05-5511-ag

To Be Argued By:
KAREN L. PECK

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-5511-ag

ELKIN MONTOYA-VALLEJO,
Petitioner,

-vs-

ALBERTO R. GONZALES, Attorney General,
Respondent.

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

Petitioner is subject to a final order of removal. This Court has jurisdiction under § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (2006), to review petitioner's challenge to the Board of Immigration Appeals' September 19, 2005, final order denying him withholding of removal and relief under the Convention Against Torture.

To the extent that the Immigration Judge and Board of Immigration Appeals denied petitioner's application for asylum on the ground that it was untimely, and in the absence of a constitutional or legal challenge to that decision, this Court does not have jurisdiction to review that determination. 8 U.S.C. § 1158(a)(3).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether this Court has jurisdiction to review the Board of Immigration Appeals' determination that petitioner's asylum application was untimely.

2. Whether a reasonable fact finder would be compelled to reverse the Immigration Judge's and Board of Immigration Appeals' adverse finding that petitioner had not been subject to past persecution and did not have a well-founded fear of future persecution, where petitioner failed to meet his burden of proof of showing that the isolated threats he had received were due to membership in a social group or were based upon political opinion; and where other members of his family have continued to reside in Colombia without incident.

3. Whether the Immigration Judge and Board of Immigration Appeals properly rejected petitioner's claim for relief under the Convention Against Torture.

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Attorney General of the United States

Preliminary Statement

Elkin Montoya-Vallejo, a native and citizen of Colombia, petitions this Court for review of a September 19, 2005, decision of the Board of Immigration Appeals ("BIA"). (Joint Appendix ("JA") 2). The BIA summarily affirmed the July 8, 2004, decision of an Immigration Judge ("IJ") (JA 56), denying petitioner asylum and withholding of removal under the Immigration and

Nationality Act of 1952, as amended ("INA"), and relief under the Convention Against Torture ("CAT").[1]

Petitioner sought asylum, withholding of removal, and CAT relief based on a claim that he had been persecuted by Colombian guerrillas for his refusal to pay a "war tax." The IJ correctly found that petitioner's application for asylum was time-barred and this Court lacks jurisdiction to review that determination. Further, substantial evidence supports the IJ's determination that petitioner failed to meet his burden of proof for asylum, withholding of removal or CAT relief.

First, there is no evidence in the record that the threats made by guerrillas for money payments were made for political purposes. Rather, the evidence demonstrated that the demands for money were no more than criminal extortion of individuals perceived by the guerrillas to have money.

Second, as the record does not demonstrate that the guerrillas who threatened him would be able to follow him throughout Colombia, there was not sufficient evidence to support a well-founded fear of future persecution or any

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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).

likelihood of torture based on any statutory ground for asylum, particularly where other members of petitioner's family, including his daughter and son, still reside in Colombia without any problems from the guerrillas.

For all these reasons, the petition for review should be denied.

Statement of the Case

Petitioner entered the United States with a visitor visa on June 24, 2000. (JA 89, 424). His visa expired on December 23, 2000.

On August 13, 2003, petitioner was served with a Notice to Appear for removal proceedings. (JA 424-25). Petitioner appeared before an IJ on November 25, 2003 (JA 75-79), and was ordered to file an application for asylum by February 3, 2004 (JA 78). Petitioner appeared before the IJ again on February 3, 2004, and filed the asylum application. (JA 80). The IJ heard testimony on July 8, 2004, and rendered an oral decision denying petitioner asylum, withholding of removal, and CAT relief that same day. (JA 83-117).

On July 26, 2004, petitioner filed an appeal to the BIA. (JA 48-49). On September 19, 2005, the BIA affirmed the IJ's decision. (JA 2).

On October 18, 2005, petitioner filed a petition for review with this Court. He also filed a motion for stay of removal which was granted.

Statement of Facts

A. Elkin Montoya-Vallejo's Entry into the United States and Application for Asylum, Withholding of Removal, and CAT Relief

Petitioner Elkin Montoya-Vallejo is a native and citizen of Colombia, where he was born on January 11, 1949. (JA 399). Petitioner testified that he left Colombia on June 24, 2000, to come to the United States on a visa. (JA 87). His visa expired on December 23, 2000. (JA 424). Petitioner testified that he hired an attorney in August or September of 2000 to file an asylum application but that the attorney disappeared without filing the application. (JA 90). Petitioner further testified that he did nothing further regarding the asylum application until three years later when he was placed in removal proceedings after testifying in his wife's removal hearing. (JA 89-90).

Petitioner's wife entered the United States in September of 2000 and returned to Colombia approximately two years later in August 2002. (JA 88). When she returned to the United States in September 2002, she was arrested and placed in removal proceedings. (JA 88). Petitioner's wife applied for asylum, and her claim was denied. (JA 88-89, 103). *See Tobon v. Gonzales*, No. 04-5341-ag, 2006 WL 328282 (2d Cir. Feb. 13, 2006) (denying petition for review in wife's case).

Petitioner testified in his wife's removal proceedings, and in the course of those proceedings, on August 13, 2003, was himself served with a Notice to Appear. (JA 89, 424-25). He appeared before an IJ on November 25, 2003 (JA 75-79), and at his second appearance before the IJ, on February 3, 2004, he filed an application for asylum with the Immigration and Naturalization Service ("INS"). (JA 80-82, 399). In his application, he stated that he was seeking asylum to escape from threats posed by a Colombian rebel group. (JA 411).

B. Petitioner's Removal Proceedings

Petitioner was served with a Notice to Appear dated August 1, 2003 which charged that he was subject to removal as a non-immigrant who was admitted into the United States but had remained in the country longer than permitted. (JA 424-25). The INS alleged in this Notice that: (1) petitioner was not a citizen or national of the United States; (2) petitioner was a native and citizen of Colombia; (3) petitioner was admitted into the United States at or near New York, New York on or about June 24, 2000 with authorization to remain until December 23, 2000; and (4) petitioner had remained in the United States beyond December 23, 2000, without authorization from INS. (JA 424).

The initial removal hearing took place on November 25, 2003. (JA 75-79). Petitioner was given until February 3, 2004 to file an application for asylum, and a second hearing took place on that day. (JA 80-82). Removal

proceedings were continued until July 8, 2004, when the asylum hearing was concluded. (JA 83-117).

1. Documentary Submissions

Five numbered exhibits were admitted at the July 8, 2004 hearing. The INS Notice to Appear, as the charging document, was admitted as Exhibit 1. (JA 424-25). Respondent's Pleadings were admitted as Exhibit 2. (JA 413-423) In this pleading, petitioner admitted all the allegations and conceded all the charges contained in the charging document and requested asylum and withholding of removal based on political opinion and membership in a social group. (JA 413-14).

The Notice of Privilege of Counsel and Consequences of Knowingly Filing a Frivolous Application for Asylum was admitted as Exhibit 3 (JA 412), and petitioner's asylum application was identified as Exhibit 4 (JA 399-411).

Exhibit 5 was a package of supplementary documents submitted by petitioner. (JA 118-398). The package contained numerous articles on human rights; photocopies of the 1999, 2002 and 2003 Country Reports for Colombia issued by the United States Department of State; several newspaper articles about violence purportedly committed by Colombian rebels; a copy of petitioner's marriage certificate; copies of the birth certificates of petitioner and his two sons; a letter from petitioner's uncle; letters from municipal officers in Colombia; and a police report and complaint from petitioner's son-in-law.

2. Elkin Montoya-Vallejo's Testimony

Petitioner was the only witness to testify at the July 8, 2004, hearing. He testified that he was born in Medellin, Colombia and left Colombia for the United States with a visa on June 24, 2000. (JA 87). Petitioner testified that he had been an accountant and business administrator in Medellin and had employed five people in his business. (JA 92-93). Petitioner also testified that in addition to his accounting business, he owned a ranch/farm and employed seven people to work there raising cattle and various crops. (JA 92-93). Petitioner described his life in Colombia as "[s]uper comfortable." (JA 93)

According to petitioner, sometime in 1999, a Colombian guerrilla group approached him at his ranch and asked for payment of a "war tax." (JA 91). He paid the tax in July, September, and October 1999 but refused to pay in December 1999. (JA 91, 94-95). Petitioner testified that, at that time, he told the guerrillas that he could no longer afford to pay. (JA 110). The guerrillas indicated to him that they wanted access to his farm. (JA 110-11). Petitioner further testified that the guerrillas sought a war tax from everyone whom they believed could pay it. (JA 107). According to petitioner, his first contact with the guerrillas was in July of 1999. While the guerrilla group had always been in the area, they had never approached him before. (JA 106).

Petitioner testified that he complained about the guerrillas to a sergeant with the Fourth Brigade of the Colombian army in or about late December 1999. He told

the sergeant that the guerrillas were taking possession of his farm. (JA 95-96). Petitioner testified that although the Colombian army drove the guerrillas from his farm, he did not return to his farm thereafter. (JA 96).

Petitioner testified that he received two telephone calls after he refused to pay the guerrillas. In the first call, in January of 2000, someone who identified himself as part of the National Liberation Army told petitioner that he was considered a military target because he had sent the army to them. (JA 97). The second call came twenty to thirty days later. (JA 98). After that call, petitioner testified that he moved from the La Estrella province of Medellin to the Caldas province about an hour away. (JA 98-99). He remained in Caldas for three months and did not hear from the guerrillas again. (JA 99).

Petitioner testified that his son-in-law received a telephone call or calls from someone who claimed that petitioner owed him money. (JA 111). Petitioner's son-in-law filed a complaint with municipal officials. (JA 111-12, 323-27). Petitioner's daughter, who is married to the son-in-law, remains in Caldas. (JA 112). One of petitioner's sons also continues to live in Medellin. (JA 113). The other son is in the United States illegally. (JA 113). There was no evidence that any of petitioner's family who remain in Colombia have been physically or economically harmed since petitioner's departure from Colombia. Nor was there any evidence that petitioner's son-in-law suffered any harm or reprisal due to his filing of the complaint against the person or persons who sought money from petitioner.

Petitioner's wife and son came to the United States in September of 2000, approximately two months after petitioner. (JA 88). Petitioner's wife remained in the country until August of 2002 when she returned to Colombia to be with her son during an operation. (JA 88). When she attempted to return to the United States in September of 2002, she was apprehended at the airport and placed in removal proceedings. (JA 88). She was denied asylum after a hearing. (JA 89, 103). The claims made in her asylum application were the same as those made by petitioner. (JA 114).

Petitioner testified that shortly after coming to the United States, in August or September 2000, he contacted an attorney in New York about filing an asylum application. (JA 90). Petitioner claimed that, when he went to the attorney's office thereafter, the office was closed. (JA 90). He did not know whether the attorney had filed an application for asylum on his behalf (JA 90), and he offered no evidence, whether testimonial or otherwise, that he took any steps to file an asylum application before he was placed in removal proceedings in August of 2003.

C. The Immigration Judge's Decision

At the conclusion of the hearing on July 8, 2004, Immigration Judge Michael W. Straus issued an oral ruling denying petitioner's asylum petition, his application for withholding of removal, and his request for relief under CAT. (JA 67-72).

The IJ began his ruling by noting that petitioner had been charged in the Notice to Appear with being a native and citizen of Colombia who was present in the United States after entering as a B-2 visitor and remaining longer than permitted, and that petitioner "admitted the allegations and conceded the charges." (JA 57). With removability established by clear and convincing evidence, the IJ observed that petitioner had declined to designate a country of removal and therefore the IJ designated Colombia as that country. (JA 58).

After summarizing the evidence of record, which included petitioner's testimony and the various documents submitted as exhibits, the IJ recounted that, to be eligible for asylum, petitioner must establish that he is a refugee under § 101(a)(42)(A) of the Act, that is, that "he suffered either past persecution or has a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." (JA 66). The IJ also noted that "[petitioner] is not eligible for asylum if the asylum application is not filed within a year after his arrival in the United States unless the respondent can establish change[d] or extraordinary circumstances." (JA 67).

The IJ found that petitioner had failed to file a timely asylum application. The IJ noted that petitioner claimed to have hired an attorney to file an asylum application in September of 2000 but also noted that when petitioner could not locate the attorney, he took no steps to file an asylum application. Moreover, petitioner did not even file a complaint against the attorney he claimed to have

retained. Finally, the IJ noted that petitioner took no steps to file an asylum application until after he was placed in removal proceedings in 2003. (JA 67-68). Thus, according to the IJ, petitioner's "application for asylum under Section 208 must be barred." (JA 68).

As an alternative ground for decision, the IJ addressed the merits of petitioner's asylum application. The IJ found first that the two telephonic threats to petitioner failed to establish past persecution. (JA 68). In addition, the IJ concluded that petitioner failed to show that he had a well-founded fear of future persecution on account of his social group or political opinion. (JA 69-71). Citing BIA precedent, the IJ concluded that "criminal extortion attempts do not constitute persecution based on political opinion." (JA 71). The IJ found that the guerrillas targeted petitioner because of his perceived ability to pay and not because of his political opinions or membership in a social group. (JA 71).

The IJ further found that petitioner failed to establish that his fear of persecution was reasonable. (JA 72). In this regard, the IJ noted that petitioner moved to a different part of Colombia and did not have any problems with the guerrilla group thereafter, and that his daughter and son have continued to live in Colombia without any problems from the guerrillas. (JA 72). Moreover, the IJ found that according to a State Department Report, the guerrilla group petitioner identified as having threatened him does not have sufficient numbers to follow petitioner throughout Colombia. (JA 72). Thus, the IJ concluded

that petitioner's fear of persecution by the guerrillas was not reasonable. (JA 72).

In sum, the IJ found that petitioner had failed to establish his eligibility for asylum, and accordingly had also failed to meet the higher standard of eligibility for withholding of removal. (JA 72). The IJ thus denied both applications for relief.

In addition, the IJ found no evidence in the record to suggest that if petitioner returned to Colombia he would be tortured by anyone acting on behalf of the Colombian government. Moreover, the IJ relied on BIA precedent to hold that "[a]ny harm by guerrilla organizations cannot be covered by the Torture Convention" (JA 72), and also found that any likelihood of torture was not "more likely than not." (JA 72). Thus, the IJ denied petitioner's request for relief under CAT.

After denying the petitions for asylum, withholding of removal, and relief under CAT, and in light of petitioner's waiver of voluntary departure, the IJ ordered petitioner removed to Colombia. (JA 72).

D. The BIA's Decision

On September 19, 2005, the BIA dismissed petitioner's appeal from the IJ's decision. (JA 2). In a one-paragraph order, the BIA summarized the IJ's decision and held that "[w]e find no basis for disturbing the decision below." According to the BIA, petitioner's application was untimely because it was not filed within a

reasonable time after his visa expired, and it was without merit in any event because petitioner had not established "the required nexus between a statutorily protected ground and the guerrillas' extortionate acts and threats." (JA 2). Furthermore, petitioner "did not show it was more likely than not that he would be persecuted on account of a statutorily protected ground as required for withholding of removal, or that he would be tortured within the meaning of the CAT." (JA 2).

SUMMARY OF ARGUMENT

1. This Court lacks jurisdiction to review the IJ's and BIA's conclusion that petitioner's asylum application was time-barred. 8 U.S.C. § 1158(a)(3). Although this Court may review "constitutional claims or questions of law" related to that conclusion, petitioner raises no such claims or questions to this Court. Accordingly, the IJ's and BIA's decision is not reviewable by this Court.

In any event, the IJ and BIA were undoubtedly correct to hold that petitioner's asylum application was untimely. Petitioner arrived in the United States in June 2000, but did not file an asylum application until February 2004, long past the one-year statutory deadline. 8 U.S.C. § 1158(a)(2)(B). Petitioner did not demonstrate changed or extraordinary circumstances relating to his delay in filing an asylum application that would justify his failure to meet the deadline. *See* 8 U.S.C. § 1158(a)(2)(D).

2. Substantial evidence supports the IJ's determination that petitioner failed meet the burden of

proof for his asylum and withholding claims, that is, that the guerrillas who approached him had threatened him on account of political opinion or membership in any social group, or that he had a well-founded fear of persecution on that basis should he be returned to Colombia. The record showed that petitioner was not himself political, that the demands for money made by the guerrillas were directed towards him and other persons because he and they were perceived to have money, and that petitioner's family had remained in Colombia and had suffered no harm from Colombian guerrillas after the alleged threats to petitioner.

3. Substantial evidence also supports the IJ's determination that petitioner failed to establish a basis for withholding of removal under the CAT. Petitioner failed to adduce sufficient proof to establish that it is more likely than not that he would be tortured by, or with the acquiescence of, government officials if removed to Colombia.

ARGUMENT

I. TO THE EXTENT THAT THE IMMIGRATION JUDGE AND BIA DENIED PETITIONER'S APPLICATION FOR ASYLUM FOR UNTIMELINESS, THIS COURT LACKS JURISDICTION TO REVIEW THAT DECISION

A. Relevant Facts

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

B. Governing Law and Standard of Review

8 U.S.C. § 1158(a)(1) provides in pertinent part that "[a]ny alien who is physically present in the United States or who arrives in the United States . . . may apply for asylum in accordance with this section . . . ." This relief is not available, however, "unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States." 8 U.S.C. § 1158(a)(2)(B). "Any application for asylum of an alien may be considered, notwithstanding [the time limitation], if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified . . . ." 8 U.S.C. § 1158(a)(2)(D).

By regulation, "extraordinary circumstances" that may excuse an applicant's failure to meet the one-year deadline include events or factors that relate directly to the failure to file an application. 8 C.F.R. § 208.4(a)(5). Ineffective assistance of counsel may qualify as an "extraordinary circumstance" that would allow consideration of an untimely application. *Id.* To show ineffective assistance of counsel, an applicant must file an affidavit setting forth the agreement he had with counsel with respect to the actions to be taken, the attorney must be given notice of the claim of ineffective assistance and provided an opportunity to respond, and the applicant must indicate that a complaint has been filed against the attorney with the appropriate disciplinary authorities. *Id.* If an extraordinary circumstance is shown, the alien must file an asylum application within a "reasonable period" given the circumstances justifying the delay. *Id.*

Significantly, however, in the absence of a constitutional claim or question of statutory interpretation, the INA, as amended by the REAL ID Act of 2005, precludes judicial review of the Attorney General's determination on the timeliness of an asylum application. Specifically, 8 U.S.C. § 1158(a)(3) provides that "[n]o court shall have jurisdiction to review any determination of the Attorney General [on the timeliness of the application]." Although this language precludes most forms of judicial review, the REAL ID Act provides that this Court may review "constitutional claims or questions of law" raised in a petition for review. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Title I, § 106(a)(1)(A)(iii), 119 Stat. 231, 310 (codified at 8

U.S.C. § 1252(a)(2)(D)). *See also Joaquin-Porras v. Gonzales*, 435 F.3d 172, 177-78 (2d Cir. 2006) (court may review Attorney General's decision on timeliness of asylum application for constitutional claim or question of law).

C. Discussion

Here, it is undisputed that petitioner arrived in the United States on June 24, 2000 (JA 424) and that he did not file an asylum application until after he was placed in removal proceedings in October 2003. The IJ concluded that there were no changed circumstances to justify the late-filed application, and that petitioner had not met the regulatory criteria for establishing extraordinary circumstances for his late filing and thus found the application time-barred. (JA 67-68). However, the IJ also considered the application on the merits and denied it on the grounds that petitioner had failed to establish any connection between his fear of future persecution and any statutorily protected factor. Nevertheless, to the extent that the IJ denied the asylum application on the ground that it was untimely and there were no circumstances excusing that untimeliness, this Court has no jurisdiction to review that determination, despite the IJ's subsequent consideration and rejection of the merits of the claim. *See Ngure v. Ashcroft*, 367 F.3d 975, 988-89 (8th Cir. 2004) (where IJ rejected asylum application on both limitations grounds and on the merits, Court of Appeals was divested of jurisdiction under 8 U.S.C. § 1158(a)(3)). Although the REAL ID Act allows this Court to review constitutional and legal questions, petitioner raises no such questions in

this Court and thus has waived any judicial review of such claims.

In any event, the IJ and BIA properly concluded that petitioner's asylum application was untimely. Petitioner arrived in the United States in June 2000 and testified that he hired an attorney to file an asylum application for him in August or September 2000. He claimed he paid the attorney some money for the application (JA 90), but upon discovering that the attorney had closed his office and disappeared, he made no attempt to learn whether an application had been filed on his behalf. Furthermore, he took no other steps to obtain asylum until after he was placed in removal proceedings in 2003. These facts fully justify the IJ's and BIA's determination that petitioner's application for asylum was untimely.[2]

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[2] The one-year filing deadline is not applicable to claims for withholding of removal and for relief under CAT. *See Joaquin-Porras*, 435 F.3d at 180. Accordingly, as the standards for asylum and withholding of removal overlap to some degree and in the event this Court is inclined to review the asylum claim on its merits, the Government has nonetheless addressed below the merits of both claims.

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

A. Relevant Facts

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

B. Governing Law and Standard of Review

Two forms of relief are potentially available to aliens claiming that they will be persecuted if removed from this country: asylum and withholding of removal.[3] *See* 8 U.S.C. §§ 1158(a), 1231(b)(3) (2004); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995). Although these types of relief are "closely related and appear to overlap,"

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[3] "Removal" is the collective term for proceedings that previously were referred to, depending on whether the alien had effected an "entry" into the United States, as "deportation" or "exclusion" proceedings. Because withholding of removal is relief that is identical to the former relief known as withholding of deportation or return, *compare* 8 U.S.C. §1253(h)(1) (1994) *with id.* § 1231(b)(3)(A) (2004), cases relating to the former relief remain applicable precedent.

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

1. Asylum

An asylum applicant must, as a threshold matter, establish that he is a "refugee" within the meaning of 8 U.S.C. § 1101(a)(42) (2004). *See* 8 U.S.C. § 1158(a) (2004); *Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 66 (2d Cir. 2002). A refugee is a person who is unable or unwilling to return to his native country because of past "persecution or a well-founded fear of persecution on account of" one of five enumerated grounds: "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (2004); *Liao*, 293 F.3d at 66.

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

Nelson v. INS, 232 F.3d 258, 263 (1st Cir. 2000). Upon a demonstration of past persecution, a rebuttable presumption arises that the alien has a well-founded fear of future persecution. *See Melgar de Torres v. Reno*, 191 F.3d 307, 315 (2d Cir. 1999); 8 C.F.R. § 208.13(b)(1) (2004).

"[E]stablishing past persecution is a daunting task." *Guzman v. INS*, 327 F.3d 11, 15 (1st Cir. 2003). Establishing persecution for purposes of an asylum claim is especially difficult where the alleged mistreatment involves one or very few incidents, and the circumstances fall short of extreme hardship or suffering. *See Tawm v. Ashcroft*, 363 F.3d 740, 743-44 (8th Cir. 2004) (persecution not shown by member of the "Lebanese Forces" who "was detained twice, th[e] incidents were four years apart, lasted only a few hours each, and did not result in serious injury"); *Eusebio v. Ashcroft*, 361 F.3d 1088, 1090-91 (8th Cir. 2004) (persecution for political beliefs not shown by asylum-seeker who was briefly beaten and detained in connection with political rallies, was arrested for anti-government statements made as schoolteacher, and whose home was damaged and looted by the military; court reasoned, "minor beatings and brief detentions, even detentions lasting two or three days, do not amount to political persecution, even if government officials are motivated by political animus"); *Dandan v. Ashcroft*, 339 F.3d 567, 573-74 (7th Cir. 2003) (persecution not shown where asylum-seeker was "detained, beaten and deprived of food for three days"); *Guzman*, 327 F.3d at 15-16 (asylum-seeker's one-time kidnapping and beating during civil war fell well short of

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

Proving persecution is also difficult where the account of the alleged mistreatment lacks detail or corroboration. *See*, *e.g.*, *Dandan*, 339 F.3d at 574 (asylum-seeker alleging "three-day interrogation resulting in a "swollen face," without furnishing more detail, "fail[ed] to provide sufficient specifics" to establish persecution); *Bhatt v. Reno*, 172 F.3d 978, 982 (7th Cir. 1999) ("[Petitioner's] testimony of the threats and harm he says he received from

radical Hindus is too vague, speculative, and insubstantial to establish either past or future persecution . . . . Beyond his own allegations and testimony that he was beaten on several occasions by Hindus, the record contains no evidence corroborating the beatings or describing the severity of his injuries.").

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

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

Where an applicant is unable to prove past persecution, the applicant nonetheless becomes eligible for asylum upon demonstrating a well-founded fear of future persecution. *See Zhang*, 55 F.3d at 737-38; 8 C.F.R. §208.13(b)(2) (2004). A well-founded fear of persecution "consists of both a subjective and objective component." *Gomez v. INS*, 947 F.2d 660, 663 (2d Cir. 1991). Accordingly, the alien must actually fear persecution, and this fear must be reasonable. *See id*. at 663-64.

"An alien may satisfy the subjective prong by showing that events in the country to which he . . . will be deported have personally or directly affected him." *Id*. at 663. With respect to the objective component, the applicant must prove that a reasonable person in his circumstances would fear persecution if returned to his native country. *See* 8 C.F.R. § 208.13(b)(2) (2004); *see also Zhang*, 55 F.3d at 752 (noting that when seeking reversal of a BIA factual determination, the petitioner must show "that the evidence he presented was so compelling that no reasonable factfinder could fail" to agree with the findings (quoting *INS v. Elias-Zacarias*, 502 U.S at 483-84); *Melgar de Torres*, 191 F.3d at 311.

The asylum applicant bears the burden of demonstrating eligibility for asylum by establishing either

that he was persecuted or that he "has a well-founded fear future persecution on account of, inter alia, his political opinion." *Wu Biao Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003); *Osorio*, 18 F.3d at 1027. *See* 8 C.F.R. § 208.13(a)-(b) (2004). The applicant's testimony and evidence must be credible, specific, and detailed in order to establish eligibility for asylum. *See* 8 C.F.R. § 208.13(a) (2004); *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999); *Melendez v. U.S. Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991) (stating that applicant must provide "credible, persuasive and . . . specific facts" (internal quotation marks omitted)); *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987) (applicant must provide testimony that is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account"), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647-48 (9th Cir. 1997).

Because the applicant bears the burden of proof, he should provide supporting evidence when available, or explain its unavailability. *See Zhang v. INS*, 386 F.3d 66, 71 (2d Cir. 2004) ("[W]here the circumstances indicate that an applicant has, or with reasonable effort could gain, access to relevant corroborating evidence, his failure to produce such evidence in support of his claim is a factor that may be weighed in considering whether he has satisfied the burden of proof."); *see also Diallo v. INS*, 232 F.3d 279, 285-86 (2d Cir. 2000); *In re S-M-J-*, 21 I. & N. Dec. 722, 723-26 (BIA 1997).

Finally, even if the alien establishes that he is a "refugee" within the meaning of the INA, the decision

whether ultimately to grant asylum rests in the Attorney General's discretion. *See* 8 U.S.C. § 1158(b)(1) (2004); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004); *Zhang*, 55 F.3d at 738.

2. Withholding of Removal

Unlike the discretionary grant of asylum, withholding of removal is mandatory if the alien proves that his "life or freedom would be threatened in [his native] country because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (2000); *Zhang*, 55 F.3d at 738. To obtain such relief, the alien bears the burden of proving by a "clear probability," *i.e.*, that it is "more likely than not," that he would suffer persecution on return. *See* 8 C.F.R. § 208.16(b)(2)(ii) (2004); *INS v. Stevic*, 467 U.S. 407, 429-30 (1984); *Melgar de Torres*, 191 F.3d at 311. Because this standard is higher than that governing eligibility for asylum, an alien who has failed to establish a well-founded fear of persecution for asylum purposes is necessarily ineligible for withholding of removal. *See Zhang v. INS*, 386 F.3d at 71; *Wu Biao Chen*, 344 F.3d at 275; *Zhang*, 55 F.3d at 738.

3. Standard of Review

This Court reviews the determination of whether an applicant for asylum or withholding of removal has established past persecution or a well-founded fear of persecution under the substantial evidence test. *Zhang v. INS*, 386 F.3d at 73; *Wu Biao Chen*, 344 F.3d at 275

(factual findings regarding asylum eligibility must be upheld if supported by "reasonable, substantive and probative evidence in the record when considered as a whole") (internal quotation marks omitted); *see Secaida-Rosales v. INS*, 331 F.3d 297, 306-07 (2d Cir. 2003); *Melgar de Torres*, 191 F.3d at 312-13 (factual findings regarding both asylum eligibility and withholding of removal must be upheld if supported by substantial evidence). "Under this standard, a finding will stand if it is supported by 'reasonable, substantial, and probative' evidence in the record when considered as a whole." *Secaida-Rosales*, 331 F.3d at 307 (quoting *Diallo*, 232 F.3d at 287).

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

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[6] Although judicial review ordinarily is confined to the BIA's order, *see, e.g.*, *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001), courts properly review an IJ's decision where, as here, the BIA adopts that decision. *See Secaida-Rosales*, 331 F.3d at 305; *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994). Accordingly, this brief treats the IJ's decision as the relevant administrative decision.

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

Indeed, the IJ's and BIA's eligibility determination "can be reversed only if the evidence presented by [the asylum applicant] was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." *INS v. Elias-Zacarias*, 502 U.S. at 481. In other words, to reverse the BIA's decision, the Court "must find that the evidence not only *supports* th[e]

conclusion [that the applicant is eligible for asylum], but *compels* it." *Id.* at 481 n.1.

C. Discussion

Substantial evidence supports the IJ's determination that petitioner failed to carry his burden of establishing his eligibility for asylum and withholding of removal. Petitioner, who was the sole witness in his case, testified that he received two threatening telephone calls. He suffered no physical harm, however, and the IJ thus concluded that these two isolated phone calls did not establish past persecution. Although petitioner disagrees with this conclusion, the IJ's finding that two isolated phone calls do not amount to persecution is supported by substantial evidence. *See, e.g.*, *Tawm*, 363 F.3d at 743-44 (detention on two occasions, lasting a few hours each, and with no serious injury, did not constitute persecution); *Eusebio*, 361 F.3d at 1090-91 (minor beatings and detentions do not amount to persecution). In any event, petitioner identifies no evidence that would warrant reversal of the IJ's finding by this Court. *See INS v. Elias-Zacarias*, 502 U.S. at 481 n.1 (to reverse BIA's decision, Court "must find that the evidence not only *supports* th[e] conclusion [that the applicant is eligible for asylum], but *compels* it").

Furthermore, substantial evidence supports the IJ's and BIA's finding that petitioner had not established a connection between any feared future persecution and a statutorily protected ground. Petitioner presented no evidence that the threats by the guerrillas were based on

any political opinion held by petitioner or by his membership in a cognizable social group. Petitioner presented no evidence that he himself was political or that the guerrillas had expressed any political opinion towards him. As the IJ found, the background materials presented by petitioner, and petitioner's own testimony, established that guerrilla groups, like the one that approached petitioner, use extortion to raise money from those perceived to have money, like petitioner. (JA 65-66, 358). The evidence indicates that petitioner was extorted because of his wealth and not because of any basis recognized by statute as a ground for political asylum. (JA 69-70). The IJ correctly found on the evidence presented by petitioner that, while he may have been the victim of a crime, petitioner was not a victim of past persecution on any of the five grounds enumerated in the INA.

Finally, the IJ properly concluded that petitioner did not sustain his burden of proof that he had a *reasonable* fear of future persecution. As the IJ explained, the most recent State Department report indicates that the guerrilla group that threatened petitioner was relatively small and thus there was insufficient evidence that it would be able to follow petitioner throughout all of Colombia to harm him. (JA 71-72). Petitioner's own testimony supports this conclusion. According to his testimony, he received two telephonic threats. After these threats, he relocated to a different province in Medellin, less than an hour away from his original home, and lived there for a number of months without receiving any additional threats from the guerrillas. In fact, according to his testimony, he left for

the United States without hearing again from the guerrillas.

Furthermore, petitioner's daughter and son have continued to reside in Colombia, without retribution from guerrilla groups. (JA 102-103). Petitioner's son-in-law received phone calls about petitioner's alleged "debts" to the guerrilla groups, but aside from these two isolated phone calls, his daughter and son-in-law (as well as another son) continue to live in Colombia with no problem. (JA 63, 71). Thus, the record supports the IJ's conclusion that any threat to petitioner does not exist countrywide throughout all of Colombia. In other words, the evidence indicates that there is a place within Colombia to which the petitioner could return without fear of persecution. *See Mazariegos v. Office of U.S. Attorney General,* 241 F.3d 1320, 1325-26 (11th Cir. 2001); *see also* 8 C.F.R. §§ 1208.13(b)(1)(i)(B) and (b)(2)(ii) (providing for denial of asylum application where it would be reasonable for applicant to relocate to another part of the country).

In *Mazariegos,* 241 F.3d at 1325, the court relied on a number of BIA administrative decisions which construed the statute and regulations to require that an asylum applicant face a threat of persecution country-wide, citing *Matter of Acosta*, 19 I. & N. Dec. 211, 235 (BIA 1985); *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987); *Matter of R-,* 20 I. & N. Dec. 621 (BIA 1992) (An alien seeking to meet the definition of a refugee must do more than show a well-founded fear of persecution in a particular place or abode within a country -- he must show

that the threat of persecution exists for him country-wide). Moreover, in a recent and similar case, the First Circuit held that where the petitioner testified that his parents still lived in Haiti and they suffered no harm since he left the country, the BIA reasonably concluded that the petitioner could return to Haiti without facing future persecution. *Romilus v. Ashcroft*, 385 F.3d 1, 8 (1st Cir. 2004) (citing *Aguilar-Solis v. INS*, 168 F.3d 565, 573 (1st Cir. 1999) ("[T]he fact that close relatives continue to live peacefully in the alien's homeland undercuts the alien's claim that persecution awaits his return") (alteration in original)). *See also Melgar de Torres,* 191 F.3d at 313 (finding that the evidence that applicant's own mother and daughters continued to live in El Salvador after the applicant emigrated without harm cut against the argument that applicant had a well-founded fear of persecution).

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

III. THE IMMIGRATION JUDGE PROPERLY REJECTED PETITIONER'S CLAIM FOR RELIEF UNDER THE CONVENTION AGAINST TORTURE BECAUSE PETITIONER FAILED TO SHOW A LIKELIHOOD THAT HE WOULD BE TORTURED UPON RETURNING TO COLOMBIA

A. Relevant Facts

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

B. Governing Law and Standard of Review

1. Withholding of Removal Under the Convention Against Torture

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

To establish eligibility for relief under the Convention Against Torture, an applicant bears the burden of proof to "establish that it is more likely than not that he or she

would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2) (2004); *see also Najjar v. Ashcroft*, 257 F.3d 1262, 1304 (11th Cir. 2001); *Wang*, 320 F.3d at 133-34, 144 & n.20.

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

Because "[t]orture is an extreme form of cruel and inhuman treatment," even cruel and inhuman behavior by officials may not warrant Convention Against Torture protection. *Sevoian v. Ashcroft*, 290 F.3d 166, 175 (3d Cir. 2002) (citing 8 C.F.R. § 208.18(a)(2)). The term "acquiescence" requires that "the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 208.18(a)(7) (2004). Under CAT, an alien's removal may be either permanently withheld or temporarily deferred. *See* 8 C.F.R. §§ 208.16-17 (2004).

2. Standard of Review

This Court reviews the determination of whether an alien is eligible for protection under CAT under the "substantial evidence" standard. *See Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 353-54 (5th Cir. 2002)*; Ali*, 237 F.3d at 596; *Saleh v. U.S. Dep't of Justice*, 962 F.2d 234, 238 (2d Cir. 1992).

C. Discussion

Substantial evidence supports the IJ's determination that petitioner failed to establish a basis for withholding of removal under CAT. Petitioner presented no evidence that any torture that might hypothetically be inflicted would be "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 208.18(a)(1) (2004). Petitioner's claims turned entirely on allegations regarding a guerrilla group, and he offered no evidence that the groups' activities were pursued with the consent or acquiescence of any public official. Indeed, petitioner's own testimony suggests the contrary. According to petitioner, when he complained to the army about the guerrillas' actions in taking over his farm, the army responded promptly and removed the guerrillas from his farm. (JA 95-96). And while he claimed that the mayor took no action in response to his reports about the threatening phone calls, this alleged inaction could reflect -- as the mayor suggested -- the need for more information about the threats and not government acquiescence in the guerrilla group's activities.

CONCLUSION

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

Dated: April 21, 2006

Respectfully submitted,

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,463 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

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Addendum

8 U.S.C. § 1101(a)(42) (2004). Definitions.

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .

8 U.S.C. § 1158(a)(1), (a)(2), (b)(1) (2004). Asylum.

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

. . . .

(2) Exceptions

(B) Time limit

Subject to subparagraph (D), paragraph 1 shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

. . . .

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

(b) Conditions for granting asylum

(1) In general

The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

8 U.S.C. § 1231(b)(3)(A) (2004). Detention and removal of aliens ordered removed.

(A) In general

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

8 U.S.C. § 1252(a)(2)(D) and (b)(4) (2004). Judicial review of orders of removal.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (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.

. . .

(4) Scope and standard for review

Except as provided in paragraph (5)(B)--

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

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

8 C.F.R. § 208.13 (2004). Establishing asylum eligibility.

(a) Burden of proof. The burden of proof is on the applicant for asylum to establish that he or she is a refugee

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

(b) Eligibility. The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

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

persecution, the applicant bears the burden of establishing that the fear is well-founded.

(I) Discretionary referral or denial. Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

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

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

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

(iii) Grant in the absence of well-founded fear of persecution. An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

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

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

(2) Well-founded fear of persecution.

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

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

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

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

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

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

would be singled out individually for persecution if:

> (A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and
>
> (B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

. . . .

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

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

Act. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.

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

(1) Past threat to life or freedom.

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

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

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

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

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

(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than

not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

> (i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and
>
> (ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not

that his or her life or freedom would be threatened upon return to that country.

. . . .

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

(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub.L. 105-277, 112 Stat. 2681, 2681-821). The definition of torture contained in § 208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

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

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

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

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

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

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

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An

alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under § 208.17(a).

(d) Approval or denial of application--

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

. . . .

8 C.F.R. § 208.17 (2004). 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 § 208.16(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 § 208.16(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. § 208.18 (2004). 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.

(b) Applicability of §§ 208.16(c) and 208.17(a)--

(1) Aliens in proceedings on or after March 22, 1999. An alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999 may apply for withholding of removal under § 208.16(c), and, if applicable, may be considered for deferral of removal under § 208.17(a).

ANTI-VIRUS CERTIFICATION

Case Name: Montoya-Vallejo v. Gonzales

Docket Number: 05-5511-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 4/21/2006) and found to be VIRUS FREE.

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Dated: April 21, 2006