05-0738-ag

To Be Argued By:
WILLIAM A. COLLIER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-0738-ag

GRACE DOROTHY MUTONYI,
Petitioner,

-vs-

ALBERTO GONZALES, UNITED STATES ATTORNEY GENERAL,
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR ALBERTO GONZALES ATTORNEY GENERAL OF THE UNITED STATES

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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

WILLIAM A. COLLIER
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction under § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b), to review petitioner's challenge to the BIA's January 18, 2005, final order denying her request for asylum, withholding of removal, and relief under the United Nations Convention Against Torture.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether substantial evidence supports the BIA's conclusion that petitioner failed to establish eligibility for asylum, for withholding of removal, or for relief under the United Nations Convention Against Torture, because she failed to show (1) that she had a well-founded fear of future persecution if she were to return to Uganda, or (2) that it was more likely than not that she would be tortured if she were to return to Uganda.

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BRIEF FOR ALBERTO GONZALES
Attorney General of the United States

Preliminary Statement

Grace Dorothy Mutonyi, a native and citizen of Uganda, petitions this Court for review of an January 18, 2005, decision of the Board of Immigration Appeals ("BIA") (Joint Appendix ("JA") 1-2). The BIA adopted and affirmed the November 17, 2003, decision and order of an Immigration Judge ("IJ"), which denied petitioner's applications for asylum, for withholding of removal, and

for relief under the U.N. Convention Against Torture ("CAT")[1] under the Immigration and Nationality Act of 1952, as amended ("INA"), and which ordered her removed from the United States. (JA 113-118 (IJ's decision and order)).

Substantial evidence supports the IJ's and the BIA's conclusion that petitioner failed to establish her eligibility for asylum, for withholding of removal, and for relief under the CAT. The IJ correctly rejected petitioner's claim that her status as a professional woman would expose her to harm that could give rise to a claim of asylum or withholding of removal or relief under the CAT. Petitioner failed to establish an objectively reasonable fear that she would be singled out for persecution upon returning to Uganda, or that she would more likely than not be tortured upon such a return.

Statement of the Case

On May 20, 1988, petitioner entered the United States as a visitor through New York, New York. (JA 558).

On or about December 21, 1992, petitioner submitted a Request for Asylum in the United States. (JA 120-124).

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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).

On June 5, 1997, petitioner was served a Notice to Appear charging her with removability. (JA 764-765).

On November 17, 2003, petitioner appeared at a removal and asylum hearing in New York, New York. On that same date, Immigration Judge Margaret McManus issued an oral ruling finding petitioner removable to Uganda; and denying petitioner's claims for asylum, withholding of removal, and relief under the CAT. (JA 113-117, 170-171).

On December 16, 2003, petitioner filed a timely notice of appeal to the BIA (JA 163-167), and filed a brief on June 23, 2004. (JA 6-18).

On January 18, 2005, the BIA issued an order adopting and affirming the IJ's decision, and dismissing the appeal. (JA 2).

On February 16, 2005, petitioner filed a timely petition for review of the BIA's decision.

Statement of Facts

A. Petitioner's Entry into the United States and Asylum, Withholding, and CAT Application

Petitioner Grace Mutonyi is a native and citizen of Uganda. (JA 448). According to petitioner, she came to the United States at age 19 on May 20, 1988, to visit a relative, and she stayed in New York, New York. (JA 448-449). Her nonimmigrant visa expired on November 19, 1988, and petitioner overstayed the visa. (JA 764).

Wanting to improve her life while in the United States, petitioner began taking nursing and other health care courses in New York. (JA 448-449).

On or about December 21, 1992, petitioner submitted a written request for asylum and withholding of removal with the Immigration and Naturalization Service ("INS").[2] (JA 448-452). Petitioner based the asylum request on her membership as a teenager in the Uganda Peoples Congress ("UPC"), a political organization that had allegedly been banned by the president of Uganda, Yoweni Museveni. (JA 449). According to petitioner, she had joined the pro-democracy UPC while a student, and "[i]f I returned to my country my life would be in grave danger and I will be detained without trial or killed." (JA 449). However, in response to a question on the asylum application about whether petitioner or any member of her family had ever been mistreated or threatened by the authorities in her home country, or by a group the government was unwilling or unable to control, petitioner responded, "No." (JA 450).

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[2] The INS was abolished effective March 1, 2003, and its functions transferred to three bureaus within the Department of Homeland Security pursuant to the Homeland Security Act of 2002. *See* Pub. L. No. 107-296, 116 Stat. 2135, 2178. The enforcement functions of the INS were transferred to the Bureau of Immigration and Customs Enforcement ("ICE"). *Id.* For convenience, this brief will refer throughout to the INS.

Petitioner's request for asylum is dated December 21, 1992; it appears to have been filed with the INS on January 11, 1993. (JA 448, 452).

Petitioner made no mention of any other basis or claim for asylum in her application.

B. Petitioner's Removal Proceedings

On June 5, 1997, the INS served petitioner with a Notice to Appear for a removal hearing. (JA 764-765). The alleged bases for removal asserted in the Notice to Appear were that petitioner: (1) was neither a citizen nor a national of the United States; (2) was a native and citizen of Uganda; (3) was admitted to the United States at New York, New York on or about May 20, 1988, as a non-immigrant visitor with authorization to remain in the United States for a period not to exceed November 19, 1998; and (4) that petitioner remained in the United States beyond November 19, 1998, without authorization from the INS. (JA 764). The Notice to Appear concluded, therefore, that petitioner was subject to removal as an alien who remained in the United States for a time longer than permitted, under Section 237(a)(1)(B) of the Immigration & Nationality Act. (JA 764).

After several continuances, a combined removal hearing and hearing on the asylum petition was held before the IJ on November 17, 2003 (hereinafter "Removal/Asylum Hearing"). Prior to hearing testimony, the IJ inquired on the record whether petitioner had any changes to her asylum application. (JA 85). Petitioner's then-counsel indicated that petitioner was withdrawing her claim of asylum based on political involvement in the UPC, and asserting instead that "the basis of her claim is a membership in a social group, which is being a woman -- a professional woman." (JA 86). Upon further inquiry by

the IJ, petitioner agreed that her asylum application was no longer based on political opinion. (JA 86).

1. Petitioner's Testimony

Petitioner was the only witness to testify at the Removal/Asylum Hearing. On direct examination, petitioner testified among other things that she had received various types of medical education while in the United States, including training as a nurse's aide and as an electroencephalogram technician, and that she had been working since 1993 in the medical field. (JA 98-99). When asked by her counsel how she thought she would be treated as a professional woman in Uganda, petitioner replied, "It is difficult to say. I don't know. It's complicated, I think." (JA 100). Petitioner acknowledged that there are laws in Uganda that protect women, but she testified that the laws are not as extensive as those in the United States. (JA 100). According to petitioner, "men always have the power," and they can abuse women, including their wives, even though Ugandan law may prohibit such acts. (JA 100-101).

Petitioner further testified that conditions are "not good" in the northern part of Uganda, and that assaults, rape, and murder are taking place there. (JA 101-102). She stated, however, that she would be going to the "center" of the country, the area where her family resides, if she were returned to Uganda. (JA 102). She testified that life in Uganda would be hard for her in terms of work and that she feared being hurt. (JA 102).

On cross-examination, petitioner testified that she is unmarried and that her parents and eight siblings reside in Uganda. (JA 103-104).

C. The IJ's Decision

The IJ issued an oral ruling on November 17, 2003, denying petitioner's asylum petition, and her requests for withholding of removal and CAT relief. (JA 110, 113-118).

The IJ began her ruling by noting that petitioner had been credible in her testimony. (JA 114). The IJ stated that petitioner's asylum application was initially based on a political opinion claim, but that petitioner was now "seeking asylum based on her status as a professional woman in a particular social group." (JA 114). The IJ acknowledged that petitioner was pursuing education in the United States that was not available to her in Uganda, at least in part because men seem to receive preferential treatment "in pretty much everything" in Uganda. (JA 114-115). According to the IJ, the gist of petitioner's testimony was that "it would be complicated as a professional woman in Uganda." (JA 115). The IJ then summarized petitioner's testimony about education, possible spousal abuse, and "problems in northern Uganda," though as to the last issue the IJ did not think that those problems would necessarily "affect the [petitioner] in her particular circumstances." (JA 115). The IJ then commented that petitioner's claim is "really based on the status as a female, generally, or professional woman." (JA 115).

According to the IJ, the background materials in evidence about Uganda, including the Department of State's most recent *Country Report*, confirmed petitioner's testimony about domestic violence and societal discrimination against women. (JA 116). The IJ recognized that it would be "very difficult" for petitioner to live in Uganda under those circumstances, but that "[t]he problem is, I just do not think there is enough evidence that she would be persecuted." (JA 116). The IJ therefore concluded that petitioner failed to demonstrate the requisite degree of harm that would rise to the level of persecution. (JA 117). The IJ consequently denied petitioner's requests for asylum and for withholding, and the IJ concluded that petitioner's request for relief under the CAT must also be denied because petitioner had not demonstrated the likelihood that she "would be placed in a situation where she would be subjected to torture" upon return to Uganda. (JA 117-118). Finally, the IJ ordered that petitioner be removed from the United States to Uganda as charged in the Notice of Appearance. (JA 118).

D. The BIA's Decision

The BIA adopted and affirmed the decision of the IJ, concluding that "[t]he record does not demonstrate a reasonable possibility that the respondent herself will suffer persecution if she is returned to Uganda." (JA 2). In dismissing the appeal, the BIA also noted that petitioner had explicitly withdrawn her claim for asylum predicated on political opinion. (JA 2).

This petition for review followed.

SUMMARY OF ARGUMENT

Substantial evidence supports the IJ's finding that petitioner failed to meet her burden of demonstrating eligibility for asylum, for withholding of removal, and for relief under the CAT.

The record supports the IJ's conclusion that petitioner failed to provide probative evidence establishing a well-founded fear of future persecution in Uganda against petitioner's putative social group, i.e., professional women. At most, petitioner provided anecdotal evidence about the plight of women in general in Uganda, but not the specific and detailed evidence necessary for prevailing on her claims for asylum and withholding of removal.

Substantial evidence further supports the IJ's finding that petitioner did not prevail on her CAT claim. Petitioner did not testify during the Removal/Asylum Hearing about government-sponsored or government-condoned torture, and the documentary evidence submitted in support of petitioner's CAT claim did not satisfy the high standard of proof necessary for relief under the CAT.

ARGUMENT

I. THE BIA PROPERLY DETERMINED THAT PETITIONER FAILED TO ESTABLISH ELIGIBILITY FOR ASYLUM, FOR WITHHOLDING OF REMOVAL, AND FOR RELIEF UNDER THE CAT.

A. Relevant Facts

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

B. Governing Law and Standard of Review

Two forms of relief are potentially available under the INA 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

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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.

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).

A third form of relief, under the CAT, is also available to aliens who can demonstrate the likelihood that they will be subject to torture if removed to the proposed country of removal. 8 C.F.R. § 208.16(c)(2); *see also Joaquin-Porras v. Gonzales,* ___ F.3d, ___, 2006 WL 120331, at *7 (2d Cir. Jan. 18, 2006).

1. Asylum

An asylum applicant must, as a threshold matter, establish that she 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 her 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.

"The phrase 'particular social group' has been defined to encompass 'a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.'" *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (citation omitted). "A particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor -- or in the eyes of the outside world in general." *Id.* "Like the traits which distinguish

the other four enumerated categories -- race, religion, nationality and political opinion -- the attributes of a particular social group must be recognizable and discrete." *Id.* Consequently, "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group." *Id.*

Although there is no statutory definition of "persecution," courts have described it as "'punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.'" *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995) (quoting *De Souza v. INS*, 999 F.2d 1156, 1158 (7th Cir. 1993)); *see also Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (stating that persecution is an "extreme concept"). While the conduct complained of need not be life-threatening, it nonetheless "must rise above unpleasantness, harassment, and even basic suffering." *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000). Upon a demonstration of past persecution, a rebuttable presumption arises that the alien has a well-founded fear of future persecution. *See Melgar de Torres v. Reno*, 191 F.3d 307, 315 (2d Cir. 1999); 8 C.F.R. § 208.13(b)(1)(i) (2004).

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*, 947 F.2d at 663. 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 [s]he . . . will be deported have personally or directly affected [her.]" *Id.* at 663. With respect to the objective component, the applicant must prove that a reasonable person in her circumstances would fear persecution if returned to her 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 [s]he presented was so compelling that no reasonable factfinder could fail'" to agree with the findings (quoting *INS v. Elias-Zacarias*, 502 U.S 478, 483-84 (1992)); *Melgar de Torres*, 191 F.3d at 311.

The asylum applicant bears the burden of demonstrating eligibility for asylum by establishing either that she was persecuted or that she "has a well-founded fear of future persecution on account of [one of the statutorily protected grounds]." *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, 1987 WL 108943 (BIA June 12,

1987), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647-48 (9th Cir. 1997) (applicant must provide testimony that is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account").

Finally, even if the alien establishes that she 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 her "life or freedom would be threatened in [her native] country because of [her] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (2004); *Zhang*, 55 F.3d at 738. To obtain such relief, the alien bears the burden of proving by a "clear probability," i.e., that it is "more likely than not," that she 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 66, 71 (2d Cir. 2004); *Wu Biao Chen*, 344 F.3d at 275; *Zhang*, 55 F.3d at 738.

3. Relief Under the CAT

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

To establish eligibility for relief under the CAT, 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) (2004); *see also Joaquin-Porras,* 2006 WL 120331, at *7; *Wang*, 320 F.3d at 133-34, 144 & n.20.

The CAT defines "torture" as "'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, punish[ment] . . . , or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'" *Ali*, 237 F.3d at 597 (quoting 8 C.F.R. § 208.18(a)(1)).

Because "[t]orture is an extreme form of cruel and inhuman treatment," even cruel and inhuman behavior by officials may not warrant CAT protection. *Sevoian v.*

Ashcroft, 290 F.3d 166, 175 (3d Cir. 2002) (citing 8 C.F.R. § 208.18(a)(2)). The term "acquiescence" requires that "the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 208.18(a)(7) (2004). Under the CAT, an alien's removal may be either permanently withheld or temporarily deferred. *See* 8 C.F.R. §§ 208.16-17 (2004).

4. Standard of Review

Where, as here, the BIA summarily affirms an IJ's decision, this Court reviews the decision of the IJ directly. *Xie v. INS,* ___ F.3d ___, 2006 WL 23413, at *2 (2d Cir. Jan. 5, 2006); *Shi Liang Lin v. U.S. Dep't of Justice,* 416 F.3d 184, 189 (2d Cir. 2005).

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). This Court also reviews the determination of whether an alien is eligible for protection under the CAT

under the "substantial evidence" standard. *See Joaquin-Porras,* 2006 WL 120331, at *8; *Saleh v. U.S. Dep't of Justice*, 962 F.2d 234, 238 (2d Cir. 1992). "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).

Where an appeal turns on the sufficiency of the factual findings underlying the BIA's determination 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. Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v.*

Federal Maritime Comm'n, 383 U.S. 607, 620 (1966); *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992).

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

C. Discussion

The IJ properly concluded that petitioner failed to establish eligibility for asylum, for withholding of removal, and for relief under the CAT. Specifically, the record supports the IJ's conclusions that petitioner (1) failed to establish that she had a well-founded fear of future prosecution, and (2) failed to establish that it was more likely than not that she would be subjected to torture in Uganda.

Petitioner's sole basis for eligibility for asylum or withholding of removal was her claim of refugee status because of membership in the particular social group she designated as "professional women." This claim was asserted for the first time on November 17, 2003, at the outset of petitioner's Removal/Asylum Hearing. (JA 86). It is unclear whether "professional women" are individuals "who possess some fundamental characteristic in common

which serves to distinguish them in the eyes of a persecutor–or in the eyes of the outside world in general."[8] *Gomez v. INS,* 947 F.2d 660, 664 (2d Cir. 1991). However, since the IJ did not challenge the legal cognizability of petitioner's asserted claim, respondent will assume for purposes of this Court's review that "professional women" form a particular social group under the INA.

Even with this assumption, however, petitioner has failed to meet her burden of showing that she has well-founded fears of future persecution "on account of" membership in the particular social group of professional

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[8] Despite a diligent search, respondent has been unable to find any case law recognizing "professional women" as a cognizable social group within the meaning of the statutory definition of refugee in section 1101(a)(42). As to all women being a cognizable social group, at least one court has commented that "[t]here may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation's residents to obtain asylum on the ground that women are persecuted there." *Niang v. Gonzales,* 422 F.3d 1187, 1199 (10th Cir. 2005) (holding that gender plus membership in tribe that practiced female genital mutilation sufficient to meet statutory definition of refugee). *But see Safaie v. INS,* 25 F.3d 636, 640 (8th Cir. 1994) (rejecting claim that Iranian women, by virtue of gender and harsh conditions for women in Iran, are a particular social group under INS statute). In *Gomez v. INS,* 947 F.2d 660, 663-64 (2d Cir. 1991), this Court rejected the claim that "women who have been previously battered and raped by Salvadoran guerillas" are a particular social group under section 1101(a)(42).

women. 8 U.S.C. § 1101(a)(42). By her own testimony, petitioner was unable to establish a nexus between the allegedly protected characteristic of being a professional woman, and a persecutor's decision to act on the basis of that characteristic. *Gomez,* 947 F.2d at 664. Most of petitioner's testimony related to generalized statements about the hardships facing women in Uganda. Notably, when asked on direct examination about how she would be treated as a professional woman in Uganda, petitioner answered, *"It is difficult to say. I don't know. It's complicated, I think."* (JA 100) (emphasis added). This is not the specific and detailed factual testimony necessary for establishing eligibility for asylum. *See* 8 C.F.R. § 208.13(a) (2004); *Melendez v. U.S. Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991) (asylum applicant must provide "credible, persuasive and . . . . specific facts") (internal quotation marks omitted).

Moreover, the documentary evidence offered by petitioner was not sufficient to meet her burden of demonstrating eligibility for asylum. The 2002 *Country Report* and other documents about Uganda relied on by petitioner, and reviewed and cited by the IJ, provided some evidence that domestic violence against women "remained common" in Uganda and that the problem "continued to receive increasing public attention." (JA 145). In addition, the *Country Report* noted that "[t]raditional and widespread societal discrimination against women continued, especially in rural areas," and that "[m]any customary laws discriminate against women in the areas of adoption, marriage, divorce, and inheritance." (JA 146). Significantly, none of the background information relied on by petitioner described

any acts of violence or discrimination specifically directed at professional women as a social group.[9] The

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[9] Petitioner urges the Court to consider evidence outside the administrative record. *See* Petitioner's Brief in Support of a Petition for Review with Special Appendix ("Petitioner's Brief") at 16-17 (with Special Appendix appended at SPA 1-43). According to petitioner, country conditions in Uganda have changed so drastically that the IJ's decision should be reversed, or, in the alternative, the matter remanded so that current political conditions can be considered. *Id.* at 16. For her remand argument, petitioner relies in part on this Court's decision in *Yang v. McElroy,* 277 F.3d 158 (2d Cir. 2002) (per curiam). There, the Court remanded to the BIA because there had been a "significant time gap" between the 1993 *Country Report* relied on in 1994 by the IJ in denying petitioner's asylum claim, and the BIA's 1998 affirmance of the 1994 decision. *Id.* at 163. The Court also noted that the BIA's affirmance was not unanimous and that the dissenting judge had made reference to a more recent *Country Report*. *Id.* at 161.

In the instant matter, there was not a significant time gap between the November 17, 2003, decision of the IJ and the January 18, 2005, affirmance by the BIA. In addition, the IJ relied on the 2002 *Country Report* for Uganda, while petitioner is now offering the 2004 version in the special appendix to her brief. *See* Petitioner's Brief at SPA 23-43. The 2004 version indicates that abuse against women continues to be a serious problem in Uganda, but there is nothing indicating that acts constituting persecution are being directed specifically against professional women. In any event, petitioner's proper avenue of recourse to present updated background information would be to move to reopen the BIA's decision administratively. *See, e.g., Sivaainkaran v. INS,* 972 F.2d 161, 165-66 (7th Cir.1992)

(continued...)

IJ correctly concluded, therefore, that the information in the background documents, when considered with petitioner's testimony, was insufficient to carry petitioner's burden of establishing a nexus between her

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[9] (...continued)
(proper recourse is to move to reopen administrative proceedings when seeking to expand record before BIA). That option, of course, remains open to her. *See* 8 C.F.R. §1003.2(c)(3)(ii) (2004) (limitations on number of motions and time for filing inapplicable when motion to reopen "based on changed circumstances in the country of nationality or in the country to which deportation has been ordered if such evidence is material and was not available and could not have been discovered or presented at the previous hearing").

Absent any showing comparable to that of *Yang,* this Court is limited by the dictates of the INA to "decide the petition *only* on the administrative record on which the order of removal is based." 8 U.S.C. § 1252(b)(4)(A) (emphasis added); *see also* Fed. R. App. P. 16(a) (stating that record consists of the agency's order, any findings upon which it is based, and the "pleadings, evidence, and other parts of the proceedings *before the agency*") (emphasis added); *Arenas-Yepes v. Gonzales*, 421 F.3d 111, 114 n.1 (2d Cir. 2005) (relying on § 1252(b)(4)(A) when declining to consider petitioner's factual allegation that his order to show cause had been filed on a certain date); *Vlassis v. INS*, 963 F.2d 547, 549 (2d Cir. 1992) (where administrative record contained no mention of alleged telephone conversation between plaintiff's counsel and the BIA, the Court noted that its review "is limited to [the] administrative record") (citing *Michelson v. INS*, 897 F.2d 465, 467 (10th Cir. 1990)).

protected social group and potential acts by persecutors against petitioner because of her membership in the group. As the IJ stated, after acknowledging that life in Uganda would be very hard for a "sophisticated" woman like petitioner, "[t]he problem is, I just do not think there is enough evidence that she would be persecuted." (JA 116).

The IJ apparently believed that petitioner, "who has had more education and freedom, essentially, to pursue her own professional goals in the United States," would likely experience economic difficulties if returned to Uganda. (JA 116). Economic difficulties do not equate to persecution, however. This Court has held that economic deprivations do not amount to "persecution" unless they are "'so severe that they constitute a threat to an individual's life or freedom.'" *Damko v. INS,* 430 F.3d 626, 632 (2d Cir. 2005) (quoting *Matter of Acosta,* 19 I. & N. Dec. 211, 222 (BIA 1985), *overruled in part by INS v. Cardoza-Fonseca,* 480 U.S. 421 (1987)). The IJ cited *Matter of Acosta* as a basis for her finding that petitioner had not met her burden of proving a well-founded fear of persecution. (JA 117). Moreover, the IJ's finding that economic deprivations do not constitute persecution is reviewable for substantial evidence, not *de novo*. *Damko,* 430 F.3d at 636.

Petitioner argues that the IJ incorrectly suggested that petitioner could avoid persecution in Uganda by relocating to a part of the country where persecution would not occur. *See* Petitioner's Brief in Support of a Petition for Review with Special Appendix at 11-14 (relying on 8 C.F.R. §§ 208.13(b)(2)(ii) & 1208.13(b)(2)(ii) (2004), which state that relocation, if reasonable under all the

circumstances, negates a claim of well-founded fear of persecution). The IJ, however, never suggested that petitioner could relocate. Petitioner, who has not been in Uganda for almost 18 years, testified that violence was occurring in northern Uganda. (JA 101-102). She also testified that her family lives in an area in the center of Uganda that she would be returning to if necessary, and that her family (both males and females) has apparently been able to support itself by growing crops. (JA 102-104). Petitioner did not testify that violence in the northern part of Uganda had spilled over to the central part of the country. In light of petitioner's testimony, the IJ commented that the problems in northern Uganda would not "necessarily . . . affect the [petitioner] in her particular circumstances." (JA 115). Moreover, the question here is not whether the government must prove that petitioner could relocate, but whether petitioner has shown that where she was living in Uganda was so unstable that she suffered past persecution or has a well-founded fear of persecution. Petitioner has not met her burden on this issue.

As to her asylum claim, petitioner failed to present evidence "so compelling that no reasonable factfinder could fail" to agree with the evidence. *Zhang v. Slattery,* 55 F.3d 732, 752 (2d Cir. 1995) (citation omitted). In addition, for all of the above reasons, the record provides substantial evidentiary support for the IJ's finding that petitioner failed to carry her burden of demonstrating a well-founded fear of future persecution, and hence failed to establish her eligibility for asylum. Moreover, because the burden of proof for seeking withholding of removal is greater than the burden for establishing eligibility for

asylum, failure to establish the latter will *per se* preclude the former. *Zhang v. INS,* 386 F.3d at 71. Accordingly, for all the same reasons, the record supports the BIA's finding that petitioner failed to establish a basis for withholding of removal.

Finally, petitioner's CAT claim before this Court is fatally deficient in that petitioner fails to identify any specific testimony in the record relating to a claim of torture and fails to indicate how the Ugandan government or any government official was, or would be, involved in any such torture either directly or by acquiescence. *Wang,* 320 F.3d at 133-34, 143-44 & n.20*; Ali,* 237 F.3d at 597. Indeed, there was absolutely no reference made to the CAT during the Removal/Asylum Hearing, and in fact the word torture never appears in the hearing transcript, except when the IJ denied petitioner's CAT claim in the oral decision itself. (JA 81-118).

A CAT claim is considered independently of an asylum claim and focuses solely on the likelihood that the alien will be tortured if returned to his or her home country, regardless of the alien's subjective fears of persecution or his or her past experiences. Nevertheless, to prevail on a CAT claim the alien must proffer "objective evidence that he or she is likely to be tortured in the future." *Ramsameachire v. Ashcroft*, 357 F.3d 169, 185 (2d Cir. 2004). Petitioner failed to do this. No objective evidence of torture was presented at the hearing -- certainly none that would be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R.

§ 208.18(a)(1) (2004). Accordingly, the IJ's ruling on the CAT claim was amply supported by the record.

For all of the foregoing reasons, the record provides substantial evidentiary support for the IJ's findings that petitioner did not meet her burden of demonstrating entitlement to relief on any of her claims, and the petition for review should therefore be denied.

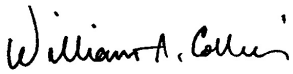
CONCLUSION

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

Dated: February 13, 2006

Respectfully submitted,

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



WILLIAM A. COLLIER
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

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

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

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

(1) Past threat to life or freedom.

(i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant’s life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant’s removal to that country; or

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed

country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

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

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

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

in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

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

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

. . . .

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

(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub.L. 105-277, 112

Stat. 2681, 2681-821). The definition of torture contained in § 208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

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

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

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

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

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

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

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under § 208.17(a).

(d) Approval or denial of application--

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

ANTI-VIRUS CERTIFICATION

Case Name: Mutonyi v. Gonzales

Docket Number: 05-0738-ag

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 2/13/2006) and found to be VIRUS FREE.

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Natasha R. Monell, Esq.
Staff Counsel
Record Press, Inc.

Dated: February 13, 2006