File: (b) (6) Date:

FEB - 9 2009

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Maria M. Curran, Esquire

APPLICATION: Reopening

The respondent's case is presently before us on a motion to reopen his deportation proceedings filed on June 9, 2008. *See* 8 C.F.R. § 1003.2. The Department of Homeland Security has not responded to the motion. The motion will be denied.

This case has a long procedural history. In a September 14, 1998, decision, the Immigration Judge found that the respondent was not credible and denied his applications for asylum and withholding of deportation, but granted him the privilege of voluntary departure. We affirmed that decision and dismissed the respondent's appeal on June 19, 2002. The United States Court of Appeals for the (b) (6) remanded the case for a new credibility determination in an order dated (b) (6) We remanded the record to the Immigration Judge on January 25, 2007, and on July 23, 2007, the Immigration Judge issued a new decision. He gave the respondent an opportunity to submit additional materials and to provide additional testimony. *See* I.J. at 2. He again found that the respondent was not credible. Through his counsel, Mr. Wong, the respondent filed an untimely appeal with a motion to accept a late appeal. We denied the motion and dismissed the appeal for lack of jurisdiction on October 2, 2007. Through his subsequent counsel (b) (6) the respondent filed another motion to accept a late appeal on March 10, 2008, citing the ineffective assistance or deficient performance of (b) (6). On May 8, 2008, we denied the motion as untimely and not supported by sufficient evidence of deficient performance of counsel. In the instant motion, the respondent offers new evidence that (b) (6) has admitted that his office failed to timely submit the appeal and (b) (6) has acknowledged procedural problems in filing the subsequent motion.

The requirements for establishing a claim of deficient performance of counsel are set forth in *Matter of Compean, Bangaly, and J-E-C-*, 24 I&N Dec. 710 (A.G. 2009) (hereinafter "*Matter of Compean*"). Unless this Board finds that the alleged deficient performance of counsel merits reopening of the proceedings and reinstatement of the appeal, this Board does not have jurisdiction over the instant motion. *Matter of Mladineo*, 14 I&N Dec. 591 (BIA 1974). Rather, the failure to timely file the appeal results in the decision of the Immigration Judge becoming the final administrative order. 8 C.F.R. § 1003.39. Thus, whether we have jurisdiction over the instant motion rests on a determination as to whether the respondent received deficient performance from his prior attorneys in the filing of the appeal and the first motion to reopen and reconsider that

determination. *See Matter of Lopez*, 22 I&N Dec. 16 (BIA 1998) (The Board retains jurisdiction over the instant motion to the extent that it challenges the finding of untimeliness or requests consideration of the reasons for untimeliness); *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Although the motion is also time and number barred, an alien may toll the time and number limitations applicable to motions to reopen by demonstrating the deficient performance of counsel. *See Matter of Compean, supra* (imposing new procedures for claims of deficient performance of counsel, but holding that the procedures set forth in *Matter of Lozada*, *supra*, will be applied when reviewing motions filed prior to January 7, 2009).

We find the respondent has met the procedural requirements for a deficient performance of counsel claim under the procedures set forth in *Matter of Lozada*, *supra*. He has submitted his affidavit setting forth his agreement with (b) (6) and (b) (6) and the actions that they failed to take, shown that he informed his former attorneys of the allegations leveled against them and gave them an opportunity to respond, and provided the complaints he filed against them with the appropriate disciplinary authorities. *Id.* The respondent has also demonstrated that his former attorneys' actions were egregious and that he acted diligently in pursuing his claim. *Matter of Compean*, *supra*. However, the respondent has not shown that he was prejudiced by their deficient performances.

The respondent has not meet his burden of proving that he will ultimately prevail on his request for asylum and withholding of deportation. *See Matter of Compean, supra*, at 733-35 (to prevail on a deficient performance of counsel claim, the alien must demonstrate that, but for the deficient performance of counsel, it is more likely than not that he would have prevailed in his quest to remain in the United States). The respondent's application for relief rests on the birth of two children in China, the forcible sterilization of his ex-wife, and the imposition of a fine. Assuming for the sake of argument that the respondent is credible, the respondent would not prevail on this claim as a matter of fact and law. As recognized by the respondent, the statute does not provide refugee status to the spouse (or former spouse) of an individual who has been forcibly sterilized. *See Matter of J-S-*, 24 I&N Dec. 520 (BIA 2008); *Lin v. U.S. Dept. of Justice*, 494 F.3d 296 (2d Cir. 2007).[1] The respondent declares that he will be punished in China for his failure to pay the fine imposed on him in 1992 for his violation of the one-child policy.[2] His evidence does not support that assertion. Moreover, the respondent has not shown that the authorities in China have pursued the fine during the past 17 years, or that he would be subjected to harm amounting to persecution for his failure to pay the fine. *See Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007)(a showing of extreme economic deprivation may qualify as persecution if the harm to be exacted amounts to severe economic

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[1] The respondent asserts that the Board's decisions in *Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006), and *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997), which have been overruled by the United States Court of Appeal for the Second Circuit (b) (6) in *Lin v. U.S. Dept. of Justice, supra*, should be applied retroactively to the facts of his case. He provides no legal authority for his position, and we find no merit to this assertion.

[2] He claimed that the amount of the fine was 1,500 Yuan, 15,000 RMB, or $15,000. *See* Exhibits 2 and 2A; Exhibit R5A; Tr. at 20.

(b) (6)

disadvantage, but a showing of economic sanctions does not amount to persecution where the record contains scant information concerning the applicant's financial situation). *See also Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008). Thus, the respondent has not demonstrated that he was prejudiced by the deficient performance of his prior attorneys. Accordingly, the motion will be denied.

ORDER: The respondent's motion to reopen is denied.

Brett M Parchert

FOR THE BOARD

File: (b) (6) Date: MAY - 8 2008

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Sandra Nichols, Esquire

ORDER:

PER CURIAM. On October 2, 2007, the Board dismissed the respondent's appeal as untimely. The respondent filed an untimely motion seeking reopening of the Board's final decision on March 10, 2008, based on alleged ineffective assistance of counsel. *See* 8 C.F.R. § 1003.2(c)(2). The Department of Homeland Security (the "DHS") has not responded to the pending motion, which will be denied.

The motion blames former counsel, (b) (6) for the lateness of the appeal. First, the respondent failed to comply with the requirements of *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003) and *Matter of Lozada* , 19 I&N Dec. 637 (BIA 1988) for making a claim of ineffective assistance of counsel. *See also Jiang v. Mukasey*, __ F.3d __, 2008 WL 817107 (2d Cir. Mar. 27, 2008). The respondent admittedly did not file a disciplinary complaint against (b) (6) a requirement under this case law.

In any event, the respondent provides no reason why the deadline for filing a motion to reopen should be tolled in this case. *See Cekic v. INS*, 435 F.3d 167, 171 (2d Cir. 2006)("[i]n a situation where ineffective assistance of counsel prevents an alien from having the opportunity to present his case for relief, the filing deadline for motions to reopen will be equitably tolled until the ineffective assistance is, or should have been, discovered by a reasonable person in the situation"). The respondent learned on October 30, 2007, that the appeal had been dismissed as untimely, Respondent's Affidavit, at ¶ 6, and signed an affidavit on November 26, 2007, but the pending motion was not filed until March 10, 2008. The respondent's pending motion is, therefore, denied.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: (b) (6) Date:

In re: (b) (6)

OCT - 2 2007

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Wong, Chun W. Esq.

ORDER:

PER CURIAM. The appeal is untimely. A Notice of Appeal (Form EOIR-26) must be filed within 30 calendar days of an Immigration Judge's oral decision or the mailing of a written decision unless the last day falls on a weekend or legal holiday, in which case the appeal must be received no later than the next working day. *See* 8 C.F.R. §§ 1003.38(b), (c). In the instant case, the Immigration Judge's decision was mailed on July 23, 2007. The appeal was accordingly due on or before August 22, 2007. The record reflects, however, that the Notice of Appeal was filed with the Board of Immigration Appeals on September 18, 2007. We find that the appeal is untimely. The Immigration Judge's decision is accordingly now final, and the record is returned to the Immigration Court without further action. *See* 8 C.F.R. §§ 1003.3(a), 1003.38, 1003.39, 1240.14, and 1240.15.

We note that because we have dismissed the appeal for lack of jurisdiction, either party wishing to file a motion in this case should follow the following guidelines: If you wish to file a motion to reconsider challenging the finding that the appeal was untimely, you must file your motion with the Board. However, if you are challenging any other finding or seek to reopen your case, you must file your motion with the Immigration Court. *See Matter of Mladineo*,14 I&N Dec. 591 (BIA 1974); *Matter of Lopez*, 22 I&N Dec. 16 (BIA 1998). You should also keep in mind that there are strict time and number limits on motions to reconsider and motions to reopen. *See* 8 C.F.R. §§ 1003.2(c)(2), 1003.23(b)(1); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
(b) (6)

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In the Matter of

July 23, 2007

(b) (6)

DEPORTATION PROCEEDINGS

Respondent.

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CHARGE:

Section 241(a)(1)(B) of the Immigration and Nationality Act, as amended ("INA")..

APPLICATIONS:

Request for asylum in the United States pursuant to § 208 of the INA.

Request for withholding of removal pursuant to § 241(b)(3) of the INA.

Request for withholding or deferral of removal pursuant to Article 3, UN Convention Against Torture ("CAT").

ON BEHALF OF RESPONDENT:
Chun W. Wong, Esq.
(b) (6)

ON BEHALF OF DHS:
E. Fabian, Esq.
Assist. Dist. Counsel
(b) (6) BICE

DECISION OF THE IMMIGRATION JUDGE

The Board of Immigration Appeals ("BIA") in a written decision Jan 25, 2007 (*Ex. R4-ID*) remanded this matter to the court and noted that this court should issue a new determination consistent with the caselaw and recent holdings issued by the US Circuit Court of Appeals, (b) (6) regarding the adjudication of credibility in asylum and withholding of removal applications.

Procedurally, this court denied the respondent's applications for asylum and withholding under the INA and CAT in an oral decision rendered on Sept 14, 1998, long before the standards were enunciated by the federal court. *Ex. R1-ID.* The BIA summarily dismissed the appeal in a written decision

issued on June 19, 2002. *Ex. R2-ID.* The respondent took the matter to the US Court of Appeals for the (b) (6) and the federal appeals court issued a written decision finding the IJ's credibility reasoning to be faulty and based upon a misunderstanding of the evidence presented by the respondent. The federal appeals court remanded the matter back for a new determination. *Ex. R3-ID.* The BIA in a written decision on Jan 25, 2007 remanded the case for further consideration of the respondent's applications for asylum.

In accord with the appropriate rules, this court provided due notice to the parties and conducted a master calendar proceeding. The respondent was granted permission to submit additional background materials and provide additional testimony. The respondent affirmative stated that he was not seeking any other forms of relief other than asylum and withholding of removal under the INA and CAT. The respondent requested an opportunity to present some additional background. The court accepted the materials for inclusion into the Record of Proceedings and marked them as Exhibits R5A to R5O and the respondent stated that he desired to offer no further oral testimony, despite the opportunity to do so. The court took the matter under advisement to render a written decision

The court reviewed the additional background medical materials and reviewed a supplemental statement of the respondent's ex-spouse. The respondent is a native and citizen of the People's Republic of China. The respondent, through counsel at a master calendar, conceded to the factual allegations contained in the Notice to Appear and conceded that the respondent was removable from the US, as charged. *Ex. 1.* Therefore, the court finds that the respondent is removable from the US and the court's finding is supported by clear, unequivocal and convincing evidence. *8 C.F.R. § 1240.8.* The respondent was given an opportunity to designate a country in the event removal became necessary. The respondent declined and the Immigration and Naturalization Service ("Service"), now known as the Dept of Homeland Security ("DHS"), directed the People's Republic of China ("PRC").

As relief from removal, the respondent applied for asylum under § 208 of the INA by filing a Form I-589, Request for Asylum in the United States. *Ex. 2.* The request for asylum is also considered a request for withholding of removal pursuant to § 241(b)(3) of the INA. The respondent also requested withholding of removal under the CAT.

TESTIMONY

The only witness in the proceedings was the respondent. And the respondent affirmatively stated that the court may rendered a decision based upon the respondent's prior testimony during a hearing previously conducted by this court. A complete transcript of the hearing is contained in the Record of Proceedings ("ROP"). The court's summary of the respondent's testimony that was set out in the court's oral decision of Sept 14, 1998 is also set forth herein as if it was fully stated.

ASYLUM & WITHHOLDING OF REMOVAL

LEGAL STANDARD

A. Asylum

In an asylum adjudication, the respondent bears the burden to establish statutory eligibility, which requires a showing of past persecution or well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A). If eligibility is established, asylum may be granted in the exercise of discretion. *INS v. Cardoza-Fonseca,* 480 U.S. 421 (1987).

1. Credibility

In all applications for asylum, the Court must make a threshold determination of the alien's credibility. *See Matter of O-D-*, 21 I. & N. Dec. 1079 (BIA 1998); *Matter of Pula*, 19 I. & N. Dec. 467 (BIA 1987). A respondent's own testimony is sufficient to meet his burden of proving his asylum claim if it is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his fear. *Matter of Dass*, 20 I. & N. Dec. 120, 124 (BIA 1989); *8 C.F.R. § 1208.13(a).* While minor and isolated discrepancies in the respondent's testimony need not be fatal to credibility, omission of key events coupled with numerous inconsistencies may lead to a finding that the respondent is not credible. *Alvarado-Carillo v. INS*, 251 F.3d 44 (2d Cir. 2001); *Matter of A-S-*, 21 I. & N. Dec. 1106 (BIA 1998). Testimony is not considered credible when it is inconsistent, contradictory with current country conditions, or inherently improbable. *Matter of S-M-J-*, 21 I. & N. Dec. 722, 729 (BIA 1997). *See also Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003) (requiring that an adverse credibility finding be supported by "*specific, cogent*" reasons that have a "*legitimate nexus*" to the finding in the case) (quoting *Aguilera-Cota v. INS*, 914 F.2d 1375, 1381 (9th Cir. 1990)).

2. Corroboration

An alien requesting asylum also bears the evidentiary burden of proof and persuasion in connection with any application under § 208 of the INA. *8 C.F.R. § 1208.13(a)(2005)*; *Matter of S-M-J-*, 21 I. & N. Dec. at 722; *Matter of Acosta*, 19 I. & N. Dec. 211, 215 (BIA 1985), *modified on other grounds*, *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 446 (BIA 1987). In determining whether an asylum respondent has met his burden of proof, the Board of Immigration Appeals ("Board" or "BIA") has recognized the difficulties an alien may face obtaining documentary or other corroborative evidence to support his claim of persecution. *Matter of Dass*, 20 I. & N. Dec. at 124. As such, unreasonable demands are not placed on an asylum respondent to present evidence to corroborate particular experiences (*e.g.*, corroboration from the persecutor). *Matter of S-M-J-*, 21 I. & N. Dec. at 722. In fact, lack of corroborative evidence is not necessarily fatal to an asylum application, as uncorroborated testimony that is credible, persuasive, and specific may be sufficient to sustain the burden of proof to

establish a claim for asylum. *8 C.F.R. § 1208.13(a)*; *Matter of Mogharrabi*, 19 I. & N. Dec. at 444-445.

However, where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an respondent's claim, such evidence should be provided. *Diallo v. INS*, 232 F.3d 279, 285 (2d Cir. 2000); *Matter of S-M-J-*, 21 I. & N. Dec. at 725. If such evidence is unavailable, the respondent must explain its unavailability, and the immigration judge must ensure that the respondent's explanation is included in the record. *Matter of S-M-J-*, 21 I. & N. Dec. at 728. The absence of such corroboration may lead to a finding that an respondent has failed to meet his burden of proof. *Id.* at 726. However, to deny an respondent asylum relief for lack of corroboration, the immigration judge must first identify the missing, relevant documentation and then demonstrate that such documentation was reasonably available to the respondent. *Qiu v. Ashcroft*, 329 F.3d 140, 153 (2d Cir. 2003).

3. Fear of Persecution

An asylum respondent must demonstrate that he is a "*refugee*" in one of two ways. First, she may demonstrate that he has suffered past persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *INA § 101(a)(42)(A)*. Second, the respondent may demonstrate a well-founded fear of future persecution on account of a protected ground through credible testimony that he subjectively fears persecution and that his fear is objectively reasonable. *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004).

To establish past persecution, the respondent must demonstrate that he suffered persecution in his country of nationality or, if stateless, in his country of last habitual residence, on account of an actual or imputed protected ground, and that he is unable or unwilling to return to, or avail himself of the protection of, that country because of such persecution. *8 C.F.R. § 1208.13(b)(1)*. If past persecution is established, a presumption arises that the respondent has a well-founded fear of future persecution on the basis of his original claim. *Id.*; *see also Ramsameachire*, 357 F.3d at 178. This regulatory presumption may be rebutted if the DHS establishes by a preponderance of the evidence that the respondent's fear is no longer well-founded due to a fundamental change in circumstances or that the respondent could avoid future persecution by relocating to another part of the country and that it would be reasonable to expect him to do so. *8 C.F.R. § 1208.13(b)(1)(i)-(ii)*. Additionally, if the respondent's fear of persecution is unrelated to the past persecution, he bears the burden of establishing that his fear is well-founded. *Id.* To establish a well-founded fear of future persecution, the respondent must satisfy both a subjective and an objective component. *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999). Credible testimony by an respondent may be enough to satisfy the subjective component, depending on the circumstances. *Id.*; *Diallo*, 232 F.3d at 286; *Matter of S-M-J-*, 21 I. & N. Dec. 722; *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996); *Matter of Mogharrabi*, 19 I. & N. Dec. 439. Once a subjective fear of persecution is established, the respondent need only show that such fear is grounded in reality to meet the objective element of the test—that is, he must present credible, specific and detailed evidence that a reasonable person in his position would fear persecution. *Abankwah*, 185 F.3d at 22.

There is no universally accepted definition of "*persecution*." *Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, ¶51, p.14* (Geneva, January 1992) ("Handbook"). While persecution has generally been interpreted to include threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom, courts have also recognized that "the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs." *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993); *see also Balazoski v. INS*, 932 F.2d 638, 642 (7th Cir. 1991) (noting that the conduct in question need not necessarily threaten the petitioner's "life or freedom"); *Matter of Acosta*, 19 I. & N. Dec. at 222 (noting that persecution may include mental suffering or even severe economic deprivation). By contrast, "[g]enerally harsh conditions shared by many other persons" have not been found to amount to persecution. *Matter of Acosta*, 19 I. & N. Dec. at 222; *see also Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968). *See also Matter of Sanchez and Escobar*, 19 I. & N. Dec. 276 (BIA 1985) (finding that harm resulting from country-wide civil strife is not persecution on account of one of the five enumerated grounds).

An respondent for asylum must also demonstrate that the persecution he fears would be "on account of his race, nationality, religion, membership in a particular social group, or political opinion. While he need not show conclusively what the motive for the persecution would be, or that the persecutor would be motivated solely by a protected ground, the respondent must produce evidence from which it is reasonable to conclude that the harm would be motivated, at least in part, by an actual or imputed ground. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *Matter of S-A-*, 22 I. & N. Dec. 1328 (BIA 2000); *Matter of S-V-*, 22 I. & N. Dec. 1306 (BIA 2000); *Matter of S-P-*, 21 I. & N. Dec. 486 (BIA 1996).

4. Discretion

An alien who establishes statutory eligibility for asylum still bears the burden of demonstrating that he merits a grant of asylum as a matter of discretion. See INA § 208(b)(1); *Cardoza-Fonseca v. INS*, 480 U.S. 421. In determining whether a favorable exercise of discretion is warranted, both favorable and adverse factors should be considered. *Matter of Pula*, 19 I. & N. Dec. at 473. Humanitarian factors, such as age, health, or family ties, should be considered in the exercise of discretion. *Matter of H-*, 21 I. & N. Dec. at 337 (citing *Matter of Pula*, 19 I. & N. Dec. 467). The danger of persecution should outweigh all but the most egregious adverse factors. *Matter of Pula*, 19 I. & N. Dec. at 474.

B. Withholding of Removal under INA § 241(b)(3)

A claim for withholding of removal is factually related to an asylum claim, but the respondent bears a heavier burden of proof to merit relief. For withholding, the respondent must demonstrate that, if returned to his country, his life or freedom *would be* threatened on one of the protected grounds. *INA*

§ 241(b)(3); see also Zhang v. INS, 386 F.3d 66 (2d Cir. 2004). To make this showing, the respondent must establish a "clear probability" of persecution, meaning that it is "more likely than not" that he will be subject to persecution on account of a protected ground if returned to the country from which he seeks withholding of removal. There is no discretionary element. Therefore, if the respondent establishes eligibility, withholding of removal must be granted. *INS v. Ventura*, 537 U.S. 12, 13 (2002). Additionally, there is no statutory time limit for bringing a withholding of removal claim. *El Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004); *Rashiah v. Ashcroft*, 388 F.3d 1126, 1130-1131 (7th Cir. 2004).

Because asylum and withholding claims rely on the same factual basis, but there is a heavier burden for withholding, "an respondent who fails to establish his eligibility for asylum necessarily fails to establish eligibility for withholding." *Zhang*, 386 F.3d 66. *See also Ramsameachire*, 357 F.3d at 178; *Abankwah*, 185 F.3d at 22.

Additionally, an respondent is precluded from applying for relief under INA § 241(b)(3) if he participated in the persecution of others, he was convicted of a particularly serious crime, there are serious reasons to believe he committed a serious nonpolitical crime outside of the U.S., or there are reasonable grounds to believe she is a danger to the security of the U.S. *INA § 241(b)(3)(B).*

C. Withholding of Removal under the Convention Against Torture

The Convention Against Torture and implementing legislation 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. *8 C.F.R. § 1208.16(c)(2); see also Matter of M-B-A-*, 23 I. & N. Dec. 474 (BIA 2002). "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. 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. Acquiescence of a public official requires that the official have awareness of or remain "willfully blind" to the activity constituting torture, prior to its commission, and thereafter breach his or her legal responsibility to intervene to prevent such activity. *8 C.F.R. § 1208.18(a)(7)*; *Khouzam v. Ashcroft*, 361 F.3d 161, 170-71 (2d Cir. 2004); *see also Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003). *But cf. Matter of Y-L-, A-G-, R-S-R-*, 23 I. & N. Dec. 270, 280 (A.G. 2002) (requiring an respondent to show that authorities are "willfully accepting" of torturous activities; it is not enough to show that officials are aware of such activity but are powerless to stop it) (quoting *Matter of S-V-*, 22 I. & N. Dec. at 1312).

The respondent for CAT relief bears the burden of proof. As with asylum adjudications, the respondent's testimony, if credible, may be sufficient to sustain the burden of proof without corroboration. *8 C.F.R. § 1208.16(c)(2); see also Matter of Y-B-*, 21 I. & N. Dec. 1136. In assessing whether the respondent has satisfied the burden of proof, the court must consider all evidence relevant to the possibility of future torture, including evidence that the respondent has suffered torture in the past; evidence that the respondent could relocate to a part of the country of removal where he is not likely to be tortured;

evidence of gross, flagrant or mass violations of human rights within the country of removal; and other relevant information on country conditions. *See 8 C.F.R. § 1208.16(c)(3).* However, a pattern of human rights violations alone is not sufficient to show that a particular person would be in danger of being subjected to torture upon his return to that country. Specific grounds must exist to indicate that the respondent will be personally at risk of torture. *Matter of S-V-*, 22 I. & N. Dec. at 1313. To meet his burden of proof, an respondent for CAT relief must establish that someone in his particular alleged circumstances is more likely than not to be tortured in the country designated for removal. *Wang*, 320 F.3d 130; *Matter of J-E-*, 23 I. & N. Dec. 291, 303-04 (BIA 2002); *Matter of G-A-*, 23 I. & N. Dec. 366, 371-72 (BIA 2002); *Matter of M-B-A-*, 23 I. & N. Dec. at 478-79. As with withholding of removal, there is no statutory time limit for filing a claim under the Convention Against Torture. *Rashiah v. Ashcroft*, 388 F.3d at 1130-1131.

A respondent who establishes that he is entitled to CAT protection shall be granted withholding of removal unless he is subject to mandatory denial of that relief, in which case he shall be granted deferral of removal. *8 C.F.R. §§ 1208.16(c)(4), 1208.17(a); see also Bellout*, 363 F.3d at 979. A respondent is subject to mandatory denial of withholding of removal under CAT if he participated in the persecution of others, he was convicted of a particularly serious crime, there are serious reasons to believe he committed a serious nonpolitical crime outside of the U.S., or there are reasonable grounds to believe he is a danger to the security of the U.S. *8 C.F.R. § 1208.16(d)(2); see also INA § 241(b)(3)(B).* Yet, an alien's criminal convictions, no matter how serious, are not a bar to deferral of removal under CAT. *See 8 C.F.R. § 1208.17(a); Matter of G-A-*, 23 I. & N. Dec. at 368.

ANALYSIS

It is the opinion of the court that the respondent is not entitled to asylum or to withholding of removal under the INA or under CAT. The court did not find the respondent's testimony to be credible. The court also found the respondent to have failed to meet his burden of proof for asylum or withholding of removal under the INA and CAT.

The BIA and (b) (6) US Court of Appeals for this jurisdiction have established a two-prong approach to asylum and withholding of removal adjudications. First the court must determine if the respondent's testimony was credible. Corroboration evidence is helpful, but the absence cannot be the foundation of a adverse credibility finding. Second, the court must also determine if the respondent has met his or her burden of proof. Again corroborating evidence may be required, if reasonably available, or if not presented, then the respondent must be provided with a opportunity to offer a reasonable explanation for its absence.

Inconsistencies of less than substantial importance for which a plausible explanation is offered cannot form the sole basis for an adverse credibility finding. *Secaida-Rosales v. INS*, 33 1 F.3d 297 (2d

Cir. 2003); *see also Qiu v. Ashcroft,* 329 F.3d 140 (2d Cir. 2003). Minor omissions on an asylum form or slight differences in testimony are not significant discrepancies. *See Alvarado-Carillo v. INS,* 251 F.3d 44 (2d Cir. 2001). However, this court will identify material factors regarding the respondent's testimony, internal testimonial inconsistencies and inconsistencies contained in documents that he provided to corroborate his claim of coercive family planning persecution. The inconsistencies undermined his credibility that his spouse was a victim of a forcible sterilization.

The federal appeals court found fault with the IJ's credibility determination rendered in 1998. The federal court measured the determination against recent federal court holdings that were issued subsequent to the court's findings. *Secaida-Rosales v. INS,* 331 F.3d 297, 307 (2d Cir. 2003);*Qiu v. Ashcroft,* 329 F.3d 140, 153 (2d Cir. 2003); and, *Ramsameachire v. Ashcroft,* 357 F.3d 169, 178 (2d Cir. 2004). Nevertheless, in applying the standards enunciated in these cases, the court is of the opinion that the respondent is not credible and has failed to establish eligibility for asylum or withholding of removal under the INA and CAT.

It is apparent that the federal court has overlooked several factual testimonial statements made by the respondent that render the respondent incredible and fallacious. The federal appeals court made a point to set out why the IJ's analysis regarding the facially apparent composite picture of the respondent with his purported spouse was faulty. And, the federal appeal court also pointed out that the IJ failed to render an alternative reason to support its credibility findings. Therefore, the federal appeals court was not able to confidently predict that the IJ's denial would still hold up, given the faulty IJ's analysis.

Had the record been carefully reviewed, it would have noted that the IJ did make alternative finding that found the respondent incredible. The IJ's alternative reasoning was so noted in the court's oral determination, which appears to have been either overlooked or ignored. Since the respondent was offered an opportunity to offer additional testimony and elected to stand on his prior testimony, the IJ finds that the respondent testified, on more than one occasion, during the proceedings that he was physically present when the photo of him and his wife was purported taken by the on-site document issuer. But, as is clearly evident from a naked eye review of the two documents that corroborates his alleged marriage (Exhibits 5A & 5B), is that the photos that are attached to each of the documents were composite pictures made up from two independent photos and re-photographed. However, the composite is not simply a single picture showing two separate photos, but the composite was manipulated to show that the two individuals were supposedly standing next to each other when the photo was originally taken, thereby creating the impression that the respondent and his alleged wife were together at the time of the photo. But, to the naked eye the illusion is shattered when it can be seen that the composite photo is nothing but a photography trick that contradicts the respondent's testimony under oath in open court. Additionally, the respondent's attempt to foist upon the IJ the two separate documents each containing this composite photo and also swear under oath that respondent was physically together with his alleged spouse at the time the photo was taken for both photos is both fallacious and incredible. Given the respondent's attempt

to hoodwink the immigration court into believing that the documents were genuine supported by his testimony that the composite photos was taken when he was physically present with his wife, creates doubt in the validity of the respondent's other documents that were provided by the respondent in support of his asylum claim and relied upon by the federal appeals court to remand the matter, i.e., photos of his purported children, his purported spouse and other photos. .

Another adverse aspect of the respondent's credibility was his testimony of how he come to know (b) (6) , the proponent of a medical statement that the respondent's spouse is unable to have children since the x-rays shows that experienced a tubal ligation. The respondent's testimony was inconsistent and unconvincing about his contact, knowledge and solicitation of (b) (6) The medical evidence from (b) (6) is critical and pivotal to the respondent claim that his spouse is unable to have children because she was sterilized. The respondent's inability to clearly identify who the doctor was and how respondent was able to solicit his services is fatal to his credibility.

Another inconsistency in the respondent's presentation occurred when the respondent orally testified that he remained in Lang Chi Island for more than a year before leaving for the US. The respondent's written statement indicated that he departed the PRC after five (5) months. The respondent's attempt to offer an explanation was not very convincing.

As for demeanor, the court noted that the respondent, while not specifically noted on the record with the exception of two occasions, took prolonged pauses and sipped on water when he was asked to provide details and specifics regarding family planning matters. While the federal court did not deem it a ploy, the appearance and behavioral antics of the respondent did evoke to the court a sense of stalling and delay. In addition, the court witnessed several times when the respondent's testimony was hesitant, especially when he was confronted by questions regarding inconsistencies in his testimony. The IJ found the respondent appeared to be searching, especially with his eyes, for answers to address conflicting testimony. The court also found the respondent to be defensive when clarification to his testimony was being sought by the DHS and IJ. The respondent did not appear to the court to be a credible witness.

Moving to the respondent's burden of proof, the federal appeals court found that the x-ray materials originating in China were above reproach. But, since the attached photos to the medical x-rays was the handiwork of the purported spouse and was not the product of on-site photo from the issuing authority, no evidentiary weight was provided to the medical x-rays. Also, photos of the applicant that are provided by a unknown third party to the issuer: the PRC Notary Office, that is personally unknown to the issuer, certainly defeats the purpose of having the any subsequent reviewer of the documents feel confident that the information in the issuer's document actual relates to the person in the photo. An on-site photo by the issuer attached to the document provides a modicum of proof that the issuer had contact with the photographed person. In other words, did the purported document pertain to the person standing

before you. Such on-site photo document evoke a sense of true identity, such as a government issued driver's license with an on-site photo. When a third person provides a photo to be attached to a document, there is no assurance that the photo, document or information contained therein is authentic.

The court also noted other deficiencies contained in the supporting documents as to mitigate any evidentiary value that the documents may have. Such as, the PRC Notarials were not contemporaneously issued, the issuer of the notarial documents failed to state what information or facts were relied upon for the issuance of the document. And, though not stated before, the PRC Government Notarial Certificates were not authenticated in accord with the provisions found in 8 C.F.R. § 1287.6 (2007)

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The respondent provided other photos and documents regarding his alleged spouse and children, but as noted by the court, the documents were not given any evidentiary weight since the court found the respondent's testimony to be fallacious and conflicting as he testified that he was personally present when the alleged photos were taken. A review of the photos attached to Exhibits 5A & 5B with the naked eye clearly indicate that the respondent was not truthful. Clearly these are issues that go directly to the heart of respondent's claim of coercive treatment and persecution. *Diallo v. INS,* 232 Fd 279 (2d Cir. 2000) and *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997). The respondent's ability to obtain photos that were created to give the impression that the subjects were together standing side by side undermines the validity of the remaining photos, as they too can be photo altered.

After considering the evidence and the testimony presented in this matter, the court finds that the respondent was not credible and not believable. Also, the court found the respondent's presentation to be insufficient. It is the opinion of the court that respondent failed to demonstrate either past persecution or a well-founded fear of persecution due to the coercive enforcement of the PRC family planning policy. As the respondent has failed to establish a well-founded fear of persecution, he has also failed to establish and meet the higher standard of proof necessary for withholding of removal under the INA.

As respondent requested relief under Article 3 of the UN Convention Against Torture. It is also the opinion of the court that the respondent has failed to establish that it would be more likely than not that he would be tortured if forced to return. In fact, the respondent admitted that he remained in the PRC for a period of ten (10) years after the alleged coercive treatment and encountered no problems or difficulties. The respondent also acknowledged that the children were registered and they were attending "village" supported school without any difficulty. The court will deny the respondent's request for said relief.

Accordingly, the following orders will be entered:

ORDER

IT IS ORDERED THAT the respondent's request for asylum under § 208 of the INA is denied;

IT IS FURTHER ORDERED that the respondent's request for withholding of removal under § 241(b)(3) of the INA is denied;

IT IS FURTHER ORDERED that the respondent's request for withholding of removal under CAT is denied;

IT IS FURTHER ORDERED that the respondent shall be deported from the United States to the People's Republic of China pursuant to § 241(a)(1)(B) of the INA.

SANDY K. HOM
US Immigration Judge

File: (b) (6)

Date: JAN 25 2007

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sunit K. Joshi, Esquire

CHARGE:

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

APPLICATION: Asylum; withholding of deportation

ORDER:

PER CURIAM. This case was last before us on June 19, 2002, when we dismissed the respondent's appeal from the Immigration Judge's decision denying his application for asylum and withholding of deportation. The matter is now before us pursuant to the (b) (6) decision of the United States Court of Appeals for the (b) (6) The court found numerous errors in the Immigration Judge's adverse credibility finding, and concluded that, "We are in no position to predict with confidence what the outcome of an error-free proceeding would have been." It therefore remanded the case. In view of the court's decision, we find that a remand to the Immigration Judge is necessary. Accordingly, the record is remanded to the Immigration Judge for further proceedings consistent with the court's decision.

Frederick D Hess

FOR THE BOARD