05-6756-ag

To Be Argued By:
CAROLYN A. IKARI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-6756-ag

MARSENO AUGUSTO MARTINS,
Petitioner,

-vs-

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

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to § 242(b) of the Immigration and Naturalization Act ("INA"), as amended, 8 U.S.C. § 1252(b) (2006), to review Petitioner's challenge to the November 15, 2005 order of the Board of Immigration Appeals affirming the Immigration Judge's denial of his motion to reopen. The petition was filed on December 14, 2005, and is therefore timely. *See* 8 U.S.C. § 1252(b)(1) (requiring petition to be filed within 30 days of date of final order of removal).

ISSUES PRESENTED FOR REVIEW

1. Did the Immigration Judge abuse his discretion in denying Petitioner's motion to reopen as improperly successive and untimely, when Petitioner failed to proffer evidence that was previously unavailable to show changed country conditions?

2. Does this Court have jurisdiction to review the Immigration Judge's conclusion that Petitioner's motion to reopen should be denied to the extent that decision was based on the Immigration Judge's finding that Petitioner's asylum application was untimely?

3. Should this Court reject Petitioner's international law, ineffective assistance of counsel, and due process arguments challenging the denial of his motion to reopen when Petitioner failed to exhaust these arguments before the Immigration Judge or the Board of Immigration Appeals and when they are meritless in any event?

4. Did the Immigration Judge abuse his discretion in denying Petitioner's motion to reopen when Petitioner did not meet his burden of showing that he was eligible for withholding of removal and relief under the Convention Against Torture?

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Attorney General of the United States

Preliminary Statement

Marseno A. Martins ("Martins"), a citizen of Brazil, petitions this Court to review a November 15, 2005, decision of the Board of Immigration Appeals ("BIA"). The BIA summarily affirmed the Immigration Judge's ("IJ") denial of Martins's motion to reopen his removal proceedings. Martins had argued that his proceedings should be reopened to allow him to apply for asylum,

withholding of removal, and relief under the United Nations Convention Against Torture ("CAT").[1] In support of this motion, Martins claimed – for the first time in his immigration proceedings – that he would be subject to persecution in Brazil because of his homosexuality.

The IJ acted well within his considerable discretion in denying the motion to reopen. The motion was procedurally improper because it was untimely and an unauthorized second motion to reopen. Although Martins argued that changed circumstances – namely, his recent willingness to reveal his homosexuality and his discovery that he could apply for asylum – excused his procedural deficiencies, the IJ properly rejected this argument. Furthermore, the IJ properly found that Martins could not establish a *prima facie* case of eligibility for any form of relief, and thus he properly exercised his discretion to deny Martins's motion to reopen on that basis.

In this Court, Petitioner presents a raft of new arguments to challenge the denial of his motion to reopen, based primarily on his understanding of international law. These novel arguments were never presented to the IJ or the BIA and thus should be rejected for failure to exhaust.

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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).

Even if this Court were to consider his arguments, however, they should be rejected because they are meritless.

Statement of the Case

Martins entered the United States in 1999 on a B-1 visa and overstayed his visa. (Certified Administrative Record ("CAR") 78). He was placed into removal proceedings with the issuance of a Notice to Appear that was filed with the Immigration Court on November 22, 2004. (CAR 188-89). On November 24, 2004, Martins conceded removability and was granted voluntary departure with an alternative order of removal to Brazil. (CAR 140-42). Martins moved to reopen the proceedings (CAR 174), and on December 17, 2004, the IJ denied that motion (CAR 135). Martins appealed the IJ's removal order to the BIA on December 27, 2004 (CAR 126-29), and later withdrew the appeal pursuant to an agreement on March 12, 2005 (CAR 114).

Martins filed a second motion to reopen on April 12, 2005. (CAR 47-57). His motion was denied on May 3, 2005. (CAR 40-41). Martins appealed to the BIA, and on November 15, 2005, the BIA summarily affirmed. (CAR 2). This petition for review followed.

Statement of Facts

A. Petitioner's Immigration History

Martins, a native and citizen of Brazil, entered the United States on or about June 2, 1999 at Los Angeles, California as a nonimmigrant B-1 visitor with authorization to remain in the United States for a temporary period until July 30, 1999. (CAR 188). Martins did not leave the United States as required by the terms of his visa.

At some point soon after his arrival, Martins applied for an H-1 visa, with the help of an attorney. (CAR 78). According to Martins, this application was pending for approximately three or four years, during which time he was in regular contact with his attorney. (CAR 78).

In November 2004, Martins was stopped at a checkpoint in Vermont and detained by the Department of Homeland Security ("DHS") once they determined that his application for a temporary worker visa had been denied earlier that year. DHS initiated removal proceedings against Martins by issuing a Notice to Appear, charging that he was removable from the United States as an alien who has remained in the United States longer than permitted pursuant to the Immigration and Nationality Act ("INA") § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B). (CAR 188).

B. Proceedings Before the Immigration Judge

On November 24, 2004, IJ Michael W. Straus presided over a removal hearing for Martins. (CAR 143-52). Through counsel, Martins admitted the factual allegations and conceded the charges of removability. (CAR 145). His attorney indicated that Martins intended to apply for adjustment of status, and focused her efforts on securing Martins's release from custody on bond. (CAR 146-52). At no point during Martins's removal proceedings did he make applications for asylum, withholding of removal, and/or Convention Against Torture ("CAT") relief. (CAR 140-52). On this record, the IJ found Martins removable by clear and convincing evidence. In addition, the IJ granted Martins the privilege of voluntary departure until December 27, 2004, but ordered that he be held in DHS custody pending his voluntary departure. (CAR 140-41).

C. The First Motion To Reopen and Appeal

On December 17, 2004, now represented by new counsel, Martins filed a motion to reopen with the immigration court. Martins sought to reopen the proceedings to present evidence in support of a longer period of voluntary departure and in support of a voluntary departure bond. (CAR 173-77). On that same day, the IJ denied his motion to reopen, noting that he had no jurisdiction over a request for extension of the voluntary departure period. (CAR 135).

Martins appealed the IJ's decision to the BIA. (CAR 126-29). He challenged only the IJ's decision to not release him on a voluntary departure bond. (CAR 126-29). Thereafter, on March 12, 2005, Martins withdrew his appeal to the BIA because the parties reached an agreement to settle the case. (CAR 112, 114-15).

D. The Second Motion To Reopen

On April 11, 2005, Martins, represented by yet another new lawyer, filed a second motion to reopen, seeking the opportunity to apply for asylum, withholding of removal, and CAT relief. (See CAR 47-110). In that motion, Martins claimed that his sexual orientation would subject him to persecution and torture if he were to return to Brazil. (CAR 47-110).

The IJ denied Martins's second motion to reopen in an order dated May 3, 2005. (CAR 40-41). The IJ first held that the motion was untimely because it was not filed within 90 days of the voluntary departure order, and there was no evidence of material changed country conditions that was not previously available at Martins's removal hearing. (CAR 41). In addition, the IJ found that the motion was Martins's second motion to reopen, and as such was barred by the INA's rule limiting him to one motion to reopen. (*Id.*).

As additional grounds for denying the motion, the IJ noted that Martins had not established a *prima facie* case that he was eligible for the relief he was seeking. Martins's claim for asylum was untimely because it had

not been filed within one year of his entry into the United States, and there was no evidence of changed circumstances in Brazil that would authorize an exception to the one-year bar. Furthermore, the IJ found that there were no exceptional or extraordinary circumstances to justify Martins's failure to apply for asylum within the time limit. (*Id.*). Finally, the IJ concluded that Martins had not provided sufficient evidence that he would be persecuted or tortured based on his sexual orientation if he were to return to Brazil, and as a consequence, he had failed to show he was *prima facie* eligible for withholding or removal or relief under CAT. (*Id.*).

E. The Appeal to the BIA

Martins appealed the IJ's decision to the BIA. (CAR 28-33). In his brief to the BIA, Martins challenged the IJ's denial of his motion to reopen on three grounds. *First*, he argued that a motion to reopen is not barred by the time and numerical limitations when an alien seeks asylum and that he met the "changed circumstances" standard for bypassing these procedural limitations because (1) he was not previously aware that he could seek asylum, (2) he was not previously willing to disclose his homosexuality, and (3) there had been an increase in violence and intolerance towards gays in Brazil. *Second*, Martins argued that the IJ erred in concluding that he would not be tortured if he were to return to Brazil. *Third*, Martins argued that the IJ had failed to inform him that he was entitled to apply to for asylum, withholding of removal, and relief under CAT. (CAR 10-19). By decision dated November 15, 2005, the BIA summarily affirmed, without opinion, the IJ's denial

of the motion to reopen. (CAR 2). This petition for review followed.

SUMMARY OF ARGUMENT

1. The IJ did not abuse his discretion in denying Martins's motion to reopen. The IJ properly concluded that Martins's motion to reopen was barred because it was his second such motion, and it was filed more than 90 days after the entry of the final administrative order of removal. *See* 8 U.S.C. §§ 1229a(c)(6)(A) (2004) (alien may file only one motion to reopen); (c)(6)(C)(i) (motion to reopen must be filed within 90 days of entry of final administrative order of removal); 8 C.F.R. § 1003.23(b)(1). Moreover, the IJ properly found that Martins was not eligible for the exception to these rules because he had not presented any evidence of changed country conditions that was unavailable at the time of his removal hearing. The evidence he presented was all available before his removal hearing, and the only "changed conditions" he relied upon were changes in his own life, not changes in country conditions. *See* Point I, *infra*.

2. This Court lacks jurisdiction to review the IJ's determination that Martins's asylum application was untimely. While the REAL ID Act authorizes this Court to review constitutional claims or questions of law related to the IJ's conclusion on timeliness, Martins does not raise any such questions before this Court. Thus, this Court lacks jurisdiction to review the IJ's decision. *See* 8 U.S.C. § 1158(a)(3) ("No court shall have jurisdiction to review

any determination of the Attorney General under paragraph (2).”). *See* Point II, *infra*.

3. This Court should decline to consider Martins’s international law, ineffective assistance of counsel, and due process arguments for failure to exhaust because *none* of these issues – in any form – were presented to the IJ or the BIA. The claims are meritless in any event. Martins identifies two international treaties and a United Nations Handbook to support his arguments for “relaxation” of the procedural rules that barred his motion to reopen. None of these sources provide any guidance on how to interpret the procedural rules at issue in this case, much less conflict with those rules. Moreover, because the procedural rules are clear and unambiguous, there is no basis for invoking the “*Charming Betsy*” principle to interpret those rules in conformity with international law.

Martins’s ineffective assistance of counsel arguments are similarly meritless. He cannot maintain ineffective assistance of counsel claims because he has not complied with the *Lozada* requirements, *see Matter of Lozada*, 19 I.&N. Dec. 637 (BIA 1988), and he cannot show prejudice from his various lawyers’ alleged incompetence in any event.

Finally, Martins’s due process claims fail because the proceedings below were fundamentally fair. Although he claims that he was unaware of what was happening at his removal hearing, that claim is belied by his own declaration to the contrary. Martins next argues that the IJ should have held a hearing on the timeliness of his asylum

application, but he identifies no factual disputes in need of resolution. And Martins's "due process" argument about the IJ's failure to hold a hearing on the merits of his CAT and withholding of removal claims is nothing more than his disagreement with the IJ's resolution of his claims; it does not present any reason to question the fundamental fairness of the removal proceedings. *See* Point III, *infra*.

4. The IJ did not abuse his discretion in denying Martins's motion to reopen for failing to establish a prima facie case for withholding of removal and CAT relief. Substantial evidence supports the IJ's conclusion that Martins had not established a likelihood of persecution or torture if he were returned to Brazil; Martins's factual argument to the contrary does not compel a different conclusion. Moreover, although Martins points to a different case in which the BIA granted asylum to a homosexual Brazilian male applicant, Martins failed to carry his burden of demonstrating that he faced a likelihood of persecution or torture. *See* Point IV, *infra*.

ARGUMENT

I. The IJ Was Well Within His Discretion to Deny Petitioner's Motion to Reopen As Untimely and Successive

A. Relevant Facts

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

B. Governing Law and Standard of Review

The purpose of a motion to reopen is to permit an alien to seek relief from removal based on new facts or evidence. *See Socop-Gonzalez v. INS*, 272 F.3d 1176, 1180 (9th Cir. 2001) (*en banc*); *Singh v. Gonzales*, 468 F.3d 135, 139 (2d Cir. 2006) ("Motions to reopen are designed to allow consideration of circumstances that have arisen subsequent to the applicant's previous hearing."); *In re Cerna*, 20 I. & N. Dec. 399, 402-403 (BIA 1991). Such motions are "disfavored" in light of the "strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." *INS v. Abudu*, 485 U.S. 94, 107 (1988); *see also Ali v. Gonzales*, 448 F.3d 515, 517 (2d Cir. 2006) (noting that motions to reopen are disfavored).

In light of this public interest in finality, "[m]otions to reopen must be based on evidence that 'is material and was not available and could not have been discovered or presented at the previous hearing.'" *Shou Yung Guo v. Gonzales*, 463 F.3d 109, 114 (2d Cir. 2006) (citing 8 C.F.R. § 1003.2(c)(3)(ii)). The statute and regulation thus expressly provide that a motion to reopen must "state the new facts that will be proven" and "be supported by affidavits or other evidentiary material." 8 U.S.C. § 1229a(c)(6)(B); 8 C.F.R. § 1003.23(b)(3). *See also* 8 C.F.R. § 1003.23(b)(3) ("A motion to reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not

available and could not have been discovered or presented at the former hearing.").

The INA, as amended, and its implementing regulations, establish time and numerical limits on motions to reopen. With respect to timing, the statute provides that a motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal. 8 U.S.C. § 1229a(c)(6)(C)(i). *See also* 8 C.F.R. § 1003.23(b)(1). Further, an alien is permitted only one motion to reopen. 8 U.S.C. § 1229a(c)(6)(A); 8 C.F.R. § 1003.23(b)(1) ("Subject to the exceptions in this paragraph and paragraph (b)(4), a party may file only one . . . motion to reopen proceedings."). *See Wu v. INS*, 436 F.3d 157, 164 (2d Cir. 2006).

These time and numerical limitations, while strict, are subject to certain limited exceptions. As relevant here, they do not bar a motion to reopen filed to apply for asylum, withholding of removal, and CAT relief when the motion is based on changed country conditions so long as the evidence thereof "is material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C. § 1229a(c)(6)(C)(ii); *see also* 8 C.F.R. § 1003.23(b)(4)(i) (time and numerical limits do not apply if motion is to apply for asylum, withholding of removal or CAT relief and "is based on changed country conditions . . . if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding"); *Norani v. Gonzales*, 451 F.3d 292, 294 (2d Cir. 2006) (*per curiam*) (in reviewing denial of motion to reopen, "we must inquire

whether the evidence could have been presented at the hearing before the IJ").

When reviewing a motion to reopen, the IJ may deny the motion on a number of independent grounds. First, if the alien fails to comply with the timeliness or numerical limitations, the IJ may deny the motion for that reason. *See, e.g.*, *Ali*, 448 F.3d at 517 (motion to reopen properly denied as untimely). In addition, the IJ may deny the motion if the movant has not established a *prima facie* case for the underlying substantive relief sought or if the movant has not introduced previously unavailable, material evidence. Moreover, in cases in which the ultimate grant of relief is discretionary, regardless of whether the movant has established a *prima facie* case or introduced new evidence, the IJ may deny the motion to reopen if the movant would not be entitled to the discretionary grant of relief. *Abudu*, 485 U.S. at 104-05; *see also* 8 C.F.R. § 1003.23(b)(3) ("The Immigration Judge has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief.").

Because a motion to reopen seeks a new hearing following the completion of proceedings and issuance of a final removal order, such a motion is disfavored and judicial review of its denial is circumscribed. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) ("[T]he Attorney General has 'broad discretion' to grant or deny such motions.") (citation omitted); *Abudu*, 485 U.S. at 108 ("If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The

INS should have the right to be restrictive.") (internal quotation marks and citation omitted). The Supreme Court has "repeatedly emphasized" that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens," further cautioning deference to administrative decisions. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citing *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

Accordingly, the decision not to reopen removal proceedings is reviewed only for abuse of discretion. *Ali*, 448 F.3d at 517; *Shou Yung Guo*, 463 F.3d at 113; *see also Infanzon v. Ashcroft*, 386 F.3d 1359, 1362 (10th Cir. 2004) (no abuse of discretion in denying untimely motion to reopen); *Iavorski v. INS*, 232 F.3d 124, 128 (2d Cir. 2000) ("When the BIA has applied the correct law, its decision to deny a motion to reopen deportation proceedings is reviewed to determine whether the decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.") (citation and internal quotation marks omitted). This Court "will find an abuse of discretion 'only in those limited circumstances where the BIA's decision (1) provides no rational explanation, (2) inexplicably departs from established policies, (3) is devoid of any reasoning, or (4) contains only summary or conclusory statements.'" *Maghradze v. Gonzales*, 462 F.3d 150, 152-53 (2d Cir. 2006) (quoting *Song Jin Wu v. INS*, 436 F.3d 157, 161 (2d Cir. 2006) (internal quotation marks omitted)).

"Where, as here, the BIA has affirmed the IJ's decision without an opinion, *see* 8 C.F.R. § 1003.1(e)(4),

[this Court] review[s] the IJ's decision directly as the final agency determination." *Xiao Ji Chen v. United States Dep't of Justice*, 471 F.3d 315, 323 (2d Cir. 2006); *see also Ibragimov v. Gonzales*, 476 F.3d 125, 132 (2d Cir. 2007) (same).

C. Discussion

The IJ acted well within his broad discretion when he denied Petitioner's motion to reopen as untimely and as an improper successive motion.

1. The Motion To Reopen Was Barred as Untimely and Successive

Without question, the IJ did not abuse his discretion in finding that Petitioner's motion to reopen was barred by the applicable numerical and time limitations established by statute and regulation. 8 U.S.C. §§ 1229a(c)(6)(A), (c)(6)(C)(i); 8 C.F.R. § 1003.23(b)(1).

With respect to timing, Martins's motion was filed more than 90 days after the entry of the final administrative order of removal. On November 24, 2004, the IJ issued an order granting Martins voluntary departure until December 27, 2004, with an alternate order of removal to Brazil. (*See* CAR 138-42). Although Martins appealed that decision, he subsequently withdrew the appeal before decision (CAR 112, 114), and thus the IJ's decision became final as if no appeal had been taken. 8 C.F.R. § 1003.4. Under the regulations, the IJ's decision became final upon expiration of the time for appeal on

December 27, 2004. *See* 8 C.F.R. § 1003.39 (IJ decision becomes final upon expiration of time for appeal); *see also* 8 C.F.R. § 1241.1.(f) (when IJ issues alternate order of removal in conjunction with grant of voluntary departure, the order of removal becomes final upon overstay of the voluntary departure period). Martins's motion to reopen, filed on April 12, 2005 (*see* CAR 47) was filed more than 90 days after that date and consequently, the IJ correctly denied the motion as untimely. (CAR 41). *See* 8 U.S.C. § 1229a(c)(6)(C)(i); 8 C.F.R. § 1003.23(b)(1); *see also Ali*, 448 F.3d at 517 (BIA properly denied motion to reopen as untimely).

Additionally, the IJ noted that Martins had already made (and lost) one motion to reopen on December 17, 2004. (CAR 41; *see* CAR 135, 173-176.) Thus, the IJ correctly found that the April 12, 2005 motion to reopen was barred by the one-motion rule. *See* 8 U.S.C. § 1229a(c)(6)(A); 8 C.F.R. § 1003.23(b)(1).

2. Martins Did Not Establish Changed Country Conditions to Qualify for a Waiver of the Numerical and Time Limitations on Motions to Reopen

Petitioner concedes that he cannot satisfy the statutory and regulatory requirements to be exempted from the numerical and time limitations. Pet. Brief at 14-15. This concession is confirmed in the record. Martins failed to present any evidence of changed country conditions that was unavailable at the time of his removal hearing, and

thus the IJ did not abuse his discretion in denying Martins's motion to reopen.

First, Martins presented no evidence of country conditions in Brazil that was unavailable at his November 24, 2004 removal hearing. *See* 8 C.F.R. § 1003.23(b)(4)(i) (exception to numerical and time limitations for asylum applications based on changed country conditions when evidence "was not available and could not have been presented or discovered at the previous proceeding"). Martins relied on several articles about violence against homosexuals in Brazil, but these articles were all dated *before* his removal hearing in November 2004.[2] (*See* CAR 97-98 (article dated May 26, 2004); 100-104, 108-110 (article dated Feb. 28, 2002); CAR 106-107 (article dated Feb. 8, 2000)). As evidence that could have been presented at Martins's removal hearing, this evidence is insufficient to establish changed country conditions in support of an untimely motion to reopen. *See Norani*, 451 F.3d at 294 (in reviewing "determination of whether previously unavailable evidence supported the [petitioner's] motion to reopen, we must inquire whether the evidence could have been presented at the hearing before the IJ"). Accordingly, the IJ properly declined to reopen the removal proceedings based on Martins's proffered evidence. *See Sinistaj v. Ashcroft*, 376 F.3d 516,

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[2] Martins's own asylum application, proffered with his motion to reopen, notes that at least as early as 1999, homosexuals in Brazil were subject to "discrimination, intolerance, and in many instances, physical abuse." (CAR 65).

519 (6th Cir. 2004) (upholding denial of motion to reopen when evidence was available at time of previous hearing); *Guzman v. INS*, 318 F.3d 911, 913 (9th Cir. 2003) (*per curiam*) (same); *Krougliak v. INS*, 289 F.3d 457, 460 (7th Cir. 2002) (same); *see also Harchenko v. INS*, 379 F.3d 405, 410 (6th Cir. 2004) (sustaining denial of motion to reopen where alien failed to establish existence of materially changed country conditions).

Furthermore, on the record before the IJ, the only evidence of "changed conditions" since the removal hearing were alleged changes in Martins's willingness to reveal his homosexuality, his awareness of anti-homosexual violence in Brazil, and his awareness that he could apply for asylum. (*See* CAR 78-79, 81). Even if these facts qualified as "changed" conditions that could not have been presented at Martins's removal hearing, *but see* CAR 65 (noting Martins's awareness of intolerance of and physical abuse of homosexuals in Brazil in 1999), they did not qualify as changed *country* conditions sufficient to excuse an untimely and successive motion to reopen. *See Wang v. BIA*, 437 F.3d 270, 273 (2d Cir. 2006) ("The law is clear that a petitioner must show changed country conditions in order to exceed the 90-day filing requirement for seeking to reopen removal proceedings. . . . A self-induced change in personal circumstances cannot suffice.").

II. This Court Lacks Jurisdiction to Review the IJ's Conclusion that Martins's Asylum Application was Untimely

A. Relevant Facts

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

B. Governing Law and Standard of Review

Generally, applications for asylum must be made within one year of entry into the United States. 8 U.S.C. § 1158(a)(2)(B). The statute contains an express exception to this time-bar, however, providing that a late asylum application may be considered "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). "Changed circumstances" include changes in country conditions and changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum. 8 C.F.R. § 1208.4(a)(4). The term "extraordinary circumstances" refers to events or factors that impact the applicant's ability to meet the one-year deadline, such as medical or legal incapacity or ineffective assistance of counsel. 8 C.F.R. § 1208.4(a)(5). The applicant has the burden of proving to the satisfaction of the IJ that he qualifies for one of these exceptions. 8 C.F.R. § 1208.4(a)(2)(i)(B).

Significantly, however, in the absence of a constitutional claim or question of law, 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, 180 (2d Cir. 2006) (noting that "[t]he INA, by its terms, precludes judicial review of the Attorney General's determinations regarding the one-year deadline provided in 8 U.S.C. § 1158(a)(2)," and thus that court "has no authority to review the IJ's decision" on timeliness of asylum application "unless it implicates 'constitutional claims or questions of law'").

C. Discussion

The IJ denied Martins's motion to reopen in part on the ground that Martins could not establish a *prima facie* case of eligibility for asylum because his asylum

application was untimely.[3] (CAR 41). This Court lacks jurisdiction to review that conclusion.

As this Court has explained, although the REAL ID Act allows review of certain questions, there is no jurisdiction "to review decisions under the INA when the petition for review essentially disputes the correctness of an IJ's fact-finding . . . and raises neither a constitutional claim nor a question of law." *Xiao Ji Chen*, 471 F.3d at 329. *See id.* at 330-32 (holding that IJ's determination that alien failed to demonstrate "changed" or "extraordinary circumstances" justifying late filing of asylum application did not present constitutional claim or question of law that was judicially reviewable); *cf. Liu v INS*, 475 F.3d 135, 137 (2d Cir. 2007) (*per curiam*) ("questions of law" over which this Court can exert review under the REAL ID Act "include the application of law to fact, including what evidence may satisfy a party's burden of proof").

The IJ in this case reviewed the evidence and determined that Martins did not qualify for an exception to the one-year rule. (*See* CAR 41). The IJ reviewed the articles submitted by Martins, and noted that they portrayed longstanding hostility and violence directed at gays and lesbians in Brazil, including the time period prior to Martins's departure from Brazil. He further noted that the articles did not reflect a newly-established change or

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[3] The one-year filing deadline in 8 U.S.C. § 1158(a)(2)(B) does not apply to applications for withholding of removal or CAT relief. *See Joaquin-Porras*, 435 F.3d at 180.

trend that would constitute changed circumstances for Martins. (*See* CAR 41). Finally, the IJ examined Martins's sworn statement in which he stated that he was only recently informed that he could apply for asylum on this ground, and concluded that ignorance of one's remedies was not the sort of incapacity needed to establish extraordinary circumstances. (*See* CAR 41).

In this Court, Martins asserts – without elaboration – that the IJ "was simply incorrect" to deny his asylum application as untimely. Pet. Br. at 27. He lists the examples of incapacity found in the regulatory definition of "extraordinary circumstances," and without citation to authority or explanation of any kind, states that the IJ should have at least offered him a hearing to show why the one-year limit should not apply to him. *Id.* In other words, it appears that Martins disagrees with the IJ's analysis of the evidence and conclusion – precisely the sort of question that is unreviewable under the express provision of 8 U.S.C. § 1158(a)(3).

While this Court retains jurisdiction to review "constitutional claims or questions of law" related to the IJ's determinations regarding "changed" or "extraordinary" circumstances, *Joaquin-Porras v. Gonzales*, 435 F.3d at 180, Martins makes no such claim here. Therefore, there is no proper basis for this Court's review of the IJ's decision regarding the one-year limitation.

III. This Court Should Not Consider Petitioner's International Law, Ineffective Assistance of Counsel, and Due Process Arguments Because He Failed to Exhaust Them Before the Agency and They are Meritless in Any Event

A. Relevant Facts

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

B. Governing Law and Standard of Review

1. Exhaustion

It is well-settled that before an alien can seek judicial review of a removal order, the alien is statutorily required to exhaust all administrative remedies available. *See* INA § 242(d)(1), 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if the alien has exhausted all administrative remedies available to the alien as of right, ..."). Furthermore, as a matter of judicial exhaustion, this Court requires aliens to present all of their specific *issues* to the agency before presenting them to this Court in a petition for review. *Lin Zhong v. United States Dep't of Justice*, ___ F.3d ___, 2007 WL 704891, *13-14 (2d Cir. as amended, Jan. 17, 2007). Although this requirement of *issue* exhaustion is not jurisdictional, and thus subject to waiver, it is mandatory. *Id.* at *1 n.1;

Steevenez v. Gonzales, 476 F.3d 114, 117 (2d Cir. 2007) (*per curiam*) ("[W]e recently clarified that while not jurisdictional, issue exhaustion is mandatory."). In other words, in the absence of extraordinary circumstances, "[i]f the government points out to the appeals court that an issue relied on before that court by a petitioner was not properly raised below, the court must decline to consider that issue." *Lin Zhong*, 2007 WL 704891 at *1 n.1.

To comply with the issue exhaustion requirement, each issue must be specifically raised below; generalized contentions at the administrative level are not sufficient to preserve specific claims for review by the courts. *See, e.g.*, *Steevenez*, 476 F.3d at 117 ("generalized protestations" are insufficient to preserve issues for review); *Gill v. INS*, 420 F.3d 82, 85-86 (2d Cir. 2005) (explaining that the "rule that emerges . . . is that § 1252(d)(1) bars the consideration of bases for relief that were not raised below, and of general issues that were not raised below, but not of specific, subsidiary legal arguments, or arguments by extension, that were not made below."); *Foster v. INS*, 376 F.3d 75, 77-78 (2d Cir. 2004) (*per curiam*) ("the mere statement that one is not removable does not serve to raise a specific issue to the IJ"). "While this Court will not limit the petitioner 'to the exact contours of his argument below' in determining whether the petitioner exhausted the issue, the issue raised on appeal must be either a 'specific, subsidiary legal argument[ ]' or 'an extension of [an] argument . . . raised directly before the BIA.'" *Steevenez*, 476 F.3d at 117 (quoting *Gill*, 420 F.3d at 86) (alteration in *Steevenez*).

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

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

Corp., 145 F.3d 90, 93-94 (2d Cir. 1998) (quoting *McKart v. United States*, 395 U.S. 185, 193-95 (1969)).

2. International Law

When a treaty that is self-executing is signed and ratified by the United States, it generally has the force of domestic law and can be enforced by the courts. *See Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 133 (2d Cir. 2005). On the other hand, if a treaty is not self-executing, it does not provide independent, privately enforceable rights and must be incorporated into statute or regulation before it has the force of law. *Id*.

Customary international law, broadly defined as "practices and customs of States in the international arena that are applied in a consistent fashion," is part of the law of the United States, but only "'where there is *no treaty,* and *no controlling executive or legislative act or judicial decision.*'" *United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900) (emphasis in *Yousef*). Customary international law may also inform domestic law through application of the "*Charming Betsy*" interpretive canon. According to this canon, when legislation is susceptible to multiple interpretations, courts should select the interpretation that does not conflict with customary international law. *Id.* (discussing principle from *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)); *Guaylupo-Moya*, 423 F.3d at 135 ("[W]here legislation is ambiguous, it should be interpreted to conform to international law."). This Court has repeatedly emphasized, however, that this canon only

applies when congressional intent is ambiguous; "[i]f a statute makes plain Congress's intent . . . then Article III courts, which can overrule Congressional enactments only when such enactments conflict with the Constitution, must enforce the intent of Congress irrespective of whether the statute conforms to customary international law." *Yousef*, 327 F.3d at 93 (citations omitted); *see also Guaylupo-Moya*, 423 F.3d at 135-36 (refusing to apply *Charming Betsy* principle because congressional intent was clear).

3. Ineffective Assistance of Counsel

"Deportation hearings are civil, not criminal, proceedings." *Rabiu v. INS*, 41 F. 3d 879, 882 (2d Cir. 1994) (citing *Saleh v. United States Dep't of Justice*, 962 F.2d 234, 241 (2d Cir. 1992)). Therefore, in order for petitioners to prevail on a claim of ineffective assistance of counsel, they "must show that [their] counsel's performance was so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause." *Id.* at 882. In order to show a deprivation of fundamental fairness, petitioners must allege facts sufficient to show "that competent counsel would have acted otherwise," and "that [they were] prejudiced by [their] counsel's performance." *Id.* (internal quotation marks and citations omitted). A reviewing court uses its own judgment to determine whether an attorney's conduct was ineffective. *Id.* In order for petitioners to show that their attorney's poor performance caused them actual prejudice, "[they] must make a prima facie showing that [they] would have been eligible for the relief requested and that [they] could have

made a strong showing in support of [their] application." *Id.* at 883 (citing *Miranda-Lores v. INS*, 17 F.3d 84, 85 (5th Cir. 1994)).

In *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988), the BIA held that an alien must satisfy certain evidentiary requirements before he can pursue a claim for ineffective assistance of counsel. An alien must submit: (1) an affidavit setting forth in detail the agreement with former counsel concerning what action would be taken and what counsel did or did not represent in this regard; (2) proof that the alien notified former counsel of the allegations of ineffective assistance and allowed counsel an opportunity to respond; and (3) if a violation of ethical or legal responsibilities is claimed, a statement as to whether the alien filed a complaint with any disciplinary authority regarding counsel's conduct and, if a complaint was not filed, an explanation for not doing so. This Court adopted the *Lozada* test in *Esposito v. INS*, 987 F.2d 108, 110-11 (2d Cir. 1993), and reaffirmed the rule in *Jian Yun Zheng v. U.S. Dep't of Justice*, 409 F.3d 43, 47 (2d Cir. 2005).

4. Due Process

The Due Process Clause, as applied in the immigration context, requires that the proceedings be "fundamentally fair." *See, e.g.*, *Michel v. INS*, 206 F.3d 253, 259 (2d Cir. 2000); *Felzcerek v. INS*, 75 F.3d 112, 115 (2d Cir. 1996). In immigration proceedings, the "'core' of due process "is the right to notice of the nature of the charges and a meaningful opportunity to be heard.'" *Brown v. Ashcroft*,

360 F.3d 346, 350 (2d Cir. 2004) (quoting *Choeum v. INS*, 129 F.3d 29, 38 (1st Cir. 1997)).

C. Discussion

As noted above, Petitioner acknowledges that he cannot satisfy the statutory and regulatory criteria for exemption from the limitations that bar his untimely and successive motion to reopen. Pet. Br. at 14-15. To obtain relief in this Court, therefore, Martins argues that due process and international law, along with his lawyers' ineffective assistance, require that the statutory and regulatory criteria be lifted for his benefit. Pet. Br. at 3-33.

Martins's arguments, as understood by the government, are as follows: *First*, and primarily, Martins argues that various sources of international law should inform the interpretation of United States immigration law to excuse him from complying with the 90-day time limit and numerical limitation on motions to re-open and the one-year limitation on asylum applications. Pet. Br. at 12-21, 25-27. *Second*, Martins appears to raise claims alleging that two of his prior lawyers provided ineffective assistance of counsel. Pet. Br. at 22-24, 25-26. *Finally*, Martins raises due process claims relating to his removal hearing and the failure of the IJ to hold a hearing on two issues presented by his motion to reopen. Pet. Br. at 22-24, 27-33.

This Court should reject these arguments for failure to exhaust because Martins never presented *any* of these

issues to the IJ or the BIA.[4] Even if this Court were to consider these arguments, however, it should reject them as meritless.

1. Because Martins's Arguments Based on International Law, Ineffective Assistance of Counsel, and Due Process Were Not Raised Before the IJ or the BIA, This Court Should Not Consider Them

Because Martins makes his international law, ineffective assistance of counsel, and due process arguments for the first time in his petition for review, this Court should not entertain these unexhausted claims.

Martins did not make any international law, ineffective assistance, or due process arguments in the course of his removal hearing. (*See* CAR 143-52). Nor did he raise these issues in his motion to reopen (CAR 47-58). When he appealed the denial of the motion to reopen to the BIA, he still did not raise any international law, ineffective assistance, or due process claims. (*See* CAR 28-33). He advances these bases for relief for the first

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[4] On June 28, 2006, the government filed a motion to dismiss this petition for review on this ground. The motion was denied by order dated January 25, 2007, directing the case to be assigned to a new panel of the Non-Argument Panel upon conclusion of briefing. As explained in the text, the government maintains its position that this petition should be dismissed for failure to exhaust.

time in this Court. Pet. Br. at 3-33. Accordingly, Martins's failure to comply with the mandatory exhaustion requirement deprives this Court of a record and decision upon which to review those claims. *See Xiao Ji Chen*, 471 F.3d at 320-21 n.1 (non-exhausted issues are forfeited); *Chen v. United States Attorney General*, 454 F.3d 103, 105 n.1 (2d Cir. 2006) (*per curiam*) (same); *Kambolli v. Gonzales*, 449 F.3d 454, 457-58 (2d Cir. 2006) (*per curiam*) (same).

Here, the purposes of the exhaustion requirement point squarely in favor of denying review of Martins's new-found issues. If he had presented his claims to the IJ or the BIA, the agency with the expertise and responsibility for interpreting the immigration laws and regulations would have had the opportunity to consider them first to determine whether those laws and regulations should be interpreted to account for the arguments he raises. *See Theodoropoulos*, 358 F.3d at 171. Furthermore, the agency could have resolved issues before presentation to this Court, thus promoting judicial efficiency. *Beharry*, 329 F.3d at 56. Finally, by denying review of newly raised claims, this Court would protect the authority of the agency and prevent the "frequent and deliberate flouting of administrative processes," *McKart*, 395 U.S. at 195, thus discouraging petitioners from raising new issues in this Court "to secure a delay-inducing remand well after administrative proceedings have been completed," *Xiao Ji Chen*, 471 F.3d at 321 n.1.

The narrow "manifest injustice" exception to the exhaustion requirement applied in *Marrero Pichardo*, 374

F.3d at 52-53, is not applicable in this case. In *Marrero Pichardo*, the petitioner was subject to a removal order based on multiple New York state DUI convictions. 374 F.3d at 50. After the removal order became administratively final, this Court held in a separate case that such DUI convictions are not crimes of violence and therefore not aggravated felonies for purposes of removal. *See Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001). Despite petitioner's failure to timely raise this Court's decision in *Dalton* during habeas proceedings in the district court, this Court found it necessary to craft an exception to the exhaustion requirement to avoid manifest injustice because of the unusual circumstances of an intervening change in the law. *Marrero Pichardo*, 374 F.3d at 52-53.

In this case, there are no similar "dire consequences" compelling application of the exceedingly narrow exception to the statutory exhaustion requirement. *See id*. at 54. Martins's removal will not result in manifest injustice. Unlike in *Marrero Pichardo*, there has been no intervening change in the law that would affect Petitioner's status as a removable alien. *See id.*

In addition, Martins cannot satisfy the exception to the exhaustion requirement for "subsidiary legal arguments." *Gill*, 420 F.3d at 86-87. Here, throughout Martins's merits brief, he relies on international law, ineffective assistance of counsel, and due process principles for the proposition that the IJ and the BIA incorrectly denied his motion to reopen. Pet. Br. at 2-4; 10-11; 17-28; 29; 32-33. Specifically, Martins argues that the time and numerical

limitations imposed by rules governing motions to reopen are in contravention of international law principles. Pet. Br. at 17-21; 25-28. He further argues that the IJ improperly denied his right to be heard under international law standards and in violation of due process. Pet. Br. at 21-24; 28-32. In addition, he argues that his lawyers provided ineffective assistance. Pet. Br. at 22-24, 25-26. These arguments do not fall within the above exception to the exhaustion requirement because they are not "subsidiary legal argument[s]" of the issues previously raised on appeal to the BIA by Martins. (*See* CAR 7-21).

Indeed, in his appeal to the BIA, Martins made no mention of international law violations, ineffective assistance of counsel, or due process violations but instead argued that the IJ incorrectly interpreted the regulatory provisions concerning the time and numerical limitations on motions to reopen. (*See* CAR 10-13). Martins further argued that the IJ incorrectly concluded that Martins had not submitted evidence of changed country conditions that was not previously available to him. (CAR 13-15). Moreover, the issues raised by Martins in this petition for review fall well within the expertise of the immigration courts and the BIA, which deal with these types of issues on a daily basis. These claims advanced by Martins in this petition for review could have and should have been addressed in the first instance by the BIA as they are within its unique subject matter jurisdiction.

Because Martins failed to comply with the mandatory exhaustion requirement, this Court should not entertain his international law or due process claims. *Steevenez*, 476

F.3d at 117; *see also Mattel, Inc. v. Barbie-Club.com*, 310 F.3d 293, 306 (2d Cir. 2002) (reiterating "well- established general rule that an appellate court will not consider an issue raised for the first time on appeal" unless "necessary to remedy an obvious injustice") (*quoting Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994)); *Xiao Ji Chen*, 471 F.3d at 320-21 n.1 (declining to consider arguments presented for the first time in petition for review).

2. Martins's International Law, Ineffective Assistance of Counsel, and Due Process Arguments Are Meritless, In Any Event

a. The 1951 Convention and 1967 Protocol do not Excuse Martins's Failure to Comply with Procedural Rules Governing Motions to Reopen or Applications for Asylum

For his international law arguments, Martins relies heavily on two sources: the United Nations Convention Relating to the Status of Refugees of 1951 ("1951 Convention") and the United Nations Protocol Relating to the Status of Refugees of 1967 ("1967 Protocol"). Pet. Br. at 17-33. These sources do not excuse Martins's failure to comply with the procedural rules governing motions to reopen or asylum applications.

Although the United States is not a signatory to the 1951 Convention, *Doherty v. United States Dep't of*

Justice, 908 F.2d 1108, 1118-19 (2d Cir. 1990), *rev'd on other grounds*, 502 U.S. 314 (1992), in 1968, it became a party to the 1967 Protocol. United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6257, 606 U.N.T.S. 268; *Doherty*, 908 F.2d at 1118-19. The 1967 Protocol, in turn, incorporates by reference Articles 2 through 34 of the 1951 Convention, United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951), reprinted in 19 U.S.T. at 6259, 6264-76; *see INS v. Aguirre-Aguirre,* 526 U.S. 415, 426-27 (1999), including the language in Article 33 establishing the principle of *refoulement* relied on most heavily by Martins:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Art. 33, United Nations Convention Relating to the Status of Refugees, extended by United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223-6260, T.I.A.S. No. 6577 (1968).

In 1980, based on a sense that the Attorney General's implementation of the INA had diverged from the provisions of the 1967 Protocol, Congress comprehensively revised the standards and procedures governing refugee status. *Doherty*, 908 F.2d at 1118-19. The resulting revision is commonly referred to as the

Refugee Act of 1980 ("Refugee Act"), Pub. L. No. 96-212, 94 Stat. 102. The Refugee Act conformed the asylum and withholding of removal scheme to the 1967 Protocol, which, as explained above, incorporated portions of the 1951 Convention. *Aguirre-Aguirre*, 526 U.S. at 426-27. More specifically, Article 33 of the 1951 Convention, as incorporated by the 1967 Protocol, was implemented in the statutes as the "withholding of removal" provision, currently codified at 8 U.S.C. § 1231(b)(3)(2006). *See Aguirre-Aguirre,* 526 U.S. at 426-27.

Martins suggests that there is some conflict between the 1951 Convention and the 1967 Protocol, on one hand, and the provisions of domestic law, on the other hand, when he argues that the IJ's reliance on procedural rules to deny his motion to reopen was improper under international law. There is no conflict, however, between these international law sources and domestic immigration law. As explained above, the INA, as amended by the Refugee Act, expressly adopted the relevant substantive provisions of the 1967 Protocol into domestic law. *Aguirre-Aguirre*, 526 U.S. at 426-27. Indeed, one of the Refugee Act's "principal purposes" was to conform the statutes to the 1967 Protocol, including the principle of non-refoulement invoked by Martins. *Id.* at 427. Thus, far from violating the 1967 Protocol, the INA, as amended by the 1980 Refugee Act, implements the Protocol.

Martins nevertheless argues that the procedural rules applied in his case are inconsistent with the 1951 Convention and 1967 Protocol. The only language he cites from those sources, however, is the language set forth

in Article 33. Pet. Br. at 17-21. This language, while setting forth a substantive standard to govern the consideration of claims by refugees, does not prohibit the establishment of procedures – including deadlines – for the consideration of those claims. If Martins were correct – if the principle of non-refoulement established in Article 33 prohibited states from setting deadlines or other procedural limitations on claims for relief under its provisions – then compliance with the Protocol would require the wholesale suspension of the procedural limitations in the INA. Under Martins's interpretation, there would never be finality to a removal order, no matter how many preceding motions to reopen had been filed and no matter how much time had lapsed from the final removal order.

Martins's suggestion that procedural rules such as filing deadlines should not bar his (or any other) claim for asylum runs afoul of basic principles of finality central to any form of litigation. In litigation generally, courts have stressed the need to sustain filing deadlines, which "serve several important policies, including rapid resolution of disputes, repose for those against whom a claim could be brought, and avoidance of litigation involving lost evidence or distorted testimony of witnesses." *Carey v. International Brotherhood of Electrical Workers Local 363 Pension Plan*, 201 F.3d 44, 47 (2d Cir. 1999). And these types of procedural limitations are consistent with the United States Constitution. *See, e.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982). As the Supreme Court has recognized, "[n]o procedural principle is more familiar to this Court than that a constitutional

right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444 (1944).

The interest in finality is especially strong in the immigration context, where "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *Doherty*, 502 U.S. at 323. Congress's "fundamental purpose" in selecting and then refining the petition-for-review mechanism has been "to abbreviate the process of judicial review in order to frustrate certain practices whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts." *Stone v. INS*, 514 U.S. 386, 399-400 (1995) (*quoting Foti v. INS*, 375 U.S. 217 (1963)) (ellipses omitted).

For these reasons, courts have rejected the premise that the existence and operation of time limits or other limitations intended to implement finality of decision run afoul of international law. *Sukwanputra v. Gonzales*, 434 F.3d 627, 631-32 (3d Cir. 2006) (one-year period to apply for asylum under § 1158(a)(2) does not violate 1967 Protocol); *Oliva v. United States Dep't. of Justice*, 433 F.3d 229, 235-36 (2d Cir. 2005) (unambiguous statute requiring 10 years' continuous physical presence in U.S. to qualify for family hardship exemption requirement does not give way to customary international law). Accordingly, because the procedural rules applied in this case are consistent with congressional intent, and are not

inconsistent with international law, this Court should reject Martins's argument to the contrary.

b. The United Nations Handbook Does Not Establish Binding Law or any Principle to Overturn the IJ's Decision

In support of his international law arguments, Martins relies finally on the Handbook on Procedures and Criteria for Determining Refugee Status for the 1951 Convention and 1967 Protocol ("Handbook"). Martins notes specifically two provisions of the Handbook: the Handbook's exhortations that asylum procedures not be "stringently applied" and that nations should extend asylum applicants the "benefit of the doubt." Pet. Br. at 20, 26.

The Handbook is recognized as a useful source of guidance for construing the 1967 Protocol and the 1980 Refugee Act that implemented that Protocol for the United States. *See Aguirre-Aguirre*, 526 U.S. at 427; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987). However, it is equally clear that the Handbook has no binding force of law. *Aguirre-Aguirre*, 526 U.S. at 427-28; *Cardoza-Fonseca*, 480 U.S. at 439 n.22 ("We do not suggest, of course, that the explanation in the U.N. Handbook has the force of law or in any binds the INS . . . ."). "Indeed the Handbook itself disclaims such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.'" *Cardoza-Fonseca*, 480 U.S. at

439 n.22 (quoting Handbook). As such, there is no basis for Martins's argument that two general statements in the Handbook somehow trump the specific procedural rules in the INA and its implementing regulations.

The Third Circuit recently offered another reason to reject Martins's arguments based on the Handbook. In *Sukwanputra*, 434 F.3d 627, the Third Circuit confronted an alien's claim that the IJ should have used a standard based on the "benefit of the doubt" language from the Handbook when reviewing whether his asylum application was timely. The court noted that the Handbook provided procedures for assessing refugee status, "not for assessing the circumstances surrounding the late filing of an asylum application." *Id.* at 634. In other words, while the Handbook suggests that an asylum applicant might be entitled to the benefit of the doubt when attempting to prove the factual basis for his asylum claim, it says nothing about how courts should assess the procedural rules governing the asylum process. As applied here, the Handbook language would provide no basis for construing the procedural rules in Martins's favor.

Finally, even if the Handbook's language could be considered evidence of customary international law, it could not overcome the unambiguous statutory language establishing the procedural rules that barred Martins's claim. Under the *Charming Betsy* principle, ambiguous statutory language should be construed to conform to international law. *Guaylupo-Moya*, 423 F.3d at 135. "This canon of statutory interpretation, however, does not apply where the statute at issue admits no relevant

ambiguity." *Oliva*, 433 F.3d at 235. In *Oliva*, for example, this Court rejected an argument that an alien was entitled to relief from removal based on customary international law. The Court noted that the relevant statutory language was clear and held that "[i]t would make no sense to 'interpret' this statute to . . . effectively eliminat[e] an unambiguous requirement specifically written into the statute by Congress." *Id.*

Here, Martins makes no attempt to identify ambiguity in the relevant statutes because there is none. The statutes setting forth the 90-day time limit, the limit on successive motions, and the time limits on asylum applications are simple and straightforward. *See* 8 U.S.C. §§ 1158(a)(2)(B), (D); 8 U.S.C. §§ 1229a(c)(6)(A), (C)(i)-(ii). While Martins may believe that he should have prevailed under the standards set forth in those statutes, he identifies no ambiguity in the statutory language that would allow resort to the *Charming Betsy* principle.

Martins argues, for example, that the prohibition on multiple motions to reopen should not be applied to him because the Immigration Court did not have jurisdiction to grant the relief that he requested in his first motion.[5] Pet. Br. at 25-26. The statutory language, however, is simple and unadorned. It provides that "[a]n alien may file one motion to reopen proceedings under this section." 8 U.S.C. § 1229a(c)(6)(A). Although the statute provides an exception to this limitation for asylum applications based

[5] Martins appears to make no specific arguments about the application of the 90-day time limit on motions to reopen.

on changed circumstances, it contains no exceptions to allow multiple motions when the first motion is denied for lack of jurisdiction. Martins cites no authority interpreting the statute as he suggests, and provides no reason to read an ambiguity into clear statutory language.[6] In the absence of ambiguity, there is no basis for applying the *Charming Betsy* principle.

Martins's international law argument with respect to the one-year limit on asylum applications fares no better. He contends that the standards of international law as announced in the Handbook required the IJ to hold a hearing on the timeliness of his asylum application. Pet. Br. at 26-28. As a preliminary matter, he does not explain what evidence he would have presented at this hearing. Moreover, he fails to explain how the provisions governing the timeliness requirement are in any way ambiguous, or how an interpretation based on international law would change them. Although he argues that an IJ considering an untimely asylum application must consider the reasons for the late filing, he fails to identify any ambiguous language in the statute or regulation that could plausibly be interpreted to require a hearing in the absence of any contested factual issues.

In sum, Martins's arguments based on the Handbook do not help him. Although the Handbook provides guidance for interpretation of the Refugee Act, it is not

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[6] To the extent Martins is arguing that ineffective assistance of counsel justifies "tolling" of the one-motion rule, that argument is addressed in Part III.C.2.c., *infra*.

binding on American courts. Moreover, because the procedural rules at issue in this case are clear and unambiguous, they should be applied as written. There is no basis for applying the *Charming Betsy* principle to construe them differently.

c. Martins Cannot Sustain Claims Based on the Ineffective Assistance of Counsel

Martins's brief to this Court suggests that he is raising claims of ineffective assistance of counsel with respect to two separate events in his removal proceedings. First, he argues that his lawyer was ineffective during his removal hearing because she appeared not to be familiar with the facts of his claim. Pet. Br. at 22-24. Second, he suggests that his lawyer was ineffective for filing his first motion to reopen when the Immigration Court had no jurisdiction over the relief requested in that motion. Pet. Br. at 14 n.22, 25-26.

With respect to Martins's removal hearing, he fails to explain how competent counsel would have acted differently or how he was prejudiced by his counsel's performance. He admits that he had not told his lawyer he was gay, CAR 79, and thus she could not have filed an asylum application for him at that time. *See Azanor v. Ashcroft*, 364 F.3d 1013, 1023 (9th Cir. 2004) (alien failed to establish attorney's conduct prejudiced her application when she never informed attorney of basis for her claim). Moreover, even if she could have filed an asylum application for him, that application would still have been

time-barred. *Rabiu*, 41 F.3d at 883. In addition, Martins cannot maintain an ineffective assistance of counsel claim because he has made no effort to comply with the procedure outlined in *Lozada*.

Similarly, with respect to Martins's claim that his lawyer was ineffective for filing the first motion, Martins has failed to comply with *Lozada* and this claim likewise must fail. Moreover, even if ineffective assistance of counsel in filing the first motion to reopen could relieve him of the limitation on filing multiple motions to reopen, *see, e.g.*, *Luntungan v. Attorney General*, 449 F.3d 551, 557 (3rd Cir. 2006) (suggesting that ineffective assistance of counsel in the filing of first motion to reopen might allow "tolling" of one-motion limitation on such motions), because Martins has not established that his lawyer was ineffective through the *Lozada* procedure, this claim, too, must fail. In any event, even if his lawyer were ineffective in filing the first motion to reopen, Martins cannot establish that he was prejudiced by this ineffectiveness because his second motion to reopen was also untimely. Thus, even if competent counsel had never filed the first motion, Martins's motion to reopen would still have been denied as untimely. *Rabiu*, 41 F.3d at 883 (petitioner must establish prejudice).

d. Martins's Claims Based on the Due Process Clause are Meritless

Martins alleges that he was denied due process in his removal hearing when he was effectively denied the opportunity to be heard, Pet. Br. at 22-24, and when the IJ

failed to hold a hearing on the timeliness of his asylum claim or on the merits of his CAT and withholding claims, Pet. Br. at 26-32. These arguments are all without merit.

First, Martins's claim that he was denied the right to be heard at his removal hearing is without merit. Martins's suggestion that he was denied the right to be heard because he was effectively denied an interpreter at the hearing is belied by the record. Martins claims that because he did not have an effective interpreter, his counsel reported his (alleged) plan to marry an American citizen and he was unable to respond to this allegation. *See* Pet. Br. at 23. This statement is squarely contradicted by Martins's declaration, in which he recounts hearing the California lawyer speak of a marriage, being mystified by this, trying to speak up, but being "shutout" by, among others, his own lawyer. (*See* CAR 78). Moments after counsel tells the judge that Martins plans to marry a United States citizen, Martins himself does speak up, unprompted, to say (through the translator), "I have immigration process too." (*See* CAR 146). There is no reflection in the record of his "try[ing] to intervene and explain," as asserted in his declaration. (*See* CAR 78). It is only after this exchange that the interpreter asks if she should be translating, and the judge tells her she can stop. (*See* CAR 146).

An applicant is entitled to an accurate and complete translation of official proceedings. *Nsukami v. INS*, 890 F.Supp. 170, 174 (E.D.N.Y. 1995); *see* 8 C.F.R. § 1240.44. A flawless translation of the proceedings is not necessary. Rather, due process requires that the hearing provide a meaningful opportunity to be heard so that the

petitioner is afforded a full and fair hearing within the meaning of the Due Process Clause. *Ajdari v. INS*, No. 302CV1845(PCD), 2003 WL 23498384 at *2 (D. Conn. June 2, 2003). The translation services must be sufficient to enable the applicant to place her claim before the judge. *Nsukami*, 890 F. Supp. at 174 (citing *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984)). The alien and the judge must be able to understand each other in order for the hearing to be of any value. *Id.* (citations omitted).

Thus, when material portions of the immigration proceeding are not translated at all, an alien may be entitled to a new hearing with a competent translator. In *Augustin*, 735 F.2d at 38, the court found a due process violation when significant portions of a hearing were not translated for an unrepresented alien. When the hearing convened, the *pro bono* attorney requested a continuance to prepare for the hearing with the assistance of promised, but overdue translation services. *Id*. at 35. The IJ denied the request and directed counsel to question the alien without preparation and to forego conferring with the client so she could identify other witnesses. At that point, the alien's attorney withdrew from representation. None of those portions of the hearing were translated for the alien. The fact of the attorney's withdrawal was not communicated to the alien, and it was clear from the testimony that was translated that the alien did not understand the purpose of the hearing itself. *Id.* Moreover, deficiencies in the quality of the Creole translation became apparent when the judge specifically asked if the translator was translating the judge's words, when straightforward questions yielded nonsensical

answers, and when lengthy questions yielded one-word responses. *Id.*

In this case, unlike in *Augustin*, it is clear from Martins's own declaration and the transcript of the proceeding that he knew what his lawyer was telling the judge and that he had an opportunity to be heard at that time. Thus, there is no resultant due process violation.

Second, Martins argues that the IJ should have held a hearing to determine whether to apply the one-year bar to his asylum application. Specifically, Martins claims that the IJ should have made "further inquiry" when deciding whether to apply the one-year-past-entry deadline to his asylum application. Pet. Br. at 1-2, 27. He argues that the statutory standard that exceptions to the one-year rule must be proved "to the satisfaction of the Attorney General" implicitly requires that a hearing should be held for the Government official to "explore" the reasons for the late filing. Pet. Br. at 27-28; *see* 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 1208.4 (a)(2)(i)(B) (qualification for exception must be proved "to the satisfaction of the . . . immigration judge"). There is no such hearing requirement in the governing statutes, regulations, or caselaw. Furthermore, Martins fails to explain what facts or evidence he would have presented at a hearing to support his claim or what issues required additional factfinding by the IJ. In the absence of any showing that a hearing was necessary, Martins cannot show that he was denied a meaningful opportunity to be heard in violation of due process. *See Brown*, 360 F.3d at 350.

Finally, Martins appears to argue that the IJ's failure to hold a hearing on his CAT and withholding of removal claims violates due process. Pet. Br. at 2, 28-33. However, in his brief, Martins simply argues that the IJ was wrong to conclude that Martins's evidence was insufficient to meet the thresholds for withholding or CAT relief. Pet. Br.at 28-33. This is not a due process argument. Martins does not engage in any due process analysis, nor does he address what difference it could have made if a hearing had been held. Thus, there is no basis for granting Martins relief on his CAT or withholding of removal claims on a due process theory.

IV. The IJ Properly Rejected Petitioner's Withholding and CAT Claims Because Petitioner's Motion Did Not Establish a *Prima Facie* Case for Relief

A. Relevant Facts

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

B. Governing Law and Standard of Review

1. 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); *Zhang v. Slattery*, 55 F.3d 732, 738 (2d Cir. 1995). 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 v. Reno*, 191 F.3d 307, 311 (2d Cir. 1999).

2. 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) (2005). 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) (2005); *see also Gao v. Gonzales*, 424 F.3d 122, 128 (2d Cir. 2005).

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." 8 C.F.R. § 208.18(a)(1) (2005); *see Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 399 (2d Cir. 2005).

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) (2005). "In terms of state action, torture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it." *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004) (rejecting any requirement that applicant prove affirmative state consent or approval of torture); *see Silva-Rengifo v. Attorney General*,473 F.3d 58 (3d Cir. 2007). Under CAT, an alien's removal may be either permanently withheld or temporarily deferred. *See* 8 C.F.R. §§ 208.16-17 (2005).

An individual may be entitled to relief under CAT even if not eligible for asylum:

> A CAT claim focuses solely on the likelihood that the alien will be tortured if returned to his or her home country, regardless of the alien's subjective

> fears of persecution or his or her past experiences. Unlike an asylum claim, the CAT claim lacks a subjective element, focuses broadly on torture without regard for the reasons for that treatment, and requires a showing with respect to future, rather than past, treatment.

Ramsameachire v. Ashcroft, 357 F.3d 169, 185 (2d Cir. 2004).

3. Standard of Review

As described above, this Court reviews the agency's decision to deny a motion to reopen for abuse of discretion. *See* Point I.B., *supra*.

Where the petition for review turns on the sufficiency of the factual findings underlying the IJ's determination that an alien has failed to satisfy his burden of proof, Congress has directed that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B) (2004). *Zhang v. INS*, 386 F.3d 66, 73 (2d Cir. 2004). This Court "will reverse the immigration court's ruling only if 'no reasonable fact-finder could have failed to find . . . past persecution or fear of future persecution."' *Wu Biao Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003) (omission in original) (quoting *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000)).

The scope of this Court's review under that test is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 71; *Wu Biao Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. Substantial evidence entails only "'such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992).

Indeed, the IJ's and BIA's eligibility determination "can be reversed only if the evidence presented by [the asylum applicant] was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). In other words, to reverse the 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

Putting aside the procedural bars to Martins's motion to reopen, the IJ did not abuse his discretion in denying the motion based on his finding that Martins could not establish a *prima facie* case for withholding of removal or CAT relief.

The IJ noted that Martins had presented no evidence that any group was targeting him. (CAR 41). Furthermore, the IJ noted that the record before him did not reflect "that it is more likely than not that homosexuals in Brazil will be harmed by skinhead gangs. Brazil has a

high population and the articles do not reflect that he comes close to meeting the more likely than not standard." (CAR 41). Based on these findings, the IJ concluded that Martins had failed to establish a *prima facie* case for withholding of removal or relief under CAT. (CAR 41).

The record evidence fully supports these conclusions. Martins's declaration does not aver that Martins himself would be specifically targeted due to his being gay. (*See* CAR 78-79). The news accounts offered by Martins document fatal attacks numbering anywhere between 8 and 132 a year by Brazilian offshoots of non-Governmental, right-wing European skinhead gangs in a strongly regional pattern. (*See* CAR 97, 100, 106). Although these articles suggest scattered violence in the country, they do not demonstrate, much less compel the conclusion, that it is more likely than not that Martins would be persecuted or tortured if returned to Brazil.[7]

Martins disagrees with these conclusions, and in his brief, emphasizes certain points in his evidence that he maintains are especially compelling.[8] It is clear that he

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[7] In addition, although the IJ did not address this fact, the articles do not suggest that the government of Brazil tortures, or is willfully blind to torture, of its gay population, as is required for CAT relief. *See Khouzam*, 361 F.3d at 171. To the contrary, two of the articles offered by Martins are reports of government efforts to remediate anti-gay violence and combat anti-gay discrimination. (*See* CAR 97, 100).

[8] Several times in his brief, Martins excerpts the IJ's (continued...)

fundamentally disagrees with the weight and probative value of that evidence as found by the IJ. However, fact finding is the special province of the Immigration Judge, and this Court may not disturb factual findings unless any reasonable factfinder would be compelled, on this record, to find otherwise. *Elias-Zacarias*, 502 U.S. at 481; *Siewe v. Gonzales*, ___ F.3d ___, 2007 WL 744732, *7 (2d Cir. Mar. 13, 2007) (noting that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous" and that "[s]o long as there is a basis in the evidence for a challenged inference, we do not question whether a different

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[8] (...continued)
observation, "The article provided by the respondent indicates that 130 homosexuals were killed in Brazil in 2000 and this number has not changed substantially." (*See* CAR 41). Martins says this statement was made "with unfathomable heartlessness. . . " Pet. Br. at 30. This characterization is unfounded and a misstatement of the record. The IJ certainly did not say that anti-gay violence was acceptable. Moreover, the quoted language is from the portion of the IJ decision addressing whether Martins could established changed circumstances. Thus, the IJ was required to determine whether there had been any change in country conditions sufficient to excuse the procedurally improper motion to reopen. For performing this analysis, the IJ's statement was fully proffer. To suggest that the IJ condoned anti-homosexual violence is a mischaracterization of the record.

inference was available or more likely") (quotations omitted).

Finally, Martins bolsters his argument by attaching a copy of the BIA decision *In re Antunes*, No. A74 249 200, slip op. (BIA May 13, 2002) (*per curiam*) (attached to Pet. Br.). In that case, there was no dispute that the alien, a homosexual male, had been subjected to past persecution in Brazil on account of his homosexuality and thus that he was entitled to a presumption that he had a well-founded fear of future persecution if returned to that country. The question on appeal to the BIA was whether the INS had presented sufficient evidence to rebut that presumption. Reviewing the substantial evidence in the record of violence against homosexuals – and with no brief by the INS on appeal – the BIA found "insufficient evidence of record to rebut the presumption that [the alien] continues to have a well-founded fear of persecution on account of his homosexuality."

The decision in *Antunes*, a non-precedential decision from the BIA, does not control here. In *Antunes*, the Government did not dispute on appeal that the applicant had been the victim of past persecution on account of being gay. *In re Antunes*, slip op. at 1. Thus, the alien was entitled to a presumption that he had a well-founded fear of persecution and the only issue on appeal was whether the INS had submitted sufficient evidence to rebut that presumption. Here, by contrast, Martins makes no claim that he was subject to past persecution. His declaration reports no past persecution based on his sexual orientation. (*See* CAR 78-79). Furthermore, Martins does not report

the degree or extent to which he observed violence against gay people. There is no statement from which to extrapolate the risk to him. Instead, in his application, he states in the most general of terms that "skinheads" have beaten gay men simply for being gay. (*See* CAR 64). He does not mention any encounter or threat directed to him. Instead, in the portion of the form designated to set forth past harm or mistreatment (with the explicit instruction to state what happened and when), he wrote, "My friends, who are gay, were beaten by the skinheads." (*See* CAR 64). Thus, unlike the alien in *Antunes*, Martins cannot establish past persecution.

Furthermore, unlike the applicant in *Antunes*, Martins submitted very little evidence in support of his claim. The BIA in *Antunes* noted that the "record is replete with information regarding serious problems suffered by gay men and lesbians in Brazil on account of their sexual orientation . . . ." Here, by contrast, Martins submitted his own declaration and three newspaper articles. On the basis of this record, the IJ was well within his discretion to conclude that Martins did not carry his burden to show it was more likely than not he would be persecuted (withholding) or tortured (CAT).[9] (*See* CAR 41).

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[9] Although the IJ did not note it, the record reveals an inconsistency in Martins's claim. In his affidavit, Martins claims that "I did not have nor have it now or had I in the past years have relationships with women, even American women." (CAR 78). By contrast, documents submitted in support of his first motion to reopen show that his California residence was

(continued...)

[9] (...continued)
titled and mortgaged in the name of "Marseno A. Martins, A Married Man." (CAR 158, 183). Another document shows that Martins's wife, Cristiana Maria de Avila Ferrari, conveyed her interest in the property to him by Interspousal Transfer Grant Deed on May 7, 2003. (CAR 185).

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the petition be denied.

Dated: April 2, 2007

Respectfully submitted,

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

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 13,988 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. § 1158(a)(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).

8 U.S.C. § 1158(a)(3) Limitation on judicial review

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

8 U.S.C. § 1252(a)(2)(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.

8 U.S.C. § 1252(d)(1) Review of final orders

A court may review a final order of removal only if –

(1) the alien has exhausted all administrative remedies available to the alien as of right

8 U.S.C. § 1229a(c)(6) (2004) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section.

. . .

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

8 C.F.R. § 1003.23 Reopening or reconsideration before the Immigration Court

(b) Before the Immigration Court –

(1) In general. An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals. Subject to the exceptions in this paragraph and paragraph (b)(4), a party may file only one motion to reconsider and one motion to reopen proceedings. A motion to reconsider must be filed within 30 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before July 31, 1996, whichever is later. A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before September 30, 1996, whichever is later. A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion. The time and numerical limitations set forth in this paragraph do not apply to motions by the Service in removal proceedings pursuant to section 240 of the Act. Nor shall such limitations apply to motions by the Service in exclusion or

deportation proceedings, when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(e) of this chapter.

. . .

(3) Motion to reopen. A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material. Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents. A motion to reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. A motion to reopen for the purpose of providing the alien an opportunity to apply for any form of discretionary relief will not be granted if it appears that the alien's right to apply for such relief was fully explained to him or her by the Immigration Judge and an opportunity to apply therefore was afforded at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Pursuant to section 240A(d)(1) of the Act, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 240A(a) (cancellation of removal for certain permanent residents) or 240A(b) (cancellation of removal and adjustment of status for certain nonpermanent

residents) may be granted only if the alien demonstrates that he or she was statutorily eligible for such relief prior to the service of a notice to appear, or prior to the commission of an offense referred to in section 212(a)(2) of the Act that renders the alien inadmissible or removable under sections 237(a)(2) of the Act or (a)(4), whichever is earliest. The Immigration Judge has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief.

(4) Exceptions to filing deadlines –

(i) Asylum and withholding of removal. The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply if the basis of the motion is to apply for asylum under section 208 of the Act or withholding of removal under section 241(b)(3) of the Act or withholding of removal under the Convention Against Torture, and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. The filing of a motion to reopen under this section shall not automatically stay the removal of the alien. However, the alien may request a stay and, if granted by the Immigration Judge, the alien shall not be removed pending disposition of the motion by the Immigration Judge. If the original asylum application was denied based upon a finding that it was frivolous, then the alien is ineligible to file either a motion to reopen or reconsider, or for a stay of removal.

ANTI-VIRUS CERTIFICATION

Case Name: Martins v. Gonzales

Docket Number: 05-6756-ag

I, Louis Bracco, 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 CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 4/2/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: April 2, 2007