05-6465-ag

To Be Argued By:
ALEX V. HERNANDEZ

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-6465-ag

ATIS SUTISNA, DJULAIHA SUKMANA, SHINTA NURSAFIRA AZZAHARA, RAMADHIKA H.M. IBRAHIM,

Petitioners,

-vs-

ALBERTO GONZALES,
ATTORNEY GENERAL DEPARTMENT OF JUSTICE,
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

This Court has jurisdiction under § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (2005), to review Petitioner's challenge to the BIA's final order dated November 7, 2005, denying him asylum, withholding of removal, and relief under the Convention Against Torture.

Petitioner's first asylum application is dated January 23, 2003, and was resubmitted on February 5, 2003. He had a hearing with an INS asylum officer on March 19, 2003, and a notice to appear was served on March 31, 2003, commencing removal proceedings.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether this Court has jurisdiction to review discretionary factual determinations of the Immigration Judge that Petitioner, a citizen and native of Indonesia, failed to establish changed or extraordinary circumstances which were necessary to excuse his failure to timely file an asylum claim?

2. Whether a reasonable factfinder would be compelled to reverse the Immigration Judge's adverse credibility determination, where Petitioner's testimony and documentary submissions contained numerous inconsistencies and omissions concerning material elements which go to the heart of Petitioner's claim?

3. Whether a reasonable factfinder would be compelled to reverse the Immigration Judge's finding that Petitioner did not establish that it is more likely than not that he would be tortured upon return to Indonesia, where there was no evidence in the record that he would be tortured?

4. Whether the Board of Immigration Appeals properly exercised its discretion in affirming the Immigration Judge's decision?

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BRIEF FOR ALBERTO GONZALES
Attorney General of the United States

Preliminary Statement

Atis Sutisna, a native and citizen of Indonesia, petitions this Court for review of a decision of the Board of Immigration Appeals ("BIA") dated November 7, 2005 (Joint Appendix ("JA") 1). The BIA affirmed the decision

of an Immigration Judge ("IJ") (JA30, 31) dated August 31, 2004, denying Petitioner's applications for asylum, withholding of removal and CAT[1] under the Immigration and Nationality Act of 1952, as amended ("INA"), and ordering him removed from the United States. (JA2 (BIA's decision), 48 (IJ's decision and order)).

The IJ found that Sutisna is barred from asylum "for failing to meet the one year filing requirement" and that he "does not fall within any of the exceptions for failing to meet the one year filing requirement." JA47. This Court lacks jurisdiction to review the discretionary determination of the IJ that Petitioner failed to timely file an application for asylum and otherwise failed to establish changed or extraordinary circumstances to excuse his late filing.

Turning to Petitioner's application for withholding of removal, and for withholding of removal pursuant to the Convention Against Torture, the IJ expressly based his decision on his determination that Petitioner was not a credible witness. Substantial evidence supports the IJ's conclusion. Sutisna claims that he was subject to past persecution on account of engaging in anti-government protests as a college student and based upon his

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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).

membership in a pro-democracy political party. Further, he claims that as the member of a racial and ethnic minority (Indonesian of Chinese descent), he was subjected to persecution before leaving Indonesia. He claims that his office building at the Jakarta Stock Exchange was bombed because a large number of anti-government activists were employed there, that his home was burned on account of his ethnic background, and that he was beaten by uniformed members of a pro-government youth group on account of his political beliefs. Sutisna's affidavit in support of his asylum petition, however, omitted material, relevant facts which reach to the heart of his claim such as his belated claims that the referenced persecution was motivated by his membership in an identifiable ethnic group or political party. Based on these material, self-evident inconsistencies and omissions, as well as the fact that Petitioner was unable to offer credible explanations for the inconsistencies and omissions, the IJ properly found that his claim of past persecution lacked credibility.

Substantial evidence further supports the IJ's conclusion that Sutisna failed to establish it is more likely than not he will be tortured if returned to Indonesia. The IJ found that while Petitioner may have been victimized in the past, the claimed violence was more consistent with Petitioner's being the victim of random, unorganized, and generalized violence. Because there was no credible evidence that Sutisna would be targeted upon his return to Indonesia, much less subjected to torture, the IJ properly concluded that Sutisna was not entitled to withholding of removal under the Torture Convention. As a reasonable

factfinder would not be compelled to conclude otherwise, this Court should deny Sutisna's petition for review.

Finally, the BIA acted properly and within its discretion in affirming the IJ's decision.

Statement of the Case

On January 17, 2001, the Immigration and Naturalization Service granted Atis Sutisna's petition for an nonimmigrant H-1 visa, valid from January 13, 2001, through September 30, 2003. JA478. Sutisna entered the United States on March 6, 2001, at New York and was admitted pursuant to the H-1 visa. JA480, 482.

He was employed pursuant to the H-1 visa until October 2001 when he failed to maintain his employment status. His wife and two children entered the United States on January 17, 2002, and admitted with H-4 visas valid until February 19, 2002. JA151, 609-13.

On January 23, 2003, Sutisna first filed his application for asylum and for withholding of removal. JA545. His application was rejected, but he resubmitted it on February 5, 2003. JA151, 545. His wife and two children became dependents of his asylum application. JA151. He appeared before an asylum officer on his application for withholding of removal on March 19, and on March 20, 2003, the asylum officer found that the application for asylum had not been filed within one year of his entry to the United States and, thus, was not timely. JA152. She further found that he failed to establish that he was entitled

to consideration on the merits because he failed to show that there are changed circumstances which occurred on or after his entry to the United States, or that extraordinary circumstances prevented him from timely filing. JA152. Accordingly, the asylum officer referred Sutisna's asylum application to an Immigration Judge.

On March 31, 2003, Sutisna was served with a Notice to Appear before an Immigration Judge at Hartford, Connecticut on April 29, 2003. JA617.

Brief, non-substantive hearings were held on April 29, and July 8, 2003, JA50-63, and on August 31, 2004, a merits hearing was held before an IJ. JA64-148. The IJ rendered an oral decision denying Sutisna's applications for asylum and withholding of removal and voluntary departure, and rejecting his request for protection under the Torture Convention. JA30–49.

Petitoner timely appealed the IJ's decision to the BIA, JA22-3, and on November 7, 2005, the BIA entered its decision adopting and affirming the decision of the IJ. JA2. On December 6, 2005, Petitioner filed a petition for review with this Court.

Statement of Facts

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

Petitioner Sutisna is a native and citizen of Indonesia, admitted into the United States at New York, New York, on March 6, 2001, on an H-1 visa issued by the Immigration and Naturalization Service with authorization to remain in the United States from January 13, 2001, through September 30, 2003. JA478.

He was employed pursuant to the H-1 visa until October 2001 when he failed to maintain his employment status. His wife and two children entered the United States on January 17, 2002, and were admitted with H-4 visas valid until February 19, 2002. JA151, 609–13.

1. Petitioner's Asylum Application

On January 23, 2003, Sutisna first filed his application for asylum and for withholding of removal. JA545. This application was rejected, but he resubmitted it on February 5, 2003. JA151, 545.

In Part B of his application he stated that he was seeking asylum or withholding of removal based on: (a) political opinion; (b) membership in a particular social group; and (c) Torture Convention. JA549. In his affidavit, he claimed that, "I was traumatize because of riots and bombings and I fear that if I return to my country I will abuse or killed," and "We have seen that my country

has been torn apart and seen innocent people died because of their ethnic, political opinion or religion." JA555.

a. Claim of Political Persecution

To the extent that Petitioner's affidavit dealt with the question of political violence in Indonesia, his affidavit stated as follows.

> I want to apply for an asylum because I fear for my family's safety and me if I go back to my country. *In 1997 civil war broke out because the people demanded for the corrupt government to be reformed and for the president, Soeharto, to resign. To oppose this the government responded with terror, intimadion and military*. People were kidnapped, executed without trial, shot and tortured. They even hired mercenaries to conduct act of terrorism and bombing against their own people. Everyday there were demonstrations and protests that lead into big riots and unrest. People were beaten and dragged away even shot by the military in a vary cruel way they wouldn't even allowed the red cross to take care of the wounded, they were being shot at. All this atrocities culminated in May 12th 1998 when the army snippers open fire at a group of students when they were taking shelter in University of Trisakti, one of the top private univeristy in Indonesia. The report said that three students were killed, but after the incidents many more people were missing without a trace. This incident caused a massive chain

> reaction among the people. One day after that tragedy, on May 13th 1998 tens of thousands of people rallied to the street to protest and demanded that the president took responsibilities. Again the government responded with force sending the army against the people, not only that the government also sent their own agents to blend with the civilians spreading rumours and turning them against each other. *Because of the economy gap cause by years of corruption those government agents managed to turn the people's anger against the minority ethnic groups and the middle class*. The demonstration turned into riot and looting they robbed and destroyed stores, offices, even houses they also abused and raped women and children.

JA556 (emphasis added).

To the extent that Petitioner claimed that violence was directed at him personally, he related the following details about a robbery which flowed from the lawlessness.

> After those tragedies, I was trying to start my life again. My house was destroyed and has no money to rebuild them, so I left my wife and kids to stay with my parents and I rent a small room close to the office. For a couple of months it was very difficult time for my family ane me. Everything was hard to get, even just to get a can of milk for my kids or sold on unbelieveable price. *There were so many people living in the streets, they did everything to survive, steal, rob even kill other just to get a*

> *couple thousand of money*. Wherever we go there is no safer place to be visited, no one welcomes other to visit his or her places. *On the street is the most dangerous place, the robbery can happen anytime and anywhere even in front of law enforcement agent*. I was driving my car, it the only my belonging that I have. It was in the traffic light, when groups of people come across the road and approach my car. *Suddenly they showed me their axes and pointed at my handbag. I was so sock and afraid of being harm or hurt if I did not give it to them but I have to keep my belonging with me*, but what happened than, I had to pay off, they broke my window and windshield, pull me out of my car, hit my head with their axes, they hit all over my body, even trying to step on my head. They tried to start up my car but were failed, but all my belonging that I have, my handbag was gone along with my handphone wallet and some important document as well. Nothing left, no body else want help me, everyone were careless even the police. I could do nothing just let them go. My elbow was got hurt and bleeding so bad, all my body was pain, bumped, and brushed and wounded. *After the robbery left some people trying to help me out, but it was too late.*

JA557-58 (emphasis added).

Later, his affidavit asserts that the building where he worked at the Jakarta Stock Exchange was bombed. JA558. "This incidence," he wrote, "made me even more

nervous and worried about living here, without no safety and security for my family or me." JA559.

Nowhere in his affidavit did he claim that he was a member of a political movement while in college, that he was a member of a pro-democracy political party, or that he believed that political violence had been directed against him on account of his status as a member of a pro-democracy political party. Neither did his affidavit mention that the people who robbed him were wearing uniforms, were otherwise identifiable as members of a violent, government-sponsored youth movement, or that the robbery was committed against him on account of his political beliefs. Similarly, his affidavit does not claim that the bombing of the Jakarta Stock Exchange was the result of political terror committed by the government or directed against him as a member of a pro-democracy political party, or against his political party. The affidavit is silent about his having uncovered illegal stock transactions at the stock exchange, or that any of the violence which he details was a result of his having uncovered illegal stock transactions.

b. Claim of Ethnic Persecution

To the extent that Petitioner's affidavit dealt with the question of his or his family's ethnic background, he stated, "I was born in Ciamis, Jawa Barat, Indonesia, on April 3rd, my father and my mother were Indonesian and ethnic Malay of Sudanese tribe." JA555. The affidavit does state in summary fashion as follows.

> The civil war in my country has made me and my family fear for our lives. *We have seen that my country has been torn apart and seen innocent people died because of their ethnic*, political opinion or religion.

JA555. The affidavit does not mention the alleged ethnic background of his wife's family.

His affidavit asserts that his family home was destroyed during riots which prevented him from leaving his place of employment at the Jakarta Stock Exchange.

> I could not go home because of roadblocks and some people were terrorizing the street.
>
> * * *
>
> When I got home I found out that my house has been looted and burned, no thing left, almost all my belonging was gone or destroy. I was crying and yieling, I spend almost all my time to save and buy those things but now everything was gone, the only thing that I had was my car that I leave in the office. *I could not imagine if my wife and kids did not leave our house just a day before the riots for stay at my parent's home in different city*. This tragedy always haunted me for a long time, it was very tragic and leave very scary and unforgetable horryfying experience in my life. I was so stress and depress, I could not return to work for couple weeks and should go to the traumatic center for recovery.

JA556-67 (emphasis added).

Nowhere in his affidavit does Petitioner allege that his or his wife's family are ethnic Chinese, that they were persecuted on account of their ethnicity, that he had forewarning of the destruction of his family home, or that his home was destroyed on account of his family's ethnicity. Neither does the affidavit assert that his home was destroyed pursuant to government-sponsored or government-condoned violence.

2. Petitioner's Asylum Hearing

On March 19, 2003, Sutisna appeared before an asylum officer on his application for withholding of removal. On March 20, 2003, the asylum officer found that the application for asylum was not filed within one year of his entry to the United States, and was, therefore, not timely. JA152. She further found that he failed to establish that he was entitled to consideration on the merits because he had failed to show that there are changed circumstances which occurred on or after his entry to the United States, or that extraordinary circumstances prevented him from timely filing. JA152. Accordingly, the asylum officer referred Sutisna's asylum application to an Immigration Judge. JA153.

B. Petitioner's Removal Proceedings

Removal proceedings were commenced against Sutisna on March 31, 2003, when the INS served him with a Notice to Appear before an Immigration Judge. JA617.

The Notice alleged that he was deportable because: (1) he is not a national or citizen of the United States; (2) he is a native and citizen of Indonesia; (3) he was admitted to the United States on March 6, 2001; (4) he was admitted to the United States as a nonimmigrant temporary worker with specialty occupation, with authorization to remain in the United States until September 30, 2003; and (5) he failed to maintain his status in that he was not employed from October 1, 2001, to the date of the Notice. JA616.

A merits hearing was held on August 31, 2004, at which time Petitioner was represented by counsel.

1. Documentary Submissions

The IJ accepted as exhibits the Notices to Appear issued to Petitioner and his family members, counsel's pleadings, an offer of employment, the asylum application and affidavit[2], a copy of Petitioner's passport, documents related to his and his wife's visas, proof of the issuance of social security numbers, Petitioner's marriage certificate, birth certificates of Petitioner and his family, taxpayer identification documents, JA66, 67, 69, 70, 72, and a host of English language newspaper and Internet articles, JA 73, 201-469, and the September 2, 2003 "Declaration of Atis Sutisna in Support of Application for Asylum & Withholding." JA205-08. Counsel also offered a number

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[2] Under the Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8485 (Feb. 18, 1999), an asylum application also serves as an application for relief under CAT.

of untranslated articles in the Indonesian language. The IJ, however, did not accept or consider them: "I can't consider those." JA67.

In contrast to his affidavit in support of his asylum application, Petitioner's Declaration asserted, among other things, that: (a) as a former member of a university student movement and as a member of a pro-democracy political party, he would be subjected to persecution based on his political beliefs; (b) he feared persecution based upon his membership in a particular social group, that is, Indonesian of Chinese descent; (c) as an employee of the Jakarta Stock Exchange, he had uncovered illegal stock transactions perpetrated by government officials; (d) the Jakarta Stock Exchange where he was employed was bombed by the government in retaliation for his discovery of these illegal stock trades; (e) based on the same foregoing factors, he feared government-sponsored or sanctioned torture if removed to Indonesia. JA205-08.

Among the documents submitted by Petitioner were a number of letters and miscellaneous documents in support of his claims. A Jakarta attorney wrote that Petitioner is an activist and a member of an unspecified political party, and that respondent's home was destroyed, looted and burned in May 1998. In addition, he states that, on May 19, 1999, the respondent was harassed and targeted by members of a government group because he had informed the director of the stock exchange of illegal activities. According to the letter, towards the end of 2000, an unspecified, false claim was registered against Petitioner, and in April 2001, his parents received a letter which threatened to kidnap him and kill him. Finally, in

September 2002 his parents and in-laws' homes were visited by people who damaged their houses. JA210-11.

Petitioner also submitted a letter from a member of the PRD Party – an allegedly pro-democracy party – stating that Sutisna had been an active member since 1997, and was attacked and is wanted by an unspecified group of people organized and formed by the government. JA17-19.

Petitioner submitted letters from former co-workers from the Jakarta Stock Exchange. One writer stated that he had discovered suspicious illegal stock transactions and reported them, and that, in May 1999, his secretary received a threatening telephone call instructing him to remain silent. Another stated that Sutisna had been treated in the hospital three times from 1998 to 2000. JA217-20. Medical records corroborated this claim. JA232-37.

The IJ reviewed an unsigned affidavit stating that the writer knew Petitioner to be an active student. The affidavit claimed that Petitioner had discussed the purportedly illegal stock transaction, and that a group of people burned his house in 1998. In December 2002, the writer met Sutisna's parents, who stated that he should not return to Indonesia because people are looking for him. JA222-23.

Petitioner submitted another letter from a writer who claimed that Sutisna was targeted by a youth group affiliated with Suharto's son. The writer claims to have met Petitioner at the Jakarta police headquarters after

being released from questioning. The writer added that Petitioner was treated at a hospital, and that in October 2002, Sutisna told him that he was facing judgment in a court in Jakarta.

Petitioner also submitted a number of news articles relating to the September 14, 2000, bombing of the Jakarta Stock Exchange. The articles included speculation that the bombings were related to Suharto's trial on corruption charges, but also could have been the work of international terrorists. President Wahid, however, later ordered the arrest of Tommy Suharto, former President Suharto's youngest son in connection with the stock exchange bombing attack. Sutisna's counsel also submitted other articles indicating that Indonesia has suffered from a rash of bombings, many of which go unsolved. JA325-401, 422-52.

Another article, from "Volunteers Team for Humanity" an otherwise unidentified organization, states that on May 14, 1998, thousands of commercial buildings, business offices, supermarkets, houses, buses and private cars were burned and looted, and over 2,000 people were killed. According to the article, most of the victims were ordinary people and members of the Chinese minority. JA453-56.

An email from an unidentified organization states that in early August 2004 democracy activists – including Java's PRD chairperson, Natalia Scholastika – were arrested in Indonesia in early August 2004. They were allegedly charged with inciting others to protest and strike.

2. Petitioner's Testimony

Petitioner's testimony, like his Declaration, diverged considerably from his affidavit in support of his asylum application. At the conclusion of the hearing, the IJ found that "the respondent is not a credible witness," and that his asylum application "is totally at odds with his testimony today." JA43.

Although the IJ stated that "its observations [are] based on the following factors considered in their totality," JA43, for ease of reference, his testimony is divided herein into three broad categories: (a) claims of politically motivated violence and persecution, and his explanations regarding material omissions from his asylum application; (b) claims of persecution arising from his membership in a persecuted ethnic minority; and (c) miscellaneous claims raised in documentary evidence which he failed to testify about.

a. Petitioner's Testimony About Political Violence and Explanations Regarding Material Omissions from His Asylum Application

Sutisna testified he was politically active in a pro-democracy student organization when he attended the university. As a member of that organization he distributed pro-democracy flyers and educated the community about corruption in the ruling Suharto government. Although the police allegedly discouraged meetings, he was not physically harmed.

Sutisna testified that he had joined a pro-democracy political party called the People's Democratic Party, or PRD, where his duties were to evaluate government policy, coordinate and lead demonstrations, and cooperate with other organizations. According to Sutisna, there were just a few thousand members of the PRD, and he was on the staff of the "People's Fighters Department."

The IJ questioned Sutisna about the fact that his application failed to mention his membership in an Indonesian political party.

> Q. Now you never joined any organization, according to your application. Why, why do you say that? On page 6 of your I-589 application it says have you ever belonged to any organization including a political party, answer, no.
>
> A. I was not aware of that section.
>
> Q. Well, you signed the application. Right?
>
> A. Correct.
>
> Q. And, and you didn't read these questions?
>
> A. I read it, but was probably my lack of understanding of that question.
>
> Q. Well, you understood English. Didn't you?
>
> A. Yes, a little bit.
>
> Q. And that's why you were applying for a job in America as a professional or a skilled worker. Right?
>
> A. Technically, yes. But when I came here to have the interview I failed to get the job because of my lack of English, and that was clearly stated in the letter from that company.

Q. And when you came to America on a working visa, did you tell the truth to the U.S. Consul as to why you wanted to come to America?

A. I did not go to an interview. I received a petition, it was sent by (indiscernable) and then I received a visa.

Q. Well, you did answer questions on the, the working visa application. Right?

A. Yes, correct.

JA125-26.

Petitioner's answers, however, raised questions in the IJ's mind about Sutisna's *bona fides* when applying for his original H-1 visa, and his intention to abide by the terms of that visa. The following exchange ensued.

Q. And your intent was to come here temporarily and then return. Is that right?

A. No, Your Honor. As soon as I arrive here, I did try to make an effort to apply for asylum. I saw a lawyer and apparently the lawyer was very expensive, so I have to (indiscernible) little by little and, and then complete the application.

Q. So you didn't file an application for asylum within one year after your arrival. Correct?

A. Correct.

Q. And the reason was you didn't have money to pay an attorney. Right?

Q. And besides that, also in our difficulty in trying to obtain all of the documents and getting all of the documents translated into English.

A. Well, when did you formulate your intention?

* * *

A. More or less, three to four months after I had arrived in America.

Q. Even though you had all those problems, you didn't even think about asylum until three or four months after you got here.

A. The first few months I was here, my employer was concentrating in getting some work. So I was concentrating myself in getting some work, as well. I did think about it, but I was not concentrating seriously on it.

Q. So your intent to seek asylum was – you possessed that even at the time you set foot in America. Right?

A. Yes, correct.

Q. So you, you didn't have any bona fide intent to abide by your temporary visa. Correct?

A. At that time, I did not really know the regulations of the visa. All I could think about was I wanted to live free, free from all the threats that I have received before.

JA126-27.

The IJ returned to the question of why Sutisna failed to mention his membership in the PRD and offered him an opportunity to explain.

Q. So sir, you, you wrote this all by yourself?

A. Yes, Your Honor.

A. I tried my best to translated from the Indonesian words into the English. I, I tried, I tried to explain it in English as best as I could. I'm not so sure if grammatically in English it, it, it is correct.

Q. Sir, except for, for a few misspellings, this is – I've seen, I've seen a lot worse affidavits, sir.

A. I, I, I revised it several times and I also seek help from the online dictionary and also from the computer and I tried my best to find the right wordings to interpret what, to interpret what I meant to say.

Q. Okay. And why isn't the PRD mentioned in this affidavit?

A. I mention it as I was a member of a political party. Maybe I did not put down PRD.

Q. Sir, there appears to be absolutely nothing in this affidavit that really discusses your involvement with the PRD. Do you know why?

A. Maybe I missed it because I had the original statement in Indonesia and maybe of, of the timing issues, I had to do it in a rush.

JA130-31.

Petitioner's explanation about why references to the PRD were omitted from his asylum application led the IJ to question the nature of the organization and Petitioner's familiarity with the tenets of the PRD.

Q. Do you see this here? Now stars are usually associated with flags involving communism.

Right? And the, and the heading of this says Capitalist State Equals State Terror. Sounds communist to me.

A. That, okay, yes, that's true. That's how the government positions us to be like a communist so then people will be afraid to us. And not only us as the organization was stamped as a communist, but any other organization that opposed the government would be stamped as a communist --

Q. *But sir, that's not what – this is a document from your own party. And why does it use words like capitalist state? Why does it say that?*

A. *I'm not really sure about that.*

Q. *Sir, it's your own party*. What does this party advocate except for being prodemocracy? Does it advocate communist government?

A. Not at all.

Q. So why does the party have the star and, and calls the government capitalist? Why?

A. *I don't understand that, Your Honor*.

Q. You don't understand that. Okay. What is the KPP?

A. I don't know.

Q. Is that the Communist Party of Indonesia?

A. Not – no, Your Honor.

Q. So you don't know what it means when it says KPP dash PRD?

A. It's – now I realize, it's the central leaders committee.

JA133-34 (emphasis added).

According to Sutisna, he was threatened by plainclothes government agents in June 1997. Although he claimed that they were from the government, he did not explain how it is that he knew they were from the government. The government agents allegedly threatened him, telling him to stop his political activities or else he would be harmed.

On one occasion Sutisna was trapped in his office at the Jakarta Stock Exchange due to general lawlessness and rioting. He was eventually able to walk home. On the way he witnessed rampant death and destruction. He arrived home to find that his house had been burned down, and it was the only house in the neighborhood that had been burned. According to Petitioner, his home was singled out on account of his being an anti-government activist, and he did not report the matter to the police because they would not have listened.

After losing his home, Sutisna claimed that he was forced to live with friends from the PRD, and he continued his work with the PRD. He also testified that he rented a small room near his job at the stock exchange. When questioned by the IJ about this apparent discrepancy, he testified that he lived both in this rented room and with friends. The IJ offered Petitioner an opportunity to explain material discrepancies between his testimony and asylum application about the consequences of losing his home.

> A. At that time it was safe from the chaos that we're – that was happening in Jakarta.

Q. So it was, chaos was near Jakarta and your – you, you thought your family was safe 120 miles away. That correct, sir?

Q. Tell – well, why do you say in your statement here that you rented a small room close to your office after your house was destroyed?

A. It was a temporary residence.

Q. Right. You didn't say that in your testimony, though. Why, why is that?

A. Yes, Your Honor. Basically, it was – it's about my lack of transforming the Indonesian words into English, so I had difficulty in trying to say what I actually wanted to say in English.

Q. Well sir, isn't there a big difference between going from friend to friend to find and renting a house on, on your own, or renting a small room?

A. That's true. I only used that room for – to keep my books and my – and sometimes if my friend was not available I also stayed there for one or two days.

JA106-7.

Sutisna testified about the incident described in his asylum application as a robbery. At the asylum hearing, however, he claimed that in May of 1999 he was driving his car in broad daylight when he was approached in traffic by some people who dragged him out of his car and beat him unconscious. He testified that the assailants were members of a government youth organization and he knew that they were members because they were wearing uniforms. The street thugs allegedly told him that he was

being beaten because he knew too much about certain illegal stock transactions. He also testified for the first time that he received telephonic threats before the beating and believed that the beating was related to the threats.

Petitioner's testimony triggered the following exchange with the IJ.

> Q. Now you said you were beaten in May of 1999.
>
> A. Correct
>
> Q. And how do – why do you say that this is a youth, some youth group that did this to you?
>
> A From their uniform, you could see that they were from the youth government that was controlled by the – the youth organization that was controlled by the government.
>
> Q. Okay. And this happened at a stop light, a traffic light in Jakarta?
>
> A. Correct, in the middle of the crowd.
>
> Q. So there were a lot of other cars around?
>
> A. Yes, correct.
>
> Q. Now did you read what you wrote on your, on your asylum application on paragraph five?
>
> A. Before I submitted it, I reread it.
>
> Q. Well, it gives a very different, a very different interpretation than what you're testifying about today. It indicates that they pointed to your handbag and they robbed you. And it clearly indicates that these were criminals.
>
> A. It's like this, Your Honor. The first time they approach me they think to me and they pointed

at me and after that they started beating me up and then pulled me our of the car, and then stamped on me and I remember that I was bleeding from my forehead. And then I tried to protect the important documents I had with me, so I was in this position, and then my left hand was trying to cover and to repel them, because there were – they had sharp objects with then. After they assaulted me like that, I begged for them not to kill me. I lost conscious and they ran away with all – everything that I had.

JA134-35.

Petitoner's explanations, however, prompted further questioning by the IJ whose incredulity is apparent even in the cold, black-and-white transcript.

Q. So why are you saying that they're – that this – that they targeted you other than as a victim of crime?

A. And before that, I have opened an illegal transaction at the stock exchange, and after that I received some threats and then they, and, and then, and then they said that you would pay, you would pay for what you just did.

Q. But sir, how do you know that you were not – according to your own application it says that you were a victim of a robbery, a violent robbery. Why do you say – what basis do you have to say it had anything to do with other than robbery?

A. Because beforehand I had made an illegal transaction at the stock exchange. And after that I

received some threats and I received another threat again afterwards, and then after that I experienced that incident where they made it seem as if it was a robbery.

Q. How do you know it wasn't just a robbery? I don't understand. Maybe it was a coincidence.

A. No, because they were organized by this youth group. And all I know that that organization was leaded –

* * *

– the leader of that organization was a member of the People Consultative Assemble.

JUDGE TO MR. SUTISNA

Q. All right. Well, did they say anything to you, these people that attacked you?

A. Yes, that's --

Q. What did they --

A. – true.

Q. – say?

A. They said that this is because you were involved too much.

Q. With what?

A. In that transactions I saw many illegal activities, business misconducts, and I knew who were behind those.

Q. So you're saying these street thugs knew all about stock transactions. Is that what you're saying?

A. No. They were sent by somebody who was involved, so then this case will not be opened.

JA135-36.

The IJ's question about why Sutisna did not offer the foregoing, material facts to the asylum officer caused the petioner to lose his memory.

Q. Well, all right. According to this – what the asylum officer said, when this happened nothing was said to you. Why is – why did you tell the asylum officer nothing was said to you?

A. I don't remember that anymore, Your Honor.

JA136.

The IJ struggled to understand Petitioner's version of this event.

Q. And you're saying in broad-daylight, people with uniforms beat you in front of all the traffic and all these people.

A. Correct. That's what they usually did.

* * *

Q. Well, okay. Any your asylum application that you filed also doesn't mention this youth group, either. Do you know why?

A. First, because I was also scared to reveal there the information about them because they also have some members here.

Q. So they're after you in the U.S., too?

A. They are here along with the Suharto family because they are the protectors of Suharto's family.

JA137, 140.

Sutisna testified that he was at work at the Jakarta Stock Exchange on September 14, 2000, when a large bomb was detonated nearby resulting in significant injuries and deaths. Petitioner returned to the hospital, and believes that the stock exchange was bombed because many anti-government activists work there. JA113-14.

b. Petitioner's Testimony About Ethnically-motivated Violence

Sutisna testified that his wife is half-ethnic Chinese and that persons of Chinese extraction are persecuted in Indonesia.

A. Actually, it was not really safe for [petitioner's family]. I, I mentioned that it was safe for them for that time being. And then later, when they found out that I had send my family to Bandung –

* * *

- - because this new organization had a lot of members all over Indonesia, they later found out our existency in that area and started sending

> threats again. And, besides, my wife was of Chinese descent and so it was easy to, to recognize.
>
> MR. WAHLA TO MR. SUTISNA.
>
> Q. So sir, when you say Chinese descent, what do you mean by Chinese descent?
>
> A. My wife's father is from the Chinese and my wife's mother is native Indonesian.
>
> Q. Okay. And because of this Chinese descent, what was the problem, sir?
>
> A. She was treated unjustly everywhere. Everywhere we went we received different treatments. And even in daily activity it was not usual for us to be outcasted.

JA115-16.

Later, counsel asked Sutisna what he feared would happen if he and his family were to return to Indonesia. He answered,

> A. They would be looking for me and they would definitely be abusing me and they would, they would probably kill me. And also because my wife is of Chinese descent, she would be the target of assault, the target of harassment from the government and from the program identification.

JA119.

The IJ asked Petitioner why he made no mention of his wife's ethnicity in his asylum application.

> Q. Okay. And again, your asylum application doesn't indicate that the, the burning of your house was other than, what appear to be, an random act.
>
> A. No, because in my area my house was the only one that was burned down. Oh, because all that time they also knew that my wife is of Chinese descent and they hated that fact.

JA139.

In May of 1998 he learned from the television and from friends that his house had been targeted because a cross had been painted on it. As a consequence, he decided to send his wife and children 120 miles away to live with his parents. JA104-05. According to him, he did not want to join them because he was an activist committed to the overthrow of the Suharto government. He also had to report to work at the stock exchange. JA106. At that time, there were large-scale, anti-government riots in Jakarta, and ethnic Chinese were attacked. JA138.

c. Miscellaneous Claims Raised in Documentary Evidence Omitted from or Contradicted by His Testimony

Although a Jakarta attorney submitted a letter which claimed that Petitioner's parents and in-laws were visited

by people who damaged their homes, Petitioner made no mention of this claim in his testimony.

Petitioner claimed that his place of employment was bombed on September 14, 2000. Among the documents submitted by him were medical records detailing dates of admission for treatment. The IJ observed,

> The respondent provided some medical reports showing treatment in May 1998, September 2000. *The Court questions why the admission date would have been September 13, 2000 if the bombing was not until September 14, 2000*.

JA41 (emphasis added).

Sutisna provided some documents or newsletters relating to the PRD. JA34, 408-11. The IJ questioned Petitioner whether the organization was communist, but Sutisna was unable to offer a satisfactory explanation about the organization or its views. JA133-34.

Petitioner submitted a number of documents in support of his claim of ethnic persecution.

> Finally, the fact that Mr. Sutisna's family, including his children, are of Chinese ancestry, exacerbates the threats facing him inasmuch as justice an protection from security forces for members of this minority are even more problematic than for ordinary Indonesians. Racial prejudice continues to shadow both the justice

> system and provision of protection by the security forces, rendering both, for the Sino-Indonesians, a commodity that must be purchased.

JA198.

An affiant provided the following insight,

> I did not know Mr. Sutisna personally while I was in Indonesia. I met him in the United States. After review of his applicaiton and discussion with him I can vouch for his claim and human rights violation in Indonesia. Mr. Sutisna's active involvement in political party, his wife's chines's ancestry places him at grave risk, if forced to return.

JA200.

Another affiant declared,

> I know his wife has a Chinese decent and always become victim on every riot and as minorities they always become target and abuse.

JA229.

Petitoner also offered a report prepared by an organization identified as "The Volunteers Team for Humanity" which stated that during riots, women of Chinese descent are often subjected to organized sexual assault. JA453-56.

C. The Immigration Judge's Decision

The IJ – who personally questioned Petitioner about details of his asylum application and his hearing testimony – rejected wholesale Sustina's testimony as lacking in credibility. The IJ observed and found,

> *After listening to respondent's evidence and testimony, the Court finds that the respondent is not a credible witness*. The Court makes its observations based on the following factors considered in their totality.
>
> *The Court would note that the respondent's asylum applications is totally at odds with his testimony today*. The respondent states he prepared his asylum application by himself and revised it and sought help. The Court generally finds that, with the exceptions of some spellings errors, that it is a well-written and concise affidavit. *The application, however, is totally at odds with his testimony today. The application essentially is that of a crime victim, who happened to be at the wrong place at the wrong time on three different occasions, versus political persecution which he now states is the basis of his claim*.
>
> *The respondent was asked on a number of occasions why certain things were not included in the application and he really does not give, in the Court's mind, a satisfactory reason why he does not mention the PRD or that he fears these youth*

> *groups*. In fact, he stated that he was afraid to mention this youth group because he was afraid they were in the United States, could harm him in the United States. *The Court finds that this explanation has no basis to it, whatsoever*.

JA43-4 (emphasis added).

The IJ had difficulty believing that Petitioner was a *bona fide* member of the PRD inasmuch as he appeared to be wholly unfamiliar with fundamental tenets of the organization. The IJ observed,

> The title [of the article] says *People's Democratic Party*, and then under that it says Capitalist State Equals State Terror. It appears that the flag is a star with, what appears to be, half of a wheel of a car. The respondent was asked exactly what this organization was about, and only indicated it was prodemocracy and anticorruption and tyranny and profreedom.

JA34.

The IJ did not believe Sutisna's testimony about his house being targeted on account of his political beliefs or his wife's Chinese ancestry – material details ommitted from the asylum application. The IJ found that in contrast to his hearing testimony, "There is no indication in his asylum application that he was warned that his house was targeted." JA36.

The IJ found Petitioner's claim that he was dragged from his car and beaten by members of a government youth group inherently implausible. He also declined to credit Petitioner's testimony because it was at odds with his asylum application which omitted material, relevant information first disclosed in his testimony. His hearing testimony version, moreover, was internally inconsistent. The IJ found,

> The respondent indicates he had uncovered some sort of discrepancy or malfeasance in terms of some stock transaction. When he was asked why these street thugs would know about it, he indicated that they were hired by somebody. *The respondent was asked why the asylum officer noted that none of these men had spoken with him, and the respondent stated he was not sure. The respondent first said he was not robbed, but then indicates he was robbed and his money was taken as well as some documents relating to his work at the stock exchange*.

JA37 (emphasis added).

The IJ found that "[t]he respondent did file an asylum application on January 23, 2003, almost two years after his arrival in the United States." JA38. Regarding the timeliness of Petitioner's asylum application, the IJ found,

> The Court would also note that the respondent is barred from asylum for failure to meet the one year filing requirement. The record clearly reflects

> that the respondent does not fall within any of the exceptions for failing to meet the one year filing requirement. Respondent acknowledges that he intended to apply for asylum soon after his arrival in the United States. There appear to be no extraordinary circumstances that prevented his filing for asylum. It appears that the respondent was nevery really in status as an H-1B since he never really worked for the H-1B petitioner. Accordingly, the Court finds that the application for asylum shall also be barred for failing to meet the one year filing requirement.

JA47.

D. The Board of Immigration Appeal's Decision

On November 7, 2005, the BIA adopted and affirmed the IJ's decision finding that Petitioner was subject to removal and denying his application for asylum as untimely. Because the Board found that the IJ's credibility findings were adequately supported by the record and not based merely on the vagueness or implausibility of Petitioner's testimony, it upheld the IJ's determination that Petitioner failed to present sufficient credible evidence to carry his burdens of proof and persuasion. Further, the BIA found that the IJ did not err when it concluded that Petitioner failed to prove that it was more likely than not that he would be subjected to torture if returned to Indonesia. JA2.

SUMMARY OF ARGUMENT

I. The IJ properly denied Sutisna's application for asylum and withholding of removal. The IJ's discretionary factual finding that Petitioner's asylum application was not timely, and that he failed to establish changed or extraordinary circumstances excusing his delay, may not be reviewed by this Court. Petitioner, moreover, does not raise any "constitutional claims or questions of law" in his petition for review of the IJ's findings and order.

Substantial evidence supports the IJ's finding that Sutisna was not a believable witness, and that his claims of political and ethnic persecution were not credible. Comparing and contrasting Sutisna's hearing testimony with his sworn asylum application, it is clear that he embellished a number of unrelated violent incidents and recast them as government-sponsored retaliation for his claimed political activities and as ethnic persecution. A number of his statements during the hearing were inherently improbable and internally inconsistent. Having already found Sutisna's claims not credible, the IJ properly did not credit the statements of proffered witnesses, newspaper reports and emails, inasmuch as none of them supported his claim that he personally was the target of political or ethnic intimidation. Because a reasonable factfinder would not be compelled to find otherwise, the petition should be denied.

II. The IJ's denial of protection under the Torture Convention also finds substantial support in the record.

Having already found Sutisna's claims not credible, the IJ properly did not credit the only evidence that would arguably support his claim that he would be tortured or imprisoned upon return to Indonesia: Sutisna's own self-serving testimony.

ARGUMENT

I. THE IMMIGRATION JUDGE PROPERLY DETERMINED THAT PETITIONER FAILED TO ESTABLISH ELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL BECAUSE HIS AFFIDAVIT IN SUPPORT OF HIS APPLICATION WAS MATERIALLY AT ODDS WITH HIS SWORN TESTIMONY, AND HE FAILED TO PROVIDE CREDIBLE EXPLANATIONS FOR MATERIAL OMISSIONS FROM THE AFFIDAVIT

A. Relevant Facts

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

B. Governing Law and Standard of Review

Two forms of relief are potentially available to aliens claiming that they will be persecuted if removed from this country: asylum and withholding of removal.[3] *See* 8

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[3] "Removal" is the collective term for proceedings that (continued...)

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

1. Asylum

An alien must file an application for asylum "within 1 year after the date of the alien's arrival in the United States," 8 U.S.C. § 1158(a)(2)(B), unless "the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's elligibility for asylum or extraordinary circumsatances" excusing the delay. 8 U.S.C. § 1158(a)(2)(D). "No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2)." 8 U.S.C. § 1158(a)(3). *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 177 (2d Cir. 2006)("The INA, by its terms, precludes judicial review of the Attorney

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[3] (...continued)
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) (2005), cases relating to the former relief remain applicable precedent.

General's determinations regarding the one-year deadline," as provided by statute.) This Court, however, retains jurisdiction to review "constitutional claims or questions of law" related to the IJ's determinations regarding "changed" or "extraordinary" circumstances. *Id.*, 180.

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) (2005). *See* 8 U.S.C. § 1158(a) (2005); *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) (2005); *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) (2005).

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) (2005). 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) (2005); *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) (2005). 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) (2005); *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), *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 Zhang v. INS*, 386 F.3d 66, 71 (2d Cir. 2004) ("[W]here the circumstances indicate that an applicant has, or with reasonable effort could gain, access to relevant corroborating evidence, his failure to produce such evidence in support of his claim is a factor that may be weighed in considering whether he has satisfied the burden of proof."); *see also Diallo v. INS*, 232 F.3d 279, 285-86 (2d Cir. 2000); *In re S-M-J-*, 21 I. & N. Dec. 722, 723-26 (BIA 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) (2005); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004); *Zhang*, 55 F.3d at 738.

The one-year filing deadline for asylum applications created by 8 U.S.C. § 1158(a)(2)(B) does not apply, however, to applications for withholding of removal or relief pursuant to the Convention Against Torture. 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 208.16(a); *Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 163 (2d Cir. 2006).

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) (2004); *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)(1) (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 Chen*, 344 F.3d at 275; *Zhang*, 55 F.3d at 738.

3. Standard of Review

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

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

344 F.3d at 275 (omission in original) (quoting *Diallo*, 232 F.3d at 287).

The scope of this Court's review under that test is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 71; *Wu Biao Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. *See also Zhang v. INS*, 386 F.3d at 74 ("Precisely because a reviewing court cannot glean from a hearing record the insights necessary to duplicate the fact-finder's assessment of credibility what we 'begin' is not a *de novo* review of credibility but an 'exceedingly narrow inquiry' . . . to ensure that the IJ's conclusions were not reached arbitrarily or capriciously") (citations omitted). Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992).

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

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

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

findings). The "exceedingly narrow" inquiry "is meant to ensure that credibility findings are based upon neither a misstatement of the facts in the record nor bald speculation or caprice." *Zhang v. INS*, 386 F.3d at 74.

An IJ may rely on an inconsistency concerning a single incident in an asylum applicant's account to find that applicant not credible, "provided the inconsistency affords 'substantial evidence' in support of the adverse credibility finding." *Majidi v. Gonzales*, 430 F.3d 77, 80 (2d Cir. 2005)(upholding adverse credibility finding based on discrepancies between applicant's written application and oral testimony; IJ is not required to solicit from applicant an explanation for inconsistencies in his evidence). Where an IJ's adverse credibility finding is based on specific examples in the record of inconsistent statements made by an asylum applicant about matters material to the asylum claim, "a reviewing court will . . . not be able to conclude that a reasonable adjudicator was compelled to *find* otherwise." *Lin v. U.S. Dep't. of Justice*, 413 F.3d 188, 191 (2d Cir. 2005) (emphasis in the original) (holding that petitioner's inability to remember basic personal information, such as whether she was married in the spring or fall, supported adverse credibility determination).

In reviewing credibility findings, courts "look to see if the IJ has provided 'specific, cogent' reasons for the adverse credibility finding and whether those reasons bear a 'legitimate nexus' to the finding." *Id.* (quoting *Secaida-Rosales*, 331 F.3d at 307). Credibility inferences must be upheld unless they are "irrational" or "hopelessly incredible." *See, e.g.*, *United States v. LaSpina*, 299 F.3d

165, 180 (2d Cir. 2002) ("we defer to the fact finder's determination of . . . the credibility of the witnesses, and to the fact finder's choice of competing inferences that can be drawn from the evidence") (internal marks omitted); *NLRB v. Columbia Univ.*, 541 F.2d 922, 928 (2d Cir. 1976) (credibility determination reviewed to determine if it is "irrational" or "hopelessly incredible").

Where a petitioner omitts from his asylum application an "essential factual allegation underlying petitioner's asylum claim," this Court will find that the omission was not "incidental or ancillary" and uphold the IJ's adverse credibility determination. *Xu Duan Dong v. Ashcroft*, 406 F.3d 110, 111-12 (2d Cir. 2005).

C. Discussion

This Court lacks jurisdiction to review the IJ's finding that Petitioner's application for asylum was not timely, or that there existed "changed" or "extraordinary" circumstances excusing his late filing. "No court shall have jurisdiction to review any determination of the Attorney General under paragraph [8 U.S.C. § 1158(a)] (2)." 8 U.S.C. § 1158(a)(3). *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 177 (2d Cir. 2006) ("The INA, by its terms, precludes judicial review of the Attorney General's determinations regarding the one-year deadline," as provided by statute.) While this Court retains jurisdiction to review "constitutional claims or questions of law" related to the IJ's determinations regarding "changed" or "extraordinary" circumstances, *id.* at 180, Petitoner makes no such claim here. This Court, therefore, should dismiss

the petition for lack of jurisdiction, to the extent it seeks review of the IJ's finding that Petitioner's asylum application is barred.

Further, substantial evidence supports the IJ's determination that Petitioner failed to provide credible testimony in support of his application for asylum and withholding of removal, and thus failed to establish eligibility for relief.

Sutisna's accounts about political persecution were replete with inconsistencies and implausibilities that went to the heart of his claims. For example, his application made no mention of the fact that he belonged to a student pro-democracy movement or that he was a member of the PRD, facts which go to the heart of his claim of political persecution. Indeed his affidavit in support of the application was silent regarding any form of political persecution and would not have supported an application for asylum or withholding of removal. In contrast, his hearing testimony offerred for the first time that he was beaten by uniformed members of a government-sponsored youth group.

> Q. And how do – why do you say that this is a youth, some youth group that did this to you?
>
> A. From their uniform, you could see that they were from the youth government that was controlled by the – the youth organization that was controlled by the government.

JA134.

While he told the asylum officer that the people who robbed him were silent about their motives, in his hearing testimony he asserted for the first time, "[t]hey said that this is because you were involved too much." JA136. When asked, "why did you tell the asylum officer nothing was said to you?" he answered simply, "I don't remember that anymore, Your Honor." JA137. In *Lin v. U.S. Dep't. of Justice*, 413 F.3d 188 (2d Cir. 2005), this Court observed,

> As an initial matter, we agree with petitioner's contention that whether she was married in the spring or in the fall is of little significance to her asylum claim. We do find it significant, however, that *petitioner was unable to recall whether she was married in the spring or in the fall and that she was generally unable to provide a coherent chronological account of her personal history*. Had petitioner's testimony been generally credible and coherent, an isolated discrepancy regarding the date of her marriage may not have been a sufficient basis for denying her application for asylum.

Id. at 189. Here, as in *Lin*, this Court should affirm the adverse credibility findings of the IJ where Petitioner was unable to recall material details which go to the heart of his claim and he was otherwise unable to give a "generally credible and coherent" history of his claimed persecution.

Similarly, his account of ethnic persecution on account of his wife's membership in the Sino-Indonesian minority were charachterized by material omissions that went to the heart of his claim. The affidavit in support of his application were silent about not less than: (1) his wife's being of Chinese extraction; (2) his inlaws' being of Chinese extraction; (3) that during riots, women in Indonesia are often subjected to brutal, organized sexual assault; and (4) he had a reasonable fear that it was more likely than not that if returned to Indonesia, his wife would be subjected to ethnic persecution. In contrast, documentary evidence submitted in support of his hearing testimony made out a *prima facie* showing that women of Chinese extraction are often the victims of gang rape during rioting. JA229, 453-56. He also mentioned his wife's ethnicity for the first time during his hearing testimony. JA115-16, 119. These factual claims, made for the first time in his testimony, are the foundation of his claim of feared ethinic persecution. As such, these omissions and contradictions were not "incidental or ancillary," but rather concerned an "essential factual allegation underlying petitioiner's asylum claim." *Ye v. Gonzales*, ___ F.3d ___, 2006 WL 1174145, *4 (2d Cir. May 2, 2006) (quoting *Xu Duan Dong v. Ashcroft*, 406 F.3d 110, 111-12 (2d Cir. 2005)). Moreover, Sutisna's "failure to include any reference" to the fact that that he feared serial, sexual assault on his wife and the mother of his children "in his I-589 form is 'self-evident[ly]' inconsistent with his later testimony" and documents submitted at the hearing. *Id.*

Because his testimony was not found to be credible – as it was contradicted by pertinent documentary evidence, material omissions and contrary statements in his asylum application which he failed adequately to explain – Petitioner failed to meet his burden of proof in establishing his status as a refugee, and "the inconsistency afforded substantial evidence to support the adverse credibility finding." *Id*., citing *Xu DuanDong v. Ashcroft*, 406 F.3d 110, 111-12 (2d Cir. 2005). Furthermore, because Sutisna failed to carry his burden in proving eligibility for asylum, he necessarily failed to meet his burden for withholding of removal. *See Chen*, 344 F.3d at 275. *Accord Zhang v. INS*, 386 F.3d at 71.

As detailed above, the record supports the IJ's determination that Sutisna was not a believable witness and that his claims of persecution were not credible. The IJ "provided 'specific, cogent' reasons for the adverse credibility finding and . . . those reasons bear a 'legitimate nexus' to the finding." *Zhang v. INS*, 386 F.3d at 74 (quoting *Secaida-Rosales*, 331 F.3d at 307).

In *Ye v. Gonzales*, this Court upheld the BIA's affirmance of an IJ's adverse credibility findings. There the BIA noted:

> (1) while Ye's I-589 form indicated that he was taken to the family planning office and threatened with arrest, he later testified that he was detained and severely beaten ove a three-day period; and (2) while Ye testified in 1995 that he was released after he asked someone to do him a favor, he testified in

2003 that he was released because his uncle posted bond for him.

Ye, 2006 WL 1174145, at *2 (2d Cir. May 2, 2006). Finding that these inconsistencies were far from being "a mere ommission" in his paperwork, and the inconsistency "reaches to the heart of [Petitioner's] claim," this Court upheld the IJ's credibility determinations and the BIA's affirmance. *Id*.

When questioned about the conflicting responses and omissions, Sutisna also failed adequately to explain the evidentiary deficiencies at the administrative level. As such, substantial evidence supports the IJ's decision, *see, e.g.*, *Qiu*, 329 F.3d at 152 n.6 ("incredibility arises from 'inconsistent statements, contradictory evidence, and inherently improbable testimony'" (quoting *Diallo*, 232 F.3d at 287-88)), and thus Sutisna has not met his burden of showing that a reasonable factfinder would be compelled to conclude that he is entitled to relief.

Here there also arose substantial questions about Petitioner's familiarity with fundamental tenets of his claimed political party, the PRD. A reasonable factfinder would not be compelled to find that Sutisna may be subjected to persecution on account of his political beliefs where, as here, Petitioner was unable to explain, and was not familiar with, his claimed political views. As this Court has recognized, the IJ is in the "best position to discern, often at a glance," whether Petitioner's account and explanations for inconsistencies are believable. *See Zhang v. INS*, 386 F.3d at 73 ("A fact-finder who assesses

testimony together with witness demeanor is in the best position to discern, often at a glance, whether a question that may appear poorly worded on a printed page was, in fact, confusing or well understood by those who heard it.").

Similarly, to the extent that Petitioner, through documents or testimony, asserted that his family would be persecuted as members of the Chinese minority, those details were wholly absent from his initial application. As this Court recognized in *Lin*, where an IJ's adverse credibility finding is based on specific examples in the record of inconsistent statements made by an asylum applicant about matters material to the asylum claim, "a reviewing court will . . . not be able to conclude that a reasonable adjudicator was compelled to *find* otherwise." 413 F.3d at 191. In short, the IJ properly found that Petitioner failed to meet his burden of proving that he or his family would be persecuted in Indonesia on account of his family's ethnicity.

II. THE IMMIGRATION JUDGE PROPERLY REJECTED PETITIONER'S CLAIM FOR RELIEF UNDER THE CONVENTION AGAINST TORTURE BECAUSE HE FAILED TO ESTABLISH THAT HE HAD A WELL-FOUNDED FEAR THAT IT WAS MORE LIKELY THAT NOT THAT HE WOULD BE TORTURED IF RETURNED TO INDONESIA

A. Relevant Facts

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

B. Governing Law and Standard of Review

1. Withholding of Removal Under the Convention Against Torture

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

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

would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2) (2005); *see also Gao v. Gonzales*, 424 F.3d 122, 128 (2d Cir. 2005).

The Convention Against Torture defines "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, punish[ment] . . . , or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 208.18(a)(1) (2005); *see Cao He Lin v. U.S. Dept. of Justice*, 428 F.3d 391, 399 (2d Cir. 2005).

Because "[t]orture is an extreme form of cruel and inhuman treatment," even cruel and inhuman behavior by officials may not warrant Convention Against Torture protection. *Sevoian v. Ashcroft*, 290 F.3d 166, 175 (3d Cir. 2002) (citing 8 C.F.R. § 208.18(a)(2)). The term "acquiescence" requires that "the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 208.18(a)(7) (2005). Under CAT, an alien's removal may be either permanently withheld or temporarily deferred. *See* 8 C.F.R. §§ 208.16-17 (2005).

2. Standard of Review

This Court reviews the determination of whether an alien is eligible for protection under CAT under the "substantial evidence" standard. *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 177 (2d Cir. 2004).

C. Discussion

Substantial evidence supports the IJ's determination that Sutisna failed to provide credible testimony in support of his application for protection under the CAT. His asylum application described the acts of alleged government-sponsored violence as random criminal activity resulting from a generalized breakdown of civil society. In contrast, his Declaration and hearing testimony dramatically recast those events as part of broad, nefarious government conspiracy targeting him on account of variously: his membership in a pro-democracy political party; his wife's being of ethnic Chinese extraction; his having uncovered unlawful stock transactions at the Jakarta Stock Exchange; and the claimed fact that the stock exchange is permeated with anti-government activists.

Where, as here, the IJ had an opportunity to observe Petitioner testify and rejected his self-serving version of events, this Court must defer to the IJ's determination of Sustina's credibility, and to its choice of competing inferences which may be drawn from the evidence. *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002). The

IJ's finding that Petitioner was the victim of unorganized, random violence, as opposed to concerted government-sponsored or sanctioned persecution, cannot be said to be irrational or hopelessy incredible. Because Petitioner was unable to prove that it was more likely than not that he would be tortured by, or with the acquiescence of, government officials acting under color of law, the IJ properly denied his CAT claim.

CONCLUSION

For each of the foregoing reasons, the petition for review should be dismissed to the extent it seeks review of the determination that the asylum application was untimely, and denied in all other respects.

Dated: May 8, 2006

Respectfully submitted,

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,210 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

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ASSISTANT U.S. ATTORNEY

Addendum

8 U.S.C. §1101(a)(42)

(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. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a

well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. §1158

(a) Authority to apply for asylum

(1) In general

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

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

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

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

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

(3) Limitation on judicial review

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

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has

applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(B) Burden of proof

(i) In general

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that--(i) the alien 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;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations

The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review

There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

(3) Treatment of spouse and children

(A) In general

A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be

granted the same status as the alien if accompanying, or following to join, such alien.

(B) Continued classification of certain aliens as children

An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 1159(b)(3) of this title, if the alien attained 21 years of age after such application was filed but while it was pending.(c) Asylum status

(1) In general

In the case of an alien granted asylum under subsection (b) of this section, the Attorney General--

(A) shall not remove or return the alien to the alien's country of nationality

or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) Termination of asylum

Asylum granted under subsection (b) of this section does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that--

(A) the alien no longer meets the conditions described in subsection (b)(1) of this section owing to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2) of this section;

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or

political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

(3) Removal when asylum is terminated

An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section 1182(a) and 1227(a) of this title, and the alien's removal or return shall be directed by the Attorney General in accordance with sections 1229a and 1231 of this title.

(d) Asylum procedure

(1) Applications

The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a) of this section. The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.

(2) Employment

An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

(3) Fees

The Attorney General may impose fees for the consideration of an application for asylum, for employment authorization under this section, and for adjustment of status under section 1159(b) of this title. Such fees shall not exceed the Attorney General's costs in adjudicating the applications. The Attorney General may provide for the assessment and payment of such fees over a period of time or by installments. Nothing in this paragraph shall be construed to require the Attorney General to charge fees for adjudication services provided to asylum applicants, or to limit the authority of the Attorney General to set adjudication and naturalization fees in accordance with section 1356(m) of this title.

(4) Notice of privilege of counsel and consequences of frivolous application

At the time of filing an application for asylum, the Attorney General shall–

(A) advise the alien of the privilege of being represented by counsel and of the consequences, under paragraph (6), of knowingly filing a frivolous application for asylum; and

(B) provide the alien a list of persons (updated not less often than quarterly) who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

(5) Consideration of asylum applications

(A) Procedures

The procedure established under paragraph (1) shall provide that--

(i) asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum;

(ii) in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed;

(iii) in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed;

(iv) any administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within 30 days of the completion of removal proceedings before an immigration judge under section 1229a of this title,

whichever is later; and

(v) in the case of an applicant for asylum who fails without prior authorization or in the absence of exceptional circumstances to appear for an interview or hearing, including a hearing under section 1229a of this title, the application may be dismissed or the applicant may be otherwise sanctioned for such failure.

(B) Additional regulatory conditions

The Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter.

(6) Frivolous applications

If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.

(7) No private right of action

Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.