04-2696-ag

To Be Argued By:
RAYMOND F. MILLER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-2696-ag

SHOW CHING LIN,

Petitioner,

-vs-

ALBERTO R. GONZALES
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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

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STATEMENT OF JURISDICTION

The petitioner is an alien subject to an administratively final order of removal. For the petitioner's claim arising under the Convention Against Torture, this Court has appellate jurisdiction under § 242(b) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252(b) (2005), to review the challenge to the Board of Immigration Appeals' April 26, 2004, final removal order. With respect to her claim for asylum, however, the petitioner failed to raise the issues advanced for review before the Board of Immigration Appeals, and, therefore, this Court lacks jurisdiction to consider her claims. *See* INA § 242(d)(1), 8 U.S.C. § 1252(d)(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the petition for review with respect to the petitioner's claim for asylum should be dismissed because of her failure to exhaust administrative remedies?

2. Whether, even considering the petitioner's asylum claim on the merits, substantial evidence supported the Board of Immigration Appeals' decision to affirm the Immigration Judge's denial of the asylum claim?

3. Whether, with respect to the petitioner's claim under the Convention Against Torture, a reasonable factfinder would be compelled to reverse the Immigration Judge's finding that the petitioner did not establish that it is more likely than not that she would tortured upon return to China.

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BRIEF FOR ALBERTO R. GONZALES[1]
Attorney General of the United States

Preliminary Statement

Petitioner Show Ching Lin is a Chinese citizen who entered this country on October 13, 1988. JA 76, 399, 480. On January 26, 1999, the Immigration Judge ("IJ") hearing

[1] Pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Attorney General Gonzales should be substituted as the Respondent in this matter.

the matter denied her claim for asylum and ordered her removed. JA 39-40. The Board of Immigration Appeals ("BIA") subsequently remanded the case to allow the IJ to hear the petitioner's claim for relief under the Convention Against Torture. JA 218. On November 13, 2002, a second IJ denied her claim for relief under the Convention Against Torture and ordered her removed. JA 41-44. The BIA subsequently affirmed the decisions of both IJs. JA 2.

The petitioner now seeks judicial review of the second removal order, contending that the BIA improperly dismissed her appeal under the Convention Against Torture because she has given birth to two children in the United States. In the alternative, she also challenges the first removal order, contending that changed circumstances -- namely, the arrival of her two children after the IJ initially denied her asylum relief -- warrant the grant of asylum in this case.

With respect to the petitioner's present claim for asylum based on the birth of her two children, which she concedes was not raised before the IJ or the BIA in the context of her asylum claim, this Court should dismiss the petition for lack of jurisdiction for failure to exhaust administrative remedies. Alternatively, the Court should deny the petitioner's asylum claim because she failed to establish that a reasonable fact finder would be compelled to find that she suffered from past persecution or had a well-founded fear of future persecution.

With respect to the petitioner's claim under the Convention Against Torture, the Court should deny the claim because substantial evidence supported the IJs' determination that the petitioner had failed to prove that it

was more likely than not that she would be sterilized if removed to China.

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

Statement of the Case

On October 13, 1998, the petitioner arrived in Illinois and was detained by immigration authorities. JA 399, 480. On January 26, 1999, an Immigration Judge denied her petition for asylum and withholding of removal.[2] JA 39-40. On February 18, 1999, the petitioner filed an appeal of that decision to the BIA. JA 232.

On July 30, 1999, the BIA remanded the case to the IJ for consideration of the petitioner's claim under Article Three of the Convention Against Torture (hereinafter "CAT").[3] JA 218. The case was transferred from Illinois to New York. JA 115-120.

On November 13 , 2002, a second immigration judge denied the petitioner's claims under the CAT. JA 44. On

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[2] The petitioner was subsequently released on bond and moved to New York. *See, e.g.,* JA 117.

[3] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46 (annex, 39 U.N. GAOR Supp. No. 51 at 197), U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987; for United States Apr. 18, 1988).

December 11, 2002, she appealed that decision to the BIA. JA 22-24.

On April 26, 2004, the BIA summarily affirmed the decisions of both IJs and dismissed the consolidated appeal. JA 2. On May 25, 2004, the petitioner filed a timely petition for review with this Court.

Statement of Facts

Petitioner Lin is a citizen and native of China. JA 76 She was born in China on September 9, 1980, and entered the United States on October 13, 1998. JA 76, 399, 480. At that time, she had no valid travel documents and was detained by immigration authorities. JA 399, 480.

Hearings related to the removal petition were held before an Immigration Judge on November 24, 1998, JA 45-51 (in which the petitioner was informed of the charges against her, JA 51); December 1, 1998, JA 51-57 (which was adjourned for a three-week continuance to allow the petitioner to fill out an asylum application, JA 54); December 22, 1998, JA 57-65 (which was adjourned to allow the petitioner's counsel time to review documents, JA 62-63); January 5, 1999, JA 65-70 (which was adjourned so the petitioner could consult with her attorney, JA 66-68).

On January 26, 1999, the IJ held an evidentiary hearing in which the petitioner indicated that she was formerly a resident of the Fujian province of China and had two younger brothers. JA 78, 97. She stated that, having recently turned 18, she was required to report for a gynecological examination. JA 84-85. The petitioner

testified that a policeman gave her mother notice to report for the examination, but that she (the petitioner) tore up the document. JA 86, 104. The petitioner stated that she left her home and went to live with her aunt in another city in the Fujian province. JA 92. According to the petitioner, because she failed to report for the examination, her mother was arrested, fined, and subsequently released. JA 94, 96.

Further, the petitioner testified that fourteen years ago, her mother, after having her third child, was fined and the doors and windows of her residence were broken by the police. JA 97-8. Additionally, the petitioner stated that her father had been arrested during this time period. *Id*. The petitioner stated that she feared being beaten to death or arrested by government officials since she failed to report for the medical exam. JA 99.

The IJ denied the petitioner's request for asylum, JA 111-112. On February 18, 1999, the petitioner appealed the IJ's decision to the BIA. JA 232-234.

On July 30, 1999, the BIA remanded the case to the IJ for determination of whether the petitioner was entitled to relief under CAT. On December 1, 1999, the case was transferred from Illinois to New York, given that the petitioner had moved to New York. JA 115-120. Further hearings were held before the second IJ on February 29, 2000, JA 121-123 (which was adjourned because the petitioner had recently given birth, JA 122), May 2, 2000, JA124-126, (which was adjourned after receiving the address of the petitioner, JA 73), December 15, 2000, JA 127-136, (which was adjourned to allow the petitioner's counsel to move for a continuance, JA 133), and October

16, 2001 (JA 137-139) (which was adjourned after setting a hearing date).

On November 13, 2002, the IJ held an evidentiary hearing on the petitioner's CAT claim. JA 140-150. The parties stipulated that the petitioner now had two children. JA 142. On direct examination, the petitioner stated that upon her return to China she would be sterilized since she had two children after arriving in the United States. JA 142-143. She did not testify that she had been told that she would be sterilized. Further, she did not indicate that she even knew anyone who had two children and had been sterilized. She stated that prior to her departure, when she was 18 years old, government officials had requested that she have a medical checkup. JA 146. She stated that her mother had three children, but did not indicate that her mother had been sterilized. JA 145.

After hearing the testimony and reviewing the documentary evidence, the IJ concluded that the petitioner's fear was merely speculative. JA 42. The court denied the petitioner's request for relief under CAT. JA 43.

On December 11, 2002, the petitioner filed a notice of appeal with the BIA. JA 28-29. On April 26, 2004, the BIA summarily affirmed the decisions of both the Illinois and New York IJs, concluding that "the respondent has failed to raise any arguments which were not addressed by the Immigration Judges in their respective decisions, or which would cause us to overturn the Immigration Judges' decisions." JA 2.

SUMMARY OF ARGUMENT

1. With respect to the assertion that the BIA should have remanded the petitioner's claim for asylum in light of "changed circumstances," the petitioner concedes that this issue was not raised to the BIA. As such, the petitioner failed to exhaust her administrative remedies, and this Court accordingly lacks jurisdiction to consider her claim. *See* 8 U.S.C. § 1252(d)(1).

2. Even if this Court reaches the merits of the petitioner's asylum claim, it should deny the petition for review. The petitioner has failed to establish that a reasonable fact finder would have been compelled to find that she suffered from past persecution or had a well-founded fear of future persecution.

3. Likewise, with respect to the petitioner's claim under the CAT, this Court should deny the petition for review. Substantial evidence supported the IJ's determination that the petitioner failed to show that it was more likely than not that she would be tortured if removed to China.

ARGUMENT

I. With Respect to the Petitioner's Asylum Claim, This Court Should Dismiss for Lack of Administrative Exhaustion or, Alternatively, Deny the Petition Because the Immigration Judge's Decision Was Supported by Substantial Evidence

A. The Court Lacks Jurisdiction to Consider the Petitioner's Asylum Claim Since She Failed to Exhaust Her Administrative Remedies Before the BIA

1. Statement of Facts

After arriving in the United States, an IJ in Illinois denied the appellant's petition for asylum. JA 39-40. The petitioner appealed on the ground that the IJ misapplied the law of asylum. JA 232. The BIA remanded the case to an IJ for the determination if the petitioner could find relief under CAT. JA 218. The case was transferred from Illinois to New York, as the petitioner had moved to New York. JA 115-120. Prior to the adjudication of her CAT claim in New York, the petitioner had two children. JA 122, 142. After being apprised of the change in the petitioner's family status and receiving other evidence, the New York IJ denied the CAT claim. JA 43-44. The petitioner did not file a motion to reopen her asylum claim in light of the birth of her two children.

On December 11, 2002, the petitioner again appealed to the BIA, claiming that the IJ's decision ignored the weight of the evidence. JA 22-27. Again, she neither argued that her changed circumstances should have been considered in her asylum claim nor filed a motion to reopen. She concedes that she "failed to raise this issue" below. Appellant's Brief at 13.

The BIA affirmed both the Illinois IJ's decision with respect to the asylum claim and the New York IJ's decision with respect to the CAT claim. JA 2.

2. Governing Law and Standard of Review

The INA requires that all available administrative remedies be exhausted before an alien seeks judicial review of a final removal order. *See* 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 a right . . . ."). In this regard, "[u]nder the doctrine of exhaustion of administrative remedies, a party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself." *Howell v. INS*, 72 F.3d 288, 291 (2d Cir. 1995) (quotation marks omitted). Further, if exhaustion is required, and the party fails to do so, the court may dismiss the action for want of subject matter jurisdiction. *Id.*

It is well settled that arguments or claims not raised before the BIA are deemed waived for failure to exhaust administrative remedies. *Opere v. INS*, 267 F.3d 10, 14 (1st Cir. 2001); *see Chew v. Boyd*, 309 F.2d 857, 861 (9th Cir. 1962) ("failure to raise . . . a particular question

concerning the validity of [a final] order constitutes a failure to exhaust administrative remedies with regard to that question, thereby depriving a court of appeals of jurisdiction to consider that question."). *See also Arango-Aradondo v. INS*, 13 F.3d 610, 614 (2d Cir. 1994) (declining to consider constitutional claim for ineffective assistance of counsel that was not raised before the BIA); *Correa v. Thornburgh*, 901 F.2d 1166, 1171 (2d Cir. 1990) (rejecting, in a habeas corpus proceeding, a claim that was "never raised . . . either before the Immigration Judge or on appeal to the BIA").

More recently, in *Gill v. INS*, 420 F.3d 82, 86 (2d Cir. 2005), this Court addressed "the level of specificity at which a claim must have been made to have been 'exhausted' under § 1252(d)(1)." *Gill* noted that in *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003), the Court held that the exhaustion requirement would not permit a petitioner to raise "a whole new *category of relief*" on appeal, and in *Foster v. INS*, 376 F.3d 75, 78 (2d Cir. 2004) (quotation marks omitted), it held that "we require petitioner to raise *issues* to the BIA in order to preserve them for review." At the same time, *Gill* stated that the Court has "never held that a petitioner is limited to the exact contours of his argument below." *Id.* The *Gill* decision went on to hold 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 raised below." *Id*.

As relevant to the instant petition, it is of note that among the purposes served by the exhaustion requirement contained in § 1252(d) are "to [1] ensure that the INS, as

the agency responsible for construing and applying the immigration laws and implementing regulations, has had a full opportunity to consider a petitioner's claims," *Theodoropoulos v. INS* [*Theodoropoulos II*], 358 F.3d 162, 171 (2d Cir.), *cert. denied*, 125 S. Ct. 37 (2004); (2) to 'avoid premature interference with the agency's processes,' *Sun v. Ashcroft*, 370 F.3d 932, 940 (9th Cir. 2004); and (3) to 'allow the BIA to compile a record which is adequate for judicial review.' *Dokic* [*v. INS*], 899 F.2d [530] at 532 [(6th Cir. 1990)]." *Ramani v. Ashcroft*, 378 F.3d 554, 559 (6th Cir. 2004).

Further, the Supreme Court has held that when statutorily required, exhaustion of administrative remedies is jurisdictional and must be strictly enforced, without exception. *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required."); *Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 579 (1989) ("[E]xhaustion of administrative remedies is required where Congress imposes an exhaustion requirement by statute."). *Cf. Bastek v. Fed. Crop Ins. Corp.*, 145 F.3d 90, 94 (2d Cir. 1998) (common law exhaustion doctrine "recognizes judicial discretion to employ a broad array of exceptions" for the failure to exhaust administrative remedies).

This Court has squarely held that 8 U.S.C. § 1252(d) embraces the statutory, or mandatory, exhaustion doctrine. *Theodoropoulos II*, 358 F.3d at 172. "[Section] 1252(d)'s mandate that unless a petitioner 'has exhausted all administrative remedies available,' a 'court may [not] review a final order of removal,' 18 U.S.C. § 1252(d),

applies to all forms of review . . . ." *Id.* at 171 (alteration in original). Thus, the failure to raise before the BIA specific claims, such as the 'changed circumstances' involving the petitioner's family, will constitute a waiver of those claims and preclude their consideration by an appellate court for want of jurisdiction. *Cf. Vatulev v. Ashcroft*, 354 F.3d 1207, 1211 (10th Cir. 2003) (court without jurisdiction to consider IJ's "implicit rejection of . . . new evidence" when it was not appealed to BIA). *See also Ravindran v. INS*, 976 F.2d 754, 763 (1st Cir. 1992) (complaints involving defective translations, judicial conduct at hearing and evidentiary rulings should have been raised at the BIA for appellate court to have jurisdiction).

While this Court has recognized there are some circumstances in which a petitioner's failure to exhaust administrative remedies may not deprive an appellate court of jurisdiction to consider claims, those circumstances are very limited. For example, in *United States v. Gonzalez-Roque*, 301 F.3d 39, 47-48 (2d Cir. 2002), it was noted that the BIA does not have jurisdiction to adjudicate constitutional issues. It therefore follows that exhaustion would not be required for a petitioner to seek judicial review of a constitutional claim, where the BIA could not have provided any relief. *See Ravindran*, 976 F.2d at 762-63 (noting that simply alleging that an error violated due process does not render that claim unreviewable by BIA, and hence exempt from administrative exhaustion requirement). Also, in *Theodoropoulos II*, this Court noted that in *Booth v. Churner*, 532 U.S. 731, 736 & n.4 (2001), the Supreme Court suggested a petitioner will not be required "to exhaust a procedure from which there is no

possibility of receiving any type of relief." 358 F.3d at 173.

Recently, in *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 52-53 (2d Cir. 2004), the Court held that under the unusual facts in that case, it would invoke "the narrow leeway afforded by *Theodoropoulos II* . . . to prevent manifest injustice."[4] *Marrero Pichardo*, however, did not purport to overrule *Theodoropoulos II*, and should not be read to "support the proposition that a court can find jurisdiction to overrule an agency result whenever jurisdiction will assist a sympathetic petitioner[.]" *Gill*, 420 F.3d at 97 (Jacobs, J., dissenting).

3. Discussion

The petitioner waived any claims concerning how her "changed circumstances" impacted her claim for asylum. First, it is undisputed that the fact she gave birth to two male children while in the United States was presented to the IJ considering her CAT claim. JA 142. She concedes, however, that she failed to request that these changed circumstances be considered by the BIA in its review of

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[4] Pichardo had multiple DUI convictions. An IJ found that two of those convictions constituted aggravated felonies, and Pichardo, who appeared *pro se* before the IJ, was ordered removed to his home country of the Dominican Republic. Shortly thereafter, this Court held in *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001), that a felony DUI conviction under the same statute involved in Pichardo's state convictions was not a "crime of violence" for purposes of defining an aggravated felony. *See* 374 F.3d at 49-50.

the earlier denial of her asylum claim by the IJ in Illinois. As such, she is barred from raising that claim here for the first time.[5]

It is well established that an alien is statutorily required to exhaust all administrative remedies available to her before she can seek judicial review of a removal order, *see* § 242(d)(1) of the INA (8 U.S.C. § 1252(d)(1)), and this requirement is jurisdictional. *Theodoropoulos II*, 358 F.3d at 168 (alien's "failure to exhaust his administrative remedies deprive[s] the district court of subject matter jurisdiction to entertain his habeas petition"); *see also Gonzalez-Roque*, 301 F.3d at 49 (petitioner forfeited his due process claim by failing to raise it before the BIA). As the Supreme Court and this Circuit have made clear, when statutorily required, exhaustion of administrative remedies must be strictly enforced, without exception. *See McCarthy*, 503 U.S. at 144; *Booth,* 532 U.S. at 741 n.6 (holding "we will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise"); *Bastek*, 145 F.3d at 94 ("Statutory exhaustion requirements are mandatory, and courts are not free to dispense with them.").

The instant petition raises no constitutional issue for review, *Booth*, *supra*, nor does it involve questions which could not have been ably addressed by the BIA had they been properly presented by the petitioner, *Gonzalez-Roque,*

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[5] Further, as discussed below in the analysis of the petitioner's CAT claim, even if the Court reached the merits of the new asylum claim, it is plain that the IJ relied on substantial evidence in denying the petitioner's request.

supra. This matter, then, does not involve the type of unusual facts on which the Court in *Marrero Pichardo* "invoke[d] the narrow leeway afforded by *Theodoropoulos II*" to prevent a manifest injustice. 374 F.3d at 53. The petitioner's case was reviewed by two IJs and she was accorded separate evidentiary hearings for her asylum claim and her CAT claim. The ample record of due process in this case belies any claim of this Court's need to act to "prevent a fundamental miscarriage of justice." *Marrero Pichardo,* 374 F.3d at 52. Accordingly, the Court is without jurisdiction to act on the asylum claim raised in this petition for review and, therefore, the petition with respect to the asylum claim should be dismissed.

Furthermore, even though, as explained below, the petitioner could have filed a motion to reopen with either the IJ or the BIA to raise the same claims she now makes before this Court, she failed to do so. *See* 8 C.F.R. § 1003.23(b)(3) (explaining that "[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 . . . unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing"). Although this Court has not squarely addressed whether the filing of a motion to reopen is necessary to satisfy the exhaustion requirement of § 1252(d), if the petitioner had filed such a motion she would likely have satisfied that requirement. *See United States v. Copeland*, 376 F.3d 61, 67 (2d Cir. 2004) (explaining in the context of 8 U.S.C. § 1326(d), that the exhaustion requirement is satisfied when an alien files a motion to reopen deportation hearing and appeals denial of that motion to the BIA, even though the alien failed to appeal the original deportation order). *But see Zhang v.*

Reno, 27 F. Supp. 2d 476, 477 (S.D.N.Y. 1998) (citing *Arango-Aradondo v. INS*, 13 F.3d 610, 614 (2d Cir. 1994) and concluding that motion to reopen not required to satisfy exhaustion requirement because it is not a remedy that is available by right).

In this case, the petitioner had at least two opportunities to file a timely motion to reopen her asylum petition. After having her second child, she could have raised the issue before the IJ at the hearing on November 13, 2002, or petitioned the BIA in her brief filed on June 5, 2003. JA 5-7, 140-150. She failed to do either. Instead she merely argued that she should be accorded relief under the CAT. JA 5-7, 23. In sum, Petitioner could have asked the immigration authorities in 2002 and 2003 for the relief she now seeks, but instead waited more than two years to apply for the first time for such relief in this Court. The Court should deny the petition because it lacks jurisdiction to hear this unexhausted claim.

B. Even If the Court Considers the Merits of the Petitioner's Asylum Claim in Light of the "Changed Circumstances, Substantial Evidence Supports the BIA's Decision Upholding the Denial of the Petitioner's Claim

1. Relevant Facts

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

2. Governing Law and Standard of Review

a. Law of Asylum

An asylum applicant must, as a threshold matter, establish that he is a "refugee" within the meaning of 8 U.S.C. § 1101(a)(42) (2000). *See* 8 U.S.C. § 1158(a) (2004); *Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 66 (2d Cir. 2002). A refugee is a person who is unable or unwilling to return to his native country because of past "persecution or a well-founded fear of persecution on account of" one of five enumerated grounds: "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (2004); *Liao*, 293 F.3d at 66.

Although there is no statutory definition of "persecution," courts have described it as "'punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as

legitimate.'" *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995) (quoting *DeSouza 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. *Melgar de Torres v. Reno*, 191 F.3d 307, 315 (2d Cir. 1999); 8 C.F.R. § 208.13(b)(1)(I) (2004).

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

An alien may satisfy the subjective prong by showing that events in the country to which he will be deported have personally or directly affected him. *Id*. With respect to the objective component, the applicant must prove that a reasonable person in his circumstances would fear persecution if returned to his native country. *See* 8 C.F.R. § 208.13(b)(2) (2004); *Zhang*, 55 F.3d at 737-38 (noting that when seeking reversal of a BIA factual determination, the petitioner must show "'that the evidence he presented

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

The asylum applicant bears the burden of demonstrating eligibility for asylum by establishing either that he was persecuted or that he has a well-founded fear of future persecution on account of, *inter alia*, his political opinion. *Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003) (per curiam); *Osorio*, 18 F.3d at 1027. *See* 8 C.F.R. § 208.13(a) (2004). The applicant's testimony and evidence must be credible, specific, and detailed in order to establish eligibility for asylum. *See* 8 C.F.R. § 208.13(a)(2004); *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999); *Melendez v. U.S. Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991) (stating that applicant must provide "credible, persuasive . . . [and] specific facts") (internal quotation marks omitted)); *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA June 12, 1987) (applicant must provide testimony that is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account"), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647-48 (9th Cir. 1997).

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

satisfied the burden of proof."); *see also Diallo v. INS*, 232 F.3d 279, 285-86 (2d Cir. 2000); *In re S-M-J-*, 21 I. & N. Dec. 722, 723-26 (BIA Jan. 31, 1997).

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

b. The Court's Decision in *Huang v. INS*

On August 29, 2005, this Court issued its ruling in *Huang v. INS*, 421 F.3d 125 (2d Cir. 2005) (per curiam), which denied that the petitioner's application for asylum and withholding of removal. There, as here, the issue was whether the BIA had correctly concluded that the petitioner failed to establish a likelihood of future persecution based on China's family planning policies. The *Huang* petitioner had illegally entered the United States and, in 1993, filed an application for asylum and withholding of removal based on his participation in the student democracy movement. *Id.* at 127. While his application was pending, Huang married a Chinese citizen in the United States, and his wife soon gave birth to their daughter.

When Huang's hearing began in the spring of 2000, he filed an amended asylum application citing his fear of future persecution based on his view that he would be forcibly sterilized if he were returned to China. He cited as proof the Chinese family planning policy that permitted only one child per couple and the alleged forcible

sterilization of his sister-in-law. *Id*. The hearing was adjourned to December 2000, at which point Huang's wife was pregnant with their second child. The IJ granted Huang's application for asylum based on the finding that it was "reasonable" for Huang to fear that he would be subject to forcible sterilization if removed to China. *Id*.

On appeal, the INS argued to the BIA that Huang had not sustained his burden of showing a well-founded fear of future persecution because the evidence of conditions in China undermined the claim, and because Huang had provided insufficient evidence about the alleged sterilization of his sister-in-law. Moreover, there was no evidence in the record as to whether Chinese family planning policy applied to the parents of children born abroad. *Id*. Relying on the background materials, the BIA found that there was no indication that parents of foreign-born children were subject to persecution other than modest fees or fines. *Id*.

After considering the evidence adduced by the petitioner, the *Huang* Court found that the BIA did not err in finding that Huang had failed to meet his evidentiary burden. The Court held that Fujian, province, according to the record, has a relatively lax family-planning policy and that there are "no reports of any [Chinese] national policy with regard to foreign born children, and that couples returning with more children than they would have been permitted at home are at worst, given modest fines." *Huang*, 421 F.3d at 129 (internal quotation marks omitted).

The *Huang* court also indicated that the only relevant evidence offered by the petitioner was testimony about the forcible sterilization of his sister-in-law, which the court found sparse and uncorroborated. *Id.* Further, the court noted that Huang had two older sisters, one with two sons and one with three children, but there was no evidence that they had been penalized for having children. Courts granting petitions for asylum have been presented with specific evidence of similarly situated family members who have suffered persecution on the basis of a coercive family planning policy. *See, e.g., Yang v. Gonzales*, 427 F.3d 1117, 1122 (8th Cir. 2005).

c. Standard of Review

This Court reviews the determination of whether an applicant for asylum or withholding of removal has established past persecution or a well-founded fear of persecution under the substantial evidence test. *Zhang v. INS*, 386 F.3d at 73 ("we must uphold an administrative finding of fact unless we conclude that a reasonable adjudicator would be compelled to conclude to the contrary.") (citations omitted); *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); *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); *Ali v. Reno*, 237 F.3d 591, 596 (6th Cir. 2001) (the same standard applicable to Torture Convention).

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). 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." *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 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); *see also 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)).

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[6] Although judicial review ordinarily is confined to the BIA's order, *see, e.g.*, *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001), courts properly review an IJ's decision where the BIA adopts that decision. 8 C.F.R. § 3.1(e)(4)(2002); *Secaida-Rosales*, 331 F.3d at 305; *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994).

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 (emphasis in original).

3. Discussion

In this case, even taking the petitioner's "changed circumstances" into consideration, substantial evidence exists that allowed a reasonable factfinder to conclude that the asylum petition should be denied. The petitioner stated that she fled China to avoid a medical exam required by the Chinese government for eighteen-year-old girls. JA 84-5. She now fears returning to China because she stated that she expects to be sterilized in light of the subsequent birth of her two sons in the United States. JA 142-43. She concedes, however, that her mother had three children and was not sterilized. JA 97, 145. Instead, she testified that her father was arrested and her parents were fined. *Id*. Further, she did not offer any evidence of other similarly situated individuals in the Fujian province who had been

forcibly sterilized. In light of this paucity of evidence, the IJ was correct to deny the petitioner's asylum claim.

The facts in this case even fall short of the evidence offered by the petitioner in *Huang* - - a case where this Court reversed the decision of an IJ and denied a petitioner's asylum claim. In *Huang*, the petitioner testified that his sister-in-law had been sterilized after violating the government policy. *Huang,* 421 F.3d at 129. No such testimony was offered in this case, as the petitioner failed to offer any evidence whatsoever of the implementation of the population control policy in the Fujian province.

One common feature of this case and *Huang* that supports the IJ's decision was evidence that relatives in both cases had more than one child, but had not been sterilized. This includes one of Huang's older sisters who had two male children, like the petitioner in this case. *Compare Huang*, 412 F.3d at 129 *with* JA 142. It also includes the petitioner's own mother, who had two sons and one daughter. JA 97. Moreover, as noted in *Huang*, there are "no reports of any [Chinese] national policy with regard to foreign-born children, and that couples returning from China with more children than they would have been permitted at home are at worst, given modest fines." *Id.* (internal quotation marks omitted). This observation also appears to describe the circumstances of at least some women who give birth to more than one child in China, as the petitioner testified that her mother was fined and her father was arrested upon the birth of their third child. JA 97-8.

As such, because the petitioner submitted no evidence that she personally knew of anyone sterilized pursuant to the policy and no evidence of a policy that is rigorously enforced in the Fujian province, it is readily apparent that the facts in this case fall far short of the "credible, specific and detailed evidence" required for a grant of asylum. *Huang*, 412 F.3d at 128. In this case, it can hardly be said that the evidence even uniformly supports the petitioner's claim, much less *compels* it. *See Elias-Zacarias*, 502 U.S. at 481 at n.1. As such, this Court should deny the petition for review with respect to the petitioner's asylum claim.[7]

II. Substantial Evidence Supports the Immigration Judge's Denial of CAT Relief Because the Petitioner Failed To Prove That She More Likely Than Not Would Be Tortured Upon Return to China

A. Relevant Facts

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

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[7] "Because the withholding of removal analysis overlaps factually with the asylum analysis, but involves a higher burden of proof, an alien who fails to establish [her] entitlement to asylum necessarily fails to establish [her] entitlement to withholding of removal." *Ramsameachire*, 357 F.3d at 178.

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-*, Interim Dec. 3464, 23 I. & N. Dec. 270, 279, 283, 285, 2002 WL 358818 (BIA Mar. 5, 2002); 8 C.F.R. §§ 208.16(c), 208.17(a), 208.18(a) (2004).

To establish eligibility for protection under the CAT, an applicant must demonstrate that "'it is more likely than not that he or she would be tortured if removed to the proposed country of removal.'" *Ramsameachire v. Ashcroft*, 357 F.3d 169, 184 (2d Cir.2004)(quoting 8 C.F.R. § 208.16(c)(2)). "Relief under the CAT requires the applicant to establish 'that there is greater than a fifty percent chance that he will be tortured upon return to his or her country of origin.'" *Gao v. Gonzales*, 424 F.3d 122, 128 (2d Cir. 2005) (quoting *Mu-Xing Wang v. Ashcroft*, 320 F.3d 130, 144 n. 20 (2d Cir.2003)); *see also Islami v. Gonzales*, 412 F.3d 391, 395 (2d Cir. 2005); 8 C.F.R. § 208.16(c)(2); *Najjar v. Ashcroft*, 257 F.3d 1262, 1304 (11th Cir. 2001); *Wang*, 320 F.3d at 133-34, 144 & n.20. "Unlike an asylum claim, the CAT claim lacks a subjective element, focuses broadly on torture without regard for that treatment, and requires a showing with respect to future,

rather than past, treatment." *Ramsameachire* 357 F.3d at 185.

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

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

2. Standard of Review

This Court reviews the determination of whether an alien is eligible for protection under the CAT under the "deferential substantial evidence" standard. *Islami v. Gonzales*, 412 F.3d 391, 396 (2d Cir. 2005); *see also Saleh*

v. U.S. Dep't of Justice, 962 F.2d 234, 238 (2d Cir. 1992); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 353-54 (5th Cir. 2002).

C. Discussion

Substantial evidence supported the IJ's determination that the petitioner failed to show that it was more likely than not that she would be subjected to forced sterilization upon her repatriation to China.[8] Her testimony is completely devoid of any reference to threats by the Chinese government to sterilize her upon her return to China with her two children. Further, she did not indicate that she even knew anyone who had two children and had been sterilized. In fact, she conceded that her own mother had three children and was not sterilized. JA 145.

After reviewing the evidence submitted by the petitioner, the IJ concluded that "[t]here has been no information submitted to the [c]ourt to indicate that people who have U.S. born children would be sterilized upon return to China because they have exceeded the one child policy in China." JA 43. Indeed, that conclusion comports with the testimony of the petitioner, who conceded that her mother had three children, but was not sterilized even though the children were born in China. It is also in accord with this Court's observation in *Huang* that there are "no reports of any [Chinese] national policy with regard to foreign born children, and that couples

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[8] The fear of sterilization is her sole claim under the CAT. *See* GA 43 (IJ noting that "the only thing the respondent here fears is forced sterilization")

returning with more children than they would have been permitted at home are, at worst, given modest fines." *Huang*, 421 F.3d at 129 (internal quotation marks omitted). The petitioner in this case indicated that her mother was fined for violation of the policy and her father was jailed. JA 97-8. She provided no evidence that any individual was forcibly sterilized for violation of the family planning policy.

In sum, substantial evidence supported the IJ's determination that the petitioner failed to show that it was more likely than not that she would be tortured if removed to China. *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 184 (2d Cir.2004). The petitioner failed to objectively show that establish "that there is greater than a fifty percent chance" that she will be sterilized upon return to China with her two American-born children. *See Gao v. Gonzales*, 424 F.3d 122, 128 (2d Cir. 2005) (quoting *Mu-Xing Wang v. Ashcroft*, 320 F.3d 130, 144 n. 20 (2d Cir. 2003)). This Court should affirm the decision of the BIA.

CONCLUSION

For the foregoing reasons, the instant petition for review with respect to the asylum claim should be dismissed based on the petitioner's failure to exhaust his administrative remedies. To the extent the Court elects to review the claims set forth in the instant petition, the Court should affirm BIA's conclusion that the petitioner in ineligible for either asylum or relief under CAT.

Dated: December 16, 2005

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 7,636 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

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ADDENDUM

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

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

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

(a) Authority to apply for asylum

(1) In general

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

. . . .

(b) Conditions for granting asylum

(1) In general

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

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

(A) In general

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

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

(4) Scope and standard for review

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

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

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

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

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

8 U.S.C. § 1252(d) (2004). 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, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

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

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

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

> (1) Past persecution. An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the

basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(I) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

> (I) Discretionary referral or denial. Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:
>
> > (A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular

social group, or political opinion; or

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

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

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

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

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

(2) Well-founded fear of persecution.

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

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

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

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

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

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

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual

residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

. . . .

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

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

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

(1) Past threat to life or freedom.

(i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in

a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

> (A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or
>
> (B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a

preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

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

(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion,

nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

. . . .

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

(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations,

understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub.L. 105-277, 112 Stat. 2681, 2681-821). The definition of torture contained in § 208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

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

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

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

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

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

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

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under § 208.17(a).

(d) Approval or denial of application--

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

. . . .

8 C.F.R. § 208.17 (2004). Deferral of removal under the Convention Against Torture.

(a) Grant of deferral of removal. An alien who: has been ordered removed; has been found under § 208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under § 208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured.

. . . .

8 C.F.R. § 208.18 (2004). Implementation of the Convention Against Torture.

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

> (1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
>
> (2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

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

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

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

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

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected

to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

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

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

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(8) Noncompliance with applicable legal procedural standards does not per se constitute torture.

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

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