02-4726-ag

To Be Argued By:
BRIAN P. LEAMING

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 02-4726-ag

HE XIONG QIU

Petitioner,

-vs-

JOHN ASHCROFT, ATTORNEY GENERAL,

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR JOHN ASHCROFT ATTORNEY GENERAL OF THE UNITED STATES

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STATEMENT OF JURISDICTION

Petitioner is subject to a final order of removal. This Court has appellate jurisdiction under § 242(b) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(b) (2004), to review Petitioner's challenge to the Board of Immigration Appeal's October 8, 2002, final order denying him asylum and withholding of removal.

Although Petitioner also challenges the Immigration Judge's refusal to admit certain documents into evidence, Petitioner failed to raise this issue before the Board of Immigration Appeals and thus this Court lacks jurisdiction to consider that claim. *See* Immigration and Naturalization Act § 242(d)(1), 8 U.S.C. § 1252(d)(1).

STATEMENT OF ISSUES FOR REVIEW

1. Whether a reasonable fact-finder would be compelled to reverse the Immigration Judge's adverse credibility determination, where Petitioner's testimony contained several inconsistencies concerning key elements of his claim and where Petitioner failed to adequately explain the inconsistencies.

2. Whether the Court lacks subject matter jurisdiction over Petitioner's claim that the Immigration Judge failed to admit certain documentary evidence when Petitioner failed to raise the issue before the Board of Immigration Appeals.

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BRIEF FOR JOHN ASHCROFT
Attorney General of the United States

Preliminary Statement

He Xiong Qiu, a native and citizen of the People's Republic of China, petitions this Court for review of an October 8, 2002, decision of the Board of Immigration Appeals ("BIA"). (Joint Appendix ("JA") 2). The BIA summarily affirmed the April 26, 2000, decision of an Immigration Judge ("IJ") (JA 24-26) denying Petitioner's applications for asylum and withholding of removal under the Immigration and Nationality Act of 1952, as amended ("INA"), rejecting his claim for relief under the

Convention Against Torture ("CAT"),[1] and ordering him removed from the United States.

Petitioner sought asylum and withholding of removal based on his assertion that his wife had been subjected to a forced sterilization in China. Substantial evidence supports the IJ's determination that Petitioner failed to provide credible testimony and evidence in support of this claim. The IJ found that Petitioner's testimony contained several inconsistencies and implausibilities, that Petitioner's credibility was undermined when he admitted to previously fabricating information for the purpose of obtaining an immigration benefit, and that Petitioner's demeanor and manner in responding to questions further undermined his credibility.

In this Court, Petitioner claims that the IJ erred by refusing to admit certain documents into evidence. This Court lacks jurisdiction to consider this claim, however, because Petitioner did not raise this issue before the BIA.

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[1] The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, has been implemented in the United States by the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277, Div. G Title XXII, § 2242, 112 Stat. 2681-822 (1998) (codified at 8 U.S.C. § 1231 note). *See Khouzam v. Ashcroft*, 361 F.3d 161, 168 (2d Cir. 2004).

Statement of the Case

Petitioner entered the United States without inspection on or about December 8, 1992, and requested asylum by application dated June 21, 1993.

On July 3, 1997, Petitioner was issued a Notice to Appear, and an IJ subsequently conducted a removal hearing. On April 26, 2000, the IJ issued an oral decision denying Petitioner's application for asylum, withholding of removal, and relief under the CAT.

On October 8, 2002, the BIA affirmed, without opinion, the decision of the IJ. Thereafter, on November 7, 2002, the present Petition for Review was filed.

Statement of Facts

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

Petitioner entered the United States without inspection on or about December 8, 1992. (JA 194). On June 21, 1993, he requested asylum, claiming that he left China in July 1992 because he had been persecuted for resistance to China's family planning policies. (JA 194-99).

On June 18, 1997, Petitioner supplemented his asylum application with an affidavit in which he claimed that the Chinese government had demanded that his wife undergo an abortion when she was nine months pregnant with twins. (JA 200). According to the affidavit, Petitioner's

wife hid in her mother's house, while Petitioner remained in their house. When government officials came to Petitioner's house looking for his wife, they removed property and engaged Petitioner in a fight before he managed to escape. *Id.* Petitioner affirmed that he "scraped by for about one year" in another district before deciding to travel to the United States. *Id.* Fearing arrest if he returned home, Petitioner was smuggled from China to Mexico where he remained for two days before entering the United States across the U.S.-Mexico border. (JA 200-201).

B. Petitioner's Removal Proceedings

On July 3, 1997, Petitioner was served in hand with a Notice to Appear, charging that he was removable under § 212(a)(6)(A)(i) of the INA as an alien present in the United States who had not been admitted or paroled. (JA 234). Petitioner appeared, with counsel, before an IJ on November 21, 1997, conceded that he was removable as charged, and stated that he was seeking asylum and withholding of removal. (JA 40-44). The hearing was continued several times until it was concluded on April 26, 2000. (JA 45-47, 48-99, 100-106, 107-11).

1. Documentary Submissions

During a 1999 removal hearing, the IJ admitted into evidence the Notice to Appear, Petitioner's asylum application, and the State Department's Country Report on

China.[2] (JA 50-51, 54). In addition, Petitioner submitted copies of eleven documents to support his asylum application. Even though eight of the documents (Exhibits 3-10) had stamps indicating that an asylum officer had reviewed the originals and returned them to Petitioner, Petitioner did not have originals of any of the documents at the hearing. The IJ marked the copies for identification and notified Petitioner that he needed to obtain originals before they would be admitted into evidence. (JA 50-54).

The following documents were marked for identification at the 1999 hearing:

Exhibit 3: July 1996 Receipt for Payment from Tingjiang Town Birth Control Office, in the amount of 700 yuan for a birth control fine. (JA 192).

Exhibit 4: June 3, 1996 Notice to Petitioner and his wife from Tingjiang Town Birth Control Office, reporting a violation of birth control regulations in December 1989 for having two children in excess of birth control limits. (JA 190). The notice also stated that the amount of fine is 1500 yuan, with payment of 700 yuan still outstanding. *Id.*

Exhibit 5: November 18, 1992 Receipt for Payment, from Tingjiang Town Birth Control Office, in the amount of 500 yuan as a fine for the birth of two children in December 1989. (JA 188).

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[2] The transcript from this hearing (JA 48-99) is undated, but it appears likely that the hearing was in 1999.

Exhibit 6: 1995 Receipt for Payment from Tingjiang Town Birth Control Office, in the amount of 300 yuan as a fine for the birth of two children in December 1989. (JA 186).

Exhibit 7: March 20, 1992 Birth Control Operation Letter, directed to Zheng Bao Yu. (JA 184).

Exhibit 8: March 20, 1992 Surgical Operation Certification, with a stated diagnosis of "Tubal ligation on both Fallopian tubes." (JA 182).

Exhibit 9: Petitioner's Notarial Birth Certificate. (JA 177).

Exhibit 10: Two photographs. (JA 176).

Exhibit 11: October 15, 1990 Marriage Certificate, documenting the union of Qiu He-Xiong and Zheng Bao-Yu. (JA 172-73).

Exhibit 12: October 10, 1994 Household Register for head of household, Zheng Bao-Yu, documenting her three sons. (JA 160-64).

Exhibit 13: July 16, 1997 Certificate, documenting the delivery by Zheng Bao-Yu of twin boys on October 22, 1990. (JA 158).

At the close of the 1999 hearing, Exhibits 11 and 12 were admitted into evidence. (JA 98). The hearing was continued through two more appearances before the IJ, and although Petitioner submitted an additional document

to support his asylum application (Exhibit 15, February 8, 2000 Radiology Report from Guam Memorial Hospital (JA 108, 112)), he made no attempt to submit originals of the other documents he had first presented in 1999.

2. Petitioner's Testimony

Petitioner testified that he married Zheng Bao-Yu on February 5, 1987, but did not immediately register the marriage. (JA 55-56). According to Petitioner, they obtained a marriage license in mid-October 1990 when they were notified to do so by the local township authority. (JA 56, 172-73). Petitioner averred that he and his wife applied for a marriage certificate two to three months before it was issued. (JA 57).

Petitioner also provided testimony regarding his immediate family. In particular, Petitioner testified that his first child, a boy, was born at Tingjiang Hospital on November 11, 1988. (JA 58-59). According to his testimony, Petitioner did not immediately register the birth of his first son, but did so after he and his wife paid a fine. (JA 58). On October 22, 1990, Petitioner's wife gave birth to twin boys. (JA 59).

During direct examination, Petitioner testified that all three boys were registered together after paying a fine of 1500 yuan. (JA 60). Petitioner averred that the fine had to be paid to the village officials in order to register the children, but that he did not have enough money, so he paid the fine in two installments. *Id.* Petitioner could not recall when he paid the fine, but he remembered paying it after he arrived in the United States. (JA 61). Petitioner

also testified that despite paying the fine, his fine was doubled, and an unspecified amount remains outstanding. (JA 61-62).

As direct examination proceeded, Petitioner explained that he left China on July 9, 1990. (JA 62). Petitioner explained further that he left China because the local family officials strictly enforced family planning, attempted to arrest his wife, and partially destroyed his home. *Id.* According to Petitioner, when he and his wife applied for a marriage certificate, in March or April 1990, her second pregnancy was detected. (JA 63). Several days later, Petitioner and his wife received a notice directing her to report for a medical examination. *Id.* In addition, the local village officials attempted to arrest Petitioner's wife after they applied for the marriage certificate in April 1990. (JA 64). Petitioner subsequently testified that it was around the month of March that he and his wife applied for the marriage certificate and the village officials attempted to arrest his wife. (JA 63-65).

The manner in which village officials attempted to arrest Petitioner's wife is not explained in the testimony. Petitioner related, however, that the day they received notice that his wife must report for an examination, he feared that the local authorities would "send somebody here to get her" so he sent her to her parents' house. (JA 65-66, 68). The village officials arrived at Petitioner's house the day following his wife's departure. (JA 68). Upon arrival, the local officials demanded to know the whereabouts of Petitioner's wife, but he refused to tell them. (JA 69). The village officials then proceeded to destroy parts of his house and certain equipment and

property. (JA 69-71). A physical confrontation ensued, during which Petitioner claimed he was assaulted by town officials. (JA 71-72). During the confrontation, Petitioner escaped through the back door. (JA 72).

After a four to five hour trek through the mountains, Petitioner rode a bus from Fuzhou City to Xiamen City. (JA 73). He testified that he remained in Xiamen for "more than a year" before leaving China on July 9, 1990. (JA 75). Petitioner subsequently clarified his testimony to explain that he left China in 1992, not 1990. *Id.* Smuggled on a Taiwanese fishing boat, Petitioner departed China to arrive in Mexico where he stayed two days before entering the United States. (JA 79-80). Petitioner testified that if he were returned to China, he believed he would be arrested. (JA 83).

Petitioner also testified that on March 20, 1992, his wife was sterilized, although he does not know why she was sterilized. (JA 77). In describing how he learned of the sterilization, Petitioner related that after arriving in the United States, he spoke with his wife by telephone and she "first . . . mention we have twin baby [sic]." (JA 77-78). She then explained, Petitioner attested, that she was pressured to submit to sterilization. (JA 78).

During cross-examination, Petitioner acknowledged that when he married, his wife was not yet 18 years of age. (JA 84). He acknowledged further that, despite having a child before his wife turned 20, they encountered no problems with the local officials. (JA 84-85). Petitioner admitted, however, that "between the period of '89 or '90" he and his wife were fined. (JA 85). Petitioner explained

that they were "fined" for the second pregnancy "in order to go ahead with it." (JA 85-86). After the fine was paid, according to Petitioner, his wife was allowed to become pregnant. (JA 86). The fine paid for the second pregnancy was approximately 2000 yuan. (JA 87). When questioned as to his previous testimony that he was fined 1500 yuan, Petitioner stated that the local officials also "pocket[ed]" some of the fine money. *Id*. Notwithstanding the payment of the fine, Petitioner testified that he and his wife received notice directing his wife to undergo a medical examination, or if she was pregnant, an abortion. (JA 88).

Further cross-examination probed additional inconsistencies in Petitioner's story. For example, Petitioner's testimony that local officials demanded that his wife abort her pregnancy during the third month conflicted with his asylum application where he had stated that the officials demanded she undergo an abortion during the ninth month of her pregnancy. On cross examination, he admitted that he "made up" the claim in his asylum application. (JA 88-89). As the examination continued, Petitioner contradicted his earlier testimony when he stated that he learned of his wife's sterilization when he "was planning to escape [China]." (JA 91). When questioned why he did not mention the sterilization in his asylum application, Petitioner explained that "perhaps" he did not have "enough proof" for his claim of asylum. (JA 92). When Petitioner was questioned why he previously reported to INS that his date of marriage was February 25, 1992, he responded that he "pick[ed] . . . a day, any day that . . . c[a]me . . . to mind." (JA 95). In explaining the inconsistencies between his testimony and his asylum

application, Petitioner stated that "all [he] care[d]" for at the time was his "CA [employment] card." (JA 96).

C. IJ's Decision

On April 26, 2000, the IJ rendered an oral decision denying Petitioner's requested relief. (JA 27-39). After summarizing the applicable legal standard and the evidence presented during the hearing, the IJ noted that several of the documents submitted by Petitioner were not admitted into evidence "because there are no originals available or they are official documents and have not been authenticated as required under 8 C.F.R. 287 (46) [*sic* 287.6]." (JA 34). After having considered all the testimony and evidence presented, the IJ concluded that Petitioner did not sustain "his burden of proving past persecution or well-founded fear of persecution on account of any of the grounds enumerated in the [Immigration and Nationality] Act." (JA 34-35).

The IJ found that Petitioner failed to advance a credible claim of past persecution based on the alleged forced sterilization of his wife. (JA 35). In so holding, the IJ identified several inconsistencies with Petitioner's testimony. In particular, the IJ noted the inconsistency between Petitioner's testimony and his asylum application with regard to the status of his wife's pregnancy when the village officials demanded she abort her second pregnancy. *Id.* The IJ also noted that Petitioner had provided inconsistent testimony about when he learned of his wife's sterilization. *Id.*

The IJ also commented on certain implausibilities with Petitioner's testimony. *Id.* Specifically, Petitioner testified that he paid a fine or a bond to allow his wife to continue her second pregnancy, yet the local officials subsequently demanded that she abort the pregnancy. (JA 35-36).

Petitioner's credibility was further undermined, according to the IJ, when he admitted to fabricating his asylum application so he could obtain a simple work authorization card. (JA 36). If Petitioner was willing to "manufacture a story" to obtain his work authorization card, the IJ surmised, he would be willing to manufacture a story to obtain asylum. *Id.*

The IJ expressed further concern with Petitioner's credibility because of his demeanor. *Id.* Petitioner was "extremely slow" in answering questions and was "extremely hesitant" in responding to questions involving specific dates or information. *Id.* In addition, Petitioner became "extremely flustered" and responded slower and with more hesitancy during cross examination. *Id.* Petitioner also appeared "puzzled and confused," and was evasive and unresponsive during cross examination, particularly when questioned on his wife's sterilization. (JA 36-37). The IJ credited the radiology report as establishing the wife's sterilization, but noted that Petitioner failed to prove it was forced. (JA 37).

Having concluded that Petitioner failed to prove past persecution or a well-founded fear of future persecution, Petitioner logically failed to establish his eligibility for withholding of removal under Section 241(b)(3). (JA 37).

Furthermore, based on Petitioner's unreliable and incredible testimony, the IJ also concluded that Petitioner was not entitled to relief under the CAT.[3] *Id.* Whereupon, the IJ denied Petitioner's application for asylum and withholding of removal, his request for relief under the CAT, and his request for voluntary departure. (JA 38). Petitioner was ordered removed to China. *Id.*

D. The BIA Proceedings and Decision

On May 1, 2000, Petitioner filed a notice of appeal to the BIA. (JA 18-20). In this notice, Petitioner claimed that the decision of the IJ was not "sustainable under existing law" because the IJ improperly weighed the evidence which demonstrated that Petitioner and his wife had been persecuted by the Chinese government for violating China's family planning policy. (JA 19).

Petitioner advanced two arguments in his brief to the BIA. First, Petitioner argued that he established an entitlement to a grant of asylum based on his wife's forced sterilization and that the IJ's finding that there was no evidence of "forced" sterilization is not supported by the record. (JA 7-8). Second, Petitioner argued that the IJ's

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[3] The IJ denied Petitioner relief under the CAT even though Petitioner never sought relief on that ground. (*See* JA 43, 46). Petitioner does not seek relief under CAT in this Court, nor did he challenge the IJ's decision denying him such relief before the BIA. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal.").

adverse findings on his credibility were speculative. (JA 9). For these reasons, Petitioner maintained, he should be entitled to asylum. (JA 10).

On October 8, 2002, the BIA summarily affirmed the IJ's decision and adopted it as the "final agency determination" under 8 C.F.R. § 3.1(e)(4) (2002).[4] (JA 2). This petition for review followed.

SUMMARY OF ARGUMENT

I. Substantial evidence supports the IJ's determination that Petitioner failed to provide credible testimony in support of his application for asylum and withholding of removal and thus failed to establish his eligibility for relief. The IJ found that Petitioner's admitted willingness to fabricate information in his asylum application undermined his credibility. Moreover, the IJ noted that Petitioner's account contained inconsistencies and implausibilities that went to the heart of his claims and that Petitioner could not explain these problems with his testimony. For example, Petitioner gave inconsistent testimony about when and how he learned of his wife's sterilization, provided conflicting evidence about the state of her pregnancy when local officials allegedly demanded that she have an abortion, and told the implausible story that local officials authorized his wife's second pregnancy but then, upon discovering the pregnancy, immediately demanded that she end that pregnancy.

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[4] That section has since been redesignated as 8 C.F.R. §1003.1(e)(4). *See* 68 Fed. Reg. 9824, 9830 (Feb. 28, 2003).

These inconsistencies and implausibilities, when coupled with the IJ's observations of Petitioner's demeanor, provided substantial evidence to support the IJ's decision. Petitioner cannot meet his burden of showing that a reasonable factfinder would be compelled to conclude he is entitled to relief.

II. This Court lacks jurisdiction to review Petitioner's claim that the IJ improperly excluded certain documents from evidence. Petitioner did not raise this issue before the BIA and therefore did not exhaust his administrative remedies. Because petitioner did not exhaust his administrative remedies as required by the INA, this Court lacks jurisdiction to review the claim.

Petitioner's claim lacks merit in any event. Petitioner was given the opportunity to produce the original documents for consideration by the IJ but failed to avail himself of that opportunity. But even if Petitioner had produced the original documents for submission to the IJ, the documents would not have helped his case. Some of the documents were irrelevant to the issues before the IJ, while others were duplicative of testimony that the IJ had already credited. And although some of the documents would have supported Petitioner's claim that he paid fines for having too many children, those same documents contradicted Petitioner's testimony in some respects and so could have harmed his case. In sum, the IJ's refusal to admit the documents did not harm Petitioner.

ARGUMENT

I. THE IJ PROPERLY DETERMINED THAT PETITIONER FAILED TO ESTABLISH ELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL BECAUSE HE PROVIDED INCONSISTENT AND IMPLAUSIBLE TESTIMONY.

A. Relevant Facts

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

B. Governing Law and Standard of Review

Two forms of relief are potentially available to aliens claiming that they will be persecuted if removed from this country: asylum and withholding of removal.[5] *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,'" *Carranza-Hernandez v. INS*, 12 F.3d 4, 7 (2d Cir. 1993)

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[5] "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) (2004), cases relating to the former relief remain applicable precedent.

(quoting *Carvajal-Munoz v. INS*, 743 F.2d 562, 564 (7th Cir. 1984)), the standards for granting asylum and withholding of removal differ, *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987); *Osorio v. INS*, 18 F.3d 1017, 1021 (2d Cir. 1994).

1. Asylum

An asylum applicant must, as a threshold matter, establish that he is a "refugee" within the meaning of 8 U.S.C. § 1101(a)(42) (2004). *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 *De Souza v. INS*, 999 F.2d 1156, 1158 (7th Cir. 1993)); *see also Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (stating that persecution is an "extreme concept"). While the conduct complained of need not be life-threatening, it nonetheless "must rise above unpleasantness, harassment, and even basic suffering." *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000). Upon a demonstration of past persecution, a rebuttable

presumption arises that the alien has a well-founded fear of future persecution. *See Melgar de Torres v. Reno*, 191 F.3d 307, 315 (2d Cir. 1999); 8 C.F.R. § 208.13(b)(1)(i) (2004).

In 1996, Congress amended the statutory definition of "refugee" to provide that "forced abortion or sterilization, or persecution for failure to undergo such a procedure or for other resistance to a coercive population control program," constitutes persecution on account of political opinion. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") § 601(a)(1), 110 Stat. at 3009-689 (amending 8 U.S.C. § 101(a)(42)).

In addition, the BIA has held that an alien whose spouse has been subjected to coerced abortion or sterilization has established past persecution against himself. *In re C-Y-Z-*, 21 I. & N. Dec. 915, 918-19, 1997 WL 353222 (BIA June 4, 1997); *see also Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 92 (2d Cir. 2001). As this Court has recognized, this rule allows an alien to apply for asylum "based on past spousal persecution even when [the alien's spouse] remains in their native country." *Zhang v. INS*, 386 F.3d 66, 72 (2d Cir. 2004). *See also id.* at 72-73 (describing asylum claims based on China's coercive population control measures).

The asylum applicant bears the burden of demonstrating eligibility for asylum by establishing either that he was persecuted or that he "has a well-founded fear of future persecution on account of, *inter alia*, his political opinion." *Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003); *Osorio*, 18 F.3d at 1027. *See* 8 C.F.R. § 208.13(a)-(b)

(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*, Interim Dec. 3028, 19 I. & N. Dec. 439, 445, 1987 WL 108943 (BIA June 12, 1987), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647-48 (9th Cir. 1997) (applicant must provide testimony that is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account").

Because the applicant bears the burden of proof, he should provide supporting evidence when available, or explain its unavailability. *See Zhang*, 386 F.3d at 71 ("[W]here the circumstances indicate that an applicant has, or with reasonable effort could gain, access to relevant corroborating evidence, his failure to produce such evidence in support of his claim is a factor that may be weighed in considering whether he has satisfied the burden of proof."); *see also Diallo v. INS*, 232 F.3d 279, 285-86 (2d Cir. 2000); *In re S-M-J-*, Interim Dec. 3303, 21 I. & N. Dec. 722, 723-26, 1997 WL 80984 (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);

Ramsameachire v. Ashcroft, 357 F.3d 169, 178 (2d Cir. 2004); *Zhang*, 55 F.3d at 738.

2. Withholding of Removal

Unlike the discretionary grant of asylum, withholding of removal is mandatory if the alien proves that his "life or freedom would be threatened in [his native] country because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (2000); *Zhang*, 55 F.3d at 738. To obtain such relief, the alien bears the burden of proving by a "clear probability," *i.e.*, that it is "more likely than not," that he would suffer persecution on return. *See* 8 C.F.R. § 208.16(b)(2)(ii) (2004); *INS v. Stevic*, 467 U.S. 407, 429-30 (1984); *Melgar de Torres*, 191 F.3d at 311. Because this standard is higher than that governing eligibility for asylum, an alien who has failed to establish a well-founded fear of persecution for asylum purposes is necessarily ineligible for withholding of removal. *See Zhang v. INS*, 386 F.3d at 71; *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; *Chen*, 344 F.3d at 275 (factual findings regarding asylum eligibility must be upheld if supported by "reasonable, substantive and probative evidence in the record when considered as a whole"

(internal quotation marks omitted)); *see Secaida-Rosales v. INS*, 331 F.3d 297, 306-07 (2d Cir. 2003); *Melgar de Torres*, 191 F.3d at 312-13 (factual findings regarding both asylum eligibility and withholding of removal must be upheld if supported by substantial evidence). "Under this standard, a finding will stand if it is supported by 'reasonable, substantial, and probative' evidence in the record when considered as a whole." *Secaida-Rosales*, 331 F.3d at 307 (quoting *Diallo*, 232 F.3d at 287).

Where an appeal turns on the sufficiency of the factual findings underlying the IJ's determination[6] that an alien has failed to satisfy his burden of proof, Congress has directed that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B) (2004). *Zhang v. INS*, 386 F.3d at 73 n.7. 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).

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[6] Although judicial review ordinarily is confined to the BIA's order, *see, e.g.*, *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001), courts properly review an IJ's decision where, as here (JA 2), the BIA adopts that decision. *See* 8 C.F.R. §1003.1(e)(4) (2004); *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.

The scope of this Court's review under that test is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 74; *Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. *See also 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 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). Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992).

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

This Court gives "particular deference to the credibility determinations of the IJ." *Chen*, 344 F.3d at 275 (quoting

Montero v. INS, 124 F.3d 381, 386 (2d Cir. 1997)); *see also Qiu v. Ashcroft*, 329 F.3d 140, 146 n.2 (2d Cir. 2003) (the Court "generally defer[s] to an IJ's factual findings regarding witness credibility"). This Court has recognized that "the law must entrust some official with responsibility to hear an applicant's asylum claim, and the IJ has the unique advantage among all officials involved in the process of having heard directly from the applicant." *Zhang v. INS*, 386 F.3d at 73.

Because the IJ is in the "best position to discern, often at a glance, whether a question that may appear poorly worded on a printed page was, in fact, confusing or well understood by those who heard it," this Court's review of the fact-finder's determination is exceedingly narrow. *Zhang v. INS*, 386 F.3d at 73; *see also id.* ("'[A] witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression.'" (quoting *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946)) (citation omitted); *Sarvia-Quintanilla v. United States INS*, 767 F.2d 1387, 1395 (9th Cir. 1985) (noting that IJ "alone is in a position to observe an alien's tone and demeanor . . . [and is] uniquely qualified to decide whether an alien's testimony has about it the ring of truth"); *Kokkinis v. District Dir. of INS*, 429 F.2d 938, 941-42 (2d Cir. 1970) (court "must accord great weight" to the IJ's credibility findings). The "exceedingly narrow" inquiry "is meant to ensure that credibility findings are based upon neither a misstatement of the facts in the record nor bald speculation or caprice." *Zhang 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 Petitioner failed to provide credible testimony in support of his application for asylum and withholding of removal and thus failed to establish his eligibility for relief. The IJ's credibility determination rested on Petitioner's admission that he fabricated portions of his asylum application, Petitioner's inconsistent and implausible testimony, and Petitioner's demeanor during testimony. *See, e.g.*, *Qiu*, 329 F.3d at 152 n.6 ("incredibility arises from 'inconsistent statements, contradictory evidence, and inherently improbable testimony'" (quoting *Diallo*, 232 F.3d at 287-88)). Because all of these findings are fully supported by the record, Petitioner cannot show that a reasonable factfinder would be compelled to conclude that he is entitled to relief.

Perhaps the most compelling example of Petitioner's questionable credibility was his admission that he fabricated portions of his initial asylum application because "all [he] care[d]" about was his "CA [employment] card." (JA 96). As the IJ properly concluded, the inclination to falsify information to obtain an immigration benefit is strongly suggestive of Petitioner's inclination to falsify testimony to obtain asylum. (JA 36).

In this Court, Petitioner claims that he is not responsible for the false statements in his initial application because they were inserted by other "unscrupulous" people. Pet. Br. at 21-22. Petitioner misses the point. Regardless of who made up the stories for his asylum application, Petitioner knew that they were not true when he signed the application. The fact that his application contained false statements was irrelevant to him because, as he testified, all he cared about at the time was obtaining his work permit. (JA 95 ("[S]o I just pick up a day, any day that I could really come up to my mind, I thought all I need just to get a CA card I really wanted."); JA 96 ("I really don't know how they made it up because all I care at that time, at that very moment, was to get me that CA card.")). The IJ properly relied upon Petitioner's willingness to adopt falsehoods to obtain something about which he really cared to conclude that Petitioner's testimony lacked credibility.

In addition to Petitioner's admitted willingness to fabricate stories, several inconsistencies in his testimony undermined his credibility before the IJ. For example, Petitioner provided inconsistent testimony regarding how

he learned of his wife's sterilization. On direct examination, Petitioner testified that he learned of his wife's sterilization after he arrived in the United States. (JA 77). He related in detail of telephoning his brother-in-law's residence, speaking to his wife, learning for the first time his wife had given birth to twins and that she had been forced to undergo sterilization. (JA 77-78). Petitioner recalled experiencing feelings of helplessness because he was so far away in the United States. (JA 78). During cross-examination, however, Petitioner testified that he learned of his wife's sterilization "when [he] return[ed] home, [he] return[ed] from work, [h]e was planning to escape . . . some time around July [1992]." (JA 91). He elaborated that he was living in an area where several of his wife's relatives resided and his wife "told them to give the message to me." *Id.*

Similarly, the IJ noted that Petitioner provided inconsistent stories about the state of his wife's pregnancy when the local officials demanded she have an abortion. (JA 35). In his testimony, he stated that she was three months pregnant (JA 62-65, 88), but in his sworn affidavit, he had stated that she was nine months pregnant (JA 200).[7]

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[7] Petitioner's testimony revealed other implausible and inconsistent statements which were not specifically mentioned by the IJ. For example, Petitioner testified on direct examination that he had no acquaintances in Xiamen City (JA 74), until he met a former neighbor who often traveled to and from his village and communicated messages to and from his mother, (JA 76). On cross-examination, however, he testified that he had numerous relatives in Xiamen City, one or more of (continued...)

These obvious inconsistencies, when coupled with the IJ's observations of Petitioner's demeanor, support the IJ's conclusion regarding Petitioner's credibility. *See Zhang v. INS*, 386 F.3d at 73 ("[T]he IJ has the unique advantage among all officials involved in the process of having heard directly from the applicant. A fact-finder who assesses testimony together with witness demeanor is in the best position to discern, often at a glance . . . whether inconsistent responses are the product of innocent error or intentional falsehood.").

In response, Petitioner contends that the IJ seized on trivial inconsistencies. He argues, for example, that because his wife did not communicate to him in person the event of her sterilization, his failure to recall accurately the date is understandable and excusable. Pet. Br. at 18. The

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[7] (...continued)
whom communicated information to him from his wife. (JA 91). In addition, Petitioner testified that he first learned of the birth of his twin sons when he telephoned his brother-in-law after arriving in the United States (in December 1992). (JA 77-78, 199). At this time, the twin sons would have been more than 2 years old. Despite being in contact with his family, Petitioner claimed he did not learn of the birth of the twins until after December 8, 1992. *Id.* Similarly, Petitioner's testimony about the fines was inconsistent. He first testified that he fully paid the fine to register all three children when he was in the United States. (JA 61). Petitioner subsequently testified that the fine was doubled and that an amount remains outstanding, but does not know the amount. (JA 61-62). Petitioner then testified that the fine was 2000 yuan, not 1500, as he previously testified, and that it was paid in advance of his wife's second pregnancy. (JA 86-87).

flaw in Petitioner's argument is that he did more than fail to recall "a date"; he provided substantially and materially inconsistent testimony of the facts and circumstances of this memorable event. As described above, he provided detailed testimony regarding where, when and how he received the presumably devastating news of his wife's forced sterilization.

Similarly, Petitioner argues that the inconsistency with his testimony regarding the status of his wife's pregnancy at the time of the abortion demand was adequately explained and, in any event, a trivial point. Pet. Br. at 18. The IJ's adverse credibility finding, however, was not predicated on an isolated factual inconsistency. It was the frequency of inconsistencies, the materiality of the facts on which Petitioner provided incongruent testimony, and the manner and demeanor in which he delivered the testimony, which served as the foundation for the IJ's conclusion.

Moreover, contrary to his argument, Petitioner's inconsistencies were not limited to isolated and trivial facts. Petitioner's claim that his wife was forcibly sterilized is at the core of his claim of past persecution. Such a life altering and traumatic event would presumably imprint a lasting memory, yet Petitioner could not recall how or where he was when he received the information. Likewise, the government's demand for his wife's abortion is critical to Petitioner's claim of past persecution and, if true, would tend to substantiate his claim of forced sterilization. Notwithstanding the obvious personal significance of these events, Petitioner could not provide consistent or plausible testimony on either subject. His

inability to do so provided the IJ with "specific, cogent" reasons for her adverse credibility finding. *See Zhang v. INS*, 386 F.3d at 74.

The IJ also based her credibility finding on her conclusion that parts of Petitioner's testimony were implausible. Specifically, the IJ noted that it was implausible that local officials would authorize a second pregnancy upon payment of a fine (or bond), and then demand that Petitioner's wife undergo an abortion. (JA 35-36). This proposition is particularly implausible given Petitioner's testimony and statements. Again, according to one version offered by Petitioner, he and his wife paid a 1500 or 2000 yuan fine to become pregnant. (JA 86-87). If the fine was paid, and the pregnancy authorized, as claimed by Petitioner, then it was wholly illogical and implausible that the local birth control officials would have "discovered," or become "suspicious," of his wife's "stomach . . . showing" when they appeared at a government office to register for a marriage certificate. (JA 63, 87). There would have been no need for suspicion as the town birth control officials had authorized the pregnancy. To then immediately demand an abortion and threaten arrest for an authorized pregnancy defies reason.

Petitioner responds by citing the State Department Profile on China to support his argument that the one-child policy was inconsistently enforced. Pet. Br. at 20. Nothing in the State Department profile, however, reasonably supports the proposition that Fujian Province local birth control officials would authorize a second pregnancy upon payment of a fine (or bond) and then demand an immediate abortion. (*See* JA 139). In other

words, while the country profile might explain why local officials might authorize a second pregnancy, it does not offer any logical explanation for why local officials would authorize a pregnancy and then immediately demand an end to that pregnancy.

Finally, the IJ's credibility determination was buttressed by her observations of Petitioner's demeanor and behavior during testimony and cross-examination. The IJ found that Petitioner was hesitant when asked specific questions, flustered upon questioning, and distressed and confused during cross-examination. Furthermore, according to the IJ, Petitioner "was extremely evasive and unresponsive regarding questions from the Service during cross-examination, particularly regarding his wife's alleged sterilization." (JA 36-37).

The record reveals several instances where Petitioner provided nonresponsive answers during cross-examination. (JA 89-93). In particular, Petitioner was asked in two instances to explain why the application affidavit stated that government officials demanded his wife to abort her pregnancy in the ninth month, when his testimony at the hearing was that the demand was made at three months. (JA 89-90). Petitioner was asked twice why he did not include the fact of his wife's sterilization in his asylum application. (JA 91-92). Petitioner was asked in four successive questions what information his wife communicated to him about the details of the sterilization procedure. (JA 91-93). Petitioner's repeated failure to provide responsive answers, and his hesitancy to respond to questions on cross-examination, as observed by the IJ

(JA 36)[8], supports the IJ's credibility finding. *See Zhang v. INS*, 386 F.3d at 74.

Petitioner contends that the IJ improperly penalized him for his demeanor, Pet. Br. at 22-23, but the IJ properly relied on Petitioner's conduct during the removal proceedings. Indeed, this Court accords "particular deference" to an IJ's credibility determinations *precisely because* the IJ is able to observe and evaluate "witness demeanor." *Zhang v. INS*, 386 F.3d at 73-74.

In short, the record fully supports the IJ's conclusion that Petitioner lacked credibility and thus that he failed to meet his burden of proving past persecution. Petitioner cannot meet his burden of showing that a reasonable factfinder would be compelled to conclude that he was entitled to relief.

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[8] Petitioner first stated that his wife provided details about the procedure during a telephone conversation while he was in the United States. (JA 92). After providing non-responsive answers in response to the first three questions, Petitioner testified that he did not inquire about the details because his wife would not have provided any. (JA 93).

II. THE COURT LACKS JURISDICTION OVER PETITIONER'S CLAIM THAT THE IMMIGRATION JUDGE FAILED TO ADMIT CERTAIN DOCUMENTARY EVIDENCE, BUT PETITIONER'S CLAIM LACKS MERIT IN ANY EVENT.

At the close of Petitioner's removal hearing, the IJ held that certain documents submitted by Petitioner would not be admitted into evidence because Petitioner had not properly authenticated those documents as required by regulation. (JA 34). Petitioner challenges that decision. This Court lacks jurisdiction to consider that challenge, and it is meritless in any event.

A. This Court Lacks Jurisdiction Over Petitioner's Claim that the IJ Improperly Excluded Certain Documents Because Petitioner Did Not Raise This Issue Before the BIA.

1. Relevant Facts

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

2. Governing Law and Standard of Review

The INA requires that all available administrative remedies be exhausted before seeking judicial review of a final removal order. *See* 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the alien

has exhausted all administrative remedies available to the alien as a right . . . ."). "Under the doctrine of exhaustion of administrative remedies, a party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself." *Howell v. INS*, 72 F.3d 288, 291 (2d Cir. 1995) (quotation omitted). If exhaustion is required, and the party fails to do so, the court may dismiss the action for want of subject matter jurisdiction. *Id.*

Arguments or claims not raised to the BIA are deemed waived for failure to exhaust administrative remedies. *Opere v. INS*, 267 F.3d 10, 14 (1st Cir. 2001); *see Chew v. Boyd*, 309 F.2d 857, 861 (9th Cir. 1962) ("failure to raise . . . a particular question concerning the validity of [a final] order constitutes a failure to exhaust administrative remedies with regard to that question, thereby depriving a court of appeals of jurisdiction to consider that question."). *See also Arango-Aradondo v. INS*, 13 F.3d 610, 614 (2d Cir. 1994) (declining to consider constitutional claim for ineffective assistance of counsel that was not raised before the BIA); *Correa v. Thornburgh*, 901 F.2d 1166, 1171 (2d Cir. 1990) (rejecting, in a habeas corpus proceeding, a claim that was "never raised . . . either before the Immigration Judge or on appeal to the BIA").

"The purpose of Section 1252(d)(1)'s exhaustion requirement is (1) to 'ensure that the INS, as the agency responsible for construing and applying the immigration laws and implementing regulations, has had a full opportunity to consider a petitioner's claims,' *Theodoropoulos v. INS*, 358 F.3d 162, 171 (2d Cir. 2004) [, *cert. denied*, 125 S. Ct. 37 (2004)]; (2) to 'avoid

premature interference with the agency's processes,' *Sun v. Ashcroft*, 370 F.3d 932, 940 (9th Cir. 2004); and (3) to 'allow the BIA to compile a record which is adequate for judicial review.' *Dokic* [*v. INS*], 899 F.2d [530] at 532 [(6th Cir. 1990)]." *Ramani v. Ashcroft*, 378 F.3d 554, 559 (6th Cir. 2004).

When statutorily required, exhaustion of administrative remedies is jurisdictional and must be strictly enforced, without exception. *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required."); *Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561, 579 (1989) ("[E]xhaustion of administrative remedies is required where Congress imposes an exhaustion requirement by statute."). *Cf. Bastek v. Federal Crop Ins. Corp.*, 145 F.3d 90, 94 (2d Cir. 1998) (common law exhaustion doctrine "recognizes judicial discretion to employ a broad array of exceptions" for the failure to exhaust administrative remedies).

This Court recently held that 18 U.S.C. § 1252(d) embraces the statutory, or mandatory, exhaustion doctrine. *Theodoropoulos*, 358 F.3d at 172. "[Section] 1252(d)'s mandate that unless a petitioner 'has exhausted all administrative remedies available,' a 'court may [not] review a final order of removal,' 18 U.S.C. § 1252(d), applies to all forms of review . . . ." *Id.* at 171 (alteration in original). Thus, the failure to raise specific claims, including a challenge to an evidentiary ruling by the IJ, to the BIA will constitute a waiver of the claim and preclude consideration by the appellate court for want of jurisdiction. *See Vatulev v. Ashcroft*, 354 F.3d 1207, 1211

(10th Cir. 2003) (court without jurisdiction to consider IJ's "implicit rejection of . . . new evidence" when it was not appealed to BIA). *See also Ravindran v. INS*, 976 F.2d 754, 763 (1st Cir. 1992) (complaints involving defective translations, judicial conduct at hearing and evidentiary rulings should have been raised at the BIA for appellate court to have jurisdiction).

3. Discussion

Petitioner's failure to exhaust his administrative remedies as to the IJ's ruling excluding certain documentary submissions deprives this Court of subject matter jurisdiction to review that ruling. As neither his Notice of Appeal to the BIA (JA 19) nor his brief (JA 5-10) made any mention or reference to the IJ's evidentiary ruling, Petitioner failed to exhaust his administrative remedies on this issue.

Further, to the extent that an exception existed which would excuse Petitioner's failure to exhaust, *see Theodoropoulos*, 358 F.3d at 172-73, he presents no factual or legal basis to excuse his failure. Petitioner's failure to raise to the BIA the IJ's exclusion of certain documents deprived the Court of an adequate record to review the ruling. This Court lacks jurisdiction to review this claim.

B. Petitioner's Challenge to the IJ's Evidentiary Ruling Lacks Merit.

As a preliminary matter, Petitioner's claim that the IJ improperly excluded documents is undermined by the record in this case. When Petitioner first submitted the copies of his documents at the 1999 hearing, the IJ expressly notified Petitioner that he needed to obtain originals for the proceedings. (JA 52). Nevertheless, at the close of the 1999 hearing, the IJ admitted two of the documents (the marriage certificate and the household registry) into evidence. (JA 97-98). With respect to the other documents, even though the hearing was continued on at least two occasions, Petitioner never attempted to offer the original documents to the IJ or even to explain that he could not obtain the originals.

Petitioner now claims that the IJ should have enlisted the United States Government to undertake efforts to authenticate the documents, and that as a person being persecuted it is more difficult for him to obtain the necessary authentication. Pet. Br. at 17. Petitioner never asked for assistance in obtaining original documents, however. And the IJ cannot be faulted for failing to offer any assistance *sua sponte* because she had every reason to believe that obtaining original documents would be easy for Petitioner: he had already presented the original documents to the asylum officer, who had returned the originals to Petitioner.

Even if the IJ had admitted and considered all the documentary evidence marked for identification, the

additional evidence was not "so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Elias-Zacarias*, 502 U.S. at 483-84. In the "exceedingly narrow" inquiry of reviewing the IJ's adverse credibility findings, the Petitioner's inconsistent statements on matters material to his claim and the "'inherently improbable testimony'" on these matters, justified the IJ's conclusions. *See Zhang v. INS*, 386 F.3d at 74 (quoting *Diallo*, 232 F.3d at 288). The additional documents offered by Petitioner would not have rendered the IJ's findings as being based on a misstatement of facts, or "bald speculation or caprice." *Id.*

Moreover, the documents, even if considered by the IJ, neither contradict nor undermine any of the IJ's factual findings. For example, Exhibits 7 and 8 (Birth Control Operation Letter and a Surgical Operation Certificate) both reference Petitioner's wife and appear to bear on her alleged sterilization. (JA 182-85). These exhibits, however, do not add any information or evidence not already considered by the IJ. Exhibit 15, the radiological report from Guam Memorial Hospital, was admitted into evidence and considered by the IJ. (JA 37, 112-113). The IJ found that "it appears that there is some likelihood that [Petitioner's] wife was, in fact, sterilized. However, the [Petitioner] has not established that th[e] sterilization was forced." (JA 37). Exhibits 7 and 8 merely substantiate the likelihood of the sterilization; they do not support Petitioner's claim that the sterilization was forced.[9]

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[9] The exhibits which document the date of the tubal (continued...)

Contradictory and implausible testimony convinced the IJ to find that Petitioner failed to carry his burden of proving past persecution or a well-founded fear of future persecution, and these documents, if considered, would not impugn that finding.

Several other exhibits would likely have no bearing on the IJ's decision since they contain either irrelevant information or document uncontroverted facts. Exhibit 13, a certification for the birth of Petitioner's twin boys, contains the date of birth and the fine amount paid. (JA 158). Exhibit 10 appears to be a copy of two photographs, presumably Petitioner's family (JA 176), and Exhibit 9 purports to be Petitioner's birth certificate. These exhibits do not bear on any issues in dispute and were not relevant to any of the IJ's findings.

Finally, Exhibits 3-6 arguably support the IJ's finding that Petitioner provided inconsistent testimony. Those Exhibits, which all purport to be payment receipts for a fine paid to Tingjiang Town Birth Control office (JA 186-92), reveal a total fine imposed of 1500 yuan on Petitioner and his wife for two excessive births. *Id.* They appear to document payments beginning in November 1992 and ending in July 1996. *Id.* Insofar as the documents

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[9] (...continued)
ligation as March 20, 1992, also highlight the inconsistent testimony offered by Petitioner about when he learned of the sterilization and where he was. (*See* JA 35). The documents also serve to undermine Petitioner's credibility because he makes no mention of forced sterilization in his application for asylum. (JA 200).

contradict Petitioner's testimony that a balance remains unpaid (JA 61), and his testimony as to when the fine was paid (JA 60-61), the IJ's adverse credibility finding is further justified.

More importantly, however, the IJ did not base her findings on whether a fine was imposed, the amount of the fine, or the purpose of the fine. (JA 35-37). The IJ's finding on the implausibility of Petitioner's testimony would not have been influenced if these documents were admitted because the receipts make no mention of abortion, nor do they indicate when notice of the fine was given to Petitioner. The documents, had they been admitted, in no way contradict or undermine the IJ's factual findings because they do not correct or explain the inconsistent and implausible testimony of Petitioner. In fact, the documents suggest a version of events different from both of the versions offered by Petitioner during the hearing. Thus, the IJ decision embraces "specific, cogent" reasons for the adverse credibility finding and a "legitimate nexus" between the reasons and the finding. *Zhang v. INS*, 386 F.3d 66, 74.

CONCLUSION

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

Dated: November 24, 2004

Respectfully submitted,

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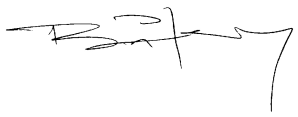
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,468 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)

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

such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.