05-4635-ag

To Be Argued By:
JOHN A. MARRELLA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-4635-ag

QIAO JUAN LIU,

Petitioner,

-vs-

UNITED STATES DEPARTMENT OF JUSTICE,
ATTORNEY GENERAL ALBERTO GONZALES,

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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STATEMENT OF JURISDICTION

This Court has jurisdiction under § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (2005), to review the petitioner's challenge to the BIA's final order dated August 16, 2005, affirming the decision of the Immigration Judge denying her asylum, withholding of removal, and relief under the Convention Against Torture.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the Board of Immigration Appeals properly determined that the petitioner did not possess a well-founded fear of persecution based on the birth in the United States of two children to the petitioner and the fact that two family members had been sterilized, where the petitioner suffered no past persecution under China's family planning policy, where she presented no evidence that she would be individually targeted for sterilization, and where the background materials in the record on Chinese country conditions reflect that China does not uniformly apply coercive population control policies.

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BRIEF FOR ALBERTO GONZALES
Attorney General of the United States

Preliminary Statement

Qiao Juan Liu ("the petitioner"), a native and citizen of China, petitions this Court for review of a decision of the Board of Immigration Appeals ("BIA") dated August 16, 2005. Joint Appendix ("JA") 2. The BIA summarily affirmed the decision of an Immigration Judge ("IJ"), JA

26-30, dated April 6, 2004, denying the petitioner's applications for asylum, withholding of removal, and relief under CAT[1] pursuant to the Immigration and Nationality Act of 1952, as amended ("INA"), and ordering her removed from the United States, JA 6-7 (IJ's decision and order).

The petitioner claimed she had a well-founded fear of future persecution if she were to return to China, due to the birth of her two children in the United States, in violation of China's family planning policy. JA 52, 180.

Substantial evidence supports the IJ's determination that the petitioner failed to provide sufficient evidence to support of her claim for asylum. The Department of Homeland Security ("DHS") introduced evidence showing that China does not uniformly apply coercive population control policies. Moreover, materials submitted by the DHS indicate that to the extent that coercive methods are still employed by Chinese family planning officials, those methods tend to involve fines and other economic penalties rather than forced sterilizations or forced abortions. The petitioner failed to introduce any evidence showing that family planning officials in China would

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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).

individually target her for forced sterilization if they were to become aware of her two children.

Statement of the Case

The petitioner entered the United States illegally on January 5, 1998. JA 27. On or about April 4, 2003, she filed an application for asylum, Form I-589, with the DHS. JA 545-555. On or about June 20, 2003, the DHS issued a Notice to Appear. JA 647-648.

On August 29, 2003, the petitioner appeared in a removal proceeding before the IJ. In light of the petitioner's pregnancy with her second child and the possible relevance of the child's prospective birth in October 2003 to the petitioner's claim of fear of future persecution, the IJ continued the removal proceedings until March 11, 2004. JA 31-38.

On or about December 15, 2003, the petitioner filed an amended application for asylum, Form I-589, with the DHS. JA 169-180.

On March 11, 2004, the petitioner appeared in a removal proceeding before the IJ, at which time the IJ received the petitioner's testimony in support of her application for asylum. JA 39-64.

On April 6, 2004, the IJ issued a decision denying the petitioner's request for asylum, denying her request for withholding of removal, denying her request for withholding relief under CAT, and ordering her removed from the United States. JA 26-30.

On or about April 13, 2004, the petitioner filed a timely notice of appeal of the IJ's decision. JA 20-21.

On August 16, 2005, the BIA issued an order summarily affirming the decision of the IJ. JA 2.

On or about August 24, 2005, the petitioner filed a timely petition for review.

Statement of Facts

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

The petitioner arrived in the United States illegally on or about January 5, 1998. JA 555. She filed an application for asylum, Form I-589, with the DHS on or about April 4, 2003. JA 545-555. Following this filing, the petitioner was placed in removal proceedings by the issuance of a notice to appear, and her application for asylum was referred to an immigration judge of the United States Department of Justice Executive Office for Immigration Review in New York City. JA 647-648.

On or about December 15, 2003, following the birth of her second child in October 2003, the petitioner filed an amended application for asylum. JA 169-180. In her amended asylum application, the petitioner claimed that she would be sterilized if she were to return to China because she had given birth to two children while living in the United States, in violation of China's family planning policy, which disfavors more than one child per couple. In

support of her application, the petitioner submitted evidence indicating that after her aunt and her husband's aunt had given birth to two children, both were forcibly sterilized by Chinese family planning officials in 1989 and 1984, respectively. JA 328-333, 312-323.

B. The Petitioner's Removal Proceedings

1. Documentary Submissions

The IJ received into evidence documents submitted by the petitioner, including the affidavit of Dr. J.S. Aird and supporting exhibits relating to China's family planning policy and the enforcement of that policy. JA 185-243. The IJ also received into evidence documents relating to the petitioner's husband's aunt's forced sterilization in 1984, JA 312-323, and the petitioner's aunt's forced sterilization in 1989, JA 328-333, birth certificates for the petitioner's children, JA 183, 566, and the petitioner's amended application for asylum, which was also considered a request for withholding of removal pursuant to § 208 of the INA. JA 171-180.[2] The Government submitted, and the IJ received into evidence, documents relating to the enforcement of China's family planning policy. JA 70-135.

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[2] 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.

2. The Petitioner's Testimony

The petitioner was the only witness to testify before the IJ. On direct examination, she testified that she entered the United States on January 5, 1998. JA 52. She testified that she was born in Changle, China, on September 8, 1979, JA 47, and married her husband in New Jersey on July 31, 2000, JA 47. Her first child, a son, was born in New York on February 14, 2001. JA 48. Her second child, a daughter, was born in New York on October 10, 2003. JA 49.

The petitioner further testified on direct examination that she believed that if she returned to China, she would be sterilized because by giving birth to two children she had violated China's family planning policy, which disfavors more than one child per couple. JA 49. The petitioner stated that she had heard about this policy from watching television, listening to the radio, and reading the newspaper. JA 49. The petitioner also claimed that her aunt and her husband's aunt had both been sterilized after giving birth to two children. JA 50. The petitioner recalled watching family planning officials apprehend her aunt following the birth of the aunt's second child in order to forcibly sterilize her. JA 50-51. The petitioner stated that if she is returned to China, she will take her children with her. JA 49. The petitioner expressed her desire to have more children, which she stated would be impossible if she returned to China. JA 51-52.

On cross-examination, the petitioner testified that she has two siblings. JA 53. She admitted that although her

mother has had an IUD inserted, her mother has not been sterilized. JA 53.

C. The Immigration Judge's Decision

In a written decision issued on April 6, 2004, the IJ denied the petitioner's requests for: (1) asylum under § 208 of the INA; (2) withholding of removal under § 241(b)(3); and (3) relief under CAT. Accordingly, the IJ ordered the petitioner removed from the United States to China pursuant to § 212(a)(6)(A)(i). JA 26-30.

As a preliminary matter, the IJ noted that although the petitioner arrived in the United States in 1998, she did not file her request for asylum until 2003. The IJ concluded that the petitioner's late filing falls within an exception to the one-year filing requirement, *viz.*, a change in circumstances arising from her becoming pregnant with her second child in January 2003. JA 28. *See also* JA 246-247. The IJ found that the petitioner had filed her application for asylum within a reasonable period of time after this change in circumstances. Accordingly, the IJ held that the petitioner was entitled to have her request for asylum considered by the Immigration Court. JA 28.

The petitioner's application for asylum was based on her assertion that she has a well-founded fear of future persecution based on the fact that she has given birth to two children in the United States. The IJ began her analysis of the merits of the petitioner's claim by noting that the petitioner "makes no claims regarding past persecution nor does she rely upon any events occurring to her in the PRC [People's Republic of China] that would

arise to a level of a well-founded fear of persecution." JA 28. In light of this, the IJ concluded that much of the background materials submitted by the petitioner were simply not relevant to her claim. The documents submitted by the DHS, on the other hand, JA 70-135, indicated that there was "very little evidence to support the use of coercive enforcement of the FPP [family planning program] by the officials against returning PRC nationals with multiple children." JA 28.

To support her claim that returning Chinese nationals with multiple children will be subjected to coercive enforcement of the family planning program, the petitioner submitted the affidavit of Dr. J.S. Aird, along with supporting exhibits. However, the IJ found this evidence to be "of very little value and not helpful in establishing that [the petitioner] would be sterilized, if she is forced to return to the PRC." JA 29. Specifically, the Aird affidavit did not support the petitioner's central claim that returning Chinese nationals who have violated the family planning policy will be subjected to forced abortion or coerced sterilization. JA 29.

The IJ was persuaded by the DHS submissions, which indicated that the most severe treatment meted out to returning Chinese nationals who have violated the family planning policy is the imposition of monetary penalties and an added tuition assessment for the children's education, and disqualification from government employment. JA 29. The IJ found that "[t]hese factors do not add up to persecution." JA 29.

In light of the analysis described above, the IJ held that the petitioner had "failed to meet her burden of demonstrating a well-founded fear of future persecution due to the PRC family planning policy." JA 29. The IJ also held that the petitioner failed to meet the higher standard of proof required for withholding of removal under the INA. Finally, although the petitioner had requested relief under CAT, the IJ noted that she had offered no evidence to warrant such relief; accordingly, the petitioner's request for withholding of removal under CAT was also denied. JA 29.

D. The Board of Immigration Appeals Decision

On August 16, 2005, the BIA summarily affirmed the IJ's decision and adopted it as the "final agency determination" under 8 C.F.R. § 3.1(e)(4). JA 2. This petition for review followed.

SUMMARY OF ARGUMENT

Substantial evidence supports the IJ's determination that the petitioner's fear of future persecution under China's family planning program was not well founded. In support of her claim, the petitioner did not testify to or otherwise introduce any credible evidence indicating that family planning officials in China would individually target her for forced sterilization if they were to become aware of her two children. The petitioner's application rests principally on her claim that by giving birth to two children, she has violated China's family planning policy and will be subject to forced sterilization upon her return

to China. The petitioner supports her claim with certain documents in the record that provide general evidence, some of which is anecdotal, of the strict enforcement of China's family planning policy.

The record reflects that China does not uniformly apply coercive population control policies. Moreover, materials submitted by the DHS indicate that to the extent that coercive methods are still employed by Chinese family planning officials, those methods tend to involve fines and other economic penalties rather than forced sterilizations or forced abortions.

In sum, the petitioner is asking this Court to hold that any citizen of China who has two or more children -- whether they are born and reside in the United States or in China -- is entitled to asylum after entering the United States.

Because the record evidence would not compel a reasonable finder of fact to conclude that the petitioner has established eligibility for asylum, the Court should deny the petition for review.

ARGUMENT

I. THE IMMIGRATION JUDGE PROPERLY DETERMINED THAT THE PETITIONER FAILED TO ESTABLISH ELIGIBILITY FOR ASYLUM AND WITHHOLDING OF REMOVAL BECAUSE SHE PRESENTED NO EVIDENCE THAT WOULD SUPPORT A WELL-FOUNDED FEAR OF FUTURE PERSECUTION.

A. Relevant Facts

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

B. Governing Law and Standard of Review

Two forms of relief are potentially available to aliens claiming that they will be persecuted if removed from this country: asylum and withholding of removal.[3] *See* 8 U.S.C. §§ 1158(a), 1231(b)(3) (2005); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995). Although these types of relief are "'closely related and appear to overlap,'"

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[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) (2005), cases relating to the former relief remain applicable precedent.

Carranza-Hernandez v. INS, 12 F.3d 4, 7 (2d Cir. 1993) (quoting *Carvajal-Munoz v. INS*, 743 F.2d 562, 564 (7th Cir. 1984)), the standards for granting asylum and withholding of removal differ, *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987); *Osorio v. INS*, 18 F.3d 1017, 1021 (2d Cir. 1994).

1. Asylum

An asylum applicant must, as a threshold matter, establish that he is a "refugee" within the meaning of 8 U.S.C. § 1101(a)(42) (2005). *See* 8 U.S.C. § 1158(a) (2005); *Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 66 (2d Cir. 2002). A refugee is a person who is unable or unwilling to return to his native country because of past "persecution or a well-founded fear of persecution on account of" one of five enumerated grounds: "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (2005); *Liao*, 293 F.3d at 66.

Although there is no statutory definition of "persecution," courts have described it as "'punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.'" *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995) (quoting *De Souza v. INS*, 999 F.2d 1156, 1158 (7th Cir. 1993)); *see also Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (stating that persecution is an "extreme concept"). While the conduct complained of need not be life-threatening, it nonetheless "must rise above unpleasantness, harassment, and even basic suffering." *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000). Upon a

demonstration of past persecution, a rebuttable presumption arises that the alien has a well-founded fear of future persecution. *See Melgar de Torres v. Reno*, 191 F.3d 307, 315 (2d Cir. 1999); 8 C.F.R. § 208.13(b)(1)(i) (2005).

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

In addition, the BIA has held that an alien whose spouse has been subjected to coerced abortion or sterilization has established past persecution against himself. *In re C-Y-Z-*, 21 I. & N. Dec. 915, 918-19 (BIA June 4, 1997); *see also Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 92 (2d Cir. 2001). *But see Shi Liang Lin v. U.S. Dep't of Justice,* 416 F.3d 184 (2d Cir. 2005) (remanding three cases involving unmarried couples for the BIA to clarify its rationale for creating spousal eligibility in *C-Y-Z-*). Thus, under the INA as amended by IIRIRA, an asylum applicant need not show that China's family planning policy was or will be selectively applied on the basis of a protected ground.[5] The applicant must,

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[5] Prior to the enactment of IIRIRA § 601(a), the BIA had held that China's implementation of its population control policy did not, on its face, constitute persecution on account (continued...)

however, still make a threshold showing that he has suffered past persecution or has a well-founded fear of future persecution. *See Chen v. U.S. INS*, 195 F.3d 198, 202-05 (4th Cir. 1999).

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 v. Slattery*, 55 F.3d at 737-38; 8 C.F.R. § 208.13(b)(2) (2005). A well-founded fear of persecution "consists of both a subjective and objective component." *Gomez v. INS*, 947 F.2d 660, 663 (2d Cir. 1991). Accordingly, the alien must actually fear persecution, and this fear must be reasonable. *See id.* at 663-64.

"An alien may satisfy the subjective prong by showing that events in the country to which he . . . . will be deported have personally or directly affected him." *Id.* at 663. With respect to the objective component, the applicant must prove that a reasonable person in his circumstances would fear persecution if returned to his native country. *See* 8 C.F.R. § 208.13(b)(2) (2005); *see also Zhang v. Slattery*, 55 F.3d at 752 (noting that when seeking reversal of a BIA factual determination, the petitioner must show "'that the evidence he presented was

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[5] (...continued)
of a protected ground. *See Matter of Chang*, 20 I. & N. Dec. 38, 43-44, 1989 WL 247513 (BIA May 12, 1989). Rather, an asylum applicant was required to show that the family planning policy had been or would be selectively applied to him on the basis of a protected ground. *Id.*

so compelling that no reasonable factfinder could fail'" to agree (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992)); *Melgar de Torres*, 191 F.3d at 311.

The asylum applicant bears the burden of demonstrating eligibility for asylum by establishing either that he was persecuted or that he "has a well-founded fear of future persecution on account of, *inter alia*, his political opinion." *Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003); *Osorio*, 18 F.3d at 1027. *See* 8 C.F.R. § 208.13(a)-(b) (2005). 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) (2005); *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999); *Melendez v. U.S. Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991) (stating that applicant must provide "credible, persuasive and . . . . specific facts" (internal quotation marks omitted)); *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA June 12, 1987), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647-48 (9th Cir. 1997) (applicant must provide testimony that is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account").

Because the applicant bears the burden of proof, he should provide supporting evidence when available, or explain its unavailability. *See Zhang v. INS*, 386 F.3d 66, 71 (2d Cir. 2004) ("[W]here the circumstances indicate that an applicant has, or with reasonable effort could gain, access to relevant corroborating evidence, his failure to produce such evidence in support of his claim is a factor that may be weighed in considering whether he has satisfied the burden of proof."); *see also Diallo v. INS*, 232

F.3d 279, 285-86 (2d Cir. 2000); *In re S-M-J-*, 21 I. & N. Dec. 722, 723-26 (BIA Jan. 31, 1997).

Finally, even if the alien establishes that he is a "refugee" within the meaning of the INA, the decision whether ultimately to grant asylum rests in the Attorney General's discretion. *See* 8 U.S.C. § 1158(b)(1) (2005); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004); *Zhang v. Slattery*, 55 F.3d at 738.

2. Withholding of Removal

Unlike the discretionary grant of asylum, withholding of removal is mandatory if the alien proves that his "life or freedom would be threatened in [his native] country because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (2005); *Zhang v. Slattery*, 55 F.3d at 738. To obtain such relief, the alien bears the burden of proving by a "clear probability," *i.e.*, that it is "more likely than not," that he would suffer persecution on return. *See* 8 C.F.R. § 208.16(b)(2)(ii) (2005); *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 272, 275 (2d Cir. 2003); *Zhang*, 55 F.3d at 738.

3. Standard of Review

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

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

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[6] Although judicial review ordinarily is confined to the BIA's order, *see, e.g.*, *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001), courts properly review an IJ's decision where, as here (JA 2), the BIA adopts that decision. *See* 8 C.F.R. § 1003.1(a)(7) (2005); *Ivanishvili v. Gonzales*, 433 F.3d 332, 337 (2d Cir. 2006); *Secaida-Rosales*, 331 F.3d at 305; *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994). (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) (2005). *See also Zhang v. INS*, 386 F.3d at 73. This Court "will reverse the immigration court's ruling only if 'no reasonable fact-finder could have failed to find . . . past persecution or fear of future persecution.'" *Wu Biao Chen*, 344 F.3d at 275 (omission in original) (quoting *Diallo*, 232 F.3d at 287).

The scope of this Court's review under that test is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 71; *Wu Biao Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. *See also Zhang v. INS*, 386 F.3d at 74 ("Precisely because a reviewing court cannot glean from a hearing record the insights necessary to duplicate the fact-finder's assessment of credibility what we 'begin' is not a *de novo* review of credibility but an 'exceedingly narrow inquiry' . . . to ensure that the IJ's conclusions were not reached arbitrarily or capriciously") (citations omitted)). Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (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*

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[6] (...continued)
Accordingly, this brief treats the IJ's decision as the relevant administrative decision.

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

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

This Court gives "particular deference to the credibility determinations of the IJ." *Wu Biao Chen*, 344 F.3d at 275 (quoting *Montero v. INS*, 124 F.3d 381, 386 (2d Cir. 1997)); *see also Qiu v. Ashcroft*, 329 F.3d 140, 146 n.2 (2d Cir. 2003) (the Court "generally defer[s] to an IJ's factual findings regarding witness credibility"). This Court has recognized that "the law must entrust some official with responsibility to hear an applicant's asylum claim, and the IJ has the unique advantage among all officials involved in the process of having heard directly from the applicant." *Zhang v. INS*, 386 F.3d at 73.

C. Discussion

The gravamen of the petitioner's claim for asylum is that she has a well-founded fear of future persecution because she has given birth to two children while residing in the United States, in violation of China's family planning policy. The Government submits that the IJ carefully weighed the evidence submitted by the parties

and correctly found that the petitioner failed to meet her burden of establishing a well-founded fear of future persecution based on China's family planning policy.

The IJ began her analysis of this claim by noting that the petitioner "makes no claims regarding past persecution nor does she rely upon any events occurring to her in the PRC that would arise to a level of a well-founded fear of persecution." JA 28. The IJ was correct to begin by focusing on what was *missing* from the petitioner's application, *viz.*, any specific facts that would establish that she had been targeted for persecution. In the absence of such evidence, the petitioner cannot prevail.

The legislative history of a 1996 amendment to the Immigration and Nationality Act, which authorizes Immigration Courts to grant asylum to persons resisting coercive population control methods, states that the statute "is not intended to protect persons who have not actually been subjected to coercive measures or specifically threatened with such measures, but merely speculate that they will be so mistreated at some point in the future." JA 125; H.R. Rep. 104-469(i), 104th Cong., 2d Sess. 1996, 1996 WL 168955 (Leg. Hist.) at *174. This Court has recently recognized and effectuated this legislative intent in the case of *Huang v. U.S. INS*, 421 F.3d 125 (2d Cir. 2005) (per curiam). In *Huang*, the applicant, the father of a child born in the United States, sought asylum after his wife became pregnant with their second child. He claimed to have a well-founded fear of future persecution, and in particular that he would be forcibly sterilized, because of China's family planing policy permitting one child per couple and the fact that his sister-in-law had been forcibly

sterilized. The Court determined that the applicant had failed to establish that he had a well-founded fear of future persecution or forced sterilization under China's population control program. To meet his burden on this ground, the applicant "was required to offer credible, *specific, and detailed* evidence that his well-founded fear is either of forcible sterilization or of some other sort of persecution based on resistance to China's family planning policies." *Id.* at 128 (emphasis added); *see also Melendez v. U.S. Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991) (applicant must provide evidence that is "credible, persuasive, and refers to *specific* facts" (internal quotation marks omitted) (emphasis in original)). In denying Huang's petition, this Court noted that "[i]n the absence of solid support in the record for Huang's assertion that he will be subjected to forced sterilization, his fear is speculative at best." *Huang*, 421 F.3d at 129.

The IJ's observation regarding the absence of any claim of past persecution focuses the inquiry even more sharply on the evidence (or lack thereof) relating to future persecution. The absence of evidence of past persecution does not automatically disqualify the petitioner for asylum. "Asylum petitioners who have not suffered past persecution have been able to establish a well-founded fear of future persecution when they have offered some evidence that they would be individually targeted, because of their particular status or role in their home country, for persecution on one of the statutorily defined grounds." *Chen v. U.S. INS*, 195 F.3d 198, 203 (4th Cir. 1999). This Court reached the same conclusion in *Abankwah v. INS*, 185 F.3d 18, 23-26 (2d Cir. 1999) (applicant had well-founded fear of being subjected to female genital

mutilation if returned to Ghana because of her designated role in a tribal practice); *Sotelo-Aquije v. Slattery*, 17 F.3d 33, 37 (2d Cir. 1994) (vocal opponent of Shining Path had well-founded fear of being targeted for retribution); s*ee also Velarde v. INS*, 140 F.3d 1305, 1312 (9th Cir. 1998) (former bodyguard to Peruvian president's daughters had well-founded fear of persecution by Shining Path); *Ubao-Marenco v. INS*, 67 F.3d 750, 758-59 (9th Cir. 1995) (judicial summons and decree issued for applicant under a Nicaraguan law commonly employed to suppress political dissent could establish that applicant had a well-founded fear), *overruled on other grounds, Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996).

In light of the authority requiring specific evidence that she had been individually targeted for persecution, the IJ's observation -- that the record contains no evidence regarding events that had occurred *to the petitioner* in China that would arise to a level of a well-founded fear of future persecution -- is almost dispositive of the petitioner's claim. Some asylum applicants, however, have overcome this lack of evidence of persecution directed at them by presenting evidence that similarly situated friends or family members have suffered persecution in the petitioner's home country. *See, e.g., Zheng v. Gonzales*, 415 F.3d 955, 960 (8th Cir. 2005) (acts of violence against or persecution of family members may constitute evidence of a well-founded fear of persecution). In the present case, the petitioner has presented evidence that her aunt was forcibly sterilized in 1989 after giving birth to two children, JA 50-51, 328, and her husband's aunt was sterilized in 1984 after giving birth to two children, JA 313, 322. Based on this evidence, and in light

of the fact that she has two children herself, the petitioner argues that she has a well-founded fear of future persecution. However, the premise of this argument -- that the petitioner's family has been targeted for persecution for resistance to China's family planning policy -- is undermined by the petitioner's admission that her own mother bore *three* children and was not sterilized. JA 53. *Cf. Yang v. Gonzales*, 427 F.3d 1117, 1119, 1121 (8th Cir. 2005) (applicant had well-founded fear of future persecution where her family was well-known for violating China's family planning policy, several family members were forcibly sterilized or aborted, and government official told applicant's brother that applicant would be sterilized upon return to China). In any event, the fact that her aunt and her husband's aunt had been sterilized 15 and 20 years earlier, respectively, does not, of itself, establish that the petitioner's family has been singled out for persecution by Chinese family planning officials, especially when viewed in light of the evidence in the record showing that China's enforcement of the family planning policy has dramatically changed in recent years. *See generally* JA 72-121.

In the absence of specific evidence that the petitioner had been targeted for future persecution under China's family planning policy, the IJ considered but properly discounted much of the material submitted by the petitioner, inasmuch as this material "was not pertinent to the claim of a well-founded fear of future persecution premised upon US born children and return to the PRC." JA 28. Rather, the IJ was persuaded by the documentary submissions of the DHS "regarding the opinions of several researchers and other relevant articles that indicated that

there is very little evidence to support the use of coercive enforcement of the FPP by the officials against returning PRC nationals with multiple children." JA 28.

The DHS submitted several articles and reports bearing directly on the question presented by the petitioner's application, *viz.*, to what extent have Chinese government officials been enforcing that country's family planning policy through coercive means, particularly with respect to Chinese citizens returning to China from abroad. Four of these documents in particular warrant careful review.

A monograph produced by Susan Greenhalgh, Ph.D., and Edwin A. Winckler, Ph.D., and published by the Department of Justice in 2001, describes dramatic changes in China's population control methods. JA 72-87. The monograph states that "China's state birth planning program evolved significantly during the 1990s and promises to change even further in the first decade of the 21st century." JA 74. This monograph, while recognizing the goal of the Chinese family planning policy to discourage couples from having more than one child, nevertheless documents changes in the enforcement of that policy pursuant to which the use of coercive contraceptive techniques has decreased significantly. Instead of forced sterilization or abortion, for example, women who give birth to multiple children face fines and the denial of certain government benefits. JA 79-80.

According to Drs. Greenhalgh and Winckler, "[t]he question frequently arises whether Chinese couples who have an unauthorized child while residing abroad are likely to face penalties upon returning to China. The evidence

available suggests that, in many if not most cases, the answer is no. The relevant regulations do not call for penalties." JA 80.

The authors go on to state that "[i]n the late 1990s, many provinces revised their birth planning regulations, and reportedly all of those provinces dropped mandatory sterilization of couples with two children, requiring only that they practice 'safe and effective' contraception." JA 80.

The authors discuss at some length the enforcement of China's family planning policy in Changle, which is the petitioner's native city. "Paradoxically, given the Changle asylum applicants' claimed fear of birth planning enforcement, Changle has been an area of particularly lax enforcement." JA 86. Anecdotal evidence indicates that large families (*i.e.*, families with two or more children) are not unusual in Changle, with some couples having as many as six children. JA 87. Furthermore, some local family planning officials in Changle appear to be resistant to vigorous enforcement of China's policy. JA 87.

Another document submitted by the DHS, published by the INS Resource Information Center in 2002, includes information obtained from a variety of experts concerning the enforcement of China's family planning policy. JA 88-92. The author of the report states that "Chinese authorities seem to be dealing relatively leniently with citizens who return to China with two or more children, particularly students and professionals. If they are punished at all for violating family planning policies, it is generally with fines rather than more severe measures,

although the fines can be steep." JA 88. While the document acknowledges that critics of China's family planning policy have alleged that violators of the policy have been punished with forced sterilization and physical abuse, and there is some uncertainty as to the treatment of returning workers and peasants, "in general, the use of fines rather than more extreme punitive measures seems to be the norm in China." JA 88. According to the report, "[a] China desk officer at the U.S. State Department said in a telephone interview that anecdotal evidence suggests that workers and peasants are often forced to pay fines when they return to China after having more than one child abroad." JA 88. The State Department desk officer also mentioned in his telephone interview that "in general, officials do not resort to anything worse than fines to punish returning workers and peasants who violated policy while abroad." JA 91. The study also includes information obtained from Dr. Greenhalgh, who noted that "in general, Chinese citizens who have 'above-quota' children while abroad are generally treated more leniently than those who violate quotas inside China." JA 89. The report acknowledges experts who disagree with this conclusion, including Dr. J. S. Aird, whose affidavit the petitioner submitted in support of her application for asylum. JA 90-91.

The IJ also received into evidence a report prepared by the Immigration and Nationality Directorate of the United Kingdom in 2002, which focused on enforcement of China's family planning policy in Fujian Province, which is the petitioner's home province. JA 93-101. According to this report, "most authorities agree that Fujian Province is lax in implementing the birth control policies." JA 97.

Moreover, "[t]he authorities work by incentive schemes rather than coercion, with forced abortion and sterilization no longer tolerated, and efforts to increase the professionalism of family planning workers. Enforcement of sanctions has proved ineffective -- one third of families have three children or more." JA 98. One source stated that "the local Fujian authorities in Fuzhou lacked both capacity and will to fully implement the central Government's national birth control policy." JA 98. The report also notes that Chinese women are averaging more than two births each, and a 1995 study indicates that 25% of women of childbearing age have three or more children. JA 98. In light of the social problems associated with China's one-child policy, the report notes that the Chinese central government has "officially relaxed family planning regulations for urban couples." JA 99.

The DHS also submitted an article published in *The Washington Post* on August 20, 2002, describing sweeping changes in China's approach to population control. JA 118-121. While acknowledging the enduring effects of China's long-standing one-child policy and the Bush Administration's continuing criticism of that policy, the article describes the country's decreasing reliance on birth permits, quotas, and sterilization as means of birth control. The article focuses on the apparently successful efforts of the United Nations Population Fund ("UNFPA") to encourage an official family planning policy that would allow women to make their own decisions about birth control. JA 120. The article also reports that the European Union "boosted funding for UNFPA, crediting it with pushing China toward more humane family planning programs." JA 119.

In sum, the materials submitted by the DHS provide credible and detailed evidence that the enforcement of China's family planning policy, particularly in Fujian Province, has been generally relaxed, "with forced abortion and sterilization no longer tolerated." JA 98.

Because she herself has suffered no past persecution, and adduced no evidence that she has been targeted for future persecution, the petitioner must argue that country conditions in China support her claim of a well-founded fear of future persecution. In support of that argument, the petitioner submitted various articles and reports, relying principally on the affidavit of Dr. J.S. Aird, along with supporting documents. JA 187-193, 231-237, 240-243, 342-385, 387-388, 494-504, 506-517, 524-527, 529-542, and 591-592. The IJ considered these materials but found them unconvincing. Dr. Aird's affidavit, which was not prepared in connection with this particular case, addresses the question of whether "children born to Chinese couples while in residence in other countries are [ ] counted by the family planning authorities in their home communities in China in assessing penalties under family planning rules when these couples are repatriated." JA 189. The Aird affidavit attacks the validity of certain United States State Department reports describing a more lenient approach to enforcement of China's family planning policy.

Setting aside the fact that the Government is not relying on State Department reports in this case, the Aird affidavit is unavailing. As the IJ noted, even assuming, "*[i]n arguendo*, the failure of the US Department of State to be truthful or thorough does not automatically support [the petitioner]'s claim of a future fear of either an

abortion or sterilization under the FPP." JA 29. The IJ correctly and appropriately distinguished coercive methods of birth control, such as abortion and sterilization, from the general enforcement of China's family planning policy: "Dr. Aird's affidavit also artfully concludes that returning violators will be subject to FPP policy, but it does not confirm that it would result in forced abortion or coerced sterilization. INA § 101(a)(42)(B)." JA 29. Where, as here, the petitioner is claiming that she will suffer future persecution in China in the form of forced sterilization, the Aird affidavit's silence on this point is telling.

The Aird affidavit does include an account of the forced repatriation of a female Chinese national from Australia in 1997. The woman, who was more than eight and a half months pregnant at the time of her return to China, was forced to terminate her pregnancy. JA 192, 203-204. While accepting this account at face value, the IJ noted that it had happened more than five years previously. JA 29. The IJ weighed this account against "the absence of other cases and reports in Dr. Aird's submission of forced abortions or coercive sterilization for returning PRC nationals," and concluded that this incident "appear[ed] to be aberrational rather than the norm." JA 29. The IJ also discounted the Aird affidavit because it does not cite "any first hand knowledge or personal experience of a PRC national having to be forcibly sterilized or forcibly aborted after having US citizen children allegedly in violation of the FPP." JA 29.

In conclusion, the IJ found that the materials provided by the DHS indicate that "the most severe treatment that generally occurs against FPP violators that have returned

to the PRC with more children than permitted is the assessment of a monetary penalty and added tuition and assessments for the children's education. Also, such violators would be disqualified from coveted government employment. These factors do not add up to persecution." JA 29. These findings are amply supported by the record, as summarized above.

The petitioner's background materials on country conditions in China included, among other documents, the birth control regulations for Fujian Province. JA 494-504. Although these regulations reflect an official policy of comprehensive population control, materials submitted by the DHS strongly indicate that the policy is not strictly enforced and that coercive enforcement is unusual. JA 85-87, 97-98, 118-121. The IJ considered the conflicting evidence in the record and concluded that the petitioner did not have a well-founded fear of future persecution. It is not for this Court to weigh the conflicting evidence and make a new determination as to whether the petitioner has a well-founded fear of future persecution. This Court's review is, rather, "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 71. It is the role of this Court to determine whether substantial evidence supports the IJ's conclusion, not to second-guess the IJ or to speculate as to whether the IJ theoretically could have decided the issue in favor of the petitioner. 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*, 383 U.S. at 620. The petitioner bears the burden of demonstrating that "no reasonable fact-finder could have failed to find . . . past persecution or fear of future persecution." *Diallo*, 232

F.3d at 287 (omission in original). The petitioner has failed to meet that burden in this case.

In addition to her substantive argument that she has a well-founded fear of persecution if she were to return to China, the petitioner argues that the IJ's decision was procedurally flawed in that the IJ failed to consider significant evidence supporting her claim for asylum. Citing *Habtemicael v. Ashcroft*, 370 F.3d 774 (8th Cir. 2004), and several other cases, the petitioner argues that when an agency makes findings of fact without analyzing significant evidence, those findings are invalid. Specifically, the petitioner claims that the IJ ignored the Aird affidavit and attachments, JA 187-222, and other evidence, such as a 1999 INS publication describing coercive birth control methods in Shanghai, JA 591-592.

Here, however, there is no indication that the IJ ignored or excluded any evidence whatsoever that was submitted by the petitioner. The IJ explicitly considered the Aird affidavit and attachments, devoting a significant portion of her analysis to explaining why she found these materials unpersuasive. JA 29. The record includes numerous other items submitted by the petitioner and the DHS, most of which are not specifically identified in the IJ's decision. This does not lead to the conclusion that the IJ ignored or excluded these from her consideration.

It is instructive in this regard to compare some of the cases cited by the petitioner where an agency has made findings of fact without having considered significant evidence. In *Zheng v. Gonzales*, 415 F.3d 955 (8th Cir. 2005), for example, the IJ rejected Zheng's claim for

asylum based on her fear of persecution in China for violating the family planning policy. The Eighth Circuit vacated and remanded the case for reconsideration, holding that the IJ did not give sufficient consideration to an affidavit by Dr. Aird, which the petitioner had submitted. *Id.* at 961. In addition, the appellate court noted that the IJ expressly declined to consider an important piece of relevant evidence, *viz.*, credible testimony of the petitioner's sister regarding her forced abortion in China three years earlier. *Id.* at 958.

Similarly, in *Yang v. Gonzales*, 427 F.3d 1117 (8th Cir. 2005), an asylum claim based on fear of sterilization under China's family planning policy, the Eighth Circuit remanded because the IJ relied primarily on certain reports, without analyzing the applicant's individual circumstances. *Id.* at 1121. According to the *Yang* court, the IJ's "order lacks any analysis or mention of significant evidence in the Aird affidavit and the petitioners' testimony." *Id.* at 1122.

In the present case, there is no basis for concluding that the IJ ignored or excluded any of the evidence submitted by the petitioner. As for the Aird affidavit and its attachments, the IJ clearly explained why she found these materials unpersuasive on the particular facts of this case. If anything, this attention to the Aird affidavit reflects the IJ's keen awareness of its importance to the petitioner's case.

There is no legal requirement that in making findings of fact, an IJ must specifically mention each item of evidence that a party deems significant. In *Chen v.*

Gonzales, 2006 WL 27427 at *12 (2d Cir. 2006), this Court held that an IJ "need not enumerate and evaluate on the record each piece of evidence, item by item . . . ." Such a requirement would be particularly cumbersome in a case such as this, where the parties have submitted a large amount of documentary evidence containing facts that support each party's argument. In such a case, the IJ may properly weigh the evidence as a whole and, without expressly discussing each individual document, explain why he or she finds one side or the other more persuasive. That is precisely what the IJ did in this case. *Cf. United States v. Crosby*, 397 F.3d 103, 113 (2d Cir 2005) (noting that a statutory duty to "consider" matters relevant to sentencing does not require "robotic incantations" by district judges).

The most important evidence in this case is, in a sense, the complete lack of evidence that *this particular* petitioner would suffer persecution if she were to return to China. The petitioner's own testimony included so few individualized facts relating to possible future persecution that the IJ was able to address it in summary fashion. In the absence of such individualized evidence, the IJ properly rejected the petitioner's attempt to bootstrap her application by relying on the Aird affidavit and similar materials of a general and anecdotal nature. If this petitioner can prevail on her application for asylum merely by submitting the Aird affidavit and expressing a subjective fear of persecution, then any alien can make the same claim.

The IJ's decision in this case is supported by substantial evidence relating to the country conditions in

China, as described in the DHS submissions and summarized above, and is consistent with the lack of evidence supporting the petitioner's particularized fear of persecution. In order to reverse the IJ's decision, this Court "must find that the evidence not only *supports* th[e] conclusion [that the applicant is eligible for asylum], but *compels* it." *INS v. Elias-Zacarias*, 502 U.S. at 481 n.1 (emphasis in original). The petitioner has not produced any evidence that would compel the conclusion that she has a well-founded fear of future persecution if she were to return to China.

CONCLUSION

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

Dated: February 14, 2006

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
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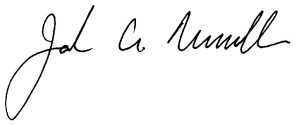

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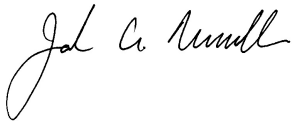
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,481 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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Addendum

8 U.S.C. § 1101(a)(42) (2005). 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. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure,

refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

8 U.S.C. § 1158(a)(1), (b)(1)-(2) (2005). 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.

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that--

(i) the alien 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. § 1231(b)(3)(A)-(B) (2005). Detention and removal of aliens ordered removed.

(b) Countries to which aliens may be removed

(1) Aliens arriving at the United States

Subject to paragraph (3)--

(A) In general

Except as provided by subparagraphs (B) and (C), an alien who arrives at the United States and with respect to whom proceedings under section 1229a of this title were initiated at the time of such alien's arrival shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States.

. . . .

(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; . . . .

8 U.S.C. § 1252(b)(4) (2005). 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 (2005). Establishing asylum eligibility.

(a) Burden of proof. The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.

(b) Eligibility. The applicant may qualify as a refugee either because he or she has suffered past persecution or

because he or she has a well-founded fear of future persecution.

(1) Past persecution. An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

(i) Discretionary referral or denial. Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past

persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

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

(iii) Grant in the absence of well-founded fear of persecution. An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph

(c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

(2) Well-founded fear of persecution.

(i) An applicant has a well-founded fear of persecution if:

(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the

protection of, that country because of such fear.

(ii) An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her

fear of persecution upon return is reasonable.

. . . .

8 C.F.R. § 1003.1 (e)(4) (2004) Affirmance without opinion.

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

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

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

(ii) If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. 1003.1(e)(4)." An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not

necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial.

ANTI-VIRUS CERTIFICATION

Case Name: Liu v. Gonzales

Docket Number: 05-4635-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 2/14/2006) and found to be VIRUS FREE.

_____

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

Dated: February 14, 2006