03-4145-ag

To Be Argued By:
BRENDA M. GREEN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-4145-ag

XIU QING LI,
Petitioner,
-vs-

JOHN ASHCROFT, ATTORNEY GENERAL
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR JOHN ASHCROFT ATTORNEY GENERAL OF THE UNITED STATES

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STATEMENT OF JURISDICTION

Li is subject to a final order of removal. This Court has appellate jurisdiction under § 242(b) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(b) (2004), to review Li's challenge to the BIA's final order dated December 30, 2002, denying her applications for asylum and withholding of removal.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a reasonable factfinder would be compelled to reverse the Immigration Judge's determination that Li failed to present specific, detailed, credible evidence in support of her persecution claim, where the IJ made a reasonable adverse credibility finding based on inconsistencies and implausibilities in her testimony as to material elements of her claim coupled with observations of Li's demeanor; where the IJ could reasonably disbelieve her attempts to explain away these flaws; and where Li failed to submit specific, identifiable corroborating evidence that was reasonably available to Li.

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BRIEF FOR JOHN ASHCROFT
Attorney General of the United States

Preliminary Statement

Xiu Qing Li, a native and citizen of China, petitions this Court for review of a decision of the Board of Immigration Appeals ("BIA"), summarily affirming the decision of an Immigration Judge ("IJ") denying Li's applications for asylum and withholding of removal under the Immigration and Nationality Act of 1952, as amended ("INA"), and ordering her removed from the United States.

Li sought asylum and withholding of removal based on her assertion that she had been subjected to forced sterilization in China. Substantial evidence supports the IJ's determination that Li failed to provide specific, detailed, and credible testimony and evidence in support of that claim. Most notably, the IJ reasonably found that Li's testimony contained several inconsistencies and implausibilities concerning material aspects of her claim to have suffered persecution -- for example, about whether her husband remained in hiding in China, and whether Chinese authorities asked her to submit to insertion of an IUD -- which undermined the credibility of her account. This credibility assessment was supported by the IJ's observations of Li's demeanor while testifying about key aspects of her claim -- including the fact that Li was quick to change her answer when pressed on one material issue (the IUD), and mumbled when challenged on another key issue (the whereabouts of her husband and how she managed to retrieve certain documents from China).

On this petition for review, Li primarily argues that the IJ erred (1) in finding her testimony incredible, and (2) in finding that she had produced insufficient corroborating evidence to prove that she had suffered past persecution. In essence, Li is asking this Court to disregard the inconsistencies and implausibilities in her story, to ignore the IJ's observations of Li's demeanor during these questionable portions of her testimony, and instead to credit her testimony to the extent it supports her persecution claim. Such a request overlooks the broad deference that this Court accords to an IJ's assessment of the evidence presented during asylum proceedings. As described in detail below, it cannot be said that a

reasonable factfinder would be compelled to disagree with the IJ's assessment of Li's credibility. Nor can it be said that the IJ erred in concluding that the Li failed to submit corroborating evidence that was reasonably available to her, or that much of the evidence she did submit was insufficiently authenticated to support her claim. Accordingly, the petition for review should be denied.

Statement of the Case

Li entered the United States at Miami International Airport in Florida on May 16, 1999, participated in an initial airport asylum interview (JA 260-63), and was initially detained. (JA 277).

On May 27, 1999, Li participated in a credible fear interview. (JA 276-93).

On June 3, 1999, Li was issued a Notice to Appear charging her with removability. (JA 297).

On July 13, 1999, a hearing was held in Miami, Florida at which Li did not appear, and the IJ ordered Li removed. (JA 252, 254). On July 14, 1999, the IJ re-opened the case based upon Li's previously filed motion for change of venue, and transferred the case to New York. (JA 249).

On August 4, 1999, a further removal hearing was held before an IJ in New York. (JA 48-55). At that hearing, Li submitted her evidence for the removal hearing (JA 51), the Government filed written objections to that evidence (JA 226-27), and Li filed an Application for Asylum and Withholding of Removal. (JA 230-40).

On December 2, 1999, a merits hearing was heard before the IJ. (JA 48-123). The IJ rendered an oral decision denying Li's applications for asylum and withholding of removal and voluntary departure. (JA 24-46).

On December 21, 1999, Li filed a timely appeal of the IJ's decision to the BIA. (JA18). On December 30, 2002, the BIA summarily affirmed the IJ's decision. (JA 2).

On January 22, 2003, Li filed a timely petition for review with this Court.

Statement of Facts

A. Li's Entry into the United States, Airport Interview, and Credible Fear Interview

Li entered the United States at Miami International Airport in Florida on May 16, 1999, without any valid entry documents. (JA 279). On the same date, she was detained at Krome SPC. (JA 277).

Upon her entry on May 16, 1999, Li participated in an airport asylum interview through a Chinese interpreter. (JA 259-63). When asked what her purpose was in entering the United States, she responded "I don't know why, because I am not happy at my home." (JA 260). Asked further why she left China, she answered, "Because I had three children already, I have exceeded the birth policy, that is why I escaped." (JA 263). She made no mention of having been forcibly sterilized or fined in the past. Instead, she stated simply that she feared that "if I go

back they will fine me, because I heard it was better here that is why I came here." (JA 263).

On May 27, 1999, Li participated in a credible fear interview at Krome SPC, with the assistance of a Fuzhou interpreter. (JA 276). At that hearing, Li testified at length about her persecution claim. Specifically, she claimed that after she had her first two children, government authorities took her to be forcibly sterilized in August 1989. After the sterilization, she got pregnant again and gave birth to a third child. (JA 282). She claimed that authorities wanted her to pay a heavy fine after the third child was born, so she "ran away" and "went into hiding." (JA 283). Her husband also ran away, though she did not know where -- only that he was hiding "in different places" and "could not stay home either." (JA 283-84). She last saw him a year before coming to the United States. (JA 284). She remained in hiding for over nine years before deciding to come to the United States. (*Id.*). When asked whether she saw her children during those nine years, she responded, "I missed my kids, but I did not go back home but sometimes they came to where I was hiding." (JA 284). Li claimed that she was afraid to return to China, and that "if I go back I will be jailed and have to pay a heavy fine." (JA 287). Based on this interview, the asylum officer determined that Li met the credible fear standard. (JA 279, 290).

B. Li's Asylum Application

On June 3, 1999, Li was issued a Notice to Appear before the Immigration Court on June 22, 1999, in Miami, Florida (JA 296). It charged that she was removable under

§ 212(a)(7)(A)(i) of the INA as an immigrant present in the United States without a valid entry document.(JA 297).

On August 4, 1999, a removal hearing, pursuant to a change of venue, was held in New York before IJ Victoria Ghartey. Li appeared with counsel and conceded removability as charged. (JA 50). At that time the Notice to Appear and change of venue were marked as exhibits. (JA 50). Counsel for Li also submitted her original evidence for the removal hearing. (JA 51, 224-25). The Government filed written objections to several pieces of evidence, based on (1) lack of authentication of foreign official records, (2) lack of foundation, and (3) lack of expert qualification. (JA 226).

Counsel for Li also filed an Asylum Application Form I-589 at the hearing, which was then also marked as an exhibit. (JA 50-51). In a supplement to her asylum application, Li outlined her claim to have been forcibly sterilized. (JA 230). Li stated that she married her husband in a traditional ceremony in China in November 1984, and they registered their marriage on August 25, 1990. Their first daughter was born on March 1, 1986. Shortly after the birth, Li "was told . . . to submit to an IUD insertion." Because the policy "was not rigorously enforced," she "was not forcibly inserted." *(Id.*)

Li's asylum application further stated that her second child, a son, was born on March 23, 1988. Subsequent to his birth, "the local family planning officials ordered [Li] to submit to a sterilization." Because Li did not wish to be sterilized, she and her husband hid at her mother's home, twenty minutes away by bus, for almost a year.

Approximately one year later, local authorities went to her in-laws' home and demanded payment of a 1,000 RMB fine. Li stated that "[w]e paid the fine to prevent their home from being demolished." Li then stated that "[o]n August 16, 1989, at about noon, five cadres came to my in-laws home and apprehended me, I was taken against my will to a local hospital where I was forcibly sterilized. Unknown to me, and the government officials, I was pregnant at this time." On May 20, 1990, Li gave birth to her third child, a daughter. Government officials demanded a fine in the amount of 8,000 RMB, which "remains unpaid today." Li asserted that "[i]f I return to China, I will be jailed, fined even more, and possibly taken for a second sterilization." (*Id.*)

C. Li's Merits Hearing Before the Immigration Judge

A merits hearing was held before on December 2, 1999, before an Immigration Judge. At this hearing additional documents provided by Li through her counsel were marked into evidence, and Li herself testified. (JA 48-123).

1. Documentary Submissions

Li offered into evidence eleven documents to support her asylum application: notarial birth certificates of herself, her husband, and her three children, Exhibits 5a-5e (JA 59; 198-223); a photograph of Li with a man and three children, Exhibit 6 (JA 59; 197); a notarial statement from Li's husband attesting to his marriage to Li and the births of their three children, and a notarial marriage certificate,

Exhibits 7, 8A-8B (JA 60, 63; 183-88); Li's household registration booklet, Exhibit 9 (JA 60; 171-82); a certificate issued by Central Medical Services, Inc., a medical service in New York, certifying Li's tubal ligation, Exhibit 10 (JA 61; 170); and an x-ray examination report issued by C.P. Radiology, P.C. in New York, verifying Li's tubal ligation, Exhibit 11. (JA 61; 169-70).

The Government submitted a report of the U.S. State Department entitled *China: Profile of Asylum Claims and Country Conditions*, Exhibit 12. (JA 124-68).

2. Li's Testimony

a. Li's Family Background, Sterilization, and Fines

At the December 2, 1999, hearing, Li testified that she was 34 years old, and married with three children. (JA 75). She testified that her oldest child, a girl, was born on March 1, 1986. Her second child, a boy, was born on March 23, 1988. (JA 76). Her second child was born in her village, where she continued to live until one month after his birth. (JA 80).

Li testified that after having her second child, she left her village because a cadre from the brigade wanted her to undergo sterilization. (JA 80). She then went to her mother's house which was located approximately twenty minutes from her village, and she and her husband remained there for about a year. (JA 80-81). While she was at her mother's house, a cadre "came to my house

and imposed a fine against me" because she failed to report for the sterilization operation. (JA 81) She explained that "we paid the fine" of 1,000 RMB "to avoid being sterilized." (JA 81). When asked whether she had proof of having been fined the 1,000 RMB, she replied that she had it "at home, not in here." (JA 91, 110) She claimed that she could not bring the documents with her from China. (JA 91). When asked why she had not asked her husband to mail her the documents, she replied that she did not know she needed them and therefore had not asked him to mail them. (JA 92).

Li testified that after paying the fine, she returned to her home in 1989, where she lived with her in-laws, and thought nothing more would happen. (JA 82). But five government cadres came to her home and took her away by force to a local hospital to perform a sterilization surgery. (*Id.*). Li testified that after the surgery she suffered back pain and memory problems. (JA 83).

On May 20, 1990, despite the sterilization surgery, Li's third child was born. (*Id.*) Li testified that unbeknownst to herself or the cadre, she was already nine or ten days pregnant at the time of the sterilization surgery. (JA83). Once the pregnancy became noticeable she again moved to her parents' home to hide. (JA 84).

Li testified that she registered her marriage on August 25, 1990 -- just three months after her youngest daughter was born and she claimed to have gone into hiding. She testified that she waited so many years to register because she was underage and not able to obtain a marriage certificate. (JA 89). A fine was imposed after she

registered her marriage, and she and her husband paid the fine of 100 Yuan to get a marriage certificate. (JA 91).

Li testified, during both direct and cross-examination, that after the birth of her third child the cadre found out, and in the "cold weather, approximately in . . . October" of 1990, the brigade cadre asked her to undergo a second sterilization procedure, and imposed an 8,000 RMB fine (JA 84, 90, 111). She testified that the fine was imposed the same year as the birth of her third child, in the winter of 1990. (*Id.,* JA 90-91). She was unable to pay the fine because she had no money. (JA 84-85). "I don't pay the fine and that's why I left. I escape." (JA 91). When asked whether she had any proof that she had been fined 8,000 RMB, she replied that she had no receipt because she had never paid the fine. (JA 91). She testified that someone last visited her in February 1991 to inform her that she should submit to a sterilization procedure, "and that's why I went into hiding." (JA 112).

Li admitted that she had no documentation at or near the time of her sterilization to establish that she had been sterilized in China. (JA 97). Li responded that the brigades in China issued papers to her which proved she was involuntarily sterilized, but those papers were in China. (*Id.,* JA 109). She failed to have the papers forwarded to her in New York because she thought x-rays and an examination would be enough to prove that she had been sterilized. (JA 97).

During cross-examination, Li testified that she had the permission of the government to have her second child, and that she was never offered the alternative of using

birth control methods after giving birth to the boy. (JA 98). When asked whether "[a]t any point in time" it had been suggested that an IUD be implanted, she replied that it "never" had. (JA 98-99). On redirect, however, Li stated that authorities had, in fact, asked her to undergo IUD insertion after the birth of her first child. (JA 104-05).

Li testified that she waited nine years after the birth of her third child to leave China for the United States because she did not want to leave a small child. (JA 99). When asked whether the children were in hiding with her during the nine years before she fled, she responded, "The youngest one, the smallest one was hiding with me." (JA 99).

Li testified that she fears if she goes back to China they will put her in jail or impose bond or ask her to undergo another sterilization surgery. (JA 88).

b. The Ability of Li's Husband to Obtain Government-Issued Documents While Remaining in Hiding

Li testified that because they were unable to pay the fine, her husband went into hiding. She testified that her smallest child and her husband were both in hiding with her during the nine years after she was fined and fled to the United States. (JA 99). Li testified that if her husband had not been in hiding with her he would have been taken away by the cadre. (*Id.*) At the time she left China, she and her husband were not hiding in the same place. (JA 109). Li testified that after she left, "he went somewhere, but I do not know where. After I left he transfer, transfer

to another place because he had to go -- anyway he need the money to survive." (JA 110).

Despite her testimony that her husband was in hiding, she also testified that he was able to go the notarial office to get the notarial statement that she submitted as Exhibit Number 7 (which was dated June 16, 1999). (JA 99, 191). She explained that he could do this despite being in hiding because the county office was "very far away" from her village, and "the county office doesn't know . . . what's happening in the village. They don't know I was -- we were in hiding." (JA 99-100). She further testified that even though she did not know where her husband was (JA 110), family members knew where he was hiding so they told him "to go to the county to make these statements." (JA 99-100). Li testified that her husband was able to go to the county office building to get the statement and procure notarial birth certificates for Li and her children. (JA 100-01). She then testified that her father helped her husband obtain the notarial documents because it was easier for him since he was "kind of an old man." (JA 100).

Li admitted that her husband and father needed to take the household registration book to the county office to obtain the documents. In the household registration book, she admitted that all three children were listed. She also testified that all of her children go the school even though they never paid a fine for the third child. (JA 101).[1]

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[1] During his closing argument, counsel for the government noted that it would be implausible that Li's (continued...)

When the IJ questioned Li, she testified that she left China on April 6, 1999, and that since leaving authorities were still looking for her husband. (JA 107). She testified that the last time she spoke with him was the day she left China (JA 107), although she added that she had recently written a letter, hoping the family would forward it to him (JA 108). Although she remains in contact with her father (JA 108-09), she was unsure whether her father has contact with her husband (JA 108). She reemphasized that the documents her husband provided were sent by her father rather than her husband. (JA 63, 108).

c. Obtaining Medical Proof of Sterilization in New York

Li testified that, once in New York, she went to a medical facility to obtain x-rays which showed proof of her sterilization.(JA 86-87). She testified that a tube was inserted in order to take the x-ray, that it took a long time, and that it caused her to suffer pain for which she had to take painkillers. (JA 87). Li had trouble remembering where she went for her examination and x-ray, variously stating that she walked straight to the doctor's office, but then saying that she had to stop at a different office first; first testifying that she walked directly there, and later that she took the subway and then walked. (JA 101-03)

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[1] (...continued)
children would be permitted to register and go to school, if the fines were not paid and the family was in hiding. (JA 114).

D. The Immigration Judge's Decision

At the conclusion of the December 2, 1999, hearing the IJ rendered a lengthy oral decision denying Li's applications for asylum, withholding of removal, and voluntary departure, and ordered Li removed to China. The IJ expressly found that Li was not credible and that details of her claim were implausible. (JA 35-38). Moreover, the IJ held that Li failed to provide any corroborative evidence that could fill the void left by her unbelievable testimony. (JA 38-45).

1. Lack of Detail

The IJ found that Li had an opportunity during her testimony to provide details regarding the key elements of her claim of forced sterilization and that she failed to do that. (JA 35). The lack of details during her testimony led the IJ to conclude that Li had not in fact undergone a forced sterilization. (*Id.*). For example, the IJ found that Li had failed to provide a detailed account of what happened during the time she was taken from her home, how she was taken to the hospital, detail regarding what occurred at the hospital and the surgery and how she left the hospital, and or anything regarding her recovery. (JA 35-36).

2. Lack of Credibility

The IJ expressly made "an adverse credibility finding" with respect to Li, based on several troubling inconsistencies in her testimony. (JA 43). For example,

the IJ found that Li changed her testimony regarding whether or not she was asked to have an IUD insertion at any time.(JA 44). The IJ found her testimony to be internally inconsistent because the Li testified during cross-examination that she was not asked to have an IUD insertion "at any time" in her country, and that she was only asked to be sterilized. However, on redirect, when questioned by her attorney, she testified that family planning officials did ask her to have an IUD insertion. The IJ also noted that in her Asylum Application, Li stated that she was asked to have an IUD inserted. (JA 37).

Similarly, the IJ found implausible Li's testimony that although her husband was in hiding in China, he was nevertheless able to go to a government office and sign for government-issued statements that were then forwarded to Li in the United States to be submitted in support of her asylum claim. (JA 36-37). The IJ noted the tension between such testimony and Li's claim that she had no contact with her husband, nor any knowledge of his whereabouts. (JA 36) Additionally, Li testified at one point that her husband's whereabouts were unknown to her own father, yet she testified that the father arranged for the documents that she submitted (the household registration booklet and the notarial certificates), and that the father went with the husband to sign the household registration booklet in June 1999. (JA 37-38). The IJ ultimately "conclude[d] that she has failed to prove that the husband is in fact in hiding in her country." (JA 42).

In arriving at the adverse credibility finding, the IJ also expressly took into account Li's demeanor: "[Li] was very quick to change her answers especially with respect to

whether or not she was forced to have an IUD insertion when she was questioned on cross-examination. . . . [Li] also mumbled her answers when she was questioned about the whereabouts of the husband and how the documents that she submitted were obtained." (JA 44-45).

3. Lack of Corroborative Evidence

The IJ concluded that Li failed to provide any reliable corroborative evidence to prove her case. She provided no affidavits from anyone who was familiar with what happened to her in her country in support of her claim. (JA 38). Exhibit 7, which purported to be a document from her husband, did not even mention anything about Li's alleged forced sterilization.[2] (*Id.*). The IJ further noted that even though Li testified that she had received official documents after her sterilization and after paying the 1,000 RMB fine, she failed to produce any of them at the hearing. (JA 38).

The IJ further "question[ed] the authenticity" of the notarial birth certificates and the household registration booklet. (JA 38-39). She did not find these documents to be reliable because Li had failed to credibly establish how these documents were obtained. (JA 39). The IJ also noted that these documents all bore dates in 1999 -- not close to

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[2] The IJ misspoke at this one point of her decision, twice mistakenly referring to a forced "abortion" rather than "sterilization." (JA 38). At every other point of the 23-page oral decision, the IJ correctly referred to Li's claim as involving a forced sterilization.

the dates of the events described in the birth certificates. (JA 39). The IJ also took into account the State Department's finding, reported in its country profile of China (admitted as Exhibit 12), that "[d]ocumentation from China, particularly from the Fuzhou and Wenzhou areas, as well as elsewhere in Southeast China is subject to widespread fabrication and fraud." (JA 40). Based on all of these factors, the IJ concluded that "these documents are not genuine." (JA 39). And the fact that Li had submitted non-genuine documents in support of her asylum application cast further doubt on her "overall credibility." (JA 39).

The IJ went on to find it "questionable" whether Li really "has the children that she claims she has." (JA 42). As noted above, the IJ had already refused to give any weight to the notarial birth certificates. Even with respect to the photograph submitted by Li, which showed two adults and three children, she failed to provide any description at all of who was in the photograph. (JA 42).

The IJ similarly concluded that the documents purporting to be medical documents (Exhibit 10 and 11) were not to be given any weight, because Li had not submitted any curriculum vitae for the preparers of these documents. (JA 40). Accordingly, the IJ found that the documents could not establish that Li had undergone sterilization at all, much less forced sterilization, in China or elsewhere. (JA 40).

4. Lack of Well-Founded Fear of Future Persecution

For the reasons set forth above, the IJ concluded that Li had failed to demonstrate that she had suffered past persecution in the form of forced sterilization. The IJ then rejected Li's contention that she nevertheless had a well-founded fear of future persecution in the form of a future sterilization procedure or further fines. (JA 41) The IJ found that Li again failed to provide detailed, specific and credible evidence to establish that she would be harmed, arrested or detained in China because of the birth of her third child. (*Id.*). As the IJ pointed out, Li remained in her country for nine years before coming to the United States, and there was no evidence that since Li left her country anything had happened to her husband or to her children. (JA 41-42).

The IJ further concluded that even if Li feared criminal prosecution upon her return to China based on her secret crossing of the national border, such punishment for violation of a criminal law would not constitute persecution. (JA 43). Absent any other indication that Li was likely to be targeted for persecution if she were to return to China, the IJ held that Li had failed to establish her statutory eligibility for asylum or withholding of removal. (JA 43). The IJ noted that Li was not statutorily eligible for voluntary departure, and therefore ordered her removed to China. (JA 45).

5. The BIA's Decision

On December 30, 2002, the BIA summarily affirmed the IJ's decision and adopted it as the "final agency determination" under 8 C.F.R. § 3.1(e)(4) (2002).[3] (JA 1-2). This petition for review followed.

SUMMARY OF ARGUMENT

Substantial evidence supports the IJ's determination that Li failed to provide specific, detailed, and credible testimony in support of her application for asylum and withholding of removal and thus failed to establish her eligibility for relief. A reasonable factfinder would not be compelled to reject the IJ's adverse credibility determination, in light of (1) the inconsistencies and implausibilities in Li's testimony -- most notably regarding her husband's supposed ability to obtain government-issued documents while he remained in hiding from the government -- together with (2) the IJ's observations of her demeanor and (3) the IJ's determination that Li had submitted non-genuine documents in support of her application. Moreover, Li failed to produce reasonably available corroborative evidence to support her claim, such as affidavits from family members in China or the United States with whom she was admittedly in contact. Nor did she produce documents which she claimed to have possessed in China, such as a receipt for the 1,000 RMB fine supposedly assessed after the birth of a second child, and documents

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

issued by family planning authorities after her purported sterilization. Finally, the IJ did not violate due process by concluding that Li had failed to lay a sufficient foundation for a number of documents she submitted during the asylum hearing, and that those documents should therefore be accorded little or no probative weight.

ARGUMENT

I. THE IMMIGRATION JUDGE PROPERLY DETERMINED THAT LI FAILED TO ESTABLISH ELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL BECAUSE LI FAILED TO PROVIDE CREDIBLE TESTIMONY OR EVIDENCE TO SUPPORT HER APPLICATION FOR REMOVAL

A. Relevant Facts

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

B. Governing Law and Standard of Review

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

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

§§ 1158(a), 1231(b)(3) (2004); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995). Although these types of relief are "'closely related and appear to overlap,'" *Carranza-Hernandez v. INS*, 12 F.3d 4, 7 (2d Cir. 1993) (quoting *Carvajal-Munoz v. INS*, 743 F.2d 562, 564 (7th Cir. 1984)), the standards for granting asylum and withholding of removal differ, *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987); *Osorio v. INS*, 18 F.3d 1017, 1021 (2d Cir. 1994).

1. Asylum

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

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[4] (...continued)
"exclusion" proceedings. Because withholding of removal is relief that is identical to the former relief known as withholding of deportation or return, *compare* 8 U.S.C. § 1253(h)(1) (1994) *with id.* § 1231(b)(3)(A) (2004), cases relating to the former relief remain applicable precedent.

Although there is no statutory definition of "persecution," courts have described it as "'punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.'" *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995) (quoting *De Souza v. INS*, 999 F.2d 1156, 1158 (7th Cir. 1993)); *see also Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (stating that persecution is an "extreme concept"). While the conduct complained of need not be life-threatening, it nonetheless "must rise above unpleasantness, harassment, and even basic suffering." *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000). Upon a demonstration of past persecution, a rebuttable presumption arises that the alien has a well-founded fear of future persecution. *See Melgar de Torres v. Reno*, 191 F.3d 307, 315 (2d Cir. 1999); 8 C.F.R. § 208.13(b)(1)(i) (2004).

In 1996, Congress amended the statutory definition of "refugee" to provide that "forced abortion or sterilization, or persecution for failure to undergo such a procedure or for other resistance to a coercive population control program," constitutes persecution on account of political opinion. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") § 601(a)(1), 110 Stat. at 3009-689 (amending 8 U.S.C. § 101(a)(42)). Thus, under the INA as amended by IIRIRA, an asylum applicant need not show that China's family planning policy was or will be selectively applied on the basis of a

protected ground.[5] The applicant must, however, still make a threshold showing that he or she has suffered past persecution or has a well-founded fear of future persecution. *See Chen v. INS*, 195 F.3d 198, 202-05 (4th Cir. 1999).

Where an applicant is unable to prove past persecution, the applicant nonetheless becomes eligible for asylum upon demonstrating a well-founded fear of future persecution. *See Zhang*, 55 F.3d at 737-38; 8 C.F.R. § 208.13(b)(2) (2004). A well-founded fear of persecution "consists of both a subjective and objective component." *Gomez v. INS*, 947 F.2d 660, 663 (2d Cir. 1991). Accordingly, the alien must actually fear persecution, and this fear must be reasonable. *See id.* at 663-64.

"An alien may satisfy the subjective prong by showing that events in the country to which he . . . will be deported have personally or directly affected him." *Id.* at 663. With respect to the objective component, the applicant must prove that a reasonable person in his circumstances would fear persecution if returned to his native country. *See* 8 C.F.R. § 208.13(b)(2) (2004); *see also Zhang*, 55 F.3d at 752 (noting that when seeking reversal of a BIA factual

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[5] Prior to the enactment of IIRIRA § 601(a), the BIA had held that China's implementation of its population control policy did not, on its face, constitute persecution on account of a protected ground. *See, Matter of Chang*, 20 I. & N. Dec. 38, 43-44, 1989 WL 247513 (BIA May 12, 1989). Rather, an asylum applicant was required to show that the family planning policy had been or would be selectively applied to him on the basis of a protected ground. *Id.*

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

The asylum applicant bears the burden of demonstrating eligibility for asylum by establishing either that he was persecuted or that he "has a well-founded fear of future persecution on account of, *inter alia*, his political opinion." *Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003); *Osorio*, 18 F.3d at 1027. *See* 8 C.F.R. § 208.13(a)-(b) (2004). The applicant's testimony and evidence must be credible, specific, and detailed in order to establish eligibility for asylum. *See* 8 C.F.R. § 208.13(a)(2004); *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999); *Melendez v. U.S. Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991) (stating that applicant must provide "credible, persuasive and . . . . specific facts" (internal quotation marks omitted)); *Matter of Mogharrabi*, Interim Dec. 3028, 19 I. & N. Dec. 439, 445, 1987 WL 108943 (BIA June 12, 1987), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647-48 (9th Cir. 1997) (applicant must provide testimony that is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account").

Because the applicant bears the burden of proof, he should provide supporting evidence when available, or explain its unavailability. *See 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); Interim Dec. 3303, 21 I. & N. Dec. 722, 723-26, 1997 WL 80984 (BIA Jan. 31, 1997).

Finally, even if the alien establishes that he is a "refugee" within the meaning of the INA, the decision whether ultimately to grant asylum rests in the Attorney General's discretion. *See* 8 U.S.C. § 1158(b)(1) (2004); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004); *Zhang*, 55 F.3d at 738.

2. Withholding of Removal

Unlike the discretionary grant of asylum, withholding of removal is mandatory if the alien proves that his "life or freedom would be threatened in [his native] country because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (2000); *Zhang*, 55 F.3d at 738. To obtain such relief, the alien bears the burden of proving by a "clear probability," *i.e.*, that it is "more likely than not," that he would suffer persecution on return. *See* 8 C.F.R. § 208.16(b)(2)(ii) (2004); *INS v. Stevic*, 467 U.S. 407, 429-30 (1984); *Melgar de Torres*, 191 F.3d at 311. Because this standard is higher than that governing eligibility for asylum, an alien who has failed to establish a well-founded fear of persecution for asylum purposes is necessarily ineligible for withholding of removal. *See Zhang v. INS*, 386 F.3d 66, 71 (2d Cir. 2004); *Wu Biao 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[6] that an alien has failed to satisfy his burden of proof, Congress has

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[6] Although judicial review ordinarily is confined to the BIA's order, *see, e.g.*, *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001), courts properly review an IJ's decision where, as here (JA1-2), the BIA adopts that decision. *See* 8 C.F.R. § 1003.1(a)(7) (2004); *Secaida-Rosales*, 331 F.3d at 305; *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994). Accordingly, this brief treats the IJ's decision as the relevant administrative decision.

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*, 2004 WL 2223319, at *6 ("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 IJ has the unique advantage among all officials involved in the process of having heard directly from the applicant." *Zhang v. INS*, 386 F.3d at 73.

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

. . . [and is] uniquely qualified to decide whether an alien's testimony has about it the ring of truth"); *Kokkinis v. District Dir. of INS*, 429 F.2d 938, 941-42 (2d Cir. 1970) (court "must accord great weight" to the IJ's credibility findings). The "exceedingly narrow" inquiry "is meant to ensure that credibility findings are based upon neither a misstatement of the facts in the record nor bald speculation or caprice." *Zhang v. INS*, 386 F.3d at 74.

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

C. Discussion

Substantial evidence supports the IJ's determination that Li failed to provide credible testimony in support of her application for asylum and withholding of removal and thus failed to establish eligibility for relief. The IJ based this determination on a finding that Li's testimony was inconsistent and implausible, and that Li had failed to produce specific, identifiable corroborative evidence that

was reasonably available to her at the time of the hearing. *See Chen,* 344 F.3d at 275. *Accord Zhang v. INS,* 386 F3d. at 71. Because all of these findings are supported by the record, Li cannot show that a reasonable factfinder would be compelled to conclude that she is entitled to relief. *See Gao v. Ashcroft*, 2005 WL 548991 at *3 (2d Cir. Mar. 09, 2005) (affirming IJ's findings where record provided supportable basis for finding aspects of petitioner's testimony inherently implausible, and such implausibilities diminished petitioner's credibility); *see also Zheng v. U.S. Atty. Gen.*, 2004 WL 2820948 (3d Cir. Dec. 9, 2004) (not precedential) (substantial evidence supported IJ's adverse credibility finding against asylum applicant where applicant changed her testimony regarding the core of her claim regarding forced abortion and IUD insertion claims).

1. The IJ's Adverse Credibility Assessment Was Supported by Substantial Evidence, and Was Not Irrational.

Substantial evidence in the record supports the IJ's determination that Li was not a believable witness and that her persecution claim was 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). Li's testimony was internally inconsistent as to certain points, and was implausible when taken in conjunction with certain documents she proffered, all of which caused the IJ to ultimately conclude that Li was "unbelievable" and that her claim was implausible.

For example, the IJ was justifiably skeptical of Li's testimony that even though her husband had gone into hiding after the birth of their third child and the imposition of a large fine (which remained unpaid) (JA 84, 99), he nevertheless went right to a government office building to get several notarial documents issued (JA 99-100). When pressed as to how this could be, Li testified that her father had helped her husband, and that the county office was far away and unconnected with the local family planning authorities. (JA 100). Yet the IJ was certainly entitled to find such testimony implausible, particularly in light of the fact that the husband was purportedly going to a government office to acquire official documents attesting to his having exceeded the family planning policy: namely, the birth certificates for three children, and a household registration booklet that included three children -- the third of which had prompted imposition of a large unpaid fine. It was reasonable for the IJ to conclude that such risky behavior was unlikely to be true.

Moreover, the IJ's doubts were properly compounded by Li's vague testimony about her husband's whereabouts. On the one hand, she testified that she had no direct contact with her husband, did not know his whereabouts, and communicated with him only through relatives. (JA 107-08). On the other hand, when asked whether her father (who had supposedly gone to the county office with the husband) knew of his whereabouts, Li responded that she did not know, and simply hoped that a letter she had written to her husband would be forwarded to him by her family. (JA 108). Importantly, the IJ also rested her adverse credibility determination on her observation that the defendant "mumbled her answers" when questioned about her husband's whereabouts and how she had

obtained the documents submitted at the hearing. (JA 44-45). All of these ambiguities, together with the IJ's observation of Li's changed demeanor when answering these questions, justified the adverse credibility finding as to whether Li's family was really in hiding.[7]

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[7] There are additional material discrepancies between Li's statements at her airport interview, her credible fear interview, and hearing testimony. Because the IJ did not remark upon them, or rely upon them in reaching her asylum determination, they do not factor directly into this Court's review of the IJ's decision. *See Secaida-Rosales v. INS*, 331 F.3d 297, 305 (2d Cir. 2003) ("our review will be confined to the reasoning of the IJ, and we will not search the record independently for a basis to affirm the BIA"). Nevertheless, these discrepancies are noteworthy because they would have provided similar support for the IJ's ultimate asylum decision. *See Gao v. Ashcroft*, 2005 WL 548991 *3 (2d Cir. 2005) (upholding IJ's denial of asylum, where petitioner's testimony at asylum hearing differed substantially from initial written asylum application and first asylum interview, in which he failed to mention central claim that his wife was forced to undergo an abortion). *Ramsameachire v. Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004) ("the INS may rely on airport statements in judging an asylum applicant's credibility if the record of the interview indicates that it presents an accurate record of the alien's statements, and that it was not conducted under coercive or misleading circumstances").

For example, when asked upon entry to the United States why she left China, Li made no mention of her central claim: that she had been forcibly sterilized, and that family planning authorities had threatened to force a second sterilization procedure upon her. Instead, she simply claimed that she had "exceeded the birth policy" by having three children already,

(continued...)

Li also provided conflicting testimony regarding whether she was ever required to have an IUD inserted at any time. (JA 44). She testified that she was only told she had to be sterilized. However, when her attorney asked her again about the IUD insertion on redirect, she changed her testimony and said that she was in fact asked to have an IUD inserted after the birth of her first child. (JA 104). Li argues that the IJ's finding that Li's testimony was inconsistent as to whether she was asked to have IUD inserted was due to the IJ's misunderstanding from "unspecified questioning" (Pet. Brief 15). The relevant testimony is as follows:

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[7] (...continued)
and that "if I go back they will fine me." (JA 263).

At her credible fear interview, Li indicated that when she went into hiding during the nine years, she was not with her children. (JA 284) ("I did not got back home but sometimes they came to where I was hiding."). At her hearing, however, she testified that she kept her youngest daughter with her while in hiding. (JA 99). During her initial interview, she also became flustered while discussing when authorities asked her to get an IUD. At first, she said that authorities asked her to do so after her third pregnancy, but when asked by the asylum officer when that was, she immediately changed her story and said "no they did not ask me to get an IUD, I gave birth to the first child without a marriage certificate . . . ." (JA 282). As noted by the IJ, Li's Asylum Application specified that authorities asked her to use an IUD after her first pregnancy. (JA 230).

[Government counsel] to Ms. Li:

Q: Were you offered the alternative of using birth control after the birth of your second child?

[objection and ruling omitted]

A: You mean after I given the birth of the boy?

Q: Yes, ma'am.

A: No, I never using any birth control method. As you know in the rural area nobody using these and I think that's why, that's the reason they wanted me to go for sterilization.

Q: *At any point in time*, did the family planning cadre suggest that an IUD be implanted?

A: No. They never asking to go for insertion of the ring or something like that. As you know in China you know mostly people they wish they have more children. No one wanted to go for these kind of procedures.

Q: And it was *never* suggested to you by the authorities?

A: No. They ask -- they only ask me to do the sterilization operation.

(JA 98-99) (emphasis added). On redirect, counsel returned to the matter of Li's contact with family planning officials:

> Q: Did you have any contact with the family planning officials after the birth of your first child?
>
> A: Yes, they do ask me to undergo for insertion of the ring.
>
> Q: Why didn't you mention this before?
>
> A: Well, because you don't ask me. But, however, I don't go for insertion because the policy is not that strict at that time.

(JA 104-05).

Li contends that this was not inconsistent testimony, only "different answers to different questions." (Pet. Brief at 16). Specifically, she argues that her testimony is not "conflicting" because her statement on cross-examination must be viewed as addressing only what happened after the birth of her *second* child, whereas her statement on re-direct was expressly addressed to what happened after the birth of her *first* child. Moreover, she points out that her testimony on re-direct is consistent with her statement attached to the written Application for Asylum that she was told, "shortly after" her first daughter's birth on March 1, 1986, to submit to an IUD insertion. (JA 230).

The problem with Li's argument is that the two questions at issue were not limited, as previous questions

had been, to the time period after the birth of the second child. It is clear from the transcript that the government attorney had already asked and received the Li's answer to the question of whether authorities had asked her to use contraception after her second child was born. The next two questions were drawn more broadly, in an apparent attempt to expand the temporal scope of the question. The first follow-up question was: "*At any point in time* did the family planning cadre suggest that an IUD be implanted?" (JA 98) (emphasis added). Li's response was likewise not limited to a precise point in time, and in fact suggested quite generally that IUDs were disfavored in China: "No. They *never* asking to go for insertion of the ring or something like that. (JA 98-99) (emphasis added). Government counsel followed up again with a question that contained no temporal limitation, and which sought to confirm Li's previous answer by incorporating her use of the word "never": "And it was *never* suggested to you by the authorities?" (JA 99) (emphasis added). Li again responded in the negative. (JA 99).

The IJ was certainly entitled to conclude, based on this exchange, that Li understood the questions that had been posed to her not once but twice, and that she intended the responses that she gave. It is conceivable, of course, that the IJ could also reasonably have drawn a contrary inference -- that despite the expansive framing of the questions, the Li had nevertheless understood them more narrowly. But when there are two competing, rational inferences that may be drawn from a witness's testimony, the IJ is the decisionmaker in the best position to determine which inference is most appropriate. *See LaSpina*, 299 F.3d at 180. It is the IJ who hears the

inflection of questions and answers, who sees the body language of a witness as he or she responds, and who is therefore best able to say whether Li appeared to understand the questions posed. *See Zhang v. INS*, 386 F.3d at 74 (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"). Indeed, in the present case the IJ observed that one factor in her adverse credibility determination was that Li "was very quick to change her answers especially with respect to whether or not she was forced to have an IUD insertion when she was questioned on cross-examination." (JA 44). Given the obvious care with which the IJ considered how Li testified, her credibility assessment in this regard is worthy of "particular deference." *Chen*, 344 F.3d at 275.

Li also vacillated about the location of the medical facility where she testified she received X-rays and a medical examination, and had difficulty remembering how she got there. (JA 102-103) First she testified that she walked there by herself. (JA 102). Then she testified that she had to go to a separate place to register first, and then she was instructed to go to a separate room for the X-ray. (*Id.*). When pressed further, she testified that she walked and took the subway. (JA 103). Again, given this conflicting testimony, it would be reasonable to doubt whether Li had in fact undergone the testing at issue, and hence whether she had in fact been sterilized.

Li's principal argument against the negative credibility finding is that the alleged inconsistencies discussed by the IJ in her decision are "not enough to constitute the sole

base for the adverse credibility finding because they are both minor in quantity as in Li's whole volume of evidence and testimony and minor in quality as in Li's application for asylum." (Pet . Brief at 10-11). Li then proceeds to offer her own interpretation of the record that differs from that adopted by the IJ. In making this argument, Li misconstrues the standard of review. (*Id.)*. The substantial evidence standard requires Li to offer more than a plausible alternative theory. To the contrary, she "must demonstrate that a reasonable fact-finder would be compelled to credit [her] testimony." *Chen*, 344 F.3d at 275-76 (citing *Elias-Zacarias*, 502 U.S. at 481& n.1). As the Supreme Court has held, "'the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 523 (1981) (quoting *Consolo*, 383 U.S. at 620); *accord Mar Oil, S.A. v. Morrissey*, 982 F.2d 830, 837-38 (2d Cir. 1993). It is not the role of the reviewing court to re-weigh the inconsistencies "to see if we would reach the same credibility conclusions as the IJ." *Zhang v. INS*, 386 F.3d at 77.

Where, as here, the "IJ's adverse credibility finding is based on specific examples in the record of 'inconsistent statements' by [Li] about matters material to her claim pf persecution, [and] on 'contradictory evidence'. . . . [the Court] will generally not conclude that a reasonable adjudicator was compelled to find otherwise." *Zhang v. INS*, 386 F.3d at 74 (internal quotation marks and citation omitted). *See also id.* ("the court may not itself hypothesize excuses for the inconsistencies, nor may it justify contradictions or explain away the improbabilities.

Its limited power or review will not permit it to "reverse the BIA [or IJ] simply because [it] disagree[s] with its evaluation of the facts") (internal quotation marks and citations omitted).

2. Substantial Evidence Supports the IJ's Determination that Li Failed to Produce Specific, Identifiable Corroborating Evidence That Was Reasonably Available

a. The IJ Specifically Identified Available Evidence that Li Failed to Produce

The IJ reasonably concluded that Li failed to provide specific, identifiable corroborative evidence that was reasonable available at the time of the hearing. She provided no affidavits from anyone who was familiar with what happened to her in her country in support of her claim. (JA 38). Not only did Li fail to secure such evidence when it was feasible to do so, she was unable to offer a satisfactory explanation for her failure. Li claimed that the brigade issued documents after the sterilization but that the documents were in China. (JA 97).The document Li submitted which purported to be a document from her husband (Exhibit 7), did not even mention anything about Li being sterilized. (*Id.)* Li testified that her husband "had first hand personal knowledge" of everything that happened to her in China, including the sterilization and fine, but failed to write it in his statement. (JA 93). She further testified that she never asked him to write another statement. (*Id.*). *See Zhang v. INS*, 386 F.3d at 78 (holding that asylum petitioner could be faulted for failing to

submit affidavit from wife in China, who would have had first-hand knowledge of sterilization claim, where petitioner had admittedly received other documents in mail from wife in weeks preceding asylum hearing, and simply had not asked wife to send an affidavit).

Li argues that the IJ's finding with respect to corroborative documentation is contrary to the holding of *Diallo v. INS*, 232 F.3d 279 (2d Cir. 2000). Li argues that "if the BIA finds an insufficiency of evidence, it must fully explain its reasoning and state which parts of the claim should have been corroborated" (Pet. Brief at 18). *Diallo* summarized the standard by which the BIA evaluates the testimony of an asylum claimant: "While consistent, detailed, and credible testimony may be sufficient to carry the alien's burden, evidence corroborating his story, or an explanation for its absence, may be required where it would reasonably be expected." *Id*. at 285. The issue faced by the *Diallo* court was the BIA's erroneous application of that standard.

In *Diallo*, unlike the instant case, petitioner's testimony "provided 'specific, credible detail'" in support of the asserted fear of persecution. *Id*. at 287. Accordingly Li, unlike the petitioner in *Diallo*, could not have qualified for asylum based solely on the compelling nature of her testimony. Furthermore, unlike *Diallo,* Li has not furnished specific explanations for why personal documents were unavailable to her at the time of her hearing. *Id*. Indeed, when asked why she had not produced receipts for the fine that supposedly resulted from one of her pregnancies, or the documents issued contemporaneously with her sterilization, she admitted that she had possessed those documents while in China

and simply said that she had not asked anyone to send them. Again, unlike *Diallo*, Li admitted that she remained in contact with relatives who could have corroborated her story but who submitted no affidavits -- including a brother in New York whom she claimed to have informed of the sterilization, "probably in the year '89," (JA 95), and relatives in China with whom she corresponded, and who presumably could have offered statements from "villagers" who were allegedly present when she was "dragged" away to the operation (JA 93-94). Moreover, unlike *Diallo*, Li submitted documents which the IJ found not to be genuine. In short, it was against a far more compelling record in *Diallo* that this Court found the IJ to have erred by denying asylum on the basis of insufficient corroborative materials. Here, given the inconsistencies and implausibilities of Li's testimony and other evidence, the IJ properly held that it was necessary to have some "corroboration of the specifics of [Li's] personal experiences . . . ." *Id.* at 288.

b. The IJ Properly Gave No Weight to Certain Evidence Submitted by Li Which Failed to Comply with Certain Foundational Requirements

Li also challenges the IJ's decision to accord little or no weight to certain documents submitted by Li at the hearing -- specifically, the notarial documents and household registration booklet purportedly mailed from Li's relatives in China, and medical reports offered to prove that Li had been sterilized -- based on her failure to provide a certified translation for the notarial documents, to lay an adequate foundation for the source of the

household registration booklet, and to lay an proper foundation for the expert testimony. As explained below, these claims are meritless.

Although the "'strict rules of evidence do not apply in deportation proceedings,'" "[t]he Federal Rules of Evidence may nevertheless guide an IJ regarding the presentation of evidence so as to ensure that a petitioner is afforded due process in the course of the proceedings." *Secaida-Rosales*, 331 F.3d at 306 & n.2; *see also Dallo v. INS*, 765 F.2d 581, 586 (6th Cir. 1985). In immigration proceedings, an applicant is "entitled to 'a reasonable opportunity to examine the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government.'" *Mikhailevitch v. INS*, 146 F.3d 384, 391 (6th Cir. 1998) (quoting 8 U.S.C. § 1252(b)(3)). Moreover, the BIA has promulgated specific regulations governing the admissibility of certain types of evidence in asylum cases. For example, 8 C.F.R.§ 287.6(b) requires that foreign official records, when admissible for any purpose, be evidenced by an official publication thereof, or by a copy attested by an officer so authorized. Likewise, 8 C.F.R. § 1003.33 (formerly 8 C.F.R. § 3.33 (1999)) requires any foreign-language document to be accompanied by an English translation with appropriate certification.[8]

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[8] 8 C.F.R. § 3.33 (1999) provided:

> Any foreign language document offered by a party in a proceeding shall be accompanied by an English language translation and a certification signed by the translator that must be printed legibly or typed. Such

(continued...)

A court of appeals reviews evidentiary rulings by an IJ only to determine whether such rulings have resulted in a violation of due process.[9] *See Castellano-Chacon v. INS*, 341 F.3d 533, 552-53 (6th Cir. 2003); *Mikhailevitch*, 146 F.3d at 391 ("Such opportunity need not be upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act.") (internal quotation marks and citations omitted).

In the present case, the IJ's decision to give no weight to the documents in question did not violate due process, much less was it erroneous under any lesser standard of

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[8] (...continued)
certification must include a statement that the translator is competent to translate the document, and that the translation is true and accurate to the best of the translator's abilities.

[9] Because asylum is a discretionary form of relief for which there is no statutory entitlement, it cannot "give rise to a due process claim," whereas due process rights may attach to withholding of removal -- which is mandated by statute in certain circumstances. *Ahmetovic v. INS*, 62 F.3d 48, 53 (2d Cir. 1995). *But cf. Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 1994) (allowing due process claim based on ineffective assistance of counsel, where counsel failed to file for discretionary relief under INA § 212(c)). Because Li sought both asylum and withholding of removal, her hearing had to comply with due process.

review. With respect to the Chinese notarial documents (Exhibits 5a-e), the IJ accorded them no weight because, *inter alia*, Li had provided no certificate of translation as required by 8 C.F.R. § 3.33 (1999). Even if Li is correct that documents such as birth certificates need not be issued contemporaneously with the events described therein to be reliable, she makes no effort to explain how the IJ erred in complying with the BIA regulation governing translations. *See Krasnopivtsev v. Ashcroft*, 382 F.3d 832, 838 (8th Cir. 2004) (finding no error, or fundamental unfairness, where IJ gave no weight to asylum petitioner's untranslated passport for lack of compliance with 8 C.F.R. § 1003.33).

Likewise, the IJ's grant of "no weight" to the household registration booklet did not render the removal hearing "fundamentally unfair" in violation of due process. As noted above, the IJ reasonably found implausible Li's account of how her husband, who was supposedly in hiding, nevertheless went to a government office to obtain a replacement household registration booklet and various notarial documents. (JA 39). Indeed, the IJ's skepticism seems particularly well-placed given that the husband's fugitive status was premised on having too many children, yet he went to a government office to document the existence of his family, for which he owed a large outstanding fine. An additional factor inducing dubiety (although the IJ did not note the fact in her oral decision) was that -- to the apparent surprise of her own lawyer -- Li produced what she claimed to be her original household registration booklet from her purse in the middle of the

hearing. (JA 86).[10] Li suggests that the IJ's doubts are unjustified, and posits that if one of Li's relatives went to the county office, they might have claimed that the original booklet had been lost and thereby obtained a new one bearing an issuance date of May 20, 1999 -- the date on the copy submitted during the hearing. (Pet. Brief at 18). Such an argument must fail, however, as it depends upon a hypothetical explanation which was not articulated during the hearing.

The IJ similarly did not err in attributing no weight to the x-ray and medical report from a clinic in New York, offered by Li to establish that she had in fact been sterilized. (Exhibits 10 and 11; JA 169-170). The IJ gave the documents no weight because Li "did not provide curriculum vitae for any of the persons who prepared those documents." (JA 27). Li argues that it would have been "easy for the Court to verify the medical report submitted by Li had the IJ ever attempted to do so." (Pet. Br. at 23). Yet it is Li, not the IJ, who bears the burden of proving her persecution claim. *See Chen,* 344 F.3d at 275. Moreover, the Government had notified petitioner's counsel in writing four months before the final removal hearing of its objection to the medical evidence under Fed. R. Evid.

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[10] After producing a document entitled "household registration" from her bag (JA 85), the following exchange ensued:

> [Li's counsel]: Why didn't you give us the household registration sooner than today?
>
> A: Because you never told me. I don't know.

(JA 86).

702.[11] (JA 226). Petitioner had ample notice that she needed to lay a proper foundation to show that the two pieces of paper offered to prove that she was sterilized had in fact been prepared by a qualified expert. Even though immigration proceedings are not strictly bound by the Federal Rules of Evidence, an IJ cannot be said to violate due process by using those well-established rules as guidelines for screening out unreliable evidence. *See Secaida-Rosales*, 331 F.3d at 306 & n.2 (noting that IJ may be guided by Federal Rules of Evidence to assure that petitioner is afforded due process); *cf. Felzcerek v. INS*, 75 F.3d 112, 116 (2d Cir. 1996) (holding that document's admissibility under Federal Rules of Evidence lends strong support to conclusion that admission comports with due process).

In short, the IJ reasonably concluded that Li had failed to lay a sufficient foundation for several of her documentary submissions. It was Li's burden as the proponent of evidentiary items to establish their authenticity. *See generally United States v. Almonte,* 956 F.2d 27, 29 (2d Cir. 1992) (party offering evidence bears burden of proving "a rational basis for concluding that an exhibit is what it purports to be") (citing *United States v. Hon,* 904 F.2d 803, 809 (2d Cir 1990)). Given Li's failure

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[11] Fed. R. Evid. 702 requires that before expert testimony can be admitted, three conditions must be met: (1) that the witness qualifies as an expert; (2) that the subject matter of the testimony is an appropriate one for expert testimony; and (3) that admitting the experts testimony will assist the factfinder in deciding cases. *See United States v. DiDomenico,* 985 F.2d 1159 (2d Cir. 1993).

to do so, the IJ did not violate her due process rights by declining to accord that evidence any weight.

3. Li Failed to Establish a Well-Founded Fear of Future Persecution

Not only did Li fail to establish a credible basis for a finding of past persecution (and thereby fail to establish a presumption of future persecution), but she also failed to offer specific, detailed reasons to support her claim of future persecution if she were to return to China. Although she testified that she would be fined and possibly sterilized again, this testimony necessarily rises and falls on her central claim to have been forcibly sterilized in the past. For the reasons set forth above, the IJ properly concluded that there was no evidence on this or any other grounds "which shows that [Li] is likely to be targeted for persecution if she were to return to her home country." (JA 43). Li did not attempt to prove that she would be directly and personally affected in any other way if she were to return to China, and hence her asylum and withholding claims must also fail for lack of a well-founded fear of future persecution. *See Feleke v. INS*, 118 F.3d 594, 598 (8th Cir. 1997) (holding that asylum-seeker must generally show an objectively reasonable fear of "particularized persecution").[12]

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[12] The IJ also held that Li had failed to provide adequate detail regarding her forced sterilization. Her complete testimony on this point takes up just over one page of the hearing transcript (JA 82-83), and can be compressed into the following sentence: On August 16, 1989, five government (continued...)

CONCLUSION

For each of the foregoing reasons, the petition for review should be denied.[13]

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[12] (...continued)
cadres came to the house where she lived with her in-laws in Guchin, Gufong, #78, and forcibly took her to the local hospital to perform the sterilization operation against her wishes. Li provided no additional detail -- such as what happened while she was being taken from her home, how she was taken to the hospital, what occurred at the hospital, or the details of her surgery and recovery. (JA 80-81). The IJ based the denial of asylum and withholding in part on this lack of detail.

Four years after the IJ's ruling in the present case, this Court held in *Qiu v. Ashcroft* 329 F.3d 140, 151 (2d Cir. 2003), that the BIA erred in denying asylum to a Chinese citizen based on insufficient testimonial specificity. The Court vacated the BIA's decision on the grounds that the testimonial evidence, though sparse, covered each of the elements of the persecution claim and was therefore adequate (if credible) to support an asylum claim. The Court further noted that the petitioner had not been pressed for further details on cross-examination, and so could not be faulted for failing to provide them. *Id.* at 157. Unlike *Qiu*, the IJ in the present case made an adverse credibility finding and identified particular items of available corroborative evidence that Li failed to provide. When coupled with these two independent grounds for denying Li's claim, the IJ here was justified in questioning the lack of detail in Li's testimony. *See Zhang v. INS*, 386 F.3d at 79 ("*Qiu*'s admonitions do not pertain . . . where the applicant's testimony was independently found to lack veracity").

[13] Finally, to the extent that Li's brief can be construed as (continued...)

[13] (...continued)
challenging the BIA's decision to summarily affirm the IJ's decision, such a claim is foreclosed by this Court's decisions in *Zhang v. United States Dep't of Justice*, 362 F.3d 155, 157 (2d Cir. 2004) (per curiam) (BIA's decision to summarily affirm an IJ's decision, without opinion, in accordance with streamlined review process set forth in 8 C.F.R. § 3.1(a)(7) "does not deprive an asylum applicant of due process"), and *Shi v. Board of Immigration Appeals,* 374 F.3d 64, 66 (2d Cir. 2004) (BIA did not abuse its discretion in summarily affirming decision of IJ, without opinion, pursuant to streamlining regulations). The oral decision of the IJ recounts the testimony of Li in detail, summarizes the documentary evidence, and comments on the evidence which Li could have submitted but did not. (JA 24-55). The decision also contains a recitation of the legal standard the IJ was required to follow in assessing Li's asylum and withholding of removal claims, (JA 27-34), as well as a full analysis of the record evidence and the law. Finally, the IJ's decision contains "'specific, cogent' reasons for [her] adverse credibility finding and . . . those reasons bear a 'legitimate nexus' to the finding." (JA52-59); *See Zhang v. INS*, 386 F.3d at 74 (quoting *Secaida-Rosales*, 331 F.3d at 307). Thus, the IJ's decision provides ample basis for review by this Court as the "final agency determination."

Dated: March 21, 2005

Respectfully submitted,

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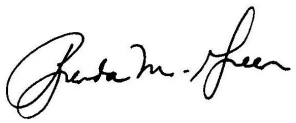

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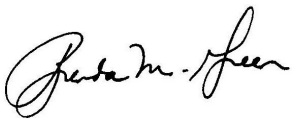
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 12,787 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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Addendum

8 U.S.C. §1101(a)(42)

(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)(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. § 3.1(a)(7) (2002)

(7) Affirmance without opinion.

(i) The Chairman may designate, from time-to-time, permanent Board Members who are authorized, acting alone, to affirm decisions of Immigration Judges and the Service without opinion. The Chairman may designate certain categories of cases as suitable for review pursuant to this paragraph.

(ii) The single Board Member to whom a case is assigned may affirm the decision of the Service or the Immigration Judge, without opinion, if the Board Member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or

(B) the factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted.

(iii) If the Board Member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 CFR 3.1(a)(7)." An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the Immigration Judge or the Service were harmless or nonmaterial.

(iv) If the Board Member determines that the decision is not appropriate for affirmance without opinion, the case will be assigned to a three-Member panel for review and decision. The panel to which the case is assigned also has the authority to determine that a case should be affirmed without opinion.

8 C.F.R. § 3.33 (1999) (redesignated 8 C.F.R. § 1003.33)

Any foreign language document offered by a party in a proceeding shall be accompanied by an English language translation and a certification signed by the translator that must be printed legibly or typed.

> Such certification must include a statement that the translator is competent to translate the document, and that the translation is true and accurate to the best of the translator's abilities.

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.