04-3661-ag

To Be Argued By:
MICHAEL E. RUNOWICZ

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-3661-ag

JORGE MARULANDA,
Petitioner,

-vs-

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

==========

BRIEF FOR ALBERTO R. GONZALES ATTORNEY GENERAL OF THE UNITED STATES

==========

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

MICHAEL E. RUNOWICZ
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

This Court has jurisdiction under § 242(b) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(b) (2005), to review petitioner's challenge to the Board of Immigration Appeals' June 15, 2004, final order denying him asylum, withholding of removal, and relief under the Convention Against Torture.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a reasonable fact finder would be compelled to reverse the Immigration Judge's adverse credibility determination and finding that petitioner had not been subject to past persecution or had a well-founded fear of future persecution, where petitioner's statements and evidentiary submissions were either implausible or internally inconsistent on material elements of his claim; where petitioner failed to adequately explain the inconsistencies; where petitioner failed to provide proof that the threats he had received had been made due to membership in a social group or had been based upon political opinion; and where his family has resided in Colombia for the last sixteen years without problems or retribution from guerrilla groups.

2. Whether the Immigration Judge properly rejected petitioner's claim for relief under the Convention Against Torture.

3. Whether the Board of Immigration Appeals erred in summarily affirming the Immigration Judge's finding that petitioner had failed to establish his eligibility for asylum, withholding of removal, and relief under the Convention Against Torture.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-3661-ag

JORGE MARULANDA,

Petitioner,

-vs-

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR ALBERTO R. GONZALES[1]
Attorney General of the United States

[1] Pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Attorney General Gonzales has been substituted as the Respondent in this matter.

Preliminary Statement

Jorge Marulanda, a native and citizen of Colombia, petitions this Court for review of a June 15, 2004, decision of the Board of Immigration Appeals ("BIA") (Joint Appendix ("JA") 2). The BIA summarily affirmed the March 3, 2003, decision of an Immigration Judge ("IJ"), (JA 50), denying petitioner asylum, withholding of removal under the Immigration and Nationality Act of 1952, as amended ("INA"), and relief under the Convention Against Torture ("CAT")[2], but allowing him voluntary departure with an alternate order of removal to Colombia. (JA 2 (BIA's decision), 50-65 (IJ's decision and order)).

Petitioner sought asylum, withholding, and CAT relief based on a claim of past persecution by Colombian guerrillas due to his claimed membership in a union of businessmen who refused to pay extortion money to those guerrillas. Substantial evidence supports the IJ's determination that petitioner failed to provide credible testimony and evidence in support of his claim for asylum.

First, there is no evidence in the record that the threats

---

[2] 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).

made by guerrillas for money payments were made for political purposes. Rather, the evidence demonstrated that the demands for money were no more than criminal extortion of individuals perceived by the guerillas to have funds.

Second, as the record does not demonstrate that the group that the petitioner claimed to have threatened him still existed, there was not sufficient evidence to support a well-founded fear of future persecution or any likelihood of torture -- particularly where petitioner, who had been gone from Colombia for some fourteen years, was no longer a small business owner, was no longer a member of the business union, and where other members of his family including his mother, sisters, daughters, and ex-wife, still resided in Colombia without any problems from the guerrillas.

Finally, the BIA acted properly in summarily affirming the IJ's decision. For all these reasons, the petition for review should be denied.

Statement of the Case

Petitioner entered the United States on July 11, 1989, without inspection. (JA 290).

On September 2, 1993, petitioner filed a Request for Asylum in the United States. (JA 290-94).

On October 29, 2001, petitioner underwent an asylum interview. (JA 141-43). The following day, October 30,

2001, the asylum officer referred the asylum assessment to an immigration judge. (JA 144-45).

On November 30, 2001, the petitioner was issued a Notice to Appear for removal proceedings. (JA 297-98). Petitioner appeared before an immigration judge on June 19, 2002, where the asylum removal hearing was then scheduled for March 3, 2003, and the matter was adjourned. (JA 67-71). On March 3, 2003, an asylum/removal hearing was held before an immigration judge. (JA 72-140). The IJ rendered an oral decision denying petitioner asylum and withholding of removal. (JA 52-66).

On April 1, 2003, the petitioner filed an appeal to the BIA. (JA 46-47). On June 15, 2004, the BIA summarily affirmed the IJ's decision. (JA 2).

On July 13, 2004, the petitioner filed a petition for review with this Court.

Statement of Facts

A. Jorge Marulanda's Entry into the United States and Application for Asylum, Withholding of Removal, and CAT Relief.

Petitioner Jorge Marulanda is a native and citizen of Colombia, where he was born on August 29, 1956. (JA 82, 290). Petitioner testified that he last left Colombia on June 23, 1989, to come to the United States, (JA 82), where he entered the United States through San Diego, California. (JA 82). On September 2, 1993, a Request for

Asylum in the United States (Form I-589) ("Request for Asylum" or "I-589") was received by the Immigration and Naturalization Service ("INS"). (JA 290). That Request for Asylum provided that petitioner arrived in the United States at New York, New York, on July 11, 1989. The stated reasons for seeking asylum were to escape from threats posed by drug traffickers and to avoid persecution by the police, who perceived petitioner "as a trouble maker." (JA 283, 291). No apparent action was taken on this asylum request until the petitioner met with an INS asylum officer ("AO") in Lyndhurst, New Jersey, on October 29, 2001, where petitioner signed the application for asylum in the AO's presence. (JA 91, 294). At the conclusion of this interview, the asylum officer concluded that petitioner was not credible and was not eligible for asylum, but decided to refer the matter to an Immigration Judge. (JA 145). Petitioner's counsel later completed a Pleadings Form prior to the asylum/removal hearing which indicated on a checklist that relief was requested for asylum and withholding and also for relief pursuant to the Convention against Torture. (JA 280-281).

B. Petitioner's Removal Proceedings

The petitioner was served with a Notice to Appear dated November 30, 2001, which charged that he was subject to removal as an alien present in the United States without having been admitted or paroled. The INS alleged in this Notice that: 1) petitioner was not a citizen or a national of the United States; 2) petitioner was a native and a citizen of Colombia; 3) petitioner entered the United States at or near New York, New York, on or about July 11, 1989; and 4) petitioner had not then been admitted or

paroled after inspection by an immigration officer. (JA 297).

The hearing, originally scheduled for June 18, 2002, took place the following day, June 19, 2002 (JA 69-71), and was then continued until March 3, 2003, when the asylum hearing was completed, (JA 72-140).

1. Documentary Submissions

Six numbered exhibits were submitted at the March 3, 2003, Removal/Asylum Hearing. The INS Notice to Appear, as the charging document, was admitted as Exhibit 1. (JA 73, 297-298).

Petitioner's August 21, 1993, I-589, Request for Asylum, was identified as Exhibit 2. (JA 73, 282-286). Attached to this Request for Asylum and made a part of Exhibit 2 was an INS Form G-325 A and a two-page typewritten document about the current status of human rights in the Americas which the IJ assumed had been prepared by petitioner. (JA 73, 287, 288-289). The Request for Asylum asserted that petitioner was seeking asylum because of the present condition of Colombia as a country "contaminated by drugs, kidnapping and terrorism." (JA 283). Although petitioner stated that he had received threats and feared for his safety, he provided no time, place, or other facts regarding those threats. (JA 283). The application also provided that if he had to return to Colombia, he would be "returning to hell because my life will again be persecuted by the police who only sees (sic) me as a trouble maker." (JA 283). In response to a question about whether petitioner or any member of his

family had ever belonged to any organization or group in his home country, the "No" box was checked. (JA 284).

Respondent's Pleadings, dated June 18, 2002, were admitted as Exhibit 3. (JA 73, 280-281). In this exhibit, petitioner admitted all the allegations and conceded all the charges contained in the charging document and requested asylum and withholding of removal based on political opinion and membership in a social group, as well as relief under the Convention against Torture. In addition, the pleadings requested voluntary departure in the alternative. (JA 280, 281).

Exhibit 4 was a supplementary document submitted by petitioner containing numerous articles on human rights; a photocopy of a 1999 Country Report for Colombia issued by the United States Department of State (JA 184-247); several newspaper articles about a kidnapping and killing by Colombian rebels; and letters from seven people, including petitioner's brother, which each asserted petitioner had left Colombia because of death threats, although none gave an explanation as to the reason for those threats (JA 257, 260, 263, 266, 269, 272, 275); and a certification that petitioner's brother, Juan Pablo Marulanda, had been a homicide victim (JA 276).

During the removal hearing of March 3, 2003, the report of the AO who had interviewed petitioner and who had made the assessment to refer the asylum petition to an immigration judge was submitted by government counsel as Exhibit 5. (JA 111-113, 144-145). In a summary of petitioner's testimony, the AO noted that petitioner had stated that he had "not [been] involved in any political

activity in his country, nor had he himself encountered any trouble while he was in his country." (JA 144). The AO also noted that petitioner was "unwilling to return to his country for fear that he would be killed by the police." (JA 144). The AO also noted that although petitioner had indicated in his written submission that he and his family had trouble with guerrillas in Colombia, petitioner denied such a problem when speaking to the AO and also that petitioner could not provide a reason why the police would want to kill him. (JA 145).

The AO's handwritten notes of the interview of October 29, 2001, were also admitted during the course of the hearing as Exhibit 6. (JA 121-125, 141-143).

2. Jorge Marulanda's Testimony

Petitioner was the only witness to testify at the March 3, 2003, Asylum/Removal Hearing. On direct examination, petitioner testified, among other things, that: he had been born in Santa Rosa de Cabal, Colombia (JA 82); he last left Colombia on June 23, 1989 (JA 82); and that he entered the United States without a visa through San Diego, California, without dealing with any United States immigration official (JA 82-83).

He stated that the reason he had left Colombia was because he was "being threatened to death" by "[t]he guerrillas." (JA 83). Petitioner identified the guerrillas as M-19 or FARC and testified that he received the threats, "[b]ecause we were a part of a union, and it was united businessmen." (JA 83). He did not identify this union by name other than to describe it as "a small union of

commercial workers, or business workers" joined together to better protect themselves against threats. (JA 83). Although he had joined the union some ten years earlier in 1979, he did not remember how many people were in this union. (JA 83-84). This union only represented those from the town where he lived. (JA 84). The union had problems with the guerrilla group M-19 who were demanding monthly payments of money. (JA 84).

Petitioner testified that his brother, Juan Pablo, had been in a high position within this union when he was killed on January 4, 1988, by guerrillas because he had not paid money that they had demanded. (JA 85). Petitioner also testified that prior to his death, Juan Pablo had received threats from the M-19. (JA 85). When asked if he (petitioner) had received any threats from this organization, petitioner replied "we always received them all together, all the people that existed," and the threats had been made by "telephone, or in person, or through leaflets that they sent us." (JA 86). After the death of his brother, petitioner testified he went to live with other family members in Bogota, but did not leave Colombia until June 1989. (JA 86-87, 128). He testified that he did not leave earlier because he was waiting to see if the government could do something. (JA 87, 128). During this period, he had remained in Bogota. (JA 128).

Although he had left Colombia in 1989, petitioner testified that he did not file his application for asylum until 1993 because he thought that only those persons who had problems with the government and not with guerrillas could seek asylum. (JA 87). Petitioner testified that the asylum application had been prepared by a New York

attorney, Paul Friedman. (JA 88). Petitioner testified, "I have just seen his name over there, as a suspended attorney." (JA 88). Petitioner also testified that, although he had an interpreter assist him in preparing the asylum application, that interpreter did not speak very much Spanish. (JA 88).

In his testimony, petitioner claimed that he never told the interpreter that he was afraid of drug traffickers or of the police. (JA 88-89). He further testified that he told Attorney Friedman that his brother had been killed and about the M-19. (JA 89). Petitioner stated that he never read the asylum application when he signed it and had not been given a copy of it by the attorney. (JA 88-89).

Petitioner testified that in "August of 2001" he had an interview in New Jersey with an INS asylum officer, where he signed the application in the officer's presence without reading the application and without knowing the contents of the application because the officer told him that signing the form was "just to prove that I have been present to (sic) the appointment." (JA 90-91).

At this asylum interview, petitioner denied that the AO asked him any questions about his application, save one question, i.e., why petitioner was asking for asylum. (JA 91). He testified that he told the AO about his brother being killed, about his own threats, and that a cousin had been kidnapped. (JA 91-92). Petitioner testified that the officer asked no questions about the mention of a police problem in the application, asked no questions about why there was no mention of the brother's death in the application, asked no questions about the union and asked

no questions about Escobar (a drug trafficker) mentioned in the application. (JA 92).

Petitioner testified that the first time he had gone over the asylum application was two weeks prior to the present hearing. (JA 92). He testified that there were mistakes in the application about Pablo Escobar and the police. He did not testify about what he had said to his attorney who prepared the application, other than to say "[t]hey did not write in there what I told them." (JA 93).

Petitioner went on to testify that the situation with M -19 had gotten worse since he left Colombia, and that he was afraid to return there because he "formed part of the list of all the people that are being threatened . . . ." (JA 94). He also opined that he would be targeted by the guerrilla groups because "we belong to the union . . . and because we did not pay the money that they require of us." (JA 94-95). He was not aware of other members of the union having problems after he left Colombia. (JA 95).

Petitioner testified that when he went to the asylum interview he told the immigration officer about a cousin who had been kidnapped. (JA 92, 95). This kidnapping, by guerrillas, took place in 1998. (JA 96). He also testified that another cousin, a police officer, was kidnapped and killed "last year" by FARC, a guerrilla group petitioner insisted was the same thing as M-19. (JA 96). When asked on direct examination about murders of police officers, business persons or trade union members, petitioner indicated that the murder of a police officer is not an unusual occurrence in Colombia (JA 99), nor is it unusual for business people to be killed in Colombia (JA

100), adding "that it a normal thing in Colombia every day, to extortion (sic) people . . . ." (JA 100).

Petitioner testified, however, that his mother, his ex-wife, and his two daughters who remain in Colombia have not been harmed and have had no problems with the guerrillas. (JA 97). He did indicate that the family no longer owns the three supermarkets they had when petitioner left Colombia. (JA 97-98). Petitioner, when asked if his mother had sold the businesses, testified "she actually had to give them away. She could not do it." (JA 97).

Near the end of his direct testimony, petitioner testified that he had obtained letters from friends who were aware of the reason why he had left Colombia. (JA 100). He also explained that he did not have any paperwork concerning his membership in the union because he had given them to "the authority in New York" and had not kept copies. (JA 100-01).[3]

On cross-examination, when asked the name of the union to which he stated he had belonged, petitioner

---

[3] When petitioner stated that he had given his union papers to "the authority in New York," he was apparently referring to the attorney who had prepared the asylum petition rather than to a governmental authority, as on cross-examination, he affirmatively answered a question of INS counsel that he had given documents to his lawyer. (JA 103). Further, in response to a question about whether he had asked his attorney to return his papers, petitioner said no because he could not find him. (JA 106).

testified, "It's, it's more businesses of Santa Rosa de Cabal." (JA 102). He again could not say how many people were in this union other than "we were a lot of us." (JA 103). Petitioner acknowledged that the problem the union had with FARC was that FARC wanted to extort money on a monthly basis and the union members did not want to pay. (JA 103). Petitioner also acknowledged that the guerrillas extorted money from all unions, and anyone who had a small business or had money in order to get weapons and arms. (JA 118). Petitioner further testified that he did not know if the union of small businesses still existed, or if some of the members still lived in Colombia. (JA 103-104). Petitioner did acknowledge that he could have found out since he still had friends and family in Colombia. (JA 104).

When asked about the letters he had received, some of which had come from attorneys, petitioner acknowledged that although the letters stated that he had left Colombia because of threats, none of the letters stated that the threats were the result of his membership in the union. (JA 104-106). Petitioner later testified, "I just told them to send me a letter and, talking about the problem why I had left." (JA 126). He also testified that he did not ask his attorney in New York to return his papers showing his membership in the union that he had given him, because he said that he could not find him. (JA 103, 106).

When asked about the asylum interview in New Jersey, and whether he had noticed the AO had been taking notes with a red pen while asking him questions, petitioner insisted that the asylum officer "only asked me one question, and that was why did you ask for asylum." (JA

107). Petitioner insisted that was the only question asked during the entire interview. (JA 107, 108, 113, 114).

Petitioner denied that the asylum officer had asked him if he had ever been arrested before (JA 108), or if he was willing to return to Colombia (JA 108). Petitioner testified that he had served in the military, but could not explain how the AO would have known that since that information was not on the asylum application. (JA 109). He denied telling the AO that he had been a manager of a supermarket because the AO had never asked the question. (JA 110). When asked about the AO's report where the AO noted that although the application had provided that petitioner's family had problems with the guerrillas, but petitioner had told him that he had not had problems with the guerrillas, petitioner testified, "I did not declare that." (JA 110). Petitioner denied telling the AO that he said he would be killed by the police when he returned to Colombia. (JA 110, 123). He also testified that the AO did not ask him why the police thought he was a trouble maker, or why he could not explain why the police would want to kill him (JA 114, 123), saying "he only asked me why are you asking for asylum." (JA 114). When asked if the asylum officer had asked petitioner who had prepared the asylum application, petitioner replied, "I don't remember. No." (JA 113). Petitioner further testified that he could not remember how the AO knew that his lawyer had prepared the application (JA 113), but denied that there were questions and answers between the AO and him, again insisting, "[t]here was only one question, and it was why did you ask for asylum." (JA 113).

Petitioner also admitted that his two daughters still live in his old hometown (JA 116), because their mother (his ex-wife), has "very good employment." (JA 117). They have not been persecuted by the guerrillas. (JA 117). He acknowledged that in the fourteen years that he has been gone from Colombia, his ex-wife and daughters have not been bothered by the guerrillas. (JA 117).

After redirect testimony had been given, the IJ asked petitioner if the M-19 still existed since the IJ did not see any mention of the M-19 in any of the documents provided by petitioner. (JA 127). Petitioner testified that the M-19 was now the FARC, as "[t]hey got together." (JA 127). Petitioner did not know when this happened, but knows they are the same group through "the internet, through the newspapers, and through my home." (JA 127).

The IJ asked petitioner where he had gone after receiving threats and was told he had gone into hiding in Bogota where petitioner waited for protection from the district attorney's office. (JA 128).

In response to other questions of the IJ, the petitioner testified that his mother and four sisters still live in Santa Rosa. (JA 129). Petitioner further advised the IJ that his mother lives off the dividends and interest from money in the bank that came from the sale of the businesses. (JA 130). The IJ asked petitioner if he had ever asked his mother about other people that had been in the union. Petitioner said he had and that she had told him "[t]hat three more people had been killed." (JA 130). The IJ then stated "Well, sir, you previously testified that you didn't know what happened to the other union members, sir."

(JA 130). Petitioner responded, "[t]hey worked here in the beginning when I was (indiscernable)." (*Id*.). The IJ then stated "[b]ut you don't know what happened after you left?" to which the petitioner replied, "No, I did not hear anything else any more." (JA 131).

C. The Immigration Judge's Decision

At the conclusion of the hearing, Immigration Judge Michael W. Strauss issued an oral ruling denying Jorge Marulanda's asylum petition, his application for withholding of removal, and for withholding of removal under CAT, but granted petitioner's application for voluntary departure. (JA 50, 64-65).

The IJ began his ruling by noting that petitioner had been charged in the Notice to Appear with being a native and citizen of Colombia who was present in the United States without having been admitted or paroled, and that petitioner "had admitted the allegations and conceded the charges." (JA 52). With removability established by clear and convincing evidence (JA 52), the IJ observed that petitioner had declined to designate a country of removal and therefore the IJ designated Colombia (JA 53). The IJ then noted that petitioner had applied for asylum relief "under Section 208 of the Immigration and Nationality Act (ACT)." (JA 53). The IJ indicated that an application for asylum would also be considered an application for withholding of removal under Section 241(b)(3) of the Act, and that the court would also consider petitioner's request for withholding of removal under the Convention Against Torture. (JA 53).

After summarizing the evidence of record, which included petitioner's testimony, the asylum application, the notes and the referral of the Asylum Officer and the materials presented by petitioner for the hearing, including the seven letters, the IJ recounted that to be eligible for asylum the petitioner must establish that he is a refugee under Section 101(a)(42)(A) of the Act, that is, the person had to demonstrate that he had "either suffered past persecution, or has a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." (JA 59). In analyzing petitioner's claim, the IJ indicated that it would be guided by the regulations at 8 C.F.R. § 208.13(b) and further indicated that "[s]ince the well founded fear standard required for asylum is more generous tha[n] the clear probability standard for withholding of removal, the Court will apply the more liberal well-founded fear standard when reviewing [petitioner's] application, because if he fails to meet this test, it follows that he necessarily would fail to meet the clear probability test required for withholding of removal." (JA 59).

Before analyzing the evidence in the record and making his findings, the IJ first made a finding that petitioner was not credible. (JA 59). As the IJ noted, petitioner claimed that he was asked only one question by the asylum officer during a ten-minute-long interview and that question was simply why petitioner was seeking asylum, to which petitioner claimed he was applying for asylum because of threats made against him by guerrillas. (JA 59). The IJ found that due to the internal inconsistencies in the asylum application and the amount

of information about petitioner contained in the asylum officer's paperwork, it was "clear that the Asylum Officer certainly did ask the respondent a number of questions" (JA 60), and that therefore petitioner was simply not credible when he testified that he was only asked one question (JA 60). Moreover, the IJ found that there was a total discrepancy between petitioner's testimony under oath at the removal hearing (that he had been threatened with death by guerrillas) and his statements, also made under oath, to the asylum officer (namely, that he was afraid of the police and that he had no problems with the guerrillas) and that petitioner had not resolved the discrepancy. (JA 60).

The IJ also noted that there was no corroboration in the record for petitioner's claim that he left Colombia because of his membership in a union of businessmen, even though records of this membership should have been readily available to petitioner, whose mother still lived in the same town. The IJ also noted that petitioner did not even know if the union still existed. This lack of corroboration undercut petitioner's credibility. (JA 60-61).

Finally, the IJ found that the letters filed by petitioner as Exhibit 4 were not credible, as the letters seemed to be almost identical, even though petitioner testified that he and his mother had individually and separately approached the writers for the letters. (JA 61). Given all those findings, the Court found "that [petitioner] is not a credible witness." (JA 61).

After making his findings, the IJ found that petitioner had not met his burden for the relief he was seeking.

Given the court's adverse credibility finding, the IJ determined that petitioner had not established past persecution. (JA 61). Moreover, the IJ stated that even if petitioner's testimony had been taken as true, there was no evidence that he had been harmed in any way in Colombia and there was no evidence that he would be harmed on any of the five grounds enumerated in the Act. (JA 62).

The IJ, citing BIA precedent, found that criminal extortion "efforts do not constitute persecution on account of political opinion where it is reasonable to conclude that those who threatened or harmed the respondent were not motivated by political opinion." (JA 62). The IJ found that there was nothing in the record to indicate that the reason for the extortionate threats by the guerrillas was more than simply to obtain money from people they perceived to have funds, and that there was no evidence that the threats were based on an expression of a political opinion either by petitioner or by the guerrillas themselves. (JA 62).

After concluding that petitioner had failed to meet his burden of proof that he had been a victim of past persecution, the IJ then considered whether petitioner had established a well-founded fear of future persecution based on the five enumerated grounds of the Act. Again, the IJ determined that petitioner had failed to meet his burden of proof, based not only on the IJ's adverse credibility finding, but also based upon finding that even if petitioner were to be singled out upon return to Colombia, it would not be on account of any protected ground, such as imputed political opinion. (JA 62-63). The IJ found that there was no evidence that the M-19 group, of which there

was no mention in the background materials filed by the petitioner,[4] was the same as FARC, except for petitioner saying that they had merged. (JA 63). Additionally, the IJ found that there was no credible evidence whatsoever that petitioner would be of interest to the guerrillas should he return to Colombia given that he had left Colombia fourteen years ago; he was no longer a business owner; and there was no evidence he had been a leader of the union or that he was wealthy or politically involved. (JA 63). For all those reasons, the IJ found that there was no evidence to support petitioner's belief that he would be singled out by the guerrillas for harm upon his return, and thus the IJ concluded that petitioner had not established a well-founded fear of future persecution, and, accordingly, denied the application for asylum. (JA 63).

Having found that petitioner had "failed to meet the well-founded fear standard for asylum it follows that he fail[ed] to meet the clear probability standard for withholding of removal." (JA 63). "Accordingly, his application for withholding of removal under Section 241 (b)(3) of the ACT is denied." (JA 63).

Additionally, the IJ denied petitioner's application for withholding of removal under the CAT, as the IJ again found that petitioner had failed to meet his burden of proof (JA 64). The IJ did not find any credible evidence that any organization, let alone the Colombian government, would single petitioner out for torture. (JA 64).

---

[4] Exhibit 4. (JA 146-279).

After denying the petition for asylum, denying the request for withholding of removal, and relief under CAT, the IJ found that petitioner was otherwise eligible for voluntary departure and granted petitioner a period of voluntary departure for sixty days with the posting of a $1,000 bond. (JA 64).

D. The BIA's Decision

On June 15, 2004, the BIA summarily affirmed the IJ's decision and adopted it as the "final agency determination" under 8 C.F.R.§ 1003.1(e)(4). (JA 2). This petition for review followed.

SUMMARY OF ARGUMENT

1. Substantial evidence supports the IJ's determination that petitioner failed to provide sufficient credible evidence for his asylum and withholding claims, that is, that he had been persecuted on account of his membership in a businessman's union and on account of political opinion or that he had a well-founded fear of persecution on that basis should he be returned to Colombia. The IJ's determination that petitioner's testimony at his asylum hearing lacked credibility was amply supported by the record. Among other things, petitioner's stated reason for seeking asylum -- originally based on complaints about drug traffickers and fear of persecution by Colombian police -- had changed by the time of his asylum hearing to having received threats from guerrillas due to petitioner's claimed membership in a small businessman's union. Further, this latter claim was unsupported by any evidence aside from petitioner's incredible testimony. Moreover,

the IJ properly determined that even if petitioner's testimony were accepted as true, he had not met his burden of proof that he had suffered past persecution from guerrillas or had a well-founded fear of future persecution by them. The record showed that petitioner was not himself political, that the demands for money made by guerrillas of local business people were no more than criminal extortion efforts directed towards persons perceived to have money, and that petitioner's family had remained in Colombia in the fourteen years after he left and had had no trouble with Colombian guerrillas.

2. Substantial evidence also supports the IJ's determination that petitioner failed to establish a basis for withholding of removal under the CAT. For the same reasons discussed above, petitioner failed to adduce sufficient proof to establish that it is more likely than not that he would be tortured if removed to Colombia.

3. Summary affirmance by the BIA was appropriate under the applicable regulations, and the IJ's oral decision contains sufficient reasoning and evidence to enable this Court to determine that it was issued only after consideration of the requisite factors.

ARGUMENT

I. THE IMMIGRATION JUDGE PROPERLY DETERMINED THAT JORGE MARULANDA FAILED TO ESTABLISH ELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL BECAUSE HE DID NOT PRESENT SUFFICIENT CREDIBLE EVIDENCE THAT HE HAD SUFFERED PAST PERSECUTION OR HAD A WELL-FOUNDED FEAR OF PERSECUTION SHOULD HE RETURN TO COLOMBIA

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.[5] *See* 8 U.S.C. §§ 1158(a), 1231(b)(3) (2004); *Zhang v. Slattery*,

---

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

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

1. Asylum

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

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) (2004).

"[E]stablishing past persecution is a daunting task." *Guzman v. INS*, 327 F.3d 11, 15 (1st Cir. 2003). Establishing persecution for purposes of an asylum claim is especially difficult where the alleged mistreatment involves one or very few incidents, and the circumstances fall short of extreme hardship or suffering. *See Tawm v. Ashcroft*, 363 F.3d 740, 743-44 (8th Cir. 2004) (persecution not shown by member of the "Lebanese Forces" who "was detained twice, th[e] incidents were four years apart, lasted only a few hours each, and did not result in serious injury"); *Eusebio v. Ashcroft*, 361 F.3d 1088, 1090-91 (8th Cir. 2004) (persecution for political beliefs not shown by asylum-seeker who was briefly beaten and detained in connection with political rallies, was arrested for anti-government statements made as schoolteacher, and whose home was damaged and looted by the military; court reasoned, "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*, 327 F.3d at 15-16 (asylum-seeker's one-time kidnapping and beating during civil war fell well short of

establishing "past persecution" necessary to obtain asylum; court reasoned that "more than harassment or spasmodic mistreatment by a totalitarian regime must be shown"); *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"; such "brief detentions and mild harassment . . . do not add up to 'persecution'").

Proving persecution is also difficult where the account of the alleged mistreatment lacks detail or corroboration. *See*, *e.g.*, *Dandan*, 339 F.3d at 574 (asylum-seeker alleging "three-day interrogation resulting in a "swollen face," without furnishing more detail, "fail[ed] to provide sufficient specifics" to establish persecution); *Bhatt v. Reno*, 172 F.3d 978, 982 (7th Cir. 1999) ("[Petitioner's] testimony of the threats and harm he says he received from radical Hindus is too vague, speculative, and insubstantial

to establish either past or future persecution . . . . Beyond his own allegations and testimony that he was beaten on several occasions by Hindus, the record contains no evidence corroborating the beatings or describing the severity of his injuries.").

Similarly, persecution will not be found where the alleged mistreatment cannot be distinguished from random violence, such as a criminal assault, or arbitrary mistreatment during a state of civil war. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483-484 (1992) (asylum seeker must provide "proof of his persecutors' motives . . . [whether] direct or circumstantial"); *Albathani v. INS*, 318 F.3d 365, 373-74 (1st Cir. 2003) (former Lebanese armed forces member failed to establish asylum claim, because record failed to establish political basis of alleged beatings by Hezbollah militia; "[t]he two incidents on the road may well have been . . . nothing more than the robbery of someone driving a Mercedes with cash in his pocket"); *Ravindran*, 976 F.2d at 759 (political bases of mistreatment not established 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, because "[e]xcept for the vague statement by a prison official upon petitioner's release that he should avoid political activities, no other facts were offered to show that the authorities ever questioned petitioner about, or even knew about, his political activities or opinions"). *See also Sivaainkaran v. INS*, 972 F.2d 161, 165 (7th Cir. 1992) ("[P]olitical turmoil alone does not permit the judiciary to stretch the definition of 'refugee' to cover sympathetic, yet statutorily ineligible, asylum applicants . . . . [C]onditions of political

upheaval which affect the populace as a whole or in large part are generally insufficient to establish eligibility for asylum.").

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

"An alien may satisfy the subjective prong by showing that events in the country to which he . . . will be deported have personally or directly affected him." *Id*. at 663. With respect to the objective component, the applicant must prove that a reasonable person in his circumstances would fear persecution if returned to his native country. *See* 8 C.F.R. § 208.13(b)(2) (2004); *see also Zhang*, 55 F.3d at 752 (noting that when seeking reversal of a BIA factual 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 at 483-84); *Melgar de Torres*, 191 F.3d at 311.

The asylum applicant bears the burden of demonstrating eligibility for asylum by establishing either that he was persecuted or that he "has a well-founded fear future persecution on account of, inter alia, his political opinion." *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*, 19 I. & N. Dec. 439, 445 (BIA 1987) (applicant must provide testimony that is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account"), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647-48 (9th Cir. 1997).

Because the applicant bears the burden of proof, he should provide supporting evidence when available, or explain its unavailability. *See Zhang v. INS*, 386 F.3d 66, 71 (2d Cir. 2004) ("[W]here the circumstances indicate that an applicant has, or with reasonable effort could gain, access to relevant corroborating evidence, his failure to produce such evidence in support of his claim is a factor that may be weighed in considering whether he has satisfied the burden of proof."); *see also Diallo v. INS*, 232 F.3d 279, 285-86 (2d Cir. 2000); *In re S-M-J-*, 21 I. & N. Dec. 722, 723-26 (BIA 1997).

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

2. Withholding of Removal

Unlike the discretionary grant of asylum, withholding of removal is mandatory if the alien proves that his "life or freedom would be threatened in [his native] country because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (2000); *Zhang*, 55 F.3d at 738. To obtain such relief, the alien bears the burden of proving by a "clear probability," i.e., that it is "more likely than not," that he would suffer persecution on return. *See* 8 C.F.R. § 208.16(b)(2)(ii) (2004); *INS v. Stevic*, 467 U.S. 407, 429-30 (1984); *Melgar de Torres*, 191 F.3d at 311. Because this standard is higher than that governing eligibility for asylum, an alien who has failed to establish a well-founded fear of persecution for asylum purposes is necessarily ineligible for withholding of removal. *See Zhang v. INS*, 386 F.3d at 71; *Wu Biao Chen*, 344 F.3d at 275; *Zhang*, 55 F.3d at 738.

3. Standard of Review

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

regarding both asylum eligibility and withholding of removal must be upheld if supported by substantial evidence). "Under this standard, a finding will stand if it is supported by 'reasonable, substantial, and probative' evidence in the record when considered as a whole." *Secaida-Rosales*, 331 F.3d at 307 (quoting *Diallo*, 232 F.3d at 287).

Where an appeal turns on the sufficiency of the factual findings underlying the IJ's determination[6] that an alien has failed to satisfy his burden of proof, Congress has directed that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B) (2004). *Zhang v. INS*, 386 F.3d at 73. This Court "will reverse the immigration court's ruling only if 'no reasonable fact-finder could have failed to find . . . past persecution or fear of future persecution.'" *Wu Biao Chen*, 344 F.3d at 275 (omission in original) (quoting *Diallo*, 232 F.3d at 287).

The scope of this Court's review under that test is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 71; *Wu Biao Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. *See also Zhang v. INS*, 386 F.3d at 74 ("Precisely

---

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

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

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

This Court gives "particular deference to the credibility determinations of the IJ." *Wu Biao Chen*, 344 F.3d at 275 (quoting *Montero v. INS*, 124 F.3d 381, 386 (2d Cir. 1997)); *see also Qiu v. Ashcroft*, 329 F.3d 140, 146 n.2 (2d Cir. 2003) (the Court "generally defer[s] to an IJ's factual findings regarding witness credibility"). This Court has

recognized that "the law must entrust some official with responsibility to hear an applicant's asylum claim, and the IJ has the unique advantage among all officials involved in the process of having heard directly from the applicant." *Zhang v. INS*, 386 F.3d at 73.

Because the IJ is in the "best position to discern, often at a glance, whether a question that may appear poorly worded on a printed page was, in fact, confusing or well understood by those who heard it," this Court's review of the fact-finder's determination is exceedingly narrow. *Zhang v. INS*, 386 F.3d at 74; *see also id.* at 73. ("'[A] witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression.'") (quoting *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946) (citation omitted)); *Sarvia-Quintanilla v. United States INS*, 767 F.2d 1387, 1395 (9th Cir. 1985) (noting that IJ "alone is in a position to observe an alien's tone and demeanor . . . [and is] uniquely qualified to decide whether an alien's testimony has about it the ring of truth"); *Kokkinis v. District Dir. of INS*, 429 F.2d 938, 941-42 (2d Cir. 1970) (court "must accord great weight" to the IJ's credibility findings). The "exceedingly narrow" inquiry "is meant to ensure that credibility findings are based upon neither a misstatement of the facts in the record nor bald speculation or caprice." *Zhang v. INS*, 386 F.3d at 74.

In reviewing credibility findings, courts "look to see if the IJ has provided 'specific, cogent' reasons for the adverse credibility finding and whether those reasons bear a 'legitimate nexus' to the finding." *Id.* (quoting *Secaida-Rosales*, 331 F.3d at 307). Credibility inferences must be

upheld unless they are "irrational" or "hopelessly incredible." *See, e.g.*, *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002) ("we defer to the fact finder's determination of . . . the credibility of the witnesses, and to the fact finder's choice of competing inferences that can be drawn from the evidence") (internal marks omitted); *NLRB v. Columbia Univ.*, 541 F.2d 922, 928 (2d Cir. 1976) (credibility determination reviewed to determine if it is "irrational" or "hopelessly incredible").

C. Discussion

Substantial evidence supports the IJ's determination that Jorge Marulanda failed to provide credible testimony in support of his application for asylum and withholding of removal, and thus failed to establish his eligibility for relief. Petitioner's account contained inconsistencies and implausibilities that went to the heart of his claims. When questioned about the conflicting responses, petitioner failed to adequately explain the evidentiary deficiencies at the administrative level. As such, substantial evidence supports the IJ's decision, *see, e.g.*, *Qiu*, 329 F.3d at 152 n.6 ("incredibility arises from 'inconsistent statements, contradictory evidence, and inherently improbable testimony'" (quoting *Diallo*, 232 F.3d at 287-88)), and thus petitioner has not met his burden of showing that a reasonable factfinder would be compelled to conclude he is entitled to relief.

Additionally, the record supports the IJ's conclusion that even absent the negative credibility finding, had the court taken all of petitioner's testimony as true, petitioner's allegations did not establish that petitioner had

been subject to past persecution on the basis of political opinion. Specifically, petitioner presented no evidence that the threats he had received were more than extortionate demands for money and were based on his political opinion or membership in the businessman's union. The record further supports the IJ's determination that objectively, petitioner had not proven he had a well-founded belief that he would be sought out by guerrillas upon his return. Given the evidence presented by petitioner, it is certainly not the case that "any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. § 1252(b)(4)(B), and therefore the IJ's ruling should be affirmed.

The record amply supports the IJ's finding that Jorge Marulanda was not a credible witness. His testimony at his asylum hearing was contradicted numerous times during the course of the hearing. For example, he repeatedly insisted that during his asylum interview on October 29, 2001, the asylum officer had only asked him one question, i.e., why he was seeking asylum. When confronted by the notes taken by the AO and the report written after the interview, petitioner could offer no explanation of how the AO knew he had served in the military and had managed a supermarket in Colombia when the asylum petition presented at the interview did not contain this information. Moreover, he offered no explanation of why the AO had taken no notice either in the interview report or in his notes, that petitioner's brother had been killed as he claimed to have told the AO. As it is clear that the AO had asked petitioner much more than one question, petitioner's claim to the contrary at his asylum hearing before the IJ does not pass scrutiny.

Moreover, as the IJ noted, petitioner's stated reason for seeking asylum given to the AO in his asylum interview was totally different than that presented to the IJ at the asylum hearing. (JA 60). The record shows that before the AO, the petitioner told the AO he feared return to Colombia because he was afraid of the police, and that he had no problems with the guerrillas. By the time of his asylum hearing, his reason had changed to persecution by guerrillas. The IJ found this to be a total discrepancy which petitioner did not resolve. That one discrepancy alone is enough to sustain the IJ's determination that petitioner was not credible, as the IJ identified an inconsistency that served as an example of the very reason petitioner sought asylum. *Majidi v. Gonzales*, _ F.3d_, 2005 WL 304624 at *3-*4 (2d Cir. November 15, 2005) (IJ "may rely on an inconsistency in an asylum applicant's account to find that applicant not credible -- provided the inconsistency affords 'substantial evidence' in support of the adverse credibility finding"; "To satisfy the requirements of 'substantial evidence,' it is enough that a part of an asylum applicant's account be found not credible, provided that this part bears a 'legitimate nexus' to the applicant's claim of persecution"). Where an IJ's adverse credibility finding is based on specific examples in the record of inconsistent statements made by an asylum applicant about matters material to the asylum claim, "a reviewing court will . . . not be able to conclude that a reasonable adjudicator was compelled to *find* otherwise." *Lin v. U.S. Dep't. of Justice*, 413 F.3d 188, 191 (2d Cir. 2005) (emphasis in the original). Accordingly, the IJ's adverse credibility determination must be sustained.

Petitioner's inconsistent testimony continued throughout the hearing. Despite admitting the allegations contained in Exhibit 1, the Notice to Appear, that he had entered into the United States on July 11, 1989, at New York, New York (JA 280, 297), petitioner testified that he entered the United States on June 23, 1989, at San Diego, California (JA 82). He testified that not only had he told the AO at his asylum interview about his brother's killing, of which there is no mention in the AO's referral or notes of the interview; he also testified that he had told the AO that he had a female cousin who had been kidnapped. (JA 92, 95). Again there was no mention of this kidnapping in the AO's paperwork.

Petitioner's testimony contained other inconsistencies. During his direct examination he testified that his mother could not sell the family business, i.e., three supermarkets; rather, she had to give them away. (JA 97). However, when later questioned by the IJ, he admitted that his mother was living off the dividends and interest from the proceeds of the sale of the businesses. (JA 130). Petitioner also testified that his mother had told him that three other members of the union had been killed after he had left the area, but again, when questioned by the IJ who noted that petitioner previously had testified earlier in the hearing that he did not know what had happened to union members after his departure, petitioner gave an answer to the IJ which seemed to suggest that those three deaths had preceded his move to Bogota. (JA 130).

Given the changing and conflicting reasons presented by petitioner as to why he had left Colombia, i.e., trouble with drug traffickers and police as related in his asylum

petition and his verbal testimony with the AO, as contrasted with threats by Colombian guerrillas as he testified at his asylum hearing, combined with all the other inconsistent statements petitioner made in his sworn testimony, and giving due deference to the credibility findings of the IJ who is in the position to make such findings by having heard directly from an asylum applicant, *Zhang. v. INS*, 386 F.3d at 73; *Qiu*, 329 F.3d at 146 n.2), there is ample evidence to support the IJ's adverse credibility finding. Certainly, the IJ's credibility determination can not be said to have been irrational or hopelessly incredible, *NLRB v. Columbia Univ*., 541 F.2d at 928, and therefore, the IJ's credibility inferences must be upheld. *LaSpina*, 299 F.3d at 180.

Substantial evidence also supports the IJ's conclusion that petitioner did not meet his burden of proof that he had been subject to past persecution because of his political opinions or his membership in a social group. Other than petitioner's testimony at the asylum hearing that he was a member of a businessman's union, there is no evidence in the record that such an organization existed and that petitioner was a member. On at least two occasions during his asylum hearing petitioner was asked the name of this union, but did not provide one. (JA 83, 102). Although he purported to have been a member for ten years before leaving Colombia, he did not know how many members this union had (JA 83-84), or even if it was still in existence (JA 103). He produced no physical evidence that he had been a member. As his mother and daughters still reside in the town where this union supposedly was based, documentation of petitioner's membership was accessible to him, yet not produced.

Moreover, the six letters that he produced, some of which had been solicited by his mother, and the one written by his own brother, while asserting petitioner had fled due to the death of another brother and threats petitioner had received, make no mention that the threats arose from his membership in the union.

Additionally, petitioner presented no evidence that the threats by the guerrillas were based on political opinion. The record before the IJ did not establish that petitioner occupied any leadership position or role within the union. The record provided no information that petitioner was in any way politically involved in the affairs of his town or the Colombian government. Petitioner presented no evidence that he himself was political, that the union was political, or that the guerrillas had expressed any political opinion towards petitioner. As the IJ found, the background materials presented by petitioner established that guerrilla groups use extortion to raise money, (JA 154, 166-69), but the materials do not support the petitioner's claim that the threats made to him were based on political opinion. (JA 62). The IJ correctly found on the evidence presented by petitioner, that petitioner was not a victim of past persecution on any of the five enumerated grounds of the INA.

Finally, the IJ properly concluded that petitioner did not sustain his burden of proof that he had a well-founded fear of future persecution on account of the five enumerated grounds under 8 C.F.R. § 208.13(b)(2). As the IJ noted, nowhere in the materials presented by petitioner is there any mention of the guerrilla group M-19 which is the apparent source of all petitioner's problems.

(JA 63). Petitioner presented no proof, with the exception of his own testimony which indicated no basis for such knowledge, that the M-19 had merged with the FARC and thus represented a continuing threat to him. (JA 63). He did state that he feared them because they kept lists (JA 94, 117), but he certainly presented no evidence that if such a list existed, his name was on it.

Additionally, the IJ found that there was no credible evidence that there was a continuing interest in the petitioner that would make the guerrillas single him out, since he had been gone from Colombia for fourteen years; he was no longer a business owner; and there was no evidence that petitioner is wealthy. (JA 63). Finally, as petitioner has testified, his mother, daughters, ex-wife, and sisters continue to reside in Colombia, some within the very town from where he had fled, all without retribution from guerrilla groups. (JA 116-17).

The fact that the petitioner's mother, daughters, ex-wife, and sisters still reside in Colombia also demonstrates that the petitioner does not have a well-founded fear of persecution because the threat to him does not exist countrywide throughout all of Colombia. There is a place within Colombia to which the petitioner could return without fear of persecution. *See Mazariegos v. Office of U.S. Attorney General,* 241 F.3d 1320, 1325-26 (11th Cir. 2001).

In *Mazariegos,* 241 F.3d at 1325, the court relied on a number of BIA administrative decisions which construed the statute and regulations to require that an asylum applicant face a threat of persecution country-wide, citing

Matter of Acosta, 19 I. & N. Dec. 211, 235 (BIA 1985); *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987); *Matter of R-,* 20 I. & N. Dec. 621 (BIA 1992) (An alien seeking to meet the definition of a refugee must do more than show a well-founded fear of persecution in a particular place or abode within a country -- he must show that the threat of persecution exists for him country-wide). Moreover, in a recent and similar case, the First Circuit held that where the petitioner testified that his parents still lived in Haiti and they suffered no harm since he left the country, the BIA reasonably concluded that the petitioner could return to Haiti without facing future persecution. *Romilus v. Ashcroft*, 385 F.3d 1, 8 (1st Cir. 2004) (citing *Aguilar-Solis v. INS*, 168 F.3d 565, 573 (1st Cir. 1999) ("[T]he fact that close relatives continue to live peacefully in the alien's homeland undercuts the alien's claim that persecution awaits his return") (alteration in original)). *See also Melgar de Torres,* 191 F.3d at 313 (finding that the evidence that applicant's own mother and daughters continued to live in El Salvador after the applicant emigrated without harm cut against the argument that applicant had a well-founded fear of persecution).

For all the foregoing reasons, the record provides substantial evidentiary support for the IJ's finding that petitioner failed to carry his burden of demonstrating a well-founded fear of persecution, and hence failed to establish his eligibility for asylum. As the burden of proof for seeking withholding of removal is greater than the burden for establishing eligibility for asylum, failure to establish the latter *per se* precluded the former.

II. THE IMMIGRATION JUDGE PROPERLY REJECTED PETITIONER'S CLAIM FOR RELIEF UNDER THE CONVENTION AGAINST TORTURE BECAUSE PETITIONER FAILED TO SHOW A LIKELIHOOD THAT HE WOULD BE TORTURED UPON RETURNING TO COLOMBIA

A. Relevant Facts

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

B. Governing Law and Standard of Review

1. Withholding of Removal Under the Convention Against Torture

Article 3 of the Convention Against Torture precludes the United States from returning an alien to a country where he more likely than not would be tortured by, or with the acquiescence of, government officials acting under color of law. *See Wang v. Ashcroft*, 320 F.3d 130, 133-34, 143-44 & n.20 (2d Cir. 2003); *Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001); *In re Y-L-, A-G-, R-S-R-*, 23 I. & N. Dec. 270, 279, 283, 285 (BIA 2002); 8 C.F.R. §§ 208.16(c), 208.17(a), 208.18(a) (2004).

To establish eligibility for relief under the Convention Against Torture, an applicant bears the burden of proof to "establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2) (2004); *see also Najjar*

v. Ashcroft, 257 F.3d 1262, 1304 (11th Cir. 2001); *Wang*, 320 F.3d at 133-34, 144 & n.20.

The Convention Against Torture defines "torture" as "'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, punish[ment] . . . , or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'" *Ali*, 237 F.3d at 597 (quoting 8 C.F.R. § 208.18(a)(1)).

Because "[t]orture is an extreme form of cruel and inhuman treatment," even cruel and inhuman behavior by officials may not warrant Convention Against Torture protection. *Sevoian v. Ashcroft*, 290 F.3d 166, 175 (3d Cir. 2002) (citing 8 C.F.R. § 208.18(a)(2)). The term "acquiescence" requires that "the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 208.18(a)(7) (2004). Under CAT, an alien's removal may be either permanently withheld or temporarily deferred. *See* 8 C.F.R. §§ 208.16-17 (2004).

2. Standard of Review

This Court reviews the determination of whether an alien is eligible for protection under CAT under the "substantial evidence" standard. *See Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 353-54 (5th Cir. 2002)*; Ali*, 237 F.3d at 596; *Saleh v. U.S. Dep't of Justice*, 962 F.2d 234, 238 (2d Cir. 1992).

C. Discussion

Substantial evidence supports the IJ's determination that petitioner failed to establish a basis for withholding of removal under CAT. For all the reasons discussed in Part I.C, above, petitioner failed to adduce sufficient proof before the IJ to meet his burden of establishing that it is more likely than not he would be harmed in any way, much less tortured, if removed to Colombia.

Moreover, no evidence was presented that any torture that might hypothetically be inflicted would be "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 208.18(a)(1) (2004). Petitioner's claims turned entirely on allegations regarding guerrilla groups, and he offered no evidence that the groups' activities were pursued with the consent or acquiescence of any public official. Although petitioner testified that his brother, before he was shot and killed, had complained to police about threats he had received from M-19 guerrillas (JA 85), and the police did nothing (JA 86), he did state that he did not know if the police investigated the complaints (JA 86). The fact that no one was arrested for

the killing (JA 85) or the threats, which could be due to a variety of factors, such as lack of evidence or lack of an identified perpetrator, does not rise to official acquiescence by a public official of the guerrilla group's activities.

III. SUMMARY AFFIRMANCE BY THE BIA WAS APPROPRIATE AND IN ACCORDANCE WITH THE REGULATIONS

A. Relevant Facts

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

B. Governing Law and Standard of Review

Immigration regulations provide that a single BIA member

> to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that
>
> (A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or

(B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

8 C.F.R. § 1003.1(e)(4)(2004).

The procedure by which a single member of the BIA summarily affirms the IJ's decision is reviewed for abuse of discretion. *See Shi v. Board of Immigration Appeals*, 374 F.3d 64, 66 (2d Cir. 2004).

C. Discussion

This Court has clearly held in several recent cases that the streamlining regulations issued by the former Immigration and Naturalization Service (now the United States Citizenship and Immigration Services), codified at 8 C.F.R. § 1003.1 (e)(4) (2004), expressly authorize summary affirmance by a single member of the BIA. *Shi*, 374 F.3d at 66; *see also Zhang v. U.S. Dep't of Justice*, 362 F.3d 155, 158 (2d Cir. 2004) ("Because the BIA streamlining regulations expressly provide for the summarily affirmed IJ decision to become the final agency order subject to judicial review, we are satisfied the regulations do not compromise the proper exercise of our [8 U.S.C.] § 1252 jurisdiction.") (footnote omitted). This practice of the BIA was upheld even prior to promulgation of these regulations, provided "'the immigration judge's decision below contains sufficient reasoning and evidence to enable [the Court] to determine that the requisite factors were considered."' *Shi*, 374 F.3d at 66 (quoting *Arango-Aradondo v. INS*, 13 F.3d

610, 613 (2d Cir. 1994)). Just as in *Shi* and *Zhang*, the IJ's decision in this case clearly meets this standard.

The Oral Decision of the IJ recites the testimony of petitioner, summarizes the documentary evidence submitted by petitioner, and comments on the evidence which petitioner could have submitted, but did not submit. (JA 61). In petitioner's brief, there is virtually no analysis of why the summary affirmance is claimed to have been inappropriate. Petitioner's Brief at 34. For example, the petitioner has not demonstrated that the IJ's decision contained errors that were more than harmless or immaterial, or that it ignored a controlling Board or federal court precedent. 8 C.F.R. § 1003.1(e)(4).

Nothing in the petitioner's submission to the BIA (JA 4-37) indicated that any purpose would have been served by issuing a separate opinion affirming the IJ's decision. In purely conclusory fashion, the petitioner now states that the IJ made his decision in complete disregard of the evidence on the record and that such errors substantially affected the outcome of the case. Petitioner's Brief at 34. This is simply not enough. The BIA acted well within its discretion in adopting the IJ's decision as the "final agency determination" in adjudicating the petitioner's appeal, and the IJ's decision provides an ample basis for review by this Court.

CONCLUSION

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

Dated: December 16, 2005

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

MICHAEL E. RUNOWICZ
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 12,192 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

MICHAEL E. RUNOWICZ
ASSISTANT U.S. ATTORNEY

Addendum

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

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

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

(a) Authority to apply for asylum

(1) In general

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

. . . .

(b) Conditions for granting asylum

(1) In general

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

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

(A) In general

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

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

(4) Scope and standard for review

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

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

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

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

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

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

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

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

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

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

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

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

(B) The applicant could avoid future persecution by relocating to another part of

the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

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

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

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

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

(2) Well-founded fear of persecution.

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

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

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

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

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

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that

there is a reasonable possibility he or she would be singled out individually for persecution if:

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

. . . .

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

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

and a request for withholding of removal whether or not asylum is granted.

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

(1) Past threat to life or freedom.

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

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

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

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

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

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

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

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

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

. . . .

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

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

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

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

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

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

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

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

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

(d) Approval or denial of application--

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

. . . .

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

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

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

(a) Definitions. The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is

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

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

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

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

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

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

(iii) The threat of imminent death; or

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

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

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

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

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

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

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

8 C.F.R. § 1003.1 (e)(4) (2004) Affirmance without opinion.

(i) The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or

(B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

(ii) If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 CFR 1003.1(e)(4)." An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial.