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Coercive Family Planning [2]

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Washington, D.C. 20530

UNCLEARED DRAFT; UNCLEARED DRAFT; UNCLEARED DRAFT; UNCLEARED

TO: National Security Council
Domestic Policy Council

FROM: Department of Justice

RE: Asylum Claims Based on Coercive Family Planning
Practices

1. Introduction

The question of how U.S. asylum law should apply to coercive family planning practices has arisen in recent months in the context of criminal alien smuggling from the People's Republic of China. Several hundred Chinese nationals were smuggled by organized crime into the United States this spring; they were detained and put into deportation proceedings. In response, many of the Chinese aliens and their counsel have claimed asylum, principally on the ground of Chinese coercive family planning practices. The adjudication of their claims has brought to the forefront unresolved legal issues surrounding the application of U.S. asylum law and a 1990 Bush Executive Order concerning coercive family planning practices.

However, this issue does have a broader context. Every year, more than 100,000 Chinese nonimmigrants enter the U.S. legally, and numerous others enter illegally apart from the highly publicized arrival of smugglers' ships. Any of these aliens could potentially seek the benefit of a program providing relief from coercive family planning practices. In addition, this issue is not limited to China. Singapore and perhaps others countries have now or may in the future adopt similar practices.

This memo explains the legal background and policy context of this issue and outlines immigration policy alternatives available to address humanitarian concerns presented by coercive family planning practices. Establishing an effective policy requires that we address migration flows such as this at their outset.

2. Legal Background

Following the Tiananmen Square massacre, Congress passed by wide margins the Emergency Chinese Immigration Relief Act of 1989. During the passage of that Act, Congress added a provision which would have provided that a person fleeing coercive family planning practices would be eligible for asylum in the United States if he or she would be persecuted upon return to China. President Bush vetoed the bill but directed that the Attorney General give enhanced consideration under the immigration laws to persons fleeing such practices and fearing persecution upon their return to their home country. In January 1990, the Attorney General published an interim rule interpreting the asylum provisions of the immigration laws to provide asylum to those who have a well-founded fear of forced abortion, forced sterilization, or persecution upon return.

Thereafter, in April 1990 President Bush issued Executive Order 12711. Section 4 of the Executive Order directed the Secretary of State and the Attorney General to provide for "enhanced consideration under the immigration laws" for persons expressing fear of persecution related to coerced abortion or involuntary sterilization policies. The order further directed that such enhanced consideration be provided "as implemented by the Attorney General's regulation effective January 29, 1990."

However, when the Bush Administration revised the asylum regulations in July 1990, the interim rule was not included and coercive family planning practices were not mentioned in the final regulations. In January 1993, Attorney General Barr signed regulations which would have made subjection to coercive family planning practices, by itself, a ground for asylum; however, these regulations were never formally published before the end of the last Administration.

In the absence of definitive legislation or regulations, the Board of Immigration Appeals (a component of the Department of Justice which reviews immigration cases) was free to interpret the asylum laws according to its best reading of the 1980 Refugee Act. In 1989 it issued Matter of Chang which held that an alien could not establish a claim to asylum by virtue of the application of broadly applied coercive family planning laws, even if the alien could show coerced abortion or sterilization (absent proof, for example, of selected application based on grounds such as religion or political views).

To this day, the Board of Immigration Appeals has consistently followed this precedent and has applied it to the cases of the Chinese aliens recently smuggled into the United States. However, contrary to the position of the Board, since

the Bush Administration, INS general counsel has taken the position that persons fleeing coercive family planning practices are entitled to asylum under the Executive Order and the 1990 regulations and INS asylum officers have been adjudicating under this standard. This issue was presented to the Attorney General in June when the Board certified to her two Chinese asylum cases and asked her to resolve the apparent conflict between the Executive Order and the Board's decision. The Attorney General in December determined that because the Chinese petitioners in those cases did not present credible claims, the cases were not appropriate vehicles to decide the issue. Immediately after the Attorney General's decision, the Board issued an opinion reaffirming Matter of Chang and holding that the Executive Order does not create binding standards of eligibility for asylum. By regulation, decisions of the Board are binding on the INS.

A large number of the cases in which the BIA has denied asylum based on Chang have reached the federal courts. One or more district courts may issue decisions in the near future. In litigation, the Department of Justice has defended the Board's decisions, as it routinely does. In the course of that defense, the Department has argued that Chang is a reasonable interpretation of the asylum laws to which the courts must defer.

The discussion below describes and recommends policy alternatives based on the current situation. During the course of the litigation pending in courts throughout the country, at some point there may be an adverse ruling that would produce public reaction, require public comment or different legal and administrative action by the President, the Attorney General, or INS.

3. Policy Context

Chinese alien smuggling into the United States has increased dramatically in the past two years. From a trickle of persons arriving on commercial airlines and fishing boats in 1990, there has been an upsurge in the number of Chinese nationals arriving aboard fishing boats and rusting ocean freighters. Since January 1993, the Coast Guard has intercepted 11 ships carrying over 2,500 Chinese migrants. Substantially more Chinese nationals entered the U.S. illegally in 1992, most by air or land across our border with Mexico. According to INS estimates, more than 14,000 Chinese nationals applied for asylum in FY '93, up from roughly 3,400 the prior year.

The Chinese alien smuggling phenomenon is particularly distressing because of the dangers, inhuman treatment and indentured servitude imposed by organized crime syndicates.

U.S. policy should not unwittingly contribute to what has been called "the new slave trade." Since the announcement of the President's plan of action in June, we have seen that enhanced USG efforts to detain and deport illegal Chinese aliens have had the salutary effect of increasing the PRC's efforts to clamp down on the smuggling operations in China. Continued PRC cooperation is imperative to disabling these organizations and to ensuring that the PRC will accept the return of those of the approximately 1100 Chinese illegal aliens currently in INS detention who will be judged ineligible to remain. The State Department indicates that in diplomatic discussions Chinese officials have communicated their perception that lax U.S. asylum policies are a significant contributing factor to the problem of illegal migration of Chinese to the United States.

4. Immigration Policy Alternatives - Providing Relief on Humanitarian Grounds

It is possible to provide some form of extraordinary relief on humanitarian grounds to address concerns raised by coercive family planning practices. Such relief should be fashioned in a way that would not invite abuse -- or at least in a way that permits case-by-case eligibility determinations so that relief is extended only to those who actually fall into defined categories for relief. In evaluating each option, we address the concern that a humanitarian initiative could be turned into an unintended incentive for alien smuggling, resulting in serious harm inflicted upon the victims of criminal smuggling activity.

Who Should Be Provided Relief

(1) Individuals Facing Coerced Abortion.

The most obvious category is pregnant women who, if returned, would face imminent danger of undergoing a forced abortion. Without question, these persons face a most severe human rights abuse.

We understand that, to date, there have been no such cases, and officials familiar with the situation in China feel it is unlikely that large numbers of such persons would be victims of alien smuggling. Over 90% of the current population seeking asylum are young Chinese males.

(2) Individuals in the U.S. Facing Imminent Danger of Coerced Sterilization.

This category would include males and females, and the threat they face is also unquestionably a serious human rights abuse. Coercion may be of several types:

DEC. 25 95 19:37 0007700 P. 6/13

(a) Physical coercion of the applicant;

(b) Coercion of the applicant by threat of physical harm to a family member.

Others Who Might be Considered for Relief

Coercion under category 2 above could also include a subcategory (c):

(c) Threat of egregious harm other than physical harm which could be demonstrated by lengthy imprisonment or destruction of a home.

By including individuals who fall under subcategory (c), we would be including potentially a very large number of applicants. A larger number of persons could make a genuine claim for relief, and there is also the risk of a much larger number of false claims.

A key question for each subcategory is what proof would be required to establish eligibility. Most of those seeking asylum based on coercive family planning practices are young males, predominantly from areas of China with lax enforcement of family planning policies. Some may attempt to fabricate evidence when they do not face genuine danger of coerced sterilization, and smugglers may use the existence of this relief to attract victims. The INS after study would have to provide guidance in light of its experience making credibility determinations. Factors may include: incidence of coerced sterilization in place of origin and return; proof of marriage and the existence of children; genuine documentary evidence, if available; proof of past persecution or threat; and internally consistent testimony.

(3) Individuals who, if returned, would face penalties -- short of coercion -- as punishment for having violated population control rules.

For example, there are reports that fines are imposed and personal property is seized for violation of family planning

¹ For example, the Chinese government announced on December 21 that a new eugenics law would soon be promulgated. This law would "encourage" the use of abortion and sterilization to halt the birth of "abnormal" children. These practices could be encompassed within the concept of coercion. We have no specifics on what the law would contain but there have been suggestions that marriage between certain people would be conditioned on their being sterilized.

rules. These sorts of claim have been commonly made by asylum applicants.

- (4) Individuals who may want to have children in the future and who would be subject to coercive population control measures.

Obviously this is an extremely broad category. Protecting persons in this category would permit persons to gain relief by making what amounts to a quite speculative claim of harm. It would also be difficult for INS officials to determine those who actually fall into the category.

- (5) Individuals who have in the past been subjected to coerced abortion, forced sterilization, or some other egregious penalty.

Because of the severity of the past trauma, relief on humanitarian grounds might be appropriate for these persons. A policy of no return, however, would not remedy the harm these persons suffered. It should be noted that a large number of asylum claims made to date have fallen into this category and that this category would have been protected under the 1993 proposed regulations.

Categories 3-5 present human rights concerns, but not as severe as subjection to imminent coerced abortion or sterilization. These categories also create much more serious problems of proof and potential for abuse. For example, any adult can claim a desire to have children in the future; and millions of Chinese, have voluntarily, in exchange for incentives, had abortions or sterilization and could claim they were coerced. The danger of abuse and fraud is great; and the greater the risk of fraud, the greater the risk of increased alien smuggling and the attendant abuses.

Whatever categories are chosen, the spouse of a qualifying applicant would also be entitled to relief if the spouse were an applicant, to avoid separating families.

To provide an idea of the types of asylum claims that have been filed so far, attached to this memorandum is a summary of the allegations made in representative cases.

Recommendation

We recommend inclusion of categories 1 and 2(a) in any program of humanitarian relief. These present the most compelling cases and are the easiest to administer. We also recommend inclusion of category 2(b), but it presents more difficult problems of proof and is therefore more difficult to administer. Category 2(c) is more difficult still, because it

presents not only problems of proof but problems of determining what constitutes coercion in any particular case. To date, it also represents perhaps the largest category of claims.

We do not recommend inclusion of categories 3 and 4. Careful consideration should be given to whether protection should be extended to individuals in category 5 who have actually been subjected to coerced abortion or forced sterilization.

5. Administrative Mechanisms for Providing Relief on Humanitarian Grounds

There are several alternative mechanisms to provide relief to these categories. We begin with what we consider the preferable alternative.

(a) Discretionary Relief. Under existing mechanisms, INS could determine administratively in particular cases to defer return of the applicant.

When it appeared that an alien fell into one of the defined categories, the INS would defer return of the alien to his home country. The alien would be released from detention and would be granted work authorization. However, granting this relief would not foreclose an asylum claim or deny an alien any other rights he or she may have under immigration laws.

This option protects the alien from a severe human rights abuse and denies him no right he may have under U.S. immigration laws. In addition, it should be one of the least complicated approaches since it does not entail administrative litigation and judicial review would be more limited.

If circumstances change, the INS would remain free to institute deportation proceedings at a later date, unless the alien otherwise was determined to be eligible for asylum or some other existing immigration benefit.

Action Necessary to Implement Relief. Such discretionary relief can be implemented simply. The INS Commissioner would instruct INS administrators to follow such a policy. No statutory or regulatory changes are necessary.

However, there remains the legal confusion over the meaning of the 1990 Executive Order, which references 1990 regulations that are no longer in effect. This confusion could be eliminated by simply deleting the reference in the Executive Order to the 1990 regulations. In this manner, the Executive Order would continue to instruct the Attorney General and the Secretary of State to provide enhanced consideration under the

immigration laws to claims of persecution due to coercive family planning practices, but that instruction would no longer be made in the context of asylum. The instruction would be carried out through the implementation of discretionary relief as set forth above.

(b) Asylum. The more far-reaching alternative is the one contemplated by the proposed regulations that were not finally adopted during the Bush Administration, asylum. This option would require a change of current law, since Matter of Chang holds that political asylum is not an available remedy. It grants the beneficiaries the greatest relief.

There are several problems with this option. First, granting asylum is the less flexible alternative. Once a legal principle is in place that asylum is generally available in coercive family planning cases, if circumstances change and it becomes desirable to change policy, that principle could be altered only by a legal change. In contrast, by using discretionary relief, INS maintains the maximum flexibility to respond to future events. Second, an expanded reading of the asylum laws may have unforeseen consequences, such as inviting other asylum claims that are not currently recognized. Asylum is available only to victims of persecution on account of certain factors, such as political opinion. Application of the asylum laws to a broadly-applied birth control policy puts pressure on this definition, except when the birth control policy is selectively enforced for one of the forbidden reasons, such as political opinion or religion. Third, applying asylum in these cases creates the greatest incentive to alien smuggling and fraudulent claims, because it would send the strongest signal to potential illegal immigrants and because it provides the greatest benefits to successful claimants -- immediate work authorization, protection from deportation, legal permanent resident status after a year, and then the opportunity to seek immigration of relatives.

Action Necessary to Implement Relief. This option would require the reversal of Matter of Chang. That could be most easily accomplished by the Attorney General adopting regulations to that effect. The Attorney General could also review an appropriate case and reverse Matter of Chang. Alternatively, an appropriate Executive Order could be adopted, or legislation could be proposed.

6. Additional Considerations

(a) Litigation. Under the discretionary relief proposed above, the pending litigation, and any future litigation by asylum seekers, would continue. Until the courts rule conclusively on the meaning of U.S. asylum laws and the validity of Matter of Chang, these issues will continue to be

litigated. It should be recognized that it is always possible for there to be an adverse result in the litigation, and developments in the litigation may require some other or additional action in the future. For example, there could be a ruling based on the Executive Order which might require a decision whether to make additional changes in the Order, or there might be a ruling concerning Matter of Chang which would require a decision whether the Attorney General would take some further action.

It should also be understood that any action will probably result in litigation; that does not mean that the court challenge would be successful, however. We will attempt to design any discretionary relief to limit judicial review, to make the process as simple and expeditious as possible.

(b) Precedential Effect. By establishing a discretionary mechanism for extending relief on humanitarian grounds to persons who do not qualify for asylum, we may be inviting demands for similar relief from other groups who face return to human rights abuses.

7. Conclusion

The relief proposed above does not go as far as the 1990 interim regulations or the 1993 regulations proposed by Attorney General Barr, principally because it does not stretch U.S. asylum laws to address these humanitarian concerns. In addition, it would narrow the categories of persons to whom relief could be given. However, the proposal would provide a flexible means for extending protection to victims of the most serious human rights violations -- the motivating force behind the Congressional action in 1989 -- and at the same time would reduce the dangers and abuses associated with increased alien smuggling -- a pressing concern of Congress today.

14-00000 10079000 10-01-1008 P.11/13 102

**DESCRIPTIONS OF REPRESENTATIVE ASYLUM CLAIMS BASED ON ENFORCEMENT
OF COERCE FAMILY PLANNING IN THE PEOPLE'S REPUBLIC OF CHINA**

1. (Categories 2 and 5) The applicant's wife went into hiding in 1989 to conceal her second pregnancy. After the birth, she stayed with her children at the house of the applicant's sister. Eventually, she moved to the applicant's uncle's house in another village. Both hiding places were within 15-30 minutes of where applicant lived. Applicant's wife was seized in March 1992 when she was six months' pregnant (third child) and immediately taken in for an abortion. Applicant testified that "at that time in 1992, the policy was very tight and they were arresting pregnant women very severely."

The family reunited after the abortion. The birth control officials came to take the wife away for sterilization on May 10, 1992. The wife was taken some distance to a county hospital, but found unsuitable for sterilization due to a kidney condition, nephritis. On May 12, while his wife was still at the hospital, the birth control officials came after the applicant. He was out in his fishing boat, and found out about the "visit" when he returned home. He then escaped to another uncle's house in Foo Chow, and hid at relatives' homes until leaving China.

2. (Category 2) The applicant was subject to an order to undergo sterilization. His wife was originally ordered to undergo sterilization, and taken away for this purpose by village birth control officials in August 1991. She was found to have a minor heart condition, and the order was changed to compel the applicant to undergo sterilization. The applicant escaped from officials and went to aunt's home in Fuzhou.

3. (Categories 2 and 3) The applicant, who was 22 at the time, married his wife, then 17, in a customary ceremony in August 1991. Other people his age in the village married early under similar circumstances, and many of the wives were ordered to undergo abortions when they became pregnant. In February 1992, when the applicant's wife was five months' pregnant, 2-3 village officials came to their home and ordered the wife to undergo an abortion, or "face the consequences." The "consequences" would entail destruction of the family's home.

The applicant and his wife fled the next day to his aunt's home in Nanming. The baby was born June 28, 1992. On July 19, the applicant and his wife and baby returned to his home village for a visit. The next morning, they awoke early and went to his in-laws. The officials came later that morning, and when they saw the applicant was gone, they started wrecking furniture and slapped the applicant's parents. They told the applicant's parents that the applicant and his wife could not have any more children and that one of them would have to be sterilized. They

also said that the applicant would be fined RMB 10,000. The applicant stayed at a neighbor's house the following evening, and then went (with his family) to his aunt's house (not clear it was the same aunt). His family had heard of a boat going to America, and arranged for the applicant to get on it.

The applicant stated that he wants to have one more child. He did not testify that a specific sterilization order had been directed at him. He said in his written application that he would be sterilized and fined for violating the birth control policy and for leaving the country illegally. He also said that he feared being punished by a fine of RMB 40,000 for departing China illegally. A letter from his father indicated that a person in the village who had left China illegally was sentenced to two years in a labor camp.

4. (Categories 2 and 3) The applicant and his wife have three children. They had their third child in secret after his wife was determined to be unfit for sterilization due to a heart condition. When he attempted to register his children in his home village, he was ordered to pay a 10,000 yuan fine and be sterilized. He did not want to be sterilized because of fears of adverse health consequences. He struck a birth control official when confronted about paying the fine. His furniture was taken and his home demolished.

5. (Categories 2 and 3) The applicant's home was seriously vandalized in April 1991 when officials delivered a second notice regarding a fine imposed on the applicant for having a child without permission. The applicant and his wife had escaped to his mother-in-law's in late 1990, during his wife's pregnancy with their third child, in order to avoid a compulsory abortion. There had been no direct threat of a coerced abortion, but birth control enforcement was very aggressive at that time. The applicant fears being imprisoned by authorities upon his return for not paying the fine, for not complying with the family planning policy, and for escaping illegally. He also said he feared being sterilized against his will.

6. (Categories 2 and 3) The applicant is a 34 year-old married male from Changle county in Fujian province. He arrived in Honolulu by boat on September 17, 1992. He testified that after the birth of his first child, a daughter, in April 1989, village officials took his wife away to have an IUD inserted against her will. He and his wife wanted to have more children, particularly a son. His wife suffered complications from the IUD. In 1990, they decided to hire a private doctor to remove the IUD. His wife became pregnant, and gave birth to another daughter in December 1991. During the pregnancy, she hid away from home, but she came home to have the child. The applicant testified that at a later date, which he did not specify, ten people came to his home to take his wife away to be sterilized and to find out about

the doctor who removed the IUD. He and his wife escaped out the back door of their home and fled together to a mountain area. The children were left with the applicant's mother. The applicant sent a friend back to the village to find out about the welfare of his children. The friend told him that the officials later returned to the house and demanded of the mother to know where the applicant and his wife had fled. The officials vandalized the home, and pushed the mother around. The baby was also injured during this scuffle, but all recovered. The applicant's wife is still in hiding.

208-4807

THE WHITE HOUSE

WASHINGTON

December 16, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: BERNARD W. NUSSBAUM
CAROL RASCO
ANTHONY LAKE

SUBJECT: Asylum Claims Based on China's Family Planning Policies

A District Court in Virginia could issue a decision as early as 4PM today which may draw attention to developments regarding the return of illegal aliens to China. The alien is asserting a right to asylum based on China's coercive family planning policies; the Justice Department has opposed this position.

Pursuant to our policy to stem illegal immigration to the United States, the Justice Department has moved expeditiously to return the Chinese aliens aboard the Golden Venture, the vessel which ran aground off Long Island this past summer.

Those cases are now working their way through U.S. courts. Many of the Chinese are asserting a right to asylum, based on Chinese coercive family planning policies. In that context, the aliens are seeking to rely on a Bush Executive Order, and implementing regulations, which purported to make eligible for asylum any individual who feared being subjected to such family practices on return to China.

The Board of Immigration Appeals has found since 1989 that the regulations implementing the Bush E.O. were procedurally defective, and that China's family planning practices, which are generally applied, do not constitute persecution based on race, religion or political opinion, as required under our asylum law. The Justice Department is defending these views. This could lead to judicial decisions finding deportable certain aliens who have a credible fear of forced sterilization or abortion.

We have under review what policy to recommend concerning the protection of illegal Chinese immigrants, in light of China's family planning policies. Our approach must take into account our human rights concerns, and also our need to be able to deport undeserving illegal aliens in order to avoid attracting further immigration. It must also take into account our overall China policy, and Congressional considerations. (Congressional sentiments are likely to be torn between human rights and anti-

illegal immigration concerns.) We expect to have a recommendation to you within two weeks.

In the meantime, the Justice Department position could attract criticism, based on human rights concerns and perceived weakness toward China. We are using the attached press guidance to indicate that the Justice Department litigating position is based on legal considerations, and that we have the overall policy under review.

Q: Has the Administration changed the Bush Administration policy against returning to China individuals who fear forced abortion or sterilization?

A: The policy is under review.

Q: Why did the Justice Department support the deportability of a person who had a credible claim based on Chinese family planning policies?

A: The Justice Department defended the denial by the Board of Immigration Appeals of an asylum claim based on legal precedent which the Board has followed since 1989.

Q: Are people who request asylum based on fear of coercive family planning practices being returned to China?

A: As we stated, the asylum and deportation policy is under review in all its aspects. Individuals who request asylum have an opportunity for a hearing before an Immigration Judge and for judicial review.

Q: Has the Administration changed the Bush Administration policy against returning to China individuals who fear forced abortion or sterilization?

A: The previous Administration's policy on this issue was the subject of confusion and conflicting interpretations between different parts of the government charged with enforcing the immigration laws. Consequently, the policy ~~is~~ currently under review. While this policy is under review, no one facing an imminent prospect of forced abortion or sterilization will be subjected to final deportation.

Q: Why did the Justice Department support the deportability of a person who had a credible claim based on Chinese family planning policies?

A: The Justice Department defended the denial by the Board of Immigration Appeals of an asylum claim based on legal precedent which the Board has followed since 1989.

After Jan 1, those who have not applied
will become eligible for deportation

Interim Regs not final
Protects ^{Bilingual} students
not others
Final Rule - Jan 1,

Under Exec order -
work auth allowed
Those who have not processed
not work auth

China Desk -

demonstrating likelihood of forced
or sterilization

How many have raised the defense
of forced abortion or sterilization?

How many are waylaid - across Europe?

How is student provision are implemented?
Outside of refugee statute.

How wide should protections be?

What should the vehicle be?

Provincial quotas against more births

Magnet effect sets out possibility for staying

3 ways of getting at correcting EO

1. propose legislation /
2. Presidential Directive
3. AG - TPS

4p today VA Dist Ct is expected to rule

Is DOJ arguing the procedural or the substance?

Brief has elements of both -

B/C of procedural flaws - the only thing left standing is Chang

Statement

The entire issue is under review. Until policy issue is solved

If we get an adverse decision, DOJ will appeal. This will allow time for policy to catch up w/ legal action.

DOJ has not said what Bush tried to accomplish was not accomplished
But DOJ has said Chang is a reasonable interpretation of the Refugee Act.

Bush EO:
give different meaning to "enhanced consideration" in regulation
OLC must change its opinion

Reactions to memo

need for a chronology; political dynamics

Want to wind up w/ a Presidential action to prevent return of those who are facing the abuse; limit the class on executive action such as INS reissuing reqs

Other options

TPS - or Deferred Vol Departure -

Citation	Rank(R)	Database	Mode
	R 1 OF 1	FIM-BIA	P
Interim Decision 3107, 1989 WL 247513 (B.I.A.)			

MATTER OF CHANG**In Deportation Proceedings**

A-27202715

Decided by Board May 12, 1989

(1) Implementation of the one couple, one child policy of the Chinese Government is not on its face persecutive and does not create a well-founded fear of persecution on account of one of the five reasons enumerated in section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. s 1101(a)(42)(A) (1982), even to the extent that involuntary sterilizations may occur.

(2) An individual claiming asylum for reasons related to the one couple, one child policy must establish that the application of the policy to him was in fact persecutive or that he had a well-founded fear that it would be persecutive because the policy was being selectively applied against members of a particular religious group or was being used to punish individuals for their political opinions or for other reasons enumerated under section 101(a)(42)(A) of the Act.

(3) A person who shows that he opposed the one couple, one child policy but was subjected to it nevertheless has not demonstrated that he was being punished for his opinion as a member of a particular social group (persons opposed to the policy), but rather, there must be evidence that the governmental action arose for a reason other than general population control (for instance, evidence of disparate, more severe treatment for those who publicly oppose the policy).

(4) If the applicant claims that action occurred at the hands of local officials, he must normally show that redress from higher officials was unavailable or that he has a well-founded fear that it would be unavailable.

(5) The policy guidelines announced by Attorney General Meese on August 5, 1988, regarding the one couple, one child policy do not apply to decisions by immigration judges and the Board of Immigration Appeals.

CHARGE:

Order: Act of 1952--Sec. 241(a)(2) [8 U.S.C. s 1251(a)(2)]--Entered without inspection

ON BEHALF OF RESPONDENT:

Lebenkoff & Coven
505 Fifth Avenue
New York, New York 10017

ON BEHALF OF SERVICE:

Jill H. Dufresne
Deputy Chief Legal Officer

BY: Milhollan, Chairman; Dunne, Morris, Vacca, and Heilman, Board Members

In a decision dated December 18, 1986, the immigration judge found the respondent deportable on the charge set forth above and denied his applications for asylum, withholding of deportation, and voluntary departure. The respondent has appealed from the denial of those applications. The appeal will be dismissed, except insofar as it concerns the denial of voluntary departure. The request for oral argument is denied.

With respect to his applications for asylum and withholding of deportation under sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. ss 1158(a) and 1253(h) (1982), the respondent, a 33-year-old native and citizen of the People's Republic of China, made the following assertions. In his application for asylum, the respondent indicated that he was an anti-Communist who fled his homeland "because of Communist domination of China"; that he did not base his asylum claim on conditions in China that affected his freedom more than the rest of the country's population; and that neither he nor any member of his immediate family had "ever been mistreated by the authorities of his home country." His asylum application did not reference any claim to asylum based on his country's population control measures and he did not allege any mistreatment arising from such policies.

At his deportation hearing, the respondent testified that he was afraid of persecution in China; that people there were "mobilized" and "forced to do the bidding of the government"; that he and his wife were not given any work to do; that he and his wife were forced to flee from their commune because they had two children and did not agree to stop having more children; and, that they disagreed with China's family planning policies because "in the countryside, especially in the farming areas, we need more children." He indicated that the "government" wanted him to go to a clinic to be sterilized, that he thought the operation would "harm" his body, that he did not want to be sterilized, and that if he returned to China he would be forced to submit to the operation. He testified that his wife was supposed to go to the clinic but did not do so because she was ill. He testified that he did not know what would have happened if his wife had gone to the clinic. He further testified that he did not mention his opposition to China's birth control policies on his asylum application because "nobody had asked [him]" and because he was not very "conversant" in expressing himself and did not understand English.

On appeal, the respondent, through counsel, states that the facts of the case are that he and his wife were ordered by their commune to submit to sterilization operations after the birth of their second child, that his wife was able to "postpone" the operation due to illness, but that he fled China because he had no choice other than to submit to the surgery.

In conjunction with the appeal, the respondent also submitted a letter from the Library of Congress dated November 23, 1987, transmitting to the Immigration and Naturalization Service a report entitled "Population Control in the People's Republic of China." The report was apparently requested by the Service in connection with another matter. [FN1] According to the report, the People's Republic of China ("PRC") has no national law on population control per se. The constitution provides that the state shall carry out family planning to control the size of the population and that spouses have the duty

to carry out family planning. The Marriage Law of 1980 sets minimum marriage ages and places responsibility for birth control on both partners. The provinces and the cities governed directly by the state have enacted their own regulations on population control, but the population control program is guided by a joint directive of the Chinese Communist Party and the state entitled "On the Further Implementation of Family Planning Work" of February 1982. The policy provides that state cadres and urban residents are allowed one child per couple, with exceptions when special permission is granted. In rural areas generally the one-child rule is applied, except that where there are special difficulties, such as the birth of a handicapped child who cannot work, application to have a second child can be made. In no case is a third birth to be permitted. The rules are more leniently applied to families of non-Han ethnic minority groups. Late in 1985, it was announced that the one-child rule would be relaxed, and that in some areas a second child would be permitted if the first was a girl and in other special circumstances. The mechanics of the implementation of the program are by and large locally determined. Economic sanctions, peer pressure, and propaganda are used to insure compliance. Single child families receive health and educational benefits for the child. Couples who continue pregnancies which are not allowed may suffer the suspension of wages, fines, loss of seniority for promotion, and so forth. Couples are urged to undergo birth control operations (sterilization). Wages are sometimes paid during a rest period after sterilization, and cash rewards have been used to encourage sterilization. The Chinese Government has consistently denied supporting any use of force to obtain compliance with birth quotas. The transmittal letter forwarding the report states that punishment in the form of a sterilization operation is not provided for in Chinese law, though local officials may have used the one-child campaign to carry out a private vendetta.

Counsel also relies on the 1985 and 1987 Country Reports on Human Rights Practices, Joint Committee of the Senate and the House of Representatives, 99th Congress, 2d Session (1986), and 100th Congress, 2d Session (1988) ("Country Reports"), respectively. The 1985 Country Report on the PRC indicates that "[r]eported instances of family planning malpractice occur mostly in rural areas, where local officials have sometimes translated the policy into rigid quotas. Chinese authorities say they take measures against local officials who violate the Government's policy in this regard, but there have been few reports of punishment of such offenders." 1985 Country Reports at 741. According to the 1987 report, provinces are allowed to make their own regulations regarding implementation of the one-child policy as long as overall birthrates match the state-imposed goals. In the past, local officials coerced significant numbers of women into having abortions. In 1987 the Chinese Government stressed repeatedly that it does not condone forced abortions or sterilizations. Chinese authorities have said that they take measures against local officials who violate the Government's policy. Despite central government efforts to prevent the imposition of rigid quotas, local government officials and peers reportedly continue to exert pressure on some persons seeking to have second children. Economic pressure on families with more than two children can be severe and can include loss of party membership, loss of job, difficulty in purchasing state-supplied seed, fertilizer, and fuel and other sanctions. 1987 Country Reports at 666. [FN2]

An applicant for asylum must establish that he was persecuted, or that a

reasonable person in his circumstances would fear persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. See sections 101(a)(42)(A), 208(a) of the Act, 8 U.S.C. ss 101(a)(42)(A), 1158(a) (1982); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Carcamo-Flores v. INS*, 805 F.2d 60 (2d Cir.1986); *Guevara Flores v. INS*, 786 F.2d 1242 (5th Cir.1986), cert. denied, 480 U.S. 930 (1987); *Matter of Vigil*, Interim Decision 3050 (BIA 1988); *Matter of Mogharrabi*, Interim Decision 3028 (BIA 1987). The respondent bears the evidentiary burdens of proof and persuasion in any application for asylum under section 208(a) or withholding of deportation under section 243(h) of the Act. 8 C.F.R. ss 208.5, 242.17(e) (1988); *Rebollo-Jovel v. INS*, 794 F.2d 441 (9th Cir.1986); *Matter of Maldonado-Cruz*, Interim Decision 3041 (BIA 1988); *Matter of Acosta*, Interim Decision 2986 (BIA 1985), modified on other grounds, *Matter of Mogharrabi*, supra; see also *Young v. United States Dept. of Justice*, *INS*, 759 F.2d 450 (5th Cir.), cert. denied, 474 U.S. 996 (1985). We recognize, as have the courts, the difficulties faced by many aliens in obtaining documentary or other corroborative evidence to support their claims of persecution. Although every effort should be made to obtain such evidence, the lack of such evidence will not necessarily be fatal to the application. The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear. *Matter of Mogharrabi*, supra; see also, e.g., *Blanco-Comarribas v. INS*, 830 F.2d 1039 (9th Cir.1987).

In support of his appeal from the denial of his applications for asylum and withholding of deportation, the respondent makes a number of arguments to which we shall respond in turn.

The respondent initially submits that the Board should apply to this case certain "policy guidelines" announced by Attorney General Meese on August 5, 1988. These guidelines, however, were directed to the Immigration and Naturalization Service, rather than the immigration judges and this Board. See 8 C.F.R. ss 2.1, 3.1, 236.1, 236.3, 242.2(d), 242.8(a) (1988); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). The Service's apparent position is that the case before us on its facts does not come within the scope of the guidelines the Attorney General has directed "will be used by the Immigration and Naturalization Service in considering asylum requests from [individuals who cite a fear of persecution upon return to the PRC for having violated that country's 'one couple, one child' planning policy]."

The respondent's position on appeal is that he has a well-founded fear of persecution based on the likelihood he would face mandatory sterilization, that he has a reasonable fear of persecution as a member of a "particular social group" (namely, persons who actually oppose the government policy of "one child per family"), and that he is eligible for withholding of deportation under section 243(h) of the Act because he has demonstrated a clear probability of being sterilized if returned to China.

We do not find that the "one couple, one child" policy of the Chinese Government is on its face persecutive. China has adopted a policy whose stated objective is to discourage births through economic incentives, economic sanctions, peer pressure, education, availability of sterilization and other birth control measures, and use of propaganda. Chinese policymakers are faced

with the difficulty of providing for China's vast population in good years and in bad. The Government is concerned not only with the ability of its citizens to survive, but also with their housing, education, medical services, and the other benefits of life that persons in many other societies take for granted. For China to fail to take steps to prevent births might well mean that many millions of people would be condemned to, at best, the most marginal existence. The record reflects that China was in fact encouraged by world opinion to take measures to control its population.

There is no evidence that the goal of China's policy is other than as stated, or that it is a subterfuge for persecuting any portion of the Chinese citizenry on account of one of the reasons enumerated in section 101(a)(42)(A) of the Act. The policy does not prevent couples from having children but strives to limit the size of the family. It appears that exceptions are made so that couples facing certain hardships may have another child. The policy applies to everyone but expressly protects, and indeed is more leniently applied to, minority (non-Han) peoples within China. It appears to impose stricter requirements on Party members (state cadres) than on some non-Party members. The Chinese Government has stated that it does not condone forced sterilizations and that its policy is to take action against local officials who violate this policy.

The population problem arising in China poses a profound dilemma. We cannot find that implementation of the "one couple, one child" policy in and of itself, even to the extent that involuntary sterilizations may occur, is persecution or creates a well-founded fear of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." This is not to say that such a policy could not be implemented in such a way as to individuals or categories of persons so as to be persecution on account of a ground protected by the Act. To the extent, however, that such a policy is solely tied to controlling population, rather than as a guise for acting against people for reasons protected by the Act, we cannot find that persons who do not wish to have the policy applied to them are victims of persecution or have a well-founded fear of persecution within the present scope of the Act.

Thus, an asylum claim based solely on the fact that the applicant is subject to this policy must fail. An individual claiming asylum for reasons related to this policy must establish, based on additional facts present in his case, that the application of the policy to him was in fact persecutive or that he had a well-founded fear that it would be persecutive on account of one of the five reasons enumerated in section 101(a)(42)(A). For example, this might include evidence that the policy was being selectively applied against members of particular religious groups or was in fact being used to punish individuals for their political opinions. This does not mean that all who show that they opposed the policy, but were subjected to it anyway, have demonstrated that they are being "punished" for their opinions. Rather, there must be evidence that the governmental action arises for a reason other than general population control (e.g., evidence of disparate, more severe treatment for those who publicly oppose the policy). Finally, if the applicant claims that the punishment occurred at the hands of local officials, he must normally show that redress from higher officials was unavailable or that he has a well-founded fear that it would be unavailable.

We note that the respondent has not shown that mandatory sterilization is or was authorized under regulations or programs in effect in Fukien province, whence he came, or that forced sterilization has in fact occurred in his locality. The Country Report for 1987 reflects that 48.8% of the births in China in 1986 were second, third, or later births, which indicates that millions of persons in China were allowed or chose to have more than one child in that year. It also is support for the Chinese claim that the one-child policy is not routinely enforced by mandatory sterilization and abortion. The sole evidence at the hearing regarding this respondent's claim was his asylum application itself and his testimony. His testimony was simply not sufficiently detailed to provide a plausible and coherent account of the basis of his asylum claim and was contradicted by other information in the record. His asylum application undermines his testimony as it disclaims any mistreatment by the Government and does not refer to any fear stemming from China's population control measures. However, even if we accept the characterization of the evidence as set forth by the respondent on appeal (i.e., that he and his wife wished to have more than two children and he would be forced to undergo mandatory sterilization if returned to China), we would not find that evidence sufficient in itself to support a well-founded fear of persecution on account of a reason enumerated in section 101(a)(42)(a) of the Act. The respondent has not asserted or established that he was treated differently from other Chinese with respect to application of the "one couple, one child" policy, or that its application in his case was in reality a guise to achieve a governmental goal other than general population control.

Such a showing cannot be made by arguing that there is a "particular social group" made up of those persons who "actually" oppose the policy of "one couple, one child," and that the evidence that this "group" is persecuted is simply the fact that the policy is applied to them despite their opposition to it. If a law or policy is not inherently persecutive (as would be, for example, a law enacted to punish individuals because of their religious beliefs), one cannot demonstrate that it is a persecutive measure simply with evidence that it is applied to all persons, including those who do not agree with it. This is true even where questions of conscience or religion may be involved. In the United States, there are numerous cases upholding the imposition of religiously neutral laws against persons whose religious beliefs conflicted with them. See, e.g., *United States v. Lee*, 455 U.S. 252 (1982) (imposition of Social Security taxes against Amish persons whose religious beliefs forbade payment of the taxes or receipt of the benefits did not interfere with the free exercise of their religion); *United States v. Merkt*, 794 F.2d 950, 954-57 (5th Cir.1986), cert. denied, 480 U.S. 946 (1987) (conviction for illegally transporting aliens not barred by first amendment although defendants contended they were religiously motivated in conducting "sanctuary" activities), and cases cited therein.

The respondent submits that the freedom to have children is an absolute right under the 14th amendment to the United States Constitution and, for that reason, countries that abridge this right must be found to be engaging in acts of persecution. The resolution of the constitutional issues that could arise if the population problems underlying the implementation of the "one couple, one child" policy in China were to occur in the United States is a matter of speculation that it is hoped this country need never address. However, the

fact that a citizen of another country may not enjoy the same constitutional protections as a citizen of the United States does not mean that he is therefore persecuted on account of one of the five grounds enumerated in section 101(a)(42)(A) of the Act.

The respondent points out that Congress has chosen to provide financial aid only to countries that employ voluntary family planning techniques. It has prohibited the use of such aid to coerce or provide any financial incentive to any person to undergo sterilization, or for the performance of involuntary sterilizations as a method of family planning, or for biomedical research relating to methods of performing abortions or involuntary sterilization as a means of family planning. However, the fact that Congress may strongly disapprove of a foreign country's policy does not mean that Congress has found that the policy involves "persecution on account of race, religion, nationality, membership in a particular social group or political opinion." [FN3]

The respondent submits that involuntary sterilization is both a violation of fundamental human rights and a denial of the "right to life, liberty, and ... security" within the meaning of 22 U.S.C. s 2151n(a) (1982), which restricts the use of international development funds in countries which engage in a consistent pattern of gross violations of internationally recognized human rights. However, even if involuntary sterilization was demonstrated to be a violation of internationally recognized human rights, [FN4] that fact in itself would not establish that an individual subjected to such an act was a victim of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." We are satisfied that if an individual demonstrated a well-founded fear that such an act would occur "on account of" a reason protected by the Act, the "refugee" definition in section 101(a)(42) of the Act would be met.

The issue before us is not whether China's population control policies, in whole or in part, should be encouraged or discouraged to the fullest extent possible by the United States and the world community. The issue is whether the respondent demonstrates persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion simply with evidence that he and his wife desire to have more than two children and that, because of China's population control measures, he may be subjected to mandatory sterilization. Where there is no evidence that the application of the policy is a subterfuge for some other persecutive purpose, we do not find that he demonstrates eligibility for asylum by this evidence alone. Whether these policies are such that the immigration laws should be amended to provide temporary or permanent relief from deportation to all individuals who face the possibility of forced sterilization as part of a country's population control program is a matter for Congress to resolve legislatively.

On the record before us we find that the respondent's claims are insufficient to establish that he has a well-founded fear of persecution on account of one of the five grounds enumerated in section 101(a)(42)(A) of the Act. Because the respondent has failed to demonstrate a well-founded fear of persecution, he has necessarily failed to demonstrate a clear probability of it. See, e.g., *INS v. Cardoza-Fonseca*, supra; *Carcamo-Flores v. INS*, supra; *Guevara Flores v. INS*, supra. Therefore, the respondent has failed to show

that he qualifies for withholding of deportation.

The immigration judge denied the respondent's application for voluntary departure as a matter of discretion solely because the respondent made no reference to a lawful permanent resident sister on his request for asylum and mentioned a citizen "cousin" on the application, who appeared "to be a pure fabrication." However, the Service does not challenge the respondent's testimony at the hearing regarding his relatives or the fact that he has a lawful permanent resident sister. We are not satisfied that the reference to a "cousin" on the asylum application was not simply caused by error, particularly as the closer, and more significant, familial relationship was not referenced. As this was the sole basis underlying the immigration judge's discretionary denial of voluntary departure and as the respondent does have a relative in the United States who at least potentially could file a preference visa petition on his behalf, considering the record in its entirety we will grant the respondent the privilege of voluntary departure in the exercise of discretion.

Accordingly, the appeal will be dismissed except insofar as it pertains to the denial of voluntary departure.

ORDER: The appeal is dismissed except insofar as it concerns the denial of voluntary departure.

FURTHER ORDER: The outstanding order of deportation is withdrawn, and in lieu of an order of deportation the respondent is allowed to depart voluntarily, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director and under such conditions as he may direct. In the event of the respondent's failure so to depart, the order of deportation will be reinstated and executed.

FN1 Counsel for the respondent states that the Service is aware of this report. The sources cited in the report were not furnished to the Board in connection with this appeal and it is not known whether they were furnished to the Service by the Library of Congress. The Service, however, has not objected to consideration of this report. On appeal, respondent has also referenced newspaper articles and various other non-legal sources which were not offered into evidence at the hearing and whose texts have not been made available to this Board. These latter sources will not be considered.

FN2 In addition to the excerpts quoted by the respondent, we note the following relevant excerpts from the Country Reports on the PRC:

Implementation [of the family planning program] has varied widely from place to place. Although coercive family planning is contrary to official Chinese policy, there have been numerous reliable reports of coercive birth control practices, including forced abortions and sterilization....
1985 Country Reports at 738.

Extensive regulation of individual and family life is one of the distinctive features of the Chinese sociopolitical system. For most Chinese (particularly urban residents), life revolves around the work unit, which provides not only employment, but also housing, ration coupons, permission to marry and have a child, and other aspects of ordinary life....

Faced with one-fifth of the world's population squeezed onto 7 percent of the world's arable land, China's leaders have made family planning a top national priority. They believe that economic modernization goals will be unattainable without a low birth rate, particularly given the current high number of females of childbearing age, traditionally high Chinese birth rates, and recent medical advances leading to longer life expectancies. To achieve its goal of limiting China's population to 1.2 billion in the year 2000, the Government is discouraging early marriage and promoting as an ideal a norm of one child per family, backed by a massive, grassroots institutional effort involving education, contraceptive counseling, free contraceptive devices, and economic and social incentives and disincentives.

1985 Country Reports at 740-41 (emphasis added).

The effect of the economic reforms and the central policy of relaxing social controls in the rural areas has influenced the implementation of the birth-planning policy. In February the State Statistical Bureau published the results of a population sampling which indicated that 3.12 million more babies were born in 1986 than in 1985, 1.6 million more than the number planned for 1986. The increase was attributed to the rise in the number of multiple births and to the increased number of people of marriageable and childbearing age. According to the survey, in 1986 the crude birth rate rose to 20.7 per thousand compared to 17.8 per thousand in 1985. There was a slight decrease in the rate of abortions. The number of first births in 1986 was 51.2 percent of the total, second births were 31.5 percent of the total, and third or more were 17.3 percent. Only 15 percent of all couples of childbearing age have signed a one-child pledge.

After years of resisting the view held widely outside China that the PRC had to take steps to limit the growth of its population, now at 1.08 billion, the post-Mao reform leadership decided to institute family planning programs. During 1986-1987, China's leaders reiterated that family planning is a top national priority and expressed concern that the Government's policy has not been uniformly implemented in the past 12 months. The Government cited particular concern over the current unusually high number of females of childbearing age, increasing birth rates, and recent medical advances leading to longer life expectancies as reasons for renewed efforts to achieve its goal of limiting China's population to around 1.2 billion in the year 2000. Early in 1986, authorities began a massive campaign to extend education, contraceptive counseling, free contraceptive devices, and economic and social incentives down to the grassroots level.

1987 Country Reports at 665 (emphasis added).

FN3 The respondent also states that on July 11, 1985, the House of Representatives "passed legislation" accusing China of coercive sterilization and abortion programs. While the House passed a bill on that date with such a provision, it was dropped from the final legislation. See H.R.Rep. No. 237, 99th Cong., 1st Sess. 101, 105, 118, reprinted in 1985 U.S.Code Cong. & Ad.News 210, 214, 227.

FN4 The State Department is required to make reports on human rights violations

under 22 U.S.C. s 2151n(d)(1) (1982), which was amended in 1987 to require in addition a report on "practices regarding coercion in population control, including coerced abortion and involuntary sterilization." Pub.L. No. 100-204, Title I, s 127(1), 101 Stat. 1342 (1987).

United States Department of Justice

Board of Immigration Appeals

Interim Decision 3107, 1989 WL 247513 (B.I.A.)

END OF DOCUMENT

Rules and Regulations

Federal Register

Vol. 55, No. 19

Monday, January 29, 1990

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 910

[Lemon Reg. 702]

Lemons Grown in California and Arizona; Limitation of Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: Regulation 702 establishes the quantity of fresh California-Arizona lemons that may be shipped to market at 265,000 cartons during the period from January 28, 1990, through February 3, 1990. Such action is needed to balance the supply of fresh lemons with market demand for the period specified, due to the marketing situation confronting the lemon industry.

DATES: Regulation 702 (7 CFR part 910) is effective for the period from January 28, 1990, through February 3, 1990.

FOR FURTHER INFORMATION CONTACT: Beatriz Rodriguez, Marketing Specialist, Marketing Order Administration Branch, F&V, AMS, USDA, Room 2523, South Building, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 475-3861.

SUPPLEMENTARY INFORMATION: This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory action to the scale of business subject to such actions in order

that small businesses will not be unduly or disproportionately burdened.

Marketing orders issued pursuant to the Agricultural Marketing Agreement Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 85 handlers of lemons grown in California and Arizona subject to regulation under the lemon marketing order and approximately 2,500 producers in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual receipts of less than \$500,000, and small agricultural service firms are defined as those whose annual receipts are less than \$3,500,000. The majority of handlers and producers of California-Arizona lemons may be classified as small entities.

This regulation is issued under Marketing Order No. 910, as amended (7 CFR part 910), regulating the handling of lemons grown in California and Arizona. The order is effective under the Agricultural Marketing Agreement Act (the "Act," 7 U.S.C. 601-674), as amended. This action is based upon the recommendation and information submitted by the Lemon Administrative Committee (Committee) and upon other available information. It is found that this action will tend to effectuate the declared policy of the Act.

This regulation is consistent with the California-Arizona lemon marketing policy for 1989-90. The Committee met publicly on January 23, 1990, in Los Angeles, California, to consider the current and prospective conditions of supply and demand and unanimously recommended a quantity of lemons deemed advisable to be handled during the specified week. The Committee reports that overall demand for lemons is good.

Pursuant to 5 U.S.C. 553, it is further found that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice and engage in further public procedure with respect to this action and that good cause exists for not postponing the effective date of this action until 30 days after publication in the *Federal Register* because of insufficient time between the date when information became

available upon which this regulation is based and the effective date necessary to effectuate the declared purposes of the Act. Interested persons were given an opportunity to submit information and views on the regulation at an open meeting. It is necessary, in order to effectuate the declared purposes of the Act, to make these regulatory provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

List of Subjects in 7 CFR Part 910

Arizona, California, Lemons, Marketing agreements.

For the reasons set forth in the preamble, 7 CFR part 910 is amended as follows:

PART 910—LEMONS GROWN IN CALIFORNIA AND ARIZONA

1. The authority citation for 7 CFR part 910 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

Note: This section will not appear in the Code of Federal Regulations.

2. Section 910.702 is added to read as follows:

§ 910.702 Lemon Regulation 702.

The quantity of lemons grown in California and Arizona which may be handled during the period from January 28, 1990, through February 3, 1990, is established at 265,000 cartons.

Dated: January 24, 1990.

Robert C. Keeney,

Director, Fruit and Vegetable Division.

[FR Doc. 90-1978 Filed 1-25-90; 8:45 am]

BILLING CODE 3410-02-M

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

[Attorney General Order No. 1391-90; INS Number: J-89]

8 CFR Parts 208 and 242

Refugee Status, Withholding of Deportation, and Asylum; Burden of Proof

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This rule clarifies the burden of proof for applicants for refugee status, withholding of deportation and asylum by establishing that an alien fleeing coerced population control policies of forced abortions or sterilization may be considered to have a clear probability (for withholding of deportation) or well-founded fear (for asylum) of persecution on account of political opinion. These humanitarian provisions are necessary in order to provide immediate protection for foreign nationals seeking refugee status, withholding of deportation, or asylum because of their countries' coerced family planning policies. The changes will conform with the President's foreign policy and will provide guidance for adjudication of refugee, withholding of deportation, and asylum claims.

DATES: This interim rule is effective January 29, 1990. Comments must be received on or before February 28, 1990.

ADDRESSES: Written comments should be submitted, in triplicate, to the Director, Policy Directives and Instructions, Immigration and Naturalization Service, Room 2011, 425 I Street, NW., Washington, DC 20536.

FOR FURTHER INFORMATION CONTACT: Patricia A. Cole, Assistant General Counsel, Immigration and Naturalization Service, 425 I St., NW., Room 7048, Washington, DC 20536, (202) 633-2895.

SUPPLEMENTARY INFORMATION: The rule would amend the Immigration and Naturalization Service regulations on burden of proof in withholding of deportation procedures at 8 CFR 242.17(c) and asylum procedures at 8 CFR 208.5. The amended regulations would benefit the public by expanding the classes of aliens eligible for refugee, asylum, or withholding of deportation relief; consolidate into the regulations existing policies and procedures as enunciated by the Attorney General; and make the eligibility requirements easier for the public to understand.

Background

In any application for asylum under section 208(a) or withholding of deportation under section 243(h) of the Immigration and Nationality Act, the applicant bears the evidentiary burdens of proof and persuasion. An alien who is seeking withholding of deportation from any country must show that his or her life or freedom would be threatened in such country on account of one of the five grounds enumerated in the statute. In order to make this showing, the alien must establish a "clear probability" of

persecution on account of one of the enumerated grounds. Under the Refugee Act of 1980, Public Law No. 96-212, 94 Stat. 197, once an individual has met the burden of proof, withholding of deportation is mandatory. In this regard, withholding of deportation differs from asylum, which may be denied in the exercise of discretion to aliens who establish statutory eligibility for the relief.

In order to establish eligibility for a grant of asylum, an alien must demonstrate that he or she is a "refugee" within the meaning of section 101(a)(42)(A) of the Act. That definition includes the requirement that an alien demonstrate that he or she is unwilling or unable to return to his country because of persecution or a "well-founded fear" of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

The Courts have formulated definitions of the burdens that an alien has in order to be granted withholding of deportation or asylum. An alien seeking withholding of deportation must prove that it is more likely than not that the alien would be subject to persecution. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). The well-founded fear standard for an asylum applicant requires a showing that a reasonable person in the alien's circumstances would fear persecution. The alien must present specific facts through objective evidence to demonstrate a reasonable possibility of persecution and to prove either past persecution or a showing of good reason to fear future persecution. *Matter of Mogharrabi*, Interim Decision 3050 (BIA 1988).

Amendment

The alien's burden of proof to establish eligibility for asylum contained in 8 CFR 208 is described in general terms. This burden requires that the applicant establish persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Similarly, the alien's burden of proof to establish eligibility for withholding of deportation contained in 8 CFR 242.17(c) requires a showing that the alien would be subject to persecution on the same five enumerated grounds.

These amendments are interpretative rules and general statements of policy for establishing statutory eligibility for asylum or withholding of deportation on the basis of political opinion for aliens who express a fear of coercive population control policies in their homeland. Such aliens can establish a

well-founded fear, in the case of an asylum applicant, or a clear probability, in the case of an applicant for withholding, of political persecution if evidence exists that the alien will be persecuted if returned to his or her homeland.

Amended 8 CFR 208.5(b)(1) is a general rule to provide that aliens who express a fear that they will be required to abort a pregnancy or to be sterilized may establish a well-founded fear of political persecution.

Amended 8 CFR 208.5(b)(2) addresses those individuals who have already resisted the population control policy in their country and describes specific circumstances wherein an alien has established eligibility for asylum. An applicant (or applicant's spouse) who has violated the population control policy of his or her homeland by refusing to abort a pregnancy or resisting sterilization may be granted asylum if the applicant has a well-founded fear that the applicant (or applicant's spouse) will be required to abort the pregnancy or to be sterilized or will otherwise be persecuted if the applicant is returned to the homeland.

Amended 8 CFR 242.17(c) provides that a respondent (or respondent's spouse) who establishes that he or she will be required to abort a pregnancy or to be sterilized or who has violated the population control policy of his or her homeland by refusing to abort a pregnancy or resisting sterilization may be granted withholding of deportation if evidence exists that the individual will be required to abort the pregnancy or to be sterilized or will otherwise be persecuted upon return to their homeland.

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule does not have a significant economic impact on a substantial number of small entities. This is not a major rule as defined in section 1(b) of E.O. 12291, nor does this rule have Federalism implications warranting the preparation of a Federalism Assessment in accordance with E.O. 12812.

The Service has determined that notice and public comment regarding this interim final rule are unnecessary under 5 U.S.C. 553(b) (A) and (B). These changes constitute interpretative rules and general statements of policy. Further, there is good cause to waive the requirement of notice and comment. Opportunity for notice and comment is unnecessary because the rules implement an interpretation of the statute that has already been announced by the Attorney General and is being implemented by the Service. The

interpretation will broaden the relief available to aliens and therefore will not harm any third parties. Notice and comment are also contrary to the public interest. The humanitarian goals underlying the Refugee Act will be best served by prompt codification in the rules of the Department's interpretation of the statute. The sooner the regulations are adopted, the sooner aliens will have published rules that will ensure the broadest possible protection of their rights.

List of Subjects

8 CFR Part 208

Administrative practice and procedure, Aliens, Asylum, Deportation, Immigration, Refugees, Reporting and recordkeeping requirements.

8 CFR Part 242

Administrative practice and procedures, Aliens.

Therefore, by virtue of the authority vested in me, including 28 U.S.C 509, 510 and 8 U.S.C. 1101 and 1158, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 208—[AMENDED]

1. The authority citation for part 208 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1158.

2. In § 208.5 all existing text is designated as paragraph (a), a heading is added at the beginning of newly designated paragraph (a), and a new paragraph (b) is added to read as follows:

§ 208.5 Burden of proof.

(a) *Burden generally.* * * *

(b) *Related to coercive family planning policies.* The burden is on the asylum applicant who expresses a fear of persecution upon return to his or her country of nationality or, in the case of a person having no nationality, the country in which such person habitually resided, related to implementation of a country's family planning policy that includes forced abortion or coerced sterilization.

(1) Aliens who have a well-founded fear that they will be required to abort a pregnancy or to be sterilized because of their country's family planning policies may be granted asylum on the ground of persecution on account of political opinion.

(2) An applicant who establishes that the applicant (or applicant's spouse) has refused to abort a pregnancy or to be sterilized in violation of a country's family planning policy, and who has a well-founded fear that he or she will be

required to abort the pregnancy or to be sterilized or otherwise persecuted if the applicant were returned to such country may be granted asylum.

PART 242—[AMENDED]

3. The authority citation for part 242 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1186a, 1251, 1252, 1254, 1362.

4. Section 242.17 is amended by revising paragraph (c) to read as follows:

§ 242.17 Ancillary matters, applications.

(c) *Temporary withholding of deportation.* The special inquiry officer shall notify the respondent that if he is finally ordered deported his deportation will in the first instance be directed pursuant to section 243(a) of the Act to the country designated by him and shall afford the respondent an opportunity then and there to make such designation. The special inquiry officer shall then specify and state for the record the country, or countries in the alternate, to which respondent's deportation will be directed pursuant to section 243(a) of the Act if the country of his designation will not accept him into its territory, or fails to furnish timely notice of acceptance, or the respondent declines to designate a country. The respondent shall be advised that pursuant to section 243 (h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion, nationality, membership in a particular social group, or political opinion as claimed. Eligibility for withholding of deportation on account of political opinion is established by the respondent who establishes that he or she (or respondent's spouse) will be required to abort a pregnancy or to be sterilized, or who establishes that he or she (or respondent's spouse) has refused to abort a pregnancy or to be sterilized in violation of the implementation of the specified country's family planning policy directives, and that he or she (or respondent's spouse) will be required to abort a pregnancy or to be sterilized or

would otherwise be persecuted if returned to such country. The trial attorney may also present evidence or information for the record, and he may submit information not of record to be considered by the special inquiry officer provided that the special inquiry officer or the Board has determined that such information is relevant and is classified under Executive Order No. 12356 (47 FR 14874; April 6, 1982) as requiring protection from unauthorized disclosure in the interest of national security. When the special inquiry officer receives such non-record information he shall inform the respondent thereof and shall also inform him whether it concerns conditions generally in a specified country or the respondent himself. Whenever he believes he can do so consistently with safeguarding both the information and its source, the special inquiry officer should state more specifically the general nature of the information in order that the respondent may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state that such information is material to the decision.

Dated: January 23, 1990.

Dick Thornburgh,

Attorney General.

[FR Doc. 90-1820 Filed 1-26-90; 8:45 am]

BILLING CODE 4410-10-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 404

[Reg. No. 4]

RIN 0960-AC62

Federal Old-Age, Survivors, and Disability Insurance Benefits; Continued Payment of Benefits During Appeal

AGENCY: Social Security Administration, HHS.

ACTION: Final rule.

SUMMARY: These final regulations reflect section 8006 of Public Law 100-647, the Technical and Miscellaneous Revenue Act of 1988. Section 8006 amended section 223(g) of the Social Security Act (the Act) and extended for 1 year the statutory provisions under which an insured worker may elect to have his or her disability insurance benefits under title II of the Act and/or Medicare benefits under title XVIII of the Act

THE WHITE HOUSE

WASHINGTON

December 17, 1993

MEMORANDUM FOR CHINA IMMIGRATION TEAM

FROM: TODD STERN *TDS*
SUBJECT: Questions That Need Answering

The following is designed to help focus our efforts to develop recommendations on whether and how China's family planning policies should be taken into account in asylum and deportation decisions. The questions on "DOJ's experience to date" are taken from the memo Cliff did for Phyllis Coven.

Policy

Our policy objective is a rule which would protect from deportation those with a credible fear of forced abortion or sterilization, without encouraging waves of new immigrants. In my view, it would be desirable to accomplish this in the least obtrusive manner possible (e.g., not through new legislation).

There are a number of legal and factual questions that need to be addressed in structuring a solution.

Legal questions

- What needs to be done legally in order to have new regulations issued that would accomplish our result? Do we need a new Executive Order or Presidential Memorandum directing the AG to do this? Do the regulations have to be issued pursuant to the Immigration and Nationality Act or can they simply be ordered by the President? If they do have to be pursuant to statute, can we write regs that OLC will bless? Does any action have to be taken with respect to the existing Bush Executive Order?

Factual questions

- What showing should be required to establish a credible fear? To answer this question, we need input from those with a solid knowledge of facts on the ground in China: how common forced abortions or sterilizations are; what kinds of evidence an immigrant could reasonably be expected to produce to demonstrate a credible fear, etc.

• What impact can we expect, in terms of increased immigration, from a policy declaring that we won't deport those who can meet a high standard of proving a credible fear of forced abortion or sterilization?

• What has DOJ's experience been to date regarding claims based on a fear of forced abortion or sterilization?

-- How many people since 1989 have applied for asylum and how many have applied based on family planning policies? In how many of the family planning cases was asylum granted, how many denied on basis of credibility, how many denied on basis of Matter of Chang, how many still in litigation.

I think the meeting Eric is setting up ought to include people who can provide knowledgeable, well-grounded answers to these and any other important questions.

To: Cliff Sloan
Alan Kreczko
Neal Wolin
Eric Schwartz
Donsia Strong

DOJ - Bush order did not create private enforceable
Rts
Regs not properly implemented
Defending

CIA - Prevalence of forced sterilization
1991 - local authorities too active so State enacted changes
gov't sets quotas - ~~few~~ results
reduced overall goals
lots of pressure brought to bear of individuals

P
will leave area rather than submit
\$3,000 fine -
confiscation of property
dejection of family members
Threats of destruction of property

Nigian see less of this activity than in other regions

large # of people (floating) not complying / nothing happens
70 - 100 million - no household registration
in urban areas - not subject to limitation
no means of forcing people to return native province

Tibet-singjun - more generous -

State is very sensitive to charges of abuse -
taken steps to alleviate - ^{allow} civil suits against family
authorities

79 forced ster keep
91 new reqs stiffened guidelines -

Conclusions -

Central authorities do not condone abusive practices

Most have come from Fujian province

4 county area -

family planning practices are lax -

documentary basis - since are much lower
incidence of coercion less

What happens to those who were repatriated?

Women are the ones who are sterilized
but men are those who migrate

if in province - will get documentation

Migration Impact

are migrating as part of a

following Pres-announcements - Christopher talked to
State made dramatic steps in response

Reams going house to house

Public affairs campaign -

dramatic affect in stopping those from leaving

U.S. immig policies are part & parcel as to why Chinese were leaving
But change in operations in U.S. has changed this -

178 are ready to be sent back. (detained in Bakersfield)
Chinese are very leery about taking those
back who have spent a lot of time in U.S.

Profile - young, unmarried, coastal province,

Rutgers Prof - study instances of abuse here in U.S.
telephone extortion

BP apprehension	1037	1100 in detention -
last year	295	
Mexican border	710	

State dept perspective regarding family planning

So do we make policy
of actual
treatment or
perceived or possible
treatment

June 23-

20 Hill -

Feinstein - Reg had

Chinese for affirm - bad Yang

House -
Jud - Hyde; Berman; Oberstar; Moran
Pelosi bill 89 -

Senate amendment - 89-4

Senate -

Jerry Zilber - armstrong amendment would have no chance now

House would raise issue on generalized human rights abuse -

If

Chinese students were the force behind the 89 bill.

- They are opposed to illegal immigration -

- ^{Exe order} Reg is over broad -

Has there been a case where there was an actual pregnancy

• Principle distinction -

interim - single males could come in - ① well founded fear of forced ffp ② you or spouse refused to stay and ^{fear of} ~~persecution~~

final - applicant must make the showing

- subjected to past persec - or refused and was persecuted (economic)

- well founded fear -

permits both to apply if both are present

Can not have a China specific req, etc.

Pres. does not want to be an accomplice to ffp to someone who will be served up for ffp in China -

What causal steps are necessary to show well-founded fear -

50% granted/denied

What are we trying to protect?

immediate risk upon return

been threatened - aff act by the gov't to harm you

To what extent will narrow category
open the ~~narrow~~ door — increase immigration —

Appropriate remedy/relief

issue reg. changing rule in Rhaag

if not asylum issue —

withhold deportation —

deferred action status — individual case by case basis

3 TPS - magnet

1965- asylum provisions - well founded fear of persec.

1980 2 more grounds added political / social

1979 Matter of Chang - not a ground of asylum

6/1989 Tiananmen - Leg in Congress -
BUSH vetoed Pelosi bill -
EO issued

4/1990 EO enhanced consideration

BIA - declined to follow EO

referred conflict of INA; EO; Chang

Affirm - BIA refer to OLC EO not valid - non of S encompass
abortion

do not condemn China's family planning law -
but ok if pretext for pol. op being made

TO: Cliff, Todd, Donsia

W538

I hope this accomodates your various suggestions. I need to get this to Berger tonight for his comment, and would therefore welcome any further comment by noon.

Alan

DRAFT MEMORANDUM

Subject: Asylum Claims Based on Coercive Family Planning Practices

PURPOSE

To establish a policy concerning undocumented aliens who seek to avoid deportation because of their home country's coercive family planning practices.

I. INTRODUCTION

The issue has arisen in recent months in the context of criminal alien smuggling from the People's Republic of China. Several hundred Chinese nationals were smuggled by organized crime syndicates into the United States this spring; they were detained and put into deportation proceedings. In response, many of the Chinese aliens have claimed asylum, principally on the ground of Chinese coercive family planning practices. The adjudication of their claims has brought to the forefront unresolved legal issues surrounding the application of U.S. asylum law and a 1990 Bush Executive Order concerning coercive family planning practices.

II. BACKGROUND

A. ACTIONS DURING THE BUSH ADMINISTRATION

Following the Tiananmen Square massacre, Congress passed by wide margins the Emergency Chinese Immigration Relief Act of 1989. During consideration of the measure, Congress added a section that would have provided asylum for a person fleeing coercive family planning practices if the individual would be persecuted upon return. President Bush vetoed the bill, but, to avoid a Congressional override he issued an Executive Order directing the Attorney General give enhanced consideration under the immigration laws to persons fleeing such practices and fearing persecution upon return to their home country.

While INS acted in accordance with the E.O., the Board of Immigration Appeals (an administrative component of the Justice Department which reviews immigration cases) did not. In a 1989 case entitled Matter of Chang, the Board had ruled that coercive family planning, while abusive, applies to all Chinese and does not appear to be based on "race, religion, nationality, membership in a social group or political opinion," as required by U.S. law. The BIA rejected the Bush Administration's theory that those who opposed abusive family planning practices were considered "enemies of the state" in China and that the persecution they suffered upon return was therefore based on political opinion "imputed" to them by the Chinese authorities.

Moreover, the Board maintained its position even after the 1990 E.O., holding that the Order was not enforceable in court, as regulations to implement the Order were improperly issued.

Thus, at the close of the Bush Administration, the adjudication of Chinese asylum claims was inconsistent, depending upon whether they were resolved by BIA or INS adjudicators.

B. CURRENT LITIGATING POSTURE.

A large number of cases in which the BIA denied asylum on the basis of Matter of Chang have now reached the federal courts. In that litigation, Justice has defended Chang. Justice decided on this approach for two reasons:

- it believes Matter of Chang is the better interpretation of our own asylum law.
- its traditional view that BIA decisions are entitled to deference by the courts.

Justice has also concluded and argued that Bush's Executive Order did not create enforceable rights, and that the AG's implementing regulations were not properly issued. It has, however, stopped short of finding the Bush Executive Order to be an invalid exercise of Presidential authority.

On January 14, a Virginia District Court rejected the Justice arguments. Noting the "cacophony" of Executive Branch positions on the matter, it declined to accord deference to Matter of Chang. It concluded that opposing China's one child policy (e.g. by refusing sterilization) constituted a political act, and that extreme enforcement action by China constituted "persecution" on account of political opinion under our asylum law. Justice is reviewing whether to appeal.

If Justice prevails with its current litigating posture, it means that individuals deemed to have a well-founded fear of being subjected to coerced abortion or sterilization could be returned to China unless they can demonstrate that they are being singled out for such punitive action because of their race, religion, membership in a social group or political opinion. However, we could, as matter of Executive Branch discretion, take administrative steps to withhold deportation of all or a subset of those individuals. (We have made clear to the press that DOJ's litigating posture was without prejudice to Administration policy on whether such individuals will actually be returned.)

C. Congressional views.

As noted above, in 1989 there was overwhelming Congressional support for broad asylum protection for individuals. More recently, Senator Feinstein has written you asking that you revoke the Bush Executive Order. (Tab 1) Concerned by the large

number of illegal aliens in California, she and Senator Boxer have also introduced legislation to that effect. On the other hand, 18 members of Congress, including several California representatives, wrote to AG Reno in mid-June, urging that the fear of alien smuggling not lead to a cut-back in asylum rights. (Tab 2)

III. DISCUSSION

The basic policy issue is whether to continue to afford protection to individuals who fear return to China because of its coercive family planning policies on the same basis as the Bush Administration, or whether to ~~cut it back~~, and, if so, how, ~~far~~.
Several factors are relevant to that decision:

- Human Rights. There is little question that very abusive family planning practices take place in parts of China. While they are not officially condoned at the central level nor pervasive throughout the country, a "responsibility" system imposing family planning targets on local officials has led to severe abuses in many cases. These have included forced abortions and involuntary sterilizations, as well as destruction of homes, detention and loss of employment. (It should be noted that imposing economic penalties against those who fail to comply with family planning targets are part of central government policy, as are providing economic incentives *for those voluntarily complying*.)
- Immigration Policy. Any policy to provide protection must be sensitive to the magnet effect and the potential for fraud. Chinese alien smuggling has increased dramatically in the past two years. Whereas in 1990 a small number of persons arrived without documentation on commercial airlines and fishing boats, there has since been a sharp increase in the numbers of Chinese nationals arriving aboard fishing boats and rusting ocean freighters. Since January 1993, the Coast Guard has interdicted 11 ships carrying over 2500 Chinese migrants. Substantially more Chinese nationals entered the U.S. illegally in 1992, most by air or land across our border with Mexico. According to INS estimates, more than 14,000 Chinese nationals applied for asylum in FY '93, up from roughly 3400 the previous year. Moreover, while the primary risk of asylum claims may come from illegal aliens, over 100,000 Chinese enter the US lawfully each year and could potentially seek the benefit of a program providing relief from coercive family planning. Moreover, the issue is not limited to China. Singapore and other countries have now or may in the future adopt similar procedures.
- Precedent. We have generally not treated as refugees individuals fleeing conflicts or poor human rights conditions unless the individual can demonstrate that he is being singled out for particularly severe treatment on the

basis of one of the five grounds identified in our asylum statute. Deviating from that general practice for individuals fleeing coercive family planning practices could set a precedent for other illegal aliens who fear being subjected to generalized human rights abuses if deported (e.g. African women fearing forced female circumcision; individuals fearing gender bias). On the other hand, we have already accepted in the Torture Convention an absolute obligation not to return individuals to torture (without regard to the five asylum bases) and forced abortion/sterilization is arguably at a similar level of human rights abuse.

- Congressional and Public Reaction. To be sure, a restrictive approach will result in strong expressions of opposition from some in Congress, the media and human rights groups, who would accuse you of undermining protections afforded by President Bush. On the other hand, Congressional views will be less uniform than in 1989 when overwhelming pressure forced the Bush E.O. That action came in the immediate aftermath of Tiananmen Square; also there is now much greater Congressional and public concern about illegal alien smuggling, as indicated by Senators Feinstein and Boxer.
- China Policy. A policy that narrows protections for Chinese in the United States might be perceived by the Chinese and others as a weakening of U.S. resolve on human rights issues. However, this does not seem to be a major risk, as the issue of large-scale migration has not thus far been linked by either side to the MFN discussions.

On the other hand, the Chinese, who claim that our asylum policies encourage large outflows, might react negatively to a liberal approach to protecting asylum-seekers. They could conceivably slow their cooperation on accepting returnees. We believe, however, that this issue can be managed and that broader protections by themselves will not be the cause of an end to Chinese cooperation.

IV. Options.

We have identified five general categories of individuals who might be offered protection from China's coercive planning policy:

1. Those facing coerced abortion or coerced sterilization, if returned.
2. Those facing extreme mistreatment, such as imprisonment or destruction of home, for failure to comply with the one-child policy.
3. Those facing less extreme punishment (fines) for failure

to comply with the once-child policy.

4. Those who claim they want in the future to have more children and who therefore fear China's population controls in the future.

5. Those who have been subjected to coerced abortion or sterilization.

Option 1 - Offer the Same Protection offered by Bush.

7?
What about 3.
The Bush policy was not completely clear; there were differences between the 1989 interim rule, and the final rule proposed by Bush in 1992. INS advises that as applied, the Bush-era regulations afforded protection to any individual who could demonstrate a credible fear of forced sterilization or abortion, or of imposition of severe mistreatment or punishment to coerce such an operation; or of past forced abortion or sterilization. (Categories 1, 2 and 5 above.) INS advises that during the Bush Administration, roughly 10-15 percent of Chinese who claimed asylum on the basis of coercive family planning were approved.

() favor this approach.

State opposes this option, because of concerns about its magnet effect and the potential for fraud. () believe the magnet effect can be minimized by making clear that there is no change in policy, and that fraud can be minimized through giving more precise guidance to adjudicators (e.g. by defining more precisely those parts of China where there is a real risk of forced abortion or sterilization.)

Option 2 -- Protect only those individuals who have a credible fear of actual forced abortion or sterilization.

This would narrow the Bush Administration protections, by ceasing to protect individuals subjected to extreme punishment short of actual physical coercion and by ceasing protection of individuals subjected to past forced abortion or sterilization. It would be criticized by human rights groups. It would, however, provide protection for the most extreme cases, while offering less opportunity for fraudulent claims and less magnet effect than option 1.

Option 3 -- Offer protection only in undefined "compelling circumstances".

The State department recommends this approach. Under this approach, INS adjudicators would be instructed to withhold deportation in "compelling circumstances". The circumstances would not be defined by reference to particular categories.

This option is prompted by State's concern that the identification of any category of individuals, even one as narrow as pregnant women, will stimulate fraudulent claims, risks serving as a magnet effect, and undercuts our efforts to deter illegal immigration by readily deporting such immigrants. sp

This option maximizes our anti-illegal immigration interests. We would argue that our immigration law does not provide relief in these cases, and that while we strongly condemn China's policy, we can not rectify it by taking in all Chinese who flee it. sp

On the other hand, this option ^{has the potential for} subjects individuals to severe human rights abuse. You would be criticized as more indifferent than the Bush Administration, whose policies on promotion of human rights in China you described as callous. In the absence of further definition, it would result in uneven application by INS adjudicators. () also believe it is politically unrealistic to expect that we would not be required by the press or Congress to elaborate what we consider "compelling circumstances."

II. Implementation

Once you have decided your basic policy, there may be various ways to implement it.

1. For example, if you decide to maintain the Bush-era protections (Option 1), it can be implemented one of two ways: ^{don't suggest}

--Through asylum law. Justice could accept the Virginia court decision, and drop its current litigating posture. The AG could reverse Matter of Chang, and any procedural defects in the Bush E.O. or implementing regulations would be remedied. ✓

--Through Administrative Relief. Under this option, Justice would simply refrain from seeking to deport individuals who qualify under option 1, without conceding that they are entitled to asylum as a matter of law. Administrative relief could more easily be calibrated if the ~~option becomes~~ a policy becomes a magnet for

2. On the other hand, if you endorse option 2 or 3, Justice would provide relief to those protected under either option administratively (i.e. it would withhold deportation.) It would need to continue litigating against asylum claims from those individuals outside either option 2 or 3; to assist that litigation, we would probably ask you to amend the Bush Executive Order. However, as indicated by the Virginia district court decision, this litigating posture may not prevail, and the courts may impose option 3 as matter of judicial interpretation of our existing asylum law. ^{illegal immigration or fraudulent claims.}

Once we have your policy decision on who to protect, we will provide more specific options on how it could be implemented.

RECOMMENDATION

That you approve option 1 (Provide the same protection as provided during the Bush Administration.) Supported by

_____ approve _____ disapprove

Alternatively, that you approve option 2 (Narrow the Bush protections to include those facing physically-forced abortion or sterilization.) Supported by

_____ approve _____ disapprove

Alternatively, that you approve option 3 (Protect undefined "compelling cases".) Supported by State.

_____ approve _____ disapprove

Past abort; Simpson
past future persecution about or future persecution

Strike all after the word "Section" and insert the following:

" ____ . Asylum Policy.

(a) POLICY. -- For the purposes of section 101(a)(42) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(42)) --

(1) a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to do so, ~~shall be considered to have been persecuted on account of political opinion, and~~

The Attorney General should report
has or
(2) a person who can establish by clear and convincing evidence that he or she will be forced to abort a pregnancy or to undergo involuntary sterilization shall be considered to have demonstrated a well-founded fear of persecution on account of political opinion.

(b) DEFINITION. -- For the purposes of this section, the phrase "has been persecuted" shall not include actions of a purely economic nature.

(c) NUMERICAL LIMITATION. -- Notwithstanding subsection (d), the number of persons receiving political asylum or refugee status solely on the basis of the provisions of this section shall not exceed 1,000 in any fiscal year.

(d) TERMINATION DATE. -- This section shall terminate on the last day of Fiscal Year 1996."

S.

Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. Helms, Mr. Deconcini, Mr. Coats and Mr. Brown.

Viz: "

On page 179, after line 6, insert the following:

"SEC. ____ CHINESE FLEEING COERCIVE POPULATION CONTROL POLICIES.

(1) Pursuant to paragraph (42)(A) of section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(42)(A)), all adjudicators of asylum or refugee status shall give fullest possible consideration to applications from nationals of the People's Republic of China who express a fear of persecution upon return to that country because they refuse to abort a pregnancy or resist surgical sterilization in violation of Chinese Communist Party directives on population. If such refusal is undertaken with full awareness of the urgent priority assigned to such directives by all levels of the Chinese government, and full awareness of the severe consequences which may be imposed for violation of such directives.

or was

or who demonstrate that they have experienced persecution on account of such refusal,

(2) In view of the urgent priority assigned to the "one couple, one child" policy by high level Chinese Communist Party officials and local party cadres at all levels, as well as the severe consequences commonly imposed for violations of that policy, which are regarded as "political dissent," refusal to abort or to be sterilized, as described in subsection (A) of this section, shall be viewed as an act of political defiance justifying a "well-founded fear of persecution" sufficient to establish refugee status under paragraph (42)(A) of section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(42)(A)).

(3) All other factors which may contribute to a determination of asylum or refugee status in such cases are to be given additional weight by asylum and refugee adjudicators, such factors including, but not limited to, overt political activities while in the United States or third countries, membership in an ethnic or religious minority, family background and history, or suspicion of "counterrevolutionary" activities by Chinese Communist Party officials.

(4) Nothing in this section shall be construed to necessitate a grant of asylum or refugee status to any individual who is ineligible for admission to the United States under section 212(a) of the Immigration and Nationality Act (8 U.S.C. 1182(a)).

(5) The Secretary of State and the Attorney General shall within 30 days of enactment of this section, promulgate regulations and guidelines to carry out the provisions of this section.

(6) Nothing in this section shall be construed as—

(A) Shifting the burden of providing, in each individual case, facts sufficient to establish a claim of asylum or refugee status as described in subsection (a) of this section, from any person making such claim of asylum or refugee status to the Attorney General; or

(B) Requiring the Attorney General to disprove such claim in the absence of proof of facts sufficient to establish a claim of refugee or asylum status as described in subsection (a) of this section by any person making such claim.

(7) The number of persons receiving political asylum status solely because of the provisions of this section shall not exceed 1,000 in any fiscal year.

(8) The Attorney General shall not be obligated to grant political asylum to any person claiming to qualify under subsection (a) if the Attorney General proves by clear and convincing evidence that such person has claimed such status solely for the purposes of evading the immigration laws of the United States.

(9) The provisions of this section shall take effect on the date of enactment of this Act, and notwithstanding the provisions of subsection (c) of this section or any other provision of law, all adjudicators of asylum or refugee status shall apply the provisions of this section to every case, administrative or judicial proceeding, or appeal that is pending on the date of enactment of this

Act, and to any claim that arises on or after such date of enactment.

Context

On May 24, 1992, President Bush issued Executive Order No. 12,807 (the so-called "Kennebunkport Order"), which ordered the return to Haiti of all Haitians fleeing that country by sea without benefit of individualized investigations into their eligibility for refugee status. In Haitian Centers Council Inc. v. McNary, 969 F.2d 1350 (1992), the Second Circuit Court of Appeals found that the Kennebunkport Order violated the language of the Immigration and Nationality Act (INA) (section 243(h)) and 8 U.S.C. sec. 1253(h). The Supreme Court stayed the Court of Appeals' injunction pending disposition of the case on its merits.

Before issuing the Kennebunkport Order, the Bush Administration followed the 11-year old practice of "screening" Haitians interdicted on the high seas to determine whether a person had a credible fear of persecution if returned to Haiti. The Bush Administration reportedly acknowledged that prior to the Kennebunkport Order, 30 percent or more of all Haitians interdicted were deemed to have a credible claim for asylum within this country.

Legislation:

H.R. 3844, the Haitian Refugee Protection Act, would prohibit for 180 days the involuntary repatriation of Haitian nationals who were in the custody of the U.S. government outside the United States on February 5, 1992; prohibit the admission to the United States of any Haitian national involved in the September 30, 1991 coup; provide at least 2,000 refugee admissions

numbers for Haiti in FY '92; ensure that Congress receives from the Department of State full and accurate information concerning the fate of repatriated Haitians; and call on the President and international organizations to convene a conference on the Haitian refugee crisis. The House of Representatives approved H.R. 3844 on February 26, 1992. The Senate took no action on this bill during the 102nd Congress.

With regard to the legislative agenda for other immigration issues during the 103rd Congress, the prevailing sentiment is to await direction from the White House on various initiatives. The summary exclusion bill -- which would give low-level INS employees final authority to expel asylum seekers who arrive without proper documents -- may prove to be the one exception. Senator Simpson, the bill's sponsor, is interested in pushing his bill during the next session.

Stephen R. Neuwirth
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Q. Apparently Governor Clinton has broken a campaign promise and decided to let the repatriation stay in place for some period of time. Do you agree with the policy? When will it be lifted?

A: This Administration will be committed to the basic principle of U.S. law, international law, and human decency that persons not be compelled to return to a country where they will be persecuted because of political opinion or religion or other forbidden ground. The new Clinton policy, when it is finally put in place, will ensure that Haitians who meet the standard for refugee status will be able to seek protection. Of course, the primary goal remains the restoration of democracy and an ending of human rights abuse in Haiti. The formulation of policy is an on-going process involving delicate matters of foreign affairs, and it would be inappropriate for me to comment any further at this point.

Q. It has been reported that plans are being made to re-open Guantanamo naval base for processing Haitian asylum-seekers. The Bush Administration refused to permit Haitians at Guantanamo access to lawyers. If Guantanamo is re-opened, will you permit lawyers in the asylum proceedings?

A: As you may know, the issue of lawyer access and the due process rights of Haitians at Guantanamo is currently in litigation. If confirmed, I will take a careful look at the government's positions in the pending litigation.

[Context: The case brought by Harold Koh had two parts: a challenge to the procedures at Guantanamo (currently scheduled for trial in March) and an attack on the return order (currently pending before the Supreme Court. McNary v. Haitian Centers Council.)]

Q. Haitians detained in the Everglades (at Krome Detention Center) have begun a hunger strike in protest of the quick release of 40 or so Cubans who entered the U.S. by plane this month. Do you agree with the discriminatory parole policy of the Bush Administration?

A: If confirmed, I will take a careful look at the parole policy. I can state categorically that racial discrimination cannot be a legitimate basis for parole decisions.

[Context: The Haitians detained at Krome are excludable aliens; that is, they were stopped at the border. They are being held pending determination of their asylum claims. They remain free to return to Haiti, but, of course, those with valid asylum claims are quite unlikely to accept return.

Haitians who were processed through Guantanamo (more than 10,000) were "paroled" into the United States in order to pursue asylum claims. (They are referred to as the "screened-in" Haitians. They are not detained and have been granted work authorization.)]

Q. Currently, some 250 screened-in Haitians remain detained at Guantanamo because they (or close family members) have tested positive for HIV. Will you parole these people in?

A: I will take an immediate look at this problem. As you know, Governor Clinton has announced his intent to revoke the HIV exclusion ground.

Q. I understand that the INS officers adjudicating refugee claims in Haiti are Border Patrol agents. Apparently, the Administration's new policy calls for greater access to refugee processing in Haiti. Will such processing be done by Border Patrol agents?

A. I will ensure that any INS official conducting refugee determinations is adequately trained for the job.

Q. The United States interdicts no other nationality. Isn't the main strike against the Haitians their skin color? Why have we singled out Haitians for interdiction?

A. This is a very difficult situation. There is no doubt that under current circumstances without some kind of interdiction policy many hundreds of Haitians would drown at sea. The question is how can we best pursue human rights and protection of people without triggering a massive and terribly risky boatflow. The Administration is committed to ensuring that Haitians who qualify as refugees receive protection.

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Q. Isn't the new policy announced by the incoming Administration the same as the Bush policy?

A: No. Under the new policy, great efforts will be made to assure that Haitians with bona fide refugee claims will be able to present them to U.S. adjudicators and receive protection. The plans for in-country processing go far beyond the Bush program.

Alex Aleinikoff