04-4294-ag

To Be Argued By:
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-4294-ag

WEN HUEI ZHO, aka CAO, WEN HUI,
Petitioner,

-vs-

ALBERTO GONZALES
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR ALBERTO GONZALES ATTORNEY GENERAL OF THE UNITED STATES

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction under § 242(b) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(b) (2004), to review the petitioner's challenge to the BIA's July 14, 2004, final order denying her asylum, withholding of removal, and relief under the Convention Against Torture.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Immigration Judge violated the petitioner's due process rights to a full and fair hearing where the IJ took evidence of a claim for asylum that the petitioner's own counsel admitted was not viable and where the IJ refused to impose a lifetime bar on asylum relief although the petitioner initially filed a materially false application for asylum?

2. Whether the Immigration Judge acted irrationally in finding the petitioner had not adequately established her identity when the petitioner had at different times proffered identity documents with different names and dates of birth, when the petitioner appeared to make little effort to substantiate the documents ultimately proffered and when the credibility of the petitioner and her supporting witness was questionable?

3. Whether the Immigration Judge made sufficient findings regarding the petitioner's alleged "resistance" to a coercive population control program, when the Immigration Judge concluded that, as a threshold matter, the petitioner had not suffered "persecution" and there was insufficient evidence of future persecution to justify a claim for asylum, making additional findings unnecessary?

United States Court of Appeals

FOR THE SECOND CIRCUIT

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-vs-

ALBERTO GONZALES
ATTORNEY GENERAL OF THE UNITED STATES
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR ALBERTO GONZALES
Attorney General of the United States

Preliminary Statement

The petitioner, Wen Huei Zho,[1] a native and citizen of China, petitions this Court for review of a July 14, 2004,

[1] Petitioner is also identified as Zheng Jing or Wen Hui Cao in some of the documents she submitted in support of her asylum application.

decision of the Board of Immigration Appeals ("BIA"). Appendix of Petitioner ("AP") 2. The BIA summarily affirmed the February 26, 2003 decision of an Immigration Judge ("IJ"), AP 64-79, denying the petitioner's application for asylum under the Immigration and Nationality Act of 1952, as amended ("the INA"), and for withholding of removal under the INA and under the Convention Against Torture ("CAT"),[2] ordering her removed from the United States. AP 2 (BIA's decision), 64-79 (IJ's decision and order).

The petitioner raises three claims in this appeal contesting the denial of her asylum application: (1) the IJ denied the petitioner her due process rights under the 5th Amendment to the U.S. Constitution to a full and fair hearing, by allegedly not acting as a neutral fact-finder; (2) the IJ improperly concluded that the petitioner had not proved her identity based on the documents and testimony provided and thus improperly denied her claim; and (3) the IJ did not properly consider whether the petitioner's alleged actions in China constituted "other resistance to a coercive population control program" so as to qualify as protected political opinion, and thus remand is needed to fully consider the issue.

The petitioner advances these claims despite changing her factual story over the course of her removal proceedings, and abandoning her first materially false story to adopt a version of events that her own counsel

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[2] 8 U.S.C. § 1231 note; *see Khouzam v. Ashcroft*, 361 F.3d 161, 168 (2d Cir. 2004).

conceded did not state a valid claim for asylum under the current regulations. AP 153, 195-197. For the reasons that follow, the petitioner's claims lack merit, and the Board of Immigration Appeals decision denying asylum should be affirmed.[3]

Statement of the Case

The petitioner, then a 16-year-old unmarried girl with no children, entered the United States on February 25, 1999, at Los Angeles, and was apprehended and detained at that time by the Immigration and Naturalization Service ("INS"). AP 267-268. On March 2, 1999, she was issued a Notice to Appear in Los Angeles. AP 544-545. As the petitioner was an unaccompanied minor at the time of entry,[4] she was transferred to the Travelers and Immigrants Juvenile Shelter in Chicago, and an order changing venue

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[3] Petitioner has abandoned any CAT claim she might potentially have raised by failing to address that issue in her Brief to this Court. *See, e.g.*, Pet. Br. 1, 14, 15, 18 (referring only to a "claim to asylum"); *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."). Accordingly, this Brief will focus only on the petitioner's claims for asylum and withholding of removal. As the IJ found, moreover, the petitioner never testified at the hearings that she was or would be tortured.

[4] Although the petitioner was accompanied by an adult woman and two other children, and the woman apparently provided the initial identification documents, the petitioner testified at the February 26, 2003, hearing that the petitioner did not know them. AP 268.

to Chicago was entered by the IJ in Los Angeles on March 10, 1999. AP 85, 510.

The petitioner appeared before an IJ in Chicago on April 21, 1999. AP 81. She had not yet retained counsel, but was assisted by Legal Technicians from the Travelers and Immigrants Aid (TIA), who appeared as friends of the court. AP 82. Subsequently, TIA chose to represent her. AP 103. With the assistance of TIA, the petitioner prepared an application for asylum dated November 24, 1999. AP 492-501.

At a subsequent hearing in Chicago, on January 24, 2000, the petitioner admitted that she was a citizen of China who had attempted to enter the United States without valid travel documents and was thus subject to removal under INA § 212(a)(7)(A)(i)(I). AP 115. However, the petitioner denied that she was likely to become a public charge, as described in INA § 212(a)(4)(A). AP 114-115.

When the petitioner received permission to live with her "aunt" in New York City,[5] venue was changed to New York where she was represented by counsel through the

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[5] Although the petitioner referred to this relative as her aunt, identifying her as her mother's sister at the March 15, 2001, hearing, AP 158, the petitioner later testified that the other woman's father was the brother of the petitioner's grandfather, AP 205, making her a first cousin once removed. For the sake of convenience and consistency, this Brief will refer to her as the "aunt," although the nature of any relation is far from clear.

Safe Horizon Immigration project. AP 129. Hearings began on April 27, 2000, in New York (IJ Ferris). The petitioner filed an amended application for asylum on June 26, 2000. The hearings concluded on February 26, 2003. AP 128, 260. The IJ denied the petition for asylum, withholding of removal, and relief under CAT in an oral decision dated February 26, 2003. AP 64-79.

On July 14, 2004, the BIA affirmed, without opinion, the decision of the IJ. AP 2. The present appeal was filed on August 12, 2004. Government Appendix 1-2.

Statement of Facts and Proceedings Relevant to this Appeal

During the over five-year evolution of her case, the petitioner distanced herself from the initial version of her asylum claim. The last version of the story was that the petitioner, unmarried and childless, had been persecuted and feared future persecution by the Chinese government because she had failed to attend required family planning classes, because the petitioner did not want to attend such classes on return to China, and because her mother had allegedly been sterilized by the government for failure to follow China's one-child policy by having three children,

The petitioner's own counsel acknowledged that based on the version of events finally advanced by the petitioner, she lacked a viable claim for asylum. AP 153, 195-197. Despite these circumstances, the IJ allowed the petitioner a lengthy opportunity to present her best case, including adjournments to assess her legal options and to obtain

witnesses and documents. The IJ ultimately took great pains not to impose a lifetime bar for a frivolous filing, though such an option was plainly available.

A. The Initial Application for Asylum

The petitioner sought to enter the United States at Los Angeles on February 25, 1999. AP 64-65. At that time she proffered identity documents representing herself to be an individual named Zheng Jing, including a passport bearing the name Zheng Jing, with a likeness of the petitioner and a date of birth of June 27, 1985, AP 347 (exhibit 24); a medical examination form "of Applicants for United States Visas," conducted at the Fujian Provincial hospital in 1999, including a likeness of the petitioner, giving the same date of birth and name Zheng Jing, AP 345 (exhibit 25); IRS form 9003, attached to a visa application package in the name of Zheng Jing, AP 344 (exhibit 26); a visa package bearing the likeness of the petitioner and using the name of Zheng Jing, AP 324 (exhibit 27); a visa application in the name of Zheng Jing, with the date of birth as June 27, 1985, AP 320 (exhibit 28); and a photograph of the petitioner, AP 319 (exhibit 30).[6]

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[6] The IJ considered these documents, "[t]o the best of the Court's knowledge, [to be] the materials that were proffered by the adult accompanying the respondent to the United States in an attempt to procure the respondent's entry." AP 68 (exhibits 24-29).

On the entry date, the petitioner was apprehended by the Immigration and Naturalization Service and detained. The petitioner then claimed to go by the name Wen Huei Zho or Wen Hui Cao. AP 64-65, 83-84, 544.[7] The petitioner submitted a draft of her first asylum application on November 24, 1999, in Chicago, AP 492-501, at which time she received warnings regarding the penalties for knowingly filing a frivolous application for asylum, including that, if she filed an application that contained statements or responses to questions that were fabricated, she would be barred forever from receiving benefits under the INA. AP 504.

In the initial application, the petitioner, an apparent attendee of the Chang Shan Teachers' College, AP 493, claimed under oath that her family had been persecuted because it had violated the one-child policy. She contended that she herself was "against the government controlling the number of children in a family." She then claimed that the Chinese government "seeks to perform surgery on me to prevent me from having children." AP 496. In the same application she explained that "I fear that I would be subjected to torture if forced to return to China, where I *will be forced* to undergo surgery which *will prevent me from having children*"– as she was and is childless. AP 497 (emphasis added). In fact, she indicated that she "had already been selected" to undergo such population control procedures. AP 500. She further stated

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[7] At the time of her apprehension, the petitioner offered her identity as Wen Huei Zho as noted in the February 25, 1999, I-213 form prepared by the INS. AP 318 (exhibit 30).

that "[i]f I [was] forced to return to China, I fear that I would be forced to undergo sterilization, beaten and imprisoned." AP 497.

The petitioner also then explained that she had "received 2 letters from the government to come in for a surgical procedure to prevent me from having children." AP 501. She indicated that she did not respond to the letters and suggested that she was "kicked out of school and [her] name was erased from the list of students" as a result of her failure to appear for her sterilization. *Id.* She noted that her "mother explained that the surgical procedure will prohibit me from having children." She also stated that "I think that the government is trying to make me have the surgery because my mother did not comply with the government's one child policy." *Id.*

Toward the end of her statement, the petitioner reiterated:

> The thought of being forced to undergo this surgery make[s] me very uncomfortable and fearful. . . . *I want to have children some day and do not believe that I should be forced to undergo this surgery.*

AP 501 (emphasis added).

B. The Revised Application for Asylum and Preliminary Matters

The petitioner's asylum hearings began on April 27, 2000 in New York (IJ Ferris), where petitioner obtained

New York counsel. The proceedings were continued until May 25, 2000, when new counsel orally acknowledged that the original application had "some errors." AP 137. The IJ thereafter construed the prior application as a "draft" and instructed counsel to file a new application. *Id.*

The petitioner filed an amended application for asylum on June 26, 2000. In the new application, the petitioner markedly changed her version of the events. Now she alleged that she would generally "face risks and problems" based on China's population control policies and because family members had been in trouble with the authorities. Gone is the assertion that she had left China to avoid immediate sterilization that would prevent her from ever conceiving a child. AP 433. She also admitted that it was "error" to have stated that the government notices required her to undergo sterilization. She further acknowledged that she did not know the specific reason she was expelled from her technical school. Her only explanation for the repeated misstatements in her original submission, which she had signed under penalty of perjury after having had it read to her in her native language, was a supposed "misunderstanding" by the prior lawyer. AP 499, 439.

On July 6, 2000, the next hearing date, the petitioner requested additional time to provide further documentation and received a continuation from the IJ. AP 147-148.

On September 28, 2000, the removal proceedings continued with the IJ attempting to determine whether the documentary record was complete. At that point, having considered the pending application, the IJ inquired of the

petitioner's counsel whether there was "any authority at all to support [the petitioner] having a claim under the revised definitions." AP 153. The petitioner's counsel candidly admitted, "No, Your Honor." The IJ asked for counsel to provide support if she obtained any. *Id.* The IJ continued the hearing date.

On March 19, 2001, the next hearing date, the IJ forthrightly informed the petitioner that even accepting the facts of the asylum application as true, the IJ did not believe there to be a legal basis for relief; the IJ proceeded to give a detailed explanation of her reasoning. AP 159, 161. The IJ then outlined her concerns regarding the accuracy of the petitioner's initial application, noting that the IJ had seen young persons from China exaggerate or invent claims to try to stay in the United States and that such persons faced a real risk of a lifetime bar from entry. AP 159-160. The IJ offered the petitioner the chance to reconsider her position, to withdraw the application for asylum and to maintain a clean immigration record. AP 160. The IJ then again explained:

> Let me tell [you] what the problem is. Even if everything in your application is true, I don't believe you have a claim. So I will be denying this case even if you say everything in here is true. I don't believe you're covered by the law as it stands today. You have a right to appeal that, but I do not believe and I think your lawyer will confirm this [that] there is any case to suggest there is a claim for asylum in this country at this time [with your facts], but there is a risk in going forward because if I find that this is not a truthful application, you will also be barred for the rest of your

> life, not just lose the case today. It may not be easy for you to go home, but you have relatives here and you're talking about the rest of your life and you're a very young person and that's what you need to consider in making this decision.

AP 161. The IJ then offered the petitioner's counsel the benefit of the court interpreter to discuss the matter with the petitioner. AP 161-162. Shortly thereafter, the IJ, with the agreement of the petitioner, continued the hearing to give the petitioner a chance to consider withdrawing the application. AP 164. On April 12, 2001, a status conference confirmed that the petitioner intended to go forward with her application.

C. The July 30, 2002, Asylum Hearing

The asylum proceedings continued on July 30, 2002. There the IJ went through the existing documentary record in detail. AP 173-194. The IJ again inquired of the petitioner's counsel under what theory the petitioner's application for asylum stated a viable claim. Counsel noted that she did not have any case support for the petitioner's claim, but that her client expressed a fear of returning to China in light of what had happened to the petitioner's mother, namely persecution by sterilization. AP 195-196. The IJ queried whether, in fact, the petitioner's fear of persecution was "outrageously speculative" in that she might never marry, might not be fertile, may not be a heterosexual, and may never want more than one child. When pressed, the petitioner's counsel agreed with the IJ, "It is speculative in nature." AP 196.

Counsel, however, defended the application, noting that the petitioner was facing potential future sanctions in that the petitioner purportedly had been told to attend family planning sessions or she could not return to school. The IJ suggested that being required to attend family planning classes was simply not "persecution" under the law. AP 196. The IJ inquired whether the petitioner knew of any theory of law that the claim was well founded, and the petitioner's counsel replied, "No." AP 196-197.

Again seeking to protect the petitioner's interests, the IJ asked whether the petitioner wanted to proceed in light of a better understanding of her options or instead wished to withdraw the petition without penalty to any future ability to seek to come to this country. AP 197. The petitioner's counsel explained that her client "is somewhat [in] denial of the possibility of her chance of success even though it has been expressed to her over and over . . . ." Counsel simply stated: "I don't think she's interested in leaving [the United States]." AP 197.

The IJ proceeded with the case, focusing initially on issues of the petitioner's identity, as the petitioner had entered the country using identity documents in the name of Zheng Jing.[7]

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[7] Far from railroading the case through, the court ultimately decided to grant an additional continuance out of "fundamental fairness" to permit the petitioner to review documents produced by the Government at the hearing and to produce additional identity documents. AP 198.

The petitioner attempted to identify several persons in the United States who might be able to confirm her identity and corroborate aspects of her story. She mentioned Lin, a woman who attended the hearing and whom she called "aunt." The petitioner, however, did not remember ever meeting Lin in China before her immigration to the United States, but said that she might have seen her on a visit to her grandmother's when she was very young. AP 207. When the petitioner was asked her aunt's given name, her "aunt," sitting in the audience, interrupted the questioning, talking to the petitioner in Chinese and volunteering her name -- conduct that the IJ found suspicious. AP 173.

When questioned as to how the petitioner had contacted Lin once she arrived in the United States, the petitioner first provided a phone number that she said her parents had given her before she left China. AP 215-216. However, when the IJ noted that the number did not correspond to the address to which the petitioner was released from detention, AP 216, she then said that she thought the IJ had asked for Lin's current phone number instead. AP 217.

The petitioner also mentioned a purported cousin, Liu Jin Shoau, who lived in Brooklyn, but she had no clear recollection of ever meeting him in China. AP 208-209. This individual never testified at the hearing. She also claimed to have seen a neighbor from her home town on the subway, but had no way of contacting him at the time. AP 211-213.

When the petitioner's aunt was then questioned at the same hearing, she had difficulty remembering her own address, AP 220, difficulty remembering the last time she had seen the petitioner in China, AP 222-223, and difficulty remembering the name of the petitioner's home town in China. AP 224. The only statement she seemed certain of was that the petitioner's last name was Zho, which she knew "[b]ecause [the petitioner's] father told me. . . . I was told that she is my relative." AP 225. When Lin failed to provide a street name for her own former home in China and stated that she would not be able to name the current year if asked, the IJ declared her intention to strike the testimony in its entirety unless the witness became more responsive.[8] AP 227-231.

After a brief recess, Lin's examination re-commenced. This time the witness was able to provide the name of the petitioner's mother and the number of the petitioner's siblings. AP 235-236. She stated, however, that although the petitioner had purportedly lived with her for three years, they had remarkably never discussed the names of either the petitioner's siblings or father. AP 237-240. Nor had they ever discussed what the petitioner did in her spare time or where she worked; rather, Lin stated, "Usually I overheard when she talk[ed] to someone else." AP 242.

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[8] Although the petitioner asserts in her Brief that the IJ struck Lin's testimony after "only a few questions," Pet. Br. 7, the Record reveals that the IJ made a concerted effort to elicit relevant testimony from the witness and that Lin's testimony was in fact considered by the IJ in her oral decision. AP 69-70.

Lin was not able to provide a coherent description of how she came to take care of her alleged niece. First she stated that the petitioner's mother had called to ask her to take the petitioner in, AP 245; then she stated that "[a] friend told me [the petitioner] was here and her mother said I have to help her to bail out," AP 246; then she claimed that the petitioner's father had called, identifying himself only as Huei's father, and asked her to take care of the petitioner. AP 246. While Lin was attempting to describe how the petitioner came to be in her custody, the petitioner began to speak to her aunt in Chinese, just as Lin had done earlier when the petitioner was asked her aunt's name. AP 172, 244. When confronted with the inconsistencies in her testimony, Lin said, "It's two or three years back. I cannot remember." AP 248.

D. The February 26, 2003, Hearing

The asylum hearing continued on February 26, 2003. AP 260. After providing her name, date of birth, the names of her family members, and her home address in China, the petitioner described her attempted entry into the United States. AP 265-267. The petitioner stated that she arrived in Los Angeles with three people she did not know, an adult woman and two other children, although the adult woman apparently provided the authorities with what is claimed to be false identity documentation regarding the petitioner. AP 268-269. The petitioner claimed to have provided her true name and age when

asked by the INS officials. AP 268.[9] The petitioner was then placed in a children's center in Chicago for approximately one year before being transferred to New York to live with Lin. AP 269.

The petitioner stated that her parents traveled to Jiangxi province for the birth of her youngest sibling, in order to evade the birth control authorities, AP 274, and that she and her younger brother remained in their home town with a "good friend of [their] mother." AP 275. The petitioner alleged that during the year her parents were away, government officials came to their house, smashed the windows, and took the two main doors. AP 275. However, the petitioner herself did not witness these events; rather, she saw the windows after they had been broken and said that her neighbors told her "when those people came, they came in a group and we could know that they were the village committee[']s cadres." AP 275-276.[10]

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[9] The IJ noted that, because the petitioner was a minor at the time of entry, there would be no fraud charges on the basis of the forged documents. AP 271.

[10] The Department of State's Profile of Asylum Claims and Country Conditions for China (1998) states that 90% of Chinese asylum claims come from Fujian province, and that these claims commonly include allegations that the alien's house was damaged by "angry birth control officials." AP 479. The report goes on to caution, however, that "reporting by the Consulate General in Guangzhou raises doubt that [such actions] have occurred with the frequency asserted by asylum applicants from Fujian province, which apparently has been (continued...)

Before the birth of her youngest sibling, the petitioner and her younger brother moved to Jiangxi province with their parents, and remained there "up to four or five years," AP 277, before returning to their home town. In the meantime, the government had issued a fine notice, and the fine was paid by the petitioner's maternal grandfather. AP 278. The petitioner also asserted that, after the family returned to their home town in 1995, the government became aware of their presence and took her mother to Chang Le hospital to be sterilized. AP 278. Although the petitioner's mother told her at the time that she had an operation and was not feeling well, she did not tell the petitioner that she had been sterilized. The petitioner claims this was because the children were still young. AP 280.

The petitioner testified that, before she had completed a semester at Chang Shan Teachers' College, a guidance counselor told her that "with your name, you can no longer attend school." AP 281. However, the counselor did not tell her why she was being expelled. *Id.* Although Zho stated that she herself had no contact with the government, *id.*, she said that her mother told her that to the government "my family was not good, my family was an over birth family and so was being constantly targeted." *Id.* However, when asked whether she had ever formed an opinion as to why she was sent home, the petitioner responded, "Because I was very much concentrating in my

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[10] (...continued)
relatively liberal in implementing restrictive family planning policies." *Id.*

study, because I was hardworking in my study, and my home was very far from the school and I only communicate with my mother by phone. My mother told me that the government was targeting me." AP 282.

When asked whether her mother had told her how the government was targeting her, the petitioner responded that her mother had informed her that two government notices had been sent to their home, requiring the petitioner to report for a birth control class, and that the petitioner had learned of the notices before she was asked to leave the university. AP 282-283.

The petitioner introduced the purported notices, which explained that the purpose of the classes was educational in nature and outlined national policy on family planning, including raising levels of knowledge on birth control and contraception for unmarried young women over the age of 16. AP 421, 423. The petitioner stated that she had not attended the classes "[b]ecause for me, I like to study and because this class have to go and come back and just took up a lot of time and because it is something the government require you to do." AP 284. The petitioner then said her mother told her not to attend the classes and at that time also explained having previously undergone forced sterilization. AP 284-285. The petitioner did not know whether any other students had received similar notices to attend the birth control class or not. AP 285.

The petitioner's parents allegedly made the decision for her to come to the United States because "[t]here would be more freedom," and because the Chinese government "could take further action" if one did not comply with the

population control policies. AP 287. The petitioner did not want to return to China "[b]ecause now the government already label me as someone who would not go to, would not comply with their plan for not having more birth and the neighbor[s] would look at me as some kind of bad girl because a lot of things happen." AP 288. She did not allege any fear of sterilization, incarceration, fine or other punishment. When asked whether she was willing to attend the birth control class, the petitioner said, "I don't like to attend them. . . . Because so much we could decide ourselves." *Id.*

The petitioner's attorney then began to question her about the documents she had provided to the court. The petitioner stated that she had submitted a document attesting to her mother's sterilization and a copy of the fine notice. AP 293. She had not seen either of these documents in China, but claimed her parents had mailed them to her once she was in the United States. *Id.* Her parents also provided her with other documentation, including a copy of a notarial birth certificate, two graduation diplomas, and a Chinese resident identity card. AP 294-295. The petitioner also was mailed the two notices from the government as to the birth control classes, which she had never seen while in China. AP 295-296. Despite having been in the country for three years, the petitioner provided no corroborative evidence that in fact the persons identified on the documents were her parents or had, in fact, forwarded the identified documents. When the petitioner was asked why she hadn't tried to obtain even a letter from her parents to corroborate her version of events, she said only, "In general we contact by phone and in general, we do not correspond[] in letters. . . . [W]e did

not know there is a need for my mother to write me a letter." AP 296.

On cross-examination, the petitioner stated that the government had not sent any further notices of birth control classes because the authorities knew she had left the country. However, she was unable to provide a clear explanation of how the Chinese government would know this. AP 297. Although the petitioner was unsure of what information was contained in the family register she had submitted as evidence, she did know that both her younger brothers were registered in the household registration booklet. AP 300-302.

As for the two notices from the government, the petitioner said that she knew about the classes before they were held, but that her parents had never been required to pay a bond for her failure to attend. AP 303-304. Finally, the petitioner admitted that she was unable to provide any proof of her attendance at the Teachers' College, allegedly because she was dismissed and no longer allowed to attend class. AP 305.

In assessing the petitioner's claim, the IJ considered a wide range of documents, which included the original identity documents in the name Zheng Jing, *see supra* at 6, AP 66, two I-589 forms (applications for asylum), and the 2000 Department of State Country Report. AP 492, 429, 366.

The petitioner also ultimately provided certain documents to support her identity as Wen Huei Zho and to support her version of events: a June 28, 1995, graduation

certificate from primary school for Wen-Hui Cao, AP 353 (exhibit 22); a copy of the September 20, 1998, graduation certificate from primary-middle school for the student Wen-Hui Cao (the original was later produced and marked Exhibit 31), AP 360 (exhibit 20); the November 10, 1998, notice and December 10, 1998, notice of scheduled birth control education class issued to Wen Hui Cao, AP 423, 421 (exhibit 16, 17); a copy of an August 21, 1994, notarial certificate, with cover missing, bearing the likeness of the petitioner and registering the marriage of Chen Qiaozhen (female, born September 17, 1971) and Chen Zhong (male, born September 13, 1968), AP 350 (exhibit 23); a July 11, 1993, receipt for a fine resulting from "excessive childbirth," listing only the name of the person paying the fine, Li-Hai Cao, with no information as to the individual to be punished, AP 357 (exhibit 21); the September 20, 1995 Chang Le city hospital record of the sterilization of Mei-qiao Chen, the petitioner's alleged mother, AP 427 (exhibit 15); a Green Card of Mei Zhen Lin ("Lin"), the petitioner's alleged aunt, AP 363 (exhibit 19); and a copy of untranslated pages of a household register, AP 312 (exhibit 33).

E. The Immigration Judge's Decision

The hearings concluded on February 26, 2003, with an oral decision. AP 64-79. The IJ denied the petition for asylum, withholding of removal, and relief under CAT.

The IJ explained:

> I do not believe that you have made a claim. I think that even if you had proven adequately the facts you alleged, you would not have made a claim for asylum in the United States. I believe it was legally without merit. I do not believe you have even proven the facts that you alleged. I do not believe that you have even proven that you left China because you couldn't be bothered to go to a birth control class. I do not believe that you have proven that your failure to go to such a class would target you for persecution in the future.

AP 309.

In the oral decision, the IJ found removability under INA § 212(a)(7)(A)(i)(I), based on the petitioner's presence in the United States without a valid visa, which was not challenged by the petitioner and which the court found to be established "by evidence that is clear, convincing, and unequivocal." AP 65.

The IJ went on to note that much of the evidence provided by the petitioner lacked "indicia of reliability," AP 66, either because the respondent never saw the document in China, or because the petitioner's mother had failed to provide any correspondence providing any kind of authentication. AP 66-67. Particularly concerning was the fact that even by the end of several hearings, it was unclear what the petitioner's true name was, as she had submitted purportedly official documents under three different names. AP 68-69.

The IJ also found both the petitioner and Lin, her one corroborating witness, to be not credible. The petitioner "was not a particularly persuasive witness. [She] became increasingly evasive on cross-examination despite being cautioned that it was important to focus on the questions. The respondent suddenly ceased understanding the interpreter on cross when she did not like the questions." AP 75. With respect to Lin, the IJ said, "Her testimony was extremely difficult. She appeared to be willing to agree to anything suggested to her." AP 69. In making her credibility determination, the IJ considered "not only [the petitioner's] demeanor, but also the rationale, the internal consistency, the inherent persuasiveness of her testimony, and the manner in which it melds together with other evidence." AP 77.

Although the lack of testimony, even in letter form, by the petitioner's mother left gaps in the evidence, the IJ found that "[e]ven if [the petitioner's] mother had been sterilized, that does not make a claim for respondent." AP 70. The petitioner needed to present her own, valid claim for asylum, and was unable to do so. For as the IJ noted, "[a]ttending a birth control class is not persecution." AP 73. The petitioner "does not at this time claim that she was threatened with any harm whatsoever, except that she had to go [to family planning classes] or she might be compelled." *Id.* The IJ went on to state that "[t]he respondent is equally unsuccessful in attempting to establish that there might be any future persecution against this backdrop." AP 75.

As a result of the petitioner's failure to prove a well-founded fear of persecution within the meaning of INA

§ 208, the IJ denied her application for asylum. By necessity, the petitioner's inability to meet the standard for asylum also meant that she failed to meet the stricter standard for withholding of removal. In addition, the IJ also found that the petitioner had failed to make a claim for withholding under CAT, as she had "introduced no particularized evidence whatsoever of torture and made no suggestion of it in her oral testimony." AP 78.

F. The Board of Immigration Appeals' Decision

On July 14, 2004, 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).[11] AP 2. This petition for review followed.

SUMMARY OF ARGUMENT

The petitioner raises three arguments against the denial of her asylum application: (1) the petitioner was denied a fair hearing in violation of her due process rights because the IJ was allegedly not a neutral fact-finder; (2) the IJ improperly concluded that the petitioner had not sufficiently established her identity, which undercut the factual basis for her claim; and (3) the IJ made no finding as to whether the petitioner had failed to establish a well-founded fear of persecution for "resisting" a coercive population control program.

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

First, the process was more than fair. As a threshold matter, even accepting the petitioner's facts, the petitioner's claim was inadequate as a matter of law, and thus the IJ was particularly permissive in the lengths she went to permit a full evidentiary hearing. In fact, the petitioner was not only permitted but encouraged to provide her own testimony, to submit all relevant documentation, and to offer the testimony of corroborating witnesses. Although the IJ was brusque at times, she nevertheless clearly explained the legal requirements of a successful claim to the petitioner and described other, potentially more viable alternatives as well. In fact, the IJ's willingness to overlook discrepancies between the two asylum applications submitted by the petitioner, which could have led to a finding of frivolousness and a lifetime bar from entry into the United States, illustrates the fundamental fairness with which the IJ approached the hearings.

Second, the IJ's suggestion that the petitioner failed to provide sufficient evidence of identity was hardly an irrational assessment of the evidence and, in addition, was not ultimately material to whether the petitioner had a viable claim as a matter of law. The petitioner's presentation included inconsistent statements, inherently improbable assertions, and documents of questionable authenticity. For example, the petitioner submitted a passport in one name, two notarial certificates in two other names, and a visa application in yet another name. The IJ also considered, among many other factors, the petitioner's evasiveness when asked difficult questions on the stand, her failure to provide reasonably available corroborating evidence, such as a letter from her mother detailing her

version of the events, despite various opportunities to do so, and the inconsistencies in the statements of her only corroborating witness, her "aunt."

Third, the IJ considered with great care all of the petitioner's claims of past and potential future persecution and rejected them as a matter of law, even accepting the petitioner's factual assertions as true. Further, the IJ's factual findings and credibility assessments made clear that the petitioner had not come close to establishing her factual claims, and those findings were hardly irrational.

ARGUMENT

I. THE IMMIGRATION JUDGE APPROPRIATELY DENIED THE PETITIONER'S APPLICATION FOR ASYLUM AND WITHHOLDING OF REMOVAL.

A. Factual Background

The relevant factual background is set forth 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 (or, as previously known, withholding of deportation).[12] *See* 8

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[12] Under current law, "removal" is the collective term for (continued...)

U.S.C. §§ 1158(a), 1231(b)(3) (2004); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995).[13] Although these types of relief are "'closely related and appear to overlap,'" *Carranza-Hernandez v. INS*, 12 F.3d 4, 7 (2d Cir. 1993) (quoting *Carvajal-Munoz v. INS*, 743 F.2d 562, 564 (7th Cir. 1984)), the standards for granting asylum and withholding of removal differ. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-432 (1987); *Osorio v. INS*, 18 F.3d 1017, 1021 (2d Cir. 1994). In addition to these grounds for relief, an additional ground is provided by Article 3 of CAT. *See* note 2 *supra*. Because the petitioner has challenged only the IJ's decision on the subject of persecution and nowhere claims she will be subject to torture if returned to China, she has waived any

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[12] (...continued)
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*. at § 1231(b)(3)(A) (2004), cases relating to "withholding of removal" are applicable precedent for this case involving "withholding of deportation."

[13] On May 11, 2005, the President signed into law the "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005," Pub. L. No. 109-13, 199 Stat. 231. Division B of the Act is referred to as the "REAL ID Act" ("RIDA"). Section 101(e) of RIDA amends § 242(b)(4)(D) of the INA, 8 U.S.C. § 1252(b)(4)(D), as discussed, *infra*. This amendment takes effect immediately.

CAT claim, and this Brief will not discuss the issue further. *See* note 3 *supra*.

1. Asylum

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

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

F.3d 307, 315 (2d Cir. 1999); 8 C.F.R. § 208.13(b)(1)(i) (2004).

In 1996, Congress amended the statutory definition of "refugee" to provide that "forced abortion or sterilization, or persecution for failure to undergo such a procedure or for other resistance to a coercive population control program" constitutes persecution on account of political opinion. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") § 601(a)(1), 110 Stat. 3009-689 (amending 8 U.S.C. § 101(a)(42)).

In addition, the BIA has held that an alien whose spouse has been subjected to coerced abortion or sterilization has established past persecution against himself. *In re C-Y-Z-*, 21 I. & N. Dec. 915, 918-919 (BIA 1997); *see also Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 92 (2d Cir. 2001). Thus, under the INA as amended by IIRIRA, an asylum applicant need not show that China's family planning policy was or will be selectively applied on the basis of a protected ground. The applicant must, however, still make a threshold showing that he has suffered past persecution or has a well-founded fear of future persecution. *See Chen v. INS*, 195 F.3d 198, 202-205 (4th Cir. 1999). *But see Shi Liang Lin v. U.S. Dep't of Justice*, Nos. 02-4611, 02-4629, 03-40837, -- F.3d --, mem. op. at 3-4 (2d Cir. July 29, 2005) (questioning basis for BIA's holding in *In re C-Y-Z-* that spouses of women covered by § 601 are *per se* eligible for asylum, and remanding for determination of such eligibility for boyfriends and fiancés); *Ai Feng Yuan v. U.S. Dep't of Justice*, Nos. 02-4632-AG, 02-4635-AG, -- F.3d --, mem. op. at 9, 11 (2d Cir. July 26, 2005) (refusing to extend the

per se eligibility for asylum to parents and in-laws of women covered by § 601, and questioning rationale for maintaining even presumption of spousal eligibility).

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 v. Slattery*, 55 F.3d at 737-738; 8 C.F.R. § 208.13(b)(2) (2004). A well-founded fear of persecution "consists of both a subjective and objective component." *Gomez v. INS*, 947 F.2d 660, 663 (2d Cir. 1991). Accordingly, the alien must actually fear persecution, and this fear must be reasonable. *See id.* at 663-664.

"An alien may satisfy the subjective prong by showing that events in the country to which he . . . will be deported have personally or directly affected him." *Id.* at 663. With respect to the objective component, the applicant must prove that a reasonable person in his circumstances would fear persecution if returned to his native country. *See* 8 C.F.R. § 208.13(b)(2) (2004); *see also Zhang v. Slattery*, 55 F.3d at 752 (noting that when seeking reversal of a BIA factual determination, the petitioner must show "'that the evidence he presented was so compelling that no reasonable factfinder could fail'" to agree with that evidence (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." *Wu Biao Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003); *see also Osorio*, 18 F.3d at 1027; 8 C.F.R. § 208.13(a)-(b) (2004). The applicant's testimony and evidence must be credible, specific, and detailed in order to establish eligibility for asylum. *See* 8 C.F.R. § 208.13(a) (2004); *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999); *Melendez v. U.S. Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991) (stating that applicant must provide "credible, persuasive and . . . specific facts" (internal quotation marks omitted)); *In re Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647-648 (9th Cir. 1997) (applicant must provide testimony that is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account").

Because the applicant bears the burden of proof, he must provide supporting evidence, unless it cannot be reasonably obtained. *Zhang v. INS*, 386 F.3d 66, 71 (2d Cir. 2004) ("[W]here the circumstances indicate that an applicant has, or with reasonable effort could gain, access to relevant corroborating evidence, his failure to produce such evidence in support of his claim is a factor that may be weighed in considering whether he has satisfied the burden of proof."); *see also Diallo v. INS*, 232 F.3d 279, 285-286 (2d Cir. 2000); *In re S-M-J-*, 21 I. & N. Dec. 722, 723-726 (BIA 1997). Section 101(e) of RIDA amends § 242(b)(4)(D) of the INA, 8 U.S.C. § 1252(b)(4)(D), by providing that a reviewing court may not reverse an agency finding with respect to the availability of corroborating evidence unless the court determines that a reasonable factfinder would be compelled to conclude that such corroborating evidence is unavailable. *See also*

RIDA § 101(h)(3) (§ 101(e) takes effect immediately and applies "to all cases in which the final administrative removal order is or was issued before, on, or after" the date of enactment).

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 Secretary of Homeland Security's or the Attorney General's discretion. *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004); *Zhang v. Slattery*, 55 F.3d at 738.

2. Withholding of Removal

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

3. Standards of Review

a. Due Process Analysis

In an asylum proceeding, an alien has certain procedural and substantive rights, grounded in statute and regulations, including the right to present evidence, cross-examine witnesses, inspect and object to evidence presented against the alien, and the right to counsel. *See Augustin v. Sava*, 735 F.2d 32, 36 (2d Cir. 1984); *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1998). Asylum, as a discretionary form of relief for which there is no statutory entitlement, cannot "give rise to a due process claim," whereas due process rights under the U.S. Constitution may attach to withholding of deportation, which is mandated by statute in certain circumstances. *Ahmetovic v. INS*, 62 F.3d 48, 53 (2d Cir. 1995). *But cf. Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 1994) (allowing due process claim based on ineffective assistance of counsel, where counsel failed to file for discretionary relief under INA § 212(c)). Because the petitioner seeks relief from her conceded deportability in the forms of both discretionary asylum and mandatory withholding of removal, it appears unnecessary to address to what extent the two forms of relief may deserve differing levels of constitutionally mandated procedural safeguards. At least as to withholding of removal, constitutionally mandated process is due.

Further, to justify remand for any alleged constitutional violation of due process, the petitioner must also demonstrate prejudice resulting from the violation. *See Rabiu,* 41 F.3d at 882 (2d. Cir. 1994) (ineffective

assistance of counsel claim).[16] This standard has been adopted in similar cases by the Ninth Circuit, as well. *See, e.g.*, *Jacinto v. INS*, 208 F.3d 725, 727-28 (9th Cir. 2000); *Campos-Sanchez*, 164 F.3d at 450. To demonstrate prejudice, this Court has held that an appellant must establish that there was a reasonable probability that the alleged error "put the whole case in such a different light as to undermine confidence in the verdict." *United States v. Coppa*, 267 F.3d 132, 139 (2d Cir. 2001) (*Brady* claim); *see also United States v. Copeland*, 376 F.3d 61, 72 (2d Cir. 2004) (violation of due process rights through

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[16] The petitioner argues that the IJ violated her due process rights protected by the 5th Amendment of the U.S. Constitution, not that the IJ failed to comply with regulatory requirements. Pet. Br. 10-11. When the INS plainly violates an express regulatory requirement implicating a core constitutional right, a petitioner need not show prejudice as a result of the blatant violation. *See Montilla v. INS*, 926 F.2d 162, 166 (2d Cir. 1991) (where INS has failed to adhere to specific regulations in case contesting deportability and the regulation protected a fundamental constitutional right, the right to counsel, there is no need to establish prejudice). *Cf. Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. amended opinion 1994) (finding core rights not implicated). *Montilla* is inapplicable here, because the IJ complied with the regulatory requirements of a full and fair hearing. None of the conduct of which the petitioner complains, such as the IJ's tone or demeanor at isolated times in the proceeding, comes close to implicating core due process concerns. *See Waldron*, *supra*, at 518 (requiring a showing of prejudice unless regulation violated directly addresses fundamental rights). Moreover, by not raising the regulatory argument in her Brief, the petitioner waived the argument. *Norton*, 145 F.3d at 117.

incorrect advice as to right to § 212(c) relief requires showing of prejudice).[17]

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[17] The petitioner cites *United States v. Copeland*, 369 F. Supp. 2d 275 (E.D.N.Y. 2005), as an example of the application of the reasonable probability standard. There the court attempted to quantify the standard, suggesting it required a showing of 20% probability that the results would differ. The *Copeland* effort at quantifying the legal standard, an approach not adopted by this Court, is not particularly meaningful outside the unusual procedural circumstances involved in § 212(c) cases. Unlike in *Copeland*, where the court was trying to assess whether an IJ, who held no hearing and heard no testimony, might have reached a particular result, the IJ here actually conducted a full hearing, took testimony, considered the documentary record, and carefully addressed the applicable law. It is in this more typical context, where a hearing actually took place, that the courts have traditionally employed the reasonable probability standard to determine whether the change of one particular variable might have altered the outcome of a hearing that was actually completed. *See, e.g.*, *United States v. Dominguez Benitez*, 124 S. Ct. 2333, 2339 (2004) (Fed. R. Crim. P. 11); *Kyles v. Whitley*, 514 U.S. 419, 433-435 (1995) (failure to disclose potentially exculpatory evidence); *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (ineffective assistance of counsel). In such circumstances, including the present one, the courts therefore have a more detailed record for assessing the impact of the missing variable. For the reasons set forth in the text, *infra*, it is fair to say that there is very little likelihood and no real probability that the result of this proceeding would have been different, particularly where the petitioner has not identified any specific piece of evidence that she was precluded from introducing as a result of the IJ's supposed bias. The petitioner thus cannot (continued...)

b. The Substantial Evidence Test

This Court reviews the IJ's determination of whether an applicant for asylum or withholding of removal has established a claim under the deferential "substantial evidence" test, that is, if there is reasonable, substantive and probative evidence in the record to support the IJ's decision, the decision must be upheld. *Zhang v. INS*, 386 F.3d at 73; *Wu Biao Chen*, 344 F.3d at 275; *see Secaida-Rosales v. INS*, 331 F.3d 297, 306-07 (2d Cir. 2003); *Melgar de Torres*, 191 F.3d at 312-13 (findings regarding both asylum eligibility and withholding of removal must be upheld if supported by substantial evidence).

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

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[17] (...continued)
approach a showing of prejudice.

would *have to conclude* that the requisite fear of persecution existed." *Elias-Zacarias*, 502 U.S. at 481 (emphasis added). 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.

When assessing specific factual findings underlying the IJ's determination[18] that an alien has failed to satisfy her 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); *see also Zhang v. INS*, 386 F.3d at 73. This Court "will reverse the immigration court's ruling only if 'no reasonable fact-finder could have failed to find . . . past persecution or fear of future persecution." *Wu Biao Chen*, 344 F.3d at 275 (omission in original) (quoting *Diallo*, 232 F.3d at 287).

The scope of this Court's review under that test is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 71; *Wu Biao Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313; *see also Zhang v. INS*, 386 F.3d at 74 ("Precisely because a reviewing court cannot glean from a hearing

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[18] 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), this Court properly reviews an IJ's decision where, as here, the BIA adopts that decision. *See* 8 C.F.R. § 1003.1(a)(7) (2004); *Secaida-Rosales*, 331 F.3d at 305; *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994). Accordingly, this Brief treats the IJ's decision as the relevant administrative decision.

record the insights necessary to duplicate the fact-finder's assessment of credibility what we 'begin' is not a *de novo* review of credibility but an 'exceedingly narrow inquiry' . . . to ensure that the IJ's conclusions were not reached arbitrarily or capriciously.") (citations omitted).

This Court gives "particular deference to the credibility determinations of the IJ." *Wu Biao Chen*, 344 F.3d at 275 (quoting *Montero v. INS*, 124 F.3d 381, 386 (2d Cir. 1997)); *see also Qiu v. Ashcroft*, 329 F.3d 140, 146 n.2 (2d Cir. 2003) (the Court "generally defer[s] to an IJ's factual findings regarding witness credibility"). This Court has recognized that "the law must entrust some official with responsibility to hear an applicant's asylum claim, and the IJ has the unique advantage among all officials involved in the process of having heard directly from the applicant." *Zhang v. INS*, 386 F.3d at 73. Because the IJ is in the "best position to discern, often at a glance, whether a question that may appear poorly worded on a printed page was, in fact, confusing or well understood by those who heard it," this Court's review of the fact-finder's determination is exceedingly narrow. *Zhang v. INS*, 386 F.3d at 74; *see also id.* ("'[A] witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression.'") (quoting *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946) (citation omitted)); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1395 (9th Cir. 1985) (noting that 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) ("[W]e 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. Review of Conclusions of Law

On direct review, when the question presented is the IJ's application of legal principles to undisputed facts, rather than factual questions or mixed questions of law and facts, the Court's review is *de novo*. *Diallo*, 232 F.3d at 287 (citing *Singh v. Ilchert*, 63 F.3d 1501, 1506 (9th Cir.1995)).

C. Discussion

1. The Petitioner Received a Full and Fair Hearing and All the Process She Was Due.

Far from violating the petitioner's due process rights, the IJ afforded the petitioner process that verged on overly generous. The petitioner has now remained in this country for over five years, living for much of the time with alleged relatives in New York City, despite the fact that her own counsel admitted as long ago as 2000 that she lacked a viable claim to remain in this country. AP 153, 195-197. The gist of the petitioner's argument is that the IJ abandoned her role as neutral fact-finder in denying the asylum application and thereby denied the petitioner due process rights guaranteed by the U.S. Constitution. The record does not support this claim.

First, the petitioner now argues that the IJ pre-judged the case by stating, before testimony was taken, that the petitioner had no basis for her claim. Pet. Br. 6. Yet the petitioner's counsel at the time candidly agreed with the IJ, who was simply outlining the state of the law in light of the proffered facts.[19] *See supra* at 11-12. Far from

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[19] In her analysis of the merits of the petitioner's claims, the IJ performed a function similar to that of a district court judge considering a motion under Fed. R. Civ. P. 12(b)(6). As here, the district court judge's decision that a plaintiff has failed to state a claim is not a forbidden "pre-judging" of the case, but rather an assessment that the plaintiff could not (continued...)

seeking to prejudice the petitioner, the IJ was plainly attempting to *protect* the petitioner from forfeiting a future opportunity to enter this country. The IJ explained the potential benefits of voluntary departure from the United States, which would allow the petitioner the opportunity to return in the future with a clean immigration record and a potentially more meritorious claim. AP 160-161. The IJ provided an adjournment to allow the petitioner to discuss these options with her aunt and raised the possibility again in a later hearing. AP 164, 197.

Second, the petitioner criticizes the IJ's tone and demeanor, claiming the IJ was judgmental, hostile and overbearing during questioning of the petitioner and her aunt. Pet. Br. at 7-8, 10. While the record suggests that the IJ was persistent in her attempts to clarify questions relating to the petitioner's testimony and identity, the IJ's handling of the proceeding was reasonable. Much of the IJ's most pointed questioning resulted from her belief that the petitioner and her aunt were being untruthful, hardly an unreasonable view of the proceedings for a host of reasons, including the changing stories told by the petitioner, the confused testimony of the aunt, the inclination of both the petitioner and the aunt to communicate with each other in Chinese while the other was testifying, AP 172, 244, and their less-than-

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[19] (...continued)
"conceivably adduce facts that support[] the cause of action brought in the complaint." *MacDonald v. Safir*, 206 F.3d 183, 190 (2d Cir. 2000).

cooperative attitude, which the IJ commented on several times. AP 206, 225, 237.

Far from limiting the petitioner, the IJ plainly intended to establish a full record, with as much support for the petitioner's claims as possible. For that reason, she allowed another adjournment to provide the petitioner with the opportunity to seek out other Chinese natives in New York who knew her while in China to verify her identity and to retrieve other identity documents. AP 212-214. Similarly, when the petitioner's aunt stated that she was feeling unwell, the IJ offered several times to call a nurse to attend her. AP 225-226. After Lin declined to testify further, the IJ took a short recess to allow the petitioner's counsel to speak with Lin, and the IJ herself encouraged the witness to continue testifying on behalf of her alleged niece. AP 231-232.

The IJ also recognized and accommodated the requirements of "fundamental fairness" in allowing the petitioner to review documents submitted late by the Government into evidence and to provide an adequate response. AP 198. Perhaps most telling of the IJ's attitude, the IJ declined to consider the first written application for asylum that the petitioner had submitted, in which the petitioner claimed to be in imminent danger of sterilization. AP 72 ("[B]ecause she is a minor and because she was in custody at the time of the presentation of that document and therefore might have been subjected to undue influences beyond her control, I do not believe it is appropriate to find the frivolous bar in this case and to permit her to proceed as if [exhibit] 12 does not exist even though it is in the hearing record.").

Although the petitioner's Brief argues that the IJ "put her own cultural biases into play" when she stated that it was unusual for a Chinese family to send their minor child halfway around the world unaccompanied, Pet. Br. 7, it seems reasonable for the IJ to have wondered whether the petitioner was being fully honest regarding the details of her attempted entry into this country, with whom she was traveling, with whom she was to stay, and whether her real motive for coming to the United States was more driven by potential opportunities here than any well-founded fear of her home government.

That the petitioner's complaints about the IJ's management of the hearings do not come close to a due process violation is supported by the very cases cited in the petitioner's Brief. In each of these cases, the IJ failed to admit or fully to consider evidence or testimony that might have affected the outcome of the case. *See, e.g.*, *Reyes-Melendez v. INS*, 342 F.3d 1001 (9th Cir. 2003) (IJ cut off alien's testimony regarding his background and other factors relevant to "extreme hardship" in order to focus on his adulterous relationship with a co-worker in the United States, and refused to even consider the impact of his removal on his U.S. citizen son); *Kerciku v. INS*, 314 F.3d 913 (7th Cir. 2003) (IJ refused to allow alien to complete his testimony or to present corroborating witnesses); *Colmenar v. INS*, 210 F.3d 967 (9th Cir. 2000) (same); *Podio v. INS*, 153 F.3d 506, 507 (7th Cir. 1998) (due process violation where petitioner "was not allowed to complete his own testimony or to present witnesses to corroborate his testimony"). Each of these cases involved an IJ who refused to allow the alien to present his testimony, to provide witnesses, and to submit

documentary evidence, substantially compromising his ability to make otherwise meritorious claims.

In sharp contrast, the IJ here tried to help the petitioner understand the legal requirements that the petitioner needed to meet and repeatedly sought to strengthen the record, fill in gaps, and resolve inconsistencies through additional documentation and testimony. *See Michel v. INS*, 206 F.3d 253, 259 (2d Cir. 2000) (finding claim of due process violation meritless where the IJ "went well out of his way to ensure that Michel knew what was happening at all times during the proceeding and never prevented Michel from presenting arguments or evidence in his favor." This Court went on to "note additionally that the IJ adjourned the hearing several times before making his decision to ensure that he had complete and accurate information."); *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) ("One of the components of a full and fair hearing is that the IJ must adequately explain the hearing procedures to the alien, including what he must prove to establish his basis for relief.").

Finally, even if the IJ's conduct were ultimately deemed to rise to the level warranting rebuke, the petitioner cannot establish prejudice here. Even taking the underlying facts alleged by the petitioner as true, there is not a viable basis for relief. *See United States v. Scott*, 394 F.3d 111, 117 (2d Cir. 2005) (ineffective assistance of counsel claim requires prejudice for relief); *Rabiu,* 41 F.3d at 882 (2d. Cir. 1994) (same); *Enciso-Cardozo v. INS*, 504 F.2d 1252, 1254 (2d Cir. 1974) (refusal to allow intervention of citizen infant in mother's deportation

proceeding not denial of due process given lack of prejudice).

2. The IJ's Factual Findings Regarding the Petitioner's Identity Were Not Irrational and, in Any Event, Would Not Alter the Denial of Asylum.

The IJ held that there was substantial question as to the petitioner's identity. AP 69. But nothing in the record suggests the IJ acted irrationally in her findings on identity or that these findings ultimately were necessary to deny the petitioner's application. The petitioner's Brief argues that the IJ erred in not immediately crediting various documents, including her alleged identity card, school certificates, fine notices and notarial birth certificate. Pet. Br. 13. The IJ's assessment of the petitioner's identity, however, cannot be divorced from other indicia of deceit in the record. *See, e.g.*, *Qiu*, 329 F.3d at 152 n.6 ("[I]ncredibility arises from 'inconsistent statements, contradictory evidence, and inherently improbable testimony.'" (quoting *Diallo*, 232 F.3d at 287-288)).

First, the petitioner attempted to enter the country using a number of other identity documents that sought to establish her as an individual named Zheng Jing, not Wen Huei Zho. The documents on which the petitioner later sought to rely[20] were obtained only after a significant

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[20] As to the notarial birth certificate, the petitioner's Brief contends that the judge acted at odds with Department of State (continued...)

passage of time, with little effort to provide letters or other materials to give context or to authenticate the submissions.[21]

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[20] (...continued)
directives in the Foreign Affairs Manual, which supports the sufficiency of such notarial certificates. Yet that same manual includes several caveats regarding the evaluation of the weight of these documents. For example, the Manual states that "[f]or most notarial certificates of birth or adoption, the primary underlying documentation is the household register (HR) which appears to be extremely susceptible to fraud and manipulation, especially if the holder of the HR lives outside of a major metropolitan area." AP 22. Although the petitioner submitted photocopies of several pages of a household register, she did not provide a translation. AP 69. She also comes from a small village. AP 437. The Manual further cautions that while notarial birth certificates are "generally reliable," they are "best used in conjunction with other evidence." AP 24. Much of the other documentary evidence provided by the petitioner contradicted the notarial birth certificate by providing other names. *See* exhibits 23-28.

[21] Although the petitioner cites *Alvarado-Carillo v. INS*, 251 F.3d 45 (2d Cir. 2001), to argue that the IJ should have relied on the documents provided, that case is inapposite. There, the "BIA did not identify any particular document or type of document it believed to be missing from the record (as it did in *Diallo*), much less explain why it would have been reasonable to expect the provision of such materials under its own standards." *Id.* at 54 (internal marks and citation omitted). Here, on the other hand, the IJ clearly indicated to the petitioner the types of documents necessary to corroborate her claims, including her resident identity card, AP 204-205, and provided adjournments to allow her time to collect those (continued...)

Second, the petitioner initially filed an application of asylum under oath to which she subsequently made significant changes, rendering the initial submission materially false.

Third, the testimony of the petitioner and the supporting witness raised considerable questions as to the believability of the petitioner's claims. Inconsistent or implausible testimony included: the petitioner's explanation that she, a young girl, did not know the persons with whom she was traveling, even though they allegedly provided her entry documents, AP 268; the petitioner's inconsistent explanations of why she decided to leave China, AP 287-288; her conflicting testimony as to whether or not she knew about the birth control classes before they occurred, AP 74; her ambiguous explanations of persons who she claimed could identify her in the United States, AP 208-209, 211-213; the suspicious efforts of the petitioner and her "aunt" to converse in Chinese while the other was testifying, AP 172, 244; that the petitioner became "increasingly evasive on cross-examination," AP 75; and that Lin, her "aunt," "appeared . . . willing to agree to anything suggested to her," AP 69.

In short, the IJ's assessment was supported by more than substantial evidence. Moreover, as the IJ observed, even if the petitioner's factual claims had been accepted as true, the petitioner's claim was appropriately denied as a matter of law.

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[21] (...continued)
documents.

3. The Petitioner Misconstrues the IJ'S Opinion Because the IJ Made Sufficient Factual Findings of No Persecution To Deny the Claim.

The petitioner claims that the IJ failed to consider whether the petitioner had suffered past persecution or had a well-founded fear of future persecution arising from "resistance" to a coercive population control program under the third prong of § 601 of IIRIRA, Pet. Br. 14-15, which would be a basis for granting asylum. The petitioner seeks to treat any alleged government response relating to her failure to attend family planning classes as "persecution for resistance to a coercive population control program."

In assessing the petitioner's claim, the IJ did not need to reach either the issue of whether failure to attend a birth control class constituted "resistance" to a coercive population control program[22] or whether any requirement

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[22] This Court recently joined several other circuits in requiring that "other resistance" be clear, consistent, and result in significant hardship to the petitioner. *See Ai Feng Yuan*, Nos. 02-4632, 02-4635, mem. op. at 12-13 ("brief" detention of mother, in which she was not mistreated, dismissal from work of father, and ransacking of their house due to disagreements between daughters-in-law and birth control officials did not constitute "other resistance"). In *Cao v. Attorney General of the United States*, 407 F.3d 146 (3d Cir. 2005), for example, the petitioner, a pediatrician in a Chinese hospital, claimed to have discovered that other doctors were (continued...)

to attend family planning classes would fall within the definition of "a coercive population control program" under the statute, although as to the latter issue the IJ plainly suggested that it would not.[23] Instead, the IJ made

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[22] (...continued)
committing infanticide in order to comply with the one-child policy. *Id.* at 149. Cao took steps to publicize these facts, demonstrating "resistence" and, as a result, was detained for three months, interrogated, and beaten. *Id.* The petitioner was also able to produce specific documentary evidence that the events took place. *Id.* at 150-151.

Similarly, the petitioner in *Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004), was vocal about her opposition to China's birth control program, demonstrating significant resistance; was forced to submit to a lengthy and abusive "medical examination" to determine whether she was in fact pregnant; and was told she was subject to spot examinations in the future and would be forced to abort any pregnancy. *Id.* at 1160; *see also Qiu*, 329 F.3d at 144 (persecution found where, among other incidents, the petitioner's boss confirmed that Qiu's spouse's failure to report for sterilization was the cause of his dismissal, and stated that she would have to be sterilized in order for him to reclaim his position); *Li v. Attorney General of the United States*, 400 F.3d 157, 167, 169 (3d Cir. 2005) (finding economic persecution where petitioner was fired from a government job, effectively blacklisted from future legitimate employment, and economic harm was "deliberately imposed as a form of punishment because of his violation of China's population control policy").

[23] The IJ discusses at length how attending birth control classes are routinely required in this country, and is a (continued...)

clear that, as a threshold matter, the facts regarding the Chinese government's response to the petitioner's failure to attend classes on family planning simply did not constitute "persecution." AP 73. In other words, the IJ did not deny the claim because the petitioner had been persecuted on a non-covered ground, but rather because no persecution had taken place. The IJ found no persecution because the petitioner was "simply required to go to class and listen to whatever they had to say about the family planning policies." AP 73. The IJ explained that there is no claim that "she was threatened with any harm whatsoever, except that she had to go or might be compelled." *Id.* The IJ further suggested that there was no established causal link between her failure to go to family planning courses and her allegations of expulsion from the teachers' college. *Id.* The IJ further suggested that even if there were a causal link, such a government response would have been entirely reasonable, not persecution. AP 74 ("Why a teacher's college, where they were going to put the respondent in a position of responsibility as to other children, might think it very appropriate for her to attend these classes is too obvious to even need mention in this courtroom.").

The IJ went on to discuss how the petitioner was equally unsuccessful in attempting to establish any future "persecution" under the facts. Although the petitioner

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[23] (...continued)
"perfectly reasonable thing for a country that has an excess population" to require. AP 73. "There is nothing in the record to suggest that such a class would be improper." AP 74.

testified that she might be labeled as someone who had not followed the plan or that neighbors would consider her a bad girl, AP 74, the IJ found such concerns hardly sufficient to establish a well-founded fear of future persecution under established law. *Id.* There is simply no basis in the record to disturb the IJ's findings.

In fact, this Court has held that the requirement to attend birth control classes does not constitute persecution. In *Liao*, for example, the petitioner argued that he was threatened with detention in the form of coercive birth control classes. 293 F.3d at 70-71. The Court clearly stated, however, that "[w]ith regard to the threat of detention, the threat itself -- an ambiguously worded order to attend a birth control study class -- is not past persecution." *Id.* at 70. The court also drew attention to the importance of examining the Department of State report findings relating to that petitioner's home province, rather than looking at generalized statements. *Id.* at 71. The same holds true in the present case; the Department of State Profile on China states that "Fujian province's lax enforcement of family planning rules has been criticized in the official press." AP 468. Further, "[o]n visits to Fujian province, Consulate General officials found that strong persuasion through public and other pressure was used, but they did not find any cases of physical force actually employed in connection with abortion or sterilization." AP 473.

While such background information does not imply that the petitioner's claims here are necessarily false, "a stronger showing of individual targeting will be necessary where the underlying basis for the applicant's fear is

membership in a diffuse class against whom actual persecution is haphazard and rare." *Yong Hao Chen v. INS*, 195 F.3d 198, 204 (4th Cir. 1999). Thus, as a member of a large and diffuse class, *i.e.*, women in China who are subject to the requirements of the one-child policy, the petitioner "must show that [s]he has been individually targeted for coercive enforcement of the 'one child' program or that [s]he belongs to some subgroup, such as those residing in a particular province or region, against whom coercive enforcement of the 'one child' program remains systematic." *Id.* Here, the petitioner failed to demonstrate that she was in any way singled out for her failure to comply with a coercive birth control program, much less that she was persecuted for such resistance.[24] Thus, the IJ's determination that the petitioner failed to state a claim under IIRIRA § 601 is supported by substantial evidence.

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[24] As this Court made clear in *Ai Feng Yuan*, Nos. 02-4632, 02-4635, mem. op. at 11, eligibility for asylum status based on § 601 does not extend from children to parents or, presumably, vice versa. Thus, any persecution that the petitioner's mother encountered as a result of China's one-child policy provides no grounds for the petitioner's own asylum claim.

CONCLUSION

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

Dated: August 5, 2005

Respectfully submitted,

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,694 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. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure,

refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. § 1158(a)(1), (b)(1) (as amended by RIDA § 101(a)(3) with effective date May 11, 2005). 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

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney

General under this section if the Secretary of Homeland Security or 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) (as amended by RIDA § 101(e) with effective date May 11, 2005). 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.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 208(b)(1)(B), 240(c)(4)(B), or 241(b)(3)(C), unless the court finds, pursuant to section 242(b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

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.

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

(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.

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