02-4573-ag

To Be Argued By:
JOHN B. HUGHES

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 02-4573-ag

ELSON PREVILON,

Petitioner,

-vs-

JOHN ASHCROFT,

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR JOHN ASHCROFT
ATTORNEY GENERAL OF THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

This Court has appellate jurisdiction under § 242(b) of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1252(b) (2000).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a reasonable fact-finder would be compelled to reverse the IJ's determination, where the petitioner's testimony and evidentiary submissions contained inconsistencies, lacked detail and were not specific concerning key elements of his claim.

2. Whether the petitioner adequately preserved and presented a claim for relief under the Convention Against Torture.

3. Whether summary affirmance by the Board of Immigration Appeals was appropriate in this case.

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Preliminary Statement

Elson Previlon, a native and citizen of Haiti, petitions this Court for review of a September 13, 2002, decision of the Board of Immigration Appeals ("BIA") (Joint Appendix ("JA") 2-3). The BIA summarily affirmed the May 1, 2001, decision of an Immigration Judge ("IJ") (JA 50-56) denying the petitioner's applications for asylum,

withholding of removal and Convention Against Torture ("CAT")[1] under the Immigration and Nationality Act of 1952, as amended ("INA"), and ordering him removed from the United States.

The petitioner sought asylum based on the past persecution of certain family members on account of their political opinions, and those opinions being imputed to him. Substantial evidence supports the IJ's determination that the petitioner failed to provide probative evidence in support of this asylum claim. First, the evidence elicited through the petitioner's own testimony revealed that he was not political and was not a member of the organization to which his family members belonged. Second, the evidence did not clearly establish that the deaths of the petitioner's mother and brother were political rather than simply criminal and financially motivated. Third, even if the deaths were politically motivated, the petitioner failed to demonstrate that there was evidence that the political opinions of his mother and brother were imputed to him.

Statement of the Case

On October 7, 1999, the petitioner filed an initial Application for Asylum and Withholding of Removal.

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

On May 3, 2000, the petitioner underwent an asylum interview and re-submitted his application for asylum and withholding of removal.

On May 15, 2000, the petitioner was issued a Notice to Appear for removal proceedings. On May 1, 2001, a removal hearing was held before an immigration judge.

On May 18, 2001, the petitioner filed an appeal to the Board of Immigration Appeals ("BIA"). On September 13, 2002, the BIA summarily affirmed the IJ's decision. On October 11, 2002, the petitioner filed a petition for review with this Court.

Statement of Facts

A. The Petitioner's Entry into the United States and Applications for Asylum, Withholding of Removal and CAT Relief

On April 3, 1999, the petitioner left Haiti and went to the Dominican Republic for five months. (JA 71). Thereafter he traveled to St. Thomas in the U.S. Virgin Islands, where he completed the initial Application for Asylum and Withholding of Removal on October 7, 1999. (JA 205-215). This application was apparently re-submitted at the time of the petitioner's interview on May 3, 2000. (JA 192-202). In the application the petitioner indicated he was seeking asylum because he was fearful of living in Haiti. His mother and brother had been killed, his father received a threatening phone call and his house was set on fire. (JA 195). The petitioner's counsel later completed a Pleadings Form prior to the removal hearing,

which indicated on a checklist that relief was also requested pursuant to the Convention Against Torture. (JA 220-221). At the conclusion of the hearing, the IJ suggested that there was uncertainty as to whether the petitioner had even applied for CAT relief and found that no evidence was presented at the hearing that the Haitian government or a government official was involved or would be responsible for any physical or mental torture upon the petitioner should he return to Haiti. (JA 118).

B. The Petitioner's Removal Proceedings

The petitioner was served with a Notice to Appear dated May 15, 2000, which charged that he was subject to removal pursuant to § 212(a)(6)(A)(i) of the INA, as an alien who was present in the United States without being admitted or paroled. (JA 222). An initial hearing was scheduled for July 25, 2000, which was continued on that date to December 12, 2000, and then to May 1, 2001, when it was completed. (JA 57-118).

1. Documentary Submissions

At the hearing on May 1, 2001, the petitioner submitted a number of exhibits which were included in the administrative record. (JA 120-191). Among those documents was the U.S. Department of State Human Rights Report for 1999, two additional Human Rights Reports issued by Human Rights Watch, an independent, non-governmental organization, two certificates of membership for the petitioner's late mother and brother attesting to their membership in the Youth Association for the Development of Corso, and two police complaints

made by the petitioner following the deaths of his mother and brother. It is the second of these two police complaints which is central to the petitioner's argument that he has alleged from the beginning there was a political motivation to the killings and that he has a well-founded fear of future persecution on account of the political opinions of his mother and brother being imputed to him.

In the first police complaint, concerning the killing of his mother on December 24, 1998, the petitioner describes the attack made by "bandits and aggressors" on his mother while she was coming from a flea market. He did not identify the aggressors by name or association. There is no indication of involvement by any politically motivated group. (JA 173-177).

In the second police complaint, the petitioner describes the January 19, 1999, attack and killing of his brother by armed individuals. The complaint recites that the petitioner's family "has always been persecuted by individuals that are called *dechoukè* (gangsters or bandits group) . . ." and that people in the community must give money at the end of the month to this group. The petitioner's mother resisted and "could not put up with that" and was therefore murdered. (JA 184-189).

B. The Petitioner's Testimony

At the May 1, 2001, hearing the petitioner testified that he was born in Haiti and left there on April 3, 1999. He went to the Dominican Republic, where he stayed for five months until he traveled to St. Thomas, in the U.S. Virgin Islands. The petitioner indicated he left Haiti because of

his brother's death. When asked how is brother died, the petitioner answered "he belonged to a political party." (JA 72). Additional testimony revealed that the brother, Jean Claude Previlon, had been shot and killed on January 19, 1999. When asked if he knew who killed his brother, the petitioner responded he did not know but that his brother "did belong to a political party." (JA 75). The political party was identified by the petitioner as the Youth Association for the Beloved of Corso which he described as a political organization that finances poor people who are indigent and uneducated. (JA 76). The petitioner also identified FRAPH as an organization opposed to the group his brother belonged to.

The petitioner's mother, Jullienne Jean-Jacques, had been killed previously on December 24, 1998, while on her way home from shopping. (JA 77). In somewhat disjointed testimony the petitioner indicated that he didn't exactly know who killed his mother but believed it was the FRAPH party. The mother was also identified as being a member of the Youth Association for the Beloved of Corso and was its cashier responsible for the organization's funds. (JA 79). The petitioner testified that he did not think she was killed for the money she held but because she was in charge of the party. (JA 80). At this point the IJ reviewed the second police complaint which had been marked as an exhibit and made the following observation:

> You said your family has been persecuted by individuals called *Dechoukè* and you said they are either gangsters or bandits and that they demand money at the end of the month and your mother

> went against that transaction and because of that she was killed and the threats continued and your brother was killed. You state nothing about a political party. So, in your complaint to the police you say it is strictly a financial situation. If ransom was not paid they were killed. This is the complaint you made to the police on January 20, 1999, explaining what has happened to your family and about the threats. You make no mention of the political connection, only that thugs are demanding money and if not paid things happen. Why didn't you even mention anything political in that statement?

(JA 183-189).

The petitioner's only explanation for not mentioning anything political at the time of the complaint was that his father was alive and "he did not want his name mentioned." (JA 81). This non-responsive answer was followed by an inquiry from his counsel as to why there was no mention of FRAPH in the police complaint. The petitioner suggested that the police did not put FRAPH in the report but did use the term gangsters because "they know that FRAPH and gangsters are the same." (JA 82). The police investigated the mother's killing but no one was ever arrested.

Each of the two police complaints also mentioned threats made to the petitioner and his family, but there were no specifics concerning who made the threats or exactly when they were made. In his testimony, the petitioner gave conflicting responses about the threats, at

one point in response to the IJ, stating that the threats were made subsequent to his brother's death in January 1999, and later indicating to his counsel that his father first received a phone call and that subsequent to the call his brother was killed. (JA 175, 187). In his application for asylum and withholding the petitioner indicated that several months after his mother was killed his father received a phone call from someone saying that they would kill his family one by one. (JA 208). Significantly, the petitioner testified that he did not belong to any political party. (JA 85). Nevertheless, he thought he would be killed by the same members of FRAPH if he returned to Haiti (JA 86).

C. The Immigration Judge's Decision

After the hearing, Immigration Judge Michael Barrett issued an Oral Decision in which the petitioner's applications for political asylum, withholding of removal and voluntary departure were considered. The IJ recounted the testimony of the petitioner and the other witnesses at the hearing. Rachell Etienne, described as the petitioner's girlfriend, came to the United States from Haiti in June of 2000 and claimed to be a permanent resident. The IJ noted that the witness had no independent knowledge concerning the murders of the petitioner's mother and brother and only knew what the petitioner had told her about threats made to the family. The witness did verify, however that the petitioner's father was a minister and still lived in Gonaives, Haiti.

The other witness to testify at the hearing was Henry Pedy, the petitioner's brother-in-law, who is married to

one of the petitioner's sisters. This witness had come to the United States from Haiti in 1974 but often returned to Haiti to visit. He learned of the deaths of the petitioner's mother and brother from his wife, although he attended the funeral of the brother as he was in Haiti visiting at the time.

The IJ recounted that to be eligible for asylum, one must show a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The court indicated that it must look at both subjective and objective evidence. To be eligible for withholding of removal, the IJ noted that the petitioner must show a clear probability of persecution under one of the specified grounds, but this required only objective evidence. (JA 53).

After reviewing the evidence of record, the IJ found that the petitioner had not met his burden for the relief requested. Specifically, the petitioner did not show that he had one of the specified traits or characteristics for which he had been persecuted or would be persecuted if he returned to Haiti. The only characteristic focused on at the hearing was whether the petitioner was persecuted or had a well-founded fear of future persecution based on political opinion. The IJ found that the petitioner was not politically involved like his mother and brother and did not attend the meetings of the group to which the mother and brother had belonged. Although the IJ did describe the group, the Youth Association for the Development of

Corso ("YADC")[2] as a political organization, he found that the record did not show that the deaths of the mother and brother were political. (JA 54). The court found that the basis for the deaths was likely financial rather than political since the petitioner himself indicated in the complaints that he filed with the police (JA 173-177, 184-189) that the deaths were caused by criminal gangs that wanted money from the family and others in the community at the end of the month and that his mother's refusal to pay led to her death. (JA 54). The IJ found that the declarations attesting to the membership status of both the mother and brother in the YADC (JA 164-169) were of no substance. The petitioner provided no details concerning the conflict between the YADC and FRAPH, and thus the IJ could not make a finding that it was political. (JA 54).

The IJ also considered the petitioner's claim that the whole family had been threatened, but found it significant that the father lived openly in a prominent area of Haiti and visibly worked as a minister. (JA 55). The petitioner made no showing at the hearing that anything had happened to his father or his two sisters who had also remained in Haiti. The IJ commented on the fact that the petitioner did not produce any correspondence or statement from the father to corroborate any of the petitioner's

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[2] The IJ properly named the group as the Youth Association for the Development of Corso, *see* Declarations as to Membership, (JA 164-166, 167-169). The petitioner revealed his lack of involvement in the group by incorrectly referring to it as the Youth Association for the *Beloved* of Corso. (JA 76).

claims and nothing to support his claim, made only in the Application for Asylum (JA 192-202), that the burning of his house had political overtones. Finally, the IJ commented upon the witnesses who testified, noting that they did not testify from firsthand knowledge. Of particular note was the fact that the petitioner's brother-in-law came from Miami to testify even though he did not have direct personal knowledge of the threats and deaths to the petitioner's family while his wife, the petitioner's sister – who would have such direct knowledge – did not appear to testify on the petitioner's behalf. (JA 55). Mr. Pedy, petitioner's brother in law, testified that his wife, Emmit, petitioner's sister, came to the United States in February 2000 and was in Miami at the time of the hearing. (JA 102, 104-105).

In conclusion, the IJ found that he did not have enough probative evidence to find that there was a political basis for the petitioner's claim of persecution. The petitioner failed to show that anything had happened to him in Haiti; he was a student and no incidents had been directed against him. Accordingly, the IJ found that the petitioner did not meet the standards for asylum or withholding of removal. (JA 55A). To the extent that the petitioner was also making a claim under the Convention Against Torture, there was likewise no basis for such a claim since there was no showing that the government or a government official would physically or mentally abuse the petitioner. (JA 55A).

D. The BIA Proceedings and Decision

Subsequent to the hearing and Oral Decision of the IJ, the petitioner filed an appeal to the Board of Immigration Appeals on May 18, 2001 (JA 43), and filed a Brief in Support of his appeal on March 12, 2002. (JA 6-30). Both in the Notice of Appeal and in the Summation of Testimony and Evidence Presented section of his brief, the petitioner indicated the appeal was only from the decision denying his request for asylum and withholding of removal. Apparently abandoning any claim under the Convention Against Torture, the petitioner clearly stated that the only issue before the Board was whether asylum and/or withholding should have been granted. (JA 7). Nevertheless, the petitioner made a *pro forma* argument in section three of his BIA Appeal Brief that he was entitled to CAT relief because he was in *danger* of being tortured. (JA 28-29). There is virtually no analysis or supporting evidence for this claim, and aside from the misrepresentation that the petitioner testified about a reasonable and well founded fear of torture (JA 29-30) there is no basis for withholding of removal under the Convention Against Torture.[3]

The petitioner's BIA Appeal Brief summarized the testimony of the witnesses and applicable law regarding asylum, including the burden on the petitioner to show that he has suffered past persecution or has a well-founded fear

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[3] The representation is made that the petitioner testified as to his reasonable and well founded fear of torture. (JA 29-30). In fact, there is no such testimony and the word "torture" is never mentioned in the hearing transcript. (JA 67-118).

of future persecution, citing the Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. §§ 1101(a)(42)(A) and 1158(a). The petitioner argued that the testimony of an applicant, if credible in light of the general conditions in the country of nationality, may be sufficient to sustain the applicant's burden without corroboration. 8 C.F.R. § 208.13(a). The petitioner recognized that there were both subjective and objective elements in proving a well-founded fear of persecution and argued that mistreatment of family members could form a basis for having a well-founded fear of persecution. (JA 15). The petitioner argued for the first time that his claim of past and future persecution arises out of his membership in a particular social group, his family. Although citing several definitions of "social group," the petitioner failed to note any authority for equating social group and family.

The major argument made by the petitioner to the BIA was that the IJ erred in not finding that the petitioner's fear of future persecution was on account of the political opinion of members of his family being imputed to him. (JA 20-22). On September 13, 2002 the Board summarily affirmed the IJ's decision and adopted it as the "final agency determination" under 8 C.F.R. § 3.1(e)(4) (2002).[4] (JA 2-3). This petition for review, filed on October 11, 2002, followed.

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[4] That section has since been redesignated as 8 C.F.R. §1003.1(e)(4) (2004). *See* 68 Fed. Reg. 9824, 9830 (Feb. 28, 2003).

SUMMARY OF ARGUMENT

1. Substantial evidence supports the IJ's determination that the petitioner failed to provide sufficient evidence for his asylum claim -- that is, that he had been persecuted on account of political opinion or that he had a well-founded fear of persecution on that basis should he be returned to Haiti. First, the evidence elicited through the petitioner's own testimony revealed that he was not political and was not a member of the organization to which his mother and brother, who had been killed, belonged. Second, the evidence did not establish that the deaths of these family members had been politically motivated, rather than simply criminal and financially motivated. Third, even if the deaths were politically motivated, the petitioner failed to produce any evidence that the political opinions of his mother and brother had been or would be imputed to him.

2. The petitioner failed to preserve a claim for relief under the Convention Against Torture. His notice of appeal to the BIA challenged the immigration judge's decision only with respect to asylum and withholding of deportation, and his BIA brief made only a *pro forma* mention of CAT that failed to cite any portion of the record in support of his claim. In any event, even if such a claim had been properly asserted, there is no evidence in the record to support such a claim.

3. Summary affirmance by the BIA was appropriate under the applicable regulations, and the immigration judge's oral decision contains sufficient reasoning and evidence to enable this Court to determine that it was issued only after consideration of the requisite factors.

ARGUMENT

I. THE IJ PROPERLY DETERMINED THAT THE PETITIONER FAILED TO ESTABLISH ELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL SINCE HE DID NOT SUFFER PAST PERSECUTION OR HAVE A WELL-FOUNDED FEAR OF PERSECUTION ON ACCOUNT OF POLITICAL OPINION

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.[5] *See* 8 U.S.C. §§ 1158(a), 1231(b)(3) (2004); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995). Although these types of relief are "'closely related and appear to overlap,'"

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

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

1. Asylum

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

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

demonstration of past persecution, a rebuttable presumption arises that the alien has a well-founded fear of future persecution. *See Melgar de Torres v. Reno*, 191 F.3d 307, 315 (2d Cir. 1999); 8 C.F.R. § 208.13(b)(1)(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. *See id*. at 663-64.

"An alien may satisfy the subjective prong by showing that events in the country to which he. . . . will be deported have personally or directly affected him." *Id*. at 663. With respect to the objective component, the applicant must prove that a reasonable person in his circumstances would fear persecution if returned to his native country. *See* 8 C.F.R. § 208.13(b)(2) (2004). *See also Zhang*, 55 F.3d at 752 (noting that when seeking reversal of a BIA factual determination, the petitioner must show "'that the evidence he presented was so compelling that no reasonable factfinder could fail'" to agree with the findings (quoting *INS v. Elias-Zacarias*, 502 U.S 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); *Osorio*, 18 F.3d at 1027. *See* 8 C.F.R. § 208.13(a), (b) (2004). The applicant's testimony and evidence must be credible, specific, and detailed in order to establish eligibility for asylum. *See* 8 C.F.R. § 208.13(a)(2004); *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999); *Melendez v. U.S. Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991) (stating that applicant must provide "credible, persuasive and . . . . *specific* facts" (internal quotation marks omitted)); *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445, 1987 WL 108943 (BIA June 12, 1987), *abrogated on other grounds by Pitcherskaia v. INS,* 118 F.3d 641, 647-
48 (9th Cir. 1997) (applicant must provide testimony that is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account"). Because the applicant bears the burden of proof, he should provide supporting evidence when available, or explain its unavailability. *See Diallo v. INS*, 232 F.3d 279, 285-86 (2d Cir. 2000); *In re S-M-J-*, 21 I. & N. Dec. 722, 723-26, 1997 WL 80984 (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)(A) (2004); *Ramsameachire v. Ashcroft,* 357 F.3d 169, 178 (2d Cir. 2004); *Zhang*, 55 F.3d at 738.

2. Withholding of Removal

Unlike the discretionary grant of asylum, withholding of removal is mandatory if the alien proves that his "life or freedom would be threatened in [his native] country because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (2000); *Zhang,* 55 F.3d at 738. To obtain such relief, the alien bears the burden of proving by a "clear probability," *i.e.*, that it is "more likely than not," that he would suffer persecution on return. *See* 8 C.F.R. § 208.16(b)(2)(ii) (2004); *INS v. Stevic*, 467 U.S. 407, 429-430 (1984); *Melgar de Torres,* 191 F.3d at 311. Because this standard is higher than that governing eligibility for asylum, an alien who has failed to establish a well-founded fear of persecution for asylum purposes is necessarily ineligible for withholding of removal. *See Zhang v. INS,* No. 02-4252, 2004 WL 2223319, at *4 (2d Cir. Oct. 5, 2004); *Chen*, 344 F.3d at 275; *Zhang*, 55 F.3d at 738.

3. Standard of Review

This Court reviews the determination of whether an applicant for asylum or withholding of removal has established past persecution or a well-founded fear of persecution under the substantial evidence test. *Zhang* v. *INS,* No. 02-4252, 2004 WL 2223319, at*5; *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); *Ali v. Reno*, 237 F.3d 591, 596 (6th Cir 2001) (same standard applicable to Torture Convention). "Under this standard, a finding will stand if it is supported by 'reasonable, substantial, and probative' evidence in the record when considered as a whole." *Secaida-Rosales*, 331 F.3d at 307 (quoting *Diallo*, 232 F.3d at 287).

Where an appeal turns on the sufficiency of the factual findings underlying the IJ's determination[6] that an alien has failed to satisfy his burden of proof, Congress has directed that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B) (2004). *Zhang* v. *INS,* No. 02-4252, 2004 WL 2223319, at*19, n. 7. 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,* No. 02-4252, 2004

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[6] Although judicial review ordinarily is confined to the BIA's order, *see, e.g.*, *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001), courts properly review an IJ's decision where, as here (JA 2-3), the BIA adopts that decision. *See* 8 C.F.R. § 3.1(a)(7)(2004); *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.

WL 2223319, at*6; *Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales,* 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992).

Indeed, the IJ's and BIA's eligibility determination "can be reversed only if the evidence presented by [the asylum applicant] was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). In other words, to reverse the BIA's decision, the Court "must find that the evidence not only *supports* th[e] conclusion [that the applicant is eligible for asylum], but *compels* it." *Id*. at 481 n.1 (emphasis in original).

C. Discussion

Substantial evidence supports the IJ's determination that the petitioner failed to provide consistent, detailed and specific probative evidence in support of his application for asylum and withholding of removal. To be eligible for asylum, the petitioner had to prove his claim that he was persecuted because of political opinion -- either his own or that of others imputed to him. The petitioner testified, however, that he was not a member of the same group as

his mother and brother, the YADC. (JA 85). Moreover, the petitioner provided no testimony or other evidence concerning any political views which he personally held.

There was also very little, if any, evidence concerning the political nature of the group to which his mother and brother belonged. The petitioner did not even correctly identify the name of the group, calling it the Youth Association for the *Beloved* of Corso. When asked what kind of organization it was, the petitioner described it as "a political organization that finances poor, poor people who are indigent, people who are not educated." (JA 76). That was the extent of the evidence concerning the political nature of the YADC and the political opinions of the petitioner's mother and brother.

Nor was there any specific evidence concerning the political views of the organization which the petitioner claimed was responsible for the murders of his mother and brother. When asked who would be opposed to the group his brother belonged to, the petitioner responded "the party named FRAPH" which he said "resembles Macoute" without further explanation.[7] The IJ found it significant

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[7] In the articles submitted by the petitioner's counsel as part of an appendix marked as an exhibit at the hearing (JA 69, 119-191) there are only two brief references to FRAPH. In the Human Rights Watch World Report 1999, the Front for the Advancement and Progress of Haiti is described as a paramilitary organization comprised of former Haitian soldiers. (JA 161). In the U.S. State Department, Human Rights Report for 1999, FRAPH is mentioned as reportedly responsible for (continued...)

that the petitioner did not mention FRAPH in the complaints he made to the police. (JA 80). The petitioner's explanations for this failure were inconsistent and lacking detail. Initially, the petitioner stated that he didn't mention any political connection because his father was alive and did not want his name mentioned. (JA 81). Later, his explanation for not mentioning FRAPH in the police complaints was that in Haiti gangsters are equated with FRAPH and that the police did not put FRAPH in the report because they know that FRAPH and gangsters are the same. (JA 81-82). These explanations are inconsistent and sound like after-the-fact rationalizations.

There was also no testimony or evidence concerning any direct persecution of the petitioner. He was never physically harmed, let alone on account of any political opinion he held. The petitioner's only possible claim to have been personally subject to persecution would be based on his testimony at the hearing regarding threats allegedly received by him and his family. That testimony, however, was inconsistent and lacking in detail. In the police complaints regarding his mother and brother, the petitioner mentioned threats to his family and to himself. (JA 176, 188). Asked about these threats at the hearing, the petitioner related that his father had received a phone call with a threat that the family would be killed one by one. His first explanation was that this call was made in April following the death of his brother in January 1999. (JA 82-83). The second explanation was that the

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[7] (...continued)
the 1993 Cite de Soleil fire. (JA 124).

threatening phone call came first and *then* his brother was killed. (JA 84). In his Application for Asylum, the petitioner had previously stated that his father had received the threatening phone call "several months after my mother was killed by someone we did not know." (JA 195, 208). The petitioner admitted that he did not report this threatening phone call to the police. (JA 84).

In his brief to this Court, the petitioner raises a new argument, one that was not presented to the IJ or BIA. The argument centers on the translation of the word *dechoukè* in the second police report (JA 184-189) concerning his brother's death. Petitioner's Brief at 6, 20-23. The petitioner argues that this word was incorrectly translated from the police report and thus misunderstood by the IJ and improperly used by the IJ to discredit the petitioner's testimony. When the word *dechoukè* was used to refer to the individuals who persecuted the petitioner's family, it was parenthetically translated as "gangsters or bandits group" in the version reviewed by the IJ. (JA 80). The police complaint went on to state that the group demanded money from members of the community at the end of the month, and the IJ found this to be an indication that the motivation for the threats and deaths was financial rather than political. (JA 54).

The petitioner now argues that *dechoukè* is a term which has political significance. Relying on a translation obtained from an internet web site (set forth in the Addendum to Petitioner's Brief and not part of the record presented to the IJ) the word is variously defined as a verb meaning "to uproot, root out, pull out [by the roots] and also "to depose, overthrow." A secondary meaning is provided as "to

vandalize, ransack the property of and or lynch a person, get rid of s.o. by mob action." Petitioner's Addendum at 1, Petitioner's Brief at 21. With additional references to the word *dechoukè* found in articles contained in the Addendum (also not presented to the IJ) the petitioner argues that the IJ therefore misunderstood the petitioner's testimony when he remarked, "You state nothing about a political party. . . . You make no mention about any political connection, only that thugs are demanding money and if not paid things happen. Why didn't you mention anything political in that statement." (JA 80). The petitioner now argues for the first time on appeal to this court that when he used the word *dechoukè* to describe the group responsible for the threats against his family he meant it to suggest a political motivation. Petitioner's Brief at 22-23.

As an initial matter, the petitioner waived any claim regarding the meaning of *dechoukè* by failing to raise it before the BIA. Where a petitioner fails to present an argument to the BIA regarding his entitlement to asylum, and the agency therefore has "no opportunity to consider [the] question in the first instance," such an argument is deemed waived on appeal. *Ramsameachire v. Ashcroft*, 357 F.3d 169, 182 n.4 (2d Cir. 2004). *See also Drozd v. INS*, 155 F.3d 81, 91 (2d Cir.1998) (noting that petitioner's argument on appeal was waived because argument had not been raised before the IJ or the BIA).

Even if his claim had been properly preserved, it would still be meritless. Now claiming he was confused at the hearing, the petitioner argues that his testimony about the police equating gangsters and FRAPH (JA 82) is the same as his substituting the word *dechoukè* for FRAPH in his

complaints to the police, thus affording to FRAPH a political connotation otherwise absent. Petitioner's Brief at 23. Even assuming FRAPH is a political entity, however, that does not necessarily mean there was a political motivation to the threats and killings.[8] The use of the word *dechoukè* could just have readily been consistent with one of the other definitions now provided by the petitioner. The extortionate demands for money from the community at the end of each month and the death threats by these gangs could be described as "vandalizing a person" and "getting rid of someone by mob action." This is how the IJ interpreted the police complaints and the petitioner's testimony together as a whole; this was not an unreasonable interpretation. *See Secaida-Rosales v. INS,* 331 F.3d 297, 307 (2d Cir. 2003).

The IJ reasonably found that the petitioner did not suffer past persecution on account of political opinion. Having so found, the petitioner was not entitled to a presumption of having a well-founded fear of persecution should he return to Haiti. *See* 8 C.F.R. § 208.13(b)(1)(2004); *Melendez v. United States Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991). Accordingly, the petitioner must otherwise meet his burden of demonstrating both subjective and objective evidence that he would be persecuted on account of political opinion should he return. *See Ramsameachire,* 357 F.3d at 178.

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[8] The recent 2004 activities of FRAPH, as set forth in the Addendum references, was of course not available to the IJ at the time of the May 2001 hearing and have no significance to the IJ's determination.

The IJ apparently credited the petitioner's testimony that the family received threats and that the petitioner's mother and brother were killed by the group called FRAPH. Even having done so, however, the IJ could not make the necessary connection to a political motivation for these events and found that the likely basis was financial. (JA 54).

The IJ specifically noted (JA 54-55) that the petitioner's father and two sisters remained in Haiti, based on petitioner's testimony that his father was openly serving as a minister in another city (JA 83, 89) in the northern part of Haiti and the sisters residing in a location outside of the city where the "incident" happened. (JA 89). Petitioner did not specify what incident he was referring to. It was also noted that no statement, affidavit or correspondence was obtained from the father which could have explained why the family's house was burned, when the threatening phone call was made and what he knew about the deaths of his wife and son. The fact that the petitioner's father and sisters still reside in Haiti also demonstrates that the petitioner does not have a well-founded fear of persecution because the threat to him does not exist countrywide throughout all of Haiti. There is a place within Haiti to which the petitioner could return without fear of persecution. *See Mazariegos v. Office of U.S. Attorney General,* 241 F.3d 1320, 1325-1326 (11th Cir. 2001).

In *Mazariegos* 241 F.3d at 1325, the court relied on a number of BIA administrative decisions which construed the statute and regulations to require that an asylum applicant face a threat of persecution country-wide, citing *Matter of Acosta*, Interim Dec. 2986, 19 I. & N. Dec. 211,

235 (BIA March 1, 1985); *Matter of Mogharrabi*, Interim Dec. 3028, 19 I. & N. Dec. 439, 1987 WL 108943 (BIA June 12, 1987); *Matter of R-,* Interim Dec. 3195, 20 I. & N. Dec. 621, 1992 WL 386814 (BIA Dec. 15, 1992) (An alien seeking to meet the definition of a refugee must do more than show a well-founded fear of persecution in a particular place or abode within a country -- he must show that the threat of persecution exists for him country-wide). Moreover, in a recent similar case, the court held that where the petitioner testified that his parents still lived in Haiti and they suffered no harm since he left the country the BIA made the reasonable conclusion that the petitioner could return to Haiti without facing future persecution. *Romilus v. Ashcroft,* No. 03-1538, 2004 WL 2059565, at *2, 6 (1st Cir. Sept. 14, 2004)) (citing *Aguilar-Solis v. INS*, 168 F.3d 565, 573 (1st Cir. 1999) ("[T]he fact that close relatives continue to live peacefully in the alien's homeland undercuts the alien's claim that persecution awaits his return")(alteration in original)). *See also Melgar de Torres,* 191 F.3d at 313 (finding that the evidence that applicant's own mother and daughters continued to live in El Salvador after the applicant emigrated without harm cut against the argument that applicant had a well-founded fear of persecution).

The petitioner also claims that the political opinions of his mother and brother were imputed to him. It has been held that an imputed political opinion, whether correctly or incorrectly attributed, can constitute a ground for political persecution within the meaning of the INA. *Alvarez-Flores v. INS,* 909 F.2d 1, 4 (1st Cir. 1990). But even if a petitioner could demonstrate that a political opinion was imputed to him, he also has to demonstrate that he was

persecuted in some way on account of that opinion. *See INS v. Elias-Zacarias*, 503 U.S. 478, 489-90 (1991); *Canas-Segovia v. INS,* 970 F.2d 599, 601-602 (9th Cir. 1992) (imputed political opinion applies where a persecutor falsely attributes an opinion to the victim, and then persecutes the victim because of the mistaken belief about the victim's views).

Whether FRAPH imputed to the petitioner the political opinions held by his mother, brother or the YADC is a question of fact, and there was no evidence presented to support this assertion. *See In re S-P,* Interim Decision 3287, 21 I. & N. Dec. 486, 490, 1996 WL 422990. (BIA June 18, 1996). The petitioner testified that he was not a member of any political party (JA 85) and offered no evidence as to any political opinions he personally held or the nature of any political opinions held by his mother or brother that could have been imputed to him. The only evidence of "political opinion" was extremely limited. The petitioner identified YADC as a political organization that finances poor people who are indigent and not educated. When the petitioner's brother-in-law was asked if he knew what the petitioner's mother was involved in politically, he testified that the YADC was involved in "feeding the kids." (JA 107). Even if feeding or educating the indigent could be considered an expression of political opinion, there was no testimony upon which to base the conclusion that FRAPH imputed to the petitioner a similar belief.

Nor was there any evidence on the political nature of the views of FRAPH, the purported persecutor. *See Hernandez-Ortiz v. INS,* 777 F.2d 509, 516 (9th Cir. 1985) ("in determining whether threats or violence constitute

political persecution, it is permissible to examine the motivation of the persecutor; [the court] may look to the political views and actions of the entity or individual responsible for the threats or violence, as well as to the victim's, and . . . the relationship between the two). While the petitioner testified that FRAPH, the group believed to be the persecutor, was opposed to YADC, and the two groups always had conflict (JA 79), he provided only a financial motivation, based on either robbery or extortion, for the conflict. (JA 80). The IJ accordingly made that finding after hearing the petitioner's testimony and reviewing the police complaints filed at the time by the petitioner. (JA 173-177, 184-189). This finding of fact is supported by substantial evidence and is entitled to deference. *See* 8 U.S.C. § 1252(b)(4)(B); *Zhang v. INS,* No. 02-4252, 2004 WL 2223319, at *5 (2d Cir. Oct. 5, 2004) ("Indeed, we must uphold an administrative finding of fact unless we conclude that a reasonable adjudicator would be compelled to conclude to the contrary.").

II. THE IJ PROPERLY DETERMINED THAT THE PETITIONER FAILED TO ESTABLISH ELIGIBILITY FOR RELIEF UNDER THE CONVENTION AGAINST TORTURE

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-*, Interim Decision 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 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) (2002); *see also Najjar v. Ashcroft*, 257 F.3d 1262, 1304 (11th Cir. 2001); *Wang*, 320 F.3d at 133-34, 144 & n.20.

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

original) (quoting 8 C.F.R. § 208.18(a)(1) (2000)(language reamins same in 8 C.F.R,. § 208.18(a)(1) (2004)).

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 Convention Against Torture, an alien's removal may be either permanently withheld or temporarily deferred. *See* 8 C.F.R. §§ 208.16, 208.17 (2004).

2. Standard of Review

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

C. Discussion

The petitioner waived his claim under the Convention Against Torture by not including it in the Notice of Appeal to the BIA, which only sought review of the IJ's denial of the asylum and withholding of removal applications. (JA 43). Although the petitioner's counsel made a somewhat

half-hearted attempt at asserting a CAT claim in his Brief to the BIA, (JA 28-29), it was fatally deficient in that it failed to cite any specific testimony in the record relating to a claim of torture and failed to indicate how the Haitian government or any government official was involved. *Wang,* 320 F.3d at 133-34, 143-44 & n.20*; Ali,* 237 F.3d at 597.

Moreover, the petitioner failed to preserve his Convention Against Torture claim even before the IJ. The IJ himself found it at best uncertain whether the petitioner had even properly claimed CAT relief. (JA 55). The IJ's uncertainty whether a CAT claim was even made was due to the fact that there was absolutely no reference made to the Convention Against Torture during the hearing, and in fact the word torture never appears in the hearing transcript. (JA 67-118).

Even if properly preserved, the petitioner's claim under the Convention Against Torture is meritless, because substantial evidence supports the IJ's determination that the petitioner failed to provide any testimony in support of his application for protection under the CAT. More specifically, there was no showing that the Haitian government or a government official would physically or mentally abuse the petitioner. (JA 55A).

A CAT claim is considered independent of an asylum claim and focuses solely on the likelihood that the alien will be tortured if returned to his or her home country, regardless of the alien's subjective fears of persecution or his or her past experiences. Nevertheless, to prevail on a CAT claim the alien must proffer "objective evidence that

he or she is likely to be tortured in the future." *Ramsameachire v. Ashcroft*, 357 F.3d at 169, 185 (2d. Cir. 2004). This petitioner failed to do. No objective evidence of torture was presented at the hearing and certainly none that would be 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) (2004).

III. THE SUMMARY AFFIRMANCE BY THE BIA WAS APPROPRIATE AND IN ACCORDANCE WITH THE REGULATIONS

A. Relevant Facts

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

B. Governing Law and Standard of Review

The procedure by which a single member of the BIA summarily affirms the IJ's decision is reviewed for abuse of discretion. *See Shi v. Board of Immigration Appeals,* 374 F.3d 64, 66 (2d Cir. 2004).

C. Discussion

This Court has clearly held in several recent cases that the streamlining regulations issued by the former Immigration and Naturalization Service (now the U.S. Citizenship and Immigration Services) expressly authorize summary affirmance by a single member of the BIA, citing 8 C.F.R. § 3.1(a)(7) (2002) (re-codified at 8 C.F.R.

§ 1003.1(a)(7) (2004)). *Shi,* 374 F.3d at 66; *see also Zhang v. U.S. Dep't of Justice,* 362 F.3d 155, 158 (2d Cir. 2004) ("Because the BIA streamlining regulations expressly provide for the summarily affirmed IJ decision to become the final agency order subject to judicial review, we are satisfied the regulations do not compromise the proper exercise of our [8 U.S.C.] § 1252 jurisdiction.") (footnote omitted). This practice of the BIA was upheld even prior to promulgation of these regulations, provided "'the immigration judge's decision below contains sufficient reasoning and evidence to enable [the Court] to determine that the requisite factors were considered,'" *Shi,* 374 F.3d at 66 (quoting *Arango-Aradondo v. INS,* 13 F.3d 610, 613 (2d Cir. 1994)). Just as in *Shi* and *Zhang,* the IJ's decision in this case clearly meets this standard.

The Oral Decision of the IJ recites the testimony of each witness, summarizes the documentary evidence including the police complaints filed by the petitioner and the declarations of membership concerning his mother and brother and comments on the evidence which the petitioner could have submitted, but did not submit. (JA 54-55). In the petitioner's brief, there is virtually no analysis of why the summary affirmance is claimed to be inappropriate. Petitioner's Brief at 24. For example, the petitioner has not demonstrated that the IJ decision contained errors that were more than harmless or nonmaterial, or that it ignored a controlling Board or federal court precedent. 8 C.F.R. § 1003.1(a)(7)(ii)(A) (2004).

Nothing in the petitioner's submission to the BIA (JA 6-30) indicated that any purpose would have been served by issuing a separate opinion affirming the IJ's decision.

In purely conclusory fashion, the petitioner now states that the IJ made his decision in complete disregard of the evidence on the record and such errors substantially affected the outcome of the case. Petitioner's Brief at 24. This is simply not enough. The BIA acted well within its discretion in adopting the IJ's decision as the "final agency determination" in adjudicating the petitioner's appeal, and the IJ's decision provides an ample basis for review by this Court.

CONCLUSION

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

Dated: October 15, 2004

Respectfully submitted,

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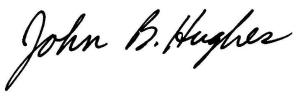

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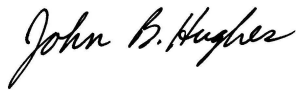
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,132 words, exclusive of the Table of Contents, Table of Authorities, and this Certification.



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