05-5099-ag

To be Argued By:
KRISHNA R. PATEL

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-5099-ag

KERVING'S GUILLAUME,

Petitioner,

-vs-

ALBERTO R. GONZALES, Attorney General, INS, US, STEVEN J. FARQUHARSON, District Director, GARY COTE, Officer in Charge,

Respondents,

ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC,

Amicus.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR ALBERTO R. GONZALES ATTORNEY GENERAL OF THE UNITED STATES

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STATEMENT OF JURISDICTION

This Court has exclusive jurisdiction to review a final order of removal in the wake of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B., 119 Stat. 231 (May 11, 2005). Pursuant to § 106(c) of the Act, this case, which was pending as a habeas petition in the District Court on the date of enactment of the REAL ID Act, was properly transferred to this Court to be treated as a petition for review. *See Marquez-Almanzar v. INS*, 418 F.3d 210, 215-16 (2d Cir. 2005). Venue is appropriate because the immigration proceedings in the present case occurred within this Circuit (here, in Hartford, Connecticut), and so a petition for review would have been properly filed in this Court. *See id*. at 215 n.6.

The petitioner was ordered removed from the United States as an alien convicted of an aggravated felony. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). Consequently, under 8 U.S.C. § 1252, as amended by the REAL ID Act of 2005, this Court has jurisdiction to review only "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D). *See Vargas-Sarmiento v. U.S. Department of Justice*, ___ F.3d ___, 2006 WL 1223105, *3 (2d Cir. May 8, 2006) (federal courts lack jurisdiction to review final agency orders of removal based on an alien's conviction for aggravated felony, but courts retain jurisdiction to review constitutional claims or questions of law).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether general prison conditions in Haiti constitute torture such that Petitioner is entitled to withholding of removal under the Convention Against Torture?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-5099-ag

KERVING'S GUILLAUME,

Petitioner,

-vs-

ALBERTO R. GONZALES, Attorney General, INS, US, STEVEN J. FARQUHARSON, District Director, GARY COTE, Officer in Charge,[1]

Respondents,

ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC,

Amicus.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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

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[1] This case originated as a habeas petition in the District Court, but under the REAL ID Act of 2005, was transferred to this Court for consideration as a petition for review. Under 8 U.S.C. § 1252(b)(3)(A), the Attorney General is the only proper Respondent in a petition for review. Pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Attorney General Gonzales has been substituted as the Respondent in this matter.

Preliminary Statement

Keegan Kerving's Guillaume ("Guillaume"), a native and citizen of Haiti, petitions this Court for review of a decision of the Board of Immigration Appeals ("BIA" or "Board") dated April 11, 2002 (Joint Appendix ("JA") 26). The BIA affirmed the decision of an Immigration Judge ("IJ") (JA 78-88) dated July 11, 2001 denying Guillaume's application for withholding of removal under the Convention Against Torture,[2] and ordering him removed from the United States. (JA 26 (BIA's decision), 77-88 (IJ's decision and order)).

Guillaume contends that he is entitled to relief under the CAT because, as a deportee with a criminal record, if he is returned to Haiti, he will be detained in one of Haiti's notoriously deplorable and miserable prisons. While the conditions of Haitian prisons are harsh and cannot be condoned, there is no evidence that the Haitian government intends to cause severe physical or mental pain and suffering with its detention policy. Thus, Guillaume's temporary detention, as part of a lawful deterrent policy, does not constitute torture under the CAT.

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

Statement of Facts

A. Guillaume's Entry into the United States and CAT Application

Guillaume, a native and citizen of Haiti, was admitted to the United States as an immigrant on or about June 8, 1991, when he was a teenager. (*See* JA 126, 277, 296). Since entering the United States in 1991, Guillaume has accumulated a serious criminal history.

As relevant here, on or about June 15, 1999, Guillaume pled guilty and was convicted of assault in the second degree and interfering/resisting arrest, in violation of Conn. Gen. Statute §§ 53a-60 and 53a-167a, respectively. For the assault conviction, he was sentenced to five years' imprisonment, two years to serve, and three years' probation; he received a one-year concurrent term of imprisonment for interfering/resisting arrest. (*See* 279, 296).

B. Guillaume's Removal Proceedings

Based on the June 1999 conviction for assault in the second degree, the former Immigration and Naturalization Service ("INS") served Guillaume with a Notice to Appear ("NTA") charging that he was subject to removal from the United States under 8 U.S.C. § 1227(a)(2)(A)(iii) of the Immigration and Nationality Act of 1952, as amended ("INA"), as an alien convicted of an aggravated felony, as that term is defined in 8 U.S.C. § 1101(a)(43)(F) (crime of violence for which the term of imprisonment is at least one year). (JA 296); *see also* 8 C.F.R. § 239.1(a) (1999)

(removal proceedings "commenced by the filing of a notice to appear with the Immigration Court").

On July 13, 2000, Guillaume's removal proceedings commenced before an Immigration Judge ("IJ") in Hartford, Connecticut. (JA 91). At that time, the IJ explained the charges contained in the NTA and adjourned the proceedings to provide Guillaume an opportunity to retain counsel. (JA 92-96). The IJ then gave Guillaume two more continuances so that he could attempt to retain counsel. (JA 99-100; JA 104-05). When the hearing resumed on March 9, 2001, Guillaume appeared with his counsel, Michael Boyle, Esq. (JA 107-10). The IJ rescheduled the hearing for May 17, 2001. (*Id.*)

At the continued hearing, Guillaume, through his counsel, admitted all of the allegations in the NTA, conceded removability, and sought withholding of removal to Haiti under the CAT. (JA 112). Guillaume conceded that because of the length of his sentence, he was not eligible for any other form of relief. (JA 113).

The hearing was then again continued until July 11, 2001, at which time, Guillaume testified in support of his application. (JA 124-33). Specifically, Guillaume testified that in 1991, when he was thirteen years old, his mother brought him and two of his two siblings to the United States from Haiti. (JA 126-27, 130-31). In the United States, Guillaume lived with his mother, who worked as a babysitter. (JA 129-30). Guillaume finished high school in the United States (JA 130), and prior to his incarceration, he was in school and working to support himself and help his family (JA 129). Guillaume claimed

that while in Haiti, he lived with an uncle who has since passed away, that he no longer has family or friends in Haiti, and that he has not left the United States since his arrival. (JA 128, 130, 131). He testified further that he has never been in a Haitian prison (JA 130), and that in addition to English, he speaks some Creole. (JA 132).

In support of his claim that if he were returned to Haiti, his detention in a Haitian prison would amount to torture, Guillaume submitted several documents which are included in the certified administrative record.

The 2000 State Department report on Haiti states that prison conditions in Haiti remain "very poor." (JA 149). The report states that "[p]risoners and detainees, held in overcrowded and inadequate facilities, continued to suffer from a lack of basic hygiene, poor quality health care, and 24-hour confinement to cells in come facilities." (JA 149). The report goes on to discuss food shortages and a high number of deaths reported in the prisons. (JA 149). The report acknowledges, however, that the International Committee of the Red Cross is working with the Haitian government in an attempt to improve the conditions in Haitian prisons. (JA 149).

The report finds that criminal deportees had been detained for approximately "1 week and then released" after being processed, but that "since March 24, criminal deportees who already have served sentences outside the country are kept in jail, with no timetable for their eventual release." (JA 150). The report quotes a prosecutor who stated that these "'preventive measures' are being taken to prevent the 'bandits' from increasing

the level of insecurity and crime in the country." (JA 150).[3]

Guillaume also submitted a March 25, 2001 article from the Miami Herald and a 2000 Amnesty International Report. (JA 159-65; 224-64). An article describing the personal account of a criminal deportee is also included in the documentary submissions. (JA 175-79).

Finally, Petitioner submitted a statement from the Executive Director of Alternative Chance. The report states that criminal deportees are detained from anywhere between "two weeks to two months or more before being transferred to the National Penitentiary or released." (JA 167). The report goes on to describe in detail the lack of basic hygiene, the food shortages, the lack of basic medical care, and the disease rampant in Haitian prisons. (JA 168-72).

Guillaume's attorney argued that criminal deportees returned to Haiti and detained in Haitian prisons are "at particular risk" because "they have lost their immunity to the microbes and parasites in Haitian water" and because "most of them" have "no family left, have no significant contacts of any kind to help them in prison, to bring food, to bring boiled water, to bribe guards to help prevent physical abuse." (JA 132).

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[3] Guillaume submitted the 2001 State Department report to the BIA on appeal. (JA 15-24). That report reiterates the descriptions of harsh conditions in Haitian prisons found in the 2000 report. (JA 17).

The Government's attorney asserted that even if Petitioner were to be incarcerated, he would be subject to generally poor jail conditions in Haiti which are not intended to torture him. (JA 135).

C. The IJ's Decision

By order dated July 11, 2001, the IJ denied Guillaume's application for protection under the CAT and ordered his removal from the United States to Haiti. (*See* JA 77 (IJ's Order)). In its decision, the court summarized Guillaume's testimony (JA 79-80), and the various reports and newspaper articles which described conditions in Haitian prisons. (*See* JA 80-83).

In denying Petitioner's sole claim under the CAT, the IJ concluded that Guillaume had failed to meet his burden of proof that it is more likely than not that he would be tortured if returned to Haiti. (*See* JA 85-88). While the court acknowledged the dismal conditions in Haitian prisons, it found that those conditions did not constitute torture within the meaning of the CAT because there was no evidence that there was any *intentional* infliction of harm by the authorities. Specifically, the IJ stated as follows:

> There is no evidence that, while conditions in the Haitian prison system are very poor for anyone who is detained in that system, there would be any intentional infliction of harm by the authorities. It appears that persons who are detained in Haiti face very poor conditions, but that does not rise to the level of torture as required in the Torture

> Convention. The Court finds that [Guillaume] has no[t] shown that there would be any intention by the authorities to inflict pain and suffering on [him] as required in the regulation. [citation omitted]. The Court finds that there's not a specific intent by the authorities in Haiti to torture [Guillaume]. While the Court is certainly concerned about the lack of food and adequate hygiene in the Haitian prison system, again, there is no evidence that the authorities use this to intentionally harm prisoners in that country. Haiti is a very poor country and it does not appear that the government has the resources to maintain an adequate prison system. In sum, [Guillaume] has failed to establish that these conditions are serious enough to rise to the level of torture versus cruel, inhuman and degrading treatment. In addition, [Guillaume] has not established that any torture would be intentionally inflicted on him.

(JA 87).

D. The BIA's Decision

On April 11, 2002, the BIA affirmed the IJ's decision denying Guillaume's application for CAT relief. (*See* JA 26). Citing *In re J-E*, 23 I & N Dec. 291 (BIA 2002), the BIA held that:

> [N]either indefinite detention nor inhuman prison conditions in Haiti constitutes torture. We specifically noted that there is no evidence that either of these actions by the Haitian government is

> done with the specific intent to inflict severe pain or suffering, or to otherwise defeat the purpose of the Convention Against Torture [citation omitted]. Moreover, although we recognize that isolated acts of torture occur in Haitian detention facilities, there is insufficient evidence in the record to establish that it is more likely than not that [Guillaume] will be subjected to this severe mistreatment if he is detained upon his return to Haiti [citation omitted].

(JA 26).

E. Federal Court Review

On April 22, 2002, Guillaume filed a petition for review and a motion for an "emergency stay of deportation" in this Court. In July, 2002, Guillaume, represented by counsel, and the Government, agreed by stipulation to dismiss the petition for review and on July 30, 2002, this Court ordered that Petitioner's motion for a stay was moot in light of the stipulation. *See* Docket, No. 02-4131-ag.

On July 23, 2002, in the United States District Court for the District of Connecticut, Guillaume filed a motion for a stay of removal and a habeas petition seeking relief under the CAT.

This petition was still pending in the district court when Congress passed the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231. Consequently, pursuant to § 106(c) of that Act, on September 20, 2005, the district

court transferred the case to this Court for consideration as a petition for review.

SUMMARY OF ARGUMENT

The BIA properly concluded, on the basis of its decision in *In re J-E-*, that Guillaume failed to establish his eligibility for relief under the CAT. In the *J-E-* decision, the Board held that Haiti's policy of detaining criminal deportees indefinitely in its deplorable prisons was not torture because there is no evidence that Haiti has the specific intent to cause the deportees pain and suffering and because the detention is a lawful sanction. Both conclusions are correct.

The Attorney General's regulations implementing the CAT in the United States properly define torture to require a finding of specific intent to cause pain and suffering. The ratification history of the CAT in the United States demonstrates that both the President and the Senate understood the treaty to contain a specific intent requirement. Congress directed the Attorney General to include this understanding in his regulations, and consistent with this directive, the regulations do just that. Based on this history, the BIA properly interpreted the regulations to define torture as including a specific intent requirement. Although amicus curiae argues that torture under the CAT should only require general intent, that argument misses the mark; the BIA's interpretation of its regulations to require specific intent is entitled to substantial deference.

The BIA properly concluded that Guillaume would not be tortured if returned to Haiti because detention in Haitian prisons is not intended to cause pain and suffering. In *In re J-E-*, the BIA found that Haiti detains its criminal deportees to protect its population from increased crime and insecurity, not to inflict pain and suffering on the deportees. Similarly, the BIA found that the dismal and dangerous prison conditions result from economic, budgetary, and social conditions in the country, not from an intent to cause pain and suffering. Thus, even though Haitian authorities know that their prisons cause pain and suffering, their detention policy does not qualify as torture under the CAT because the policy is not intended to cause that pain and suffering.

In the alternative, the BIA properly rejected Guillaume's claim under the CAT because any pain and suffering inflicted on criminal deportees in Haiti's prisons is incident to the lawful sanction of Haiti's detention policy.

ARGUMENT

I. THE IMMIGRATION JUDGE AND BOARD OF IMMIGRATION APPEALS PROPERLY REJECTED GUILLAUME'S CLAIM FOR RELIEF UNDER THE CONVENTION AGAINST TORTURE BECAUSE GENERAL PRISON CONDITIONS DO NOT CONSTITUTE TORTURE UNDER THE CONVENTION

A. Relevant Facts

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

B. Standard of Review and Governing Law

1. Standard of Review

Under 8 U.S.C. § 1252(a)(2)(D), this Court only has jurisdiction to review constitutional questions and questions of law. This Court affords "substantial deference to the BIA's interpretation of the statutes and regulations that it administers." *Brissett v. Ashcroft*, 363 F.3d 130, 133 (2d Cir. 2004) (citing *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984)); *see also Thelemaque v. Ashcroft*, 363 F. Supp. 2d 198, 205 (D. Conn. 2005) (citing cases); *Auguste v. Ridge*, 395 F.3d 123, 144 (3rd Cir. 2005). Thus, when a statute is ambiguous with respect to a specific issue, the Court's review of the agency's interpretation is limited to "whether the agency's answer is based on a permissible construction of the statute." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424

(1999) (quoting *Chevron USA*, 467 U.S. at 843 (1984)); *Ahmetovic v. INS*, 62 F.3d 48, 53 (2d Cir. 1995).

This Court reviews the BIA's application of legal principles to undisputed facts *de novo*. *Wangchuck v. Department of Homeland Security*, ___ F.3d ___, 2006 WL 1314685, *3 (2d Cir. May 15, 2006). *See generally Xiao Ji Chen v. U.S. Department of Justice*, 434 F.3d 144, 153-54 (2d Cir. 2006) (interpreting REAL ID Act provision limiting court review to "questions of law" as precluding review of discretionary and factual determinations and suggesting that this language allows review of legal questions that were formerly available on habeas review); *Wang v. Ashcroft*, 320 F.3d 130, 143 (2d Cir. 2003) (habeas review extends to claims of erroneous application of statutes).

2. Witholding of Removal Under the Convention Against Torture

A. The CAT and the Statutory Framework

The CAT was adopted by the United Nations General Assembly on December 10, 1984, and signed by the United States on April 18, 1988. *See* Report of the Senate Committee on Foreign Relations ("Senate Report"), Exec. Rep. No. 101-30 at 1, 101st Cong., 2d sess. (Aug. 30, 1990). Article 1 of the CAT defines torture as follows:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or

> a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, 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. It does not include pain or suffering arising only from, inherent in or incident to lawful sanctions.

Article 3 of the CAT provides that "[n]o State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

President Reagan signed the treaty and transmitted it to the Senate for ratification "subject to certain reservations, understandings, and declarations." *See* Message From the President Transmitting the CAT, Treaty Doc. No. 100-20, at iii (1988). The CAT was, however, not ratified during President Reagan's presidency. President Bush, in 1990, "submitted a revised and reduced list of proposed conditions." *Thelemaque*, 363 F. Supp. 2d at 207. With respect to the intent element of the definition of torture, the President recommended a proposed understanding stating that the "United States understands that, in order to constitute torture, an act must be *specifically intended* to inflict severe physical or mental pain or suffering." *Id.* (citation omitted) (emphasis added).

On October 27, 1990, the Senate offered its advice and consent to the CAT subject to, *inter alia*, President Bush's proposed understanding about the specific intent element in the definition of torture. The Senate Resolution provided as follows:

> That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be *specifically intended to inflict severe physical or mental pain or suffering* and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the *intentional infliction* or threatened infliction of *severe physical pain or suffering*; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality . . . .
>
> That the United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture," as used in Article 3 of the Convention, to mean "if it is more likely than not that he would be tortured."

136 Cong. Rec. S17486, S17491 to S17492 (Oct. 27, 1990) (emphasis added).

The Senate's advice and consent was expressly subject to this understanding, and to the declaration "that the provisions of Articles 1 through 16 . . . are not self-executing." 136 Cong. Rec. S17486, S17491 to S 17492 (Oct. 27, 1990). President Clinton deposited the ratification instrument with the United Nations in 1994. *See* 64 Fed. Reg. 8478, 8478 (Feb. 19, 1999).

In 1998, Congress enacted the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, 112 Stat. 2681, 2681-822 (Oct. 21, 1998), which required the Attorney General to promulgate "regulations to implement the obligations of the United States under Article 3 of the [CAT] *subject to any reservations, understandings, declarations, and provisos contained in the . . . Senate resolution of ratification*." FARRA § 2242(b), codified at 8 U.S.C. § 1231 note (emphasis added).

Accordingly, the Attorney General promulgated regulations to govern procedures for seeking relief under the CAT. *See* 64 Fed. Reg. 8478 (Feb. 19, 1999), codified at 8 C.F.R. §§ 1208.16(c), 1208.17, 1208.18(a). Section 1208.18(a) contains relevant definitions and begins by noting that "[t]he definitions in this subsection incorporate the definition of torture contained in Article 1 of the [CAT], subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention." Section 1208.18(a)(1) sets forth the basic definition of

torture as found in Article 1 of the CAT, and is followed by several clarifying provisions. As relevant here, § 1208.18(a)(3) provides that "[t]orture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the CAT to prohibit torture."

In addition, § 1208.18(a)(5) provides -- consistent with the Senate Resolution understanding -- that "[i]n order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture." *See also Wang*, 320 F.3d at 134 (stating that "an alien is not entitled to CAT relief unless he can prove that . . . he is more likely than not to suffer *intentionally-inflicted* cruel and inhuman treatment") (emphasis added); *Sevoian v. Ashcroft*, 290 F.3d 166, 175 (3d Cir. 2002); *In re J-E-*, 23 I. & N. Dec. 291, 298 (BIA 2002) ("This specific intent requirement is taken directly from the understanding contained in the Senate's ratification resolution."). In this case, "we are presented with a situation where both the President and the Senate, the two institutions of the federal government with constitutional roles in the treaty-making process, agreed during the ratification stage that their understanding of the definition of torture contained in Article 1 of the Convention included a specific intent requirement." *Auguste*, 395 F.3d at 142.

B. The Definition of Torture

The CAT as implemented by the Attorney General's regulations, 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, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, 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." 8 C.F.R. § 1208.18(a)(1).

As set forth in the regulations, there are five basic requirements for an act to constitute torture under the CAT. First, the act must be committed by the government or with government acquiescence. Second, the act must involve the infliction of severe pain and suffering. "'Torture is an extreme form of cruel and inhuman treatment,'" and thus "even cruel and inhuman behavior by government officials may not" warrant CAT protection. *Sevoian*, 290 F.3d at 175 (quoting 8 C.F.R. § 1208.18(a)(2)). Third, the infliction of the pain must be for some illicit purpose such as punishing, intimidating, or discriminating. Fourth, the infliction of pain or suffering must be specifically intended. *Wang*, 320 F.3d at 134. And finally, the act cannot be pursuant to a lawful sanction. *See generally* 8 C.F.R. § 1208.18(a).

C. The BIA's Interpretation of the CAT

In *In re J-E-*, the BIA determined that the indefinite detention of criminal deportees by Haitian authorities in substandard jail conditions does not amount to torture within the meaning of the CAT. 23 I. & N. Dec. at 299-304. The Board reached this conclusion by analyzing the five criteria set forth by the regulatory definition of torture.

The Board found that a criminal deportee "will be subject to detention of an indeterminate length on his return to Haiti." *Id.* at 299. It noted that the Haitian government has instituted this detention practice to protect its citizens from increased criminal activities; thus, the policy amounts to a lawful sanction and does not constitute torture. *Id.* at 300. The Board further noted the alien's argument that "indefinite detention, coupled with inhuman prison conditions, amounts to torture," but found no evidence that Haitian authorities were detaining criminal deportees with the specific intent to inflict severe physical or mental pain or suffering. *Id.* at 300-301. According to the Board, the ratification documents require "specific intent" to cause severe pain or suffering, and this is defined as the "intent to accomplish the precise criminal act that one is later charged with." *Id.* at 301 (quoting Black's Law Dictionary 813-14 (7th ed. 1999)).

The Board relied on the State Department's Country Report to find that the prison conditions in Haiti result from "budgetary and management problems as well as the country's severe economic difficulties." *Id.* at 301. It noted that the Haitian government allows visits by the International Committee of the Red Cross, the Haitian Red

Cross, and other human rights groups. *Id.* Even members of the media (specifically, the Miami Herald) were allowed access to the prisons. *Id.* Finally, the Board held that although there was evidence of isolated instances of mistreatment in Haitian prisons, there was no evidence that the severity of the mistreatment was sufficient to rise to the level of torture within the regulatory definition. *Id.* at 301-302.

After considering the entire record, the Board concluded that although the Haitian government's policy of indefinitely detaining criminal deportees in such conditions was unacceptable, the policy did not rise to the level of torture as defined by the regulations because there was no evidence of specific intent on the part of the Haitian government. *Id.* at 300-01; JA 26; *see also Cadet v. Bulger*, 377 F.3d 1173, 1192-94 (11th Cir. 2004) (finding that Haitian prison conditions do not constitute torture under CAT); *Auguste*, 395 F.3d at 153 (general prison conditions in Haiti, no matter how deplorable, not sufficient to make a finding of torture under the CAT because no evidence that the pain and suffering is intentionally inflicted).

C. Discussion

1. "Torture" Under The CAT Requires Specific Intent To Cause Severe Pain and Suffering

As described above, *see* Part B.2., *supra*, the history of the CAT -- and the embodiment of that history in the regulations -- establishes that "torture" under the CAT

requires *specific intent* to cause severe pain and suffering. In other words, the actor must not only intend the act, but must also intend the consequences of the act, namely, the infliction of severe pain and suffering.

Article 1 of the CAT defines torture as an intentional act. Presidents Reagan and Bush both communicated to the Senate their understanding that torture requires specific intent, and the Senate adopted this understanding in its official resolution ratifying the Convention. Later, in FARRA, Congress directed the Attorney General to adopt regulations incorporating this understanding, and the resulting regulations did just that. Thus, the relevant regulatory language states emphatically that "[i]n order to constitute torture, an act must be *specifically intended* to inflict severe physical or mental pain or suffering." 8 C.F.R. § 1208.18(a)(5) (emphasis added). Finally, the BIA, the agency charged with interpreting and applying immigration statutes and the CAT regulations, has interpreted the CAT regulations to limit the definition of torture to those acts committed with the specific intent to cause severe pain or suffering. *In re J-E-*, 23 I. & N. Dec. at 298, 300-301; *see also Auguste*, 395 F.3d at 142-46[4] (torture under the CAT requires finding of specific intent); *Francois v. Gonzales*, ___ F.3d ___, 2006 WL 1360072, *4-7 (3rd Cir. May 19, 2006) (finding that general prison conditions in Haiti do not constitute torture under the

[4] The *Auguste* court discussed an earlier Third Circuit decision, *Zubeda v. Ashcroft*, 333 F.3d 463 (3rd Cir. 2003), that had stated that the CAT does not require specific intent, but specifically declined to follow *Zubeda* as dicta. *Auguste*, 395 F.3d at 147-48.

CAT); *Thelemaque*, 363 F. Supp. 2d at 212-215 (torture under the CAT requires finding of specific intent).

Despite this well-documented history of the specific intent requirement, amicus curiae[5] argues that the definition of torture requires only general intent, and not specific intent. *See, e.g.,* Amicus Curiae Br. at 9-11. Specifically, amicus argues that torture should be defined as any deliberate act when "severe mental or physical pain or suffering [is] a foreseeable consequence of the act." *Id.* at 9. In other words, according to amicus, the intent requirement was meant to distinguish between suffering that is accidental and suffering that is intended. *Id.* at 6. In support of this argument, amicus relies primarily on a discussion of customary international law. *Id.* at 9-15.

Even assuming *arguendo*, that customary international law would support amicus curiae's argument, the reliance on international law is misplaced. The CAT is not a self-executing treaty. *See Wang*, 320 F.3d at 140; 136 Cong. Rec. at S17492 (declaration "that the provisions of Articles 1 through 16 . . . are not self-executing"). Accordingly, the regulations enacted pursuant to congressional direction trump any customary international law. *See Oliva v. U.S. Dept of Justice*, 433 F.3d 229, 236 (2d Cir. 2005) (holding that "'clear congressional action trumps customary international law'") (quoting *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005)); *Wang*, 320 F.3d at 142 n.18 (need not consider customary

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[5] At the time of filing of this brief, this Court has not yet ruled on amicus curiae's motion for leave to participate in this case. The Government has no objection to its motion.

international law because issue is governed by "treaties and legislative and regulatory enactments of the United States"); *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson,* 636 F.2d 1300, 1323 (D.C. Cir. 1980) (noting that courts "obligated to give effect to an unambiguous exercise by Congress of its jurisdiction to prescribe even if such an exercise would exceed the limitations imposed by international law"). *See also Auguste*, 395 F.3d at 143 ("[W]here the President and the Senate express a shared consensus on the meaning of a treaty as part of the ratification process, that meaning is to govern in the domestic context."). Here, the legislative history, regulations, and case law support an interpretation requiring specific intent. Therefore, amicus's claim that a general-intent interpretation should be followed, as a matter of international law, cannot stand.

In further support of its "general intent" argument, amicus contends that the phrase "specifically intended" in the Senate Resolution and in the regulations is "not unambiguous" and should not be interpreted to include a specific intent requirement. According to amicus, a specific intent requirement would defeat the object and purpose of the CAT and would undermine the internal consistency of the resolution and the regulations. Amicus Curiae Br. at 17-25.

Amicus curiae's argument ignores the law governing the deference owed to the BIA in this context. As described above, the Senate Resolution and the governing regulations include a specific intent requirement. To the extent there is any ambiguity, this Court must defer to the BIA's reasonable interpretations of the statutes and

regulations it administers. *Brissett*, 363 F.3d at 133; *see also Auguste*, 395 F.3d at 144. Thus, even if, as amicus argues, the phrase "specifically intended" is ambiguous, a Court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Brissett*, 363 F.3d at 133 (quoting *Sutherland v. Reno*, 228 F.3d 171, 174 (2d Cir. 2000)).

This deference to an expert agency's reasonable interpretations applies with even greater force in the immigration context, because the Attorney General and those acting on his behalf in these matters "must exercise especially sensitive political functions that implicate questions of foreign relations." *INS v. Abudu*, 485 U.S. 94, 110 (1988); *Aguirre-Aguirre*, 526 U.S. at 425; *Auguste*, 395 F.3d at 144-45 ("[T]his Court owes deference to the agency's interpretations to the extent that the CAT involves issues of immigration law which may implicate questions of foreign relations."). That basis for judicial caution pertains here. The decision of whether returning an alien to the country of removal will subject him to pain or suffering "intentionally 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. § 1208.18(a)(1), is often a politically sensitive determination. *See* 8 C.F.R. §§ 1208.18(a)(5), (7); *see also id.* at § 1208.17(f) ("the Attorney General may determine whether deferral [of removal] should be terminated based on diplomatic assurances forwarded by the Secretary of State"). Thus, in reviewing the Board's determination of torture in this case, the Court should take care not to "substitute its own construction" of that term,

Chevron, 467 U.S. at 844; rather, the inquiry is limited to whether the Board's approach "is not one that Congress would have sanctioned," *id.* at 845. *See INS v. Rios-Pineda*, 471 U.S. 444, 452 (1985) ("In this government of separated powers, it is not for the judiciary to usurp Congress' grant of authority to the Attorney General by applying what approximates *de novo* appellate review.").

Here, the Board's interpretation of the CAT and its regulations to require specific intent is a reasonable one. The BIA reviewed the CAT's ratification history and determined that that history required utilization of a specific intent standard. *In re J-E-*, 23 I. & N. Dec. at 298, 300-301. Although amicus argues that "specifically intended" does not necessarily mean "specific intent" as applied in the criminal law context, Amicus Curiae Br. at 20-22, it was certainly permissible for the BIA to interpret it in that manner. Thus, even if there might be arguments (as suggested by amicus) for interpreting the language differently, that is not the proper inquiry. The only question is whether the BIA's interpretation is reasonable; it is not for amicus (or this Court) to substitute its judgment for that of the expert agency. *See Chevron*, 467 U.S. at 844.

In any event, amicus curiae's arguments for a different interpretation of the "specifically intended" language are not persuasive. Amicus argues first that a specific intent requirement would defeat the object and purpose of the CAT and would thus be invalid as a matter of international law. Amicus Curiae Br. at 23-24. Although one court has suggested that a specific intent requirement "could pose insurmountable obstacles" to claims for relief under the

CAT, *Zubeda v. Ashcroft*, 333 F.3d 463, 474 (3rd Cir. 2003), this is pure speculation. Amicus presents no evidence that the specific intent requirement has hampered the purposes of the CAT. In addition, even if the specific intent requirement were inconsistent with international law, it is a part of domestic law and thus must be enforced. *See, e.g.*, *Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d at 1323 (courts must give effect to unambiguous laws even if this would be inconsistent with international law).

Amicus also argues that torture cannot contain a specific intent requirement because this would be inconsistent with language in the resolution and regulations providing that the state action requirement can be met with the mere "acquiescence" of public official. *See* 8 C.F.R. §§ 1208.18(a)(1), (7). In other words, amicus argues that a public official cannot simultaneously "acquiesce" in torture and specifically intend pain and suffering. Amicus Curiae Br. at 24-25.

Amicus conflates two separate requirements. The question of acquiescence arises in determining whether a public official is involved in the torture, not in determining whether there has been a specific intent to cause pain and suffering. In other words, a public official could be held responsible for the torture inflicted by a third party if he acquiesced in the intentional acts of that third party without intervening to prevent those acts. In this context, there is no inconsistency to resolve. The intentional acts would be those of the third party; the acquiescence would be that of the public official.

In sum, the CAT regulations, as interpreted by the BIA define torture to require a finding of specific intent to cause pain and suffering. This interpretation is a reasonable interpretation of the CAT, its ratification history, and the CAT regulations. As such, it is entitled to substantial deference by this Court.

2. Haiti's Policy of Detaining Criminal Deportees In Its Prisons Is Not Torture Because it is Not Specifically Intended to Cause Severe Pain and Suffering

The BIA found, in reliance on its decision in *In re J-E-*, 23 I. & N. Dec. 291, that Guillaume would not be tortured if returned to Haiti because indefinite detention in deplorable prison conditions is not specifically intended to cause pain and suffering. (JA 26). This conclusion is a proper application of the governing law and should be upheld.

The record evidence shows, and the BIA found, that Haiti detains criminal deportees for security reasons, not to inflict pain and suffering. Specifically, the BIA found that Haiti "has a legitimate national interest in protecting its citizens from increased criminal activity," *In re J-E-*, 23 I. & N. Dec. at 300, and thus designed the detention policy to "protect the populace from criminal acts committed by Haitians who are forced to return to the country after having been convicted of crimes abroad," *id.* In this way, Haiti's detention policy serves as a "warning and deterrent" to returning deportees. *Id. See also* JA 149-50; *Francois*, ___F.3d at___, 2006 WL 1360072, at *4 ("The Haitian authorities [imprison criminal deportees] as a

preventive measure to prevent returning criminals from further exacerbating the country's already high levels of crime.") (quoting district court decision); *Cadet*, 377 F.3d at 1193 (upholding BIA's analysis of Haiti's intent); *Auguste*, 395 F.3d at 152-54 (same).

Similarly, the BIA properly found that the substandard conditions existing in Haiti's prisons do not qualify as torture because those conditions were not created with an intent to cause pain and suffering. According to the BIA, the deplorable conditions in Haitian prisons result from "budgetary and management problems as well as the country's severe economic difficulties." *In re J-E-*, 23 I. & N. Dec. at 301. In other words, Haiti itself is plagued with extreme poverty and instability, and so it is not surprising that its prisons reflect this same poverty and instability. *Id.* Moreover, the fact that Haiti is taking steps to improve its prisons, and that it opens its prisons to the media and international human rights observers, undermines any argument that it intends to cause pain and suffering. *Id.* With these facts as found by the BIA, it would strain the language and spirit of the CAT to conclude that public officials in Haiti intentionally torture their citizens by not providing optimal care in their prison system. As the District Court for the District of Connecticut explained in rejecting a virtually identical claim, "there is a difference between being impoverished and being cruel, and CAT's prohibition on returning persons to another State was expressly intended to deal with the latter, not the former." *Thelemaque*, 363 F. Supp. 2d at 215.

In response, Petitioner argues that the Haitian authorities meet the specific intent requirement because they place criminal deportees in "life-threatening" prison conditions to punish them. The Third Circuit considered a virtually identical argument in *Auguste*. The petitioner there argued that Haitian authorities "are not only aware that their imprisonment policy causes severe pain and suffering, but purposely place deportees in the brutal prison conditions in order to punish and intimidate them." 395 F.3d at 153. As the Third Circuit noted, this argument conflates general intent and specific intent. The BIA found that the brutal prison conditions in Haiti result from budgetary and economic conditions in the country, not from an intent to cause pain and suffering. Thus, while Haitian authorities intend the act (*i.e.*, the detention of criminal deportees), the BIA properly found that they lack the intent to cause the consequences of that act (*i.e.*, the pain and suffering). *See id.* at 153-54 ("The mere fact that the Haitian authorities have knowledge that severe pain and suffering may result by placing detainees in these conditions does not support a finding that the Haitian authorities intend to inflict severe pain and suffering. The difference goes to the heart of the distinction between general and specific intent.").

In sum, while the conditions in Haitian prisons are very troubling, and certainly are not condoned by our Government, in the context of this case, they do not fall within the purview of the CAT. The record evidence simply does not establish that the Haitian government specifically intends to cause pain and suffering to criminal deportees. *See Cadet*, 377 F.3d at 1193-94; *Auguste*, 395 F.3d at 153-54; *Thelemaque*, 363 F. Supp. 2d at 215.

3. In the Alternative, Haiti's Policy of Detaining Criminal Deportees is Not Torture Because it is a Lawful Sanction that Does Not Defeat the Purpose of the CAT

The BIA properly found that Haiti's detention policy for criminal deportees is not "torture" within the meaning of the CAT because it is a lawful sanction that does not defeat the purpose of the CAT. *In re J-E-*, 23 I. & N. Dec. at 299-300. The CAT does not define the term "lawful sanctions." *See Nauru v. Gonzales*, 404 F.3d 1207, 1221 (9th Cir. 2005). The Senate, however, "did qualify its ratification with the understanding that a state 'could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.'" *Id.* (citing 136 Cong. Rec. 36,198 (1990)). The regulations governing claims under the CAT therefore define lawful sanctions as "'judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty,' *but* only so long as those sanctions do not 'defeat the object and purpose of [CAT] to prohibit torture.'" *Id.* (citing 8 C.F.R. § 1208.18(a)(3)).

Applying this regulatory definition in *In re J-E-*, the BIA upheld Haiti's detention policy as a lawful sanction. The BIA expressly found that "Haiti has a legitimate national interest in protecting its citizens from increasing criminal activity." 23 I. & N. Dec. at 300. Accordingly, the detention policy is designed to prevent criminal deportees from "increasing the level of insecurity and crime in the country." *Id.* Thus, according to the BIA,

> Haiti's detention policy in itself appears to be a lawful enforcement sanction designed by the Haitian Ministry of Justice to protect the populace from criminal acts committed by Haitians who are forced to return to the country after having been convicted of crimes abroad. We find that this policy is a lawful sanction and, therefore, does not constitute torture. [citation omitted]. Additionally, there is no evidence that Haiti's detention policy is intended to defeat the purpose of the Convention to prohibit torture.

Id. The Eleventh Circuit expressly upheld this decision in *Cadet*, finding that the BIA's conclusion was a reasonable interpretation of the definition of torture. *See Cadet*, 377 F.3d at 1193.

Petitioner argues that Haiti's detention policy cannot be a "lawful" sanction because it is not expressly authorized by Haitian law. Petitioner's Br. at 24-26. Petitioner cites no authority holding, however, that an action must be *expressly* authorized in law to qualify as a "lawful sanction." In Haiti, as Petitioner acknowledges, the detention policy appears to reflect an executive policy, a policy the BIA found was designed to further a "legitimate national interest" in protecting the Haitian people from increased crime. *In re J-E-*, 23 I. & N. Dec. at 300. The BIA's conclusion is a reasonable one and should be upheld.

CONCLUSION

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

Dated: June 8, 2006

Respectfully submitted,

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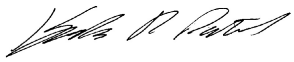

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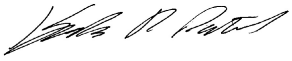
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

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 7,722 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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Addendum

STATUTORY PROVISION

8 USC §1252(b)

* * * *

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection(a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in

which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

DIVISION B--REAL ID ACT OF 2005

SECTION 1. SHORT TITLE.

This division may be cited as the "REAL ID Act of 2005"

. . .

SEC. 106. JUDICIAL REVIEW OF ORDERS OF REMOVAL.

(a) *In General.* – Section 242 of the Immigration and Nationality Act (8 U.S.C. 125) is

amended --

(1) in subsection (a)--

(A) in paragraph (2)--

(i) in subparagraph (A), by inserting "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title" after "Notwithstanding any other provision of law";

(ii) (ii) in each of subparagraphs (B) and (C), by inserting "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D)" after "Notwithstanding any other provision of law" ; and

(iii) by adding at the end the following:

(D) **JUDICIAL REVIEW OF CERTAIN LEGAL** CLAIMS.--Nothing in subparagraph (B) -or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a

petition for review filed with an appropriate court of appeals in accordance with this section." ; and

(B) by adding at the end the following:

(4) **CLAIMS UNDER THE UNITED NATIONS CONVENTION.**
Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

(5) **EXCLUSIVE MEANS OF REVIEW**.--Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered' or issued under any provision of this Act, except as provided in subsection (e). For purposes of this Act, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms 'judicial review' and 'jurisdiction to review' include habeas corpus review pursuant to section 2241 of title 28, United States Code, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).";

(2) in subsection (b)(9), by adding at the end the following: "Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28, United States Code, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory) to review such an order or such questions of law or fact.'.; and

(3) in subsection (g), by inserting "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title" after "notwithstanding any other provision of law".

(b) Effective Date.--The amendments made by subsection (a) shall take effect upon the date of the enactment of this division and shall apply to cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of the enactment of this division.

(c) Transfer of Cases.– If an alien's case, brought under section 2241 of title 28, United States Code, and challenging a final administrative order of removal, deportation, or exclusion, is pending in a district court on the date of the enactment of this division, then the district court shall transfer the case (or the part of the case that challenges the order of removal, deportation, or exclusion) to the court of appeals for the circuit in which a petition for review could have been properly filed under section 242(b)(2) of the Immigration and Nationality Act (8 U.S.C. 1252), as amended by this section, or under section 309(c)(4)(D) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1101 note). The court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under such section 242, except that, subsection.(b)(1) of such section shall not apply.

(d) Transitional Rule Cases.--A petition for review filed under former section 106(a) of the Immigration and Nationality Act (as in effect before its repeal by section 306(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1252 note)) shall be treated as if it had been filed as a petition for review under section 242 of the

Immigration and Nationality Act (8 U.S.C. 1252*),* as amended by this section. Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241of title 28*,* United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, such petition for review shall be the sole and exclusive means for judicial review of an order of deportation or exclusion.

REGULATIONS

8 C.F.R. § 1208.16 Withholding of removal. . . under the Convention Against Torture.

* * * *

(c) Eligibility for withholding of removal under 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.

* * * *

(d) Approval or denial of application--

* * * *

(2) Mandatory denials. Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section 241(b)(3) of the Act or under the Convention Against Torture shall be denied if the applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced

prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

8 C.F.R. § 1208.17 Deferral of removal under the Convention Against Torture.

(a) Grant of deferral of removal. An alien who: has been ordered removed; has been found under § 1208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under § 1208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured.

8 C.F.R. § 1208.18. Implementation of the Convention Against Torture.

(a) Definitions. The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, 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.

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of

mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

(6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official 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) Noncompliance with applicable legal procedural standards does not per se constitute torture.

ANTI-VIRUS CERTIFICATION

Case Name: Guillaume v. Gonzales

Docket Number: 05-5099-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 6/8/2006) and found to be VIRUS FREE.

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