02-4859-ag

To Be Argued By:
LISA E. PERKINS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 02-4859-ag

KWAY ZWAR TUN,

Petitioner,

-vs-

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR RESPONDENT IMMIGRATION AND NATURALIZATION SERVICE

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STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the Board of Immigration Appeals under Section 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (2002).

Petitioner's first asylum application is dated September 10, 1993. He had a hearing with an INS asylum officer September 30, 1998, and a notice to appear was issued in October 1998, commencing removal proceedings.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a reasonable factfinder would be compelled to reverse the Immigration Judge's adverse credibility determination, where petitioner's testimony and documentary submissions contained several inconsistencies concerning material elements of petitioner's claim.

2. Whether a reasonable factfinder would be compelled to reverse the Immigration Judge's finding that petitioner did not establish that it is more likely than not that he would tortured upon return to Burma, where there was no evidence in the record that he would be tortured?

3. Whether the Board of Immigration Appeals properly exercised its discretion in summarily affirming, without opinion, the Immigration Judge's decision.

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BRIEF FOR RESPONDENT IMMIGRATION AND NATURALIZATION SERVICE[1]

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

Preliminary Statement

Kway Zwar Tun ("Tun"), a native and citizen of Burma,[2] petitions this Court for review of a October 31, 2002, decision of the Board of Immigration Appeals ("BIA"). Joint Appendix (Certified Administrative Record) ("JA") 2. The BIA summarily affirmed the March 21, 2000, decision of an Immigration Judge ("IJ"), JA38, denying Tun's applications for asylum and withholding of removal under the Immigration and Nationality Act of 1952, as amended ("INA"), denying his application for voluntary departure, rejecting his claim for protection under the Convention Against Torture ("CAT"),[3] and ordering him removed from the United States. JA1-2; JA 36.

The IJ expressly based her decision on her determination that petitioner was not a credible witness. Substantial evidence supports the IJ's conclusion. Tun claims he was subject to past persecution on account of

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[2] Burma is now known as Myanmar, the name conferred by the military government in the early 1990s. *See* JA200 (Department of State - Burma - Profile of Asylum Claims and Country Conditions). For ease of reference to the record in this case, however, the Government will refer to petitioner's home country as Burma throughout.

[3] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46 (annex, 39 U.N. GAOR Supp. No. 51 at 197), U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987; for United States Apr. 18, 1988).

engaging in anti-government protests as a student in 1988, a few years before leaving Burma. He claims he was arrested by police, interrogated and beaten for two weeks as a result of this political activity and that he and his parents had to sign a statement that they would not engage in such activity in the future in order to secure Tun's release. Yet, when Tun left Burma two years later as a crewman on a ship, he passed many countries of safe haven other than the United States and did not seek refuge. In fact, he did not jump ship the first time it stopped in the United States. In addition, travel/exit documents provided by Tun were inconsistent with pertinent aspects of his account of how he left Burma. Based on these inconsistencies, as well as a lack of other seemingly available corroborative evidence, the IJ properly found that petitioner's claim of past persecution lacked credibility.

Substantial evidence further supports the IJ's conclusion that Tun failed to establish it is more likely than not he will be tortured if returned to Burma. The IJ previously found petitioner's claim to be a political dissident not credible; however, she believed his claim that he jumped ship and failed to pay taxes to Burma. Tun did not prove he would be tortured even if sanctioned for his failure to pay taxes and his having jumped ship. Thus, the IJ properly concluded that any alleged *prosecution* of Tun upon his return to Burma does not warrant withholding of removal under the Torture Convention. As a reasonable factfinder would not be compelled to conclude otherwise, this Court should deny Tun's petition for review.

Finally, the BIA acted properly and within its discretion in summarily affirming the IJ's decision in this

case, without opinion, pursuant to 8 C.F.R. § 3.1(a)(7) (2002) (re-codified at 8 C.F.R. § 1003.1(a)(7) (2004)). This Court has held that the BIA's summary affirmance procedures do not violate the Due Process Clause.

Statement of the Case

On May 5, 1991, Tun entered the United States as a ship crewmember with authorization to remain in the United States while his ship was in port for not more than 29 days. JA386. On September 10, 1993, Tun filed an Application for Asylum and Withholding of Removal. JA253. On September 30, 1998, Tun was interviewed by an INS asylum officer. JA258.

On October 15, 1998, Tun was issued a Notice to Appear for removal proceedings. GA386. On December 21, 1999, petitioner filed an amended Application for Asylum and Withholding of Removal and an affidavit in support of the application. JA210. On March 21, 2000, a merits hearing was held before an IJ. JA77-168. The IJ rendered an oral decision denying Tun's applications for asylum and withholding of removal and voluntary departure, and rejecting his request for protection under the Torture Convention. JA38-61.

Petitioner timely appealed the IJ's decision to the BIA. On October 31, 2002, the BIA summarily affirmed the IJ's decision. JA1-2. On December 2, 2002, the petitioner filed a petition for review with this Court.

Statement of Facts

A. Petitioner's Entry into the United States and Applications for Asylum and Withholding of Removal

Petitioner Tun is a native and citizen of Burma, who was admitted into the United States at Houston, Texas, on May 5, 1991, as a crewmember of a ship with authorization to remain in the United States for not more than 29 days. JA386.

1. Tun's First Asylum Application

Tun filed his first Application for Asylum and Withholding of Removal on September 10, 1993, more than two years after entry. JA253. In his initial asylum application, Tun claimed he was persecuted in Burma and would be subject to future persecution if returned there on account of his political opinion. JA256. More particularly, Tun claimed that in March 1988, he participated along with other college students in demonstrations in protest of the death of a student at Rangoon Institute of Technology at the hands of the military police. JA254. Tun also claimed in his initial application that he and his brother, Kyaw Thu Tun (also in removal proceedings) were members of the National League for Democracy (NLD), headed by Aung San Suu Kyi. JA256. Tun additionally claimed he and his brother were arrested, detained, interrogated and mistreated by government intelligence personnel. JA256. Tun did not provide any details regarding the supposed arrest. He did, however, repeatedly indicate his fear of punishment

(imprisonment) on account of having jumped ship in the United States. JA254-255.[4] Tun was interviewed by an asylum officer on September 30, 1998, JA258, and at that time made three changes to his initial application: a change in address lived prior to coming to the United States, the date his authorized stay expired, and he added his social security number. JA253, 258.

2. Tun's Second Asylum Application

During removal proceedings, petitioner filed a second application for Asylum and Withholding of Removal dated December 21, 1999. JA210-217. He simultaneously executed an affidavit in support of his asylum application. JA218-222.[5] In his second application, and affidavit in support, Tun again asserted that he had participated in political protests during the "1988 August Uprising." JA 213, 218-219. However, he did not claim his brother

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[4] The enclosure letter that accompanied Tun's first asylum application also claims that he and his brother were arrested by military intelligence personnel simultaneously after participating in anti-government protests, that they were interrogated, kicked and beaten, and that their parents had to sign a statement of responsibility in order to secure their release. *See* JA313.

[5] Although the record contains an affidavit in support of Tun's asylum application and allegedly sworn before attorney Patrick Wang July 25, 1998, attorney Wang did not represent petitioner until sometime in 1999, *see* JA361-363, and the 1998 date appears to be incorrect, as the affidavit is identical to that submitted in 1999 in support of petitioner's amended asylum application. JA260-262.

participated in these activities with him. JA213, 218-219. In addition, Tun claimed he was arrested (alone, not with his brother) by five soldiers, and tortured for two weeks in 1988. JA 214-215, 220. Tun claimed he was released only "after his parents were called in and forced to sign a statement that they would be held responsible for any of [his] future anti-government activities." JA220. Tun further claimed he feared returning to Burma due to his having jumped ship and his failing to pay taxes as a sailor. JA220-221.

B. Petitioner's Removal Proceedings

On or about October 28, 1998, the INS commenced removal proceedings against Tun by filing with the immigration court a Notice to Appear, charging petitioner as removable on the ground that he remained in the United States beyond the 29 days permitted, without authorization of the INS, in violation of Section 237(a)(1)(B) of the INA, 8 U.S.C. § 1227(a)(1)(B).[6] JA386

Tun appeared *pro se* before an IJ on November 5 and 12, 1998, but his hearing was continued to allow him to obtain counsel. Petitioner appeared before an IJ again on January 21, 1999, this time with counsel, and conceded removability as charged. JA73. At this time, the Notice to Appear and Tun's first asylum application dated September 1993 were marked as exhibits. JA73, JA253-59. A merits hearing was scheduled for July 15, 1999, and

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[6] The statute provides: "Any alien who is present in the United States in violation of this chapter or any other law of the United States is deportable."

Tun was given a deadline for filing supplemental materials and advised of the importance of identity documents. JA74. Thereafter, Tun retained new counsel and additional continuances were granted to allow new counsel to prepare. A merits hearing was held before an Immigration Judge on March 21, 2000. JA77.

At the merits hearing on March 21, 2000, additional documents provided by Tun through his counsel were marked into evidence, including Tun's second Application for Asylum and Withholding of Removal[7] and affidavit in support. *See* JA80.

1. Documentary Submissions

Tun submitted several documents in support of his claim during the merits hearing. In addition to his 1993 asylum application, as noted, he submitted a second Application for Asylum and Withholding of Removal and supporting affidavit dated December 21, 1999. *See* JA80; JA210-222. In support of his asylum claim, Tun also submitted the following: State Department Country Reports and news clippings, JA232-51; photographs of Tun protesting outside the Burmese Consulate in New York in March, August and September 1999, JA223-28; a letter from his wife dated December 12, 1998, JA229-30; a copy of his Burmese passport issued December 14, 1989, JA267-274; INS Form I-95 crewman's landing permit, JA275-276; seaman's documents he took with him when

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

he left the ship Equity, JA277-288, including a certificate of completion of survival, first aid and fire fighting courses dated October 27, 1989, JA 285-286; Tun's seaman's identity card issued November 7, 1990, JA287; a photograph of a woman and child purporting to be Tun's wife and daughter in Burma, JA291; an affidavit from Tun's cousin, Ye Lin, stating that in 1993 the Burmese Embassy would not renew Tun's passport because Tun was "blacklisted" because he failed to pay taxes and was not cleared politically, JA263; a letter from the Burma Action Committee verifying Tun has protested in front of the Burma Embassy on behalf of that group, JA252, 292; and the curriculum vitae for Dr. Aye Kyaw, founder of the Burma Action Committee, who testified before the IJ. JA at 338-46.

2. Petitioner's Hearing

a. Tun's Alleged 1988 Arrest in Burma

Tun testified that he protested on March 13 and 14, 1988, along with other students at his college in Dangya, after the military killed a student at the Institute of Technology in Rangoon. JA120. He testified he did not demonstrate again until August 8, 1988, JA126, but distributed political pamphlets. JA125. The demonstration camps were closed on September 18, 1998, by the military. JA129. Tun stated nothing happened to him as a result of his participation in these demonstrations, until he was arrested by five soldiers in October 1988. JA129-130. The soldiers allegedly took him to a police station where he was interrogated and hit three times. JA131. He testified he was held, interrogated and beaten for two

weeks. JA 133-134. He was only released after his parents came to the station and were forced to sign a statement that Tun would not participate in future anti-government demonstrations. JA134-135.

b. Tun's Efforts to Exit Burma

Tun testified that after his arrest in October 1988 he was married. JA135. Within a few months, he heard the government was re-arresting student activists, so he became scared and moved to Rangoon to live with an aunt. JA135. He then heard from his wife that people were looking for him so he started to try to get travel documents to leave the country. JA136. When questioned further by the IJ, Tun testified he did nothing for a two year period while living with his aunt in Rangoon. JA141("I didn't go outside. I just stayed inside and just hid there."). He testified he was not politically active, he did not work, and his parents supported him during this time.[8] JA136-137. Tun testified he paid a broker for a passport, JA138, and after receipt of the passport, an uncle in England who had a friend in Singapore got him an employment letter. JA 139. He then applied for seaman's documents and subsequently left the country without problems. JA139-140.

When questioned by the IJ further about how he acquired his seaman's documents, Tun testified that he attended a two-week course in the beginning of 1990

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[8] Tun testified his father was a doctor at Dangya Hospital and mother was a clerk at the government office of Death and Birth. JA137.

which qualified him for seaman's status. JA140. When asked later about who helped him get permission to attend the program, Tun replied, "[t]he broker from earlier." JA141. The IJ questioned Tun at length about the program he attended to become a seaman. When asked what he studied he replied, "Nothing very major. About how to operate a fire extinguisher and life boat." JA142. The testimony continued as follows:

> Q. What exactly was going to be your area of expertise on the ship?
>
> A. I was going to be a trainee for an officer position on the ship.
>
> Q. All right, let me get this straight, sir. You spent two weeks training to operate fire extinguishers and life boats and this prepares you for a career as an officer on a ship? Is that what you're telling us?
>
> A. The certificate allows you to become anything, either be an officer or a general crew person. It gives you permission to leave.

JA143.

Tun was questioned further regarding discrepancies between his testimony and his identity documents used to exit Burma:

> Q. All the time you were in Rangoon, you were doing nothing?

A. No.

Q. And you spent all that time trying to get a passport?

A. Yes, that's all I was doing.

Q. Well, sir, I was looking at your passport and it was issued to you in December of 1989. Are you aware of that?

A. Yes, I do know that.

Q. Now, sir, when did you start attending that Marine Institute?

A. If I remember, at the beginning of 1990.

Q. For two weeks?

A. Yes, two.

Q. Prior to that you had no marine experience?

A. No.

Q. Well explain then, if you would, sir, for me, why is it your passport lists your occupation as cadet?

A. It was, it was filled in later on. The date was put in was the date when I was, when I was issued the passport. Those dates were filled in later as well.

> Q. Okay. Explain then, sir, if you've had no marine experience prior to attending seaman's school in the beginning of 1990, why you have a certificate of survival from the Burmese Marine Administration from October of [19]89. Sir, your answer.
>
> A. I made arrangements to have this paper done before so I can enter.

JA164-165.

c. Tun's Arrival in the United States

In November 1990, Tun left Burma and flew to Singapore where he joined the ship "Equity." JA145, 215. Tun labored aboard the Equity, which initially journeyed to Indonesia, Taiwan, Malaysia, back to Singapore, and then, in February 1991, stopped in the United States. JA145, 215. However, Tun did not leave the ship during its first journey to the United States in February 1991. Instead, he continued on with the Equity, traveling to Belgium and Mexico and then back to the United States in May 1991. JA146.

While aboard the ship, Tun refused to pay taxes out of his salary as required by the Burmese government. JA 143-144. He did not attempt to seek asylum in any of the other countries to which he traveled on the Equity, JA158-159, and he did not seek entry into the United States until his second visit in May 1991. JA146-147. When asked why he did not seek to enter the United States the first time the ship docked here in February 1991, Tun stated a fellow seaman convinced him to wait for another time. JA145-

146. At this time, Tun left the ship and entered the United States at Houston, Texas, as a crewmember with authorization to remain in the United States while his ship was in port for a period not to exceed 29 days. JA210, 386. Tun left Houston and traveled by bus to New York to live with his aunt, where he still resides.

Tun testified he did not become politically active in the United States until 1997 because "there weren't many organizations and I didn't know much about them." JA150. "But in 1997 when they formed the Burma Action Committee I joined them." JA150. Tun's political activity beginning in 1997 was corroborated by the testimony of Dr. Kyaw, who, according to his resume, founded the Burma Action Committee in New York in 1966. JA112, 339. Tun claims he fears reprisal from the government of Burma for his political activity in the United States. JA151-152 ("I would be arrested because I would be considered as a treasoner (sic)."). According to Dr. Kyaw, Tun would be "in danger" in Burma because of his political activity here. JA105. Dr. Kyaw further clarified this danger as follows: "he will not be arrested at the . . . airplane, but he will be . . . arrested maybe after 2 month, 3 months. Because once he is listed as the political activist, especially students . . . they are carefully under watch." JA 105.[9]

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[9] Dr. Kyaw testified that he first met Tun during a protest in front of the Burmese Embassy in 1997, and saw him about three times at meetings. JA 112-113. Dr. Kyaw explained he was there "as a professor as a scholar" but he "dare not [shout against the government] because the ambassador is my friend." (continued...)

According to Tun, he attempted to renew his passport in 1993 but was unable to because he was "blacklisted" for his failure to pay taxes while working as a crewman, for having jumped ship and for being a political activist. JA147-148. This testimony was corroborated by Tun's cousin, Ye Lin, who testified when he (Lin) went to the Burmese Embassy in 1993 to renew his father's passport, he learned from a friend there that Tun's passport could not be renewed because he was "blacklisted" for jumping ship, failing to pay his Burmese taxes, and being a political activist. JA94-96; *see also* JA 263 (Lin's affidavit stating same).

d. Tun's Cross Examination

Tun confirmed the presence of his mother and father, his brother and two sisters in the United States, but testified that he had no corroborating evidence or affidavits from them to support his political activities, arrest or status as a student in Burma. JA155-156, 161-163. When asked if he had any newspaper articles or clippings from his days as a student protestor, Tun stated he was afraid to keep them and so he destroyed them. JA162-163. When asked why his wife's letter dated December 12, 1998, which says military intelligence has interrogated her about him, does not mention his previous arrest or political activity in Burma, Tun said his wife would get into trouble if she

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[9] (...continued)
JA112. When asked by the IJ a minute later how he encountered Tun, Dr. Kyaw stated "I met him in front of the Burmese Embassy," "we shouted" and "two police are always watching in front of the Burmese Embassy." JA113.

wrote such things in a letter. JA159, 229.

When asked why he has no medical records to support his claim that he was injured during his 1988 arrest, Tun testified, "After I was released I was threatened and told that I should not go anywhere, do anything, should just keep quiet. So I was quite shooken (*sic*) up so I just stayed home and stayed very quiet, low keyed. And, and then got treatment at home." JA159. Earlier, however, Tun testified that after his release, he was required to report his whereabouts every day to the police station. JA158. Tun further testified that although he was afraid the police would come looking for him, he had no trouble registering his marriage on April 27, 1989. JA158. He explained that "marriage courts" are different from the courts that deal with political activism. JA158. He nonetheless asserted that the Burmese government knows everything he does in the United States because they have "informers" everywhere. JA 152-153.

Finally, Tun clarified the primary discrepancies between his original application for asylum and his amended application. He stated that the first application erroneously stated he was a member of the National League for Democracy ("NLD") when he was just a supporter and also stated that both he and his brother were arrested together in 1988, when he was arrested alone. JA159-162. He blamed these discrepancies on lack of assistance of an attorney in drafting the first application and his failure to read the application carefully. JA159.

C. The Immigration Judge's Decision

At the conclusion of the March 21, 2000, hearing, the IJ rendered an oral decision denying Tun's applications for asylum, withholding of removal, protection under CAT, and for voluntary departure and ordered Tun removed to Burma. The IJ based the denial on her express determination that Tun was not believable and his claim was implausible. The IJ held "when the respondent's documentary information is compared against his oral testimony and his written application for political asylum as in this case, it is clear that the respondent must be deemed a not credible witness." JA52.

Though Tun's first asylum application was inconsistent with key points of his testimony, the IJ gave it limited weight accepting Tun's representation that it was not prepared with assistance of counsel. JA41, 52. The IJ concentrated instead on the discrepancies between Tun's amended asylum application, his testimony and his exit documents. JA52. The IJ noted that Tun's oral testimony appeared mostly consistent with his amended asylum application. JA52. However, the IJ noted that "the fact that the respondent's testimony mirrors his written application is not in and of itself dispositive that the respondent is a credible witness." JA52. Rather, the IJ found the when Tun's oral testimony is compared with his documentary evidence and written application, his claim was not credible. JA52; *see also* JA53 (finding Tun's words alone would not suffice to establish his persecution claim where "his documentary evidence is in contrast to his oral testimony and his written application").

In addition, the IJ further held that Tun's lack of corroborative evidence that he was politically active and had been arrested on account of such activity in Burma further undermined his claim. JA52-53. In particular, the IJ noted that Tun's claim that he spent a few years in Rangoon in hiding at an aunt's house doing everything he could to exit Burma was contradicted by the documentary evidence. JA53. The IJ noted that Tun's passport issued to him as a "cadet" on December 14, 1989, as well as his certificate of survival from the Department of Marine Administration dated October 27, 1989, refute Tun's claims that he had no involvement or training in seamanship prior to a two week training course in 1990. JA53. The IJ explicitly rejected Tun's attempt to explain these discrepancies by claiming "these documents are suddenly all fabricated and produced after the fact." JA54. The IJ also noted that Tun's fabrication claim is not reflected in his written application or affidavit. JA54. *Compare Khup v. Ashcroft*, 376 F.3d 898, 903-05 (9th Cir. 2004) (in the absence of adverse credibility finding, petitioner established objective fear of persecution where petitioner's close associate was beaten and killed and petitioner alleged he fled the country soon thereafter, upon learning the Burmese government was looking for him).

The IJ additionally found that Tun's actions after leaving Burma were not consistent with those of a political activist and refugee fearing persecution upon return. JA56. In this regard, the IJ noted that Tun passed through many countries of safe haven, including Belgium, while aboard the Equity without seeking asylum, did not enter the United States during the ship's first trip here, did not seek asylum until more than two years after entering the United

States and was not politically active in the United States until near the time of his removal proceedings. JA55-56. The IJ concluded that Tun's political activities were "self-serving rather than honorable" and "did not start until the respondent was well in proceedings and petitioning for asylum." JA56.

Based on these findings, the IJ concluded Tun was not a political dissident in Burma. "I do not find that [Tun] has met his burden of showing that he had been subjected to past persecution in Burma. I do not find the respondent to be a credible witness. I find his application for political asylum to be not credible and [his] testimony . . . to be implausible." JA54. Accordingly, the IJ denied Tun's applications for asylum and withholding of removal. JA57.

In reviewing Tun's CAT claim, the IJ found credible Tun's claim that he failed to pay Burmese taxes and he jumped ship, and that he may be punished by the Burmese government for these violations. JA57. However, the IJ determined that these actions are not political but instead criminal in nature. JA57. Relying upon the Profile of Asylum Claims and Country Conditions in Burma, JA198-206, the IJ noted "it is those who are returned for political reasons who are fearful of reprisal." JA58-59. Having already found Tun's claim to be a political dissident not credible, the IJ concluded that while Tun may be imprisoned as a result of his failure to pay taxes or having jumped ship, there is no evidence in the record that he would be tortured within the meaning of the Torture Convention for those violations. JA59. Accordingly, protection under CAT was denied. JA59.

Finally, the IJ determined that since Tun did not possess a valid passport as evidenced by testimony, he was not eligible for voluntary departure. JA59.

D. The BIA's Summary Dismissal

On October 31, 2002, the BIA summarily affirmed the IJ's decision and adopted it as the "final agency determination" under 8 C.F.R. § 3.1(e)(4) (2002).[10] JA2. This petition for review followed.

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

SUMMARY OF ARGUMENT

I. The IJ properly denied Tun's application for asylum and withholding of removal. Substantial evidence supports the IJ's determination that Tun was not a believable witness and that his persecution claim was not credible. When compared against specific exit documents in the record, it is clear that Tun's claim that he was in hiding during 1989 and 1990, due to his alleged 1988 arrest and interrogation as a political protestor, rather than training to become a seaman is false. In addition, the IJ's conclusion that corroboration of this claim, in the form of testimony, affidavits, or letters, was reasonably available and should have been provided, was proper. Tun's parents, who now live in New York, could have corroborated Tun's claim that he was arrested in Burma for his alleged past political protest activity as it was his parents who supposedly had to sign a statement taking responsibility for Tun's actions in order to get him released. Substantial evidence further supports the IJ's finding that Tun's actions upon leaving Burma are not consistent with those of a political dissident fearful of persecution if returned to Burma. Tun traveled to many countries of safe haven after leaving Burma and prior to entering the United States, without seeking refuge, and moreover, did not seek to enter the United States on his first stop here. Finally, the IJ's finding that Tun's late-started, apathetic political activity in the United States would not subject him to persecution is supported in the record. Having already found Tun's claim to be a student protestor in Burma not credible, the IJ properly did not credit a) the testimony of Tun's cousin that Tun was "blacklisted" for such activity, and b) Dr. Kyaw's testimony that as a blacklisted student dissident, Tun

would be in particular danger of imprisonment upon return to Burma. Because a reasonable factfinder would not be compelled to find otherwise, the petition should be denied.

II. The IJ's denial of protection under the Torture Convention also finds substantial support in the record. Having already found Tun's claim to be a student protestor in Burma not credible, the IJ properly did not credit the only evidence in the record that would arguably support his claim that he would be imprisoned upon return to Burma: the testimony Tun's cousin, Lin, and Dr. Kyaw. First, Lin's testimony as to his 1993 inquiry at the Burmese Embassy was unhelpful to Tun's CAT claim because it only showed that Tun's passport would not be renewed based on his alleged *past* political activity - a claim the IJ found not believable. Second, Dr. Kyaw's general testimony that Tun may be imprisoned two or three months after returning to Burma was at best speculative, and moreover, was based on Tun's representation that he had previously engaged in student protests - a claim already denounced by the IJ. Further, the IJ properly concluded the record is utterly lacking in any evidence that Tun would be tortured within the meaning of the Torture Convention based on his criminal violations of jumping ship and failure to pay taxes. Accordingly, the IJ properly denied Tun protection under the CAT.

III. In light of this Court's decision in *Zhang v. United States Dep't of Justice*, 362 F.3d 155, 157 (2d Cir. 2004) (per curiam), Tun's final claim, that his due process rights were violated by the BIA's decision to summarily affirm the IJ's decision in accordance with its streamlined review process, must fail.

ARGUMENT

I. Substantial Evidence Supports the Immigration Judge's Determination That Tun Failed To Establish Eligibility for Asylum & Withholding of Removal Since His Testimony Was Not Credible

A. Relevant Facts

The relevant facts are set forth in the Statement of 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.[11] *See* 8 U.S.C. §§ 1158(a), 1231(b)(3) (2004); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995). Although these types of relief are "closely related and appear to overlap," *Carranza-Hernandez v. INS*, 12 F.3d 4, 7 (2d Cir. 1993) (citation and internal marks omitted), the standards for granting asylum and withholding of removal differ, *see*

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

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) (2000). *See* 8 U.S.C. § 1158(a) (2004); *Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 66 (2d Cir. 2002). A refugee is a person who is unable or unwilling to return to his native country because of past "persecution or a well-founded fear of persecution on account of" one of five enumerated grounds: "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (2004); *Liao*, 293 F.3d at 66.

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

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. *Id*.

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*. 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); *Zhang*, 55 F.3d at 737-38 (noting that when seeking reversal of a BIA factual determination, petitioner must show "'that the evidence he presented was so compelling that no reasonable factfinder could fail'" to agree) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992)); *Melgar de Torres*, 191 F.3d at 311.

The asylum applicant bears the burden of demonstrating eligibility for asylum by establishing either that he was persecuted or that he has a well-founded fear of future persecution on account of, *inter alia*, his political opinion. *Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003) (per curiam); *Osorio*, 18 F.3d at 1027. *See* 8 C.F.R. § 208.13(a)(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, 1987 WL 108943 (BIA June 12, 1987) (applicant must provide testimony that is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account"), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647-48 (9th Cir. 1997).

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) ("where 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, 1997 WL 80984 (BIA Jan 31, 1997).

Finally, even if the alien establishes that he is a "refugee" within the meaning of the INA, the decision whether ultimately to grant asylum rests in the Attorney General's discretion. *See* 8 U.S.C. § 1158(b)(1) (2004); *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) (2004); *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)(1) (2004); *INS v. Stevic*, 467 U.S. 407, 429-430 (1984); *Melgar de Torres,* 191 F.3d at 311. Because this standard is higher than that governing eligibility for asylum, an alien who has failed to establish a well-founded fear of persecution for asylum purposes is necessarily ineligible for withholding of removal. *See 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 ("we must uphold an administrative finding of fact unless we conclude that a reasonable adjudicator would be compelled to conclude to the contrary.")(citations omitted); *Chen,* 344 F.3d at 275 (factual findings regarding asylum eligibility must be upheld if supported by reasonable, substantive and probative evidence in the record when considered as a whole); *see Secaida-Rosales v. INS*, 331 F.3d 297, 306-07 (2d Cir. 2003); *Melgar de Torres*, 191 F.3d at 312-13 (factual findings regarding both asylum eligibility and withholding of removal must be upheld if supported by substantial evidence); *Ali v. Reno*, 237 F.3d 591, 596 (6th

Cir 2001) (same standard applicable to Torture Convention). "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[12] 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). This Court "will reverse the immigration court's ruling only if 'no reasonable fact-finder could have failed to find . . . past persecution or fear of future persecution." *Chen*, 344 F.3d at 275 (omission in original) (quoting *Diallo*, 232 F.3d at 287).

The scope of this Court's review under that test is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 74 ("Precisely because a reviewing court cannot glean from a hearing record the insights necessary to duplicate the fact-finder's assessment of credibility, what we 'begin' is not

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[12] 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, JA at 2, the BIA adopts that decision. 8 C.F.R. § 3.1(e)(4)(2002); *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.

a *de novo* review of credibility, but an 'exceedingly narrow' inquiry . . . to ensure that the IJ's conclusions were not reached arbitrarily or capriciously") (citations omitted); *see also Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992).

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

This Court gives "particular deference to the credibility determinations of the IJ." *Chen*, 344 F.3d at 275 (quoting *Montero v. INS*, 124 F.3d 381, 386 (2d Cir. 1997)); *see also Qiu v. Ashcroft*, 329 F.3d 140, 146 n.2 (2d Cir. 2003) (the Court "generally defer[s] to an IJ's factual findings regarding witness credibility"). This Court has recognized that "the law must entrust some official with responsibility to hear an applicant's asylum claim, and the IJ has the

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

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

In reviewing credibility findings, courts "look to see if the IJ has provided 'specific, cogent' reasons for the adverse credibility finding and whether those reasons bear a 'legitimate nexus' to the finding." *Id.* (quoting *Secaida-Rosales*, 331 F.3d at 307). Credibility inferences must be upheld unless they are "irrational" or "hopelessly incredible." *See, e.g.*, *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002) ("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 Tun failed to provide credible testimony in support of his application for asylum and withholding of removal, and thus failed to establish eligibility for relief. Because his testimony was not found to be credible, as it was contradicted by pertinent documentary evidence, the petitioner failed to meet his burden of proof in establishing his status as a refugee. Furthermore, because Tun failed to carry his burden in proving eligibility for asylum, he necessarily failed to meet his burden for withholding of removal. *See Chen*, 344 F.3d at 275. *Accord Zhang v. INS*, 386 F.3d at 71.

First, substantial evidence in the record supports the IJ's determination that Tun was not a believable witness and that his persecution claim was not credible. The IJ "provided 'specific, cogent' reasons for the adverse credibility finding and . . . those reasons bear a 'legitimate nexus' to the finding." *Zhang v. INS*, 386 F.3d at 74 (quoting *Secaida-Rosales*, 331 F.3d at 307). First, the IJ found that when compared against specific identity documents in the record, Tun's claim that he was in hiding during 1989 and 1990, due to his alleged 1988 arrest and interrogation as a political protestor, rather than training to

become a seaman, was simply not credible. JA52-53. Tun claimed to have no experience as a seaman prior to 1990, yet his passport which was issued in 1989 listed him as a cadet. JA140, 164, 270. In addition, Tun possessed a certificate of survival from the Burmese Marine administration dated October 1989. JA285. Tun further testified he obtained his passport through a paid broker *prior to* arranging for seaman's papers, JA139, but when confronted later with the discrepancies between the passport, his certificate, and his testimony he claimed that his occupation as a "cadet" and the dates in the passport were "filled in later." JA164-165. As this Court has recognized, the IJ is in the "best position to discern, often at a glance," whether the petitioner's account and explanations for inconsistencies are believable. *See Zhang v. INS*, 386 F.3d at 73 ("A fact-finder who assesses testimony together with witness demeanor 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.").

The IJ additionally properly determined that Tun's lack of corroborating evidence of his claim that he was a political dissident in Burma seriously undermined his asylum claim. Tun admitted that his parents, brother and sisters, who lived in Burma in 1988, now live in New York, where his proceedings took place. While his brother may not have known about his arrest, *but see* 256 (Tun's 1993 asylum application),[13] Tun's oral testimony, written

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[13] Tun claimed both he and his brother were arrested by (continued...)

application and affidavit indicate that he was released from detention only after his parents were called in and forced to sign a statement that they would take responsibility for any future protest activity by Tun. JA134-135, 215, 220. Thus, though the IJ noted the lack of corroboration of the arrest in the letter from Tun's wife in Burma, *see* JA54, Tun could have easily corroborated his account with an affidavit or testimony of his father and/or mother who are here in the United States. Under the circumstances, it was reasonable to expect such corroboration. The alleged arrest was key to Tun's persecution claim and the IJ appropriately factored in Tun's failure to provide this supporting evidence in denying his asylum application. *See Zhang v. INS*, 386 F.3d at 71 ("where 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.").

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[13] (...continued)
government intelligence personnel simultaneously after participating in anti-government protests, that they were interrogated, kicked and beaten, and that their parents had to sign a statement of responsibility in order to secure their release. JA256. The enclosure letter that accompanied Tun's first asylum application reiterates this claim. JA313. In addition, Tun did not change this account during his interview with an asylum officer in 1998, when he had the opportunity to do so. *See* JA253, 258. Although at his hearing Tun disavowed the fact that his brother was arrested with him, this first application was given some, albeit limited, weight by the IJ. *See* JA52.

The record also substantially supports the IJ's finding that Tun's actions after leaving Burma were not consistent with those of a political dissident and refugee fearing persecution upon return. *See* JA56. Tun admitted that his ship stopped at many countries of safe haven, including Belgium, and he did not seek asylum in any of those countries. JA 145-146. What's more, he did not seek to enter the United States during the ship's first trip here. JA146. Instead, "he took the chance of being returned to Burma." JA55. Nor did he immediately seek asylum when he did finally enter the United States in May 1991. Rather, he waited for more than two years after his entry to file his first asylum application dated September 10, 1993. JA148; JA253-259. As the IJ correctly concluded, "[i]t makes no sense that the respondent would have the potential to protect himself by disembarking in the United States on his first go-round the world and not take advantage of it. This is not the behavior of a refugee and this is not the behavior of someone who is fearful of returning to Burma." JA55.

Likewise, having already found Tun's claim to be a student protestor in Burma not credible, the testimony of Tun's cousin, Lin, or Dr. Kyaw, could not carry Tun's burden of establishing he would be subject to persecution upon return to Burma. First, Lin's testimony, based on his 1993 inquiry at the Burmese Embassy, that Tun was "blacklisted" as a political protestor supported only Tun's past persecution claim which was properly rejected by the IJ. Further, Dr. Kyaw's testimony was similarly faulty. Notably, Dr. Kyaw testified he hardly knows Tun, having only first met him in 1997 in front of the Burmese Embassy and thereafter having observed him at three

meetings of the Burma Action Committee. JA114. Dr. Kyaw nonetheless testified that Tun would be arrested "maybe" 2 or 3 months after returning to Burma based on his assumption that Tun had been a student protestor -- an assumption based on Tun's claims alone, not on Dr. Kyaw's personal observations. *See* JA41, 105 (testifying that students are blacklisted automatically and carefully watched). As explained previously, however, the premise on which Dr. Kyaw relied for this opinion -- that Tun had been a student protestor in Burma -- was reasonably rejected by the IJ.

Moreover, Tun's record of political protest in the United States since 1997 is insufficient to meet his burden of establishing an objective fear of future persecution. Although Dr. Kyaw corroborated petitioner's "appearance" in front of the Burmese Embassy in New York in 1997, the record offers no convincing evidence that the Burmese government knows of or cares about Tun's apathetic political activity here. Thus, the record amply supports the IJ's conclusion that Tun could not establish a well-founded fear of future persecution based on his self-serving, too-little-too-late, political activity here. *See Bahramnia v. United States INS*, 782 F.2d 1243, 1248 (5th Cir. 1986) (finding petitioner's participation in political protest group in United States insufficient to establish well-founded fear of persecution where there was no evidence petitioner had been identified to the Iranian government "or that his activities in this country . . . have been so visible or notable so as to come to the attention of [Iranian officials]"). *Compare Sakhavat v. INS*, 796 F.2d 1201, 1205 (9th Cir. 1986) (granting asylum where Iranian student was involved in numerous well-documented and publicized

clashes on American campuses with pro-Khomeini students, and his family in Iran suffered retribution as a result of his American protest activities).

Based on the record in this case, a reasonable factfinder would not be compelled to find that Tun established a well-founded fear of persecution if returned to Burma. *Elias-Zacarias*, 502 U.S. at 481 n.1. Moreover, in cases like the instant one, where the decision turns on the IJ's credibility determination, this Court's review is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 73. *See also Qiu,* 329 F.3d at 146 n.2 (the Court "generally defer[s] to an IJ's factual findings regarding witness credibility"). Where, as here, "the IJ's adverse credibility finding is based on specific examples in the record of 'inconsistent statements' by [petitioner] about matters material to his claim of persecution, [and] on 'contradictory evidence' . . . [the Court] will generally not be able to conclude that a reasonable adjudicator was compelled to find otherwise." *Zhang v. INS*, 386 F.3d at 74 (internal quotation marks and citations omitted). *See also id.* ("the court may not itself hypothesize excuses for the inconsistencies, nor may it justify the contradictions or explain away the improbabilities. Its limited power of review will not permit it to 'reverse the BIA [or IJ] simply because [it] disagree[s] with its evaluation of the facts.")(internal quotation marks and citations omitted).

In sum, the record evidence substantially supports the IJ's determination that petitioner's testimony was not credible and that he failed to establish eligibility for asylum and withholding of removal. Accordingly, this Court should deny the petition.

II. Substantial Evidence Supports the Immigration Judge's Determination That Tun Failed to Establish Eligibility for Protection Under the Convention Against Torture Since He Failed To Provide Sufficient Evidence He Would Be Tortured Upon Return to Burma

A. Relevant Facts

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

B. Governing Law and Standard of Review

1. Deferral of Removal Under the Torture Convention

Under Article 3 of the Torture Convention, the United States cannot return 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, 2002 WL 358818 (A.G. Mar. 5, 2002); 8 C.F.R. §§ 208.16(a), 208.17(a), 208.18(a) (2004).

To establish eligibility for relief under the Torture Convention, the 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 (noting that this burden of proof is higher than that required of those seeking asylum). The applicant must show that someone in "his particular alleged circumstances" has a greater than 50% chance of torture. *Wang*, 320 F.3d at 144.

The Torture Convention 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 (citing 8 C.F.R. § 208.18(a)(1) (2002)).

Because "[t]orture is an extreme form of cruel and inhuman treatment," even cruel and inhuman behavior by officials may not warrant Torture Convention 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 the Torture Convention, an alien's removal may be either permanently withheld or temporarily deferred. *See* 8 C.F.R. §§ 208.16, 208.17 (2004).

2. Standard of Review

This Court also reviews the determination of whether an alien is eligible for protection under the Torture Convention under the "substantial evidence" standard. *See Saleh v. U.S. Dep't of Justice*, 962 F.2d 239, 238 (2d Cir. 1992) (same); *Ali,* 237 F.3d at 596 (Torture Convention); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 353 (5th Cir. 2002) (Torture Convention). Measured against this stringent standard, petitioner's challenge to the BIA's and IJ's determination clearly fails.

C. Discussion

Substantial evidence supports the IJ's determination that petitioner is not eligible for protection under the Torture Convention. The IJ credited Tun's testimony that he failed to pay Burmese taxes as a seaman and there is no dispute that Tun jumped ship. Relying on the State Department's Profile of Asylum Claims and Country Conditions in Burma, JA198-206, the IJ properly found, however, that "it is those who are returned for political reasons who are fearful of reprisal." JA58-59. Having already found Tun's claim to be a political dissident not credible, the IJ properly concluded that while Tun may be imprisoned as a result of failure to pay taxes or jumping ship, there is no evidence in the record he would be tortured for these violations of Burmese law. JA59.

In addition, the testimony of Tun's cousin, Lin, and Dr. Kyaw, does not carry the burden of showing that Tun will more likely than not be tortured upon return to Burma. As explained, *supra*, Point I.C., Lin testified that in 1993 he

went to the Burmese Embassy to renew his father's passport and learned from a friend who worked there that Tun's passport could not be renewed because Tun "had not only jumped ship, he has not paid his Burmese taxes and he has been an anti-government activist with that so he is on the blacklist." JA95. Lin further stated that the Burmese government uses the blacklist against such protestors "for imprisonment" upon their return to Burma. JA95. *See also* JA 163 (Lin's affidavit stating if "Tun were forced to return, he would definitely be arrested and put in jail and subject to torture."). However, as Lin's inquiry into his cousin's status allegedly was made in 1993, it could only support the notion that Tun would be imprisoned and tortured because he had been a student protestor while in Burma -- a claim properly rejected by the IJ. Dr. Kyaw's testimony was based on the same faulty premise. Dr. Kyaw opined that Tun would be arrested "maybe" 2 or 3 months after returning to Burma assuming Tun had been a student protestor -- an assumption derived not from Dr. Kyaw's personal observations, but from Tun's claims alone. *See* JA41, 105 (testifying that students are blacklisted automatically and carefully watched). Because the IJ reasonably found Tun was not a political dissident in Burma, this testimony of Lin and Dr. Kyaw was insufficient to sustain petitioner's burden. *Compare Khup*, 376 F.3d at 907 (CAT protection warranted where petitioner's credible testimony establishing a well-founded fear of persecution was coupled with a "plethora of documents" confirming not only persecution but torture and killing of individuals like petitioner based on their religious beliefs and activities).

Moreover, Dr. Kyaw's testimony that Tun "may" be in danger based on his political activity in the United States

was speculative at best and does not overcome the numerous deficiencies in petitioner's claim. Dr. Kyaw acknowledged he hardly knows Tun, having allegedly first met him in 1997 in front of the Burmese Embassy and thereafter observing him at three meetings of the Burma Action Committee. JA114. Further, there is no evidence in the record that the Burmese government actually knows and cares about Tun *in particular* and his activities here in the United States. In fact, Dr. Kyaw's testimony instead corroborates the finding of the IJ that Tun is essentially a low-level, apathetic activist interested in political activity to support his claim for asylum here.[14]

In sum, substantial evidence in the record supports the IJ's determination that Tun did not demonstrate that he will "more likely than not" be tortured upon return to Burma. Accordingly, the IJ properly denied Tun's request for protection under the Torture Convention.

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[14] Tun claims the IJ improperly made much of the significant gap between when he left Burma and his political activity here -- the seven years from 1990 to 1997. He claims not much was happening in Burma during this period. *See* Pet. Brief at 25. To the contrary, from 1990 through 1995, the most visible political dissident in Burma, Nobel Laureate and National League for Democracy leader Aung San Suu Kyi was under house arrest. *See* JA200.

III. The Board of Immigration Appeals Properly Affirmed the Immigration Judge's Decision, Without Opinion, Pursuant to Its Summary Affirmance Procedures

A. Relevant Facts

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

B. Governing Law and Standard of Review

The streamlining regulation at issue in this case -- 8 C.F.R. § 3.1(a)(7)(2002) -- authorizes a single member of the BIA to affirm, without opinion, the results of an IJ's decision, when that Board Member determines:

> (1) that the result reached in the decision under review was correct;
> (2) that any errors in the decision under review were harmless or nonmaterial; and
> (3) that (A) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve that application of precedent to a novel fact situation; or (B) the factual and legal questions raised on appeal are so insubstantial that three-Member [Board] review is not warranted.

8 C.F.R. § 3.1(a)(7)(ii) (2002). [15] Once the Board Member has made the determination that a case falls into one of these categories, the Board issues the following order: "The Board affirms, without opinion, the results of the decision below. The decision is, therefore, the final agency determination. 8 C.F.R. § 3.1(a)(7)(iii)(2002).[16] In keeping with the spirit of resource-conservation that was the impetus for the streamlining process, the regulation explicitly prohibits Board Members from including in their orders their own explanation or reasoning. *Id.*; *see* 64 Fed. Reg. 56,137 (Oct. 18, 1999) (stating that one reason for the streamlining initiative was the fact that "[e]ven in routine cases in which Panel Members agree that the result reached below was correct, disagreements concerning the rationale or style of a draft decision can require significant time to resolve"). Consequently, the regulation designates the decision of the IJ, and not the BIA's summary affirmance, as the proper subject of judicial review. *See* 64 Fed. Reg. 56,137 ("[t]he decision rendered below will be the final agency decision for judicial review purposes").

This Court recently joined the majority of circuits in holding that the BIA's decision to summarily affirm an IJ's decision, without opinion, in accordance with its streamlined review process "does not deprive an asylum applicant of due process." *Zhang v. United States Dep't of*

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[15] The regulation has since been redesignated 8 C.F.R. § 1003.1(a)(7) (2004).

[16] The regulation clarifies that an affirmance without opinion "does not necessarily imply approval of all of the reasons of" the decision below. *Id.*

Justice, 362 F.3d 155, 157 (2d Cir. 2004) (per curiam). *See also Shi v. Board of Immigration Appeals,* 374 F.3d 64, 66 (2d Cir. 2004) (the BIA did not abuse its discretion in summarily affirming decision of IJ, without opinion, pursuant to streamlining regulations).

C. Discussion

As noted above, this Court has held that the streamlining regulation at issue in this case, 8 C.F.R. § 3.1(a)(7) (2002), expressly authorizing a single member of the BIA to summarily affirm an IJ's decision without opinion, does not violate due process. *Zhang,* 362 F.3d at 157 ("because nothing in the immigration laws requires that administrative appeals from IJ decisions be resolved by three-member panels of the BIA through formal opinions that 'address the record,' the BIA was free to adopt regulations permitting summary affirmance by a single Board member without depriving an alien of due process."). *See also Guentchev v. INS*, 77 F.3d 1036, 1037 (7th Cir. 1996) ("The Constitution does not entitle aliens to administrative appeals."). This Court has long upheld the authority of the BIA to summarily affirm the IJ's decision even prior to promulgation of the streamlining 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)). *See also Zhang,* 362 F.3d at 158 ("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).

As in *Shi* and *Zhang,* the IJ's decision in this case clearly provides sufficient reasoning for review by this Court. The oral decision of the IJ recites the testimony of each witness, summarizes the documentary evidence and comments on the evidence which petitioner could have submitted, but did not. *See* JA38-49, 54-58. The decision also contains a recitation of the legal standard the IJ was required to follow in assessing petitioner's asylum, withholding of removal and CAT claims, JA49-51, as well as a full analysis of the record evidence and the law. Finally, the IJ's decision contains "'specific, cogent' reasons for [her] adverse credibility finding and . . . those reasons bear a 'legitimate nexus' to the finding." JA52-59; *See Zhang v. INS*, 386 F.3d at 74 (quoting *Secaida-Rosales*, 331 F.3d at 307). Thus, the IJ's decision provides ample basis for review by this Court.

In his brief, the petitioner claims that summary affirmance was inappropriate in this case because the IJ's oral decision allegedly is wrong. Pet. Brief at 35. However, the petitioner has not demonstrated that the IJ's decision contained errors that were more than harmless or immaterial, *see supra* Points I and II, nor does he point to any controlling Board or federal court precedent that he claims the IJ ignored. *See* 8 C.F.R. § 1003.1(a)(7)(ii)(A) (2004). Petitioner claims that "the IJ's reasons for her decision were fundamentally flawed and entirely unreasoned." Pet. Brief at 35. However, just because petitioner disagrees with the reasons given by the IJ for her decision does not mean the decision does not provide sufficient reasoning for judicial review. Accordingly, the

BIA acted well within its discretion in adopting the IJ's decision as the "final agency determination" in adjudicating the petitioner's appeal.

CONCLUSION

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

Dated: January 10, 2005

Respectfully submitted,

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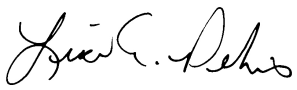

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,401 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

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Addendum

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

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

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

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and

including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

. . . .

(b) Conditions for granting asylum

(1) In general

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

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

(A) In general

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

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

(4) Scope and standard for review

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

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

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

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

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

8 C.F.R. § 3.1(a)(7) (2002)

(7) Affirmance without opinion.

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

to this paragraph.

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

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

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

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

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

8 C.F.R. § 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).

. . . .