuant to this paragraph.

(ii) The single Board Member to whom a case is assigned may 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 issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or
>
> (B) the factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted.

(iii) 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 CFR 3.1(a)(7)." 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.

(iv) If the Board Member determines that the decision is not appropriate for affirmance without opinion, the case will be assigned to a three-Member panel for review and decision. The panel to which the case is assigned also has the authority to determine that a case should be affirmed without opinion.

8 C.F.R. § 208.13 (2004). 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. § 208.16 (2004). Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

(a) Consideration of application for withholding of removal. An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is otherwise eligible for asylum but is precluded from being granted such status due solely to section 207(a)(5) of the Act. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.

(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 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. The evidence shall be evaluated as follows:

(1) Past threat to life or freedom.

(i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social

group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

> (A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or
>
> (B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

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

(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that

he or she would suffer such harm.

(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

(i) The applicant establishes that in that country there is a pattern or practice 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

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

. . . .

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

(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub.L. 105-277, 112 Stat. 2681, 2681-821). The definition of torture contained in § 208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of 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.

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the

form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under § 208.17(a).

(d) Approval or denial of application--

(1) General. Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.

. . . .

8 C.F.R. § 208.17 (2004). Deferral of removal under the Convention Against Torture.

(a) Grant of deferral of removal. An alien who: has been ordered removed; has been found under § 208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under § 208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured.

. . . .

8 C.F.R. § 208.18 (2004). Implementation of the Convention Against Torture.

(a) Definitions. The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

> (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 him or her 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 having committed, 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.
>
> (2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.
>
> (3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement

actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

(6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(8) Noncompliance with applicable legal procedural standards does not per se constitute torture.

(b) Applicability of §§ 208.16(c) and 208.17(a)--

(1) Aliens in proceedings on or after March 22, 1999. An alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999 may apply for withholding of removal under § 208.16(c), and, if applicable, may be considered for deferral of removal under § 208.17(a).

. . . .