04-1864-ag

To Be Argued By:
KEVIN J. O'CONNOR

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-1864-ag

XIU-QI YANG,

Petitioner,

-vs-

ALBERTO R. GONZALES, ATTORNEY GENERAL,

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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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

SANDRA S. GLOVER
Assistant United States Attorney (of counsel)
JEFFREY P. MUELLER
Law Student Intern

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STATEMENT OF JURISDICTION

This Court has jurisdiction to review the March 17, 2004 decision of the Board of Immigration Appeals ("BIA") affirming the Immigration Judge's denial of Petitioner's applications for asylum and withholding of removal and for relief under the Convention Against Torture under Section 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (2005). On April 13, 2004, Petitioner filed a timely petition for review of the BIA's decision with this Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a reasonable fact-finder would be compelled to reverse the Immigration Judge's adverse credibility determination, where Petitioner's hearing testimony, documentary submissions and other oral statements contained several discrepancies and inconsistencies concerning material elements of his claims for asylum and withholding of removal.

2. Whether the Immigration Judge adequately considered Petitioner's claim for relief under the Convention Against Torture where it found that Petitioner did not establish that it was more likely than not that he would be tortured upon return to China.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-1864-ag

XIU-QI YANG,

Petitioner,

-vs-

ALBERTO R. GONZALES,[1] ATTORNEY GENERAL,

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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

Preliminary Statement

Xiu-Qi Yang, a native and citizen of the People's Republic of China[2] who entered the United States without

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[1] Under Federal Rule of Appellate Procedure 43(c)(2), Alberto R. Gonzales is substituted as the respondent in this case.

[2] For ease of reference, the Government will refer herein (continued...)

authorization on November 3, 2000, petitions this Court for review of a March 17, 2004 decision of the BIA. The BIA affirmed the November 5, 2002 decision of an Immigration Judge ("IJ") denying Petitioner's application for asylum and withholding of removal under the Immigration and Nationality Act of 1952, as amended ("INA"), and rejecting his claim for relief under the United Nation's Convention Against Torture ("CAT").[3]

In his petition for review, Petitioner claims that the Immigration Judge and BIA erred in denying his applications for asylum and withholding of removal and his claim for relief under the CAT.

For the reasons that follow, Petitioner's claims lack merit and thus the petition for review of the BIA decision denying his applications for asylum and withholding of removal, as well as relief under CAT, should be denied.

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[2] (...continued)
to Petitioner's native country as China.

[3] 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).

Statement of the Case

Petitioner is a native and citizen of the People's Republic of China. (JA 341). He entered the United States at Chicago, Illinois on November 3, 2000 without valid entry documents and was detained by the Immigration and Nationalization Service ("INS"). (JA 328-329). On November 20, 2000, the INS initiated removal proceedings against Petitioner by issuing a Notice to Appear. (JA 341-342). In December 2000, after Petitioner's release from INS detention and parole into the United States, he relocated to New York. (JA 214, 309). On January 19, 2001, Petitioner moved to change venue from Chicago to New York, New York, and his motion was granted on January 25, 2001. (JA 308-311). On June 7, 2001, Petitioner filed an Application for Asylum and Withholding of Removal. (JA 185-193).

After several postponements and preliminary hearings, an IJ conducted a merits removal hearing on November 5, 2002. (JA 114-167, transcripts of hearings). On that same day, the IJ issued an Order and Oral Decision denying Petitioner's applications for asylum and withholding of removal and rejecting his claim for relief under the CAT. (JA 96-112). On November 12, 2002, Petitioner filed a notice of appeal to the BIA. (JA 85-86).

On March 17, 2004, the BIA affirmed the IJ's decision. (JA 2). Petitioner filed a petition for review of the BIA decision with this Court on April 13, 2004.

Statement of Facts

A. Petitioner's Entry into the United States, Initial Sworn Statement Upon Entry, and Asylum Pre-Screening and Credible Fear Assessment Interview

On November 2, 2000, Petitioner left China by plane, traveling from Beijing to Tokyo, Japan. (JA 329). After arriving in Tokyo, Petitioner boarded a Japan Airline flight destined for Chicago, Illinois where he arrived on November 3, 2000. (JA 328-329). Upon arrival and inspection at O'Hare International Airport, Petitioner presented an illegal United States passport that he had purchased in China, along with plane tickets, for $20,000. (JA 328-329, 335). The passport presented by Petitioner was in the name of Ka Hing Chung. (JA 319-326).

On November 3, 2000, prior to taking a sworn statement from Petitioner, an INS officer, with the assistance of an interpreter, informed him in Chinese (Mandarin dialect) of, among other things, the following:

> This may be your only opportunity to present information to me and the Immigration and Naturalization Service to make a decision. It is very important that you tell me the truth. If you lie or give misinformation, you may be subject to criminal or civil penalties, or barred from receiving immigration benefits or relief now or in the future. . . . U.S. law provides protection to certain persons who face persecution, harm or torture upon return

> to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.

(JA 327).

Following this advisement of rights, Petitioner gave a sworn statement in question and answer format to the INS, of which there is a transcript. (JA 327-330). Several of the questions were designed to elicit details regarding the basis of Petitioner's claims of persecution, harm or torture should he be returned to China. (JA 328, 330). Before answering the questions, Petitioner acknowledged that he understood the rights of which he had been advised. (JA 327). Moreover, Petitioner initialed every page of the transcript. (JA 327-330).

In his sworn statement, Petitioner stated that he came to the United States because he "was afraid that if I was still in China they would arrest me." (JA 328). He also stated that he left China because he is "very poor and it is hard to find a job and make money." (JA 330). Finally, he stated that he feared being returned to China because he "borrowed so much money, a lot of people would beat me up. It would be severe, beat [me] to death." *Id.* He did not mention at any time during his interview that he practiced Falun Gong nor did he claim any discrimination

or past persecution suffered in China as a result of his practicing Falun Gong.

On November 15, 2000, an INS asylum officer, with the assistance of an interpreter, conducted an Asylum Pre-Screening and credible fear interview of Petitioner. (JA 331-340). Prior to this interview, the INS provided Petitioner Form M-444, Information About Credible Fear Interview, which set forth the purpose of the interview and informed Petitioner that the interview would be used in evaluating any claim of fear of persecution should he be returned to China. (JA 331). Additionally, at the beginning of the interview, the officer explained the purpose of the interview and stated that "[t]his may be your only opportunity to give such information" and further informed Petitioner to "[p]lease feel comfortable telling me why you fear harm." *Id.* The officer advised Petitioner that the information he revealed would not be disclosed to his government, except in exceptional circumstances. *Id.*

During the interview, Petitioner stated for the first time that he practiced Falun Gong, beginning in April 1999. (JA 335). Petitioner was then asked numerous questions about the manner and frequency with which he practiced Falun Gong. (JA 335-336). When asked what the principles of Falun Gong were, Petitioner incorrectly answered "truth, goodness and endurance." (JA 336). When asked about Falun Gong books, Petitioner stated that he uses Volume I of a book entitled "Falun Gong" and, again in error, that Falun Gong books come in yellow and other colors. *Id.*

When asked if had problems with anyone in China, Petitioner stated that "I borrowed $20,000 US dollars. So if I go back, I am afraid that they will hurt me." (JA 337). When asked who specifically he was afraid of, Petitioner responded "different people" from whom his parents borrowed money. *Id.*

Petitioner was then asked what he thought would happen to him if he were returned to China. He replied: "I am afraid that I will be arrested because I have already been arrested and people that we borrowed money from will come and beat me." *Id.* The officer then asked:

> Q Why were you arrested?
>
> A This March . . . the police came to arrest me. I realized that they had gone through my dormitory and taken my books on Falun Gong and my audiotapes. . . . So they took me to the police department and wanted me to confess that I practice Falun Gong. At first I didn't admit, but they slapped my face and used a wooden stick to slap my shoulder. So I just had to confess. They put me in jail for 1 ½ months.
>
> . . . .
>
> Q Do you believe you would be subjected to torture if you returned to China?
>
> A Yes.
>
> Q Who do you think would do that?

A First the police department will send someone to arrest me because I was accused of being a section leader, and second, I borrowed a lot of money from people and if can't return it they will come and give me trouble.

(JA 337-338).

When asked at the end of the interview if he had any further questions, Petitioner stated that "I like to add that after they released me from jail . . . they came to arrest me for the second time and that's when I ran away." (JA 339).

Following the interview, the INS officer wrote up an Interview Summary and Comments in which she concluded that Petitioner's testimony "was found not credible for the following reason: lack of detail." (JA 339). In particular, the officer noted that Petitioner was "unable to state correctly the principles or teachings of Falun Gong" as well as the names and colors of the books he used to practice Falun Gong. *Id.* The officer concluded that "it is doubtful that [Petitioner] is a member of the Falun Gong movement." *Id.* The officer went on to state, however, that Petitioner's illegal departure from China did support the possibility of future harm to him on account of his imputed political opinion and, therefore, Petitioner "met the threshold standard for credible fear by showing a significant possibility that he could establish eligibility for asylum." (JA 340).

B. Petitioner's Asylum Application

On June 7, 2001, Petitioner filed a Form I-589, Application for Asylum and Withholding of Removal. (JA 185-193). In support of his claim to asylum, Petitioner reiterated his membership in Falun Gong, which he claimed caused the Chinese police to detain him from March 24, 2000 until May 10, 2000. (JA 189, 193). Petitioner also stated that he feared being arrested, jailed and "subjected to torture" in China should he return due to his membership in Falun Gong and illegal departure. (JA 190). In a statement attached to the Form I-589, Petitioner also claimed that the Chinese police sought to arrest him for a second time in July 2000 because he was labeled by others as a section leader for Falun Gong, but he avoided arrest by hiding at a friend's home and eventually leaving for the United States. (JA 193). Petitioner concluded his statement by saying that if he returned to China he "would be arrested, jailed, and beaten by the Chinese government because I had practiced Fa Lun Gong and left China illegally." *Id.*

C. Petitioner's Removal Proceedings

Following a change of venue and after several postponements, Petitioner appeared, with counsel, before an IJ in New York for a removal hearing on November 5, 2002. (JA 136-167). At a prior hearing, Petitioner stipulated to the facts in the Notice to Appear establishing that he was removable on the ground that, upon arrival in the United States, he was not in possession of valid immigration documents, but asserted that he was seeking

asylum, withholding of removal and relief under the CAT. (JA 117-118, 121).

1. Documentary Submissions

At the November 5, 2002 removal hearing, several documents were admitted into evidence by the IJ, including the Notice to Appear and Form I-261 (JA 341-42) as well as Petitioner's application for asylum, withholding of removal and CAT relief (JA 185-193).[4] (JA 137-138). The IJ also received various background materials pertaining to China and Falun Gong (JA 230-284), as well as other documents submitted by Petitioner, including his identification card, college course certificate, job dismissal notice, two letters from acquaintances in China and a July 4, 2000 summons to appear for questioning at the Guantou Police Station of Lianjiang County Public Security Bureau (JA 173-184, 215-228). (JA 139-140). The INS, upon investigating the summons, submitted a letter from its Consulate in China and other documents stating that the summons was not issued as claimed by the Guantou Police Station of Lianjiang County Public Security Bureau (JA 168-171). (JA 140). The INS also submitted the United States passport used by Petitioner to travel to the United States (JA 321-326) as well as Petitioner's sworn statement upon entry into the United States and Credible Fear Assessment Interview (JA 194-214). (JA 140).

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[4] Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8485 (Feb. 19, 1999) (asylum application also serves as application for relief under CAT).

2. Petitioner's Testimony

Petitioner, the only witness at the removal hearing, testified that he began practicing Falun Gong in April 1999 and continued to practice it after the Chinese government declared it illegal in July 1999. (JA 144-145). On March 24, 2000, Petitioner was removed from his workplace by the public security bureau and taken to the police station because of suspicions that he was practicing Falun Gong. (JA 146-147). At the police station, Petitioner was questioned by authorities and, when he denied practicing Falun Gong, was slapped in the face and beaten with a baton. (JA 147-148). Petitioner then admitted practicing Falun Gong "once in a while" to avoid being hit further with the baton. (JA 148-149). Petitioner was then confined to a detention center for a month and a half until his parents paid a bribe and he was released on May 10, 2000. (JA 149-150).

Petitioner further testified that, upon his release from detention, he was informed that he had been discharged by his employer and that he then had difficulty finding other jobs because of his affiliation with Falun Gong. (JA 150-151). He eventually found a job as an English teacher. (JA 151). Petitioner stated that, on July 4, 2000, Chinese authorities visited his home while he was at work and left a Summons for him to appear at the police station for further questioning about his involvement with Falun Gong. (JA 152-154, 183-184). Afraid to go home after work where the authorities might find him, Petitioner instead went to an aunt's and then a friend's house where he stayed until he traveled to the United States. (JA 153-154).

When asked if he wanted to return to China, Petitioner stated that he did not because he would be arrested and "sentenced to many years" for his involvement with Falun Gong. (JA 154). He further stated that it would be "very difficult" to find a job in China because of records in his employment files documenting his association with Falun Gong. *Id.* Petitioner never mentioned during his direct or redirect examination any fear of being tortured should he be returned to China.

On cross examination, Petitioner acknowledged that he showed a false passport to an immigration officer when he arrived in Chicago but claimed he did not do so to enter the country but only because he was asked to show it. (JA 157-158). Petitioner also acknowledged that he did not mention his persecution as a practitioner of Falun Gong when asked why he feared returning to China by an immigration officer at the airport during his initial interview. (JA 158-159). Moreover, Petitioner stated that, even though he is aware that it is legal to practice Falun Gong in the United States, he did so only once -- the evening prior to his testimony -- since arriving in the United States more than two years earlier. (JA 164). When asked why, if Falun Gong meant so much to him, he had practiced it only once in the two years since he arrived in the United States, Petitioner responded that "right now in my mind, I have a lot of matters." *Id.*

2. The Immigration Judge's Decision

At the conclusion of the hearing, the IJ issued an oral decision denying Petitioner's applications for asylum, withholding of removal and relief under the CAT. (JA 98-

112). The IJ based his decision on the Petitioner's failure to provide sufficient "details and specifics" to support his claim of persecution or threat of persecution based on his practice of Falun Gong. (JA 107). In particular, the IJ noted that the letters from acquaintances submitted by Petitioner did not have any information "regarding [his] arrest and detention" and that Petitioner did not mention his practice of Falun Gong when interviewed at the airport upon arrival in the United States. (JA 106-108).

The IJ also found "significant discrepancies" in Petitioner's testimony. (JA 108). First, Petitioner's testimony about his detention was inconsistent. He testified on direct examination that he was detained by Chinese authorities after admitting to practicing Falun Gong. On cross-examination, however, Petitioner testified that he was released after confessing to practicing Falun Gong. *Id.* Second, Petitioner's testimony about what Chinese authorities believed about his role in Falun Gong differed from his statements in his application for asylum. Indeed, Petitioner testified that he was not a Falun Gong leader and did not know why authorities thought otherwise. However, in his application for asylum, Petitioner specifically stated that Chinese authorities believed him to be a Falun Gong section leader because his work colleagues had told officers that he was. *Id.* Third, although "it goes to the heart of his claim," Petitioner never mentioned in his testimony that Chinese authorities found Falun Gong materials when they searched his work dormitory, even though he made such a claim in his application for asylum. *Id.*

Finally, the IJ concluded that Petitioner's claim that he is an active Falun Gong practitioner was "somewhat implausible." (JA 109). Indeed, while Petitioner testified that he risked his life to practice Falun Gong in China, he did not practice it at all in the United States until the night before his hearing even though "he can practice Falun Gong at every street corner if he wishes to do so." *Id.*

In sum, the IJ made a "negative credibility" finding because Petitioner's testimony "did not rise to that level of believability, consistency, and detail[] to provide us with a plausible and coherent account of the basis of his fear" of persecution. (JA 110). The IJ also concluded that Petitioner failed to meet his higher burden of proof for relief under the CAT because "[t]here is nothing in his testimony or documentation or background material that would lead me to find that it is more likely than not that [Petitioner] would be tortured in China for any reason." (JA 110-111).

3. The BIA's Decision

On March 17, 2004, the BIA, in a Per Curiam Order, adopted and affirmed the IJ's decision "because we find that the adverse credibility finding is supported by the record." (JA 2). The BIA also agreed with the IJ's determination that Petitioner failed to demonstrate eligibility for relief under the CAT because he "failed to show that he would likely face torture upon return to the People's Republic of China." *Id.* This petition for review followed.

SUMMARY OF ARGUMENT

I. The IJ properly denied Petitioner's application for asylum and withholding of removal because substantial evidence supports the IJ's adverse credibility determination. Indeed, the IJ provided numerous specific, cogent reasons in his oral decision to support his adverse credibility finding. In particular, the IJ noted a general lack of detail and inconsistencies provided by Petitioner to support his claim that he practiced Falun Gong or that he was persecuted for it in China. The IJ also emphasized the significant discrepancies in some of Petitioner's statements as well as his "arbitrary decisions to give information and withhold information as he sees fit." (JA 107).

In sum, having found Petitioner to lack credibility, the IJ properly found that Petitioner failed to establish past persecution or a well-founded fear of future persecution upon return to China. Because a reasonable fact-finder would not be compelled to find otherwise, the denial of asylum and withholding of removal should be upheld, and the instant petition should be denied.

II. The IJ adequately considered Petitioner's claim for relief under the CAT and substantial evidence in the record supports the IJ's denial of CAT relief.

First, the Petitioner incorrectly claims that the IJ applied the same legal standard to both his asylum and CAT claims. In fact, the IJ appropriately applied different standards to both claims, concluding with respect to the CAT claim that "[t]here is nothing in his testimony or documentation or background material that would lead me

to find that it is more likely than not that [Petitioner] would be tortured in China for any reason . . . ." (JA 110-111).

Second, Petitioner argues that the IJ did not consider his asylum and CAT claims independently. This argument also lacks merit as the IJ clearly articulated separate reasons for his denial of asylum and his denial of relief under the CAT.

Third, and finally, having already found Petitioner's Falun Gong claims "somewhat implausible," the IJ properly noted that there was no evidence in the record to demonstrate that it was more likely than not that Petitioner would be tortured upon return to China. Indeed, not even Petitioner, despite repeated opportunities to do so, ever specifically claimed that he would be tortured upon return to China. Accordingly, absent any evidence that Petitioner would be tortured, as defined in the CAT, upon return to China, the IJ properly denied Petitioner relief under the CAT.

ARGUMENT

I. Substantial Evidence Supports the Immigration Judge's Determination That Petitioner Failed to Establish Eligibility for Asylum and Withholding of Removal Since His Testimony Was Not Credible and the Decision of the Immigration Judge Sets Forth Specific Reasons for this Credibility Determination

A. Relevant Facts

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

B. Governing Law

Two forms of relief are available to Petitioner should he successfully prove that he will be persecuted if removed from this country and returned to China: asylum and withholding of removal.[5] *See* 8 U.S.C. §§ 1158(a), 1231(b)(3) (2004); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995). Although these types of relief are "closely

[5] "Removal" is the collective term for proceedings that previously were referred to, depending on whether the alien had effected an "entry" into the United States, as "deportation" or "exclusion" proceedings. Because withholding of removal is relief that is identical to the former relief known as withholding of deportation or return, *compare* 8 U.S.C. § 1253(h)(1) (1994) *with id.* § 1231(b)(3)(A) (2000), cases relating to the former relief remain applicable precedent.

related and appear to overlap," *Carranza-Hernandez v. INS*, 12 F.3d 4, 7 (2d Cir. 1993) (citation and internal marks omitted), 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

To be eligible for asylum, Petitioner must establish that he is a "refugee" within the meaning of 8 U.S.C. § 1101(a)(42) (2000). *See* 8 U.S.C. § 1158(a) (2004); *Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 66 (2d Cir. 2002). A refugee is a person who is unable or unwilling to return to his native country because of past "persecution or a well-founded fear of persecution on account of" one of five enumerated grounds: "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (2004); *Liao*, 293 F.3d at 66. Accordingly, Petitioner must demonstrate either that he was persecuted or that he has a well-founded fear of future persecution on account of his being a practitioner of Falun Gong. *See Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003) (per curiam); *Osorio*, 18 F.3d at 1027. *See* 8 C.F.R. § 208.13(a) (2004).

Although there is no statutory definition of "persecution," courts have described it as "'punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.'" *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995) (quoting *DeSouza v. INS*, 999 F.2d 1156, 1158 (7th Cir. 1993)); *see also Ghaly v. INS*, 58 F.3d 1425, 1431 (9th

Cir. 1995) (stating that persecution is an "extreme concept"). While the conduct complained of need not be life-threatening, it nonetheless "must rise above unpleasantness, harassment, and even basic suffering." *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000). Upon a demonstration of past persecution, a rebuttable presumption arises that the alien has a well-founded fear of future persecution. *Melgar de Torres v. Reno*, 191 F.3d 307, 315 (2d Cir. 1999); 8 C.F.R. § 208.13(b)(1)(i) (2004).

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

Petitioner may satisfy the subjective prong by showing that events in the country to which he will be deported have personally or directly affected him. *Id.* With respect to the objective component, Petitioner must prove that a reasonable person in his circumstances would fear persecution if returned to his native country. *See* 8 C.F.R. § 208.13(b)(2) (2004); *Zhang v. Slattery*, 55 F.3d at 737-38 (noting that when seeking reversal of a BIA factual determination, petitioner must show "'that the evidence he presented was so compelling that no reasonable factfinder could fail'" to agree) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992)); *Melgar de Torres*, 191 F.3d at 311.

Because Petitioner bears the burden of proof of establishing his eligibility for asylum, he must 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). Moreover, Petitioner's testimony and evidence must be credible, specific, and detailed. *See* 8 C.F.R. § 208.13(a)(2004); *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999); *Melendez v. United States Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991) (stating that applicant must provide "credible, persuasive . . . [and] specific facts") (internal quotation marks omitted)); *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA June 12, 1987) (applicant must provide testimony that is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account"), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647-48 (9th Cir. 1997).

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

2. Withholding of Removal

Unlike the discretionary grant of asylum, withholding of removal is mandatory if Petitioner can prove 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 v. Slattery,* 55 F.3d at 738. To obtain such relief, Petitioner bears the burden of proving by a "clear probability," *i.e.*, that it is "more likely than not," that he would suffer persecution if returned to China. *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, should Petitioner fail to establish a well-founded fear of persecution for asylum purposes he will also fail to establish his eligibility for withholding of removal. *See Chen*, 344 F.3d at 275; *Zhang v. Slattery*, 55 F.3d at 738.

C. Standard of Review

This Court reviews the determination of whether Petitioner has established past persecution or a well-founded fear of persecution under the substantial evidence test. *Zhang v. INS*, 386 F.3d at 73 ("[W]e must uphold an administrative finding of fact unless we conclude that a reasonable adjudicator would be compelled to conclude to the contrary.") (citations omitted); *Chen,* 344 F.3d at 275 (factual findings regarding asylum eligibility must be upheld if supported by reasonable, substantive and probative evidence in the record when considered as a whole); *see Secaida-Rosales v. INS*, 331 F.3d 297, 306-07

(2d Cir. 2003); *Melgar de Torres*, 191 F.3d at 312-13 (factual findings regarding both asylum eligibility and withholding of removal must be upheld if supported by substantial evidence).[6]

Where an appeal turns on the sufficiency of the factual findings underlying the IJ's determination[7] 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) (2005). This Court "will reverse the immigration court's ruling only if 'no reasonable fact-finder could have failed to find . . . past persecution or fear of future persecution." *Chen*, 344 F.3d at 275 (omission in original) (quoting *Diallo*, 232 F.3d at 287).

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[6] In Point I of his brief, Petitioner contends that the IJ abused his discretion in denying his application for asylum and withholding of removal. (Pet. Brief at 14-17). As set forth herein, the abuse of discretion standard is not the appropriate standard to be applied by this Court when reviewing the IJ's factual findings.

[7] Although judicial review ordinarily is confined to the BIA's order, *see, e.g.*, *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3rd Cir. 2001), courts properly review an IJ's decision where, as here, the BIA adopts that decision. 8 C.F.R. § 3.1(e)(4)(2002); *Chen v. Gonzales*, __ F.3d __, 2005 WL 1806121, *2 (2d Cir. Aug. 2, 2005); *Secaida-Rosales*, 331 F.3d at 305; *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994). Accordingly, this brief treats the IJ's decision as the relevant administrative decision.

The scope of this Court's review under that test is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 74 ("Precisely because a reviewing court cannot glean from a hearing record the insights necessary to duplicate the fact-finder's assessment of credibility, what we 'begin' is not a *de novo* review of credibility, but an 'exceedingly narrow' inquiry . . . to ensure that the IJ's conclusions were not reached arbitrarily or capriciously") (citations omitted); *see also Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (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. at 481 (1992). In other words, to reverse the BIA's decision, the Court "must find that the evidence not only *supports* th[e] conclusion [that the applicant is eligible for asylum], but *compels* it." *Id.* at 481 n.1 (emphasis in original).

This Court gives "particular deference to the credibility determinations of the IJ." *Chen*, 344 F.3d at 275 (quoting

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

Because the IJ is in the "best position to discern, often at a glance, whether a question that may appear poorly worded on a printed page was, in fact, confusing or well understood by those who heard it," this Court's review of the fact-finder's determination is exceedingly narrow. *Id.*; *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) (the 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.

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) ("[W]e defer to the fact finder's determination of . . . the credibility of the witnesses, and to the fact finder's choice of the 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").

D. Discussion

Substantial evidence supports the IJ's determination that Petitioner failed to provide specific, credible evidence to establish his status as a refugee. Furthermore, because Petitioner failed to satisfy his burden of proof with respect to his application for asylum, he necessarily failed to meet his burden for withholding of removal. *See Chen*, 344 F.3d at 275.

In addressing the instant petition, the IJ recognized that applicants who possess a well-founded fear of persecution based on their practice of Falun Gong may be entitled to a grant of asylum or withholding of removal. (JA 105). Indeed, other Chinese aliens have been granted relief on such grounds. *See Zhao v. Gonzales*, 404 F.3d 295, 307-10 (5th Cir. 2005) (asylum); *Zhang v. Ashcroft*, 388 F.3d 713, 718-21 (9th Cir. 2004) (withholding of removal); *Gao v. Ashcroft*, 299 F.3d 266 (3d Cir. 2002) (granting petition for review for further proceedings on asylum claim). With

respect to Petitioner's Falun Gong claim, however, the IJ found that the claims of persecution were lacking in detail and specifics and contained "significant discrepanc[ies]." (JA 107-108). Because Petitioner fails to demonstrate that the IJ's adverse credibility determination was irrational or that a reasonable factfinder would be compelled to conclude he is entitled to relief, his petition must be denied.

In support of his adverse credibility finding, the IJ properly noted that Petitioner offered only "very generalized" testimony -- lacking in specifics and details -- regarding his persecution for practicing Falun Gong. (JA 107). Indeed, the IJ specifically observed the Petitioner's "arbitrary decisions to give information and withhold information as he sees fit." *Id.* As this Court has stated, "[w]here an applicant gives very spare testimony, as here, the IJ or the INS may fairly wonder whether the testimony is fabricated." *Qiu*, 329 F.3d at 152. Petitioner's inability to provide details and specifics regarding his arrest and detention raised rational doubt in the IJ's mind about the truthfulness of Petitioner's claims. (JA 107-108).

The IJ's adverse credibility determination was further justified by the "significant discrepancies" in the record concerning Petitioner's claim of persecution. (JA 108). The IJ cogently observed that Petitioner's failure to mention persecution on the basis of involvement in Falun Gong in his initial airport interview undermined his credibility as did his admission on cross-examination that he did not practice Falun Gong after arriving in the United States for a period of almost two years until the night

before his removal hearing. (JA 108-109). While Petitioner offered explanations for both of these undisputed facts, the IJ appropriately discounted this testimony as unbelievable. *See LaSpina*, 299 F.3d at 180 ("[W]e defer to the fact finder's determination of . . . the credibility of the witnesses, and to the fact finder's choice of the competing inferences that can be drawn from the evidence.") (internal marks omitted).

In an effort to discount the weight given by the IJ to the statements made in his airport interview, Petitioner claims that an interpreter was unavailable for cross-examination and that the INS officer's warnings were unclear. (Pet. Brief at 16). This explanation, which was not given to the IJ but raised for the first time before the BIA, is unpersuasive in any event because of the fact that Petitioner initialed each page of his airport interview after it was transcribed. (JA 327-330). Accordingly, the IJ's reliance in its decision upon discrepancies in Petitioner's airport interview and subsequent statements was perfectly rational. *See Yu v. Ashcroft*, 364 F.3d 700 (6th Cir. 2004) (substantial evidence supported IJ's adverse credibility finding based on inconsistencies in Chinese alien's asylum claim, including Petitioner's failure to mention connection with Falun Gong during initial airport interview); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178-182 (2d Cir. 2004) (affirming IJ's decision based on finding that applicant's airport statement was materially inconsistent with later testimony).[8]

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[8] In *Ramsameachire*, this Court held that airport interviews could be used to evaluate the credibility of aliens in (continued...)

The IJ's adverse credibility determination is further supported by the inconsistencies in Petitioner's testimony regarding when he was released from detention. As the IJ noted, in his direct examination and other prior statements Petitioner claimed that he was detained after he confessed to participating in Falun Gong. On cross examination, however, Petitioner stated that he was released after he signed a confession. (JA 108).[9] Moreover, the IJ noted that an addendum submitted by Petitioner, stating that authorities believed he was a Falun Gong organizer because of conversations they had with his colleagues,

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[8] (...continued)
removal proceedings provided that the record of the interview presents a reliable record of the alien's statements. 357 F.3d at 179. Although the IJ did not have the benefit of the *Ramsameachire* decision and its specific guidance on factors to consider in assessing the reliability of airport interviews, there is no reason to question the reliability of the interview in this case. The interview was transcribed, Petitioner was fully informed of the purpose of the interview and of his rights, Petitioner indicated that he understood these rights, the questioner asked questions about the basis of Petitioner's asylum claim, and there is no indication that Petitioner did not understand the questions presented to him. (JA 327-33); *see Ramsameachire*, 357 F.3d at 180. In any event, the discrepancies between Petitioner's airport interview and his testimony were only one part of the IJ's credibility finding.

[9] While Petitioner is correct (Pet. Brief at 15) that the IJ erred in stating in his ruling that neither letter submitted by Petitioner has "any information regarding the . . . arrest" (JA 106), such a misstatement is mitigated by other, more significant evidence and thus in no way renders the IJ's adverse credibility determination irrational.

contradicted Petitioner's assertion on direct examination that he was unsure why Chinese officials would accuse him of being one of the movement's leaders. *Id*. Finally, the IJ stated that although it was mentioned in his addendum, Petitioner neglected to mention during his testimony that Chinese authorities searched his dormitory room and found Falun Gong materials, evidence that the IJ believed "goes to the heart of his claim." *Id.*

In view of the deference given by this Court to the IJ's credibility determinations, the IJ's conclusion that Petitioner's claim to be an active Falun Gong practitioner was "somewhat implausible" (JA 109) was clearly rational and justified. *See Chen*, 344 F.3d at 275.[10] Indeed, Petitioner testified that he had practiced Falun Gong since April 1999 and continued to do so in China even after the government declared it illegal. (JA 109). Yet, as the IJ noted, when he arrived in the United States "where he can practice Falun Gong at every street corner if he wishes to do so," he did not practice it all for two years until the night before his removal hearing. *Id.* When asked to explain this fact at his hearing, the best Petitioner could

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[10] Petitioner urges this Court to "follow the holding (sic) of *Wong Wing Hang* and *Henry*." (Pet. Brief at 17). Those cases, however, are inapposite because the IJ here clearly articulated the basis for his decision, followed established law and precedent, and made a reasoned determination that considered all relevant factors. *See Wong Wing Hang v. INS*, 360 F.2d 715, 718-19 (2d Cir. 1966); *Henry v. INS*, 74 F.3d 1, 4 (1st Cir. 1996).

offer was that he had "a lot of matters" on his mind. (JA 164).[11]

Because the IJ provided numerous specific reasons in support of his adverse credibility finding, a reasonable fact-finder would not be compelled to find that Petitioner established a well-founded fear of persecution if returned to China. Where, as here, "the IJ's adverse credibility finding is based on specific examples in the record of 'inconsistent statements' by [petitioner] about matters material to her claim of persecution, [and] on 'contradictory evidence' . . . [the Court] will generally not be able to conclude that a reasonable adjudicator was compelled to find otherwise." *Zhang v. INS*, 386 F.3d at 74 (internal quotation marks and citations omitted). Accordingly, the petition for review must be denied.

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[11] It bears noting that the IJ's adverse credibility finding is consistent with the finding of the INS officer who conducted Petitioner's credible fear interview. That officer found that Petitioner was "not credible" due to his failure to provide sufficient detail in support of his claim to practice Falun Gong and his inability to correctly state the principles of Falun Gong or the color of its study books. (JA 339).

II. The Immigration Judge Adequately Considered Petitioner's Convention Against Torture Claim and Substantial Evidence Supports the Immigration Judge's Finding that Petitioner Failed To Provide Sufficient Credible Evidence That It Was More Likely Than Not That He Would Be Tortured Upon Return to China

A. Relevant Facts

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

B. Governing Law

Under the CAT, Petitioner's removal may, under certain circumstances, be either permanently withheld or temporarily deferred. *See* 8 C.F.R. §§ 208.16, 208.17 (2004). Under Article 3 of the CAT, the United States cannot return an alien to a country where the alien will 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); 8 C.F.R. §§ 208.16(a), 208.17(a), 208.18(a) (2004). Where, as here, Petitioner seeks relief under the CAT on such grounds, he must "establish that it is more likely than not that he . . . would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2) (2004); *see also Najjar v. Ashcroft*, 257 F.3d 1262, 1303 (11th Cir. 2001); *Wang*, 320 F.3d at 133-34, 144 & n.20 (recognizing higher burden of proof for CAT claims than for asylum claims).

Petitioner must show that someone in "his particular alleged circumstances" has a greater than 50% chance of torture. *Wang*, 320 F.3d at 144.

"Torture" is defined in the CAT as "'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, punish[ment] . . . , or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'" *Ali*, 237 F.3d at 597 (citing 8 C.F.R. § 208.18(a)(1) (2002)). Because "[t]orture is an extreme form of cruel and inhuman treatment," even cruel and inhuman behavior by officials may not warrant CAT relief. *Sevoian v. Ashcroft*, 290 F.3d 166, 175 (3d Cir. 2002) (citing 8 C.F.R. § 208.18(a)(2)).

C. Standard of Review

This Court reviews the determination of whether an alien is eligible for protection under the CAT using the same "substantial evidence" standard used to review asylum and withholding of removal claims. *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 353 (5th Cir. 2002); *Ali,* 237 F.3d at 596.

D. Discussion

1. The IJ Applied the Appropriate Legal Standard When Considering and Denying Petitioner's CAT Claim

Petitioner claims that the IJ erroneously applied the same legal standard when considering his CAT and asylum claims. (Pet. Brief at 18-19). This claim is false.

In his oral ruling, the IJ concluded that Petitioner had failed to meet the "well-founded fear standard" necessary to support his claim for asylum. (JA 110). The IJ then appropriately stated that, due to Petitioner's failure to satisfy the well-founded fear standard, he "must also find" that Petitioner failed to meet the higher burden of "clear probability" required to grant withholding of removal. *Id.* When addressing Petitioner's CAT claim, however, the IJ specifically stated that "[t]here is nothing in [Petitioner's] testimony or documentation or background material that would lead me *to find that it is more likely than not* that [Petitioner] would be tortured in China . . . ." (JA 110-111) (emphasis added). As the law states that aliens seeking relief under the CAT must "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) (2004), it is clear that the IJ in this matter applied the appropriate legal standard when considering and denying Petitioner's CAT claim. *See Wang*, 320 F.3d at 133-34, 144 & n.20 (recognizing higher burden of proof for CAT claims than for asylum claims).

2. The IJ Independently Evaluated and Considered Petitioner's CAT Claim

Petitioner contends that the IJ did not independently consider or evaluate his claim for CAT relief but simply denied the claim "for the same reasons" the IJ denied the claims for asylum and withholding of removal. (Pet. Brief at 18). This claim also lacks merit.

A review of the IJ's oral ruling clearly shows that while he denied the Petitioner's asylum claim because of a finding that Petitioner had not demonstrated a well-founded fear of persecution based on his practice of Falun Gong, he denied the Petitioner's CAT claim based on his separate and independent conclusion that there is "nothing in his testimony or documentation or background material that would lead me to find that it is more likely than not that [Petitioner] would be tortured in China for any reason including reasons that go beyond the five protected grounds, either by the Chinese government or by those acting with the acquiescence of the Chinese government . . . ." (JA 110-111).

3. Substantial Evidence Supports the IJ's Determination That Petitioner Failed to Establish Eligibility for Relief Under the CAT Since Petitioner Failed To Demonstrate That It Was More Likely Than Not That He Would Be Tortured Upon Return to China

Petitioner's final claim is that "a reasonable fact-finder would have to conclude that it is more likely than not that Petitioner would be tortured if returned to China." (Pet. Brief at 20). This claim fails as well.

First, the IJ's denial of Petitioner's CAT claim logically flowed from the implausibility of his assertions of persecution on the basis of his being a practitioner of Falun Gong. As stated in Point I, the IJ properly found that Petitioner's claims lacked credibility because of his inability to explain discrepancies and omissions in his testimony, including his failure to mention his practice of Falun Gong during his initial airport interview and his decision to stop practicing Falun Gong upon arrival in the United States. (JA 109-110). Moreover, the IJ properly accorded little weight to the documentation submitted by Petitioner, which included an unauthenticated dismissal notice and a summons that Chinese authorities denied issuing. (JA 106, 110). On the basis of these facts, the IJ correctly concluded that there was a lack of reliable evidence to support Petitioner's CAT claim.

Second, after reviewing the record in its entirety, the IJ did not find any other evidence showing that Petitioner

would likely face torture by government officials upon return to China. (JA 110-111). Indeed, Petitioner does not even use the word "torture" to describe his anticipated treatment by Chinese authorities should he be returned. When asked at his hearing why he did not want to return to China, Petitioner stated only that he "would be arrested . . . and sentenced to many years." (JA 154, 165). Indeed, Petitioner never said, on either direct or redirect examination, that he feared being tortured should he be returned to China. Moreover, in his initial airport interview, Petitioner stated that his only fear upon returning to China was that he would be beaten by those who loaned money to him to travel to the United States. (JA 330). He never mentioned in this interview any fear of torture, let alone beatings, from Chinese authorities or those in acquiescence with them. In his credible fear interview, Petitioner stated only that he fears arrest by the Chinese authorities and trouble from those from whom he borrowed money. (JA 337-338). Finally, in his application for asylum, Petitioner stated that if he returned to China, he would be "arrested, jailed, and beaten." (JA 193). Because Petitioner offers, at best, mere speculation that he would be beaten and jailed if returned to China but no evidence that it is likely that he would be tortured, his claim for relief under the CAT was properly denied. *See Zhang v. Ashcroft*, 388 F.3d at 721-22 (affirming denial of CAT relief sought by Chinese Falun Gong practitioner because of failure to show likelihood of torture if returned to China even where IJ granted withholding of removal based on demonstration of likelihood of persecution).

CONCLUSION

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

Dated: August 18, 2005

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY

SANDRA S. GLOVER
ASSISTANT U.S. ATTORNEY (of counsel)

JEFFREY P. MUELLER
Law Student Intern

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 8,789 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY

Addendum

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

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

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

(a) Authority to apply for asylum

(1) In general

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

. . . .

(b) Conditions for granting asylum

(1) In general

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

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

(A) In general

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

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

(4) Scope and standard for review

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

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

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

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

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

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

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

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

(1) Past persecution. An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself

or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

(i) Discretionary referral or denial. Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

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

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

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

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

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

(2) Well-founded fear of persecution.

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

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

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

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

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

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she

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

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

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

. . . .

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

(a) Consideration of application for withholding of removal. An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is

otherwise eligible for asylum but is precluded from being granted such status due solely to section 207(a)(5) of the Act. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.

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

(1) Past threat to life or freedom.

(i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

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

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

(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of

race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

> (i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and
>
> (ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

. . . .

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

(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub.L. 105-277, 112 Stat. 2681, 2681-821). The definition of torture contained in § 208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

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

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

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

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

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

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

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

(d)(3) of this section, the alien's removal shall be deferred under § 208.17(a).

(d) Approval or denial of application--

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

. . . .

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

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

. . . .

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

(a) Definitions. The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the

reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

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

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

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

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

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

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

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

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

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

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

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