File: (b) (6) Date: AUG 08 2013

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gary J. Yerman, Esquire

APPLICATION: Convention Against Torture

This matter was last before us on December 12, 2006, when we vacated the portion of our June 8, 2004, decision adopting and affirming the Immigration Judge's March 21, 2003, decision denying the respondent's application for protection under the Convention Against Torture ("CAT") and remanded the record for further proceedings.[1] *See* 8 C.F.R. §§ 1208.16(c), 1208.18. On remand, the Immigration Judge denied the respondent's application for protection under the CAT. The respondent, a native and citizen of China, appeals the decision of the Immigration Judge dated February 6, 2012. The Department of Homeland Security did not file a brief in response. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). The respondent's application for relief was filed before May 11, 2005, and thus is not subject to the statutory amendments made by the REAL ID Act of 2005 (Exhs. 2, R2). *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

This matter has a lengthy procedural history which has been discussed in the Immigration Judge's February 6, 2012, decision. The pertinent facts are that the Immigration Judge, in her February 6, 2012, decision declined to revisit the frivolous finding previously made by the Immigration Judge, in his March 21, 2003, decision regarding the respondent's withdrawn applications for asylum and withholding of removal (I.J. Dec. dated Feb. 6, 2012, at 7-8). In our June 8, 2004, decision, we had adopted and affirmed the Immigration Judge's March 21, 2003, decision, and following the (b) (6) decision from the United States Court of Appeals for the (b) (6) we, in our December 12, 2006, decision, had only vacated our decision regarding the respondent's application for CAT and remanded the matter for further proceedings (BIA Dec. dated Dec. 12, 2007 and June 8, 2004).

[1] The respondent's husband (b) (6) is in deportation proceedings and has filed a separate application for protection under the CAT (Exhs. 2A, R3). The respondents have filed a joint appeal of the Immigration Judge's February 6, 2012, decision. We have today issued a separate decision as it pertains to (b) (6)

On appeal, the respondent challenges the Immigration Judge's February 6, 2012, decision not to revisit the frivolous finding and raise general jurisdictional issues (Respondents' Br. at 6-9).[2] The respondent argues that since she withdrew her asylum application, the Immigration Judge did not make a final determination on the merits of her asylum application, and the Immigration Judge's frivolous finding was improper (Respondents' Br. at 9). Further, the Board did not have jurisdiction to affirm the Immigration Judge's frivolous finding and the (b) (6) did not address the frivolous finding because there was no final administrative order on the respondent's asylum application for the (b) (6) to consider (Respondents' Br. at 9).

We are not persuaded by the respondent's arguments that the Immigration Judge's frivolous finding was improper and not subject to appellate review. In *Matter of X-M-C-*, 25 I&N Dec. 322 (BIA 2010), we concluded that a frivolous determination under section 208(d)(6) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1158(d)(6), could be made in the absence of a final decision on the merits of the asylum application, and that a withdrawal of the asylum application after the required warnings and safeguards have been provided did not preclude the making of such a determination. In *Mei Juan Zheng v. Holder*, 672 F.3d 178 (2d Cir. 2012), the Second Circuit upheld our interpretation. Thus, the Immigration Judge's frivolous finding was proper despite the respondent's withdrawn application and the Board, on appellate review, had jurisdiction to affirm the Immigration Judge's frivolous finding. Further, we are not persuaded by the respondent's arguments that the Second Circuit did not address the frivolous finding because there had been no final administrative order on her asylum application. The Second Circuit addressed this issue in *Mei Juan Zheng v. Holder*, *supra*, at 185, and upheld our interpretation that the term "final determination" in section 208(d)(6) of the Act did not require a "final determination" on the merits of the frivolous asylum application, but encompassed any final order determining that an asylum application is frivolous. *See Matter of X-M-C*, *supra*, at 325. In light of the Second Circuit's precedent decision, the fact that the (b) (6) did not address the frivolous finding in the instant matter cannot be interpreted in the way the respondent has proposed on appeal (Respondents' Br. at 9; Exh. R25). Thus, the respondent has not presented convincing arguments on appeal and we discern no reason to disturb the Immigration Judge's February 6, 2012, decision not to revisit the frivolous finding.[3]

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[2] The respondent does not address the Immigration Judge's analysis regarding her husband's eligibility for adjustment of status (I.J. Dec. dated Feb. 6, 2012, at 7-8). We deem the issue to be waived. *See Zhang v. Gonzales*, 426 F.3d 540, 541 n.1, 545 n.7 (2d Cir. 2005); *see also Matter of J-Y-C-*, 24 I&N Dec. 260, 261 n.1 (BIA 2007); *Matter of Edwards*, 20 I&N Dec. 191, 196-97 n.4 (BIA 1990).

[3] We further note that the respondent has not claimed on appeal that the Immigration Judge's frivolous findings were clearly erroneous. The record reflects that the respondent voluntarily withdrew her applications for asylum and withholding after admitting to filing false applications and sought only to apply for protection under the CAT (*see, e.g.*, Hr'g Tr. dated Aug. 15, 2000, at 139-43; Respondents' Br. at 7-9).

Turning to the respondent's application for protection under the CAT, we affirm the Immigration Judge's determination that the respondent did not meet her burden of proof (I.J. Dec. dated Feb. 6, 2012, at 13-14). On appeal, the respondent claims that she and/or her husband will be forcibly sterilized upon return to China for violating the country's family planning policy (Respondents' Br. at 20-21).[4] The Immigration Judge found that upon the respondent's return to China, she did not face a clear probability ("more likely than not") of being tortured under China's family planning policies. *See* 8 C.F.R. §§ 1208.16(c), 1208.18(a)(1); *Lecaj v. Holder*, 616 F.3d 111, 119 (2d Cir. 2010); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 217 (BIA 2007); *Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (A.G. 2006). The Immigration Judge's factual finding is not "clearly erroneous." *See* 8 C.F.R. § 1003.1(d)(3)(i); *Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012). Further, upon our de novo review, the Immigration Judge properly determined that respondent's credible testimony and documentary evidence did not satisfy her burden to establish a clear probability that she would be tortured by or "at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" upon removal to China (I.J. Dec. dated Feb. 6, 2012, at 13). *See* 8 C.F.R. § 1208.18(a).

Despite the respondent's assertions on appeal, the record reflects that the Immigration Judge considered her individualized evidence and background country conditions materials (I.J. Dec. dated Feb. 6, 2012, at 10-13). *See Shao v. Mukasey*, 546 F.3d 138, 169 (2d Cir. 2008) (recognizing the adjudicator need not expressly parse or refute on the record each individual argument or piece of evidence offered by the petitioner); *Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 341-42 (2d Cir. 2006) (holding that an Immigration Judge need not enumerate and evaluate on the record each piece of evidence, item by item).

The Immigration Judge properly accorded limited weight to documents purporting to show the family planning policy in Fujian Province as they were unauthenticated and contradicted the State Department country reports (I.J. Dec. dated Feb. 6, 2012, at 10-11; Exhs. R17, R23). The Immigration Judge's reliance on the 2010 State Department country report and the State Department's May 2007 *Profile of Asylum Claims and Country Conditions* ("*2007 Profile*") is not clearly erroneous (I.J. Dec. dated Feb. 6, 2012, at 10-13; Exh. R17; Respondent's Br. at 12-15, 17).[5] *See Chen v. U.S. Dep't of Justice, supra*, at 341-42 (finding the State Department is usually the best available source of information on country conditions, thus the Immigration Judge's reliance on the State Department country report for the Fujian Province of China was not in error). While we have considered the respondent's assertions on appeal, we find the Immigration Judge's findings based on the 2010 State Department country report and *2007 Profile* are not clearly erroneous as her interpretations are permissible views of the evidence (I.J. Dec. dated Feb. 6, 2012, at 11-12; Respondents' Br.

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[4] The respondent has not challenged the Immigration Judge's analysis regarding her eligibility for protection under the CAT based on her violation of the exit laws of China (I.J. Dec. dated Feb. 6, 2012, at 13-14). We deem the issue to be waived. *See Zhang v. Gonzales, supra*, at 541 n.1, 545 n.7; *see also Matter of J-Y-C-, supra*, at 261 n.1; *Matter of Edwards, supra*, at 196-97 n.4.

[5] The Immigration Judge properly took administrative notice of the 2010 State Department country report (I.J. Dec. dated Feb. 6, 2012, at 11 n.8). *See* 8 C.F.R. § 1003.1(d)(3)(iv).

at 12-15, 17). *See Siewe v. Gonzales*, 480 F.3d 160, 167 (2d Cir. 2007); *Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011).

The Immigration Judge properly questioned the indicia of reliability of the affidavits from individuals purportedly sterilized in China for having children born overseas and accorded them limited weight in light of the respondent's testimony that she did not personally know these individuals and the individuals themselves were not subject to cross-examination (I.J. Dec. dated Feb. 6, 2012, at 12; Exh. R23; Hr'g Tr. dated Dec. 5, 2011, at 182-84, 191; Respondents' Br. at 16-17). *See Chen v. U.S. Dep't of Justice*, *supra*, at 342 (finding the weight afforded to the applicant's evidence in immigration proceedings lies largely within the discretion of the agency). The Immigration Judge also properly accorded limited weight to the stipulated testimony and documents from the respondent's witness as she was not similarly situated to the respondent (I.J. Dec. dated Feb. 6, 2012, at 12; Exh. R24 at Tab D; Hr'g Tr. dated Dec. 5, 2011, at 181-82, 190-91). The witness had been forcibly sterilized after having two children born in China (Exh. R24 at Tab D; Hr'g Tr. dated Dec. 5, 2011, at 181-82, 190-91). *See Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 215-16 (BIA 2010) (giving diminished weight to letters from friends and relatives where they were written by interested witnesses not subject to cross-examination), *rev'd in part on other grounds*, *Huang v. Holder*, *supra*.[6]

While there undoubtedly have been instances of forced sterilization imposed on the parents of children conceived and born in China, we agree with the Immigration Judge's determination, that the evidence in this case did not meet the respondent's burden of proof to establish protection under the CAT (I.J. Dec. dated Feb. 6, 2012, at 13). That is, the respondent did not establish that it is "more likely than not" that the population control policy in China, and specifically the Fujian Province, actually carries out at present the use of coercive measures rising to the level of torture by or "at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" in a factual situation similar to the respondent, as a parent returning to China with two children born in United States (I.J. Dec. dated Feb. 6, 2012, at 13). This is so even considering the country conditions. *See generally Matter of J-E-*, 23 I&N Dec. 291, 303 (BIA 2002) (finding the existence of a consistent pattern of gross, flagrant, or mass violations of human rights in a particular country does not, as such, constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture upon his return to that country; specific grounds must exist that indicate the individual would be personally at risk). Therefore on this record, the respondent did not meet her burden to establish eligibility for protection under the CAT, and her application for such protection was properly denied (I.J. Dec. dated Feb. 6, 2012, at 13-14). *See* 8 C.F.R. §§ 1208.16(c), 1208.18(a), 1240.8(d).

Accordingly, the following order will be entered.

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[6] In *Huang v. Holder*, the United States Court of Appeals for the Second Circuit held, in part, that the Board erred in *Matter of H-L-H- & Z-Y-Z-*, *supra*, by not reviewing for clear error an Immigration Judge's factual finding that a future event will occur. *Huang v. Holder*, *supra*, at 134-35. However, the Second Circuit did not disagree with the Board's approach in *Matter of H-L-H- & Z-Y-Z-*, *supra*, in weighing the country conditions evidence over the subjective evidence submitted by the alien as to the ultimate burden of proof. *Id.* at 137-38.

(b) (6)

ORDER: The appeal is dismissed.

FOR THE BOARD

File: (b) (6) Date: AUG 08 2013

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gary J. Yerman, Esquire

APPLICATION: Convention Against Torture

This matter was last before us on December 12, 2006, when we vacated the portion of our June 8, 2004, decision adopting and affirming the Immigration Judge's March 21, 2003, decision denying the respondent's application for protection under the Convention Against Torture ("CAT") and remanded the record for further proceedings.[1] *See* 8 C.F.R. §§ 1208.16(c), 1208.18. On remand, the Immigration Judge denied the respondent's application for protection under the CAT. The respondent, a native and citizen of China, appeals the decision of the Immigration Judge dated February 6, 2012. The Department of Homeland Security did not file a brief in response. The appeal will be dismissed.

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This matter has a lengthy procedural history which has been discussed in the Immigration Judge's February 6, 2012, decision. The pertinent facts are that the Immigration Judge, in her February 6, 2012, decision declined to revisit the frivolous finding previously made by the Immigration Judge, in his March 21, 2003, decision regarding the respondent's withdrawn applications for asylum and withholding of removal (I.J. Dec. dated Feb. 6, 2012, at 7-8). In our June 8, 2004, decision, we had adopted and affirmed the Immigration Judge's March 21, 2003, decision, and following the (b) (6) decision from the United States Court of Appeals for the (b) (6) we, in our December 12, 2006, decision, had only vacated our decision regarding the respondent's application for CAT and remanded the matter for further proceedings (BIA Dec. dated Dec. 12, 2007 and June 8, 2004).

[1] The respondent's wife (b) (6) is in removal proceedings and has filed a separate application for protection under the CAT (Exhs. 2, R2). The respondents have filed a joint appeal of the Immigration Judge's February 6, 2012, decision. We have today issued a separate decision as it pertains to (b) (6)

On appeal, the respondent challenges the Immigration Judge's February 6, 2012, decision not to revisit the frivolous finding and raise general jurisdictional issues (Respondents' Br. at 6-9).[2] The respondent argues that since he withdrew his asylum application, the Immigration Judge did not make a final determination on the merits of his asylum application, and the Immigration Judge's frivolous finding was improper (Respondents' Br. at 9). Further, the Board did not have jurisdiction to affirm the Immigration Judge's frivolous finding and the (b) (6) did not address the frivolous finding because there was no final administrative order on the respondent's asylum application for the (b) (6) to consider (Respondents' Br. at 9).

We are not persuaded by the respondent's arguments that the Immigration Judge's frivolous finding was improper and not subject to appellate review. In *Matter of X-M-C-*, 25 I&N Dec. 322 (BIA 2010), we concluded that a frivolous determination under section 208(d)(6) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1158(d)(6), could be made in the absence of a final decision on the merits of the asylum application, and that a withdrawal of the asylum application after the required warnings and safeguards have been provided did not preclude the making of such a determination. In *Mei Juan Zheng v. Holder*, 672 F.3d 178 (2d Cir. 2012), the Second Circuit upheld our interpretation. Thus, the Immigration Judge's frivolous finding was proper despite the respondent's withdrawn application and the Board, on appellate review, had jurisdiction to affirm the Immigration Judge's frivolous finding. Further, we are not persuaded by the respondent's arguments that the Second Circuit did not address the frivolous finding because there had been no final administrative order on his asylum application. The Second Circuit addressed this issue in *Mei Juan Zheng v. Holder*, *supra*, at 185, and upheld our interpretation that the term "final determination" in section 208(d)(6) of the Act did not require a "final determination" on the merits of the frivolous asylum application, but encompassed any final order determining that an asylum application is frivolous. *See Matter of X-M-C*, *supra*, at 325. In light of the Second Circuit's precedent decision, the fact that the (b) (6) did not address the frivolous finding in the instant matter cannot be interpreted in the way the respondent has proposed on appeal (Respondents' Br. at 9; Exh. R25). Thus, the respondent has not presented convincing arguments on appeal and we discern no reason to disturb the Immigration Judge's February 6, 2012, decision not to revisit the frivolous finding.[3]

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[3] We further note that the respondent has not claimed on appeal that the Immigration Judge's frivolous findings were clearly erroneous. The record reflects that the respondent voluntarily withdrew his applications for asylum and withholding after admitting to filing false applications and sought only to apply for protection under the CAT (*see, e.g.*, Hr'g Tr. dated Aug. 15, 2000, at 139-43; Respondents' Br. at 7-9).

Turning to the respondent's application for protection under the CAT, we affirm the Immigration Judge's determination that the respondent did not meet his burden of proof (I.J. Dec. dated Feb. 6, 2012, at 13-14). On appeal, the respondent claims that he and/or his wife will be forcibly sterilized upon return to China for violating the country's family planning policy (Respondents' Br. at 20-21).[4] The Immigration Judge found that upon the respondent's return to China, he did not face a clear probability ("more likely than not") of being tortured under China's family planning policies. *See* 8 C.F.R. §§ 1208.16(c), 1208.18(a)(1); *Lecaj v. Holder*, 616 F.3d 111, 119 (2d Cir. 2010); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 217 (BIA 2007); *Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (A.G. 2006). The Immigration Judge's factual finding is not "clearly erroneous." *See* 8 C.F.R. § 1003.1(d)(3)(i); *Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012). Further, upon our de novo review, the Immigration Judge properly determined that respondent's credible testimony and documentary evidence did not satisfy his burden to establish a clear probability that he would be tortured by or "at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" upon removal to China (I.J. Dec. dated Feb. 6, 2012, at 13). *See* 8 C.F.R. § 1208.18(a).

Despite the respondent's assertions on appeal, the record reflects that the Immigration Judge considered his individualized evidence and background country conditions materials (I.J. Dec. dated Feb. 6, 2012, at 10-13). *See Shao v. Mukasey*, 546 F.3d 138, 169 (2d Cir. 2008) (recognizing the adjudicator need not expressly parse or refute on the record each individual argument or piece of evidence offered by the petitioner); *Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 341-42 (2d Cir. 2006) (holding that an Immigration Judge need not enumerate and evaluate on the record each piece of evidence, item by item).

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[4] The respondent has not challenged the Immigration Judge's analysis regarding his eligibility for protection under the CAT based on his violation of the exit laws of China (I.J. Dec. dated Feb. 6, 2012, at 13-14). We deem the issue to be waived. *See Zhang v. Gonzales*, *supra*, at 541 n.1, 545 n.7; *see also Matter of J-Y-C-*, *supra*, at 261 n.1; *Matter of Edwards*, *supra*, at 196-97 n.4.

[5] The Immigration Judge properly took administrative notice of the 2010 State Department country report (I.J. Dec. dated Feb. 6, 2012, at 11 n.8). *See* 8 C.F.R. § 1003.1(d)(3)(iv).

at 12-15, 17). *See Siewe v. Gonzales*, 480 F.3d 160, 167 (2d Cir. 2007); *Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011).

The Immigration Judge properly questioned the indicia of reliability of the affidavits from individuals purportedly sterilized in China for having children born overseas and accorded them limited weight in light of the respondent's testimony that he did not personally know these individuals and the individuals themselves were not subject to cross-examination (I.J. Dec. dated Feb. 6, 2012, at 12; Exh. R23; Hr'g Tr. dated Dec. 5, 2011, at 182-84, 191; Respondents' Br. at 16-17). *See Chen v. U.S. Dep't of Justice*, *supra*, at 342 (finding the weight afforded to the applicant's evidence in immigration proceedings lies largely within the discretion of the agency). The Immigration Judge also properly accorded limited weight to the stipulated testimony and documents from the respondent's witness as she was not similarly situated to the respondent (I.J. Dec. dated Feb. 6, 2012, at 12; Exh. R24 at Tab D; Hr'g Tr. dated Dec. 5, 2011, at 181-82, 190-91). The witness had been forcibly sterilized after having two children born in China (Exh. R24 at Tab D; Hr'g Tr. dated Dec. 5, 2011, at 181-82, 190-91). *See Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 215-16 (BIA 2010) (giving diminished weight to letters from friends and relatives where they were written by interested witnesses not subject to cross-examination), *rev'd in part on other grounds*, *Huang v. Holder*, *supra*.[6]

While there undoubtedly have been instances of forced sterilization imposed on the parents of children conceived and born in China, we agree with the Immigration Judge's determination, that the evidence in this case did not meet the respondent's burden of proof to establish protection under the CAT (I.J. Dec. dated Feb. 6, 2012, at 13). That is, the respondent did not establish that it is "more likely than not" that the population control policy in China, and specifically the Fujian Province, actually carries out at present the use of coercive measures rising to the level of torture by or "at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" in a factual situation similar to the respondent, as a parent returning to China with two children born in United States (I.J. Dec. dated Feb. 6, 2012, at 13). This is so even considering the country conditions. *See generally Matter of J-E-*, 23 I&N Dec. 291, 303 (BIA 2002) (finding the existence of a consistent pattern of gross, flagrant, or mass violations of human rights in a particular country does not, as such, constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture upon his return to that country; specific grounds must exist that indicate the individual would be personally at risk). Therefore on this record, the respondent did not meet his burden to establish eligibility for protection under the CAT, and his application for such protection was properly denied (I.J. Dec. dated Feb. 6, 2012, at 13-14). *See* 8 C.F.R. §§ 1208.16(c), 1208.18(a), 1240.8(d).

Accordingly, the following order will be entered.

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[6] In *Huang v. Holder*, the United States Court of Appeals for the Second Circuit held, in part, that the Board erred in *Matter of H-L-H- & Z-Y-Z-*, *supra*, by not reviewing for clear error an Immigration Judge's factual finding that a future event will occur. *Huang v. Holder*, *supra*, at 134-35. However, the Second Circuit did not disagree with the Board's approach in *Matter of H-L-H- & Z-Y-Z-*, *supra*, in weighing the country conditions evidence over the subjective evidence submitted by the alien as to the ultimate burden of proof. *Id.* at 137-38.

(b) (6)

ORDER: The appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT

File Nos.: (b) (6)
(b) (6)

In the Matters of

(b) (6)

The respondents

IN REMOVAL PROCEEDINGS

IN DEPORTATION PROCEEDINGS

CHARGES:	INA § 237(a)(1)(A)	Inadmissible at the time of entry pursuant to INA § 212(a)(7)(A)(i)(I)
	Former INA § 241(a)(1)(B)	Entered the U.S. without inspection
APPLICATIONS:	8 C.F.R. § 1208.16(c)	Convention Against Torture

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DEPARTMENT OF JUSTICE
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IMMIGRATION REVIEW
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IMMIGRATION COURT
BOARD OF
OFFICE OF THE

ON BEHALF OF THE RESPONDENTS:
Gary Yerman, Esq.
Yerman and Associates, Esq.
(b) (6)

ON BEHALF OF DHS:
Renata Parras, Esq.
Assistant Chief Counsel
(b) (6)

DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

This matter comes before the Court on remand from the U.S. Court of Appeals for the (b) (6) and the Board of Immigration Appeals ("BIA" or "Board").

(b) (6) ("the female respondent") and (b) (6) ("the male respondent") (collectively, "the respondents"), a married couple, are natives and citizens

of the People's Republic of China ("China"). The female respondent entered the United States ("U.S.") on July 8, 1993, at New York, New York, on a nonimmigrant K-1 visa. [Exh. 1.] At the time of her entry, she was not in possession of a valid entry document. *Id.* The male respondent entered the U.S. without inspection on April 13, 1991. [Exh. 1A.]

Both respondents filed affirmative applications for asylum with the then-Immigration and Naturalization Service ("INS"), now the Department of Homeland Security ("DHS"). The male respondent's asylum application was premised on his claim that he had a wife in China, named (b) (6) who had been subjected to a forcible abortion. [Exh. 2A.] The female respondent's asylum application was premised on her claim that she was subjected to a forcible abortion in China. [Exh. 2.] She claimed that, following the alleged forcible abortion, she became pregnant again. Her husband, (b) (6) (b) (6) subsequently attempted to leave China but drowned on his way to the U.S. The female respondent suffered a miscarriage as a result of the shock from his death.

On November 26, 1996, the male respondent was served with an Order to Show Cause ("OSC") by then-INS, charging him with deportability pursuant to former section 241(a)(1)(B) of the Immigration and Nationality Act ("INA"), in that he entered the U.S. without inspection. Through counsel, the male respondent admitted all factual allegations contained in the OSC and conceded deportability as charged. Thus, deportability was established by clear, unequivocal, and convincing evidence. *See* 8 C.F.R. §§ 1240.46(a), 1240.48(b).

On November 2, 1998, the female respondent was served with a Notice to Appear ("NTA") by then-INS. [Exh. 1.] She was charged with removability pursuant to INA § 237(a)(1)(A), in that she was inadmissible at the time of her entry pursuant to INA § 212(a)(7)(A)(i)(I) (not in possession of a valid entry document). *Id.* Through counsel, the female respondent admitted all factual allegations contained in the NTA and conceded removability as charged. Thus, removability was established by clear and convincing evidence. *See* INA § 240(c)(3); 8 C.F.R. §§ 1240.8, 1240.10(c). China was designated as the country of removal.

The respondents' cases were consolidated before another Immigration Judge ("IJ") and the respondents appeared at several hearings and offered testimony over the course of several years. Specifically, the female respondent initially testified in conformity with her written application, stating that she was married in China to a man named (b) (6) and she suffered a forcible abortion. She also testified that she became pregnant again in China, her husband drowned while attempting to leave China, and she suffered a miscarriage. The female respondent was subsequently asked why a K-1 fiancée petition was filed on her behalf in February 1993 by a U.S. citizen named (b) (6) (b) (6) if she were still married at that time to (b) (6) She then stated that she was not really married in China and she and (b) (6) only had a traditional wedding ceremony. She stated that she became engaged to another man while pregnant with (b) (6) child because (b) (6) was not really her husband and she was angry that he would try to leave

China without her. She also indicated that she did not marry the K-1 petitioner, (b) (6) because he abused her.

On August 15, 2000, the respondents appeared before the IJ and indicated through counsel that they wished to withdraw their applications for asylum and withholding of removal under the INA. Both respondents admitted on that date that all material information included in their applications was false. The female respondent also specifically admitted to offering fraudulent testimony before this Court, in that she admitted that (b) (6) did not exist, she had never suffered a forcible abortion in China, and she was never abused by (b) (6)

After withdrawing their applications, the respondents indicated that they were seeking only protection under CAT. At a hearing on March 21, 2003, the IJ ordered that their applications for asylum and withholding of removal be withdrawn with prejudice. The IJ also found that both respondents had filed frivolous applications for asylum after April 1, 1997,[1] that they had knowingly filed false applications for asylum, and that they were therefore subject to a lifetime bar on further immigration benefits. *See* INA § 208(d)(6). Finally, the IJ denied the respondents' applications for protection under CAT and ordered the female respondent removed to China and the male respondent deported to China.

The respondents appealed to the BIA, which dismissed the respondents' appeals and in a June 8, 2004 decision "adopt[ed] and affirm[ed] the decision of the Immigration Judge." The respondents then filed a petition for review with the (b) (6) On February 13, 2006, the (b) (6) remanded the case for a new decision. *See* (b) (6) (b) (6) [Exh. R25.] The (b) (6) noted that "[b]oth petitioners have a long history of perjuring themselves during prior immigration proceedings." *Id.* at 178. The (b) (6) also concurred with the BIA that "if it were not for the Immigration Judge's pointed interrogation of [the female respondent], which was well within his discretion and authority, [the female respondent's] fraudulent claim might not have been admitted or discovered." *Id.* at 181. However, the (b) (6) stated that it was bound to remand the case because the IJ had "failed to consider whether petitioners' CAT claims based on China's family planning policies have any merit." *Id.* Therefore, the (b) (6) instructed the BIA to consider "whether petitioners would be subjected to forced sterilization upon their return to China and, if so, whether such conduct falls within the regulatory definition of torture." *Id.* at 179. On December 12, 2006, the BIA issued a written decision remanding the case to this Court. The BIA ordered that "[t]he portion of our June 8, 2004 decision adopting and affirming the Immigration Judge's application for protection under the Convention Against Torture is vacated."

[1] The IJ noted that, although both respondents initially filed for asylum prior to April 1, 1997, they filed amended applications after that date, thus subjecting them to the frivolous filing bar.

Upon remand to this Court,[2] the petitioners renewed their applications for CAT protection and further argued that: (1) the Court should vacate the frivolous findings made by the prior IJ; (2) the respondents are eligible for withholding of removal under the INA and (3) the male respondent is eligible for adjustment of status pursuant to INA § 245(i), on the basis of an approved I-130 petition filed on his behalf by his U.S. citizen brother.[3] [Exh. R13.]

On December 15, 2011, the Court took testimony from both respondents regarding their CAT claim.[4] A witness, (b) (6) also appeared to testify for the respondents. However, the parties agreed that the witness would testify consistently with the statement she provided to the Court. [Exh. R24, Tab D.] For the reasons that follow, the Court finds that it lacks jurisdiction over the frivolous findings and the respondents' applications for withholding of removal under the INA, finds the male respondent ineligible for adjustment of status, and denies the respondents' applications for protection under CAT.

II. EXHIBITS

The following documents were submitted as evidence and made part of the record of the original proceedings:

Exhibit 1:	The female respondent's NTA, Form I-862, served January 2, 1998;
Exhibit 1A:	The male respondent's OSC, served November 26, 1996;
Exhibit 2:	The female respondent's Form I-589, Application for Asylum and for Withholding of Removal;
Exhibit 2A:	The male respondent's supporting documentation, filed September 23, 1998, including Form I-589;
Exhibit 3:	Affidavit of the female respondent;
Exhibit 4:	INS submission of evidence.

The following documents were submitted as evidence and made part of the record of proceedings on remand:

Exhibit R1:	Notice of Privilege of Counsel and Consequences of Knowingly Filing a Frivolous Application for Asylum;
Exhibit R2:	The female respondent's amended Form I-589;
Exhibit R3:	The male respondent's amended Form I-589;
Exhibit R4:	Notarial birth certificate for the female respondent;
Exhibit R5:	Notarial birth certificate for the male respondent;

[2] On remand, the case was initially assigned to I.J. (b) (6) However, the case was later transferred to the undersigned in November of 2011.

[3] The respondents concede that the female respondent is ineligible for adjustment of status because she entered the U.S. on a K-1 visa. INA § 245(d) (barring adjustment of status for K-1 visa holders based on grounds other than marriage to K-1 petitioner).

[4] I.J. (b) (6) also took testimony from both respondents on December 2, 2008. However, on December 15, 2011, this Court indicated that it would be conducting the merits hearing *de novo*.

Exhibit R6: Copies of birth certificates for the respondents' U.S. citizen children (b) (6) and (b) (6)
Exhibit R7: Copy of the respondents' marriage certificate;
Exhibit R8: Letters from the respondents' children's school;
Exhibit R9: Honor roll certificate for the respondents' older daughter;
Exhibit R10: Copy of the respondents' lease agreement;
Exhibit R11: Copy of the respondents' wedding and family photos;
Exhibit R12: Copy of the respondents' tax transcript, 2003-2006;
Exhibit R13: Copy of I-130 approval notice with the male respondent as a derivative beneficiary;
Exhibit R14: Copy of the male respondent's business permit;
Exhibit R15: Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *China Country Reports on Human Rights Practices–2006* (March 2007);
Exhibit R16: Copies of administrative family planning decisions from Fujian Province;
Exhibit R17: Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *China: Profile of Asylum Claims and Country Conditions* (May 2007) ("2007 Profile"); Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *China: Profile of Asylum Claims and Country Conditions* (May 2005);
Exhibit R18: Notice to the Department of State regarding the respondents' asylum applications;
Exhibit R19: Information on procedure for authentication of Chinese documents;
Exhibit R20: Excerpt from the Foreign Affairs Manual;
Exhibit R21: DHS submission regarding Fujian Province;
Exhibit R22: DHS submission regarding Fujian Province;
Exhibit R23: The respondents' submission of November 21, 2011, background materials on country conditions in China;
Exhibit R24: The respondents' submission of November 23, 2011, personal documents, Tabs A-D;
Exhibit R25: (b) (6) decision (b) (6) (b) (6)

III. TESTIMONY ON REMAND

A. Testimony of the female respondent

On remand, the female respondent testified that she came to the U.S. on July 8, 1993 and has not returned to China since that time. Her husband came to the U.S. in April 1991, and he has also not returned to China since his arrival. The female respondent was born in Guan Tou Town, Lian Jiang County, Fujian Province, China, on (b) (6) She and the male respondent married on June 24, 1996 in New York. They have two U.S. citizen daughters, one born on (b) (6) and the other born on (b) (6) Their older daughter traveled to China when she was four months old and stayed there for a little more than three years before returning to the U.S. Both daughters have U.S. passports.

The female respondent stated that she gave birth in the U.S., and therefore the Chinese government does not know about her children. She testified that the family planning policy in effect in China requires that if the first child is a girl, the couple must wait four years and obtain a birth permit to have a second child. After the birth of the first child, an IUD would be inserted. After the second child, even if it is a girl, "you still have to be sterilized." The female respondent stated that she has violated the family planning policy by having two daughters that were born just two years apart. She therefore believes that, if returned to China, she would be forced to undergo sterilization.

The female respondent stated that she has friends and relatives who were forcibly sterilized in China, including her relative (b) (6) who appeared in Court to testify. The female respondent admitted on cross-examination that she does not know anyone who gave birth to two children in the U.S., returned to China, and was forcibly sterilized. Although the female respondent has heard about such an individual from her lawyer, she does not know this individual personally.

The female respondent stated that, if she returns to China, her husband and two children will return with her. She stated that the Chinese government will find out about her children because there is a regulation that anyone who lives in China must register in the household registration. If they fail to do so, the children will not be able to attend school, and private schools are very expensive.

B. Testimony of the male respondent

On remand, the male respondent testified that he was born on (b) (6) in Tiang Jiang, Fuzhou City, Fujian Province, China. He married the female respondent on June 24, 1996 in New York. They have two U.S. citizen daughters, one born on (b) (6) (b) (6) and the other on (b) (6). He stated that his older daughter has returned to China. Both his daughters have U.S. passports. The male respondent hopes to have more children in the future.

The male respondent testified that he will be sterilized and fined if he is returned to China. His aunt, (b) (6) was forcibly sterilized in China on January 29, 1983.[5] The male respondent also stated that his uncle was forcibly sterilized in China in 1982. The male respondent testified that, if he returns to China, his wife and two children will accompany him. He would be required to enter his children into the household registration in order for them to attend school. The family cannot afford to send their children to private schools.

The male respondent admitted on cross-examination that he does not know anyone who gave birth to two children in the U.S., returned to China, and was forcibly sterilized. Although the male respondent has heard about such a person from his lawyer, he does not know this individual personally.

[5] The respondents testified that (b) (6) is the male respondent's aunt; however, her letter indicates that she is their friend. [Exh. R24, Tab D.]

C. Stipulation regarding testimony of (b) (6)

The parties stipulated that (b) (6) would testify consistently with her affidavit. Specifically, the parties stipulated that she would testify that she is originally from Fujian Province and is a native and citizen of China. She had two children in China and was forcibly sterilized in 1983. She was granted asylum in the U.S. and became a lawful permanent resident on August 5, 2004.

IV. LEGAL STANDARDS AND ANALYSIS

A. Scope of Remand and Jurisdiction

The Court will briefly address the respondents' requests that the Court vacate the frivolous findings made by the prior IJ and consider the respondents' applications for withholding of removal under the INA. The Court finds that it lacks jurisdiction to do so. In an oral decision on March 21, 2003, the prior IJ specifically made frivolous findings for both applicants and determined that their applications for both asylum and withholding of removal had been withdrawn with prejudice. In its June 8, 2004 decision, the BIA "affirm[ed] and adopt [ed]" the IJ's decision. Following the (b) (6) remand, in its 2006 decision, the BIA vacated its prior decision only with respect to that portion of the decision that denied the respondents' applications for protection under CAT, before remanding the matter to this Court

Upon remand, an IJ "may not reconsider the decision of the Board." *Matter of M-D-*, 24 I&N Dec. 138, 141 (BIA 2007). Here, the BIA dismissed the respondents' appeal in all respects on June 8, 2004, and on December 12, 2006, vacated only that portion of its prior decision which denied their applications for protection under the CAT. Therefore, the Court may not reconsider the BIA's determination with respect to the respondents' applications for withholding of removal, nor the frivolous findings that were made. Because this Court lacks jurisdiction over these matters, the prior findings stand. *Id.*

The Court does not specifically lack jurisdiction over the male respondent's adjustment of status application because there was no prior finding by the BIA regarding this application for relief. However, since the frivolous finding is binding on this Court, the Court must find the male respondent ineligible for adjustment of status. *See* INA § 208(d)(6) (stating that an applicant who "has knowingly made a frivolous application for asylum…shall be permanently ineligible for any benefits under this Act."). The Court also notes that even if a frivolous finding had not been made in the male respondent's case, he is ineligible to adjust his status because he is inadmissible pursuant to INA § 212(a)(6)(c)(1), for fraud or willful misrepresentation of a material fact, given his history of fraud and perjury. The male respondent has not established a qualifying relative necessary to file for a waiver of this ground of inadmissibility under INA § 212(i).

In the alternative, even if the Court did have jurisdiction to consider the additional claims raised by the respondents, it would decline to do so in the exercise of its discretion. This case was remanded for the purpose of the Court's consideration of the respondents' claims for protection under the CAT, which the Court addresses *infra*. Unless the scope of a remand is specifically limited, the Court may consider, in the exercise of its administrative discretion, any other issues raised upon remand. *Matter of Patel*, 16 I&N Dec. 600, 601 (BIA 1978). The Court believes that the scope of the remand *has* been limited, as the BIA's 2006 decision states that the case will be remanded "for a new decision regarding the respondent's application for protection under the Convention Against Torture based on China's family planning policies." However, even if the scope of the remand were not so limited, the Court finds, that in the exercise of its administrative discretion, it will not consider the additional arguments that the respondents have raised. *Patel*, 16 I&N Dec. at 601. During the course of their time in the U.S., the respondents have perjured themselves and submitted fraudulent applications for asylum, and therefore do not warrant an exercise of this Court's discretion. For this reason, the Court will consider only their applications for protection under the CAT.

B. Convention Against Torture

CAT and its implementing regulations provide that no person may be removed to a country where it is "more likely than not" that such person will be subject to torture. *See* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984); Pub. L. 105-277 (1998); 8 C.F.R. §§ 1208.16, 1208.17, 1208.18. "Torture" is defined, in part, as the intentional infliction of severe pain or suffering by, or at the instigation of, or with the consent or acquiescence of a public official. 8 C.F.R. § 1208.18(a). It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions, unless such sanctions defeat the purpose of the CAT. 8 C.F.R. § 1208.18(a)(3).

The applicant for CAT protection bears the burden of proof. 8 C.F.R. § 1208.16(c)(2). As with asylum adjudications, the applicant's testimony, if credible, may be sufficient to sustain the burden of proof without corroboration. 8 C.F.R. § 1208.16(c)(2). However, a negative credibility finding in the context of an applicant's asylum claim should not necessarily discredit an applicant's CAT claim, which may be based solely on objective evidence. *Ramsameachire v. Ashcroft*, 357 F.3d 169, 185 (2d Cir. 2004); *see also Zubeda v. Ashcroft*, 333 F.3d 463, 476 (3d Cir. 2003) (stating that an adverse credibility finding in the asylum context should not "bleed through" to the CAT claim). Yet, if the applicant's testimony is the primary basis for the CAT claim and it is found not to be credible, that adverse credibility finding may provide a sufficient basis for denial of CAT relief. *Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 163 (2d Cir. 2006); *Paul v. Gonzales*, 444 F.3d 148, 157 (2d Cir. 2006) (observing that a request for CAT protection "may fail because of an adverse credibility ruling rendered in the asylum context where the factual basis for the alien's CAT claim was the same as that rejected in his asylum petition"); *Xue Hong Yang v. U.S. Dep't of Justice*, 426 F.3d 520, 523 (2d Cir. 2005).

1. Credibility

The Court finds that the respondents testified credibly for purposes of their current claim only. The respondents' testimony on remand was generally internally consistent and consistent with their written asylum applications. The respondents' testimony was also consistent on cross-examination. The respondents have also provided the Court with incontrovertible evidence that they have given birth to two daughters in the U.S. [Exh. R6.] Therefore, the Court finds the respondents credible for purposes of their current applications for protection.

2. Eligibility for CAT based on Family Planning Claim

In section 601(a)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Congress stated that forced abortion, involuntary sterilization, or other coercive population control measures constitute persecution on account of political opinion. INA § 101(a)(42); *see also Matter of Y-T-L-*, 23 I&N Dec. 601, 603 (BIA 2003) (finding that coerced abortion and sterilization constitute permanent and continuous acts of persecution and necessarily demonstrate a well-founded fear of persecution). A Chinese national with two or more children in China may establish a claim if she establishes that the births violate family planning policies and would be punished by local officials in a way that would give rise to an objective fear of future persecution. *Matter of J-H-S-*, 24 I&N Dec. 196, 198-99 (BIA 2007); *cf. Matter of J-W-S-*, 24 I&N Dec. 185 (BIA 2007).

In *Shao v. Mukasey*, the Second Circuit considered three consolidated asylum appeals involving claims of a well-founded fear of future persecution in the form of forced sterilization in China based on violation of the country's one-child policy. 546 F.3d 138 (2d Cir. 2008). The Second Circuit denied each of the petitions and upheld the BIA's three-part analysis for determining whether a Chinese national with two or more children demonstrates a well-founded fear of future persecution for violation of China's one-child policy. Under this analysis, the petitioner must: (1) identify the government policy implicated by the births at issue, (2) establish that government officials would view the births as a violation of the policy, and (3) demonstrate a reasonable possibility that government officials would enforce the policy against petitioner through means constituting persecution. *See Shao*, 546 F.3d at 143; *see also J-H-S-*, 24 I&N Dec. at 201. However, in *Xiao Kui Lin v. Mukasey*, 553 F.3d 217 (2d Cir. 2009), the Second Circuit clarified that it is inappropriate to categorically reject an applicant's claim by relying solely on the three BIA decisions affirmed in *Shao*. Rather, determinations in Chinese family planning cases must be made on a case-by-case basis. *Id.*

The BIA, in its recent case, *Matter of H-L-H- & Z-Y-Z-*, stated clearly that State Department reports on country conditions are highly probative evidence, and are usually the best source of information on conditions in foreign nations. 25 I&N Dec. 209, 213 (BIA 2010). The BIA found that both respondents in *H-L-H-* failed to submit evidence establishing a reasonable possibility that either of them would be subject to forced

sterilization due to having two children born in the U.S. or would face penalties or sanctions so severe that they would rise to the level of persecution. *Id.* at 217-18.

The Court will analyze the respondents' fear of torture by utilizing the precise framework sanctioned by the (b) (6) for determining whether a particular applicant has a well-founded fear of persecution in China on the basis of an alleged family planning violation for having given birth to U.S. citizen children. *See Shao*, 546 F.3d at 143. Although the *Shao* framework references asylum claims based on a well-founded fear of persecution, the Court finds the framework equally appropriate in the instant case. An applicant who fails to meet his burden of proof of demonstrating a well-founded fear of persecution necessarily fails to meet the more stringent standard of showing that it is more likely than not that he will be tortured. *See Lecaj v. Holder*, 616 F.3d 111, 119 (2d Cir. 2010).

As noted in the (b) (6) decision in this matter, neither the (b) (6) nor the BIA has determined whether forced sterilization amounts to torture. (b) (6) at (b) (6) The Court need not resolve this issue, because it finds that the respondents have not met their burden to show that it is more likely than not that they will be forcibly sterilized in China. Therefore, they have failed to establish eligibility for protection under CAT.

a. The respondents have not demonstrated the existence of a local family planning policy

In cases such as the respondents', where the claim rests on a fear of future harm due to the birth of two children in the U.S., the first step to "determining whether there is objective evidence supporting this fear is proof of the details of the family planning policy relevant to each individual case." *J-H-S-*, 24 I&N at 198; *Shao*, 546 F.3d at 148. The BIA and the (b) (6) explained that this first step is essential because, although China's national family planning policy is known as the "one child" policy, "in practice it is apparent that deviations from the general rule of 'one child' persist." *Shao*, 546 F.3d at 148 (internal citations omitted). Thus, the respondents must first establish that there exists a *local* family planning policy.

The respondents are from Fujian Province, China. They testified that the local family planning policy in effect requires an IUD insertion after the birth of a first child, and sterilization after the birth of a second child.[6] Although the respondents submitted various documents purporting to show the family planning policy in effect in Fujian Province, including wall calendars indicating that sterilization is required after the birth of two children, these documents are unauthenticated, and thus the Court affords them very little weight. *H-L-H-*, 25 I&N Dec. at 215. Moreover, these documents contradict information contained in relevant State Department reports. The 2007 China Profilenotes

[6] Neither respondent specified whether the policy they described is specific to their town, city, or province. The respondents also did not indicate where in China they would reside if they were forced to return there. Nonetheless, the Court will presume that the applicable locality is Fujian Province, based on the documentary evidence they submitted.

that the Fujian Provincial Birth Planning Committee ("FPBPC") asserts that the provincial government does not practice forced sterilization:

> According to the FPBPC, the provincial government only imposes economic penalties on families that do not comply with the birth planning law; it does not impose criminal penalties or physically coercive methods to ensure compliance.

2007 China Profile at 27.[7] [Exh. R17.] This accords with the 2010 Human Rights Country Report for China ("2010 Country Report"),[8] which indicates that Fujian Province is not one of the provinces that requires "termination of pregnancy" when there is a provincial family planning violation. 2010 Country Report at 15. The 2010 Country Report also emphasizes the local variation in family planning policies, in spite of the national law. *Id.*; *H-L-H-*, 25 I&N Dec. at 213.

Finally, the [redacted] found in *Shao* that "unattributed reports of forced sterilizations in Fujian Province of an unspecified number of women in undescribed circumstances" were inadequate to demonstrate a local enforcement policy, and thus did not establish a reasonable possibility that the petitioner would be forcibly sterilized. *See Shao*, 546 F.3d at 165. The same reasoning holds true in the instant case. The respondents have not provided adequate, authenticated, and consistent evidence, to meet their burden to show that a local policy mandating forcible sterilizations exists and is enforced in Fujian Province

b. The respondents have not demonstrated that they are in violation of a local family planning policy

As the respondents have not demonstrated the existence of an applicable local coercive family planning policy, it follows that they have not met their burden of proving that they are in violation of any such policy. Furthermore, the respondents have not conclusively demonstrated that their U.S. citizen children would be counted as part of their allowable birth quota. Children born abroad to Chinese nationals may not be counted towards the permissible birth quota. *See Shao*, 546 F.3d at 165. Additionally,

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[7] The respondents have also submitted a document entitled *Review and Evaluation of the Department of State Profile of Asylum Claims and Country Conditions: China*, written by Dr. Flora Sapio of the Centre of Advanced Studies on Contemporary China, which critiques the information contained in the 2007 China Profile. [Exh. R24.] The Court finds this critique of the 2007 China Profile unpersuasive, as it is not based on personal knowledge, draws on numerous conclusory statements, and demonstrates bias against all government agency reports. *Id.* at 7 ("[P]arties interested in obtaining first-hand, unbiased information about the humanitarian situation in China would not normally consult publications produced by the State Department or by any other Western or non-Western government agency."). In addition, the report does not specifically address the respondents' situation or the family planning laws of the respondents' home locality. *See generally Wei Guang Wang v. BIA*, 437 F.3d 270, 274 (2d Cir. 2006) (holding that the weight of an expert's statement is limited when it was not prepared for or particularized to the respondent). Moreover, Dr. Sapio was not available to testify in Court, and thus was not subject to cross-examination by DHS. For all these reasons, the Court accords little weight to Dr. Sapio's report.

[8] The Court takes administrative notice of the most recent State Department report. *Yang v. McElroy*, 277 F.3d 158, 163 (2d Cir. 2002).

the respondents have not established that they would be required to enter their two United States citizen children into the household registry. *H-L-H-*, 25 I&N Dec. at 217. The 2007 China Profile indicates that children born in the U.S. to Chinese nationals will not be counted for purposes of the family planning policy if the children are not registered as permanent residents. *Id.*

In support of their claim that the Chinese government will view them as in violation of the local family planning policy, the respondents submitted affidavits from individuals regarding their forced sterilizations following the births of their children overseas. [Exh. R23.] Two of these individuals claim to have been sterilized in China after giving birth to two U.S. citizen children. *Id.* However, these affidavits do not lend much weight to the respondents' claims. The respondents do not know any of these individuals personally, and none have been made available for cross-examination by DHS. *H-L-H-*, 25 I&N Dec. at 215. Moreover, the respondents testified that they do not personally know anyone in China who was forcibly sterilized after giving birth to two U.S. citizen children.

The respondents have submitted an affidavit from (b) (6) who also appeared in Court to testify that she was forcibly sterilized in 1983 after giving birth to two children in China. [Exh. R24, Tab D.] However, the experiences of Ms. (b) (6) similarly do not lend much weight to the respondents' claims. The circumstances of Ms. (b) (6) differ significantly from those of the respondents. *See Jian Xing Huang v. INS*, 421 F.3d 125, 129 (2d Cir. 2005) (observing that any evidence of forced sterilization of others must demonstrate circumstances sufficiently similar to the petitioner's to provide "solid support" for a claim of a well-founded fear of the same persecution). Ms. (b) (6) had her children in China. [Exh. 24.] In contrast, the respondents' children were born in the U.S., and thus would be viewed differently by government authorities. Moreover, Ms. (b) (6) was forcibly sterilized in China almost thirty years ago, in 1983, and therefore her experiences are not reflective of current country conditions. *H-L-H-*, 25 I&N Dec. at 215 (finding letters describing sterilizations that occurred from 1990 to 2003 unreliable, in part, because they "took place several years earlier" and are therefore "not current").

Finally, of particular significance in this case is the fact that the respondents have given birth to two daughters. The 2007 China Profile specifically states that couples whose first child is a daughter are often granted permission to have a second child. The 2007 China Profile states that "[i]n most rural areas (including towns of under 200,000 persons), which included approximately 60 percent of China's population, the policy is more relaxed, generally allowing couples to have a second child if the first was a girl or had a disability." 2007 Profile at 22-23. Based on the above evidence, the Court concludes that the respondents have not met their burden to prove that Chinese officials will consider them to be in violation of the family planning policy.[9] *See Huang*, 421 F.3d at 128-29 (noting that applicant with two children, the older of whom is a daughter, would not be considered in violation of the family planning policy).

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[9] The male respondent also stated that, in the future, he would like to have more children. However, the Court finds this claim to be speculative and attenuated, as it does not establish a present claim for protection. *See Jian Xing Huang v. INS*, 421 F.3d 125, 129 (2d Cir. 2005).

c. The respondents have not demonstrated that officials will enforce a family planning policy against them in a manner rising to the level of persecution or torture

Because the respondents have not satisfied the first two prongs of the *Shao* analysis, they cannot demonstrate that they will be subjected to sterilization by government officials for having given birth to two children. *Shao*, 546 F.3d at 148-49. However, even assuming that the respondents had satisfied the first two prongs, the record lacks evidence that officials in Fujian Province would use means constituting persecution to enforce any family planning policy—much less means constituting torture. The BIA has held that the applicant must prove she personally faces a well-founded fear of persecution of *forced* sterilization in order to qualify for asylum. *J-W-S-*, 24 I&N Dec. at 190. A generalized "pressure" to undergo sterilization or a broad statement from the Country Reports is not sufficient to sustain this burden. *Id.*

The record does not support a conclusion that a coercive population control policy constituting persecution or torture would be enforced against the respondents in Fujian Province. According to the 2007 China Profile, while Chinese government officials still exert a certain amount of pressure on families to heed the family planning laws, "central government policy prohibits use of physical coercion to compel persons to submit to sterilizations and abortions." 2007 China Profile at 22. Although reports of cases of forced sterilization and abortion exist, none of these reports were confirmed, and none of the reported incidents took place in Fujian Province. *Id.* at 24. Additionally, the personal evidence from the respondents' family members is insufficient to establish that the respondents would face a threat of forcible sterilization in China as a consequence of having two *U.S. citizen* children. In fact, the respondents testified that they did not know anyone who had children born in the U.S., returned to China, and was forcibly sterilized there. Although the respondents had heard about such a person from their lawyer, they do not know him personally.

For all the above reasons, the Court finds that the respondents have not met their burden of proof of establishing that it is more likely than not that they will be forcibly sterilized in China, and thus they have failed to establish eligibility for CAT on this basis.

3. Eligibility for CAT based on Violation of Exit Laws

Although not raised during the course of the individual hearing, the respondents' amended asylum applications also articulate a fear that they will be subject to torture in China for having violated China's exit laws. [Exh. R24.] In the interest of finality, the Court will address this contention. In 2005, the (b) (6) issued a precedent decision considering the question of whether an individual who fears return to China after departing illegally has demonstrated eligibility for protection under CAT. *Mu Xiang Lin v. Gonzales*, 432 F.3d 156 (2d Cir. 2005). The (b) (6) held that the evidence submitted by the petitioner was insufficient to demonstrate that it was "more likely than

not" that she would be tortured in China. *Id.* at 160. The petitioner had submitted State Department reports on human rights conditions in China, as well as letters from family members, including a letter from her brother indicating that he had been imprisoned and tortured in China upon his repatriation for violating the exit laws. *Id.* at 158. The (b) (6) (b) (6) held that the BIA's determination that the petitioner would not face torture in China was supported by substantial evidence. *Id.* The (b) (6) held that it was not inclined to find that "any asylum-seeker arriving in the U.S. illegally from China would equally be entitled to such relief" without more particularized evidence. *Id.* at 160.

Therefore, in order to prevail on a claim for CAT protection under governing (b) (6) case law, a respondent must present particularized evidence showing that she is uniquely susceptible to torture, compared to other illegal emigrants. However, in the instant case, the respondents have submitted no particularized evidence. The general country conditions reports fail to show they would be tortured in China based on their violation of the exit laws. The 2007 Profile addresses the issue of those returning to China after having left the country illegally, stating:

> In the past several years, hundreds of Chinese illegal immigrants have been returned from the United States, and U.S. Embassy Officials have been in contact with scores of them. In most cases, returnees are detained long enough once reaching China for relatives to arrange their travel home. Fines are rare. U.S. officials in China have not confirmed any cases of abuse of persons returned to China from the United States for illegal entry.

2007 China Profile at 31. Therefore, the background evidence of record establishes that, at most, the respondents would face a fine or a brief detention, which does not rise to the level of torture. *Id.* The general country conditions evidence submitted by the respondents is the very same evidence that the (b) (6) has rejected as being insufficient to demonstrate that a respondent is more likely than not to face torture in China. The respondents' request for protection under CAT on the basis of a fear of torture for having violated China's exit laws must, therefore, be denied.

V. CONCLUSION

The Court is bound by the BIA's prior decision in this matter and thus does not have jurisdiction to consider the issues that the respondents have raised regarding their applications for withholding of removal under the INA and the prior frivolous findings. Additionally, because the frivolous findings have been upheld by the BIA, the Court finds the male respondent ineligible for adjustment of status. The sole issue before this Court is whether the respondents have met their burden of proof of establishing that it is more likely than not that they will be tortured in China. After a careful consideration of all evidence in the record, the Court finds that the respondents have fallen far short of meeting this high burden of proof, and therefore denies their applications for protection under CAT.

ORDERS

IT IS HEREBY ORDERED that the respondents' application for protection under the Convention Against Torture be **DENIED.**

IT IS FURTHER ORDERED that the female respondent be removed to the People's Republic of China pursuant to the charge contained in the NTA.

IT IS FURTHER ORDERED that the male respondent be deported to the People's Republic of China pursuant to the charge contained in the OSC.

Date February 6, 2012

Sarah M. Burr
Immigration Judge

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Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: (b) (6)

Date: DEC 12 2006

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gary J. Yerman, Esquire

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] - Entered without inspection

APPLICATION: Convention Against Torture

This case was last before us on June 8, 2004, when we dismissed the respondent's appeal from the Immigration Judge's March 21, 2003, decision denying his application for protection under the Convention Against Torture.

The case is now before us pursuant to the (b) (6) decision of the United States Court of Appeals for the (b) (6) The court concluded that the Immigration Judge failed to make sufficient findings on the respondent's claim for relief under the Convention Against Torture. While the court agreed with our determination that there was insufficient evidence of bias or prejudice by the Immigration Judge to require recusal, it nevertheless directed that the case be assigned to a different Immigration Judge on remand. In view of the court's decision, the record therefore will be remanded to a different Immigration Judge for a new decision regarding the respondent's application for protection under the Convention Against Torture based on China's family planning policies.

ORDER: The portion of our June 8, 2004, decision adopting and affirming the Immigration Judge's decision denying protection under the Convention Against Torture is vacated.

FURTHER ORDER: The record is remanded to a different Immigration Judge for further proceedings consistent with this decision and the court's decision.

FOR THE BOARD

File: (b) (6)

Date: DEC 12 2006

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gary J. Yerman, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] -
Inadmissible at time of entry or adjustment of status under section
212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)]
Immigrant - no valid immigrant visa or entry document

APPLICATION: Convention Against Torture

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FOR THE BOARD