05-5914-ag

To Be Argued By:
ANN M. NEVINS

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FOR THE SECOND CIRCUIT

United States Court of Appeals

Docket No. 05-5914-ag

JINLING CHEN,

Petitioner,

-vs-

UNITED STATES DEPARTMENT OF JUSTICE, INS,

Respondents.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR RESPONDENTS

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STATEMENT OF JURISDICTION

This Court has jurisdiction under § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (2005), to review the petitioner's challenge to the Board of Immigration Appeals' final order dated October 18, 2005, denying him withholding of removal, and relief under the Convention Against Torture. The petition for review was filed on November 2, 2005, and is therefore timely. *See* 8 U.S.C. § 1252(b)(1) (establishing 30-day filing deadline).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a reasonable factfinder would be compelled to reverse the Immigration Judge's adverse credibility determination, where the petitioner's statements and evidentiary submissions were either implausible or internally inconsistent on material elements of his claim, and where the petitioner failed to adequately explain the inconsistencies.

2. Whether the Board of Immigration Appeals' dismissal of petitioner's appeal of the Immigration Judge's decision based on allegations of ineffective assistance of counsel was arbitrary, irrational, or contrary to law.

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FOR THE SECOND CIRCUIT

Docket No. 05-5914-ag

JINLING CHEN,

Petitioner,

-vs-

UNITED STATES DEPARTMENT OF JUSTICE, INS,[1]

Respondents.

ON PETITION FOR REVIEW FROM
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BRIEF FOR RESPONDENTS

Preliminary Statement

Jinling Chen (Chen or petitioner), a native and citizen of the People's Republic of China (China), petitions this Court for review of a decision of the Board of Immigration Appeals (BIA) dated October 18, 2005 (Government

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[1] Pursuant to 8 U.S.C. § 1252(b)(3)(A), the proper respondent is Attorney General Alberto Gonzales. The caption should be amended appropriately.

Appendix (GA) 2; 82). The BIA affirmed the decision of an Immigration Judge (IJ) (GA 41-49) dated July 13, 2004, denying petitioner's applications for withholding of removal and CAT[2] under the Immigration and Nationality Act of 1952, as amended (INA), and ordering him removed from the United States. (GA 2 (BIA's decision), GA 41-49 (IJ's decision and order)).

Petitioner claims that he is entitled to relief under CAT, and to withholding of removal, due to alleged past persecution of himself, his mother and his father by the Chinese government, and due to his alleged fear of future persecution, for his illegal departure from China and for his speculation that someday he may marry and have more children than are permitted by the Chinese government's family planning policy.

Substantial evidence supports the IJ's determination that petitioner failed to provide credible testimony and evidence in support of his claim for withholding of removal and CAT. Petitioner waived his initial claim for asylum and conceded removability.[3] (GA 66; 72, 78-79,

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

[3] Pursuant to 8 U.S.C. § 1158(a)(2(B), an alien may apply for asylum by filing an application within one year after (continued...)

81, 239). The IJ denied petitioner's claim for withholding of removal after finding that petitioner had failed to demonstrate either past persecution or a well-founded fear of future persecution, or that he qualified for relief under CAT. (GA 48).

Statement of the Case

On or about March 8, 2001, petitioner entered the United States by crossing the Canadian border. (GA 82-83). More than two years later, on July 2, 2003, a Notice to Appear was issued, charging petitioner with being a removable alien present in the United States without being admitted, and being an alien who arrived in the United States at a time or place other than as designated by the Attorney General. (GA 258). After being released when a relative posted a bond, petitioner filed an application for withholding of removal and relief under CAT on February 6, 2004. (GA 99-111; 71-73).

Petitioner, accompanied by retained counsel and an interpreter, appeared on July 13, 2004, before an Immigration Judge ("IJ") for a hearing on removal. (GA 39-40; 41-49; 74-98). The IJ issued an oral ruling (a) determining that petitioner waived his claim for asylum; (b) determining that petitioner failed to meet his burden of

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[3] (...continued)
the date of the alien's arrival in the United States. Here, petitioner claims he arrived in the United States on March 8, 2001, and his Form I-589 application was filed on February 6, 2004. (GA 72; 78-79; 81; 99-111; 214-222, 239).

proof as to relief under CAT; and (c) denying withholding of removal. (GA 39-40; 41-49).

On July 20, 2004, petitioner filed a timely notice of appeal to the BIA. (GA 32-33). On June 18, 2005, he filed a brief with the BIA. (GA 18-24). On August 18, 2005, petitioner filed a letter with the BIA attaching three letters in Chinese, with translations, to support his grounds for appeal. (GA 3-14). Petitioner did not move to open the IJ's decision in order to submit new evidence. (GA 2).

On October 18, 2005, the BIA issued an order summarily affirming the IJ's decision denying petitioner's claim for CAT relief and withholding of removal. (GA 2). The BIA also dismissed petitioner's appeal to the extent it sought relief on a claim of ineffective assistance of counsel. (GA 2).

With regard to the documents submitted by petitioner on August 18, 2005, the BIA determined that even if it construed petitioner's letter as a motion to open the IJ's order, it would deny the motion to open because the petitioner failed to demonstrate that the documents included new information or information which was previously unavailable. (GA 2). The BIA further found that the consideration of the evidence would not change the result in petitioner's case if admitted. (GA 2).

On November 2, 2005, petitioner filed a timely petition for review with this Court.

Statement of Facts

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

On or about March 8, 2001, petitioner entered the United States by crossing the Canadian border. (GA 82-83). More than two years later, on July 2, 2003, a Notice to Appear was issued, charging petitioner with being a removable alien present in the United States without being admitted, and being an alien who arrived in the United States at a time or place other than as designated by the Attorney General. (GA 258). On July 2, 2003, Chen was arrested in Michigan while applying for a driver's license using a fraudulent Chinese passport, birth certificate and marriage certificate. (GA 18; 61; 258-260). Chen was served with the Notice to Appear for removal proceedings on the same day. (GA 18; 258-260).

On July 24, 2003, over two years after Chen entered the United States, a hearing was held before Immigration Judge Terry C. Christian in Detroit, Michigan, to consider Chen's request for redetermination of his bond. (GA 50-57; 99). During the hearing the IJ learned that Chen had an attorney in Chicago and advised Chen to have his attorney enter an appearance. (GA 54-56). The hearing was adjourned with no action taken. (GA 57). Thereafter, in August of 2003, another hearing was held before the IJ in Detroit, Michigan, to consider Chen's request for release on bond. (58-70). Chen was represented by Attorney Jo Li. (58-59). At that hearing Attorney Li advised the IJ that Chen came into the United States in March 2001, and

was seeking withholding of removal and protection under the Convention Against Torture; Chen had an original passport issued by the Chinese government and during the intervening two years he lived with his uncle in New York. (GA 63). Attorney Li represented that he had met Chen's uncle in New York Immigration Court when Attorney Li was there for another case. (GA 63). Attorney Li advised that Chen's uncle would post bond for him of $25,000 to ensure his appearance, and the IJ agreed to release Chen on those terms. (GA 64). Attorney Li expressly conceded Chen's removability. (GA 66).

On or about December 1, 2003, Attorney Jules E. Coven filed a motion to substitute the firm of Bretz & Coven, LLP, as Chen's counsel in lieu of Attorney Li, and a motion changing venue from Detroit, Michigan to New York, New York. (GA 299-254). The petitioner conceded removability in the motion to change venue. (GA 239). An IJ granted the motion changing venue on December 19, 2003. (GA 227-228). The record is silent as to a ruling on the motion to substitute counsel, but attorneys from the law firm of Bretz & Coven, LLP continued to appear with Chen at Immigration Court hearings in February 2004 and July 2004. (GA 71-73; 74-98).

Chen filed a Form I-589, with an Affidavit, dated November 26, 2003 (the "Original Application"), on February 6, 2004, seeking relief under the CAT and withholding of removal. (GA 99 to 111; 214-222). Chen later amended his Form I-589 on or about July 13, 2004 (the "Amended Application"), and submitted copies of his resident card, his birth certificate, his permanent resident card, his mother's death certificate and the United States

Department of State's 2003 Country Report for China. (GA 112-214; 144 to 213). Chen also submitted an airbill from China dated January 23, 2004, indicating how and when the documents from China arrived in the United States. (GA 141-143).

B. Chen's Removal Proceedings

On February 6, 2004, the IJ held a hearing in New York, New York at which the petitioner was represented by Attorney Garo Kapikian. (GA 71-73). At that hearing, petitioner and his counsel confirmed that Chen was seeking withholding of removal and relief pursuant to the CAT, but was not seeking asylum. (GA 72; 78-79; 81).

On July 13, 2004, the IJ held a removal hearing at which Chen appeared represented by his counsel, Attorney Garo Kapikian. (GA 75). An interpreter was present to translate for Chen. (GA 74).

1. Documentary Submissions

Chen's Original Application states that he left China in January 2001, and entered the United States by crossing the Canadian border into New York on March 8, 2001. (GA 99). According to the Original Application, Chen was not married and had no children as of November of 2003. (GA 100-101). Chen's Original Application disclosed that he was from Fuzhou, Fujian Province, China, and that he had attended high school in Fuzhou, China. (GA 102). Chen claimed that his parents were both born in Fujian Province, China, and his mother was deceased. (GA 102). Chen further claimed in the Original

Application that he was seeking asylum and withholding of removal based on his political opinion and the Torture Convention. (GA 103). His Original Application stated that he feared harm and mistreatment if he returned to China. (GA 103).

Chen admitted in his Original Application that he had never been accused, charged, arrested, detained, interrogated, convicted, sentenced or imprisoned in any country other than the United States. (GA 104). Chen further admitted in the Original Application that neither he nor any family member had ever belonged to or been associated with any organizations or groups in China, such as a political party, student group, labor union, religious organization, military or paramilitary group, civil patrol, guerilla organization, ethnic group, human rights group, or the press or militia. (GA 104).

Chen also admitted in the Original Application that he did not apply for asylum within one year of entering the United States. (GA 106). Although Chen's application states that he is applying for asylum, he attached an Affidavit dated November 26, 2003, to the Original Application which seeks withholding of removal and relief under the CAT, but not asylum. (GA 108). Chen states in the Affidavit that he was born in 1982, and left China in 2001 because his stepmother was mentally and physically abusing him. (GA 108). Chen further states in the Affidavit that he left China without permission on January 3, 2001, and with the help of smugglers reached Hong Kong on February 2, 2001. (GA 108). According to the Affidavit, Chen then traveled to Vancouver, Canada, where he stayed for approximately two weeks. (GA 108).

Chen then traveled to Ottawa, Canada and was smuggled across the Canadian border to the United States in March of 2001. (GA 108).

Chen further states in his Affidavit that he believes he would be subject to a very high fine, torture, imprisonment or a labor camp if forced to return to China. (GA 109). Chen explains that he was able to pay smugglers to leave China by borrowing money from his uncles and cousins. According to Chen's statement in his Affidavit, he would be unable to pay a fine since his relatives would not be willing to lend him money for that purpose. (GA 109). Chen states this is because work is scarce in his province. (GA 109). Chen claims in the Affidavit that if he fails to pay the fine, he would be imprisoned indefinitely, tortured or placed in a labor camp or re-education camp. (GA 109). Chen bases his claims regarding imposition of a fine, imprisonment and labor camps on neighbors from his village who were allegedly punished for leaving China illegally. (GA 109). Chen does not recount through his Affidavit any specific examples of torture of Chinese citizens who return to China after leaving without permission. (GA 108-109).

The Amended Application modified his answer to a question inquiring whether he, his family or close friends ever experienced harm or mistreatment or threats. (GA 103; 114). According to the Amended Application, Chen's mother was persecuted to death for violating the coercive birth control policy in China and Chen himself was beaten for the same reason. (GA 114). To support that assertion, Chen submitted another affidavit dated July 7, 2004, in which he relates the following information:

Chen's mother died on the abortion operating table when she was seven or eight months pregnant with a child; Chen's grandmother told him that on July 10, 1983, five family planning officials from the town government burst into his home when he was approximately 17 months old; the family requested that the planning officials not take his mother away for a forced abortion; Chen's father tried to stop them from taking away Chen's mother but he was beaten to the ground and the mother was removed from the home; the following day the family learned that the mother had died during the operation; Chen's father was beaten again when he tried to get an explanation for Chen's mother's death; when Chen was sixteen he went to town hall to "reason with the Town Chief in his office"; Chen was then beaten by five or six officers and then burned by a cigarette and left in the street; three years later, in 2001, Chen's uncle assisted Chen in meeting a smuggler who arranged for him to leave China illegally and Chen later entered the United States after traveling through Canada. (GA 115-121).

2. Chen's Testimony

On July 13, 2004, the IJ held a hearing at which Chen appeared represented by his counsel, Attorney Garo Kapikian. (GA 75). An interpreter was present to translate for Chen. (GA 74). Chen filed an amended Form I-589 at the hearing which his counsel explained included facts in addition to those stated in the first Form I-589. (GA 76-77; 81).

At the July 2004 hearing Chen asserted for the first time, in testimony and his Amended Application, that he left China because of the government birth control policy. (GA 84; 114-121). According to Chen's testimony, his mother became pregnant when Chen was almost one year old. (GA 84). His mother was afraid to leave the family's home in Fuzhou, Fujian Province, because someone might see her and inform the government about her pregnancy. (GA 84). Chen learned this from his grandmother. (GA 84). Chen testified that on July 10, 1983, five Chinese government officials came to the family's home and took his mother away for an abortion. (GA 85). According to Chen, all of his family members begged the government officials not to take his mother away. (GA 85). Chen testified that his father was knocked to the ground when he tried to stop the officials from taking Chen's mother away. (GA 84-85). Chen further testified that his mother was taken to a hospital about 20 minutes away from the family home and died on the abortion table due to her already poor health. (GA 86). Chen stated that his father was so upset that he went to the township government and he "want[ed] the government pay my mother's life back to us." (GA 87). Chen's father was hit and he was carried home by others. (GA 87). After that event, according to Chen's testimony, the family stopped bothering the government until Chen was 16 years old. (GA 87). At that time, Chen went to the township leadership to get a "reasonable answer" about his mother's murder. (GA 87-88). Chen testified that they responded that Chen's mother's death "had nothing to do with them," and that five or six people started hitting him and provided him with no answer for his mother's death. (GA 87). Chen fell through a window and cut his hand. (GA 88). Chen

testified that he did not receive any medical treatment for his beating. (GA 88). After the beating, Chen testified he was burned with a cigarette and then dragged out of the office where he lay outside of the building for about an hour. (GA 89). Chen eventually went home. (GA 89).

Chen testified that his uncle eventually learned about the incident with the officials and introduced Chen to a snakehead, or smuggler. (GA 90). Three years after the incident with the officials, in 2001, Chen traveled to Wu Han and obtained a passport. (GA 90). Chen then left China via Hong Kong and arrived in Vancouver, Canada. (GA 90). From Vancouver, Chen traveled to Ottawa and then Toronto, Canada. (GA 90-91). At two o'clock in the morning on March 8, 2001, the smugglers took Chen in a boat across a river to the United States. (GA 91).

Chen stated that he does not want to return to China because he hates the government and believes he will be murdered by the government the same way his mother was murdered. (GA 92). Chen testified that he does not personally know of anyone, other than his mother, who was persecuted by the Chinese government. (GA 92).

Chen admitted that he had no records of committing any offenses in China. (GA 96). Chen testified that his grandmother and father still live in China. (GA 96). Chen further testified that his uncle, who introduced him to the smuggler, was living in the United States in 2001 at the time of Chen's departure from China. (GA 96).

C. The IJ's Decision

On July 13, 2004, the IJ issued an oral decision denying withholding of removal and relief under the CAT. (GA 41-49). The IJ found that Chen had conceded removability and that the only issues to be determined were Chen's application for withholding of removal and relief under the CAT. (GA 41; 66; 72; 78-79; 81; 99-111; 214-222; 239). In considering Chen's claim of past persecution in China based on Chen's views of the government family planning policies, the IJ found Chen's testimony not credible. (GA 44-48). In particular, the IJ determined that Chen's original Form I-589 bore no resemblance to the amended Form I-589 in that: (a) in the original Form I-589 Chen states that he left China because his stepmother was mentally and physically abusing him; but (b) in the amended Form I-589 and in his testimony on July 13, 2004, he states that he left China to avoid the child planning policy. (GA 44-45). The IJ found significant that Chen offered no testimony relating to any harm or abuse suffered at the hands of the stepmother, and that the original Form I-589 does not mention the circumstances surrounding his mother's death in 1983. (GA 45). The IJ found Chen's explanation for the discrepancy, that he had not known he could use his view on the Chinese child planning policy to seek asylum, as implausible. (GA 45). The IJ found a significant evidentiary gap in the absence of any corroborating evidence, such as affidavits from Chen's father or grandmother. (GA 46-47).

With respect to Chen's claim that he had suffered past torture because of his views of the Chinese government's

family planning policies, the IJ found Chen's testimony not credible. (GA 48). In particular, the IJ questioned why Chen's family, having had one family member (the father) viciously beaten in 1983 and another (the mother) allegedly murdered by the government family planning apparatus, would wait three years to arrange for Chen to leave China after Chen was allegedly beaten or tortured by the same type of government officials. (GA 48). Based on the logical inconsistencies in the testimony, the IJ found this testimony to be not credible. (GA 48).

The IJ further found that Chen had failed to meet his burden to establish that upon returning to China he would be subject to torture because of either his views of the country's family planning policies or because of his 2001 illegal exit from the country. (GA 47-48).

Accordingly, the IJ ordered Chen removed from the United States. (GA 48).

D. The BIA's Decision

On October 18, 2005, the BIA issued a per curiam opinion that adopted and affirmed the IJ's decision as to the denial of withholding of removal and relief under the CAT. (GA 2). The BIA further agreed with the IJ that the petitioner did not demonstrate that it is more likely than not that he would be tortured if returned to China and found that there was no evidence that the petitioner suffered past torture. (GA 2). The BIA also found that the petitioner did not demonstrate that he could not relocate to a part of the country where he is not likely to be tortured. (GA 2).

The BIA noted that the respondent presented further evidence to support his applications for relief but determined that the record under review is the record before the IJ. (GA 2). Even if the BIA were to consider the submission as a motion to reopen, the BIA determined that the respondent had not demonstrated that such evidence is new and previously unavailable. (GA 2). The BIA further determined that consideration of the additional evidence would not change the result in petitioner's case. (GA 2).

The BIA dismissed the petitioner's claim of ineffective assistance of counsel because petitioner failed to meet the requirements set forth in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1987), *petition for review denied*, 857 F.2d 10 (1st Cir. 1988). In particular, the BIA noted that petitioner failed to support his claim with a detailed affidavit, inform his previous attorney of the allegations of misconduct, provide the attorney with the opportunity to respond, state whether a complaint had been filed with the appropriate disciplinary authorities with respect to the attorney's alleged violation of ethical or legal responsibilities, if not, petitioner did not explain why a complaint was not filed, and had not demonstrated that he suffered prejudice. (GA 2).

This petition for review followed.

SUMMARY OF ARGUMENT

I. The IJ properly denied Chen's application for withholding of removal. Substantial evidence supports the IJ's determination that Chen's account of alleged

persecution he had suffered in China was not believable due to inconsistencies between the first written application for withholding, the second written application for withholding and Chen's testimony. Chen's final account of his persecution, relating that he had been beaten in 1998 by family planning officials when he confronted them about his mother's death in 1983, and that as a result of the single beating he had fled China three years later, in 2001, was implausible and not credible, and the IJ's decision properly reflects specific, cogent reasons for the adverse credibility determination which bear a legitimate nexus to that finding. Because a reasonable factfinder would not be compelled to find that Chen had suffered persecution in China prior to his 2001 departure, the denial of withholding of removal should be upheld, and the instant petition should be denied.

II. The IJ's denial of protection under the Torture Convention also finds substantial support in the record. Having already found Chen's claims to be incredible or implausible, the IJ properly did not credit the only evidence in the record before the IJ that would arguably support Chen's claim that he would be imprisoned upon return to China on any basis: a State Department country report that some prisoners in China are mistreated, a written statement that Chen knew of neighbors who were fined for leaving China illegally and when the fines were unpaid they were put in jail or a labor camp. Further, the IJ properly concluded the record is utterly lacking in any evidence that Chen would be tortured within the meaning of the Torture Convention upon a return to China. Accordingly, the IJ properly denied Chen protection under the CAT.

III. Chen's final claim, challenging the BIA's dismissal of his claim that he was prejudiced by ineffective assistance of his counsel, was forfeited because Chen did not exhaust his administrative remedies before the BIA by meeting the requirements to assert such a claim, as set forth in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1987), *petition for review denied*, 857 F.2d 10 (1st Cir. 1988).

ARGUMENT

I. THE IMMIGRATION JUDGE PROPERLY DETERMINED THAT CHEN FAILED TO ESTABLISH ELIGIBILITY FOR WITHHOLDING OF REMOVAL BECAUSE HE DID NOT ESTABLISH PAST PERSECUTION OR A WELL-FOUNDED FEAR OF FUTURE PERSECUTION

A. Relevant Facts

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

B. Governing Law and Standard of Review

Two forms of relief are potentially available to aliens claiming that they will be persecuted if removed from this country: asylum and withholding of removal.[4] *See* 8

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[4] "Removal" is the collective term for proceedings that previously were referred to, depending on whether the alien had effected an "entry" into the United States, as "deportation" (continued...)

U.S.C. §§ 1158(a), 1231(b)(3) (2005); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995). Although these types of relief are "'closely related and appear to overlap,'" *Carranza-Hernandez v. INS*, 12 F.3d 4, 7 (2d Cir. 1993) (quoting *Carvajal-Munoz v. INS*, 743 F.2d 562, 564 (7th Cir. 1984)), the standards for granting asylum and withholding of removal differ, *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987); *Osorio v. INS*, 18 F.3d 1017, 1021 (2d Cir. 1994).

1. Asylum

Here, the petitioner waived any claim to asylum, through his various counsel and directly, several times leading up to and during the removal hearing. (GA 66; 72, 78-79, 81, 239). An alien may apply for asylum by filing an application within one year after the date of the alien's arrival in the United States. 8 U.S.C. § 1158(a)(2)(B). Here, petitioner admits he arrived in the United States on March 8, 2001, but his Form I-589 application was not filed until February 6, 2004. (GA 72; 78-79; 81; 99-111; 214-222, 239). Accordingly, the petitioner is statutorily ineligible to apply for asylum. 8 U.S.C. § 1158(a)(2)(B).

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[4] (...continued)
or "exclusion" proceedings. Because withholding of removal is relief that is identical to the former relief known as withholding of deportation or return, *compare* 8 U.S.C. § 1253(h)(1) (1994) *with id.* § 1231(b)(3)(A) (2005), cases relating to the former relief remain applicable precedent.

2. Withholding of Removal

Unlike the discretionary grant of asylum, withholding of removal is mandatory if the alien proves that his "life or freedom would be threatened in [his native] country because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b) (3)(A) (2005); *Zhang*, 55 F.3d at 738. To obtain such relief, the alien bears the burden of proving by a "clear probability," *i.e.*, that it is "more likely than not," that he would suffer persecution on return. *See* 8 C.F.R. § 208.16 (b)(2)(ii)(2005); *INS v. Stevic*, 467 U.S. 407, 429-30 (1984); *Melgar de Torres v. Reno*, 191 F.3d 307, 311 (2d Cir. 1999). "Asylum gives the alien the right to legally remain in the United States, while withholding of return only enables the alien to avoid returning to the country in which the persecution would occur." *Zhang*, 55 F.3d at 737.

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

of future persecution. *See Melgar de Torres v. Reno*, 191 F.3d 307, 315 (2d Cir. 1999); 8 C.F.R. § 208.13(b)(1)(I) (2005).

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

Although "corroboration is not always required where the applicant's testimony is credible and detailed," *Diallo*, 232 F.3d at 287, this Circuit agrees that "where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided or an explanation should be given as to why such information was not presented." *Diallo*, 232 F.3d at 285. "An applicant may be required to provide any reasonably available documentation to corroborate the elements of her claim, or explain why such documentation is unavailable, and an IJ may rely on the failure to do so in finding that the applicant has not met her burden of proof." *Kyaw Zwar Tun v. U.S. I.N.S.*, 445 F.3d 554, 563 (2d Cir. 2006).

Further, when a petitioner "has provided two distinct, non-overlapping accounts of persecution, an IJ will be

unable to point to any 'specific inconsistencies' between these accounts because the accounts are inconsistent *in toto*. In such circumstances, an IJ must instead rely on the commonsense observation that it is inconsistent for a petitioner to respond to the same question about the nature of his asylum claim with two entirely different responses." *Guan v. Gonzales*, 432 F.3d 391, 398 (2d Cir. 2005).

3. Standard of Review

This Court reviews the determination of whether an applicant for asylum or withholding of removal has established past persecution or a well-founded fear of persecution under the substantial evidence test. *Zhang v. INS*, 386 F.3d 66, 73 (2d Cir. 2004); *Wu Biao Chen*, 344 F.3d at 275 (factual findings regarding asylum eligibility must be upheld if supported by "reasonable, substantive and probative evidence in the record when considered as a whole") (internal quotation marks omitted); *see Secaida-Rosales v. INS*, 331 F.3d 297, 306-07 (2d Cir. 2003); *Melgar de Torres*, 191 F.3d at 312-13 (factual findings regarding both asylum eligibility and withholding of removal must be upheld if supported by substantial evidence). "Under this standard, a finding will stand if it is supported by 'reasonable, substantial, and probative' evidence in the record when considered as a whole." *Secaida-Rosales*, 331 F.3d at 307 (quoting *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000)).[5]

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[5] This Court has noted that in 1996, Congress replaced the "substantial evidence" rule drawn from general administrative law with a new standard set forth in 8 U.S.C.

(continued...)

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

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[5] (...continued)
§ 1252(b)(4)(B), that "the administrative findings of fact are *conclusive* unless any reasonable adjudicator would be *copelled* to conclude to the contrary." (Emphasis added). Despite the fact that this new standard appeared to be even more deferential, the Court was compelled by precedent to continue to characterize its review in terms of "substantial evidence." *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 334 n.113 (2d Cir. 2006).

[6] Although judicial review ordinarily is confined to the BIA's order, *see, e.g.*, *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001), courts properly review an IJ's decision where, as here (GA 2), the BIA adopts that decision. *See Secaida-Rosales*, 331 F.3d at 305; *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994). Accordingly, this brief treats the IJ's decision as the relevant administrative decision as supplemented by the BIA's decision. Where "the BIA adopts the decision of the IJ and merely supplements the IJ's decision," this Court "review[s] the decision of the IJ as supplemented by the BIA." *Yan Chen v. Gonzales*, 417 F.3d 268, 271 (2d Cir. 2005).

. . . past persecution or fear of future persecution.'" *Wu Biao Chen*, 344 F.3d at 275 (omission in original) (quoting *Diallo*, 232 F.3d at 287).

The scope of this Court's review under that test is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 71; *Wu Biao Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313; *see also Zhang v. INS*, 386 F.3d at 74 ("Precisely because a reviewing court cannot glean from a hearing record the insights necessary to duplicate the fact-finder's assessment of credibility what we 'begin' is not a *de novo* review of credibility but an 'exceedingly narrow inquiry' . . . to ensure that the IJ's conclusions were not reached arbitrarily or capriciously") (citations omitted). Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal 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 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 relief], but *compels* it." *Id.* at 481 n.1.

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

Because the IJ is in the "best position to discern, often at a glance, whether a question that may appear poorly worded on a printed page was, in fact, confusing or well understood by those who heard it," this Court's review of the fact-finder's determination is exceedingly narrow. *Zhang v. INS*, 386 F.3d at 74; *see also id.* ("'[A] witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression.'") (quoting *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946)) (citation omitted); *Sarvia-Quintanilla v. United States INS*, 767 F.2d 1387, 1395 (9th Cir. 1985) (noting that IJ "alone is in a position to observe an alien's tone and demeanor . . . [and is] uniquely qualified to decide whether an alien's testimony has about it the ring of truth"); *Kokkinis v. District Dir. of INS*, 429 F.2d 938, 941-42 (2d Cir. 1970) (court "must accord great weight" to the IJ's credibility findings). The "exceedingly narrow" inquiry "is meant to

ensure that credibility findings are based upon neither a misstatement of the facts in the record nor bald speculation or caprice." *Zhang v. INS*, 386 F.3d at 74. "Demeanor is virtually always evaluated subjectively and intuitively, and an IJ therefore is accorded great deference on this score – no less deference than that accorded other fact-finders." *Tu Lin v. Gonzales*, 446 F.3d 395, 400 (2d Cir. 2006) (per curiam).

An IJ may rely on an inconsistency concerning a single incident in an asylum applicant's account to find that applicant not credible, "provided the inconsistency affords 'substantial evidence' in support of the adverse credibility finding." *Majidi v. Gonzales*, 430 F.3d 77, 80 (2d Cir. 2005) (upholding adverse credibility finding based on discrepancies between applicant's written application and oral testimony). Where an IJ's adverse credibility finding is based on specific examples in the record of inconsistent statements made by an asylum applicant about matters material to the asylum claim, "a reviewing court will . . . not be able to conclude that a reasonable adjudicator was compelled to *find* otherwise." *Lin v. U.S. Dep't. of Justice*, 413 F.3d 188, 191 (2d Cir. 2005) (emphasis in the original) (holding that petitioner's inability to remember basic personal information, such as whether she was married in the spring or fall, supported adverse credibility determination). When the essential facts of alleged persecution, which go to the heart of a petitioner's claim for relief, are omitted from a petitioner's initial application and are later included in an amendment or supplement to the application, an IJ may properly base an adverse credibility finding on the petitioner's omission. *See Dong v. Ashcroft,* 406 F.3d 110, 111 -112 (2d Cir. 2005) (per

curiam) (citing *Ramsameachire v. Ashcroft*, 357 F.3d 169, 182 (2d Cir.2004)).

"[E]ven where an IJ relies on discrepancies or lacunae that, if taken separately, concern matters collateral or ancillary to the claim, the cumulative effect may nevertheless be deemed consequential by the fact-finder." *Tu Lin,* 446 F.3d at 402 (internal quotation marks and citations omitted); *Liang Chen v. U.S. Attorney General*, 454 F.3d 103, 106-108 (2d Cir. 2006) (per curiam). Where inconsistencies among a petitioner's statements are "self-evident" – for example, where a petitioner makes no reference to alleged incidents of persecution in a written asylum application, but relies on such incidents during hearing testimony – neither the IJ nor the BIA is required to solicit from the petitioner an explanation for the inconsistency before basing an adverse credibility finding on those inconsistencies. *Ye v. Department of Homeland Security*, 446 F.3d 289, 295-96 (2d Cir. 2006) (per curiam); *Majidi*, 430 F.3d at 80.

When a petitioner "has provided two distinct, non-overlapping accounts of persecution, an IJ will be unable to point to any 'specific inconsistencies' between these accounts because the accounts are inconsistent *in toto*. In such circumstances, an IJ must instead rely on the commonsense observation that it is inconsistent for a petitioner to respond to the same question about the nature of his asylum claim with two entirely different responses." *Guan v. Gonzales*, 432 F.3d 391, 398 (2d Cir. 2005).

Although "corroboration is not always required where the applicant's testimony is credible and detailed," *Diallo*,

232 F.3d at 287, this Circuit agrees that "where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided or an explanation should be given as to why such information was not presented." *Diallo*, 232 F.3d at 285. "An applicant may be required to provide any reasonably available documentation to corroborate the elements of her claim, or explain why such documentation is unavailable, and an IJ may rely on the failure to do so in finding that the applicant has not met her burden of proof." *Kyaw Zwar Tun*, 445 F.3d at 554, 563; *Diallo*, 232 F.3d at 285.

In reviewing credibility findings, courts "look to see if the IJ has provided 'specific, cogent' reasons for the adverse credibility finding and whether those reasons bear a 'legitimate nexus' to the finding." *Id.* (quoting *Secaida-Rosales*, 331 F.3d at 307). Credibility inferences must be upheld unless they are "irrational" or "hopelessly incredible." *See, e.g.*, *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002) ("we defer to the fact finder's determination of . . . the credibility of the witnesses, and to the fact finder's choice of competing inferences that can be drawn from the evidence") (internal marks omitted); *NLRB v. Columbia Univ.*, 541 F.2d 922, 928 (2d Cir. 1976) (credibility determination reviewed to determine if it is "irrational" or "hopelessly incredible").

C. Discussion

Substantial evidence supports the IJ's determination that Chen failed to provide credible testimony in support of his application for withholding of removal, and thus

failed to establish eligibility for relief. Chen's account contained inconsistencies and implausibilities that went to the heart of his claims and when questioned about the conflicting responses, Chen failed to adequately explain the evidentiary deficiencies at the administrative level.

To establish that he is entitled to withholding of removal, Chen must have presented to the IJ evidence sufficient to prove by a clear probability that his life or freedom would be threatened upon his return to China because of his race, religion, nationality, membership in a particular social group, or political opinion. Here, as Chen failed to present such evidence by a wide margin, the IJ's credibility determination must stand.

In evaluating Chen's credibility, the IJ noted several areas of inconsistent evidence before him, including the oral testimony by the petitioner, the statements in the Original Application, the statements in the Amended Application and the absence of any corroborating statements by the petitioner's relatives including his grandmother, father and uncle. (GA 42-48) The IJ, after observing Chen's demeanor during the hearing and examining the two written applications, noted that the story of alleged persecution in the Amended Application seemed implausible for several reasons.

First, Chen provided two separate, non-overlapping accounts of his reasons for leaving China. The Original Application stated that Chen fled China because of abuse by his stepmother, yet in Chen's testimony during the removal hearing Chen did not say that the stepmother was the basis for the decision to flee China. (GA 46). Chen

testified instead that he left China due to persecution of his family by family planning officials in 1983, and of himself by family planning officials in 1998. Chen's explanation of the difference between his Original Application, his Amended Application and his testimony was that he did not know that the circumstances surrounding his mother's death in 1983 would be a basis for seeking political asylum. (GA 95). The IJ found this explanation was not credible since the attorneys who prepared his Original Application based on the allegations of abuse by his stepmother were the same attorneys who prepared his Amended Application alleging the facts surrounding the mother's death. (GA 45).[7] Furthermore, this explanation fails to explain the complete omission of any mention of Chen's beating in 1998 which Chen claims was the triggering event for his departure from China.

Because the essential facts of Chen's alleged persecution, which go to the heart of his claim for relief were omitted from his Original Application, a completely separate second set of facts was presented for the first time in the Amended Application, and the first story was completely abandoned in testimony at the removal hearing, the IJ properly based his adverse credibility

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[7] This is noteworthy to the extent Chen now alleges ineffective assistance of counsel based on his attorney's failure to submit affidavits from his grandmother, father and friend to the IJ during the hearing. Chen testified that he amended his application to include the claim of persecution based on the coercive family planning policies but was completely silent as to any affidavits he later alleges he gave to his attorney prior to the July 2004 hearing. *See* Part III, *supra.*

finding on the petitioner's initial omission. *See Guan,* 432 F.3d at 398.

Second, the IJ found Chen's assertion that he had been tortured in 1998, at the age of 16, by the family planning officials in China to be implausible. (GA 47). In particular the IJ found that Chen's three-year delay before leaving China in 2001 undermined his testimony regarding this event. (GA 47). If, as a teenager, Chen had been the victim of "gross abuse" at the hands of family planning officials then his family members would have taken earlier steps to assist him. (GA 47). Taking into consideration Chen's claim that one member of his family had been murdered (his mother) and another severely beaten (his father) by the same family planning officials, a three- year delay in arranging for Chen to flee was inconsistent and implausible. (GA 47-48). *See Tun*, 445 F.3d at 563; *Diallo*, 232 F.3d at 285.

Third, the IJ gave specific, cogent reasons why Chen's failure to provide corroborating evidence lead him to find Chen's account implausible. It is clear someone in China sent Chen some documents in January 2004. (GA 141-143). Yet, Chen did not offer any affidavits or letters from the father or grandmother at the July 2004 hearing to corroborate the 1983 and 1998 events, and offered no explanation for why such documents were unavailable. (GA 46). The IJ properly noted and relied on the lack of any corroborating letters or affidavits as to the essential elements of Chen's claims of persecution in making his credibility determination. (GA 46; 48). *See Tun*, 445 F.3d at 563; *Diallo*, 232 F.3d at 285.

Further, the IJ properly noted that Chen's uncle, who was allegedly instrumental in Chen's departure from China, was living in the United States. (GA 48). Yet, Chen offered neither testimony nor an affidavit from the uncle and did not explain the absence of these potential sources of corroborating evidence. The IJ properly relied upon the lack of this corroborating evidence in making his credibility determination. *See Tun*, 445 F.3d at 563; *Diallo*, 232 F.3d at 285.

As such, substantial evidence supports the IJ's decision, *see, e.g.*, *Qiu*, 329 F.3d at 152 n.6 ("incredibility arises from 'inconsistent statements, contradictory evidence, and inherently improbable testimony'" (quoting *Diallo*, 232 F.3d at 287-88)), and thus Chen has not met his burden of showing that a reasonable factfinder would be compelled to conclude he is entitled to relief. *See Zhang*, 386 F.3d at 73.

Even if the various factors cited by the IJ in the oral decision did not "unambiguously militate in favor of an adverse credibility determination, they also do not strongly suggest, much less 'compel,' a contrary conclusion." *Liang Chen v. U.S. Attorney General*, 454 F.3d 103, 106 (2d Cir. 2006) (per curiam).

II. THE IMMIGRATION JUDGE PROPERLY REJECTED CHEN'S CLAIM FOR RELIEF UNDER THE CONVENTION AGAINST TORTURE BECAUSE HE FAILED TO ESTABLISH IT IS MORE LIKELY THAN NOT THAT HE WOULD BE TORTURED UPON HIS RETURN TO CHINA

A. Relevant Facts

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

B. Governing Law and Standard of Review

1. Withholding of Removal Under the Convention Against Torture

Article 3 of the Convention Against Torture precludes the United States from returning an alien to a country where he more likely than not would be tortured by, or with the acquiescence of, government officials acting under color of law. *See Wang v. Ashcroft*, 320 F.3d 130, 133-34, 143-44 & n.20 (2d Cir. 2003); *Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001); *In re Y-L-, A-G-, R-S-R-*, 23 I. & N. Dec. 270, 279, 283, 285 (BIA 2002); 8 C.F.R. §§ 208.16(c), 208.17(a), 208.18(a) (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. Dept. of Justice*, 428 F.3d 391, 399 (2d Cir. 2005). 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 at 171.

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). Under CAT, an alien's removal may be either permanently withheld or temporarily deferred. *See* 8 C.F.R. §§ 208.16-17 (2005).

2. Standard of Review

This Court reviews the determination of whether an alien is eligible for protection under CAT under the "substantial evidence" standard. *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 177 (2d Cir. 2004)*; footnote 5, infra*. "An IJ may properly deny a CAT claim if he or she finds adverse credibility with respect to facts that form the 'only potentially valid basis' for the CAT claim." *Ye v. Department of Homeland Security*, 446 F.3d 289, 296 (2d Cir. 2006); *see also Xiao Ji Chen v. DOJ,* 434 F.3d 144, 163 (2d Cir.2006) ("[W]here ... the applicant relies largely on testimonial evidence to establish [his] CAT claim, and does not independently establish a probability of torture apart from [his] stated fear, an adverse credibility finding regarding that testimonial evidence may provide a sufficient basis for denial of CAT relief.").

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C. Discussion

Substantial evidence supports the IJ's determination that the petitioner failed to provide credible testimony or other credible evidence in support of his application for protection under the CAT. Having already found Chen's claims of previous persecution to be incredible or implausible, *see* Part II, Discussion*, infra,* the IJ properly did not credit the only other evidence in the record before the IJ that would arguably support Chen's claim that he would be tortured upon return to China: a State Department country report that some prisoners in China are mistreated, and Chen's affidavit included with his Original Application that Chen knew of neighbors who were fined for leaving China illegally and when the fines

were unpaid they were put in jail or a labor camp. (GA 144-213; 109).

To the extent the petitioner's basis for relief under the CAT rests upon the allegations of prior persecution in China, the IJ's determination that those allegations are not credible is supported by substantial evidence and should be affirmed. *See* Part II, Discussion, *infra.*

In his argument to this Court, Chen asserts for the first time that he has heard that "people who were repatriated back to China . . . were severely tortured by the detention officers," and refers to an affidavit from a friend he submitted to the BIA on August 18, 2005. Petitioner's Brief at 5; GA 12-14. Chen's Original Application also claimed without further elaboration that Chen believed he might be imprisoned, tortured or place in a labor or re-education camp for exiting China illegally. (GA 109). However, in that document Chen only claimed as a general matter that he knew people who were heavily fined and then punished for failing to pay the fines. (GA 109). At the removal hearing, Chen offered no testimony on this issue.

Although Chen submitted a Department of State Country Report for 2003, it was not discussed during the hearing before the IJ and there is no information in the Country Report substantiating his claim that individuals who are repatriated to China are mistreated or tortured. (GA 145-213). In his argument to this Court, the petitioner notes statements in the report to the effect that some detainees in China have been subjected to interrogations and beatings and that conditions in Chinese

prisons are harsh and degrading. However, the petitioner fails to demonstrate that it is more likely than not that he will be imprisoned, much less subjected to torture, upon his return to China because his exit from the country in 2001 was allegedly not authorized.

This Court has rejected a similar claim for CAT relief on the basis that while a petitioner's "testimony as well as portions of his 'country conditions' documents . . . indicate that *some* prisoners in China have been tortured, [the petitioner] has *in no way established that someone in his particular alleged circumstances is more likely than not to be tortured if imprisoned in China.*" *Lin v. U.S. Dep't of Justice*, 432 F.3d 156, 160 (2d Cir. 2005) (quoting *Wang v. Ashcroft*, 320 F.3d 130, 143-44 (2d Cir. 2003)) (emphasis added). In *Wang*, the Court specifically noted that "although some of the 'country conditions' reports submitted by the petitioner indicate that the government of China has committed serious human rights violations, including the torture and mistreatment of some prisoners, these documents by no means establish that prisoners in [the petitioner's] circumstances-namely, . . . unlawful emigrants-are 'more likely than not' to be tortured." *Wang*, 320 F.3d at 143-44; *Lin,* 432 F.3d at 160.

Accordingly, petitioner's vague and unsubstantiated claim that some individuals might be imprisoned upon repatriation fails to establish that the petitioner himself is more likely than not to be tortured upon repatriation to China.

III. THE BOARD OF IMMIGRATION APPEALS PROPERLY REJECTED CHEN'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO HIS FAILURE TO MEET THE REQUIREMENTS OF *MATTER OF LOZADA*

A. Relevant Facts

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

B. Governing Law and Standard of Review

1. Governing Law

In *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1987), *petition for review denied*, 857 F.2d 10 (1st Cir. 1988), the BIA prescribed three evidentiary requirements that must be met by aliens asking the BIA for relief on the basis of alleged ineffective assistance of counsel. These requirements serve several purposes: to provide the BIA with information necessary to its decision, to deter meritless claims, and to enable the BIA to regulate the attorneys practicing before it. *See id.* at 639.

The first *Lozada* requirement is that the alien's motion "be supported by an affidavit of the allegedly aggrieved respondent attesting to the relevant facts." *Id.*; *see also* 8 C.F.R. § 1003.2(c)(1) (2004) ("A motion to reopen proceedings . . . shall be supported by affidavits or other evidentiary material."). Because the BIA typically adjudicates claims of ineffective assistance of counsel

based on documentary submissions rather than by ordering new hearings, *see In re Rivera*, 21 I. & N. Dec. 599, 604 (BIA 1996), *petition for review denied*, 122 F.3d 1062 (4th Cir. 1997), the submission of an affidavit is critical to enable the BIA to decide the motion.

The second *Lozada* requirement is that "[b]efore allegations of ineffective assistance of former counsel are presented to the Board, former counsel must be informed of the allegations and allowed the opportunity to respond." *Lozada*, 19 I. & N. Dec. at 639. As the BIA has explained, "the potential for abuse is apparent where no mechanism exists for allowing former counsel, whose integrity or competence is being impugned, to present his version of events if he so chooses, thereby discouraging baseless allegations." *Id.*

The third *Lozada* requirement is that, where "it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities," an alien's motion to reopen must "reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not." *Id.* The BIA has emphasized the importance of filing a bar complaint, both for decision of particular cases and for more general policy reasons:

> The requirement of a bar complaint . . . serves important purposes . . . . First, it increases our confidence in the validity of the particular claim. Second, it reduces the likelihood that an evidentiary hearing will be needed. Third, it serves our long-term interests in policing the

> immigration bar. And, fourth[,] the requirement of filing a complaint, or adequately explaining why such a complaint has not been filed, protects against possible collusion between counsel and the alien client.

In re Rivera, 21 I. & N. Dec. at 605.

The BIA has repeatedly reaffirmed the *Lozada* requirements in subsequent cases. *See, e.g.*, *In re Assaad*, 23 I. & N. Dec. 553, 556-60 (BIA 2003), *petition for review dismissed*, 378 F.3d 471 (5th Cir. 2004); *In re Rivera*, 21 I. & N. Dec. at 602-05.

In *Zheng v. U.S. Department of Justice*, 409 F.3d 43 (2d Cir. 2005), and *Garcia-Martinez v. Department of Homeland Security*, 448 F.3d 511 (2d Cir. 2006), this Court held that an alien seeking to raise an ineffective assistance of counsel claim must substantially comply with *Lozada* in his or her presentation of the claim to the BIA. *See Garcia-Martinez*, 448 F.3d at 513-14; *Zheng*, 409 F.3d at 47. In the absence of substantial compliance, an alien "*forfeits* her ineffective assistance of counsel claim in this Court." *Zheng*, 409 F.3d at 47 (emphasis added); *see also Garcia-Martinez*, 448 F.3d at 513-14 (same). In so holding, the Court as observed that the *Lozada* requirements are "essential to establishing a full administrative record before the BIA," *Garcia-Martinez*, 448 F.3d at 513, and that the requirement of exhaustion of administrative remedies prevents the Court from considering an ineffective assistance of counsel claim that was not properly presented to the BIA, *see id.* at 513-14; *Zheng*, 409 F.3d at 46-47.

This Court does not require a "slavish adherence" to the requirements, holding only that substantial compliance is necessary. *Yang v. Gonzales*, No. 03-4973-ag, 2007 WL 530150 at *7 (2d Cir. 2007)(citing *Zheng,* 409 F.3d at 47). However, this Court has held that "essential information" should be presented initially to the BIA, "so that it can 'evaluate the substance' of an ineffectiveness claim in the first instance, and that a reviewing court should 'avoid any premature interference with the agency's processes.'" *Garcia-Martinez ,* 448 F.3d at 513 This is so in the context of a direct appeal. *See Hamid v. Ashcroft*, 336 F.3d 465 (6th Cir. 2003) (requiring adherence to *Lozada* on a direct appeal to the BIA of an IJ's removal order because "[s]ound policy reasons support compliance with the *Lozada* requirements," inasmuch as they "facilitate a more thorough evaluation by the BIA and discourage baseless allegations") (internal quotation marks and alteration omitted); *Arango-Aradondo*, 13 F.3d at 614 ("[C]laims regarding the omission of evidence resulting from allegedly ineffective assistance of counsel must first be presented to the BIA, *either on direct appeal* or through a motion to reopen.") (emphasis added).

This Court lacks jurisdiction to review, on direct appeal, allegations of ineffective assistance of counsel when the petitioner has failed to substantially comply with the requirements of *Matter of Lozada*. *Garcia-Martinez*, 448 F.3d at 513.

2. Standard of Review

The Court reviews the factual findings of the BIA, "to determine whether they are supported by substantial evidence and uphold those findings unless any reasonable factfinder would have been compelled to conclude to the contrary." *Yang,* 2007 WL 530150 at *7 (2d Cir. 2007) (citing *Diallo*, 232 F.3d at 287).

To the extent the BIA's decision to dismiss the claim of ineffective assistance of counsel is interpreted as a denial of a motion to reopen, Congress has given the Attorney General "broad discretion" to grant or deny motions to reopen, *INS v. Doherty*, 502 U.S. 314, 323 (1992), and therefore this Court will reverse a BIA decision denying a motion to reopen only if the Court finds that the BIA abused its discretion. *See Chen v. Gonzales*, 437 F.3d 267, 269 (2d Cir. 2006). This Court will find an abuse of discretion only where "the [BIA]'s decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary conclusions or statements; that is to say, where the [BIA] has acted in an arbitrary or capricious manner." *Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 93 (2d Cir. 2001) (citations omitted).

C. Discussion

Here, the petitioner failed to meet any of the *Lozada* requirements and as a result forfeited his claim of ineffective assistance of counsel before this Court. Review of the petitioner's appeal to the BIA as well as

Petitioner's Petition for Review and Petitioner's Brief filed in this Court demonstrates an absence of substantial compliance with *Lozada*. Chen filed no affidavit, failed to notify his prior counsel that he was alleging ineffective assistance of counsel, failed to indicate whether or not any complaint had been filed regarding the representation, and failed to demonstrate that he had been prejudiced by the alleged ineffective assistance.

On this record, this Court cannot evaluate the quality of representation Chen's attorney provided. The *Lozada* requirements not only permit the Court to review ineffectiveness claims meaningfully, they also alert an alien who is dissatisfied with the result of the proceedings, such as Chen, of what he must do to provide this Court with a record to determine whether he was treated fairly. By failing to meet the legal requirements which are a prerequisite to that review, Chen has forfeited his ineffective assistance of counsel claim in this Court. *Zheng*, 409 F.3d at 47; *Garcia-Martinez*, 448 F.3d at 513-14 (same).

This Court is without jurisdiction to review Chen's allegations of ineffective assistance of counsel when the petitioner has failed to substantially comply with the requirements of *Matter of Lozada,* as Chen has failed to exhaust his administrative remedies.

CONCLUSION

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

Dated: March 12, 2007

Respectfully submitted,

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 10,668 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

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