04-0848-ag

To Be Argued By:
WILLIAM J. NARDINI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-0848-ag

XIAN RONG CHEN,

Petitioner,

-vs-

UNITED STATES DEPARTMENT OF JUSTICE,
ATTORNEY GENERAL GONZALES,

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL GONZALES

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STATEMENT OF JURISDICTION

Petitioner Xian Rong Chen is an alien subject to a final order of removal from the United States. This Court has appellate jurisdiction under § 242(b) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(b) (2004), to review the petitioner's challenge to the BIA's January 26, 2004, final order denying his motion to reopen his removal proceedings and to reconsider its summary affirmance of its October 7, 2003, decision denying him asylum, withholding of removal, and relief under the Convention Against Torture. *See Infanzon v. Ashcroft,* 386 F.3d 1359, 1361-62 (10th Cir. 2004).

The Court does not have jurisdiction to review the BIA's underlying order dated October 7, 2003, because the petitioner never filed a petition for review of that decision with this Court. *See id.; Malvoisin v. INS*, 268 F.3d 74, 75-76 (2d Cir. 2001).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Whether the BIA acted within its broad discretion in denying Chen's motion to reopen his removal proceedings, where Chen's newly proffered evidence failed to make a prima facie showing that he was eligible for asylum.

2. Whether the BIA acted within its broad discretion in denying Chen's motion for reconsideration of the BIA's order denying him asylum, withholding of removal, and relief under the Convention Against Torture, where the BIA's decision rested on a rational, permissible basis and comported with this Court's decisions in *Qiu v. Ashcroft*, 329 F.3d 140 (2d Cir. 2003), and *Secaida-Rosales v. INS*, 331 F.3d 297 (2d Cir. 2003).

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Preliminary Statement

Xian Rong Chen, a citizen of China, petitions this Court pursuant to section 242 of the INA, 8 U.S.C. § 1252 (2000), to review a decision of the Board of Immigration

[1] Pursuant to Fed. R. App. P. 43(c)(2), Attorney General Alberto Gonzales has been automatically substituted as Respondent.

Appeals ("BIA") issued on January 26, 2004. The BIA denied Chen's motion to reopen his removal proceedings, after an Immigration Judge ("IJ") had denied him asylum, withholding of removal, and relief under the Convention Against Torture, and the BIA had affirmed that decision. In his motion to reopen/reconsider, Chen argued that the immigration judge's adverse credibility finding was insufficient under this Court's precedents; that the BIA's summary affirmance of the IJ was legally insufficient; and that letters from Chen's wife and a priest in China provided new evidence in support of his claim of persecution in China. Construing Chen's request as a motion to reconsider, the BIA denied relief, finding that its prior decision had been adequate under governing law. Construing the request as a motion to reopen, the BIA likewise denied relief, on the ground that the new evidence did not establish a prima facie showing that Chen was eligible for asylum.

Because Chen never filed a petition for review from the underlying BIA decision ordering him removed, he is limited in this proceeding to challenging the BIA's denial of his motion to reopen removal proceedings and to reconsider its earlier decision. For the reasons set forth below, the BIA acted well within its considerable discretion in denying the motion to reopen or reconsider. First, a number of claims raised by Chen on this appeal -- including his claim under the Torture Convention, and arguments based on an IUD examination booklet belonging to his wife -- were not presented to the BIA in his motion to reopen, and hence are barred for failure to exhaust administrative remedies. Second, the information relating to his wife's birth-control claim was not "new,"

but rather reiterated the same facts he had put forth during his removal hearing, and thus did not call into question the IJ's earlier (and now unreviewable) decision to deny him asylum, withholding of removal, and Torture Convention relief. To the extent he proffers a new translation of a document that was not submitted to the BIA or the IJ, his claim is barred because it constitutes an unexhausted claim, because it relies on information outside the administrative record, and because in any event it undermines rather than bolsters his persecution claim. Third, to the extent Chen attempted to raise a belated religious-persecution claim, his wife's letter attesting to religious oppression that *she* suffered long *after* Chen's departure from China does not suffice to make out a prima facie case that *he* is eligible for asylum. Finally, the BIA did not abuse its discretion in denying Chen's motion to reconsider its earlier decision, given that the IJ's denial of relief was consistent with this Court's decisions in *Qiu v. Ashcroft*, 329 F.3d 140 (2d Cir. 2003), and *Secaida-Rosales v. INS*, 331 F.3d 297 (2d Cir. 2003). Specifically, substantial evidence supported the IJ's adverse credibility finding; because there was insufficient documentary evidence to support his claim in the absence of credible testimony, the BIA did not abuse its discretion in concluding that there was no need to reconsider its earlier affirmance of the IJ's decision.

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

Statement of the Case

Chen entered the United States October 23, 1999, at Chicago O'Hare Airport. Joint Appendix ("JA") 185. On November 3, 1999, he participated in a credible fear interview. JA 184-99.

On November 4, 1999, Chen was issued a Notice to Appear charging him with being a removable alien. JA 182.

On March 5, 2000, Chen submitted a written asylum application on Form I-589. JA 129-40.

Chen appeared at brief hearings that were adjourned on August 22, 2000 (JA 73-78) and April 17, 2001 (JA 79-82).

On November 7, 2001, Chen participated in a combined removal/asylum hearing before Immigration Judge ("IJ") Roxanne C. Hladylowycz in New York City. JA 83-123. At the conclusion of that hearing, the IJ issued an oral decision denying Chen asylum, withholding of removal, and relief under the Convention Against Torture. JA 58-71.

On November 19, 2001, Chen filed a timely notice of appeal of the IJ's decision to the Board of Immigration Appeals ("BIA"). JA 50-52. On June 11, 2002, Chen filed a merits brief in support of his administrative appeal. JA 33-44.

On October 7, 2003, the BIA issued a *per curiam* opinion affirming the IJ's decision and dismissing the

appeal. JA 30. Chen never filed a petition for review of this decision.

On December 12, 2003, Chen filed a Motion to Reopen and Remand the Proceedings before the BIA. JA 8-10.

On January 26, 2004, the BIA denied Chen's motion in a per curiam opinion. JA 2.

On February 19, 2004, Chen filed a timely petition for review of the BIA's decision dated January 26, 2004.[2]

Statement of Facts

A. Chen's Entry into the United States, Credible Fear Interview, and Asylum Application

On October 23, 1999, Chen arrived in the United States at Chicago's O'Hare Airport. JA 60, 131, 185, 191.

Shortly thereafter, on November 3, 1999, Chen was interviewed by an asylum officer, with the aid of a Mandarin-speaking interpreter. JA 184-92. During this interview, Chen said that he was from Changle City in the Fujian province of China, and that he was Catholic. JA 188-89. He explained that he left China on October 17, 1999, because seven days earlier, local officials had forcibly taken away his wife to have an abortion while she

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[2] Chen has reprinted the petition for review on an unpaginated sheet immediately after the cover of the Joint Appendix.

was pregnant with their second child. JA 189. According to Chen, he had argued with the officials, accidentally injured one of the officers' hands, and ran away when they tried to arrest him. JA 189. Chen said he was afraid to return because officials had done the same thing to his older sister, because he had injured one of the officials, and because he had left China illegally. JA 189. Chen feared that he would be put in jail and fined if he were returned to China. JA 190. Chen testified that his wife and three-year-old daughter were still in China. JA 191. When confronted with the fact that, at the airport, he had apparently never mentioned that his wife had an abortion, Chen replied simply that "They didn't ask me that question and I just got off of the airplane and I was not in good spirits." JA 192.[3]

Based on this brief interview, the asylum officer determined that Chen had sufficiently established a credible fear of persecution to permit him an opportunity to submit a full asylum application to an Immigration Judge. JA 193-96.

On November 4, 1999, a Notice to Appear was issued, charging Chen with removability as an alien present in the United States without an unexpired visa. JA 182.[4]

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[3] The Certified Administrative Record does not include any transcript of this airport interview.

[4] The Notice also charged Chen with removability on the ground that he had misrepresented his identity in an effort to enter the United States, in violation of INA (continued...)

On March 5, 2000, Chen filed a written Form I-589, in which he sought asylum, withholding of removal, and relief under the Convention Against Torture. JA 131-40. In that application, Chen again claimed that he was married with one daughter. JA 133. In response to the question whether he had ever been mistreated by his government, Chen responded, "My wife was forced to undergo an abortion operation, and she was forced to have the IUD implanted." JA 135. He checked off the boxes "Membership in a particular social group" and "Political Opinion" as the reasons why he had been persecuted; although he elsewhere noted that he was Catholic, he did not check off the box "Religion" as a basis for persecution. JA 135. Chen expressed his fear that, if returned to China, he would be "subjected to torture because I will be forced to undergo a sterilization operation if we have another child. I will be jailed and fined." JA 136.

In a narrative statement appended to the application, Chen set forth his persecution claim, which turned entirely on the IUD and forcible abortion claim:

> About three months after my daughter was born, on 08/18/96, my wife was arrested by the Village cadres to the hospital to have the IUD implanted. I was not home. My wife told me that about five Village cadres came to my house in the

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[4] (...continued)
§ 212(a)(6)(C)(i). At his removal hearing, Chen conceded his removability based on his lack of a visa, but contested the fraud charge. JA 58-59. Accordingly, the IJ made no findings with respect to the fraud charge. JA 59.

morning and ordered my wife to have the IUD implanted. My wife told them that she did not want to go, but they physically forced her to go to the hospital to have the IUD implanted.

Because we are Catholic and we wanted to have more children, my wife went to a private doctor to remove the IUD. My wife was pregnant again. On 10/10/99, at nighttime, about seven Village cadres suddenly came to my house to arrest my wife to undergo the abortion. We were watching the TV, and we heard someone knocked the door. I went to open the door, so they entered into my house. They told us that they suspected that my wife was pregnant. We told them that they were wrong because my wife was not pregnant. They said that they did not believe us and ordered my wife to go with them to the hospital for checking. My wife and I did not agree to go, so they physically arrested my wife. I went to stop them arresting my wife because I did not want them to kill my child. One officer's hand was fractured by accident. The cadres were very mad. They wanted to arrest me for interfering with a government official, so I escaped. At the same time, they took my wife to the hospital to undergo the abortion.

I was very angry due to the Chinese government arrested my wife and forced her to undergo the abortion. I felt they were inhumane and so cruel. I opposed to the birth control policy. Also, my wife and I were Catholic. Within our Catholic belief, we could not use any birth control method.

> The IUD, abortion, and sterilization are the violation of the law of Roman Catholic. We were so sad and angry for the Chinese government killing our child. We believed it was our sin that we could not save this child, so we can not go to heaven when we die.
>
> If I return back to China, we will continue to have more children. I will be forced to undergo the sterilization, and I will be fined and jailed.

JA 140.

B. Chen's Removal Hearing

After two brief hearings that were adjourned, Chen participated in a removal hearing before an Immigration Judge on November 7, 2001. At the hearing, Chen made several documentary submissions:

Exhibit 1: Notice to Appear (JA 182)

Exhibit 2: Chen's Asylum Application (JA 131-40)

Exhibit 3: Translated Chinese documents (JA 141-69)
- Chen's birth certificate (JA 142-45)
- Chen's national ID card (JA 147-48)
- Chen's marriage certificate (JA 150-53)
- Chen's daughter's birth certificate (JA 155-56)
- Chen's household registry (JA 158-64)
- birth control operation certificates (JA 166-69)

Exhibit 4: State Department Country Profile for China[5]

Exhibit 5: Letter from Chen's wife (JA 124-27)

Chen testified at some length at his hearing. He explained that his daughter was born on May 23, 1996, and at that time family planning officials required his wife to have an IUD inserted. Thereafter, she had to undergo a quarterly physical examination. JA 100-01. Chen testified that they would receive written notices shortly before having to report for the IUD examination, but that he had left them in China. JA 102.

Chen testified that in April 1999, his wife went to a private hospital to have the IUD removed, and she became pregnant again in July 1999. JA 102. On October 10, 1999, family planning officials came to his home because they suspected that his wife was again pregnant. JA 102-03. They wanted her to go for an IUD insertion, but she refused. Chen claimed that he tried to prevent one of the female officials from dragging his wife away, and that the official then accidentally hit her hand on the table. JA 103-04. The officials then wanted to arrest Chen, both for violating the family planning policy and for injuring the official. JA 104. His wife was then taken away, and he had not seen her since. JA 104-05. He called her from Fuzhou on October 14, and she told him she had been

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[5] Although the IJ admitted into evidence the State Department's *Profile of Asylum Claims and Country Conditions* for the People's Republic of China as Exhibit 4, JA 60, 87-88, that document does not appear in the Certified Administrative Record.

subjected to an abortion the night of October 10. JA 105-06. He would not go back to his village because the officials had falsely accused him of breaking the official's hand, and they accordingly wanted to arrest him. JA 107. At the end of his direct testimony, when asked why he thought he would be arrested if returned to China, Chen suddenly threw in mention of religion:

> [Chen's counsel]: Sir, if you were to return to China, in your opinion, what would happen to you?
>
> A. I think if I return to China, I will be arrested and jailed.
>
> Q: Why do you say that?
>
> A. Because, in the past, because of that female official incident, they falsely accused me for injuring that official and also I'm a Catholic.
>
> Q. You're a Catholic?
>
> A. Yes.
>
> JUDGE TO MR. CHEN
>
> Q. What does this have to do with anything?
>
> A. In the, in the past, I have participated in Catholicism and at that time, they didn't agree to what I did.

JA 108.

On cross-examination, Chen was asked for details of August 1996 arrest which supposedly led to the insertion of an IUD into his wife. His answers were nonresponsive, and he instead began speaking about the October 10 incident. JA 111. He was then confronted with the inconsistency between his written statement which said that officials came to his house to make his wife undergo

an abortion, and his oral testimony which said that officials came to his house to make his wife undergo an IUD insertion. JA 112. Chen responded that the officials at first wanted her to go for an IUD insertion, and found out she was pregnant when she got there. JA 112. Again, he was pressed at to why officials would have believed that she needed an IUD *insertion* when they did not know that she had had the IUD privately removed. JA 112. He then claimed that it was his wife's having missed the scheduled IUD examination that caused the officials to believe that she needed another IUD inserted. JA 112.

Chen then offered conflicting testimony regarding how many IUD appointments his wife had missed. When asked whether it was correct that he had testified that his wife had missed her IUD appointments in both April and July 1999, Chen initially responded, "Yes." JA 113.[6] When asked whether the IUD had been removed before the April appointment, he indicated that it had not, JA 113, and so government counsel inquired as to why she missed the April appointment if she still had the IUD, JA 114. Chen gave a non-responsive answer, and when further

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[6] As discussed *infra* at 43-44, Chen had in fact only testified that his wife had to submit to quarterly appointments, including April and July 1999, and that she had missed the July appointment. The INS Attorney's recollection of his testimony was therefore mistaken, in that Chen had yet not testified one way or the other as to whether his wife had attended the April examination. Nevertheless, Chen responded affirmatively when asked whether his wife had missed both appointments.

pressed, now stated that she did in fact attend the April appointment. JA 114.[7]

C. The IJ's Decision

The IJ rendered an oral decision at the conclusion of the removal hearing. JA 58-71. While recognizing that "[t]he testimony of an applicant for asylum sometimes is the only evidence available and can suffice where it is believable, consistent, and sufficiently detailed in light of country conditions," the IJ found that such was not the case here. JA 66-67. "In this particular case, the respondent's words alone are not sufficiently detailed, believable and consistent to stand as an adequate support for his claim." JA 67.

First, the IJ observed that Chen's "whole testimony was totally and completely devoid of detail." JA 67. For example, despite being asked for details as to how the government dragged his wife away, "he just, basically had nothing to say." JA 67-68. The IJ likewise found that Chen "could not and would not provide [any] details" about his story of slipping out the side door to evade arrest in October 1999. JA 69.

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[7] Although the IJ did not note it, this testimony was also inconsistent with Exhibit 5, the letter allegedly written by Chen's wife, who wrote that she was required to attend IUD examinations every *four* months (not every quarter), and that she missed her *September* appointment (not her *July* appointment) because she was pregnant. JA 124.

Second, the IJ found that Chen had made inconsistent statements regarding various facts. With respect to why family planning officials came to his home in October 1999, for example, his oral testimony (which said they wanted her to undergo IUD insertion) differed from his written asylum application (which said they wanted her to undergo an abortion). JA 68. The IJ also stated that Chen's testimony about his wife's IUD appointments was "very inconsistent" as to whether she had the IUD removed before or after her April appointment.[8] JA 68.

Third, the IJ noted the lack of corroboration of certain portions of Chen's story. In this regard, the IJ cited the lack of any proof that Chen's wife was reinserted with an IUD. JA 68. Nor had Chen presented any documentary evidence showing that criminal charges were, in fact, pending against him in China. JA 69.

Fourth, the IJ listed implausibilities in Chen's claim. The IJ expressed skepticism about the recently issued notarial birth certificate Chen produced for himself, since it "made absolutely no sense" that the Chinese government would be willing to issue Chen an identity document at the same time he was a fugitive from China. JA 68. The IJ

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[8] The IJ mistakenly characterized the nature of Chen's inconsistency on this point as turning on whether his wife had had the IUD removed before or after she attended her April appointment. A closer examination of his testimony shows the inconsistency to be, instead, whether she ever attended that appointment -- not the timing of the IUD removal relative to that appointment. JA 113-14.

regarded as equally implausible Chen's claim that he was able to evade seven family planning officials who wanted to arrest him, simply by slipping out the side door of his house. JA 69.[9]

Based on all these considerations, the IJ found that Chen was neither credible nor plausible on the question of past persecution, and so his applications for asylum and withholding of removal were denied. JA 69. The IJ also found that Chen had "not set forth any credible or plausible facts or circumstances to show that it is more likely than not that he would be tortured if forced to return to the People's Republic of China," and so CAT relief was also denied. JA 70-71. Accordingly, the IJ ordered Chen to be removed from the United States.

D. The BIA Appeal

Chen appealed the IJ's decision to the BIA. In his brief, however, he did not specifically identify any portion of the IJ's reasoning as erroneous, or explain why the adverse credibility finding was flawed. Instead, he argued in conclusory fashion that his "testimony was never

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[9] There was a further inconsistency regarding this incident, not noted by the IJ, between Chen's statement during his credible fear interview and the letter he submitted from his wife. During his interview, Chen claimed he was able to escape because "[s]everal of my father's brothers were there." JA 189. His wife's letter, however, states that Chen was able to escape through the help of her "parents-in-law and [her] sister-in-law." JA 124.

evasive or vague," JA 36, that "[t]he respondent provided answers to all questions posed to him," JA 42, and that the IJ "should have taken into account that his minimal educational background may have contributed to his apparent poor performance as a witness," JA 42.

On October 7, 2003, the BIA issued a per curiam order affirming the IJ's decision and dismissing the appeal. The BIA held that the IJ had "reasonably concluded that the respondent's testimony was not alone sufficient to sustain the burden of proof." JA 30. The BIA also noted an additional "inconsistency in the documentary evidence which tends to diminish the weight of that evidence":

> Specifically, the respondent's wife's identification number is listed as "350 126 741 023 192" on the marriage certificate and their child's birth certificate, but is listed as "350 182 741 023 432" on the household registration (Compare Exhs. 3-D, 3-E with Exh. 3-F).

JA 30. Chen never filed a petition for review from this decision.

E. The Motion to Reopen and Remand

On December 12, 2003, Chen filed a Motion to Reopen and Remand the Proceedings with the BIA. JA 8-10. In that motion, Chen raised three issues. First, he cited a decision of this Court which had been issued "[d]uring the pendency of the appeal," namely *Qiu v. Ashcroft*, 329 F.3d 140 (2d Cir. 2003), which "set forth specific criteria for determining whether testimony is too vague to establish

refugee status and the need for proper explanations and corroborative evidence," as well as this Court's decision in *Secaida-Rosales v. INS*, 331 F.3d 297 (2d Cir. 2003). JA 8. Second, he sought to explain away the BIA's observation regarding the inconsistent numbers used on the identification documents for Chen's wife, by asserting that "the Chinese government in issuing new identification cards to its citizens changed their old numbers to the new numbers." JA 9. This assertion was unaccompanied by any supporting evidence; instead, Chen simply stated that he "should be allowed an opportunity . . . to obtain an official document issued by the Chinese government to support his assertion." JA 9. Third, Chen submitted a letter from his wife and a letter from a Chinese Catholic priest indicating that "since the completion of the respondent's hearing his wife has suffered further persecution at the hands of the Chinese government for practicing her Catholic faith." JA 9 (motion), 13 (wife's letter), 25 (priest's letter).

On January 26, 2004, the BIA issued a per curiam order denying Chen's motion. To the extent the motion challenged the legal sufficiency of the IJ's adverse credibility FINDING under this Court's precedents, the BIA deemed it a motion to reconsider and denied it. To the extent the motion relied on the two letters to support a claim of religious persecution, the BIA deemed it a motion to reopen and denied it, holding that the documents "do not make a prima facie showing of eligibility for asylum for the respondent." JA 2. This petition for review followed.

SUMMARY OF ARGUMENT

Because Chen never filed a petition for review from the underlying BIA decision ordering him removed, he is limited in this proceeding to challenging the BIA's denial of his motion to reopen removal proceedings and to reconsider its earlier decision.

1. Chen failed to mention his claim under the Torture Convention in his motion to reopen before the BIA, and so he failed to exhaust his administrative remedies as to this claim. Accordingly, this Court is barred from considering it. *See* 8 U.S.C. § 1252(d)(1).

2a. The BIA did not abuse its broad discretion in denying Chen's motion to reopen his removal proceedings with respect to his asylum and withholding of removal claims, because Chen failed to make out a prima facie case of eligibility for those forms of relief. As to the birth control claim, the letter from Chen's wife simply repeats the same facts presented, and rejected, in his original removal hearing. Because Chen failed to file a petition for review of that original decision, he cannot revisit those issues now. To the extent Chen has proffered to this Court a revised translation of a document that had been submitted to the BIA with his motion to reopen, his claim fails because (a) the revised translation was never submitted to the BIA and hence claims based on it are unexhausted, (b) the evidence is outside the administrative record and hence may not be considered by this Court, and (c) even with the revised translation, the underlying documents further undermine Chen's credibility on a key portion of his asylum claim, since they directly contradict

his testimony that his wife had her IUD removed in April 1999.

2b. As to his newly raised religious-persecution claim, the only evidence submitted by Chen is a letter from a priest stating that Chen was a practicing Catholic in China, and a letter from Chen's wife explaining that she had suffered religious oppression in China after Chen's departure from China. Because Chen has not alleged that he personally was ever subjected to any maltreatment based on his religion, and because his wife's letter does not indicate that Chen would face such persecution in the future, the BIA did not abuse its discretion in concluding that he did not make out a prima facie case of persecution.

3. The BIA did not abuse its broad discretion in denying Chen's motion to reconsider its earlier decision, given that the IJ's denial of relief was consistent with this Court's decisions in *Qiu v. Ashcroft*, 329 F.3d 140 (2d Cir. 2003), and *Secaida-Rosales v. INS*, 331 F.3d 297 (2d Cir. 2003). Specifically, the IJ's conclusion that Chen's testimony was insufficiently detailed on key points is supported by substantial evidence, and the IJ properly based his adverse credibility finding upon specific inconsistent statements by Chen in his written asylum application and oral testimony, which related to central aspects of his persecution claim.

ARGUMENT

I. THE BIA DID NOT ABUSE ITS DISCRETION IN DENYING CHEN'S MOTION TO RECONSIDER OR REOPEN.

A. Relevant Facts

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

B. Governing Law

1. Motions to Reopen

A motion to reopen "asks that the proceedings be reopened for new evidence and a new decision, usually after an evidentiary hearing." *Zhao v. Dep't of Justice,* 265 F.3d 83, 90 (2d Cir. 2001). Motions to reopen -- like petitions for rehearing and motions for re-trial based on new evidence -- are disfavored because of the threat they pose to finality. *See INS v. Doherty*, 502 U.S. 314, 323 (1992). "This is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *Id.* Indeed, the Supreme Court has expressly cautioned that granting motions to reopen "'too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case.'" *INS v. Abudu*, 485 U.S. 94, 108 (1988) (quoting *INS v. Jong Ha Wang*, 450 U.S. 139, 144 n.5 (1981) (internal quotation marks omitted)).

A motion to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . . ." 8 C.F.R. § 1003.2(c)(1) (2004). Moreover, the motion "shall be supported by affidavits or other evidentiary material." *Id.*; *see also Zhao*, 265 F.3d at 90 (motion to reopen "must state what new facts would be proven at a hearing"); *In re Haim*, 19 I. & N. Dec. 641, 642 (BIA 1988) ("A party seeking to reopen exclusion proceedings must state the new facts which he intends to establish, supported by affidavits or other evidentiary material.").

The BIA may deny a motion to reopen on its merits for "at least" three independent reasons: (1) the movant has not established a prima facie case for the underlying substantive relief sought; (2) the movant has failed to introduce previously unavailable, material evidence; and (3) in cases where the ultimate grant of relief is discretionary, the BIA may determine that, regardless of whether the first two conditions are met, the movant would not be entitled to the underlying discretionary grant of relief. *Abudu*, 485 U.S. at 104-05. The burden of proof is a heavy one, and as the Supreme Court noted in *INS v. Jong Ha Wang*, "the present regulation . . . does not affirmatively require the Board to reopen the proceedings under any particular condition." 450 U.S. at 143 n.5; *see also* 8 C.F.R. § 1003.2(a) ("The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief."); *Boudaguian v. Ashcroft*, 376 F.3d 825, 827 (8th Cir. 2004).

2. Motions to Reconsider

Unlike a motion to reopen which seeks to supplement the record with new evidence, a motion to reconsider "'asserts that at the time of the Board's previous decision an error was made.'" *Zhao,* 265 F.3d at 90 (quoting *In re Cerna*, 20 I. & N. Dec. 399, 402 (BIA 1991)). Regulations require that "[a] motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority." 8 C.F.R. § 3.2(1) (2003) (recodified at 8 C.F.R. § 1003.2(b)(1) (2005)).

3. Standard of Review

This Court reviews the Board's denial of a motion to reopen for abuse of discretion. *See Iavorski*, 232 F.3d at 128 ("When the BIA has applied the correct law, its decision to deny a motion to reopen deportation proceedings is reviewed to determine whether the decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.") (citation and internal quotation marks omitted). Because a motion to reopen seeks a new hearing following the completion of proceedings and issuance of a final deportation order, such a motion is disfavored and judicial review of its denial is circumscribed. *See Doherty*, 502 U.S. at 323 ("[T]he Attorney General has 'broad discretion' to grant or deny such motions.") (citation omitted); *Abudu*, 485 U.S. at 108 ("If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive.") (internal quotation marks and citation omitted). The Supreme

Court has "repeatedly emphasized" that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens," further cautioning deference to administrative decisions. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citing *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

An appellate court similarly reviews the BIA's denial of a motion to reconsider only for abuse of discretion, reversing "'if the denial was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis (such as race).'" *Boudaguian v. Ashcroft*, 376 F.3d at 828 (quoting *Zhang v. INS*, 348 F.3d 289, 293 (1st Cir.2003) (quotation omitted)). When reviewing denial of a motion to reconsider, the court should not undertake to decide whether the BIA's initial order was correct, since such review "would encourage aliens to improperly prolong the removal process by filing motions to reconsider, instead of petitioning for immediate judicial review of an initial adverse decision." *Boudaguian*, 376 F.3d at 828.

C Discussion

1. Chen's Claim for Relief Under the Torture Convention Was Not Mentioned in His Motion to Reopen, and Hence Is Barred for Failure to Exhaust Administrative Remedies

Where a petitioner fails to exhaust his administrative remedies with respect to a particular claim, this Court lacks statutory authority to consider the claim. *See* 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right...."); *see generally Theodoropoulos v. INS*, 358 F.3d 162 (2d Cir.) (discussing § 1252(d)(1) exhaustion requirement), *cert. denied*, 125 S. Ct. 37 (2004); *Drozd v. INS*, 155 F.3d 81, 91 (2d Cir. 1998) (finding argument "waived because it was not raised before the immigration judge or the BIA").[10]

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[10] Although Chen claims that §1252(d)(1) does not require exhaustion of particular claims or issues, *see* Pet'r Br. at 15, this claim is foreclosed by *Drozd*. As this Court explained in *Theodoropoulos*, the purpose of requiring administrative exhaustion is to ensure that the agency has an initial opportunity to consider an applicant's claims. 358 F.3d at 172. If the simple act of filing a BIA appeal were sufficient to satisfy §1252(d)(1) as to any and all arguments -- regardless of whether the BIA were ever given an opportunity to consider them -- such a rule would defeat the entire purpose of the exhaustion requirement.

Chen failed to mention his Torture Convention claim even obliquely in his Motion to Reopen, and so he has failed to adminstratively exhaust that claim. In that motion, Chen asserted that he had "suffered persecution" in China; that he had applied for and been denied "political asylum"; invoked a decision of this Court for the principle that certain criteria govern whether "testimony is too vague to establish refugee status"; and argued that new evidence showed his wife had been subject to "further persecution" in China. It was therefore apparent that Chen was attempting to revisit the BIA's denial of "asylum." Further, because of his references to "persecution" and "refugee status," his motion can be read generously to encompass his related claims for withholding of removal as well, since both forms of relief turn on the same underlying criteria and differ only in their burdens of proof. *See generally INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987) (discussing two forms of relief); *Osorio v. INS*, 18 F.3d 1017, 1021 (2d Cir. 1994) (same). Yet his failure to even mention the word "torture" -- much less the Convention Against Torture -- precludes this Court from considering that claim in the present petition for review. *See Prado v. Reno*, 198 F.3d 286, 292 (1st Cir. 1999) (finding claim barred on petition for review from BIA's denial of motion to reopen, where petitioner failed to raise claim in motion to reopen).

2. The BIA Did Not Abuse Its Discretion in Denying Chen's Motion to Reopen His Removal Proceedings With Respect to His Claims for Asylum and Withholding of Removal

The BIA did not abuse its discretion in deying Chen's motion to reopen on the grounds that the two documents he submitted -- "a letter from China regarding his wife's difficulties in practicing her Catholic faith and a letter from a church official attesting to the respondent's membership and activities with the Catholic Church in China" -- did not "make a prima facie showing of eligibility for asylum for the respondent." JA 2.

The Birth-Control Claim. The information contained in the wife's letter regarding the birth-control claim did not constitute "new facts" that had the potential to alter the IJ's prior ruling. It simply reiterated the same claim which Chen had already presented at his removal hearing: that his wife was obliged to submit to regular IUD examinations by Chinese authorities. There was nothing in the letter that called into question the IJ's adverse credibility determination regarding the inconsistencies in Chen's testimony and asylum application. Absent any new evidence that cast Chen's claim in a new light, and in light of Chen's failure to petition for review of the BIA's original denial of relief, the BIA was amply justified in denying the motion to re-open for Chen's failure to make out a prima facie showing of eligibility for asylum. *See* 8 C.F.R. § 1003.2(c)(1) (2004) (providing that motion to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not

available and could not have been discovered or presented at the former hearing"); *Zhao*, 265 F.3d at 90.

In his brief, Chen notes that he also attached to his motion to reopen a photocopy and translation of his wife's IUD examination records, which were offered in an apparent attempt to corroborate his testimony during the removal hearing. *See* Pet'r Br. at 46; JA 17-24. The BIA did not make any specific reference to this document in its denial of the motion to reopen. Chen nevertheless proffers to this Court that the translation he submitted to the BIA was faulty, in that the entry in the examination booklet regarding September 4, 1999, should read "No Check Up Was Done." Pet'r Br. at 46.

This proffer is irrelevant for at least three reasons. First, Chen failed to exhaust his administrative remedies with respect to the translation, since he did not present this new evidence of the translation defect to the BIA . Indeed, Chen never even mentioned this document in his *original* motion to reopen, and hence never exhausted any claims relating to it. As a result, this Court is jurisdictionally barred from considering the IUD records, much less the revised translation. *See* 8 U.S.C. § 1252(d)(1); *Theodoropoulos,* 358 F.3d at 169-74 (discussing § 1252(d)(1) exhaustion requirement).

Second, and relatedly, Chen's proffer regarding the translation is premised on information outside the administrative record, and therefore may not be considered by this Court. *See* 8 U.S.C. § 1252(b)(4)(A) (except with respect to a narrow class of citizenship claims, "[T]he court of appeals shall decide the petition *only on the*

administrative record on which the order of removal is based . . . .") (emphasis added).

Third, even with the revised translation, the medical records sharply conflict with Chen's testimony at his removal hearing. Although Chen claims that the "09/04/99" entry should read that no check-up was performed, he does not dispute that the preceding entry is for a checkup on "05/06/99" which was recorded as "IUD & no pregnant," JA 17, 20 -- despite the fact that he testified that his wife already had her IUD removed in *April* of 1999. JA 112 ("As I mentioned before, I already had the IUD removed in April of 1999 . . . ."). Because this additional inconsistency only reinforced the IJ's adverse credibility finding, the BIA certainly did not abuse its discretion in concluding, even with the supplemental documents submitted by Chen, that he had not made out a prima facie case of past persecution.

Finally, the BIA properly declined to reopen proceedings to allow Chen to "attempt to obtain an official document issued by the Chinese government to support his assertion" that the discrepancy in his wife's identification numbers on two notarized documents could be explained by the Chinese government's issuance of new ID cards. JA 9. Chen was, in fact, afforded a meaningful opportunity to challenge the BIA's finding in this respect through a motion to reopen.[11] He failed to do so, however,

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[11] The Ninth Circuit's decision in *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999), is not to the contary. In that case, the court held that "[w]hen the BIA (continued...)

by neglecting to support this factual assertion with any "affidavits or other evidentiary material" as required by 8 C.F.R. § 1003.2(c)(1). Instead, he sought only an "opportunity" to obtain such evidence. Because Chen's motion to reopen failed to satisfy the express terms of § 1003.2(c)(1), the BIA did not abuse its discretion in denying the motion to reopen.

The Religious Persecution Claim. Chen argues that the BIA erred in determining that his wife's letter failed to show that he had made out a prima facie case for asylum, since such a showing is lower than that needed to ultimately succeed on an asylum claim. The Third Circuit has recently had occasion to summarize the BIA's interpretation of what constitutes a prima facie case:

> The requirement of a prima facie case for reopening appears in several INS regulations, but the term "prima facie case" does not appear in the immigration statutes. The INS has given meaning to the requirement through decisions of the Board of Immigration Appeals. The Board's decisions

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[11] (...continued)
decides a case based on an independent, adverse, credibility determination, *contrary to that reached by the IJ,* it must give the petitioner an opportunity to explain any alleged inconsistencies that it raises for the first time." *Id.* In the present case, the BIA's decision was consistent with, not contrary to, the IJ's credibility determination. Moreover, *Campos-Sanchez* did not address the procedural question of whether a motion to reopen may constitute a sufficient opportunity to explain away inconsistencies.

> reveal that in the immigration context, "prima facie" scrutiny of a motion to reopen means an evaluation of the evidence that accompanies the motion as well as relevant evidence that may exist in the record of the prior hearing, in light of the applicable statutory requirements for relief. The question is whether the "evidence reveals a reasonable likelihood that the statutory requirements [for relief] have been satisfied." *In re S-V-*, [22 I. & N. Dec. 1306] (BIA May 9, 2000) (en banc). The Board has stated that "no hard and fast rule can be laid down as to what constitutes a sufficient showing of a prima facie case for reopening. Much depends on the nature of the case and the force of the evidence already appearing in the record sought to be reopened." *Matter of Sipus*, 14 I. & N. Dec. 229, 1972 WL 27443 (BIA Nov. 10, 1972). The decision involves "both a factual and a legal determination." *Matter of Ige*, 20 I. & N. Dec. 880, 885, 1994 WL 520996 (BIA 1994).

Sevoian v. Ashcroft, 290 F.3d 166, 173 (3d Cir. 2002) (adopting majority rule, and collecting cases). "There are sound reasons for applying the abuse of discretion level of review" to the BIA's determination, on a motion to reopen, that a petitioner has not made out a prima facie case. *Id.* at 174. "The Board 'is not required to write an exegesis on every contention,' [*Mansour v. INS*, 230 F.3d 902, 908 (7th Cir. 2000)], but only to show that it has reviewed the record and grasped the movant's claims." *Id.* at 178.

In the present case, Chen had offered no evidence of religious persecution in his original removal proceedings, and so he must rely entirely on the submissions that accompanied his motion to reopen. Here, the letter from Chen's wife did not constitute "evidence [that] reveals a reasonable likelihood that the statutory requirements [for relief] have been satisfied." *In re S-V-*, 22 I. & N. Dec. at 1308. The statements in Chen's wife's letter relate exclusively to her own difficulties as a Catholic in China, not to any difficulties her husband had purportedly suffered. Indeed, all of her complaints relating to religious oppression *post-dated* Chen's departure from China. It is therefore clear that Chen did not share in those difficulties. *Compare* JA 13 (stating that wife's arrest and detention occurred on 9/8/2002) *with* JA 131 (stating that Chen departed China on 10/17/99). The BIA correctly concluded that this letter detailing the wife's experiences did not establish a "prima facie showing of eligibility for asylum *for respondent*." JA 2 (emphasis added). As this Court has recognized, an alien's application for asylum and withholding of removal is based on persecution to the alien personally." *See Melgar de Torres v. Reno*, 191 F.3d 307, 313 (2d Cir. 1999) (upholding denial of asylum notwithstanding politically motivated killing of uncle); *Karapetian v. INS*, 162 F.3d 933, 936 (7th Cir. 1998) (finding no abuse of discretion where alien was only member of "entire immediate and extended family" who failed to obtain asylum based on claim of religious persecution); *cf. Mabikas v. INS*, 358 F.3d 145, 148-49 (1st Cir. 2004) (holding that BIA did not abuse discretion in declining to reopen notwithstanding father's grant of

asylum in France).[12] Nowhere in the wife's letter or the priest's letter is there any suggestion that Chen himself had ever suffered persecution based on his religious beliefs, or that he personally faced future persecution on

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[12] The BIA has recognized an exception to this general rule only in the context of coercive population control programs, holding that an alien whose spouse has been subjected to involuntary abortion or sterilization has established past persecution against himself, *In re C-Y-Z-*, 21 I. & N. Dec. 915, 918-19 (BIA 1997); *see also Zhao,* 265 F.3d at 92.

Because Chen has offered no evidence that he has personally suffered past persecution based on his Catholic faith, his reliance on *Guo v. Ashcroft*, 386 F.3d 556 (3d Cir. 2004), is misplaced. In *Guo*, the Court of Appeals concluded that the petitioner had credibly testified that he had been a practicing Christian in China; that he had been arrested, detained for a day and a half, and punched in the face after being found worshiping with an unauthorized congregation; that he had been beaten and detained for 15 days after resisting a police officer's attempt to remove a cross from a grave; and that he had lost his job as a result. 386 F.3d 1202-04. Chen, by contrast, has not alleged that he personally was ever persecuted, or even inconvenienced, as a result of his religious faith. *Guo* therefore provides no support for his claim that his wife's supposed persecution has established *his own* prima facie eligibility for asylum relief.

that basis. The BIA's denial of his motion to reopen was therefore amply justified in this respect as well.[13]

Chen's reliance on *Korablina v. INS*, 158 F.3d 1038, 1044-45 (9th Cir. 1998), is misplaced. Although he is correct that "acts of violence against a petitioner's friends or family members may establish a well-founded fear of persecution," such acts must "create a pattern of persecution closely tied to the petitioner." *Id.* at 1043-44 (quotation marks omitted). In *Korablina*, the petitioner established just such a pattern that was "closely tied" to her personally, by demonstrating that Jews had suffered "widespread harassment and violence" in Ukraine, and that she personally had "witnessed repeated violent attacks and experienced one violent attack herself," including one incident in which she "was robbed and attacked, tied to a chair with a noose around her neck and threatened with death." *Id.* at 1044-45. The petitioner had also credibly testified that "close associates and friends were disappearing from Kiev" in the midst of this violence, and

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[13] Although the BIA did not mention it, there is also no indication that the information contained in the priest's letter had been unavailable to Chen at the time of his removal hearing, as required for a motion to reopen under 8 C.F.R. § 1003.2(c)(1) (providing that motion to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . . ."). The letter simply reports events (such as Chen's receipt of the sacraments) that long predated Chen's removal hearing, and which presumably could have been presented to the IJ.

that shortly after she left for the United States, her husband and daughter were "brutally attacked," and the attackers alluded to the fact that their efforts to locate petitioner had been unsuccessful. *Id.* at 1045. In this context, the Court of Appeals reasonably concluded that "[w]here evidence of a *specific threat on an alien's life*, and here there were many, is presented in conjunction with evidence of political and social turmoil, the alien has succeeded in establishing a prima facie eligibility for asylum." *Id.* (emphasis added). In Chen's case, by contrast, his wife's letter contains no allegation that he had ever been threatened or injured in the past, nor any indication that he would be subject to such treatment in the future.[14]

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[14] Chen similarly overreads the Ninth Circuit's opinion in *Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996). In that case, the Court of Appeals quickly disposed of a religious persecution claim in three sentences, noting that "[t]he one incident of an arrest of a family member at a church *may* provide the basis for past persecution of petitioner's family on account of religion," but that such a presumption was rebutted by the petitioner's testimony that he and others were subsequently able to attend church regularly. *Id.* (emphasis added).

Not only is the passage in question clearly *dicta*, but the court also limited itself to noting that the arrest "may" provide a basis for a persecution claim. Even if *Li* were read to permit a vicarious persecution claim based on a single arrest, it would conflict with this Court's holding that a petitioner must demonstrate persecution specific to him. *See Melgar de Torres*, 191 F.3d at 313. It would

(continued...)

For the first time on appeal, Chen argues that the BIA erred in "failing to properly consider the relevant background documentation attesting to the persecution faced by practitioners of unregistered sects of Christianity in China." Pet'r Br. at 26-31. Chen never drew the BIA's attention to the Profile, and therefore this argument is barred for lack of administrative exhaustion. *See* 8 U.S.C. § 1252(d)(1); *see generally United States v. Gonzalez-Roque*, 301 F.3d 39, 47 (2d Cir. 2002) (discussing mandatory nature of statutory exhaustion requirements, in context of § 1326(d)).

3. The BIA Did Not Abuse Its Discretion in Denying Chen's Motion to Reconsider Its Decision Affirming the IJ's Order of Removal Because Chen Identified No Legal Defect in the BIA's Earlier Decision.

The BIA did not abuse its discretion in denying Chen's motion to reopen, construed as a motion to reconsider,

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[14] (...continued)
also contravene uniform authority that a single arrest is not enough to constitute past persecution. *See, e.g., Tawm v. Ashcroft*, 363 F.3d 740, 743-44 (8th Cir. 2004); *Eusebio v. Ashcroft*, 361 F.3d 1088, 1090-91 (8th Cir. 2004); *Dandan v. Ashcroft*, 339 F.3d 567, 573-74 (7th Cir. 2003); *Guzman v. INS*, 327 F.3d 11, 15-16 (1st Cir. 2003); *Ravindran v. INS*, 976 F.2d 754, 759 (1st Cir. 1992); *Kapcia v. INS*, 944 F.2d 702, 704-05, 708 (10th Cir. 1991); *Skalak v. INS*, 944 F.2d 364, 365 (7th Cir. 1991).

because its denial was not "made without a rational explanation," did not "inexplicably depart[] from established policies," nor did it "rest[] on an impermissible basis." *See Boudaguian,* 376 F.3d at 828 (internal quotation marks omitted). In the present petition for review, Chen identifies two decisions of this Court which were supposedly violated by the IJ and BIA. The first case is *Qiu v. Ashcroft*, 329 F.3d 140, 150-53 (2d Cir. 2003), in which this Court held primarily that an IJ may not deny an asylum claim based on lack of testimonial specificity, where the applicant's testimony is specific enough to establish the basic elements of an asylum claim, and does not fail to provide further specifics that have not been requested during questioning. The second case is *Secaida-Rosales v. INS*, 331 F.3d 297, 307-13 (2d Cir. 2003), which reiterated the standard that adverse credibility determinations must be premised on "specific, cogent" reasons supported by the record, and which relate to material aspects of an applicant's claim, and are reversible if based on "flawed reasoning."

Chen alleges that the BIA and IJ violated *Qiu* and *Secaida-Rosales* in five respects: (1) by concluding that Chen's testimony was insufficiently detailed, Pet'r Br. at 32-35; (2) by failing to consider Chen's explanation for his apparently inconsistent statements as to why officials came to his house, Pet'r Br. at 35-37; (3) by pointing to Chen's inconsistent testimony regarding whether his wife attended her April 1999 IUD examination, Pet'r Br. at 37-38; (4) by reacting with skepticism to Chen's claim to have obtained a notarial birth certificate in China despite his fugitive status, Pet'r Br. at 39-40, and (5) by faulting Chen for failing to submit documents corroborating his

testimony that there exist criminal charges against him in China, Pet'r Br. at 40. Moreover, he argues that the BIA erred in relying *sua sponte* on the discrepancies between Chen's wife's identification numbers on her marriage certificate and her child's birth certificates, because he had no opportunity to respond to that finding. Pet'r. Br. at 41. For the reasons that follow, the BIA did not abuse its discretion in concluding that its original decision had comported with *Qiu* and *Secaida-Rosales*.

First, the IJ had reasonably concluded that Chen's testimony was, in relevant points, insufficiently detailed. Although Chen correctly points to portions of his *direct* testimony that were detailed, *see, e.g.,* JA 104, 121,[15] he selectively quotes from a portion of the cross-examination during which government counsel unsuccessfully sought to elicit further detail as to how, precisely, petitioner's

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[15] In this respect, Chen is correct that the IJ erred in concluding that his testimony was insufficiently detailed with respect to the October 1999 incident. In remarking upon Chen's nonresponsiveness at JA 67, the IJ appears to have transposed Chen's testimony about the August 1996 incident (as to which he was indeed "asked time and time again to provide details" but failed to do so) and the October 1999 incident, as to which Chen did provide details. Because the IJ's basic observation about Chen's lack of detail was correct, and because her remaining observations were supported by the record, this one defect does not detract from the fact that substantial evidence supports the IJ's ultimate denial of relief -- and the BIA therefore did not abuse its discretion in declining to reconsider its affirmance of the IJ.

wife was arrested and forcibly removed from her home to initially receive an IUD in August 1996 (as he had reported in his written application, JA 140, and in a letter from his wife, JA 124). Petr. Br. at 34. Remarkably, Chen faults the government for being "vague" in its questioning in the following exchange, despite the fact that it was Chen who failed to give responsive answers regarding the August 1996 incident:

> [INS ATTORNEY]: And, you indicated that around August of 1996, your wife was arrested in your home, is that correct?
>
> A: Yes, she was arrested at home.
>
> Q: And, what do you mean when you say, arrested?
>
> A: No. On August 16, they wanted her to go for an IUD insertion.
>
> Q: But, what do you mean when you say she was arrested?
>
> A: On August 16, they wanted my wife to go for an IUD insertion.
>
> Q: Did they ask her to go first?
>
> A: Yes.
>
> Q: And, how did they arrest her?

A: At that time, there were five officials and then they wanted her to go for an IUD insertion.

[INS ATTORNEY] TO JUDGE
Just let the record reflect, non-responsive answers.

JUDGE TO MR. CHEN
Sir, you're not answering the question.

JUDGE TO [INS ATTORNEY]
Just try once.

[INS ATTORNEY TO JUDGE]
OK

JUDGE TO MR. CHEN
Now, answer the question, please, sir. Listen.

[INS ATTORNEY TO MR. CHEN]
Q: How did they arrest your wife? What did they physically do?

A: Are you talking about at what time?

Q: What, what happened? What was done?

A: On October 10th, 1999, my wife was, was forced and was taken away to the Hirshon Health Clinic and was aborted.

JUDGE TO [INS ATTORNEY]
Okay. I'll not[e] he's non-responsive.

JA 110-11. It was perfectly appropriate for the government to attempt to elicit some detail regarding the August 1996 arrest, but Chen gave no information except that five officials were present. Indeed, he seemed to retreat from his written claim that his wife had been arrested at all, and kept repeating simply that officials "wanted her to go for an IUD insertion." JA 110. When Chen responded to these repeated questions with a response about the October 1999 incident, the IJ reasonably concluded that Chen was being "non-responsive." JA 111. Certainly, a reasonable factfinder would not have been compelled to reach a contrary conclusion, 8 U.S.C. § 1252(b)(4)(B) (2004); *Zhang v. INS*, 386 F.3d 66, 73 (2d Cir. 2004) ("[W]e must uphold an administrative finding of fact unless we conclude that a reasonable adjudicator would be compelled to conclude the contrary.").

Moreover, this conclusion was consistent with this Court's holding in *Qiu* that an asylum petitioner cannot be faulted for lack of testimonial specificity, where his testimony is detailed enough to establish the basic elements of an asylum claim, and he does not fail to provide further specifics that are actually requested of him. The present case offers an illustration of what *Qiu* noted would be permissible: that the "IJ and counsel for the INS may wish to probe for incidental details, seeking to draw out inconsistencies that would support a finding of lack of credibility." *Qiu*, 329 F.3d at 152. Moreover, this Court has held that *"Qiu*'s admonitions [regarding limits on the IJ's ability to fault an asylum petitioner for providing details] do not pertain to a case such as this where the applicant's testimony was independently found to lack

veracity." *Zhang*, 386 F.3d at 79 n.11. Accordingly, the BIA did not abuse its discretion in declining to reconsider its affirmance on this point.

Second, the BIA did not abuse its discretion in finding that the IJ's decision comported with *Qiu* and *Secaida-Rosales* with respect to inconsistencies between Chen's asylum application and testimony regarding why family planning officials came to his home in October 1999. JA 68 (IJ noting inconsistency). In his written application, Chen claimed that officials suspected that his wife was pregnant, and came "to arrest my wife *to undergo the abortion*." JA 140 (emphasis added). When testifying on direct, however, Chen claimed that the officials "suspected that my wife was pregnant *and they wanted her to go for an IUD insertion*." JA 103 (emphasis added). When confronted with the inconsistency on cross, he claimed that "they came for her to go for the IUD insertion but that -- when she got there, they found out that she was pregnant." JA 112. Before this Court, Chen fails to offer any explanation for this inconsistency regarding what purpose the officials had announced at the time they arrived at Chen's house. Instead, his brief offers a third version of events that conflicts with both of his prior stories (in which his wife's pregnancy was suspected, but not verified until she arrived at the clinic) -- by now claiming that it was only "upon discovery that not only had the IUD been removed but also that Mr. Chen's wife had become pregnant, [that] officials sought to arrest the wife and force her to have an abortion." Pet'r Br. at 37. If Chen cannot make sense of his own testimony, the IJ can hardly be blamed for failing to do so either. Nor did

the BIA abuse its discretion by declining to reconsider its decision on this ground.

Third, the BIA did not abuse its discretion with respect to the inconsistencies surrounding the April 1999 IUD appointment. At issue is the following exchange:

> [INS ATTORNEY] TO MR. CHEN
>
> *Q: You indicated that your wife missed her IUD appointment in April and in July of 1999, is that correct?*
>
> *A: Yes.*
>
> Q: And, you also said that you took her to a private hospital in April of 1999 to have the IUD removed, is that correct?
>
> A: Yes.
>
> Q: Did you have it removed before the April, 1999, checkup with the family planning officials?
>
> A: Before the April -- before April, it was not removed.
>
> Q: It was not removed?
>
> . . . .
>
> Q: So why did she miss the April, 1999, appointment if she still had the IUD inside?

A: There, there were four quarters. She has to, to go for examinations on January, January, April, July.

JUDGE TO MR. CHEN

Q: So, why'd she miss her April appointment if she still had her IUD?

A: A few days after the -- after she went for the examination in April and then she had the IUD removed.

Q: That's not what you said a minute ago. You said she never went to that April exam.

A: I said, a few days after the examination, she went to the private hospital to have, to have the IUD removed.

Q: Mr. Chen, do you remember? My notes indicate otherwise.

JUDGE TO [INS ATTORNEY]
Mine too.

JA 113-14. In his brief to this Court, Chen correctly points out that the INS Attorney's initial question in this series was mistaken in assuming that Chen had testified that his wife had missed both the April and July appointments'. Pet'r Br. at 38. Up to that point, Chen had testified that the authorities suspected his wife was pregnant because she "had to undergo the examination

every three months . . . . [i]n April and also in July" and that "[s]he didn't go the previous time in July." JA 99-100. Yet the fact remains that counsel asked Chen whether it was, in fact, correct that his wife had missed the two appointments; that Chen replied, "Yes," JA 113; and that his subsequent testimony -- after the implausibility of his answer was pointed out -- was inconsistent with that earlier response.

Counsel speculates without any basis in the record that "[m]ore likely than not, the apparent discrepancy here was caused by the INS attorney's misleading questioning and . . . translation difficulties." Pet'r Br. at 38. Yet this Court has repeatedly cautioned that 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," which explains why this Court's review of the fact-finder's determination is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 74; *id.* at 76 (rejecting unsupported claim that inconsistencies were attributable to poor interpreter or lawyer's unfamiliarity with case; petitioner "must do more than offer a 'plausible' explanation for his inconsistent statements to secure relief; he must demonstrate that a reasonable fact-finder would be compelled to credit his testimony"). More to the point, the BIA did not abuse its discretion in declining to reconsider its affirmance of the IJ's decision, where the IJ had identified a clear testimonial inconsistency that went to the heart of Chen's persecution claim and weighed it in favor of an adverse credibility finding. *Compare Lin v. Dep't of Justice*, No. 03-4853, 2005 WL 1540799 at *3 (2d Cir. July 1, 2005) (upholding adverse credibility determination based on

numerous testimonial inconsistencies) *with Secaida*, 331 F.3d at 309 (faulting IJ for focusing on inconsistency on isolated collateral issue).

Fourth, Chen contends that the IJ should not have been skeptical of his claim that he was able to obtain the issuance of a notarial birth certificate, through his wife, despite being a fugitive in China. Pet'r Br. at 39. Yet an IJ must be able to assess the inherent plausibility of a story related by an asylum petitioner, as measured by common sense. A reasonable factfinder certainly would not be "compelled" to accept Chen's story that a Communist state such as China would freely issue an identity document regarding a fugitive to the fugitive's own wife. *See Zhang v. INS*, 386 F.3d at 74. And in any event, even absent this finding, substantial evidence still supported the IJ's adverse credibility determination.

Fifth, Chen argues that the IJ should not have faulted him for failing to present any documents corroborating his claim that he faces criminal charges in China. Yet this is not a case, like *Qiu* or *Diallo v. INS*, 232 F.3d 279, 285 (2d Cir. 2000), in which an otherwise credible asylum petitioner was denied relief based on a lack of corroboration. As explained above, the IJ properly found Chen ineligible for asylum based on his incredible testimony. Accordingly, the BIA did not abuse its discretion in declining to reconsider its earlier decision, which in turn affirmed a decision by the IJ that Chen had failed to salvage his otherwise unbelievable story by submitting any corroborative evidence. *See Lin,* 2005 WL 1540799 at *3 ("Nor does the documentary evidence

petitioner submitted to the IJ carry petitioner's burden in the absence of comprehensive and credible testimony.").

CONCLUSION

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

Dated: July 6, 2005

Respectfully submitted,

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,205 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

WILLIAM J. NARDINI
ASSISTANT U.S. ATTORNEY

Addendum

8 C.F.R. 3.2 (2003) Reopening or reconsideration before the Board of Immigration Appeals.

(a) General. The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

(b) Motion to reconsider.

(1) A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. A motion to reconsider a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed with the Board, or that is filed subsequent to the filing with the Board of an appeal from the decision sought to be reconsidered, may be deemed a motion to remand the decision for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with the appeal to the Board.

(2) A motion to reconsider a decision must be filed with the Board within 30 days after the mailing of the

Board decision or on or before July 31, 1996, whichever is later. A party may file only one motion to reconsider any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider. In removal proceedings pursuant to section 240 of the Act, an alien may file only one motion to reconsider a decision that the alien is removable from the United States.

(3) A motion to reconsider based solely on an argument that the case should not have been affirmed without opinion by a single Board Member, or by a three-Member panel, is barred.

(c) Motion to reopen.

(1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to

the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

(3) In removal proceedings pursuant to section 240 of the Act, the time limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen filed pursuant to the provisions of § 3.23(b)(4)(ii). The time and numerical limitations set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen proceedings:

(i) Filed pursuant to the provisions of § 3.23(b)(4)(iii)(A)(1) or § 3.23(b)(4)(iii)(A)(2);

(ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing;

(iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or

(iv) Filed by the Service in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 208.22(f) of this chapter.

(4) A motion to reopen a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed, or that is filed while an appeal is pending before the Board, may be deemed a motion to remand for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with, the appeal to the Board.

(d) Departure, deportation, or removal. A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or

her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

(e) Judicial proceedings. Motions to reopen or reconsider shall state whether the validity of the exclusion, deportation, or removal order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. In any case in which an exclusion, deportation, or removal order is in effect, any motion to reopen or reconsider such order shall include a statement by or on behalf of the moving party declaring whether the subject of the order is also the subject of any pending criminal proceeding under the Act, and, if so, the current status of that proceeding. If a motion to reopen or reconsider seeks discretionary relief, the motion shall include a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is being filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution.

(f) Stay of deportation. Except where a motion is filed pursuant to the provisions of §§ 3.23(b)(4)(ii) and 3.23(b)(4)(iii)(A), the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the Immigration Judge, or an authorized officer of the Service.

(g) Filing procedures--

(1) English language, entry of appearance, and proof of service requirements. A motion and any submission made in conjunction with a motion must be in English or accompanied by a certified English translation. If the moving party, other than the Service, is represented, Form EOIR-27, Notice of Entry of Appearance as Attorney or Representative Before the Board, must be filed with the motion. In all cases, the motion shall include proof of service on the opposing party of the motion and all attachments. If the moving party is not the Service, service of the motion shall be made upon the Office of the District Counsel for the district in which the case was completed before the Immigration Judge.

(2) Distribution of motion papers.

(i) A motion to reopen or motion to reconsider a decision of the Board pertaining to proceedings before an Immigration Judge shall be filed directly with the Board. Such motion must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of § 3.8. The record of proceeding pertaining to such a motion shall be forwarded to the Board upon the request or order of the Board.

(ii) A motion to reopen or a motion to reconsider a decision of the Board pertaining to a matter initially adjudicated by an officer of the Service shall be filed with the officer of the Service having administrative control over the record of proceeding.

(iii) If the motion is made by the Service in proceedings in which the Service has administrative control over the record of proceedings, the record of proceedings in the case and the motion shall be filed directly with the Board. If such motion is filed directly with an office of the Service, the entire record of proceeding shall be forwarded to the Board by the Service officer promptly upon receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs.

(3) Briefs and response. The moving party may file a brief if it is included with the motion. If the motion is filed directly with the Board pursuant to paragraph (g)(2)(i) of this section, the opposing party shall have 13 days from the date of service of the motion to file a brief in opposition to the motion directly with the Board. If the motion is filed with an office of the Service pursuant to paragraph (g)(2)(ii) of this section, the opposing party shall have 13 days from the date of filing of the motion to file a brief in opposition to the motion directly with the office of the Service. In all cases, briefs and any other filings made in conjunction with a motion shall include proof of service on the opposing party. The Board, in its discretion, may extend the time within which such brief is to be submitted and may authorize the filing of a brief directly with the Board. A motion shall be deemed unopposed unless a timely response is made. The Board may, in its discretion, consider a brief filed out of time.

(h) Oral argument. A request for oral argument, if desired, shall be incorporated in the motion to reopen or

reconsider. The Board, in its discretion, may grant or deny requests for oral argument.

(i) Ruling on motion. Rulings upon motions to reopen or motions to reconsider shall be by written order. Any motion for reconsideration or reopening of a decision issued by a single Board member will be referred to the screening panel for disposition by a single Board member, unless the screening panel member determines, in the exercise of judgment, that the motion for reconsideration or reopening should be assigned to a three-member panel under the standards of § 3.1(e)(6). If the order directs a reopening and further proceedings are necessary, the record shall be returned to the Immigration Court or the officer of the Service having administrative control over the place where the reopened proceedings are to be conducted. If the motion to reconsider is granted, the decision upon such reconsideration shall affirm, modify, or reverse the original decision made in the case.