04-2489-ag

To Be Argued By:
DOUGLAS P. MORABITO

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-2489-ag

SOFIA YOLANDA MANRIQUE,
Petitioner,

-vs-

JOHN ASHCROFT, UNITED STATES 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

This Court has appellate jurisdiction under § 242(b) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(b) (2004), to review petitioner's challenge to the BIA's April 20, 2004, final order denying her request for asylum, withholding of removal, and relief under the United Nations Convention Against Torture.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether substantial evidence supports the BIA's conclusion that petitioner failed to establish eligibility for asylum and for withholding of removal, because she failed to show (1) that her status as a corporate whistleblower rendered her a member of a "particular social group" for purposes of immigration law; (2) that there was any connection between the government and any harm resulting from her whistleblowing activity; (3) that she had been subjected to threats or harm that rose to the level of past persecution; or (4) that she had a well-founded fear of future persecution if she were to return to Colombia.

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BRIEF FOR JOHN ASHCROFT
Attorney General of the United States

Preliminary Statement

Sofia Yolanda Manrique, a native and citizen of Colombia, petitions this Court for review of an April 20, 2004 decision of the Board of Immigration Appeals ("BIA") (Joint Appendix ("JA") 2-4). The BIA affirmed the November 12, 2002, decision and order of an Immigration Judge ("IJ"), which denied petitioner's applications for asylum, for withholding of removal, and

for relief under the U.N. Convention Against Torture ("CAT")[1] under the Immigration and Nationality Act of 1952, as amended ("INA"), and which ordered her removed from the United States. (JA 25-33 (IJ's decision and order)).

Substantial evidence supports the BIA's conclusion that, for multiple reasons, petitioner failed to establish her eligibility for asylum or withholding of removal. First, the BIA correctly rejected petitioner's claim that her status as a "whistleblower" at her corporate employer qualifies as membership in a particular group such that any threats or harm she might have suffered could give rise to a claim of asylum or withholding of removal. Second, even if petitioner's whistleblowing claim were construed as a claim of persecution based on her political opinion, such a claim would likewise fail because she did not establish the requisite connection between the Colombian government and any retaliation she may have suffered as a result of her whistleblowing activities.

Third, even assuming that petitioner could establish a nexus between her reported harm and one of the statutorily protected asylum grounds, substantial evidence supports the BIA's finding that petitioner failed to establish that she

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

suffered from past persecution. This is so because petitioner's allegations that she was subjected to unfulfilled threats and minor property damage do not rise to the level of persecution but merely constitute harassment. Fourth, in light of her failure to demonstrate past persecution, she failed to establish an objectively reasonable fear that she would be singled out for persecution upon returning to Colombia. Petitioner likewise failed to establish that she has a well-founded fear of future persecution because she repeatedly returned to Colombia from the United States after the alleged mistreatment occurred.

Statement of the Case

On February 8, 2001, petitioner entered the United States as a visitor through Miami, Florida. (JA 172).

On or about April 30, 2002, petitioner submitted a Form I-589 Application for Asylum and for Withholding of Removal. (JA 172-287).

On May 16, 2002, petitioner was served a Notice to Appear charging her with removability. (JA 293-294).

On November 12, 2002, petitioner appeared at a removal and asylum hearing in Hartford, Connecticut. On that same date, Immigration Judge Paul M. Gagnon issued an oral ruling finding petitioner removable; denying petitioner's claims for asylum, withholding of removal, and relief under the CAT; and granting her request for voluntary departure to Colombia. (JA 27-32).

On December 2, 2002, petitioner filed a timely notice of appeal to the BIA (JA 21-24), and filed a brief on July 17, 2003. (JA 7-9).

On April 20, 2004, the BIA issued a written decision affirming the IJ's decision, and dismissing the appeal. (JA 2-4).

On May 18, 2004, petitioner filed a timely petition for review of the BIA's decision.

Statement of Facts

A. Petitioner's Entry into the United States and Asylum, Withholding, CAT, & Voluntary Departure Application

Petitioner Sofia Manrique is a native and citizen of Colombia. (JA 172). According to petitioner, she came to the United States on March 28, 2000, and stayed first in Miami, Florida, and then Stamford, Connecticut, until July 18, 2000.[2] (JA 67, 172). Petitioner returned to Colombia, then came back to the United States a second time and stayed between September 5, 2000, and December 4, 2000. (JA 69-70, 172). On February 8, 2001, petitioner entered the United States a third time as a visitor in Miami, Florida, and has remained here since. (JA 172).

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[2] Petitioner's asylum application states that she first entered the United States in 1982, but she did not testify to that fact at her removal hearing. (JA 172).

On or about April 30, 2002, petitioner submitted a written application for asylum and withholding of removal with the Immigration and Naturalization Service ("INS").[3] (JA 172-179; attachments at JA 180-287). Petitioner based the asylum request on her membership in a particular social group.[4] (JA 176). In addenda to that application (JA 180-84, 256), petitioner claimed that while working in the accounting department of a large corporation in Colombia, she "found a lot of irregularities on the books," including the fact that an American company with which her corporation was doing business "never existed." (JA 180). After reporting these facts to the company's board of directors and a state oversight agency, she stated that management got "upset" with her (JA 180), and that she began to receive threatening phone calls at home and the office, telling her "to [shut her] mouth and let the New Company work." (JA 181). She stated that "there were times when employees from other

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[3] The INS was abolished effective March 1, 2003, and its functions transferred to three bureaus within the Department of Homeland Security pursuant to the Homeland Security Act of 2002. See Pub. L. No. 107-296, 116 Stat. 2135, 2178. The enforcement functions of the INS were transferred to the Bureau of Immigration and Customs Enforcement ("ICE"). *Id.* For convenience, this brief will refer throughout to the INS.

[4] In response to the question on the asylum application regarding the reason for her asylum claim, it appears that petitioner checked the box marked "Religion" but then crossed out that mark and instead checked the box for "Membership in a particular social group." (JA 176). Petitioner never raised her religion as a basis for her asylum claim before the IJ or the BIA and has likewise not raised it on this appeal.

parts" of Colombia came to her office in Bogota and "yelled that, 'there is a necess[it]y to [shoot] traitors.'" (JA 181). As a result of her whistleblowing, corporate management transfered her to the tax department, to cut off her access to financial documents. (JA 181).

Petitioner stated that she opposed corporate restructuring plans, for fear that it would harm worker benefits. (JA 182). She attended union meetings at which "it seemed that the [workers] were confused many of them were yelling and on the halls screamed me making threats against to me because they did not believe" her views on the restructuring plan. (JA 182). In May 1999, she headed a group of union workers opposed to the plan, which was pitted against a rival group headed by the union president which was in favor of management's plan. (JA 182). At a June 1999 employees' vote on the plan, "some workers were waiting for me and the[y] have orders not to let me show up at the voting. They [scream] that 'It was necessary to [shoot] those who resist the path of the cause.'" (JA 182). In light of the danger, security guards escorted petitioner home to her apartment, and management's plan ultimately won the vote. (JA 182).

After that, the corporation's financial situation worsened "to the point that they stopped paying pensions, social securities and then postponing salaries." (JA 183). According to petitioner, the union president was not responsive to the workers' needs, and so petitioner put together an employees' petition to corporate management. In January 2000, six months shy of reaching 20 years of service, petitioner was contacted by management "because the[y] were concerned that I was against . . . what they had

been doing and how several workers threa[ten]ed my life, this was good for the company so the[y] decided to pay for my retirement plan if I want to save my life. . . . Things were getting worst so I accept the retirement plan if I want to save my life." (JA 183). She then went to live at her brother's house in Bucaramanga, but he received an "anonymous call warning him not letting me live in his house because that putting in danger his family and himself." (JA 183). After that, she decided to "leave my family, my friends and my life" and travel to the United States in December 2001. (JA 183). Petitioner made no mention of the involvement of any government officials.

B. Petitioner's Removal Proceedings

On May 16, 2002, the INS served petitioner with a Notice to Appear for a removal hearing. (JA 293-294). The alleged bases for removal asserted in the Notice to Appear were that petitioner: (1) was neither a citizen nor a national of the United States; (2) was a native and citizen of Colombia; (3) was admitted to the United States at Miami, Florida on or about February 18, 2001, as a nonimmigrant with authorization to remain in the United States for a period not to exceed May 7, 2001; and (4) that petitioner remained in the United States beyond May 7, 2001, without authorization from the INS. (JA 293). The Notice to Appear concluded, therefore, that petitioner was subject to removal as an alien who remained in the United States for a time longer than permitted, under Section 237(a)(1)(B) of the Immigration & Nationality Act. (JA 293).

After several continuances, a combined removal hearing and hearing on the asylum petition was held before the Immigration Judge ("IJ") on November 12, 2002 (hereinafter "Removal/Asylum Hearing").

1. Petitioner's Testimony

Petitioner was the only witness to testify at the Removal/Asylum Hearing. On direct examination, petitioner testified among other things that prior to leaving Colombia for the last time she had worked for the same company for almost twenty years. (JA 55-56). She left the company on January 31, 2000, after experiencing problems there. (JA 56-60). While employed at the company she was a union official. (JA 56-57). She began to have problems in the company beginning in 1998, after the majority shareholder transferred its shares to the government of Bogota, and a "phantom corporation" run by two men, Haida Quevas and Hector Arrera, appeared to rescue the company from financial problems. (JA 59). She testified that the fake company was set up by people within her company, and that those responsible included Eduardo Vega Losano, then governor of Bogota, and Noe Viancha, the head of the company union. (JA 59-60). She reported the irregularities to the company's board of directors and its president, but was told by the president's secretary to obey orders. (JA 60-61). Thereafter, she made complaints to a regulatory agency that was responsible for supervising and regulating corporations in the area and which "pulled the plug" on the non-existent company. (JA 60-61).

Petitioner testified that threats were made against her beginning at the end of 1998. (JA 62). She further

testified that when the company encountered serious financial problems, she received threats for having reported the bad corporate management and its ties to the government. (JA 62). She claimed to have been threatened once by the governor of Bogota at a public hearing, as well as by the two men in charge of the phony company. (JA 62). She received a total of around 15-20 threats while she was working in her office and someone would pass by and make a comment. (JA 63). She interpreted these threats to be against her life. (JA 63). The head of the union also made statements she construed as threats. (JA 63-64). She never reported any of these threats to the police because they are "tied in with our government." (JA 64).

After 12 years of working in the accounting department, she was transferred to the tax department in retaliation for her whistleblowing. (JA 65). (Petitioner did not testify that her compensation was reduced or that she suffered any other adverse effect from this transfer.) She testified that she continued to receive threats from people in the company after her transfer to the tax department. (JA 65). As petitioner explained, the company employees were divided into two camps: those who supported petitioner because they thought she was right, and those who sided with the union president. (JA 65). The latter group apparently blamed the company's financial woes, and hence the workers' predicament, on petitioner, and they were the ones threatening petitioner. (JA 65-66). She received three threatening telephone calls while outside of work at a time the employees' pension plans were in jeopardy and certain workers were blaming her. (JA 65).

Petitioner testified that she left the company in January 2000, six months before accruing twenty years' service and qualifying for a pension. (JA 66). She was asked to leave by a company official who said "there was danger within the company and it was better that [petitioner] wasn't associated." (JA 66). After she left the company in January 2000, she moved to the State of Bucaramanga in Colombia to live with her brother's family. (JA 66). She also testified that her brother received a threatening telephone call from an unknown caller saying that his life was in danger. (JA 66). She was also subjected to "a certain amount of harassment" in Bogota which caused her to come to the United States the first time. (JA 67).

Petitioner also testified about her prior visits to the United States. She first came to the United States on March 28, 2000, then returned to Colombia on July 18, 2000, because she "was hoping everything had returned to normal." (JA 68). Prior to returning to Colombia, she learned that a prosecution regarding the fraud at her previous company had begun as a result of the complaints she had lodged with the state agency. (JA 68). When she returned to Colombia the first time, she complied with two subpoenas concerning that prosecution. (JA 69). At that time, an unknown person broke her car windows and left a note calling her a traitor; some former co-workers told her that people at the company were angry. (JA 69). She did not receive any other threats prior to coming to the United States for a second time on September 5, 2000. (JA 69).

Petitioner further testified that she again visited the United States on September 5, 2000, and she stayed in

Stamford, Connecticut, until her return to Colombia on December 4, 2000. (JA 69-70). Petitioner testified that she returned to Colombia on December 4, 2000, to "be with [her] own people." (JA 70). Finally, petitioner testified that on December 21, 2000, as she was walking down a main street in Bogota, some people stopped and threatened her that "there had to be justice done for . . . that money that was lost for the workers." (JA 70). She received a few threatening telephone calls between December 4, 2000, and February 8, 2001, before she returned to the United States for a third time. (JA 70-71).

Asked why she needed to apply for asylum in the United States, petitioner said that she would be killed in Colombia because the governor is being prosecuted for the fraud she uncovered and that she would be required to testify. (JA 71). Asked by her attorney if she believed her life is in more danger now if she returned to Colombia as opposed to the previous times she returned, petitioner replied, "Yes, because I'm not involved with the company at all and, I'm less protected than ever." (JA 72). Asked "why would these people still be interested in you, if you're no longer involved with the company," petitioner replied, "Because these people have government positions and they don't want any ties to having done these bad practices." (JA 72).

On cross-examination, petitioner stated that in June 1999 she was physically threatened at a company pension stock vote by people in a rival faction who supported Losano, and she was escorted to safety. (JA 74). Petitioner also stated that she he was not afraid to return to Colombia in December 2000; on the contrary, she "was happy

because [she] was going back to see [her] family" and she "thought things would be back to normal." (JA 74-75). She still has an apartment in Bogota in her brother's name. (JA 75). She also noted that she tried to live in the State of Bucaramanga, but that it did not work because "[t]hey looked for me there." (JA 75).

C. The IJ's Decision

The IJ issued an oral ruling on November 12, 2002, denying petitioner's asylum petition, and her requests for withholding of removal and CAT relief. (JA 32). The IJ did, however, grant petitioner's request for voluntary departure. (JA 32, 85).

The IJ began his ruling by noting that petitioner "has admitted the allegations and conceded the charges." (JA 27). The IJ therefore concluded that clear, convincing and unequivocal evidence established petitioner's removability from the United States. (JA 27).

After summarizing the hearing testimony, the IJ found that, although petitioner's testimony was credible, she could not make out a claim for asylum because she could not show that she "has been a victim of past persecution on account of one of the five enumerated grounds." (JA 30). The IJ rejected petitioner's claim that her status as a whistleblower placed her in a social group as contemplated by the asylum statute.[5] (JA 31). Finally, the IJ concluded

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[5] Petitioner's counsel argued at the Removal/Asylum Hearing that petitioner's membership in a particular social (continued...)

that "the threats claimed by [petitioner] consist entirely of empty threats, and that she has not suffered any physical harm as a result of these threats." (JA 31). The IJ found petitioner's future persecution claim undermined by the fact that subsequent to many of the threats she received, she returned to Colombia on several occasions. (JA 31).

In sum, the IJ concluded that, because petitioner could not meet her burden of proof as to her asylum claim, she also could not make out a claim for withholding of removal. Finally, the IJ concluded that petitioner also could not establish a claim for relief under the CAT because there was no evidence that it was more likely than not that she would be singled out for torture by the government upon return to Colombia. (JA 31-32).

D. BIA's Decision

On April 20, 2004, the BIA, in a written opinion, affirmed the IJ's decision and dismissed petitioner's appeal. (JA 2-4). The BIA began its ruling by agreeing with the IJ that it found petitioner's testimony to be credible. (JA 2). Nonetheless, the BIA concluded that petitioner had not stated a cognizable asylum claim based on her contention that she was being persecuted for uncovering fraud within her company. (JA 2-3). The BIA rejected her claim that she was a member of a particular social group based on her status as a whistleblower. (JA

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[5] (...continued)
group was her status as a former employee of the company and as a member of the company union. (JA 81-82). Petitioner advances neither of those claims on this appeal.

3). The BIA explained that whistleblowers do not have discrete and recognizable characteristics as is required to establish persecution based on membership in a particular social group. (JA 3). As such, the BIA concluded that petitioner "has failed to identify any fundamental characteristic of the claimed particular social group that distinguishes it in the eyes of the persecutor and the outside world." (JA 3).

The BIA noted that petitioner's claim for asylum based on her whistleblowing activities could also be construed as persecution on account of her political opinion. (JA 3). The BIA, however, concluded that petitioner "failed to establish the requisite connection with government activity." (JA 3). Specifically, the BIA concluded that, although the governor of Bogota was allegedly involved in the fraudulent conduct, there was "no evidence that he was acting in official governmental capacity at the time of the corruption or that 'the alleged corruption [was] inextricably intertwined with governmental operation.'" (JA 3). The BIA further concluded that the wrongdoing was a "private business matter," and thus petitioner failed to meet her burden of demonstrating eligibility for asylum. (JA 3).

The BIA also concluded that, even assuming that petitioner could show a nexus between her reported harm and one of the statutorily protected grounds, the harm suffered by petitioner is more akin to harassment or discrimination and not persecution. (JA 3-4). Finally, the BIA concluded that "any asserted well-founded fear is adequately rebutted by [petitioner's] repeated visits back to Colombia." (JA 4).

The BIA also concluded that, because petitioner could not make out a claim for asylum, she also could not make out a claim for withholding of removal because she could not establish that it was more likely than not that she would be subjected to persecution upon return to Colombia. (JA 4). The BIA likewise concluded that the record did not support petitioner's CAT claim because there was no evidence that she would face torture upon return to Colombia. (JA 4). This petition for review followed.[6]

SUMMARY OF ARGUMENT

Substantial evidence supports the BIA's finding that petitioner failed to meet her burden of demonstrating eligibility for asylum or withholding of removal. The record supports the BIA's conclusion that petitioner failed to identify membership in a particular social group, i.e., whistleblowers, since members of that group do not possess recognizable and discrete characteristics evident to outside authorities.

The record also supports the BIA's conclusion that, even if petitioner's whistleblowing activity were regarded as political opinion, there was still no evidence establishing a government connection between petitioner's reported harm and her whistleblowing

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[6] Notably, petitioner's brief only challenges the BIA's conclusion that she failed to meet her burden of demonstrating eligibility for asylum and withholding of removal. Accordingly, she has abandoned her claim for withholding under the CAT.

activities. That is, the BIA properly concluded that petitioner failed to establish that the irregularities she uncovered (and which were being prosecuted at the time she left Colombia) constituted government corruption, or that the alleged corruption was inextricably intertwined with operation of the government. Instead, substantial evidence supports the conclusion that the financial irregularities were a business matter. Nor did petitioner offer sufficient evidence that the threats and minor property damage which she suffered constituted retaliation against her speaking out against government corruption.

Substantial evidence further supports the BIA's determination that, even if petitioner could establish a nexus between her reported harm and one of the statutorily protected grounds, petitioner failed to establish that she had suffered past persecution. Rather, the record adequately supports the BIA's determination that the threats and broken car windows she suffered were not severe enough to constitute persecution. Finally, substantial evidence supports the BIA's determination that any claim of a well-founded fear of persecution on petitioner's part was rebutted by her two returns to Colombia during the time of her reported harm.

ARGUMENT

I. THE BIA PROPERLY DETERMINED THAT PETITIONER FAILED TO ESTABLISH ELIGIBILITY FOR ASYLUM AND FOR WITHHOLDING OF 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.[7] *See* 8 U.S.C. §§ 1158(a), 1231(b)(3) (2004); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995). Although these types of relief are "'closely related and appear to overlap,'" *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-*

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

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.

"The phrase'"particular social group' has been defined to encompass 'a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.'" *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (citation omitted). "A particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor -- or in the eyes of the outside world in general." *Id.* "Like the traits which distinguish the other four enumerated categories -- race, religion, nationality and political opinion -- the attributes of a particular social group must be recognizable and discrete." *Id.* Consequently, "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group." *Id.*

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

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

"An alien may satisfy the subjective prong by showing that events in the country to which he . . . will be deported have personally or directly affected him." *Id.* at 663. With respect to the objective component, the applicant must prove that a reasonable person in his circumstances would

fear persecution if returned to his native country. *See* 8 C.F.R. § 208.13(b)(2) (2004); *see also Zhang*, 55 F.3d at 752 (noting that when seeking reversal of a BIA factual determination, the petitioner must show "'that the evidence he presented was so compelling that no reasonable factfinder could fail'" to agree with the findings (quoting *INS v. Elias-Zacarias*, 502 U.S 478, 483-84 (1992)); *Melgar de Torres*, 191 F.3d at 311.

An alleged fear of future persecution will be discounted by evidence that, after the mistreatment complained of, the asylum-seeker returned or stayed for some length of time in his country and suffered no further harm. *See Albathani*, 318 F.3d at 373-74 (asylum claim denied because, among other reasons, claimant's "fear of persecution was undercut by his twice returning to Lebanon after trips abroad"); *See also Tawm v. Ashcroft*, 363 F.3d 740, 743-744 (8th Cir. 2004); *Velasquez v. Ashcroft*, 342 F.3d 55, 58 (1st Cir. 2003); *Manivong v. District Director, INS*, 164 F.3d 432, 433-34 (8th Cir. 1999); *Vaduva v. INS*, 131 F.3d 689, 691-92 (7th Cir. 1997).

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 [one of the statutorily protected grounds]." *Wu Biao 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").

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 BIA's determination that an alien has failed to satisfy his burden of proof, Congress has directed that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B) (2004). *Zhang v. INS*, 386 F.3d at 73.

This Court "will reverse the immigration court's ruling only if 'no reasonable fact-finder could have failed to find . . . past persecution or fear of future persecution." *Wu Biao Chen*, 344 F.3d at 275 (omission in original) (quoting *Diallo*, 232 F.3d at 287).

The scope of this Court's review under that test is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 71; *Wu Biao Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992).

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

C. Discussion

The BIA properly concluded that petitioner failed to establish eligibility for asylum. Specifically, the record supports the BIA's conclusions that petitioner: (1) failed to establish that she was a member of a particular social group; (2) failed to establish a sufficient connection between her whistleblowing activity and the government; (3) failed to establish that she suffered from past persecution in Colombia; and (4) failed to establish that she had a well-founded fear of future persecution.

First, substantial evidence supports the BIA's finding that petitioner failed to meet her burden of demonstrating eligibility for asylum through membership in a particular social group. That is, substantial evidence supported the BIA's conclusion that petitioner failed to establish that her claimed group -- whistleblowers -- possesses recognizable and discrete characteristics evident to outside authorities. As the BIA properly noted, petitioner failed to produce any evidence that individuals characterized as whistleblowers possess common characteristics such that would-be persecutors could identify them as members of the purported group. *See Gomez*, 947 F.2d at 663-64; *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986). Absent a showing that whistleblowers possess some fundamental characteristic, both "recognizable and discrete," that would be evident to outside authorities, petitioner has failed to show that she is a member of a "particular social group." *See also Ramsameachire v. Ashcroft*, 357 F.3d 169, 182 n.4 (2d Cir. 2004); *Fatin v. INS*, 12 F.3d 1233, 1240-42 (3d Cir. 1993); *Saleh v. U.S. Dep't of Justice*, 962 F.2d 234, 240-41 (2d Cir. 1992).

Substantial evidence further supports the BIA's determination that the social group to which petitioner claimed membership did not exist independently of her claimed harm. Before the BIA, petitioner characterized her claim of membership in a particular social group as being "on the ground that she was threatened by employer and union officials yet the government law enforcement failed to act to protect her." (JA 8).[8] Such a claim must fail, because it defines the group purely in terms of the harm alleged -- that is, threats by her employer and union

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[8] In point of fact, counsel at the removal hearing characterized petitioner's claimed group as "the fact that she is a former employee of this company. . . . [and] a member of a union." (JA 81; *see also* JA 82 ("our position is that there was past persecution, it was on the basis of membership in a particular social group, being a former employee of this company")). As the IJ correctly pointed out, although there might be a stronger argument that union membership constitutes membership in a social group, that would not help petitioner's claim because there was no evidence that any other union members, much less any former employees, were subjected to any threats or harm. (JA 30-31).

officials, and a failure by the government to protect her.[9] *See Gomez*, 947 F.2d at 663-64.

Second, to the extent that the BIA construed petitioner's claim for asylum based on her whistleblowing activities as persecution on account of her political opinion, substantial evidence also supports the BIA's conclusion that petitioner failed to demonstrate a sufficient connection between her alleged harm and her political opinion. (JA 3). That is, the BIA properly concluded that petitioner failed to establish that government corruption existed or that the alleged corruption was inextricably intertwined with operation of the government. Petitioner made no mention of government officials in the narrative of her claim in her written asylum application. (JA 180-

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[9] Petitioner continues to press a failure-to-protect theory before this Court, but offers nothing more than bald speculation that "[i]t is certainly reasonable to conclude that the government of Colombia was not taking the appropriate steps to protect her because of the corrupt political influence of the people about whom the Petitioner was complaining." Petr. Br. at 13. What is relevant is the record, not petitioner's surmises. The record contains no suggestion that the Colombian government has refused to offer petitioner protection. To the contrary, she testified that she sought no police protection because she believed the police to be "tied right in with our government" (JA 64), despite her acknowledgement that authorities had commenced a prosecution of certain individuals including the governor (JA 68). The one time she was in danger of physical harm, at the employees' vote on a company restructuring plan, she was escorted to safety by security guards, though she did not specify in whose employ they were. (JA 74, 182).

184). At the removal hearing, petitioner offered little more that linked her problems to the government. She generally testified that her company was going through financial difficulties, that at some point the majority shareholder transferred its stock to the government of Bogota, and that the governor of the state of Bogota was somehow involved in creating the "phantom company" which she reported to authorities. (JA 59-60). Because she offered no further details on the nature or extent of the governor's supposed involvement, there was accordingly no evidence that he was acting in his official governmental capacity at the time of the corruption.

In addition, where a court cannot "state with conviction what motivated" a petitioner who spoke out against corruption or what motivated her alleged persecutors, the court "must defer to the BIA's findings." *Marquez v. INS*, 105 F.3d 374 (7th Cir. 1997) (according deference to BIA's finding of fact that army official's retaliation against petitioner, based on petitioner's public criticism of corrupt officials, was motivated by greed and jealousy, rather than politics); *Grava v. INS*, 205 F.3d 1177, 1181 & n.3 (9th Cir. 2000) (explaining that there must be a nexus between petitioner's persecution and his political opinion); *Marku v. Ashcroft*, 380 F.3d 982, 987-88 (6th Cir. 2004) (explaining that evidence in record must show that persecutor is not acting based on personal motives but because of political opinion espoused); *see also Sudusinghe v. Ashcroft*, 2003 WL 22299206, at *5 (S.D.N.Y. Oct. 6, 2003) (refusing to recognize nexus to political opinion where the alleged persecution occurred because of personal reasons unrelated to political opinion). Where, as here, there is no basis for concluding that

petitioner's whistleblowing was politically motivated (indeed, her testimony suggests she was primarily motivated by a desire to salvage the company's financial future, and hence its workers' prospects), there is likewise no basis for concluding that any retaliation she suffered was in response to her "political opinion" for purposes of refugee law. *See also Zayas-Marini v. INS*, 785 F.2d 801, 806 (9th Cir. 1986) (explaining that alleged persecution based on personal animosity, where petitioner accused one alleged persecutor of corruption, was not sufficient to show nexus to political activity).

Moreover, all of the threats and harm visited upon petitioner (with one isolated exception) came either from fellow employees or union members, from two individuals associated with the phantom company, or from unidentified antagonists. The one exception was an unspecified threat, which like all other threats she interpreted as a threat on her life, made by the governor at an unspecified public hearing. (JA 62). Such a lone allegation -- unsupported by any details regarding the nature of this supposed threat, or whether it was somehow linked to petitioner's whistleblowing activity -- is too slender a reed to conclude that petitioner suffered government-sponsored harm as a result of her whistleblowing about financial irregularities at her company. To the contrary, as petitioner testified, the Colombian government commenced an investigation and prosecution of the alleged wrongdoing in response to her complaints. (JA 67-70).

Third, substantial evidence further supports the BIA's determination that, even if petitioner could establish a

nexus between her reported harm and one of the statutorily protected grounds, she failed to establish that the harm rose to the level of persecution. Petitioner's experiences that allegedly give rise to her fear of persecution include 15-20 verbal threats from fellow employees, unknown individuals, her union president, and three individuals involved in the phantom corporation (including the governor); a few threatening telephone calls from unspecified callers; her car windows being broken by an unknown person; and threats from fellow workers at a convention center where a vote regarding company financial matters was taking place. (JA 57-65). Although she interpreted these threats as against her life, she offered no evidence that they were ever acted upon in the more than two years that she remained in Colombia.

These reported harms do not rise to the level of persecution because they do not involve sufficiently extreme behavior such as significant violence or physical abuse, *see Tian-Yong Chen v. INS*, 259 F.3d 121, 128 (2d Cir. 2004), or "economic restrictions so severe that they constitute a threat to life or freedom." *Fatin*, 12 F.3d at 1240 & n.10 (citation omitted); *see also Nelson*, 232 F.3d at 263 (explaining treatment complained of "must rise above unpleasantness, harassment, and even basic suffering"). Although petitioner is correct that "persecution" need not always take the form of physical violence, *see Leiva-Montalvo v. INS*, 173 F.3d 749 (9th Cir. 1999), even threats of death may not constitute past persecution. *See, e.g., Marquez*, 105 F.3d at 379-80 (affirming BIA ruling that petitioners failed to prove past persecution despite testimony that army officer issued death threats at family's home and wife's office, but

threats were never carried out). Here, the record does not reveal that the threats were ever followed up with anything more than broken car windows. *See Chen*, 359 F.3d at 128. Not all treatment that may be regarded as unfair, unjust or even unlawful rises to the level of persecution.[10] In sum, the BIA properly determined that petitioner did not

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[10] See *Fatin*, 12 F.3d at 1240; *see also Eusebio v. Ashcroft*, 361 F.3d 1088, 1090-91 (8th Cir. 2004) ("minor beatings and brief detentions, even detentions lasting two or three days, do not amount to political persecution, even if government officials are motivated by political animus"); *Dandan v. Ashcroft*, 339 F.3d 567, 573-74 (7th Cir. 2003) (persecution not shown where asylum-seeker was "detained, beaten and deprived of food for three days"); *Guzman v. INS*, 327 F.3d 11, 15-16 (1st Cir. 2003) (asylum-seeker's "one-time kidnaping and beating [during civil war] falls well short of establishing 'past persecution'" necessary to obtain asylum); *Ravindran v. INS*, 976 F.2d 754, 756-59 (1st Cir. 1992) (persecution not shown by member of Sri Lankan ethnic minority who participated in protest activities, was later arrested, detained for 3 days, and interrogated and struck by soldiers during detention, and whose uncle suffered destruction of house and one year's arrest for political activities); *Kapcia v. INS*, 944 F.2d 702, 704-05, 708 (10th Cir. 1991) (Polish asylum-seeker failed to establish "severe enough past persecution to warrant refugee status," where petitioner's anti-government activities resulted in his being "arrested four times, detained three times, . . . beaten once," having "his house . . . searched," and being "treated adversely at work"); *Skalak v. INS*, 944 F.2d 364, 365 (7th Cir. 1991) (persecution not shown by Polish Solidarity member whose activities "resulted in her being jailed twice for interrogation, each time for three days [and] officials at the school where she taught harassed her for her refusal to join the Communist Party").

provide sufficient evidence that the events complained of were severe enough to constitute past persecution.

Fourth, as to petitioner's claim that she had a well-founded fear of future prosecution, substantial evidence supports the BIA's conclusion that petitioner failed to satisfy her burden of proof. Petitioner's failure to demonstrate past persecution, as explained above, defeats any claim that she had a rebuttable presumption of future prosecution. For much the same reasons, she cannot show any objectively reasonable fear of future persecution, where none of the threats were acted upon from late 1998 until her departure in early 2001.

Nor has she demonstrated a well-founded fear of future persecution, where she twice travelled to the United States and returned home after these threats against her life began, before finally deciding in February 2001 to stay in the United States. Even after she had left her job and had her car windows broken by an unknown person (JA 68-69), she nevertheless returned to Colombia a second time in December 2000, "happy because I was going back to see my family." (JA 74-75). An asserted fear of future persecution will be discounted by evidence that the claimant chose to remain in the country for more than a year after the alleged mistreatment and suffered no further harm. *See Marquez*, 105 F.3d at 380 (affirming BIA's finding that petitioner had no objectively well-founded fear of persecution where, *inter alia*, petitioner returned twice from United States to home country despite claimed fear of persecution); *Tawm*, 363 F.3d at 743-44; *Velasquez*, 342 F.3d at 58; *Albathani*, 318 F.3d at 373-74; *Manivong*, 164 F.3d at 433-34; *Vaduva*, 131 F.3d at 691-

92. The only incident that occurred after that date was an encounter with "some people" on a main street in Bogota who "threatened us a lot and then said that there had to be justice done for all of those, that money that was lost for the workers." (JA 70). There is no suggestion in the record that these people were government-backed; if anything, the petitioner's written narrative and testimony suggest that they were more likely employees from the rival company faction who blamed petitioner for the company's financial ruin. This incident could not have reasonably given rise to a well-founded fear that petitioner would suffer government-sponsored (or even government-tolerated) harm rising to the level of persecution in the future.

For all the foregoing reasons, the record provides substantial evidentiary support for the BIA's finding that petitioner failed to carry her burden of demonstrating a well-founded fear of future persecution, and hence failed to establish her eligibility for asylum. Moreover, because the burden of proof for seeking withholding of removal is greater than the burden for establishing eligibility for asylum, failure to establish the latter will *per se* preclude the former. Accordingly, for all the same reasons, the record supports the BIA's finding that petitioner failed to establish a basis for withholding of removal.

CONCLUSION

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

Dated: May 25, 2005

Respectfully submitted,

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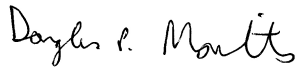

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

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 8,199 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) (2004). Definitions.

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

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

(a) Authority to apply for asylum

(1) In general

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

....

(b) Conditions for granting asylum

(1) In general

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

....

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

(A) In general

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

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

(4) Scope and standard for review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Well-founded fear of persecution.

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

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

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

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

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

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the

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

> (A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and
>
> (B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

. . . .

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

(a) Consideration of application for withholding of removal. An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is otherwise eligible for asylum but is precluded from being granted such status due solely to section 207(a)(5) of the

Act. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.

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

(1) Past threat to life or freedom.

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

(A) There has been a fundamental change in circumstances such that the applicant’s life or freedom would not be threatened on account of any of the five

grounds mentioned in this paragraph upon the applicant's removal to that country; or

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

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

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

(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration

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

(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

. . . .

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

(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer

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

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

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

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

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

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

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

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under § 208.17(a).

(d) Approval or denial of application--

(1) General. Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the

applicant's eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.