05-5183-ag *To Be*
Argued By:
MICHAEL E. RUNOWICZ

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United States Court of Appeals

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R THE SECOND CIRCUIT
Docket No. 05-5183-ag

HERMES CHAVES-LOPEZ,
Petitioner,

-vs-

ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, GARY COTE, HARTFORD OFFICER IN CHARGE, BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES, and BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES,
Respondents.

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 under § 242(b) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(b) (2005), to review petitioner's challenge to the August 31, 2005, final order of the Board of Immigration Appeals denying him asylum.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a reasonable fact finder would be compelled to reverse the Immigration Judge's determination and finding that petitioner had not been subject to past persecution or had a well-founded fear of future persecution, where petitioner's testimony and evidentiary submissions failed to provide proof that the threats and money demands made of him by Colombian guerrillas had been because of his membership in a social group (the Liberal Political Party) or had been based upon political opinion, and where his family who were members of the same political party had continued to reside in Colombia without any apparent problems or retribution from guerrilla groups.

2. Whether the Board of Immigration Appeals erred in summarily affirming the Immigration Judge's finding that petitioner had failed to establish his eligibility for asylum, withholding of removal, and relief under the Convention Against Torture.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-5183-ag

HERMES CHAVES-LOPEZ,

Petitioner,

-vs-

ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, GARY COTE, HARTFORD OFFICER IN CHARGE, BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES, and BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES,

Respondents.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR ALBERTO R. GONZALES
Attorney General of the United States

Preliminary Statement

Hermes Chaves-Lopez, a native and citizen of Colombia, petitions this Court for review of an August 31, 2005, decision of the Board of Immigration Appeals ("BIA") (Joint Appendix ("JA") 2). The BIA summarily affirmed the May 21, 2004, decision of an Immigration

Judge ("IJ"), (JA 94), denying petitioner asylum, withholding of removal under the Immigration and Nationality Act of 1952, as amended ("INA" or "Act"), and relief under the Convention Against Torture ("CAT")[1]. (JA 2 (BIA's decision), 94-108 (IJ's decision and order)).

Petitioner sought asylum, withholding, and CAT relief based on a claim of past persecution by Colombian guerrillas due to his claimed membership in a political party and his refusal to pay extortion money to those guerrillas. Substantial evidence supports the IJ's determination that petitioner failed to provide sufficient evidence in support of his claim for asylum.

First, there is no evidence in the record that the threats made by guerrillas for money payments were made because of petitioner's affiliation with a political party, or otherwise for political purposes. Rather, the evidence demonstrated that the demands for money were no more than criminal extortion of individuals perceived by the guerillas to have funds.

Second, petitioner did not provide sufficient evidence that he had a well-founded fear of future persecution, particularly since petitioner has been gone from Colombia for three and one-half years and there was no evidence that the guerrillas had continued to look for petitioner in Cali,

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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).

Colombia, after he had left his farm, and where other members of his family including his mother, sisters, brothers and son, still reside in Colombia without any problems from the guerrillas.

Finally, the BIA acted properly in summarily affirming the IJ's decision. For all these reasons, the petition for review should be denied.

Statement of the Case

Petitioner, Hermes Chaves-Lopez, arrived in the United States at Miami, Florida, on January 4, 2001, as an arriving alien in transit without a visa. (JA 96, 112, 345).

On January 24, 2001, petitioner was issued a Notice to Appear for removal proceedings. (JA 345-46).

On May 4, 2001, Immigration Judge Keith C. Williams ordered petitioner removed to Colombia after petitioner failed to appear at a removal hearing in Miami, Florida. (JA 330).

On October 30, 2001, after petitioner moved to reopen the removal hearing claiming that he had not received notice of the May 4 hearing, IJ Williams granted the motion to reopen and directed that a new hearing be scheduled. (JA 319).

After several continuances, (JA 295, 296), a master removal hearing was scheduled in Miami for August 30, 2002. (JA 293). At this hearing, (JA 109-115), IJ Williams found that petitioner's removability had been established, (JA 114), but continued the hearing until November 8, 2002, for petitioner to either file an asylum

application or move to change the venue of the proceedings, (JA 115).

On November 8, 2002, petitioner filed a Request for Asylum in the United States. (JA 118, 256-65).

On November 8, 2002, at a hearing in Miami, the petitioner was advised that his next court appearance would be in Hartford, Connecticut. (JA 121). Petitioner appeared before an immigration judge in Hartford on January 21, 2003. (JA 122). After several continuances, the asylum removal hearing was then scheduled for May 21, 2004. (JA 133).

On May 21, 2004, an asylum/removal hearing was held before Immigration Judge Michael W. Straus. (JA 134-170). The IJ rendered an oral decision denying petitioner asylum and withholding of removal. (JA 96-108).[2]

On June 17, 2004, the petitioner filed an appeal to the BIA. (JA 88-90). On August 31, 2005, the BIA summarily affirmed the IJ's decision. (JA 2).

On September 29, 2005, the petitioner filed a petition for review with this Court.

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[2] In the Joint Appendix, at pages 31-42, appears a corrected version of the oral decision of the immigration judge with apparent edits made by Immigration Judge Straus. This version, seemingly submitted to the BIA as an exhibit with petitioner's brief in support of his appeal (JA 6-16), also bears a signature of IJ Straus. For purposes of this brief, all references to the IJ's oral decision will be to this corrected and signed version.

Statement of Facts

A. Hermes Chaves-Lopez's Entry into the United States and Application for Asylum, Withholding of Removal and CAT Relief

Petitioner Hermes Chaves-Lopez is a native and citizen of Colombia, where he was born on August 11, 1968. (JA 140, 256, 274). He arrived in Miami, Florida, on January 4, 2001, as a traveler in transit without a visa on his way to Spain. (JA 112). At that time, in a sworn and subscribed written statement given at Miami International Airport by petitioner to an Immigration and Naturalization Service (INS) Officer, petitioner admitted that he had been born in Colombia, that he was not a citizen of the United States; that he presented no documents to an immigration inspector upon his arrival in Miami; that he had presented himself to the airline carrier, American Airlines, as an intended "Transit Without Visa passenger enroute through the United States, with final destination being Madrid, Spain"; that he had no intention of proceeding on to the final destination; and that he did not have, nor had he ever applied for, a United States Visa to enter this country legally. (JA 274-75). Petitioner further told the INS officer that he did not belong to any type of organization in Colombia. (JA 276).

B. Petitioner's Removal Proceedings

On January 24, 2001, petitioner was served with a Notice to Appear which charged that he was an "arriving alien" who was subject to removal from the United States as "an alien who, by fraud or willfully misrepresenting a material fact, seeks to procure . . . a visa, other documentation, or admission into the United States or other benefit provided under the [Immigration and

Nationality] Act," (JA 345). The Notice to Appear further charged that petitioner was also subject to removal "as an immigrant who at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, or who is not in possession of a valid unexpired passport, or other suitable document, or identity and nationality document . . . . " (*Id*.)

In support of the charges, the INS alleged in this Notice that: 1) petitioner was not a citizen or national of the United States; 2) petitioner was a native and citizen of Colombia; 3) on January 4, 2001, petitioner sought to procure (or procured) a visa, other documentation, or admission into the United States by fraud and by willfully misrepresenting a material fact in that petitioner presented himself as a TWOV [transit without visa] passenger and did not possess a valid United States entry document; and 4) petitioner was an immigrant without a valid unexpired passport or other suitable travel document or document of identity or nationality. (JA 345).

On May 4, 2001, petitioner failed to appear at a removal hearing scheduled in Miami, Florida. On that date, the IJ issued a decision finding that removability of petitioner as charged in the Notice to Appear had been established. Accordingly, the IJ issued an order that the petitioner "shall be removed to COLOMBIA." (JA 330).

On October 29, 2001, petitioner filed a Motion to Reopen asserting that he had failed to appear because he had never received notice of the May 4 hearing. (JA 320). The IJ granted the motion the following day and indicated that a new hearing notice would be sent. (JA 319). This hearing was ultimately held in Miami, Florida on August 30, 2002. (JA 109-121). At this hearing, in sworn

testimony before the IJ, petitioner admitted that he was a native and citizen of Colombia, (JA 111), that he had arrived in the United States on January 4, 2001, as a "transit without a visa" on his way to Spain and that he did not have a visa, (JA 112). Petitioner told the IJ that he got the idea to seek political asylum when he arrived in Miami and that he had not intended to do so (i.e., to seek asylum), when he had first boarded the plane in Colombia. (JA 113). The IJ did not find petitioner to be credible and found that petitioner's removability had been established as charged. (JA 114). As petitioner had indicated an intent to file a petition for asylum and a request for a change of venue to Connecticut where he was then residing, the IJ continued the matter for purposes of the filing of an application for asylum. (JA 115).

On November 8, 2002, petitioner filed with the IJ in Miami an Application for Asylum and for Withholding of Removal. (JA 118, 256-65). The Asylum Application provided that petitioner was seeking asylum and withholding of removal based on political opinion, membership in a particular social group, and under the "Torture Convention." (JA 260).

The stated reason for seeking the asylum was that petitioner had been threatened by a subversive group, ELN, because he "refused to feed and provide shelter for their guerrillas." (JA 260). The Application also provided that, although petitioner was a member of the Colombian Liberal Party, and had voted in elections, neither he nor his family members continued to participate in any way with this organization or group. (JA 261).

C. Petitioner's Removal Hearing of May 21, 2004

After several continuances made at petitioner's request, his asylum/removal hearing was conducted in Hartford, Connecticut on May 21, 2004, by Immigration Judge Michael W. Straus.

1. Documentary Submissions

Eight numbered exhibits were submitted at the May 21, 2004, Removal/Asylum Hearing. The Notice to Appear, as the charging document, was admitted as Exhibit 1. (JA 135, 345-46).

Marked as Exhibit 2 was the Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act, (JA 136, 273-77), which had been given by petitioner to an INS officer at Miami International Airport on January 4, 2001, when he had tried to enter into the United States. (JA 135-36). A Credible Fear Worksheet, prepared by an INS Asylum Officer in Miami, Florida, was marked as Exhibit 3. (JA 136, 267-270). A notice concerning the consequences of filing a frivolous application for Asylum was marked as Exhibit 4. (JA 138, 266).

Petitioner's Asylum Application (JA 256-65) was marked as Exhibit 5. (JA 138). In this Application, petitioner asserted that he had been threatened with death by ELN guerrillas because he had refused to provide food and shelter to the guerrilla groups passing by his property. (JA 260, 265).

Exhibit 6 was a Profile of Asylum Claims and Country Conditions for Colombia prepared by the United States

Department of State. (JA 138, 246-55). This statement provided that "[t]he vast majority (perhaps as high as 90 percent) of asylum claims from Colombia are based on political grounds even in cases where there is little evidence that the political views of the applicant were related to the mistreatment alleged." (JA 250). The profile also provided that "[a] small number (five percent) of claims are received from applicants alleging that their membership in a well-to-do business and/or landowning class puts them at particular risk from guerrilla groups. Careful review of such applications usually reveals that the terrorists are motivated to use extortion or ransom to obtain funds to finance their activities. Since the threat in most such cases is localized in nature, internal relocation may be a viable option." (JA 249).

Exhibit 7 was the United States Department of State Country Reports on Human Rights Practices for Colombia in 2001. (JA 138, 208-45). A similar report for Colombia for 2003 was marked as Exhibit 8. (JA 138, 171-207).

2. Hermes Chaves-Lopez's Testimony

Petitioner was the only witness to testify at the May 21, 2004, Asylum/Removal Hearing. After being sworn by the IJ, petitioner testified that he had been born in Cali, Colombia on August 11, 1968, and that except for the last six months before he came to the United States, he had lived in Cali for his whole life. (JA 140). In those last six months he lived at a ranch that was thirty minutes away from Cali. (*Id*.) Petitioner testified that his profession in Colombia was that of an industrial mechanic although he had intended to become a farmer. (*Id*.)

While he lived in Colombia, petitioner testified that he had been associated with the Liberal political party, a

major political party much like the Democratic and Republican parties in the United States, (JA 141-142), and that he helped raise funds for a political campaign of Carlos Olgin. (JA 142). When asked if his involvement with the Liberal party had caused him any difficulties, petitioner responded that the guerrillas were "against everybody, every person that is against them . . . ." (JA 142).

In answer to his own counsel's question as to why he was seeking asylum, petitioner explained that he had a ranch and some men dressed in military attire came and asked for food and to camp overnight. (JA 143). The men left the next day but returned a few days later. When they returned, petitioner stated that they became angry because he and his brother would not feed them. (*Id*.). The men identified themselves as guerrillas, threw him and his brother to the floor, kicked them and told them that they (he and his brother) would have to give the guerrillas a monthly payment. (JA 144). After that, the guerrillas left. (*Id*.)

Petitioner further testified that on December 8, 2000, at a festival, the guerrillas returned and asked if they "had the money ready to give them." (JA 144). Petitioner did not give them any money and was given a deadline of two days to leave the ranch. (JA 144-145). Two days later, when he saw guerrillas marching, he ran away to hide, but the guerrillas apparently saw him and fired some shots at him. (JA 145). Petitioner stated he ran to the town and boarded a bus to Cali. (*Id*.). He did not report the incident to the police. (*Id*.) Petitioner then testified that he later learned that the guerrillas took everything from the ranch and vandalized it. (JA 145-46).

In further response to his own attorney's questions, petitioner explained that at the festival, his neighbors advised him to pay the million pesos that the guerrillas were asking so he could remain at the farm. (JA 146). Instead, petitioner decided "to abandon the place." (*Id*.) It wasn't until after his attorney asked him if his membership in the Liberal party had been raised at the farm, that petitioner stated that the guerrilla commander had told him "you are liberal and you have to contribute to our cause . . ." (JA 150).

On cross-examination, petitioner admitted that he had brothers and sisters living in Colombia, (JA 152). One is a salesperson of construction materials, another a secretary, a sister works in the municipality of Cali and a brother works for a newspaper. (JA 152). They are all liberals who supported the same candidates for President of Colombia, although none were active campaigners. (JA 154). Only one of these brothers and sisters lived with him at the farm. This brother, named Wilder, had also made an asylum application in the United States which was turned down. (JA 154-55).

Under further cross, petitioner admitted that the guerrillas wanted to extort him, and that in Colombia, all farmers had to pay money to the guerrillas to be able to work. (JA 155). He further stated that even companies in Cali and other areas of Colombia receive notices from the guerrillas to pay money or have property burned down. (JA 155-56).

In answer to questions asked of him by the IJ, petitioner explained that he took possession of the farm in June of 2000, and moved there. (JA 159-60). Petitioner also testified that in November when the guerrillas first came to his farm they told him they were the Colombian

military. (JA 162). Petitioner told the IJ that it was only when the guerrillas came the second time and petitioner told them that the food had been harvested and sold to the city that the guerrillas got angry. (JA 163). When asked by the IJ why he had not written on his asylum application that the guerrillas had kicked him, petitioner tried to say that when he arrived in the United States he was confused. (JA 163). However, when the IJ noted that his asylum application had not been filed for two years, petitioner explained that he had not been asked too many questions and he only answered questions when asked. (JA 163).

Under further questioning from the IJ, petitioner admitted that the guerrillas had asked for one million pesos per month, which would be about $400. (JA 164). The guerrillas simply said that they would come each month to pick up the money. (JA 164-65). Petitioner also admitted that the other farmers in the area were paying the guerrilla money or they vacated their land. (JA 165). In response to the question asked by government counsel, "Sir, anyone who has money in Columbia (sic) has the same risk of being threatened by guerrillas who are looking for money, right?," petitioner replied "(indiscernible) totally." (JA 166).

D. The Immigration Judge's Decision

At the conclusion of the hearing, Immigration Judge Michael W. Straus issued an oral ruling denying Hermes Chaves-Lopez's application for asylum, his application for withholding of removal, and his application for withholding of removal under the Torture Convention. (JA 42). The IJ further ordered that Hermes Chaves-Lopez be removed to Colombia. (*Id*.).

The IJ began his ruling by noting that petitioner had been charged in the Notice to Appear with being a native and citizen of Colombia who as an arriving alien was inadmissible to the United States because he had presented himself as a passenger in transit without a visa who did not possess any valid entry documents, (JA 32). The IJ further noted that petitioner had pled to the charges in Immigration Court in Miami. (*Id*.). Accordingly, IJ Straus found that petitioner was not admissible to the United States. (JA 33). The IJ then considered petitioner's application for asylum and withholding of removal. (*Id*.)

After summarizing the evidence of record, which included petitioner's testimony, the asylum application, and various background reports from the United States Department of State, the IJ recounted that to be eligible for asylum, the petitioner needed to establish that he was a "refugee" within the meaning of Section 101(a) of the INA, that is, the petitioner had to demonstrate that he had "either suffered past persecution, or has a well-founded fear of future persecution on [account] of race, religion, nationality, membership in a particular social group, or political opinion." (JA 37). In analyzing petitioner's claim, the IJ indicated that he would be guided by the regulations at 8 C.F.R. § 1208.13(b). (JA 37).

Before commencing his analysis and findings, the IJ noted although petitioner had arrived in the United States in January of 2001, petitioner had not filed his asylum application until November of 2002. Although it was unclear to the court why petitioner's application had not been made in a timely fashion, the IJ gave the petitioner the benefit of the doubt and found that there had been some sort of exceptional or extraordinary circumstances. (JA 38).

The first finding made by the IJ was that petitioner had not shown that he was a victim of past persecution under 8 C.F.R. §1208.13(b)(1). The IJ, noting that petitioner had claimed that ELN guerrillas had threatened him and had harmed him by kicking him when he did not give them what they wanted in food or money, found that petitioner's testimony was not clear about what had really happened or whether he had been really injured, and further noted that petitioner had not mentioned these acts in his asylum application. Accordingly, based on petitioner's testimony, the IJ did not conclude that this incident alone "would rise to the level of persecution." (JA 38).

The IJ then considered, if there had been any persecution, whether or not that persecution was on account of any of the five protected grounds. Although petitioner was seeking asylum based on political opinion and on membership in a particular social group, the IJ found that respondent did not establish membership in any particular social group. (JA 39).

In trying to determine whether any past persecution was attributable to any political opinion, the IJ noted that petitioner testified that the guerrillas had told him, "you Liberals must contribute." (JA 39). The IJ found, however, based on the evidence, that the ELN guerrillas had requested extortion money from the other farmers and land owners in the area, and that there had been no evidence presented by petitioner that he had been "singled out or treated differently by the guerrillas because he may have been a member of the Liberal party." (JA 39). The IJ concluded that the demand by the guerrillas for money from petitioner was simply extortion as the record before the IJ was clear that the ELN had made the same demands on others who owned land or farms in the area, (JA 39), and even the background materials in evidence indicated

that the guerrillas in Colombia "frequently used extortion to raise funds based on an individual's wealth or perceived wealth." (JA 39). The IJ also found there was nothing in the record to conclude that the demands for money and threats for non-payment were the result of petitioner's political opinion. (JA 39-40). Accordingly, after considering the entire record, the IJ found that even if there had been past persecution of the petitioner by the guerrillas, it was not on account of political opinion or based on membership in a particular social group. (JA 40).

Applying the criteria of 8 C.F.R. §1208.13(b)(2), the IJ then proceeded to consider whether the evidence presented by petitioner would support a finding that he had a well-founded fear of future persecution. The IJ found that petitioner had not established a reasonable possibility of future persecution by the ELN guerrillas, given that the incidents about which petitioner had testified had occurred around three and one-half years ago and no evidence had been presented by petitioner that the guerrillas had subsequently sought him out at his residence in Cali after he had left his farm. (JA 40). Moreover, the IJ noted that the background materials in the record did not indicate that persons who fail to meet the money demands of the guerrillas become particular targets of further actions by those guerrillas, and that in comparison to the entire Colombian population, the ELN guerrilla force is very small, and that same force has been weakened in the past year due to increased Colombian government action. (JA 40-41). Additionally, if there were any possibility of future persecution, the IJ found that it would not be on account of membership in a social group or on account of political opinion, as the petitioner did not show the necessary nexus between the actions of the guerrillas and

any political opinion of petitioner. (JA 41). The IJ accordingly denied the application for asylum. (JA 41).

In announcing his decision, the IJ, having found that petitioner "failed to meet the well-founded fear standard for asylum," stated that "it follows that he fails to meet the clear probability standard required for withholding or removal. Accordingly, his application for withholding of removal under Section 241(b)(3) of the Act is denied." (JA 41). Finally, after finding that there was no evidence that petitioner would be singled out for torture by Colombian authorities, the IJ also denied petitioner's application for withholding of removal under the Torture Convention. (*Id*.). Since petitioner was barred from voluntary departure as an arriving alien, the IJ ordered his removal to Colombia. (JA 41-42).

E. The BIA's Decision

On August 31, 2005, 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). (JA 2). This petition for review followed.

SUMMARY OF ARGUMENT

1. Substantial evidence supports the IJ's determination that petitioner failed to provide sufficient evidence to meet his burden of demonstrating eligibility for asylum or withholding of removal, that is, that he had been persecuted on account of his membership in a political party and on account of political opinion or that he had a well-founded fear of persecution on that basis should he be returned to Colombia. Moreover, the IJ properly determined petitioner had not met his burden of proof that he had suffered past persecution from guerrillas or had a

well-founded fear of future persecution by them. The record showed that the demands for money made by guerrillas of local business people and farmers were no more than criminal extortion efforts directed towards persons perceived to have money, and that petitioner's family had remained in Colombia in the three and one-half years after he left and had had no trouble with Colombian guerrillas.

2. Summary affirmance by the BIA was appropriate under the applicable regulations, and the IJ's oral decision contains sufficient reasoning and evidence to enable this Court to determine that it was issued only after consideration of the requisite factors.

ARGUMENT

I. THE IMMIGRATION JUDGE PROPERLY DETERMINED THAT HERMES CHAVES-LOPEZ FAILED TO ESTABLISH ELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL BECAUSE HE DID NOT PRESENT SUFFICIENT EVIDENCE THAT HE HAD SUFFERED PAST PERSECUTION OR HAD A WELL-FOUNDED FEAR OF PERSECUTION SHOULD HE RETURN TO COLOMBIA

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.[3] *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) (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.

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[3] "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.

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) (2004).

"[E]stablishing past persecution is a daunting task." *Guzman v. INS*, 327 F.3d 11, 15 (1st Cir. 2003). Establishing persecution for purposes of an asylum claim is especially difficult where the alleged mistreatment involves one or very few incidents, and the circumstances fall short of extreme hardship or suffering. *See Tawm v. Ashcroft*, 363 F.3d 740, 743-44 (8th Cir. 2004) (persecution not shown by member of the "Lebanese Forces" who "was detained twice, th[e] incidents were four years apart, lasted only a few hours each, and did not result in serious injury"); *Eusebio v. Ashcroft*, 361 F.3d 1088, 1090-91 (8th Cir. 2004) (persecution for political beliefs not shown by asylum-seeker who was briefly beaten and detained in connection with political rallies, was arrested for anti-government statements made as schoolteacher, and whose home was damaged and looted by the military; court reasoned, "minor beatings and brief detentions, even detentions lasting two or three days, do

not amount to political persecution, even if government officials are motivated by political animus"); *Dandan v. Ashcroft*, 339 F.3d 567, 573-74 (7th Cir. 2003) (persecution not shown where asylum-seeker was "detained, beaten and deprived of food for three days"); *Guzman*, 327 F.3d at 15-16 (asylum-seeker's one-time kidnapping and beating during civil war fell well short of establishing "past persecution" necessary to obtain asylum; court reasoned that "more than harassment or spasmodic mistreatment by a totalitarian regime must be shown"); *Ravindran v. INS*, 976 F.2d 754, 756-59 (1st Cir. 1992) (persecution not shown by member of Sri Lankan ethnic minority who participated in protest activities, was later arrested, detained for 3 days, and interrogated and struck by soldiers during detention, and whose uncle suffered destruction of house and one year's arrest for political activities); *Kapcia v. INS*, 944 F.2d 702, 704-05, 708 (10th Cir. 1991) (Polish asylum-seeker failed to establish "severe enough past persecution to warrant refugee status," where petitioner's anti-government activities resulted in his being "arrested four times, detained three times, . . . beaten once," having "his house . . . searched," and being "treated adversely at work"); *Skalak v. INS*, 944 F.2d 364, 365 (7th Cir. 1991) (persecution not shown by Polish Solidarity member whose activities "resulted in her being jailed twice for interrogation, each time for three days [and] officials at the school where she taught harassed her for her refusal to join the Communist Party"; such "brief detentions and mild harassment . . . do not add up to 'persecution'").

Proving persecution is also difficult where the account of the alleged mistreatment lacks detail or corroboration. *See*, *e.g.*, *Dandan*, 339 F.3d at 574 (asylum-seeker alleging "three-day interrogation resulting in a "swollen face," without furnishing more detail, "fail[ed] to provide

sufficient specifics" to establish persecution); *Bhatt v. Reno*, 172 F.3d 978, 982 (7th Cir. 1999) ("[Petitioner's] testimony of the threats and harm he says he received from radical Hindus is too vague, speculative, and insubstantial to establish either past or future persecution . . . . Beyond his own allegations and testimony that he was beaten on several occasions by Hindus, the record contains no evidence corroborating the beatings or describing the severity of his injuries.").

Similarly, persecution will not be found where the alleged mistreatment cannot be distinguished from random violence, such as a criminal assault, or arbitrary mistreatment during a state of civil war. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483-484 (1992) (asylum seeker must provide "proof of his persecutors' motives . . . [whether] direct or circumstantial"); *Albathani v. INS*, 318 F.3d 365, 373-74 (1st Cir. 2003) (former Lebanese armed forces member failed to establish asylum claim, because record failed to establish political basis of alleged beatings by Hezbollah militia; "[t]he two incidents on the road may well have been . . . nothing more than the robbery of someone driving a Mercedes with cash in his pocket"); *Ravindran*, 976 F.2d at 759 (political bases of mistreatment not established by member of Sri Lankan ethnic minority who participated in protest activities, was later arrested, detained for 3 days, and interrogated and struck by soldiers during detention, because "[e]xcept for the vague statement by a prison official upon petitioner's release that he should avoid political activities, no other facts were offered to show that the authorities ever questioned petitioner about, or even knew about, his political activities or opinions"). *See also Sivaainkaran v. INS*, 972 F.2d 161, 165 (7th Cir. 1992) ("[P]olitical turmoil alone does not permit the judiciary to stretch the definition of 'refugee' to cover sympathetic, yet statutorily

ineligible, asylum applicants . . . . [C]onditions of political upheaval which affect the populace as a whole or in large part are generally insufficient to establish eligibility for asylum.").

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. *See id*. at 663-64.

"An alien may satisfy the subjective prong by showing that events in the country to which he . . . will be deported have personally or directly affected him." *Id*. at 663. With respect to the objective component, the applicant must prove that a reasonable person in his circumstances would fear persecution if returned to his native country. *See* 8 C.F.R. § 208.13(b)(2) (2004); *see also Zhang*, 55 F.3d at 752 (noting that when seeking reversal of a BIA factual determination, the petitioner must show "that the evidence he presented was so compelling that no reasonable factfinder could fail" to agree with the findings (quoting *INS v. Elias-Zacarias*, 502 U.S at 483-84); *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 future persecution on account of, inter alia, his political opinion." *Wu Biao 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*, 19 I. & N. Dec. 439, 445 (BIA 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) ("[W]here the circumstances indicate that an applicant has, or with reasonable effort could gain, access to relevant corroborating evidence, his failure to produce such evidence in support of his claim is a factor that may be weighed in considering whether he has satisfied the burden of proof."); *see also Diallo v. INS*, 232 F.3d 279, 285-86 (2d Cir. 2000); *In re S-M-J-*, 21 I. & N. Dec. 722, 723-26 (BIA 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; *Wu Biao Chen*, 344 F.3d at 275; *Zhang*, 55 F.3d at 738.

3. Standard of Review

This Court reviews the determination of whether an applicant for asylum or withholding of removal has established past persecution or a well-founded fear of persecution under the substantial evidence test. *Zhang v. INS*, 386 F.3d at 73; *Wu Biao Chen*, 344 F.3d at 275 (factual findings regarding asylum eligibility must be upheld if supported by "reasonable, substantive and probative evidence in the record when considered as a whole") (internal quotation marks omitted); *see Secaida-Rosales v. INS*, 331 F.3d 297, 306-07 (2d Cir. 2003); *Melgar de Torres*, 191 F.3d at 312-13 (factual findings regarding both asylum eligibility and withholding of removal must be upheld if supported by substantial evidence). "Under this standard, a finding will stand if it is supported by 'reasonable, substantial, and probative' evidence in the record when considered as a whole." *Secaida-Rosales*, 331 F.3d at 307 (quoting *Diallo*, 232 F.3d at 287).

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

The scope of this Court's review under that test is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 71; *Wu Biao 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

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

(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. at 481. 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.

C. Discussion

Substantial evidence supports the IJ's determination that Hermes Chaves-Lopez did not establish his eligibility for asylum as a refugee. The record clearly demonstrated that petitioner failed to establish (1) that he had suffered from past persecution or (2) that he had a well-founded fear of future persecution either on account of membership in a particular social group or on account of political opinion.

Substantial evidence supports the IJ's determination that any past persecution from the guerrillas was not based on political opinion either expressed by petitioner or imputed to him, or by his membership in a particular social group (here, the Liberal party). Despite petitioner's assertion that the guerrillas at one point (*after* he declined to provide them with food) stated that he (petitioner) was

a liberal and would have to contribute to their cause, petitioner presented no evidence that the threats he received were motivated by his political views or party affiliation. He lived at the farm for some six months without any problems from the guerrillas.

It wasn't until after he told the guerrillas (to whom he had previously given food) that he had sold his produce and had no food to give them, that the guerrillas became angry and began to demand monetary payments from him, (JA 143-144). The petitioner provided no evidence that these demands for money were precipitated by or preceded by any expression of political opinion by either the petitioner or guerrillas. The demands for money were only made after petitioner had told the guerrillas that he had sold his goods. (*Id*.) These demands for money payments were made not only on petitioner, but also on the other farmers in the area, (JA 165), and on companies and other businesses, (JA 155). Petitioner presented no evidence that these other farmers and businesses upon whom these demands were made were members of the Liberal party as he was. Additionally, he testified that his brother and sisters were also Liberals, (JA 154), but there was no evidence presented by petitioner that they had been subjected to monetary demands or threats from the guerrillas. In addition to all this, the background materials presented to the IJ established that guerrilla groups use extortion to raise money to finance their activities, (JA 249). Accordingly, as the IJ noted (JA 39), the evidence presented by petitioner proved only that these money demands were simple extortion.

Finally, after determining that if petitioner had been persecuted, it had not been persecution based on membership in a particular social group or upon political opinion, the IJ then properly concluded that petitioner did

not sustain his burden of proof that he had a well-founded fear of future persecution on account of any of the five enumerated grounds under 8 C.F.R. § 1208.13(b)(2).

As the IJ found, there was no evidence that there was a continuing interest in the petitioner that would make the guerrillas single him out, since he had been gone from Colombia for three and one-half years as of the time of the asylum hearing, and no evidence had been presented that showed the guerrillas had sought out the petitioner in the city of Cali to which he had fled after refusing to pay them their extortionate demands. (JA 40). Additionally, the IJ properly noted that the background materials presented at the asylum hearing also provided that all guerrilla groups have been weakened by Colombian government action, (JA 40), which reduced guerrilla strength from some 22,000 combatants in 2001 to some 17,000, country-wide in 2003. (JA 188, 227). Finally, as petitioner has testified, his mother, three sisters, two brothers, and his son continue to reside in Colombia, some within the very city (Cali) to which he now fears returning; all without retribution from guerrilla groups. (JA 140, 152-53).

The fact that the petitioner's son, mother, sisters, brothers and their families still reside in Colombia also demonstrates that the petitioner does not have a well-founded fear of persecution because the threat to him does not exist countrywide throughout all of Colombia. There is a place within Colombia to which the petitioner could return without fear of persecution. *See Mazariegos v. Office of U.S. Attorney General,* 241 F.3d 1320, 1325-26 (11th Cir. 2001).

In *Mazariegos,* 241 F.3d at 1325, the court relied on a number of BIA administrative decisions which construed the statute and regulations to require that an asylum

applicant face a threat of persecution country-wide, citing *Matter of Acosta*, 19 I. & N. Dec. 211, 235 (BIA 1985); *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987); *Matter of R-,* 20 I. & N. Dec. 621 (BIA 1992) (An alien seeking to meet the definition of a refugee must do more than show a well-founded fear of persecution in a particular place or abode within a country -- he must show that the threat of persecution exists for him country-wide). Moreover, in a recent similar case, the First Circuit held that where the petitioner testified that his parents still lived in Haiti and they suffered no harm since he left the country, the BIA reasonably concluded that the petitioner could return to Haiti without facing future persecution. *Romilus v. Ashcroft*, 385 F.3d 1, 8 (1st Cir. 2004) (citing *Aguilar-Solis v. INS*, 168 F.3d 565, 573 (1st Cir. 1999) ("[T]he fact that close relatives continue to live peacefully in the alien's homeland undercuts the alien's claim that persecution awaits his return") (alteration in original)). *See also Melgar de Torres,* 191 F.3d at 313 (finding that the evidence that applicant's own mother and daughters continued to live in El Salvador after the applicant emigrated without harm cut against the argument that applicant had a well-founded fear of persecution).

For all the foregoing reasons, the record provides substantial evidentiary support for the IJ's finding that petitioner failed to carry his burden of demonstrating a well-founded fear of persecution, and hence failed to establish his eligibility for asylum. As the burden of proof for seeking withholding of removal is greater than the burden for establishing eligibility for asylum, failure to establish the latter *per se* precluded the former.

II. SUMMARY AFFIRMANCE BY THE BIA WAS APPROPRIATE AND IN ACCORDANCE WITH THE REGULATIONS

A. Relevant Facts

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

B. Governing Law and Standard of Review

Immigration regulations provide that a single BIA member

> to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that
>
> (A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or
>
> (B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

8 C.F.R. § 1003.1(e)(4) (2004).

The procedure by which a single member of the BIA summarily affirms the IJ's decision is reviewed for abuse of discretion. *See Shi v. Board of Immigration Appeals*, 374 F.3d 64, 66 (2d Cir. 2004).

C. Discussion

This Court has clearly held in several recent cases that the streamlining regulations issued by the former Immigration and Naturalization Service (now the United States Citizenship and Immigration Services), codified at 8 C.F.R. § 1003.1(e)(4) (2004), expressly authorize summary affirmance by a single member of the BIA. *Shi*, 374 F.3d at 66; *see also Zhang v. U.S. Dep't of Justice*, 362 F.3d 155, 158 (2d Cir. 2004) ("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). This practice of the BIA was upheld even prior to promulgation of these 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)). Just as in *Shi* and *Zhang*, the IJ's decision in this case clearly meets this standard.

The Oral Decision of the IJ recites the testimony of petitioner, and summarizes the documentary evidence submitted by petitioner. In petitioner's brief, there is virtually no analysis of why the summary affirmance is claimed to have been inappropriate. Petitioner's Brief at 14. For example, the petitioner has not demonstrated that the IJ's decision contained errors that were more than harmless or immaterial, or that it ignored a controlling Board or federal court precedent. 8 C.F.R. § 1003.1(e)(4).

Nothing in the petitioner's submission to the BIA (JA 6-81) indicated that any purpose would have been served

by the BIA issuing a separate opinion affirming the IJ's decision. In purely conclusory fashion, the petitioner states that the IJ made his decision in complete disregard of the evidence on the record and that such errors substantially affected the outcome of the case. Petitioner's Brief at 12. Additionally, petitioner, without showing more, simply asserts that the BIA rubber-stamped the IJ's decision without analyzing the basis of the decision. Petitioner's Brief at 14. This is simply not enough. The BIA acted well within its discretion in adopting the IJ's decision as the "final agency determination" in adjudicating the petitioner's appeal, and the IJ's decision provides an ample basis for review by this Court.

CONCLUSION

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

Dated: March 15, 2006

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 8,715 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. § 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. § 1003.1(e)(4) (2004) Affirmance without opinion.

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

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

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

(ii) If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 CFR 1003.1(e)(4)." An order affirming without opinion,

issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial.

8 C.F.R. § 1208.13 (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.