# 01-4172-ag

*To Be Argued By*:
CAROLYN A. IKARI

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 01-4172-ag**

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LUZ ELENA LOPEZ DE ROWLEY
*Petitioner,*

-vs-

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

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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 lacks jurisdiction to review an order of the Board of Immigration Appeals removing an alien who commits an aggravated felony, *see* § 242(a)(2)(C) of the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1252(a)(2)(C), as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(A)(iii), 119 Stat. 231, 310. Nevertheless, the INA, as amended by the REAL ID Act, permits this Court to review "questions of law raised upon a petition for review filed with an appropriate court of appeals." 8 U.S.C. § 1252(a)(2)(D). To the extent Petitioner raises questions of law, this Court has jurisdiction to review them. *See Canada v. Gonzales*, 448 F.3d 560, 563 (2d Cir. 2006).

The BIA's decision in this case was issued on September 28, 2001, affirming a removal order entered by Immigration Judge Michael Straus. (JA 2-4). The petition for review was filed on October 10, 2001. Government Appendix ("GA") 1-5. Because the petition was filed within 30 days of the BIA's decision, it is timely. 8 U.S.C. § 1252(b)(1). Because the administrative proceedings took place in Immigration Court in Hartford, Connecticut, venue is proper in this Court. 8 U.S.C. § 1252(b)(2).

The correct respondent in a petition for review is the Attorney General; therefore, the Court should substitute the Attorney General for the current respondent, Immigration and Naturalization Service. *See* 8 U.S.C. § 1252(b)(3)(A).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the BIA correctly concluded that Petitioner's guilty plea to conspiracy to commit mail fraud established her commission of an aggravated felony as defined by 8 U.S.C. § 1101(a)(43)(M)(i), which includes an offense that involves fraud or deceit in which the loss exceeds $10,000.

2. Whether the BIA properly affirmed the Immigration Judge's rejection of Petitioner's argument that she is entitled to withholding of removal because she is "Americanized."

3. Whether the requirement to exhaust administrative remedies precludes this Court from addressing Petitioner's claim for relief under the Convention Against Torture when she did not raise the claim before the BIA.

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

## Docket No. 01-4172-ag

---

LUZ ELENA LOPEZ DE ROWLEY,
*Petitioner,*

-vs-

ALBERTO R. GONZALES,[1]
*Respondent.*

---

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

---

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

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### Preliminary Statement

Luz Elena Lopez De Rowley, a native and citizen of Colombia, petitions this Court for review of a decision of

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[1] The Court should substitute the Attorney General for the current respondent, the Immigration and Naturalization Service, and the caption should be amended accordingly. *See* 8 U.S.C. § 1252(b)(3)(A).

the Board of Immigration Appeals ("BIA") dated September 28, 2001 (Joint Appendix ("JA") 2-4). The BIA affirmed the decision of an Immigration Judge ("IJ") (JA 43-57) dated May 30, 2001, rejecting Lopez De Rowley's challenge to removability and denying her application for withholding of removal and request for section 212(c) relief[2] under the Immigration and Nationality Act of 1952, as amended ("INA"), and ordering her removed from the United States. (JA 2-4 (BIA decision), 43-57 (IJ's decision and order)).

Petitioner disputed that her conviction upon a plea of conspiracy to commit mail fraud constituted an aggravated felony that would subject her to removal. (JA 12-19). Also, Petitioner claimed that her "Americanization" made her eligible for withholding of removal. (JA 19-21). Finally, she claimed that she was eligible for a waiver of inadmissibility pursuant to section 212(c) of the INA. (JA 21-22).

The BIA correctly affirmed the IJ's conclusion that Petitioner committed an aggravated felony, more

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[2] Petitioner also made applications for asylum and for relief pursuant to the Convention Against Torture to the Immigration Judge, but these two forms of relief were not pursued before the BIA. *See* 8 U.S.C. § 1158(a); the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, implemented 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); JA 7-23.

specifically, an offense involving fraud or deceit in which the loss exceeded $10,000. (JA 2-3). The BIA properly referred to the record of Petitioner's conviction for conspiracy to commit mail fraud in making this determination. More particularly, the count of the indictment to which she pled guilty described the conspiracy: a scheme to submit false claims to the Blue Cross health insurance plan for medical expenses not actually incurred, including Petitioner's receipt and negotiation of a fraudulently obtained check for $17,986.79. (JA 3, 282).

Because Petitioner committed an aggravated felony, further review of her petition is barred. Even if this Court had jurisdiction to examine her other claims, however, it should conclude that the BIA properly affirmed the IJ's determination that Petitioner was not entitled to withholding of removal on the ground that her thirty years' residence in the United States has rendered her "Americanized." (JA 3, 51-55). The Government is obliged to refrain from removing an alien if she proves by a clear probability that she would face persecution in the country of return on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* 8 U.S.C. § 1231(b)(3)(A). The BIA affirmed and incorporated by reference the IJ's conclusions in this regard: that "Americanization" is not the sort of immutable or fundamental component of one's identity that is protected under this statute. (JA 3, 52-53). Even if "Americanized" Colombians were a cognizable social group under the withholding statute, the record does not compel this Court to reject the BIA and IJ's

conclusions that Petitioner did not show either that (1) "Americanized" Colombians were actually at risk of losing life or freedom or (2) it was more likely than not that Petitioner herself was subject to persecution on this basis. (JA 3, 53-55).

Finally, Petitioner abandoned her claim for relief under the Convention Against Torture before the BIA (JA 7-24), and therefore she cannot pursue it in this petition.

## Statement of the Case

On November 13, 1970, Petitioner entered the United States at Miami, Florida, as an immigrant. (JA 287, 310).

On June 16, 2000, a Notice to Appear was issued, charging petitioner with being a removable alien on the ground of conviction of an aggravated felony, that is, an offense involving fraud or deceit in which the loss to the victim or victims is greater than $10,000, pursuant to INA § 237(a)(2)(A)(iii). (JA 310).

On April 11, 2001, Petitioner appeared before Immigration Judge Michael W. Straus in Hartford, Connecticut, for a removal hearing, but it had to be continued for a week because Petitioner's counsel was not present. (JA 58-63.) The hearing was continued before Judge Straus on April 18, 2001, during which exhibits, including the record of conviction, were received into evidence without objection, and the IJ heard arguments of counsel. (JA 64-78). The hearing was suspended and continued on May 9, 2001 so that Petitioner could prepare

and submit the paperwork to accompany her asylum application. (JA 79-86). The merits hearing was held on May 30, 2001, during which Petitioner and her husband testified. (JA 87-126).

At the conclusion of that hearing, the IJ rendered an oral decision finding petitioner removable, and denying her request for asylum, withholding of removal under the INA, and withholding of removal under the United Nations Convention Against Torture. (JA 43-57).

On June 26, 2001, Petitioner filed a timely notice of appeal to the BIA. (JA 36-38). On August 29, 2001, she filed a brief with the BIA. (JA 7-24). In her brief, Petitioner abandoned her application for asylum and request for CAT relief. (JA 7-24).

On September 28, 2001, the BIA issued a decision affirming the conclusion that Petitioner's conviction constituted an aggravated felony, that she is not eligible for withholding of removal, and that she is barred from obtaining a waiver of inadmissibility under 212(c). (JA 2-4).

On October 10, 2001, Petitioner filed a timely petition for review with this Court. (GA 1-5).

## Statement of Facts

### A. Lopez De Rowley's Entry into the United States and Subsequent Criminal Conviction

On November 13, 1970, Petitioner entered the United States at Miami, Florida, as an immigrant. (JA 287, 310).

On July 7, 1999, a federal grand jury sitting in the District of Rhode Island returned a four-count indictment against Petitioner and a co-defendant. (JA 279-285). Count One charged conspiracy to commit mail fraud in violation of 18 U.S.C. § 371. Counts Two, Three and Four charged mail fraud in violation of 18 U.S.C. §§ 1341 and 1342. Petitioner and her co-defendant conspired to submit false claims for reimbursement of health care expenses to the medical insurer Blue Cross and Blue Shield of Rhode Island, causing checks payable to the defendants and Petitioner's husband to be mailed to them, which Petitioner and her co-defendant subsequently negotiated. (JA 279-285). Specifically, Petitioner was charged in Count One with conspiring to make false claims that resulted in her receipt of a check payable to her from Blue Cross in the amount of $17,986.79 and a check payable to her husband from Blue Cross in the amount of $27,934.21, both of which she negotiated. (JA 280-284).

On March 8, 2000, Petitioner pled guilty to Count One of the Indictment and was sentenced to serve a term of imprisonment of 12 months. (JA 272-278). She was also ordered to pay restitution, jointly and severally with her

co-defendant, in the amount of $55,808.42 to Blue Cross and Blue Shield of Rhode Island. (JA 275, 277).

## B. Lopez De Rowley's Removal Proceedings

Based on this conviction, on June 16, 2000, the Immigration and Naturalization Service issued Petitioner a Notice To Appear charging that she was subject to removal for having been convicted of an aggravated felony as defined in section 101(a)(43)(M)(i) that is, an offense involving fraud or deceit in which the loss to the victim exceeds $10,000. (JA 310).

In turn, Petitioner denied the allegation of conviction (JA 288) and applied for asylum, withholding of removal, and withholding of removal under CAT (JA 245-253).

A removal hearing was conducted on April 11, 2001, April 18, 2001, May 9, 2001, and May 30, 2001, before Immigration Judge Michael W. Straus in Hartford, Connecticut (JA 58-126).

### 1. Documentary Submissions

The IJ marked several documents into evidence, including the record of criminal conviction (JA 272-286), the application for asylum, withholding of removal, and

CAT relief[3] (JA 245-253), and reports and articles regarding country conditions in Colombia (JA 127-243).

### 2. Lopez De Rowley's Testimony

Principally, Petitioner testified about her fears of starting over in Colombia and her fears of generalized violence, including "bombs everywhere you don't expect to be." (JA 102, 93-113).

Petitioner testified about the occurrence of kidnaping wealthy persons' family members for ransom in Colombia. (JA 96). She expressed concern for her and her husband's safety, as he has made the voluntary decision to accompany Petitioner if she is removed to Colombia. She believes they would be singled out (and presumed to be wealthy) due to her American "ways" and accent and because her husband has a noticeably American appearance. (JA 96, 98, 112). It was clear in her testimony upon questioning from the judge and on redirect by her counsel that Petitioner's primary concern is that her husband, not she, would be endangered in Colombia. (JA 112-113).

Petitioner also testified that her husband traveled to Colombia only six months before the hearing in anticipation of their possible relocation. He stayed at

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[3] Under the Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8485 (Feb. 18, 1999), an asylum application also serves as an application for relief under CAT.

Petitioner's late uncle's home instead of in a hotel for safety reasons. (JA 106-107).

### 3. James Rowley's Testimony

Petitioner's husband testified regarding his recent trip to Medellin, Colombia. (JA 114-124). The purpose of the trip was to settle Petitioner's uncle's estate and to see if he would want to resettle in Colombia if and when Petitioner is removed. (JA 117). His travel agency cautioned against making the trip due to some sort of a Government advisory. (JA 117-118). While there, he heard of the kidnaping of some Americans and the murder of one whose ransom was not paid. (JA 118).

While in Colombia, Petitioner's husband took care to only go out accompanied and refrain from wearing any jewelry or watches. (JA 118). He felt his presence as "the only American there" was noticed whenever he went out: "I would get the looks or stared out. They basically said, why is [he] here, you know. Does he know any better?" (JA 118). He testified, "We [Americans] stand out. White skinned." (JA 124).

Despite these worrisome experiences, Mr. Rowley was firm in his intention to accompany Petitioner to Colombia, should she be removed. (JA 119).

## C. The Immigration Judge's Decision

First, the IJ addressed whether Petitioner was removable for having been convicted of an aggravated

felony. He found that the record of conviction, consisting of certified copies of the criminal judgment and the indictment, established Petitioner's conviction upon a plea for criminal conspiracy in violation of 18 U.S.C. § 371. (JA 48). The Court found that the substantive crime underlying the conspiracy, mail fraud in violation of 18 U.S.C. § 1341, was clearly an offense "involving fraud or deceit." (JA 48-49).

The IJ rejected Petitioner's contention that, despite her plea of guilty, she did not actually violate the terms of 18 U.S.C. § 371, because the scheme for which Petitioner was convicted was not one to defraud the Government of the United States. This argument hinged on the text of section 371 that makes it a crime to conspire to "commit any offense against the United States."[4] The IJ explained that Petitioner's interpretation was a misreading of the statute: It was plain from the text itself that an "offense against the United States" was simply any crime in violation of the criminal laws of the United States. (JA 49). The IJ noted that the indictment itself confirmed this point in its recitation of the section 371 violation: that Petitioner and the co-defendant conspired "to commit offenses against

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[4] The statute reads, in pertinent part: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 371 (2001).

the United States, that is, mail fraud, in violation of Title 18, U.S.C. § 1341." (JA 49-50, 280).

On the issue of amount of loss due to the conspiracy, the IJ concluded that the language of that part of the indictment to which Petitioner pled guilty established a loss of at least $10,000. (JA 50).

Thus, the IJ concluded that Petitioner had been convicted of an offense involving fraud or deceit in which the loss to the victim exceeded $10,000. As such, Petitioner was found to have been convicted of an aggravated felony and therefore was removable under INA section 237(a)(2)(A)(iii) as charged. (JA 50).

Because the IJ found that Petitioner is an aggravated felon, he concluded that she was *a fortiori* ineligible for asylum, citing INA section 208(b)(2)(B)(i). (JA 51).

On the issue of a 212(c) waiver, the IJ noted that Petitioner's guilty plea was entered in 2000. Therefore, he noted, she did not fall within the scope of the relief provided by the *St. Cyr*[5] decision to those who entered guilty pleas prior to the effective date of the IIRIRA legislation of 1996. (JA 51).

The IJ denied the request for withholding of removal on three alternative grounds. First, he held that the characteristic for which Petitioner claims a danger of

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[5] *St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000), *aff'd, INS v. St. Cyr*, 533 U.S. 289 (2001).

persecution, being Americanized in the eyes of Colombians, is not the sort of immutable or fundamental aspect of one's identity that is a cognizable basis of protection under the withholding statute. (JA 52-53).

Second, the IJ held alternatively that Petitioner had not established that members of this social group are subject to persecution for being Americanized. (JA 53-54). He observed that the documentary evidence and the testimony reflected the incidence of kidnaping wealthy persons for ransom in Colombia, but that Petitioner had not shown that victims were targeted for having lived in the United States. (JA 53-54).

Third, the IJ held alternatively that Petitioner had not established that she was more likely than not to be persecuted on this basis. (JA 54). Although the record showed "widespread" kidnaping and violence in Colombia, there was no indication that Petitioner herself would be targeted for this harm. (JA 54).

Finally, the IJ denied the CAT relief claim, holding that BIA precedent and the record did not establish that the Colombian government was engaging in torture or condoning torture by non-governmental guerilla and paramilitary groups. (JA 55). Therefore, the test for CAT withholding was not met. (JA 55).

### D. The BIA's Decision

On June 26, 2001, Petitioner appealed the IJ's decision to the BIA. (JA 37). In her appeal to the BIA, Petitioner

abandoned her challenges the IJ's denial of asylum and CAT relief. (JA 37, 7-24).

On September 28, 2001, the BIA issued its decision. (JA 2-4).

The BIA affirmed the IJ's conclusion that Petitioner was convicted of an aggravated felony. First, the BIA noted that when the conviction at issue is criminal conspiracy, the proper criminal statute to be analyzed is the underlying substantive crime, in this case, mail fraud. (JA 3). Clearly, mail fraud is an offense involving fraud. (JA 3). Second, the BIA held that the IJ's reference to Petitioner's individual record of conviction was permissible for determining whether the loss due to the fraud or deceit exceeded $10,000. (JA 2-3). On this basis, the BIA concluded that Petitioner was removable as charged. (JA 3).

Further, the BIA affirmed the IJ's conclusion that eligibility for withholding of removal was not established. (JA 3). The Board agreed with the IJ's reasoning that Petitioner's fear of being the victim of crime does not amount to persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion. (JA 3).

Finally, citing the Supreme Court precedent of *INS v. St. Cyr*, the BIA noted that Petitioner's guilty plea in 2000 was entered after the restrictions on 212(c) relief took effect, and therefore she cannot benefit from a 212(c) waiver. (JA 3-4).

This petition for review followed.

## SUMMARY OF ARGUMENT

1. The BIA correctly determined that Petitioner's conviction upon a plea for conspiracy to commit mail fraud in which scheme Petitioner's involvement included, at a minimum, receipt of proceeds for a false claim in the amount of $17,986.79, qualified as an offense involving fraud or deceit in which the loss to the victim exceeded $10,000. Therefore, Petitioner's conviction qualified as an aggravated felony under the INA. 8 U.S.C. § 1101(a)(43)(M)(i)). First, the BIA correctly rejected Petitioner's frivolous argument that the phrase in 18 U.S.C. § 371 "offense against the United States" requires that the Government be the victim of the criminal conspiracy. *United States v. Barton*, 647 F.2d 224, 236 (2d Cir. 1981) ("[V]iolation of any federal statute is an offense against the United States"). Second, the BIA properly made reference to both the criminal judgment documenting Petitioner's guilty plea and to that portion of the indictment to which she pled guilty. In applying the modified categorical approach to determine whether the statute of conviction qualifies as an aggravated felony, reference to the indictment as well as the statutory description of the offense is permitted in this context. *Sui v. INS*, 250 F.3d 105, 116 (2d Cir. 2001). Because Petitioner was convicted of an aggravated felony, this Court lacks jurisdiction to further review Petitioner's claims.

2. Even if this Court had jurisdiction over Petitioner's further claims, the BIA and IJ correctly concluded that Petitioner was not entitled to withholding of removal. First, Petitioner's claimed membership in the social group "Americanized Colombians" did not entitle her to protection under the BIA's approach set forth in *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985). *See Gao v. Gonzales*, 440 F.3d 62, 64 (2d Cir. 2006). Furthermore, substantial evidence supports the IJ's conclusions (incorporated by the BIA) that Petitioner did not show that this group is subject to persecution, nor did she show a clear probability that she would be persecuted based on her membership in this group.

3. Petitioner failed to exhaust her CAT claim in the underlying administrative proceedings before the BIA; therefore, she cannot pursue this remedy in this petition.

# ARGUMENT

## I. THE BIA CORRECTLY AFFIRMED THE IJ'S DECISION THAT A CONVICTION FOR CONSPIRACY TO COMMIT MAIL FRAUD IS AN AGGRAVATED FELONY UNDER THE IMMIGRATION AND NATIONALITY ACT

### A. Relevant Facts

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

## B. Governing Law and Standard of Review

Pursuant to § 1227(a)(2)(A)(iii) of Title 8, United States Code, any alien who has been convicted of an "aggravated felony" at any time after he has been admitted into the United States is removable. *See Vargas-Sarmiento v. United States Dep't of Justice*, 448 F.3d 159, 165 (2d Cir. 2006). "As a rule, federal courts lack jurisdiction to review final agency orders of removal based on an alien's conviction for certain crimes, including aggravated felonies." *Id.* at 164; 8 U.S.C. § 1252(a)(2)(C). Under the REAL ID Act of 2005, however, this Court retains jurisdiction to review "constitutional claims or questions of law raised upon a petition for review." 8 U.S.C. § 1252(a)(2)(D). This includes the question of whether a petitioner's offense qualifies under any of the definitions set forth in 8 U.S.C. § 1101(a)(43). *See Blake v. Gonzales*, 481 F.3d 152, 155-56 (2d Cir. 2007). If the Court concludes that the BIA correctly determined that the alien was removable based on his conviction for an aggravated felony, the Court lacks jurisdiction to further review the order of removal in the case. *See Vargas-Sarmiento*, 448 F.3d at 161.

The term "aggravated felony" includes all offenses described in 8 U.S.C. § 1101(a)(43), "whether in violation of Federal or State law." The Court reviews *de novo* the question of whether a criminal conviction qualifies as an aggravated felony. *Vargas-Sarmiento*, 448 F.3d at 165.

The term "aggravated felony" is defined in 8 U.S.C. § 1101(a)(43) and includes, among numerous other

offenses, "an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i).

The statute under which Petitioner was convicted is the general federal conspiracy statute, 18 U.S.C. § 371. The statute provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

The object of the conspiracy to which Petitioner pled guilty was mail fraud in violation of section 1341, which, in the version effective at that time, provided, in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail

> matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (2000).

### C. Discussion

Petitioner wages a two-pronged attack on the finding that her conviction is an aggravated felony. First, she argues that her conduct does not satisfy the elements of the criminal statute to which she pled, 18 U.S.C. § 371. She argues that her conspiracy to defraud Blue Cross by submitting false claims and receiving reimbursements, is not "an offense against the United States." Pet. Brief at 10-12. Therefore, she argues, she cannot be held to be an aggravated felon.

Second, Petitioner claims error in the conclusion that her conviction qualifies as an aggravated felony, since it is not an element of mail fraud, as defined by 18 U.S.C. § 1341, that the loss to the victim or victims exceed $10,000. Pet. Brief at 12-15. Because the IJ looked to the

factual circumstances of her crime, she argues, the conclusion that she was convicted of an aggravated felony was flawed.

For the reasons set forth below, both claims are meritless.

### 1. The General Federal Conspiracy Statute Does Not Require That the United States or Its Agencies Be the Victim of the Conspiracy

Petitioner's first argument is that her conduct did not actually violate 18 U.S.C. § 371. It should be noted at the outset that this argument might serve as either a direct or collateral attack on the criminal conviction, but it is not an argument that the conviction cannot serve as a basis for removal, i.e., that it is not an aggravated felony. This Court does not have jurisdiction to revisit Petitioner's guilty plea in her criminal proceeding. *See Rodriguez v. Gonzales*, 451 F.3d 60, 65 (2d Cir. 2006) (per curiam) (holding that immigration petitioner is precluded from disclaiming, in immigration proceeding, elements of offense to which he pled guilty). Petitioner's recourse with regard to her conviction is either direct appeal or habeas review. *See, e.g., United States v. Adams*, 448 F.3d 492, 499 (2d Cir. 2006) (argument on direct appeal that allocution insufficient to support plea). Petitioner entered her plea and was adjudicated accordingly. (JA 272-278). That is not in dispute in this petition. Pet. Brief at 8. In any event, the argument is frivolous.

Petitioner's interpretation of 18 U.S.C. § 371 is a profound misreading of the statute. Section 371 is the general federal conspiracy statute. *United States v. Barton*, 647 F.2d 224, 236 (2d Cir. 1981). It is phrased in the disjunctive: criminalizing in the first part, conspiracy to "commit any offense against the United States" or, in the second part, conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose." 18 U.S.C. § 371. Section 371 is therefore not limited to crimes in which the United States is the victim: rather, the first part is the general conspiracy statute, criminalizing conspiracy to commit any federal crime. "[V]iolation of any federal statute is an offense against the United States" *Barton*, 647 F.2d at 237.

"Section 371 prohibits two distinct types of conspiracies; conspiracies to defraud the United States and conspiracies to commit an offense against the United States. While the offense clause governs a conspiracy to commit a specific offense, *defined elsewhere in the federal criminal code*, the defraud clause is broader and covers agreements to interfere with or to obstruct government's lawful functions." *United States v. Bilzerian*, 926 F.2d 1285, 1301 (2d Cir. 1991) (emphasis added) (citing *United States v. Neresian*, 824 F.2d 1294, 1313 (2d Cir. 1987)); *see also United States v. Harmas*, 974 F.2d 1262, 1266 (11th Cir. 1992). Petitioner was convicted upon a plea of conspiring "to commit offenses against the United States, that is, mail fraud, in violation of Title 18, U.S.C. § 1341." (JA 272, 280). Thus, under the prong of the statute that applied to Petitioner, there was no requirement whatsoever

that the government be the victim of the conspiracy, and her first argument should be rejected.

### 2. The IJ Correctly Concluded That Petitioner's Conviction Was for an Aggravated Felony by Making Reference to the Record of Conviction

#### a. The "Categorical Approach" for Determining Whether a Conviction Constitutes an Aggravated Felony

In deciding whether a particular offense constitutes an aggravated felony under the INA, this Court has applied the same two-step test that the Supreme Court established in *Taylor v. United States*, 495 U.S. 575, 599-602 (1990), for deciding whether an offense is a "burglary" under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (2000 & Supp. IV 2004). *See Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815, 818 (2007) (noting that lower courts "uniformly have applied the approach this Court set forth in *Taylor v. United States*" in determining whether a criminal conviction qualifies as removable offense) (citing *Abimbola v. Ashcroft*, 378 F.3d 173, 176-77 (2d Cir. 2004)).

Under the first step of the test, courts employ a "categorical" approach, one that refrains from referring to the specific facts of the conviction at issue. The court compares the criminal statute under which the alien was convicted with the applicable subsection of INA § 101(a)(43) to determine whether all conduct covered by

the statute falls within the category. *See id.* If it does, the alien has been convicted of an aggravated felony. If the statute covers both conduct that falls within the generic definition and conduct that does not, the statute is deemed "divisible," *Abimbola*, 378 F.3d at 177, and reference to the record of conviction is permitted "for the limited purpose of determining whether the alien's conviction was under the branch of the statute that permits removal." *Vargas-Sarmiento*, 448 F.3d at 167.

While the BIA's interpretation of undefined terms in the INA, such as "fraud or deceit" is accorded substantial deference in accordance with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *see, e.g., Evangelista v. Ashcroft*, 359 F.3d 145, 150 (2d Cir. 2004) (examining tax offense under INA), *cert. denied*, 543 U.S. 1145 (2005), this Court reviews *de novo* "whether a particular conviction qualifies as an aggravated felony within the parameters established by the INA," *Kamagate v. Ashcroft*, 385 F.3d 144, 151 (2d Cir. 2004); *Vargas-Sarmiento*, 448 F.3d at 165 ("[W]e owe no deference to [the BIA's] interpretations of state or federal criminal laws, because the agency is not charged with the administration of such laws.") (internal quotation marks omitted) (second alteration in *Vargas-Sarmiento*); *cf. Rodriguez,* 451 F.3d at 60, 63 ("Because the BIA has no particular expertise in construing federal and state criminal statutes, we review *de novo* the BIA's finding that a particular crime of conviction falls within its definition of a [crime involving moral turpitude].").

### b. The IJ Correctly Applied the Categorical Approach To Analyze Petitioner's Conviction

It is an aggravated felony to conspire to commit a crime that is itself an aggravated felony. INA § 101 (a) (43) (U), 8 U.S.C. § 1101(a)(43)(U) (aggravated felony includes "an attempt or conspiracy to commit an offense described in this paragraph"). In order to determine whether a conspiracy conviction qualifies as an aggravated felony, the *Taylor* analysis is performed on the underlying substantive criminal statute, not the conspiracy statute of conviction. *Kamagate*, 385 F.3d at 153; *Conteh v. Gonzales*, 461 F.3d 45, 57 (1st Cir. 2006). Because Petitioner pled guilty to conspiracy to commit mail fraud in violation of 18 U.S.C. § 1341, both the IJ and the BIA correctly began this analysis by applying the categorical approach of *Taylor* to determine whether a violation of section 1341 is an aggravated felony. (JA 3, 48-50, 272, 280). Petitioner was charged in her Notice To Appear with having been convicted of an offense "involv[ing] fraud or deceit in which the loss to the victim or victims exceed[ed] $10,000." *See* 8 U.S.C. § 1101(a)(43)(M)(i); JA 310.

First, both the IJ and the BIA examined the text of the mail fraud statute and determined that it is "an offense involving fraud or deceit," a conclusion that is not at issue in this case. (JA 3, 48-49).

Next, the IJ and the BIA turned their attention to the question whether a mail fraud conviction under section

1341 necessarily involves a loss to the victims exceeding $10,000. (JA 3, 50). The BIA correctly observed that section 1341 does not have any amount of loss provision; thus, the statute encompasses both convictions that would constitute aggravated felonies and conduct that would not. (JA 3).

Under *Taylor*, when the statute of conviction is broader than the generic definition being applied, advertence to the indictment and jury instructions is permitted to show that the element required to satisfy the generic definition was actually found by the jury. *Taylor*, 495 U.S. at 602. Similarly, reference to the record of conviction is permitted to ascertain whether the individual's conviction qualifies as an aggravated felony. *Dos Santos v. Gonzales*, 440 F.3d 81, 84 (2d Cir. 2006); *Vargas-Sarmiento*, 448 F.3d at 167; *Abimbola*, 378 F.3d at 177; *see James v. United States*, 127 S. Ct. 1586, 1599 n. 7 (2007) (referring to defendant's specific charge and conviction for *Taylor* analysis of whether it was "violent felony" under Armed Career Criminal Act).

At this juncture, both the IJ and the BIA properly made limited reference to the record of conviction for the purpose of determining whether Petitioner's conviction satisfied the definition of aggravated felony. (JA 3, 50). For this purpose, the "record of conviction" includes the charging document (indictment or information), plea agreement, verdict or judgment, and the plea transcript or sentencing record. 8 U.S.C. § 1229a(c)(3)(B); *Abimbola*, 378 F.3d at 177. By contrast, reliance on a presentence report or separate restitution order is disfavored, because

the focus of the aggravated felony analysis is on the fact of conviction. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (conviction, as opposed to commission, of the categorized crimes renders alien subject to removal); *Dickson v. Ashcroft*, 346 F.3d 44, 53 (2d Cir. 2003); *Conteh*, 461 F.3d at 58 (BIA may not rely on presentence report).

Both the IJ and the BIA referred to Count One of the indictment, the count to which Petitioner pled guilty. (JA 3, 50, 272).[6] Count One alleged that the purpose of the conspiracy was submission of false claims to Blue Cross for reimbursement of medical expenses not actually incurred. (JA 280). Among the specific allegations of Count One was the submission of a claim on behalf of Petitioner in the amount of $17,986.79. (JA 282). Petitioner received and negotiated the check for this specific fraudulent claim. (JA 282).

Because the portion of the charging document to which Petitioner pled guilty showed a loss to Blue Cross

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[6] By relying heavily on *Chang v. INS* from the Ninth Circuit, Petitioner seems to be challenging the IJ's mention of the restitution portion of her criminal judgment. Pet. Brief at 14-15 (citing *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002) (reliance on presentence report in derogation of plea agreement was not proper)); JA 50, 276. However, in this case, the IJ explicitly stated that he was "guided mainly" by the language of the indictment. (JA 50), and the BIA relied only on that portion of the indictment to which Petitioner pled guilty. (JA 3). *See* 8 U.S.C. § 1229a(c)(3)(B).

exceeding $10,000, both the IJ and the BIA found that the loss requirement of INA § 101(a)(43)(M)(i) was satisfied and therefore Petitioner was removable as charged. (JA 3, 50).

In her brief, Petitioner emphasizes *Sui v. INS*, 250 F.3d 105 (2d Cir. 2001), as the basis for urging this Court to grant this petition. Pet. Brief at 12-15. Petitioner cites *Sui* for the erroneous assertion that the categorical approach prohibits reference to the record of her conviction, as was necessary for the IJ and BIA to determine the amount of loss. However, as discussed above, both the IJ and the BIA carefully followed the approach described in *Sui* and *Taylor*. In *Sui*, the Court makes clear that reference to the indictment as well as the statutory description of the offense is consistent with the categorical approach as set forth in the caselaw. *Sui*, 250 F.3d at 116.

The petitioner in *Sui* had pled guilty to one count of knowingly and unlawfully possessing counterfeit securities with the intent to deceive another, in violation of 18 U.S.C. § 513(a). *Id*. at 108. The one-count indictment alleged that Sui possessed counterfeit traveler's checks with a total face value of $22,700. *Id*. Sui was charged by INS with having been convicted of an offense defined in 8 U.S.C. § 1101(a)(43)(M)(i), an offense involving fraud or deceit in which the loss exceeds $10,000. *Id*. at 109. This is the same category of aggravated felony at issue in this petition. More specifically, the INS argued that, although the actual loss was less than $10,000, Sui's conviction of possession with intent to deceive was an

attempt (as set forth in subsection (U)) to commit such a crime (as set forth in subsection (M)(i). *Id*. at 110.

The issue in *Sui* came down to whether the possession of the $22,700 in counterfeit instruments could constitute an attempt to cause a loss in that amount. *Id*. at 118. Because it was not properly part of the record of conviction, the Court was precluded from considering statements in the presentence report that Sui was on the way to a shopping mall with a plan to make purchases with the counterfeit traveler's checks and sell the merchandise elsewhere. *Id*. at 108-09. Absent that factual background, the Court concluded that mere possession of $22,700 in counterfeit checks with intent to deceive did not necessarily amount to an attempt to cause a loss in that amount. *Id*. at 119. Therefore, based on the record of conviction and the statute of conviction, the Court concluded that Sui's conviction was not an aggravated felony. *Id*. at 119-20.

The important choice the *Sui* court made was between consideration of the indictment plus the presentence report and consideration of the indictment alone. In Sui's case, this tipped the balance, as the indictment alone did not establish an actual loss of $10,000. The important aspect of *Sui* in this petition is that the indictment was fair game for consideration either way, being part of the record of conviction. "Generally, courts undertaking a categorical approach look beyond the language of the statute to examine the charging document and the judgment of conviction when the relevant statute includes both conduct

that would constitute an aggravated felony and conduct that would not." *Id*. at 118 (citations omitted).

In this case, as in *Sui*, the Court has available to it the indictment for purposes of determining the amount of loss. Unlike *Sui*, in this case, the indictment demonstrates that Petitioner's crime was one in which the loss to the victim exceeded $10,000. Therefore, Petitioner is properly held to be an aggravated felon and the finding of removability should be affirmed. *See also Canada v. Gonzales*, 448 F.3d 560, 566-67 (2d Cir. 2006) (application of categorical approach permits reference to plea transcript for assault on a peace officer to determine which category of victim was in the charged crime and therefore whether assault was "crime of violence").

Regardless of whether the applicable analysis is labeled the "categorical approach" or "modified categorical approach," the narrow question presented here, whether reference to the individual record of conviction is permitted for the amount of loss determination under subsection (M)(i), is well settled in the affirmative. *See Conteh*, 461 F.3d at 57, 60-62; *Alaka v. Attorney General*, 456 F.3d 88, 106 (3d Cir. 2006) ("8 U.S.C. § 1101(a)(43)(M)(i) invites further inquiry because it specifies a mandatory loss amount" (citation omitted)); *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002) (rejecting BIA's reliance on PSR but relying on plea agreement); *see also Conteh*, 461 F.3d at 53-55 (canvassing cases and various incarnations of "categorical approach," settling on "modified categorical approach" in immigration context).

Since Petitioner is removable under 8 U.S.C. § 1227(a)(2)(A)(iii) based on her conviction for an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(M)(i), the Court lacks further jurisdiction over this petition. 8 U.S.C. § 1252(a)(2)(C); *see Vargas-Sarmiento*, 448 F.3d at 162; *Gattem v. Gonzales*, 412 F.3d 758, 767 (7th Cir. 2005) ("Because [petitioner] is removable by reason of having committed an aggravated felony, we have no jurisdiction to (further) review the BIA's order of removal and do not reach the other issue that [petitioner] has raised, which concerns the IJ's discretionary refusal to continue the removal proceeding pending the adjudication of the I-130 application for adjustment of status that his wife filed on his behalf."); *see also Petrov v. Gonzales*, 464 F.3d 800, 802 (7th Cir. 2006) (holding that 8 U.S.C. § 1252(a)(2)(C) bars review of "the removal order as a whole" when the alien is an aggravated felon). And because Petitioner's remaining claims essentially challenge the findings of the BIA and IJ that she did not meet her burden of proving that "Americanized Colombians" constitute a "particular social group," or that she would likely suffer persecution by virtue of her membership in such a putative group, she has not raised any constitutional claims or questions of law that would be preserved for review under 8 U.S.C. § 1252(a)(2)(D).

Nevertheless, in the event that the Court were to disagree about this procedural bar, the Government offers the following response to Petitioner's second and third points.

## II. THE IMMIGRATION JUDGE PROPERLY DETERMINED THAT LOPEZ DE ROWLEY FAILED TO ESTABLISH ELIGIBILITY FOR WITHHOLDING OF REMOVAL BECAUSE "AMERICANIZATION" IS NOT A PROTECTED STATUS AND SHE WOULD NOT BE SUBJECT TO PERSECUTION ON THIS BASIS IN ANY EVENT

### 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.[7] *See* 8 U.S.C. §§ 1158(a), 1231(b)(3); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995). Because Petitioner has abandoned her asylum application, only withholding of removal is at issue.

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[7] "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) (2007), cases relating to the former relief remain applicable precedent.

Unlike asylum, which is within the Attorney General's discretion, 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) (emphasis added); *Zhang*, 55 F.3d at 738.

To obtain withholding of removal, the alien bears the burden of proving by a "clear probability," *i.e.*, that it is "more likely than not," that his or her life or freedom would be threatened on return. *See* 8 C.F.R. § 208.16(b)(2)(ii) (2007); *INS v. Stevic*, 467 U.S. 407, 429-30 (1984); *Melgar de Torres v. Reno* , 191 F.3d 307, 311 (2d Cir. 1999).

Although the BIA's definition of "particular social group" is accorded *Chevron* deference, the determination whether a particular petitioner has identified a "particular social group" requires the application of law, *i.e.*, the *Acosta* rule and its judicial progeny, to fact. Therefore, that determination is reviewed by this Court *de novo*. *Gao v. Gonzales*, 440 F.3d 62, 65 (2d Cir. 2006).

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 66, 73 (2d Cir. 2004); *Wu Biao Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003) (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 v. INS*, 232 F.3d 279, 287 (2d Cir. 2000)).[5]

Where an appeal turns on the sufficiency of the factual findings underlying the IJ's determination[6] that an alien

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[5] This Court has noted that in 1996, Congress replaced the "substantial evidence" rule drawn from general administrative law with a new standard set forth in 8 U.S.C. § 1252(b)(4)(B), that "the administrative findings of fact are *conclusive* unless any reasonable adjudicator would be *compelled* to conclude to the contrary." (Emphasis added). Despite the fact that this new standard appeared to be even more deferential, the Court was compelled by precedent to continue to characterize its review in terms of "substantial evidence." *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 334 n.113 (2d Cir. 2006).

[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 (GA 2), 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 (continued...)

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

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[6] (...continued)
decision as the relevant administrative decision as supplemented by the BIA's decision. Where "the BIA adopts the decision of the IJ and merely supplements the IJ's decision," this Court "review[s] the decision of the IJ as supplemented by the BIA." *Yan Chen v. Gonzales*, 417 F.3d 268, 271 (2d Cir. 2005).

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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 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 relief], but *compels* it." *Id.* at 481 n.1.

## C. Discussion

### 1. "Americanized" Colombians Are Not a "Particular Social Group"

With respect to the withholding issue, in this case the BIA adopted the IJ's reasoning and offered additional commentary. Therefore, this Court "review[s] the decision of the IJ as supplemented by the BIA." *Yan Chen v. Gonzales*, 417 F.3d 268, 271 (2d Cir. 2005).

The phrase "particular social group" is not defined in the INA. *See* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); *Matter of Acosta*, 19 I. & N. Dec. at 232-33. As the Third Circuit has noted, "[t]he contours of what constitutes a 'particular social group' are difficult to discern. . . . [T]he 'statutory language standing alone is not very instructive' and . . . 'in its broadest literal sense, the phrase is almost completely open-ended.'" *Lukwago v. Ashcroft*, 329 F.3d 157, 170-71 (3d Cir. 2003) (quoting *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993)). *See also Elien v. Ashcroft*, 364 F.3d 392, 396 (1st Cir. 2004) (cautioning that the term "particular social group," as used in the INA, is not "free from ambiguity"). Accordingly, because the statute is silent with respect to the meaning of the term "particular social group," and because any definition of "social group" necessarily involves important political and foreign policy considerations, the BIA's definition merits deference. *Dailide v. United States Att'y Gen.*, 387 F.3d 1335, 1341 (11th Cir. 2004); *see Gao,* 440 F.3d at 65.

The landmark BIA case defining "a particular social group" for asylum and withholding of removal purposes is *Matter of Acosta,* 19 I. & N. Dec. 211 (BIA 1985), *overruled in part on other grounds by*, *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). *Gao*, 440 F.3d at 67. In *Acosta*, the BIA stated that "particular social group" should be construed to be congruent with the four more specific protected grounds: race, religion, nationality or political opinion. *Acosta,* 19 I. & N. Dec. at 233. More particularly, a cognizable social group would have a common, immutable characteristic, either one that is unchangeable, like race, or one that is so fundamental to

personal identity or conscience that changing it should not be required, like religion. *Id*.

This Court has afforded *Chevron* deference to the *Acosta* rule. *Gao*, 440 F.3d at 65. Specifically, the Court has required (1) that the group in question comprise a collection of people closely affiliated with each other, who are actuated by some common impulse or interest, and (2) that the members of the social group be externally distinguishable to outsiders. *Saleh v. United States Dep't of Justice*, 962 F.2d 234, 240 (2d Cir. 1992); *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991). The group must exist independently of the persecution suffered by the applicant for asylum, and it must have existed before the persecution began. *See Lukwago,* 329 F.3d at 172. Moreover, to demonstrate eligibility for relief based on membership in a particular social group, "the evidence should be specific enough to indicate that the alien's predicament is appreciably different from the dangers faced by the alien's fellow citizens." *Vides-Vides v. INS*, 783 F.2d 1463, 1469 (9th Cir. 1986). The "particular social group" category cannot be simply a "catch all" for all aliens fearing persecution. That, however, is essentially the result that would obtain should Petitioner's withholding application be approved.

First, it is clear that Petitioner's primary concern is for her husband's welfare. The first question calling for a narrative answer on the asylum petition is "Why are you seeking asylum? Explain in detail what the basis is for your claim." Petitioner answered:

> I fear for the life of my husband if I am removed to Colombia.
>
> If I am returned to Colombia, my husband of 30 years, James Rowley, will be deported, too. He is tall, distinguished looking and very much an American. He has held a sales job for most of his life and looks like a professional – in his dress and manner. He cannot change who he is. He cannot make himself look or act Colombian. He will be immediately identified as an American.
>
> . . .

(JA248). The principal emphasis of Petitioner's application and the testimony presented was her husband's visibility and ensuing threat to his welfare. (JA 98, 112-13; 117-118, 248-250). The threat to Petitioner clearly arose chiefly from being in the company of someone who is identifiable as foreign or American. (JA 99, 248, 250.)

This, however, is not a cognizable ground for withholding relief. As the IJ correctly noted, the correct analysis for withholding relief focuses solely on Petitioner. (JA54). The withholding statute, 8 U.S.C. § 1231(b)(3)(A), provides relief to "an alien" if "*the alien's* life or freedom would be threatened . . . because of *the alien's* race, religion, nationality, membership in a particular social group, or political opinion." (Emphasis added.) Thus, in order to qualify for withholding, Petitioner must demonstrate that *she* would suffer persecution – not that a person voluntarily accompanying her might do so – and that such persecution is based on

one of *her* traits. *See also* INA § 212(h), 8 U.S.C. § 1182(h) (2000) (family hardship waiver not available to aggravated felons); *cf. United States v. Fernandez-Antonia*, 278 F.3d 150, 161 (2d Cir. 2002) (anguish of family separation is not qualifying "extreme" hardship).

Second, it is equally clear that Petitioner is simply dressing up her claim that she may be victimized on the basis of perceived wealth in the nomenclature of "particular social group." This is not a proper basis for relief. As the IJ found, the background materials presented by Petitioner and Petitioner's own testimony established that bombings, violent crime, and instability are fueled by criminal elements, drug trafficking and civil war in Colombia. (JA 47, 96, 102, 130). Criminal and rebel groups use kidnaping for ransom to fund their activities. (JA 96). Petitioner submitted a March 25, 2001, Associated Press article about the extortion policy of one of Colombia's principal rebel groups, the Revolution Armed Forces of Colombia ("FARC"). "Under the policy, businesses and individuals worth more than $1 million must pay 10 percent of their assets or risk being kidnapped." (JA 129). According to the article, FARC has been "extorting the wealthy for years to finance their decades-old insurgency." (JA 129). There is no mention that the victims are targeted by nationality or even politics, only wealth. Unfortunately, Petitioner's fears for her personal safety, according one article, extend to the "average citizen" in Colombia. "Driven by Fear, Colombians Leave in Droves," *New York Times*, March 5, 2000. (JA 152). The BIA correctly noted that "The

respondent's fear of being a victim of crime does not constitute persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." (JA 3). Victimization motivated by "perceived wealth" is not a protected basis. *In re S– V–*, 22 I. & N. Dec. 1306, 1310 (BIA 2000).

Bearing in mind the primacy of the two themes of her husband's welfare and their perceived wealth in the application, it is clear that Petitioner's claimed "particular social group" does not satisfy the factors set forth in *Acosta* and its progeny, discussed above. First, there is no evidence that Petitioner's "Americanization" is either a fixed or a fundamental part of her identity. Petitioner testified about her trepidation at the prospect of entering Colombian culture and daily life after decades in the United States, but there is no evidence or testimony that she is unable to change her daily life. (JA 98, 113, 248).

Second, although Petitioner made passing reference to "my ways and my accent," she did not identify with specificity any externally distinguishable indicator that would label her "Americanized" in the eyes of Colombian culture. (JA 98). The IJ therefore properly held that Petitioner did not proffer enough evidence to conclude that the "Americanized" aspect of her identity was fundamental to her identity or that it established her as a member of a distinct group that would be subject to differential treatment. (JA 53). That is a factual finding which is "conclusive," in the absence of any evidence that would leave "any reasonable adjudicator . . . compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B).

Third, there is no evidence that "Americanized Colombians" exist as a social community or are perceived as such in Colombia. Petitioner and her husband testified about their reluctance to participate in social interaction in Colombia, but there is no evidence of the converse, that is, there is no evidence that Petitioner is drawn toward any community whose members had been long-time residents of the United States. (JA 98, 113, 248). Indeed, the BIA properly concluded that Petitioner's invocation of "Americanized" Colombians was simply a proxy for the same risk that anyone perceived to have wealth might be the victim of crime in Colombia. (JA 3).

Petitioner cites *Ucelo-Gomez v. Gonzales*, 464 F.3d 163 (2d Cir. 2006) (per curiam), a case in which the purported social group was "affluent Guatemalans," to support the conclusion that "Americanized Colombians" are a cognizable group. Pet. Brief at 16. However, in *Ucelo-Gomez*, the BIA summarily affirmed the IJ's conclusions on this issue, and the Court concluded that it could not address whether those petitioners had identified a cognizable group. *Ucelo-Gomez v. Gonzales*, 464 F.3d at 170. *See Gonzales v. Thomas*, 126 S. Ct. 1613, 1615 (2006) (per curiam) (Court of Appeals should not address "particular social group" in the first instance). The decision in *Ucelo-Gomez* was simply that the case should be remanded so that the reviewing court would have the benefit of the BIA's discussion. *Ucelo-Gomez,* 464 F.3d at 170.

Petitioner overlooks the fact that on remand, the BIA complied with this Court's directive to issue a precedential

opinion, entitled to *Chevron* deference, which "expand[ed] upon" *Matter of Acosta* "as to the meaning of 'particular social group'" and which explained "why 'affluent Guatemalans' are not a 'particular social group.'" *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 73 (BIA 2007). In doing so, the BIA focused first on the "social visibility" required for a member of a proposed group to qualify for refugee status. Examining the country conditions in Guatemala, the BIA found little evidence that "wealthy Guatemalans would be recognized as a group that is at a greater risk of crime in general or of extortion or robbery in particular." *Id.* at 74. Second, the BIA held that the proposed group "also fails the particularity requirement of the refugee definition." *Id.* at 76.

> The terms "wealthy" and "affluent" standing alone are too amorphous to provide an adequate benchmark for determining group membership. . . . Because the concept of wealth is so indeterminate, the proposed group could vary from as little as 1 percent to as much as 20 percent of the population, or more. . . . The characteristic of wealth or affluence is simply too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group.

*Id.* The BIA left open the possibility that an alien might be able to show that "wealth" could conceivably be the shared characteristic for a protected social group. "For example, should a government institute a policy of imprisoning and mistreating persons with assets or income above a fixed level, there could be a basis for a societal perception that

the class of wealthy persons, as defined by the government, would constitute a particular social group." *Id.* at 75 n.6.

The logic of *A-M-E-* applies with equal force here. Petitioner has offered no evidence that affluent Colombians have sufficient "social visibility" as a group, are or capable of being defined with sufficient particularity to constitute a protectable "social group" for purposes of refugee law. Thus, to the extent that Petitioner's "Americanization" claim is simply a permutation of an "affluent Colombian" claim, her argument is foreclosed by *A-M-E-*. *See also Acero v. United States INS*, No. 04-0223 (DGT), 2005 WL 615744 (E.D.N.Y. Mar. 16, 2005) (to the extent IJ's finding that perceived wealth and "Americanization" of Colombian national is factual determination, it is insulated from review).

For the foregoing reasons, this Court should affirm the BIA's conclusion that Petitioner is not entitled to withholding of removal on the basis of membership in the putative group of "Americanized" Colombians.

### 2. Even If Petitioner Were a Member of a Cognizable "Particular Social Group," Substantial Evidence Supports the IJ's Findings That Petitioner Did Not Show Persecution of That Group or a Clear Probability of Persecution

As noted above, because Petitioner is an aggravated felon, this Court lacks jurisdiction over anything but questions of law and constitutional claims pursuant to 8 U.S.C. § 1252(a)(2)(D). To the extent Petitioner disputes the IJ's findings as to whether and why FARC and other paramilitary groups target individuals for extortion and other maltreatment, she is challenging factual determinations that fall beyond the limited scope of review which Congress has authorized. *See Xiao Ji Chen*, 471 F.3d at 330-32 (holding that challenges to agency factfinding are not reviewable under § 1252(a)(2)(D)). And even assuming jurisdiction were available, the IJ's findings would still be supported by substantial evidence.

#### a. Petitioner Failed To Show That "Americanized" Colombians Are Persecuted

The IJ made a first alternative finding on the withholding issue: that Petitioner did not carry her burden to show that membership in the putative group of "Americanized" Colombians puts one at risk of persecution. (JA 53-54). The IJ observed that Petitioner's evidence indicated that wealth or perceived wealth is the

indicator of risk, as those who engage in kidnaping for ransom do so for the money, not to terrorize any particular political or social group. (JA 53, 217, 223). For example, FARC targeted individuals and businesses with a certain net worth. (JA 129). Petitioner submitted a number of articles about generalized violence and about kidnaping, but none of them indicated that Americans are targeted and none indicated that "Americanized" Colombians are targeted. (JA 127-152, 217-224). The same can be said for the country conditions report, consular sheets, and Congressional testimony submitted. (JA 153-216).

It is a key requirement for asylum or withholding relief that the Petitioner show that the persecution with which they are threatened is "because of" their membership in the protected group. 8 U.S.C. § 1231(b)(3)(A); *see INS v. Elias-Zacarias*, 502 U.S. 478, 482-83 (1992) (asylum seeker must show persecution "on account of" protected basis). Because substantial evidence supports the IJ's and, by reference, the BIA's conclusion that "Americanized" Colombians are not a target of persecution, the denial of withholding should be affirmed.

#### b. Petitioner Failed To Show a Clear Probability Her Life or Freedom Would Be Threatened

The IJ made a second, alternative finding, which is that even if "Americanized" Colombians were a protected group, she did not carry her burden to show a clear probability that she risked threats to her life or freedom on this basis. (JA 54). One of the articles submitted by

Petitioner discussed the fear of kidnaping as it extended to foreigners in Colombia. (JA 127). The Associated Press report said that, according to one source, 41 foreigners were kidnaped in Colombia in 2000. (JA 127). However, this is against a backdrop of over 3,000 Colombians being kidnaped in the same year. (JA 127).

The 2000 State Department country conditions report submitted by Petitioner notes that foreigners are not immune from the practice of kidnaping for ransom: "The FARC, the ELN and other guerilla groups regularly kidnaped foreign citizens throughout the year . . . ." (JA 167). The report noted one incident of kidnaping of Americans that occurred in 1993, in which FARC kidnaped three American missionaries whose welfare was still unknown in 2000. (JA 167). The February 29, 2000, consular information sheet contained this information for would-be travelers: "Kidnapping for ransom occurs throughout Colombia. Since 1980, the U.S. Embassy in Bogota has learned of 112 U.S. citizens kidnapped in Colombia and adjacent border areas. Although the majority were released, 14 were murdered, one died from malnutrition during captivity, and the whereabouts of several others remain unknown." (JA 198). The sheet states: "Some terrorist groups have targeted foreigners, multinational companies and other foreign interests, and this pattern is expected to continue in the future." (JA 198). However, apart from this generic statement, there is no document or evidence from which it can be inferred that Petitioner – who is Colombian, not a "foreigner" – herself is more likely than not to be targeted for such crime.

Thus, even if this Court had jurisdiction to review the IJ's findings, they are supported by substantial evidence and should not be disturbed.

## III. LOPEZ DE ROWLEY'S CLAIM FOR RELIEF UNDER THE CONVENTION AGAINST TORTURE WAS NOT EXHAUSTED BEFORE THE BIA

### A. Relevant Facts

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

### B. Governing Law

Article 3 of the Convention Against Torture precludes the United States from returning an alien to a country where he more likely than not would be tortured by, or with the acquiescence of, government officials acting under color of law. *See Wang v. Ashcroft*, 320 F.3d 130, 133-34, 143-44 & n.20 (2d Cir. 2003); *Ali v. Reno*, 237 F.3d 591, 596-97 (6th Cir. 2001); 8 C.F.R. §§ 208.16(c), 208.17(a), 208.18(a) (2007). To establish eligibility for relief under the Convention Against Torture, an applicant bears the burden of proof to "establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2) (2007); *see also Gao v. Gonzales*, 424 F.3d 122, 128 (2d Cir. 2005).

It is well settled that before an alien can seek judicial review of a removal order, the alien is statutorily required to exhaust all administrative remedies available. *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 of right . . . ."). Furthermore, as a matter of judicial exhaustion, this Court requires aliens to present all of their specific *issues* to the agency before presenting them to this Court in a petition for review. *Lin Zhong v. United States Dep't of Justice*, 480 F.3d 104, 117-25 (2d Cir. 2007), *pet. for reh'g in banc denied*, No. 02-4882-ag, (2d Cir. May 31, 2007). Although this requirement of *issue* exhaustion is not jurisdictional, and thus subject to waiver, it is mandatory. *Id.* at 107 n.1; *Steevenez v. Gonzales*, 476 F.3d 114, 117 (2d Cir. 2007) (per curiam) ("[W]e recently clarified that while not jurisdictional, issue exhaustion is mandatory."). In other words, in the absence of extraordinary circumstances, "[i]f the government points out to the appeals court that an issue relied on before that court by a petitioner was not properly raised below, the court must decline to consider that issue. . . ." *Lin Zhong*, 480 F.3d at 107 n.1.

To comply with the issue exhaustion requirement, each issue must be specifically raised below; generalized contentions at the administrative level are not sufficient to preserve specific claims for review by the courts. *See, e.g., Steevenez*, 476 F.3d at 117 ("generalized protestations" are insufficient to preserve issues for review); *Gill v. INS*, 420 F.3d 82, 85-86 (2d Cir. 2005) (explaining that the "rule that emerges . . . is that

§ 1252(d)(1) bars the consideration of bases for relief that were not raised below, and of general issues that were not raised below, but not of specific, subsidiary legal arguments, or arguments by extension, that were not made below."); *Foster v. INS*, 376 F.3d 75, 77-78 (2d Cir. 2004) (per curiam) ("the mere statement that one is not removable does not serve to raise a specific issue to the IJ"). "While this Court will not limit the petitioner 'to the exact contours of his argument below' in determining whether the petitioner exhausted the issue, the issue raised on appeal must be either a 'specific, subsidiary legal argument[ ]' or 'an extension of [an] argument . . . raised directly before the BIA.'" *Steevenez*, 476 F.3d at 117 (quoting *Gill*, 420 F.3d at 86) (alteration in *Steevenez*).

While stressing the mandatory nature of the exhaustion doctrine, this Court has recognized a few limited exceptions to that requirement. Thus, in *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 53 (2d Cir. 2004), this Court held that it could excuse a failure to exhaust when "necessary to avoid manifest injustice." Similarly, this Court held in *Gill* that the exhaustion requirement "would not bar consideration of a specific, subsidiary legal argument, particularly one that is purely legal and falls outside the INS's traditional area of expertise." *Gill*, 420 F.3d at 87. In other words, unless an issue is a subsidiary legal argument outside the expertise of the agency, or unless consideration of the issue is necessary to prevent "manifest injustice," an alien must present every issue to the agency to preserve them for review in this Court.

This Court has repeatedly recognized the many important purposes of the administrative exhaustion doctrine, which include "ensur[ing] that the . . . agency responsible for construing and applying the immigration laws and implementing regulations, has had a full opportunity to consider a petitioner's claims before they are submitted for review by a federal court," *Theodoropoulos v. INS*, 358 F.3d 162, 171 (2d Cir. 2004), "protecting the authority of administrative agencies, limiting interference in agency affairs, and promoting judicial efficiency by resolving potential issues," *Beharry v. Ashcroft*, 329 F.3d 51, 56 (2d Cir. 2003), as well as "preventing the 'frequent and deliberate flouting of administrative processes [that] could weaken the effectiveness of an agency,'" *Bastek v. Federal Crop Ins. Corp.*, 145 F.3d 90, 93-94 (2d Cir. 1998) (quoting *McKart v. United States*, 395 U.S. 185, 193-95 (1969)) (alteration in *Bastek*).

### C. Discussion

Petitioner failed to raise her claim for CAT relief before the BIA. (JA 37, 7-24). Therefore, the BIA did not address the issue of CAT relief. (JA 2-4). As a result, these issues have not been administratively exhausted, and Petitioner is barred from raising them at this juncture. *See Li Hua Lin v. U.S. Dep't of Justice*, 453 F.3d 99, 105 n.3 (2d Cir. 2006) (failure to raise CAT claim before IJ and BIA constitutes failure to exhaust); *Liang Chen v. U.S. Attorney General*, 454 F.3d 103, 105 n.1 (2d Cir. 2006) (per curiam) (same); *Kambolli v. Gonzales*, 449 F.3d 454, 457-58 (2d Cir. 2006) (per curiam) (same).

## CONCLUSION

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

Dated: June 1, 2007

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 12,007 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. Definitions**

(a) As used in this chapter--

. . . .

(43) The term "aggravated felony" means--

. . . .

(M) an offense that--

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

. . . .

**8 U.S.C. § 1227. Deportable aliens**

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status

. . . .

(B) Present in violation of law

Any alien who is present in the United States in violation of this chapter or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant ) has been revoked under section 1201(i) of this title, is deportable.

. . . .

(2) Criminal offenses

(A) General crimes

. . . .

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

. . . .

**8 U.S.C. § 1231 Detention and Removal Of Aliens Ordered Removed**

. . . .

(b) Countries to which aliens may be removed

. . . .

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

(A) In general

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

(B) Exception

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

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

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

(c) Sustaining burden of proof; credibility determinations

In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations,

in the manner described in clauses (ii) and (iii) of section 1158(b)(1)(B) of this title.

. . . .

**8 U.S.C. § 1252. Judicial review of orders of removal**
(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

(2) Matters not subject to judicial review

. . . .

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by

section 1227(a)(2)(A)(i) of this title.

. . . .

(b) Requirements for 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.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(C)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to section 1252(b)(4)(B) of this title, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

. . . .

**18 U.S.C. § 371 (2000) Conspiracy to commit offense or to defraud United States**

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

**18 U.S.C. § 1341 (2000) Frauds and swindles**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

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

. . . .

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

. . . .

(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under

all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

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

. . . .