

APPEAL NUMBER 13-1758
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Xue Juan Chen,)
Petitioner,)
)
-vs-)
)
Eric H. Holder, Attorney General,)
Respondent.)

PETITIONER'S BRIEF

Petition for Review
from the
Board of Immigration Appeals
Roger Pauley, Board Member
(A099-934-505)

Respectfully submitted,

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Dated: July 10, 2013.

By: _____
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CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Petitioner hereby declares that the following persons may have an interest in the outcome of this case:

1. Eric Holder, Jr., Attorney General, U.S. Department of Justice, District of Columbia.
2. Xue Juan Chen, Petitioner, Appleton, Wisconsin.
3. Troy Nader Moslemi, Counsel for Petitioner, New York, New York.
4. Richard Tarzia, attorney, Belle Mead, New Jersey.
5. Kimberly Ellis, attorney, Belle Mead, New Jersey.
6. Alexa Torres, attorney, Belle Mead, New Jersey.
7. Roger Pauley, Member, Board of Immigration Appeals, Falls Church, Virginia.
8. Minnie D. Yuen, Assistant Chief Counsel, Department of Homeland Security, Chicago, Illinois.
9. William C. Padish, Assistant Chief Counsel, Chicago, Illinois.
10. Michael L. Harper, Assistant Chief Counsel, Chicago, Illinois.
11. Robert D. Bergida, Assistant Chief Counsel, Department of Homeland

Security, Security, New York, New York.

12. Karen E. Lundgren, Chief Counsel, Department of Homeland
Chicago, Illinois.

13. Vanessa G. Pocock, Assistant Chief Counsel, Department of
Homeland Security, Chicago, Illinois.

14. Robert D. Vinikoor, Immigration Judge, Chicago, Illinois.

15. Barbera A. Nelson, Immigration Judge, New York, New York.

16. Jessica E. Sherman, attorney, Office of Immigration Litigation,
Washington, DC.

By: _____
Troy Nader Moslemi, Esq.
Attorney for Petitioner

Statement Regarding Oral Argument

Counsel for the petitioner does not request oral argument. Counsel believes that the briefs and record will adequately present the facts and legal arguments, and that oral argument is therefore unnecessary. However, if the Court finds that oral argument would be of assistance, petitioner reserves the right to participate in oral argument.

Dated: July 10, 2013.

By: _____
Troy Nader Moslemi, Esq.

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Statement Regarding Adoption of Briefs of Other Parties

The appellant is not adopting the brief of any other party.

Statement of Jurisdiction

Xue Juan Chen (hereinafter “Ms. Chen”) petitions for review of a final order of removal issued against her by the Board of Immigration Appeals (hereinafter “Board”) on March 13, 2013. R. at 1-6. The Board’s order denied Ms. Chen's applications for relief from removal in the form of political asylum, 8 U.S.C. § 1158 (2012), withholding of removal pursuant to 8 U.S.C. § 1231(b)(3) (2012) and withholding of removal pursuant to the Convention Against Torture, 8 C.F.R. §§ 208.16-208.18 (2012). *Id.*

The Court’s jurisdiction to review the Board’s decision is based on section 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252 (2012). The Board entered its final order on March 13, 2013 and Ms. Chen filed her petition for review with the Clerk on April 11, 2013. Venue is proper in this Court. *See* 8 U.S.C. § 1252(b)(2) (2012).

The Immigration Judge had denied Ms. Chen’s requests for asylum, withholding of removal and withholding of removal pursuant to the Convention Against Torture on December 29, 2010. R. at 2, 69-86. The Board’s jurisdiction to review the Immigration Judge’s order was based on 8 C.F.R. § 1003.1(b)(3) (2012). On March 13, 2013, the Board dismissed the appeal from the Immigration Judge's decision. R. at 1-6.

Statement of the Issues

This case presents the following issues:

1. Whether the Board erred in failing to find a well-founded fear of persecution.
2. Whether the Board erred in failing to find a well-founded fear of sterilization.
3. Whether the Board erred in denying withholding of removal and CAT relief.

Statement of the Case

This is a case regarding whether Ms. Chen qualifies as a refugee under the Immigration and Nationality Act.

The course of the proceedings and dispositions in the court below. The Immigration Judge in Chicago, Illinois denied Ms. Chen's's applications for asylum, withholding of removal and withholding of removal pursuant to the Convention Against Torture on December 29, 2010. R. at 2, 69-86. The Immigration Judge also ordered Ms. Chen's removal from the United States on December 29, 2010. *Id.* Ms. Zhu then filed a notice of appeal with the Board of Immigration Appeals on January 26, 2011. R. at 61-62. The Board of Immigration Appeals dismissed the appeal from the Immigration Judge's decision in Mr. Lin's case on March 13, 2013. R. at 1-6.

Statement of the Facts

At the time of her initial hearing before the Immigration Judge, Ms. Chen was a 27-year-old married female who was a native and citizen of The People's Republic of China. R. at 69-70. Mr. Chen testified that "[b]efore coming to the United States, she worked in a factory, making approximately 300 to 400 RMB every month." R. at 70. Ms. Chen has two sons, Kolby Chen, who was born on April 18, 2006, and Edward Chen, who was born on July 24, 2007." R. at 71.

"Upon learning that she was pregnant with her second child, [Ms. Chen] became afraid that she would be sterilized if she returned to China. She therefore decided to seek counsel and apply for asylum. She knows the family planning policy in her home village very well, as she heard it broadcast on the radio and saw it posted in public places many times throughout her life in China; she also knows that the policy in her husband's village, to which she would return if she were forced to go back to China, is the same. According to her understanding of the policy, a woman with one child would be forced to obtain an intrauterine device and not allowed to have any more children (except for those in rural areas whose first child is a girl, who could apply for a permit to have another child after waiting four years). A woman with two children would be forced to undergo sterilization and pay a fine of at least 30000 RMB for overbirth." R. at 71.

Ms. Chen ". . . believes that this policy is applied everywhere in China. She also believes that the policy would apply to her children, even though they are U.S. citizens, because she has obtained Chinese travel documents for them and she knows that they are considered Chinese citizens under the law, and every Chinese citizen has to register with the household registry system or face criminal penalties." R. at 71.

"Although [Ms. Chen] knew about the policy herself, she has obtained more specific information from her cousin-in-law, Gui Zhen Wu (who was sterilized around 2000) and her mother-in-law, Xiu Qin Liu (who was sterilized in the early 1980s), about the policies in their respective villages. Ms. Wu obtained letters from the Sanxing Village Committee and the Jinfeng Town Family Planning Office describing the family planning policies of that village and town and how they would be applied to the respondent if she returned to live there, and Ms. Liu obtained similar letters from the Shima Village Committee and the Tantou Town People's Government." R. at 71.

"In addition to her mother-in-law and her cousin-in-law, the respondent knows several other women who have been forced to undergo sterilization, including several neighbors and aunts on both sides of the family. Two of her neighbors in Sanxing Village, Mei Zhen Xiao and Chai Yu Lin, were forcibly

sterilized relatively recently, and the respondent's father, Guo Wen Chen, was able to obtain affidavits and supporting documentation for them." R. at 71.

Ms. Chen ". . . made little money when she first arrived in the United States, but she was still able to send a few hundred dollars back to her family in China every month. She recently invested approximately \$80000 in a small restaurant in Appleton, Wisconsin, which she operates along with her husband. Otherwise, she has few assets, and her restaurant has not been very profitable. Although she understands the family planning policy to require that she both undergo sterilization and pay a large fine if she were to return to China, she would not pay the fine to avoid sterilization if she were given the option because she believes that she has done nothing wrong and that she would be unable to afford the fine in any case." R. at 71-72. There is a positive credibility determination in this case. R. at 77.

Statement of the Standard of Review

"Where, as here, the BIA adopts the IJ's decision while supplementing the decision with its own reasoning, the IJ's decision, as supplemented by the BIA's decision, becomes the basis for review. *See Aung v. Gonzalez*, 495 F.3d 742, 745 (7th Cir. 2007). We review the denials of asylum and withholding of removal under the substantial evidence standard. *Id.* We review the denials of asylum and withholding of removal under the substantial evidence standard. *Id.* Under this deferential standard, we uphold the decision so long as it is 'supported by reasonable, substantial, and probative evidence on the record considered as a whole.' *Oryakhil v. Mukasey*, 528 F.3d 993, 998 (7th Cir. 2008) (quoting *Chatta v. Mukasey*, 523 F.3d 748, 751 (7th Cir. 2008)). We will overturn the decision to deny relief 'only if the record compels a contrary result.' *Id.* (quoting *Chatta v. Mukasey*, 523 F.3d 748, 751 (7th Cir. 2008)). We will overturn the decision to deny relief 'only if the record compels a contrary result.' *Id.* (quoting *Mema v. Gonzales*, 474 F.3d 412, 416 (7th Cir. 2007))." *Bolante v. Mukasey*, 539 F.3d 790, 793 (7th Cir. 2008).

Summary of the Argument

"We complained in *Zheng v. Holder*, 666 F.3d 1064, 1068 (7th Cir. 2012), about the Board's insouciant attitude toward evidence of forced sterilization in Fujian, an attitude illustrated by the Board's opinion in this case. It relies heavily on a report by the State Department for the proposition that 'physical coercion to achieve compliance with population control goals is uncommon' and indeed that no evidence had been found 'of forced abortions or sterilization in Fujian in the prior 10 years.' That's not what the report says. It says that '*according to the Fujian Province Birth Planning Committee (FPBPC)*, there have been no cases of forced abortion or sterilization in Fujian in the last 10 years,' U.S. Department of State, Bureau of Democracy, Human Rights and Labor, Office of Country Reports and Asylum Affairs, *China: Profile of Asylum Claims and Country Conditions* 26 (May 2007) (emphasis added). Since forced sterilization is against China's publicly declared policy (though, as we noted, maybe not against Chinese law), one hardly expects local officials to be confessing publicly to engaging in the practice, though we'll note such a confessional statement shortly. The reports next sentence - ignored by the Board - is that 'it is impossible to confirm this claim [the claim of the Fujian Provincial Birth Planning Committee that there have been no forced abortions or sterilizations in Fujian for the last ten years], and, in 2006, reportedly, there were forced sterilizations in Fujian.' (The Justice Department's brief in this court is even more egregiously selective in its quotations from the May 2007

report, illustrating the frequently obstinate manner in which the Department defends the Board's rulings in asylum cases, see, e.g., *Smykiene v. Holder*, 707 F.3d 785, 790 (7th Cir. 2013); *Lam v. Holder*, 698 F.3d 529, 534-36 (7th Cir. 2012); *Pasha v. Gonzales*, 433 F.3d 530, 537 (7th Cir. 2005), as by repeatedly flouting the *Chenery* doctrine; see the following cases cited in *Smykiene*: *Sarhan v. Holder*, 658 F.3d 649, 661 (7th Cir. 2011); *Atunnise v. Mukasey*, 523 F.3d 830, 838 (7th Cir. 2008); *Comollari v. Ashcroft*, 378 F.3d 694, 696 (7th Cir. 2004); *Carpio v. Holder*, 592 F.3d 1091, 1096 (10th Cir. 2010).)" *Chen v. Holder*, No. 12-2563, 2013 WL 1908017*5-6 (7th Cir. May 9, 2013).

"In this fog of uncertainty one is tempted to treat the question whether the petitioner has a well founded fear of persecution if returned to Fujian as one of discretion, to be left to the Board to answer, in recognition of its greater experience with asylum applications than the federal courts of appeals have. But the right to exercise discretion in particular circumstances is earned rather than blindly bestowed. We find no indication, either in this case or in previous ones involving asylum applications based on fear of coercive enforcement of the one-child policy (most recently *Ni v. Holder, supra*), that the Board has attempted to marshal the considerable literature (academic, journalistic, diplomatic, judicial) on the nature and enforcement of the policy - that it has tried in other words to construct an

empirical basis, however unavoidably crude rather than precise, for its skeptical attitude toward these applicants. What surely did not meet the Board's responsibility for the reasoned administration of asylum law in the present case was its brushing aside - with a cropped reference to the State Department report of May 2007 - the question whether the petitioner faces a substantial risk (however difficult to quantify) of compulsory sterilization if she is removed to China. The combination of the Board's inaccurate representation of the report on which it so heavily relied, disregard of other evidence, and erratic treatment of the documents submitted by the petitioner deprives the Board's order denying asylum of a rational foundation. See also *Ni v. Holder, supra.*" *Chen v. Holder*, No. 122563, 2013 WL 1908017*15-16 (7th Cir. May 9, 2013).

Argument

1. The Board Erred in Failing to Find a Well-Founded Fear of Persecution.

"The respondent claims to have a well-founded fear of forcible sterilization or other persecution in China as a result of the birth of her two children in the United States (I.J. at 2-3, 11; Exh. 2). She was born in Changle City, Fujian Province, China, and came to the United States in 2002 (I.J. at 1-2; Tr. at 75-76; Exhs. 1, 2). Her husband was born in Shima Village, Tantou Town, Changle City, Fujian Province, China (I.J. at 2; Tr. at 81). They married in 2007 and have two children, sons born in 2006 and 2007 (I.J. at 3; Tr. at 78; Exh. 2). She testified that, under the family planning policy in her and her husband's home villages, a woman with two children would be forcibly sterilized and fined at least 30,000 rmb for overbirth (I.J. at 3; Tr. at 82, 90-91; Exh. 2).

"We will first address the respondent's argument that the Immigration Judge applied the wrong legal standard in analyzing her claim (Resp. Br. at 7-9). She identifies three points in the Immigration Judge's decision where he concludes that she did not demonstrate a 'reasonable likelihood' of persecution, and argues that a remand is appropriate for the Immigration Judge to apply the correct legal standard of a 'reasonable possibility' of persecution (Resp. Br. at 7-9; *see I.J.* at 15-18). *See* 8 C.F.R. § 1208.13(b)(2)(i)(B). We note that the Immigration Judge set forth and

applied the appropriate legal standard at numerous points in his decision (I.J. at 10-12, 14). In any event, to the extent that the Immigration Judge appears to have applied the wrong standard to portions of his analysis, a remand is unwarranted because we review his legal conclusions de novo." R. at 2-3.

The Immigration Judge stated that "[t]he respondent has not shown a reasonable fear of receiving a fine that is so great as to qualify for persecution or effectively force her to be sterilized." R. at 84. Additionally, the Immigration Judge stated that ". . . the Court cannot conclude that the country conditions evidence in the record is sufficient to prove the respondent's contention that violators of the family planning policy in her are reasonably likely to be forcibly sterilized." R. at 83. "As such, the Court cannot conclude that the respondent has shown a reasonable likelihood that she would be forcibly sterilized even if the family planning policy were applied to her." R. at 84. "Therefore, in light of the evidence in the record, the Court cannot conclude that the respondent is reasonably likely to be forced to pay a fine that would rise to the level of persecution even if the authorities found her to have violated the family planning policy." R. at 85-86.

"If Chen cannot establish past persecution or if his fear of future persecution is unrelated to any past persecution, he bears the burden of establishing that his fear of future persecution is well-founded. [8 C.F.R. § 208.13(a), (b)(1), (b)(2)].

This requires Chen to demonstrate 'that his fear of persecution is both 'subjectively genuine and objectively reasonable.' *Chen [v. Holder]*, 604 F.3d [324,] 330 [(7th Cir. 2010)] (quoting *Bolante v. Mukasey*, 539 F.3d 790, 794 (7th Cir.2008)). Chen can satisfy the objective prong of this standard by presenting specific facts showing that there is a reasonable possibility that he would suffer mistreatment on account of a protected basis if he were returned to China. 8 C.F.R. § 208.13(b)(2)(i)(B); *Chen*, 604 F.3d at 330 (quoting *Sayaxing v. I.N.S.*, 179 F.3d 515, 520 (7th Cir. 1999))." *Chen v. Holder*, 705 F.3d 624, 628-629 (7th Cir. Jan. 2013). A reasonable possibility is not a reasonable likelihood.

"To demonstrate a well-founded fear of persecution based on the birth of her children in the United States, the respondent must (1) identify the family planning policy at issue, (2) establish that Chinese government officials would view the births as a violation of the policy, and (3) demonstrate a reasonable possibility that such officials would enforce the policy against her through means constituting persecution (I.J. at 11). *See Matter of J-H-S-*, 24 I&N Dec. 196, 198-200 (BIA 2007). The Immigration Judge found the respondent credible and concluded that she established the existence of an official family planning policy (I.J. at 8-9, 11). But he also concluded that she did not demonstrate a reasonable possibility that government officials would view her as having violated that policy or that, even if

she were considered to have violated the policy, she has a well-founded fear of forcible sterilization or other persecution in China (I.J. at 11-18)." R. at 3.

"The 2007 U.S. State Department Profile of Asylum Claims and Country Conditions for China ('State Department Report Profile') states that 'children born abroad, if not registered as permanent residents of China (i.e., not registered into the parents' household registration), are not considered as permanent residents of China, and therefore are not counted against the number of children allowed under China's family planning law.' Exh. 12 at 30. *See id.*

'The respondent has submitted a response to an online inquiry and two administrative decisions from the Population and Family Planning Commission of Fujian Province, deeming children of Chinese citizens with no permanent residence abroad Chinese citizens regardless of the laws of the country at birth. *See* Exh. 11, Tab EE at 274; Exh. 9, Tab S at 850; 854. One of the administrative decisions was also submitted in *Guo v. Gonzales*, 463 F.3d 109 (2d Cir. 2006), and authenticated. *See* Exh. 3 at 12. The Government, however, has submitted a response by the Population & Family Planning Commission of Fujian Province to a Government Inquiry stating that 'a U.S. born child by a resident of Mainland China shall not be considered a permanent resident of Mainland China if permanent residency was not established for the child when the child returned to

the Mainland.' *Id.* at 20. The same Commission later clarified that there is no contradiction between these opinions and that such a child 'is not considered a permanent resident of China if permanent residency was not established when he/she returned to the mainland.' *Id.* at 20. The same Commission later clarified that there is no contradiction between these opinions and that such a child 'is not considered a permanent resident of China if permanent residency was not established when he/she returned to the mainland.' *Id.* at 12. According to the Government's interpretation, therefore, children who have not 'gone through the formalities to become Chinese mainland residents' are not counted under the family planning policy and that a family must register its children in the household registration system for them to be counted. *See id.* at i; 9. The Court agrees with the Government that the language of the Commission's responses supports this interpretation.

'The respondent testified that she would be fined and imprisoned if she failed to register her children. However, she provided no rational foundation for this belief in her testimony, and she submitted no documentary evidence regarding consequences of failing to register children in the household registration system, so the Court cannot give much weight to her speculation. Though there is a regulation stating that all Chinese citizens 'should fulfill household registration,'

there is no evidence in the record other than the respondent's own testimony to indicate that this regulation would necessarily apply to her U.S. citizen children or that she would face consequences for failing to comply. *See* Exh. 8, Tab Q at 784.

"On the contrary, the State Department Profile indicates that parents of U.S. Citizen children may 'choose' to register their children as Chinese permanent residents to obtain free education and other benefits, but they may also opt not to register their children, have them attend private schools, and obtain similar benefits at a higher cost. *See* Exh. 12 at 30. The respondent did not present directly contradictory evidence or explain why she believes that she would be unable to make this choice. Moreover, like the respondent in *H-L-H- & Z-Y-Z*, the respondent has presented no evidence to demonstrate that the higher expenses incurred by forgoing the benefits obtained by registering in the household registration system would cause such 'severe economic damage' that it would amount to persecution. *See H-L-H- & Z-Y-Z*, 25 I&N Dec. at 217 (citing *Matter of T-Z*, 24 I&N Dec. 163, 173).

"There is other evidence in the record indicating that the family planning policy can be applied to individuals with children born outside the United States. The respondent has submitted documents obtained by her relatives apparently from committees in her and her husband's respective villages and towns which state that

the family planning policy will be applied in her case even though her children were born abroad. *See* Exh. 8, Tab H at 44; Tab I at 47; Tab L at 59; Tab M at 62. These documents, however, do not address the issue of whether the respondent would be able to avoid the application of the family planning policy by choosing not to register her children in the household registration system. Moreover, these documents have not been authenticated and are not very detailed, the respondent has no personal knowledge of the manner in which they were obtained, and she has provided no context regarding the authority of their authors to describe accurately or to apply the family planning policy. Additionally, the Government has submitted an opinion from the Population and Family Commission of Fujian Province stating that village committees have no right to make family planning decisions and that certificates from such committees should be deemed ineffective. *See* Exh. 3 at 21. The Court therefore will give these documents less weight than the State Department Profile and the information the Government has obtained from provincial-level family planning authorities in China." R. at 81.

"The respondent has also submitted affidavits from three individuals claiming that they had children abroad and were punished for violating the family planning policy upon their return to China. *See* Exh. 9, Tab J at 512; Exh. 9, Tab V at 1119, Tab CC at 229. According to the respondent's counsel, these accounts

were prepared for other asylum applications and offered in this case to show that the family planning policy is sometimes applied to individuals in situations similar to that of the respondent. Because the respondent does not know these individuals and they did not testify in Court, it is very difficult for the Court to judge the reliability of this evidence. Because these are individualized, self-serving, second-hand accounts, the Court will give them very little evidentiary weight. *See Song Wang [v. Keisler]*, 505 F.3d [615,] 622 [(7th Cir. 2007)]." R. at 81.

"Arguing that the Court should place less weight on the State Department Profile and ignore the BIA's holding in *H-L-H- & Z-Y-Z-* that State Department reports are 'highly probative evidence,' the respondent has relied heavily on a report criticizing the State Department Profile by Dr. Flora Sapio, a professor at Julius-Maximilians University in Würzburg, Germany. *See* Exh. 10, Respondent's Brief at 1-2; *see generally* Exh. 11, Tab Y. While some of Dr. Sapio's concerns about the transparency of the State Department and the methodology used for the Profile are valid, her criticism's do not distinguish the respondent's case from *H-L-H- & Z-Y-Z*, and the profile remains persuasive evidence of the population control policies and practices in China. As the respondent has not submitted contrary evidence on this issue from a similarly comprehensive and reputable source, the Court concludes that the respondent has not met her burden to show a reasonable

possibility that Chinese authorities would necessarily consider her to have violated the family planning policy." R. at 82.

"We complained in *Zheng v. Holder*, 666 F.3d 1064, 1068 (7th Cir. 2012), about the Board's insouciant attitude toward evidence of forced sterilization in Fujian, an attitude illustrated by the Board's opinion in this case. It relies heavily on a report by the State Department for the proposition that 'physical coercion to achieve compliance with population control goals is uncommon' and indeed that no evidence had been found 'of forced abortions or sterilization in Fujian in the prior 10 years.' That's not what the report says. It says that '*according to the Fujian Province Birth Planning Committee (FPBPC)*, there have been no cases of forced abortion or sterilization in Fujian in the last 10 years,' U.S. Department of State, Bureau of Democracy, Human Rights and Labor, Office of Country Reports and Asylum Affairs, *China: Profile of Asylum Claims and Country Conditions* 26 (May 2007) (emphasis added). Since forced sterilization is against China's publicly declared policy (though, as we noted, maybe not against Chinese law), one hardly expects local officials to be confessing publicly to engaging in the practice, though we'll note such a confessional statement shortly. The reports next sentence - ignored by the Board - is that 'it is impossible to confirm this claim [the claim of the Fujian Provincial Birth Planning Committee that there have been no

forced abortions or sterilizations in Fujian for the last ten years], and, in 2006, reportedly, there were forced sterilizations in Fujian.' (The Justice Department's brief in this court is even more egregiously selective in its quotations from the May 2007 report, illustrating the frequently obstinate manner in which the Department defends the Board's rulings in asylum cases, see, e.g., *Smykiene v. Holder*, 707 F.3d 785, 790 (7th Cir. 2013); *Lam v. Holder*, 698 F.3d 529, 534-36 (7th Cir. 2012); *Pasha v. Gonzales*, 433 F.3d 530, 537 (7th Cir. 2005), as by repeatedly flouting the *Chenery* doctrine; see the following cases cited in *Smykiene*: *Sarhan v. Holder*, 658 F.3d 649, 661 (7th Cir. 2011); *Atunnise v. Mukasey*, 523 F.3d 830, 838 (7th Cir. 2008); *Comollari v. Ashcroft*, 378 F.3d 694, 696 (7th Cir. 2004); *Carpio v. Holder*, 592 F.3d 1091, 1096 (10th Cir. 2010).)" *Chen v. Holder*, No. 12-2563, 2013 WL 1908017*5-6 (7th Cir. May 9, 2013). "Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution." *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1285 (9th Cir. 1984).

"The petitioner submitted a number of personal letters, along with communications from the local authorities in the part of Fujian Province where her family lives, in support of her claim to be at risk of forced sterilization if she is returned. The Board gave no weight to communications from the local authorities, on the ground that the communications had not been authenticated and might

therefore be forgeries. Yet how realistic is it to expect the petitioner to be able to obtain an authenticated copy of a communication from a local official that states an intention to violate Chinese national policy (whether or not codified in a law) against resorting to sterilization to punish violations of the one-child policy or deter future violations?

'The Board has a pinched conception of 'authentication.' Obviously a document must be authentic rather than a forgery to be admissible in evidence. But 'documents may be authenticated in immigration proceedings through any recognized procedure,' *Georgis v. Ashcroft*, 328 F.3d 962, 969 (7th Cir. 2003), quoting approvingly *Khan v. INS*, 237 F.3d 1143, 1144 (9th Cir. 2001); see also *Shtaro v. Gonzales*, 435 F.3d 711, 717 (7th Cir. 2006); *Gen Lin v. Attorney General*, 700 F.3d 683, 687, (3d Cir. 2012); *Jiang v. Gonzales*, 474 F.3d 25, 29 (1st Cir. 2007); *Yongo v. INS*, 355 F.3d 27, 31 (1st Cir. 2004). Some of the recognized procedures are set forth in Article IX of the Federal Rules of Evidence, where we read that 'to satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.' Fed. R. Evid. 901(a).

"The Board disregards these authorities and even imagines that the only method of authenticating a foreign official document is a certification procedure,

either the one set forth in Fed. R. Evid. 902(3), or the one in the Board's own regulations, 8 C.F.R. §§ 287.6(b), 1287.6(b) (these are identical regulations, the first applicable to proceedings before the Board, the second to proceedings before immigration judges). It isn't the only path to admissibility. *Vatyan v. Mukasey*, 508 F.3d 1179, 1182-84 (9th Cir. 2007). The path laid out in Rule 902(3), which requires certification by U.S. or foreign diplomatic officials, is a form of what is called 'self-authentication,' which is an *alternative* to authentication by evidence, not a form, let alone a mandatory form, of authentication. (Rule 902 is captioned 'Evidence That Is Self-Authenticating.') The Board's regulations, though otherwise similar to Rule 902, contain language implying that the method they specify is the only permissible method of establishing the admissibility of a foreign official document. But it's not, as held in *Liu v. Ashcroft*, 372 F.3d 529, 532-33 (3d Cir. 2004), in reliance on a government submission to that effect. The government further acknowledged in that case that 'asylum applicants can not always reasonably be expected to have an authenticated document from an alleged persecutor.' *Id.* at 532. 'It is obvious that one who escapes persecution in his or her own land will rarely be in a position to bring documentary evidence or other kinds of corroboration to support a subsequent claim for asylum. . . . Common sense establishes that it is escape and flight, not litigation and corroboration, that is

foremost in the mind of an alien who comes to these shores fleeing detention, torture and persecution.' *Senathirajah v. INS*, 157 F.3d 210, 215-16 (3d Cir. 1998).

'One of the documents that the Board refused to consider had been posted on a Fujian government website. That document (which we'll call the 'Robert Lin' document), captioned 'Beautiful Family,' was issued by Fujian Population and Procreation Planning Committee, which may be the same organization as the Fujian Provincial Birth Planning Committee, author of another 'Beautiful Family' posting: 'Reply to Inquiry Regarding: 'Whether or Not [a Person] Must Receive Sterilization Operation,' July 23, 2007, www.fjjsw.gov.cn:8080/html/1/286/1982_2008117845.html (visited May 6, 2013). The Robert Lin document states that sterilization is mandatory for violators of the one-child policy, with exceptions that don't apply to the petitioner. Population and Procreation Committee of Fujian Province, 'Answer to Robert Lin's Inquiry: 'Family Planning Policy with Respect to People Returning to China from Overseas,' 'May 6, 2008, www.fjjsw.gov.cn:8080/html/5/383/9626_200856322.html. (visited Apr. 19, 2013); cf. Population and Family Planning Regulation of Fujian Province (July 26, 2002), Articles 9-11, 39, 47.

'A document posted on a government website is presumptively authentic if

government sponsorship can be verified by visiting the website itself; and in this case it can be. See www.fjjsw.gov.cn:8080/html/5/383/9626_200856322.html (visited May 6, 2013). (gov.cn is 'The Chinese Central Government's Official Web Portal,' as explained in 'The Central People's Government of the People's Republic of China,' <http://english.gov.cn/> (visited May 6, 2013).) We don't agree that all the information available on the Internet is 'voodoo.' *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 774-75 (S.D. Tex. 1999).

As far as we can tell, the Board ignored the Robert Lin document - and that's a problem. 'We cannot sustain the exclusion of . . . documents without an explanation of the basis for the ruling.' *Zhang v. Gonzales*, 405 F.3d 150, 155 (3d Cir. 2005). The Robert Lin document cuts the ground out from under what the Board called the 'key aspect of this case' - that because Chen's children were born abroad, she is in no danger of being forced to undergo sterilization.

'As for letters from members of the petitioner's family, the Board refused to give any weight to them. They are doubtless authentic (not forgeries) - we have that authentication is not required for 'unsworn statements of facts or letters from family members.' *Gebreeyesus v. Gonzales*, 482 F.3d 952, 955 (7th Cir. 2007). But they can hardly be thought neutral, reliable sources. Yet the Board also refused to give any weight to a letter reporting a forced sterilization that was

written by a person who not a member of the petitioner's family. The Board's ground was that he had written the letter in reference to another immigration case. We can't see what difference that should make.

'The Board further discounted the family letters because the coerced sterilizations they reported were not, so far as appears, of women who had children in foreign countries. But the Board gave no reason to think that this would make a difference to the Fujian enforces of the one-child policy. Obviously foreigners who visit China with their foreign-born children aren't subject to forced sterilization no matter how many children they have. But the petitioner and her husband are not foreigners. They are citizens of China and of no other country, and their children, though U.S. citizens, will upon returning to China with their parents be deemed Chinese citizens." *Chen v. Holder*, No. 12-2563, 2013 WL 1908017*9-12 (7th Cir. May 9, 2013).

"All this said, considerable uncertainty about the application of the one-child policy, and about the sanctions for violating it when a second or subsequent Chinese child is born abroad, remains. See, e.g., Australia: Refugee Review Tribunal, Research Response, 'China: 1. Are there any More Recent Reports on the Treatment of 2nd or 3rd Children Born Overseas If They Return To China (With Particular Reference to Fujian)?,' Sept. 25, 2006, CHN30673,

www.unhcr.org/refworld/docid/4b6fe158c.html (visited May 6, 2013); Adam Minter, 'China's 'Birth Tourism' Isn't About The U.S.,' *Bloomberg World View*, Nov. 3, 2011, www.bloomberg.com/news/2011-11-03/china-s-birth-tourism-isn-t-about-the-u-s-adam-minter (Nov. 3, 2011); Rob Gifford, Born In The U.S.A.? Some Chinese Plan It That Way,' *NPR*, Nov. 22, 2010, www.npr.org/2010/11/22/131513165/born-in-the-u-s-a-some-chinese-plan-it-that-way (both websites visited May 6, 2013). Nor can we find any responsible estimate of the probability that a violator of the one-child policy will be detected and severely punished.

2. The Board Erred in Failing to Find a Well-Founded Fear of Sterilization.

"According to the State Department, the Chinese government prohibits the use of 'physical coercion' to compel compliance with its family planning policies. *See* Exh. 12 at 22; Exh. 13. Instead, on a national level, a system of fees and rewards to encourage compliance. However, implementation of this law varies regionally within the country. Regulations vary at the provincial level, and the policy's implementation is the responsibility of 'local officials.' *See* Exh. 12 at 23. In Fujian Province, investigators from the State Department have found that officials have applied private and public pressure and imposed heavy 'social compensation fees' on families in violation of the policy, they have not found any

cases of 'physical force employed in connection with . . . sterilization.' *Id.* at 26-27. Nevertheless, media sources, and hundreds of asylum claimants have described forcible and coercive sterilizations and abortions. *See* Exh. 12 at 28; Exh. 13. In fact, Chinese government officials concede that overzealous officials may have perpetrated such acts. *Id.* As explained at Part III.B.2.b *supra*, the Court places great weight on the State Department reports, notwithstanding, notwithstanding the academic criticism of them on which the respondent relies. *See H-L-H- & Z-Y-Z-*, 25 I&N Dec. 25 I&N Dec. at 213; *see also* Exh. 11, Tab Y.

'Country conditions evidence from other sources in the record is generally consistent with the State Department's findings. The Government has submitted reports from the Immigration and Refugee Board of Canada and the U.K. Immigration and Nationality Directorate finding no evidence of forced sterilization or abortion in Fujian Province and finding that enforcement of the family planning policy in Fujian Province is generally relatively lax. *See* Exh. 3 at 72; 103-104. On the other hand, while the respondent has submitted several reports from media sources and non-governmental organizations indicating that China's one-child policy is still strictly enforced and a high priority for local officials and that sterilization is encouraged. *See generally* Exh. 9, Tabs E-F. However, even some of these reports support the contention that instances of forced sterilization and

abortion are rare and that the use of fees and rewards are more common. *See, e.g.*, Exh. 9, Tab E at 267; Tab F at 289.

'The respondent has submitted some background evidence indicating that there is a possibility that violators of the family planning policy in China can be forcibly sterilized. For example, reports from the Congressional-Executive Commission on China and some from 2008 and 2009 describe incidents of forced sterilization in Shandong, Yunnan, and Gansu Provinces and the Xinjiang and Guangxi Autonomous Regions. *See* Exh. 9, Tab B at 191-193; Exh. 11, Tab AA at 215-216. Recent testimony before Congress by human rights advocates and a few news articles in the record document similar isolated incidents in other areas of China. *See* Exh. 11, Tab Z at 88; 99; 198; Tab FF at 297; 299. Some of the respondent's evidence also indicates that forced sterilization and abortion were widespread in the 1980s and 1990s. *See generally* Tab A; Tab L; Tab T.

'However, little of the respondent's background information refers to Fujian Province, and most of the recent reports refer to isolated incidents (often the same ones) in other areas of China. The State Department Profile and the reports submitted by the Government represent the most comprehensive, up-to-date findings regarding enforcement of the Chinese family planning policy across the country and in the respondent's region. Thus, the Court cannot conclude that the

country conditions evidence in the record is sufficient to prove the respondent's contention that violators of the family planning policy in her are reasonably likely to be forcibly sterilized.

'The respondent has also submitted personal documentation to support her argument that she has a particularized, well-founded fear of being forcibly sterilized. In particular, she has submitted affidavits from two of her neighbors in Sanxing Village, Jinfeng Town, Mei Zhen Xiao and Chai Yu Lin, who claim to have been forcibly sterilized, as well as three affidavits from individuals she does not know who are similarly situated. *See* Exh. 6; Exh. 9, Tab J at 512; Exh. 9, Tab V at 1119; Exh. 11, Tab CC at 229. As explained in Part III.B.2.b *supra*, the Court will attach very little weight to the affidavits of the three unknown individuals.

'Although the neighbors' stories are more relevant to the respondent's case, they are also individualized accounts clearly prepared in support of the respondent's asylum application, and the Court has no means at its disposal to evaluate the reliability of their stories, so the Court will give them little weight. *See Song Wang*, 505 F.3d at 622. Moreover, the respondent has testified that she would live in Sanxing Village, Jinfeng Town if returned to China but in Shima Village, Tantou Town. The only individuals from that village whom she claims have told her that they were forcibly sterilized are her cousin-in-law and her

mother-in-law, who underwent the procedure several years ago. Weighed against the country conditions documentation, therefore, the Court cannot conclude that these accounts establish that the respondent personally has a well-founded fear of being forcibly sterilized if she returns to China.

'The documents describing the application of the family planning policy to the respondent from committees in her and her husband's village and town also suggest that she could be sterilized if returned to China. *See* Exh. 8, Tab H at 44; Tab I at 47; Tab L at 59; Tab M at 62. As explained in Part III.B.2.b *supra*, the Court cannot give these documents much weight. Even if the Court did weigh these documents more heavily, though, they do not indicate that the respondent would be forcibly sterilized; they only state that she 'must' be sterilized. It is entirely unclear from the documents whether the authorities merely encourage sterilization as a matter of policy for individuals who have had two children or impose sterilization by force.

Finally, **although the government has not raised the issue of whether the respondent could reasonably relocate to avoid persecution**, the Court notes that the respondent has not shown that it would be unreasonable for her to move to another China where the family planning policy is applied less harshly." R. at 82-84 (*emphasis supplied*).

"In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, **unless the Service establishes** by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate." 8 C.F.R. § 208.13(b)(3)(ii) (2012). By the Immigration Judge's own admission, the Department had never even raised the issue of relocation, and under the regulation, it was their burden to do so. It appears that the 'one child' policy with sterilization as the sanction for violating it is enforced most vigorously in Fujian Province, and it is possible that if the petitioner and her son relocated to another part of China the risk of sterilization would be small, in which event they would not have a well-founded fear of persecution if they are removed. 8 C.F.R. § 1208.13(b)(2)(ii), (b)(3)(i); *Agbor v. Gonzales*, 487 F.3d 499, 505 (7th Cir. 2007); *Rashiah v. Ashcroft*, 388 F.3d 1126, 1132 (7th Cir. 2004); *Vente v. Gonzales*, 415 F.3d 296, 303 (3d Cir. 2005); *Kaiser v. Ashcroft*, 390 F.3d 653, 659 (9th Cir. 2004). **But the government has not argued this point.** This is puzzling in light of our recent decision in *Song Wang v. Keisler*, 505 F.3d 615 (7th Cir. 2007), another case from Changle in Fujian Province, where the Board, as our opinion noted, *id.* at 622, said that the petitioner could relocate to a part of China where the 'one child' policy was not enforced as harshly as it is in

Fujian. Our opinion in *Song Wang* also expressed skepticism that the threat of forcible sterilization of violators of the policy was grave, *id.* at 622-24, because of evidence that the policy is enforced mainly by monetary penalties, the size of which was not indicated. But that was before the government's lawyer told us in this case that the Board may not consider sterilization induced by inability to pay a monetary penalty to be a form of persecution, despite the Board's repeated acknowledgement in other cases that onerous monetary penalties can be persecution." *Lin v. Mukasey*, 532 F.3d 596, 598 (7th Cir. 2008) (*emphasis supplied*). "The immigration judge also found that she could relocate to a part of China in which the one-child policy is not enforced as enthusiastically as it appears to be in Fujian, but the Board ignored that issue." *Chen v. Holder*, No. 12-2563, 2013 WL 1908017*1-2 (7th Cir. May 9, 2013).

"Although the Justice Department argues that forcible sterilization is against Chinese law, it's not clear that there is such a law. See *Country Report: China 50-51*; Immigration and Refugee Board of Canada, "China: Family Planning Laws, Enforcement and Exceptions in the Provinces of Guangdong and Fujian," Oct. 1, 2012, www.unhcr.org/refworld/country,,IRBC,,CHN,,50a9fb482,0.html (visited May 6, 2013). And if there is such a law, it seems that the authorities in Fujian either don't know or don't care about it or 'resort to extra-legal means of

enforcement [of the one-child policy, which remains national policy] in order to avoid being penalized themselves for not meeting birth planning goals.' Edwin A. Winckler, 'Chinese Reproductive Policy at the Turn of the Millennium: Dynamic Stability,' 28 *Population & Development Rev.* 379, 397 (2002). '[I]ntense pressure to meet birth limitation targets set by government regulations [have] resulted in instances of local family-planning officials using physical coercion to meet governmental goals. . . . In the case of families that already had two children, one parent was often pressured to undergo sterilization.' *Country Report: China* 51. In short, 'the use of coercive measures in the enforcement of population planning policies remains commonplace.' Congressional-Executive Commission on China, *Annual Report* 153 (2009).

'Article 18 of the Population and Family Planning Regulation of Fujian Province provides that 'those who have become pregnant in violation of this Regulation [which includes the one-child policy] should take remedial measure in time.'

www.unhcr.org/refworld/country,,,LEGISLATION,CHN,,4242b7394,0.html

(visited May 6, 2013). The term 'remedial measure in time' is a euphemism for abortion. Congressional-Executive Commission on China, *Annual Report* 153 (2009). Recent instances of forced abortion in Fujian have been documented. See

Edward Wong, 'Reports of Forced Abortions Fuel Push to End Chinese Law,' *N.Y. Times*, July 23, 2012, p. A1; Congressional-Executive Commission on China, *Annual Report* 92 (2012) and *Annual Report* 112 (2011). It would be no surprise if a woman who avoided the threat of forced abortion by having a second child in the United States would if she returned to China be subject to compulsory sterilization. For evidence, besides that submitted by the petitioner, that forced sterilization is continuing in Fujian, see, e.g., *Country Report: China* 50-51; Congressional-Executive Commission on China, *Annual Report* 90-91 (2012), *Annual Report* 111 (2011), *Annual Report* 119 (2010), and *Annual Report* 154-56 (2009); Immigration and Refugee Board of Canada, *supra*, §§ 3.3, 4; 'Woman Flees Forced Sterilization,' *Radio Free Asia*, Jan. 12, 2012, www.rfa.org/english/news/china/child-0112201245358.html; 'Apology for Forced Sterilization,' *Shenzhen Daily News*, Nov. 2, 2011, www.szdaily.com/content/2011-11/02/content_6196079.htm (both websites were visited on May 6, 2013). We note with disapproval that the Board without explanation systematically ignores the annual reports of the Congressional-Executive Commission on China, several of which we have cited, even though they are pertinent official publications of the federal government. *Ni v. Holder*, No. 12-2242, 2013 WL 1776501, *5-6 (7th Cir. Apr. 26, 2013).

"We are not persuaded by the respondent's claim that the Immigration Judge clearly erred in finding that her children would not be counted under China's family planning policy (Resp. Br. at 9). The Immigration Judge determined that she established a reasonable possibility that her children would be considered Chinese citizens under Chinese law (I.J. at 11). He determined, however, that she did not establish a reasonable possibility that the family planning policy would be applied to her if she decided not to register her children or that she would have to register her children (I.J. at 12). In support of his conclusion, the Immigration Judge relied on a Department of State report indicating that 'children born abroad, if not registered as permanent residents of China (i.e., not entered into the parents' household registration), are not considered as permanent residents of China, and therefore are not counted against the number of Children allowed under China's family planning law' (I.J. at 12; Exh. 12 at 30, bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *China, Profile of Asylum Claims and Country Conditions* (May 2007) [hereinafter *Profile*]). The Immigration Judge also reviewed several documents from the Fujian Province Population and Family Planning Commission, including a statement that 'a U.S. born child by a resident of Mainland China shall not be considered a permanent resident of Mainland China if permanent residency was not established for the child when the child returned to

the Mainland,' and concluded that United States-born children must be registered to be counted for family planning policy purposes (I.J. at 12; Exh. 3 at 12, 20; Exh. 11, Tab EE at 274-75; Exh. 9, Tab S at 850-51, 854-55). The respondent urges us to interpret these documents differently on appeal, but she has not established any clear error in the Immigration Judge's findings. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (requiring a 'definite and firm conviction' that a mistake has been made in order to conclude that a factual finding is clearly erroneous); *see also Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003)." R. at 3.

"The State Department's 2007 report distinguishes (at p. 26) 'coercion through public and other pressure' to undergo sterilization from coercion through 'physical force.' The Board has latched on to the distinction, ignoring the fact that the use of physical force is only one method of coercion, of persecution. *Stanojkova v. Holder*, 645 F.3d 943, 948 (7th Cir. 2011). The petitioner argues without contradiction that unless she underwent sterilization upon returning to China she wouldn't be allowed to register her children, young children whom she would be bringing with her rather than leaving in the United States. Denial of registration could be severe punishment: Chinese 'parents must register their children in compliance with the national household registration system within one

month of birth. Children not registered cannot access public services.' *Country Report: China 56*; see also *Shi Chen v. Holder*, 604 F.3d 324, 328 (7th Cir. 2010); *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*, [2000] HCA 19 (Australia: High Court, Apr. 13, 2000). www.unhcr.org/refworld/docid/3ae6b6df4.html (visited May 6, 2013); Congressional-Executive Commission on China, *annual Report 96-97* (2012); Immigration and Refugee Board of Canada, 'China: Treatment of 'Illegal,' or 'Black,' Children Born Outside the One-Child Family Planning Policy' June 26, 2007, www.unhcr.org/refworld/docid/46c403821f.html (visited May 6, 2013).

'It's been charged that the right to take college entrance exams may be denied to unregistered children. Jiang Xueqing, 'Some Still Face Question of Identity,' *China Daily*, Mar. 26, 2013, www.chinadaily.com.cn/2013-03/26/content_16344491.htm (visited May 6, 2013). That could be thought a form of coercion. We have held that financial coercion to undergo sterilization is a ground for asylum, *Lin v. Mukasey*, 532 F.3d 596, 598 (7th Cir. 2008) (7th Cir. 2008); forbidding kids to attend college because of a parental violation of the one-child policy could be considered a ground for asylum as well. In fairness to Fujian we note that the province, suffering as it does from a shortage of skilled labor, is participating in a pilot program, to be conducted next year, that will relax college

eligibility requirements for applicants who are not locally registered because they are the children of migrant workers. Such children will be eligible to sit for the college entrance exam if they have completed three years of high school in Fujian.

Han Yuting, 'Fujian to Pioneer Gaokao Reform,' *The Economic Observer*, June 4, 2012, www.eeo.com.cn/ens/2012/0604/227672.shtml (visited May 6, 2013). But the petitioner's children are not the children of migrant workers but instead the progeny of violators of the one-child policy. We don't know whether they would be eligible to participate in the pilot program, or whether the program will be made permanent." *Chen v. Holder*, No. 12-2563, 2013 WL 1908017*5-8 (7th Cir. 2013).

"It is well established that persecution can take the form of economic deprivation as well as physical mistreatment, *see, e.g., Yun Jian Zhang v. Gonzales*, 495 F.3d 773, 777 (7th Cir. 2007); *Tarraf v. Gonzales*, 495 F.3d 525, 535 (7th Cir. 2007); a claim of persecution based on economic deprivation generally requires a showing of a "deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life," *Xiu Ling Chen v. Gonzales*, 489 F.3d 861, 863 (7th Cir. 2007) (7th Cir. 2007) (quoting *In re T-Z-*, 24 I. & N. Dec. 163, 171 (BIA 2007) (emphasis removed in *Xiu Ling Chen*)). This does not mean, however, that the alien must establish a 'total deprivation of livelihood on account of his protected status.' *Koval v. Gonzales*, 418 F.3d 798,

805-06 (7th Cir. 2005) (internal quotation marks omitted)." *Chen v. Holder*, 604 F.3d 324, 334 (7th Cir. 2010).

"The Justice Department's lawyer vehemently denied this at the oral argument, insisting that the children would be considered U.S. rather than Chinese citizens even if they accompanied their mother to China, and so would not count against the one-child policy. The Robert Lin document that the Board unaccountably ignored is only one piece of contrary evidence. Article 5 of the Nationality Law of the People's Republic of China states that 'any person born abroad whose parents are both Chinese nationals and one of whose parents is a Chinese national shall have Chinese nationality.'

www.china.org.cn/english/LivinginChina//184710.htm (visited May 6, 2013). And the website of the Chinese consulate in New York states that 'if one or two of his/her parents are foreign citizens or have foreign permanent residence right (e.g. U.S. permanent resident card), the child shall apply for a Chinese visa before traveling to China. If both of his/her parents are Chinese citizens and have no foreign permanent residence right (e.g. U.S. permanent resident card), the child shall apply for a Chinese travel document before traveling to China,'

www.nyconsulate.prchina.org/eng/lsw/lswjx/sbqz/cccbu/ (visited May 6, 2013).

The parents in this case are not permanent residents of the United States. All that

the children would need in order to return to China are travel documents, which are what Chinese citizens require to enter China which are what Chinese citizens require to enter China; visas are for foreigners.

The State Department's 2004 'China Consular Information Sheet' says that 'if one or both parents of a child are PRC [Peoples Republic of China] nationals who have not permanently settled in another country, then China regards their children as PRC nationals and does not recognize any other citizenship they may acquire at birth, including U.S. citizenship. This is true regardless of where the children are born. Such children are required to enter and depart China on PRC documents.'

<http://statelists.state.gov/scripts/wa.exe?A3=ind0501c&L=DOSTRAVEL&E=quoted->

[printable&P=45392&B=_%3D_NextPart_001_01C4FE47.15A53C20&T=text%2Fhtml;%20Charset=iso-8859-1](http://statelists.state.gov/scripts/wa.exe?A3=ind0501c&L=DOSTRAVEL&E=quoted-printable&P=45392&B=_%3D_NextPart_001_01C4FE47.15A53C20&T=text%2Fhtml;%20Charset=iso-8859-1) (visited May 6, 2013). And 'advice from the

[Chinese] Department of foreign Affairs and Trade (DFAT) . . . indicates that there are two circumstances in which couples returning to China are exempt [from the one-child policy]The first exemption applies to couples who have permanent residency rights in another country, also known as 'Overseas Chinese'. The second exemption applies to Chinese nationals who have returned to China with a second child after studying overseas for more than one year.' Australia: Refugee Review

Tribunal, Research Response, 'China: 1. Please Obtain Updated Information on the Situation of Children Born Outside the PRC in Breach of the Family Planning Regulations,' Oct. 14, 2009, CHN35531 (citations omitted), www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=cf4bd8ca-6b5f-46db-b525-39837a542362

(visited May 6, 2013); see also Shan Juan, *Babies Born Abroad May Trigger Fines,*

China Daily, Sept. 9, 2011, [www.chinadaily.com.cn/china/2011-](http://www.chinadaily.com.cn/china/2011-09/09/content_13654286.htm)

[09/09/content_13654286.htm](http://www.chinadaily.com.cn/china/2011-09/09/content_13654286.htm) (visited May 6, 2013); Kit Gillet, *'Hong Kong Crackdowns on Chinese Families Looking to Get Around One-Child Policy,'*

Toronto Star, May 16, 2012,

www.thestar.com/news/world/2012/05/16/hong_kong_crackdowns_on_chinese_families_looking_to_get_around_onechild_policy.html (visited Mar. 14, 2013). The petitioner, a waitress, fits neither exception.

"The respondent also argues that the Immigration Judge clearly erred in finding that she may choose whether to register her children, citing evidence that the household registration system is mandatory for *Chinese* citizens (Resp. Br. at 12, 13, n. 1; Exh. 9, Tab Q at 780). We discern no clear error in the Immigration *see Exh. 8, Tab H at 44, Tab I at 47, Tab L at 59, Tab M at 62*). Judge's finding,

which was based in part on the *Profile's* statement that parents of United States born children may 'choose' to register their children as Chinese permanent residents to obtain free public education and other benefits or opt not to register their children, send them to private school, and pay more for similar benefits (I.J. at 13; Exh. 12 at 30)." R. at 3-4

"Next, the respondent argues that the Immigration Judge failed to properly consider the village committee certificates she submitted (Resp. Br. at 12-13; *see* Exh. 8, Tab H at 44, Tab I at 47, Tab L at 59, Tab M at 62). But we agree that these unauthenticated, unsigned documents are entitled to little weight (I.J. at 3, 13). *See, e.g., Song Wang v. Keisler*, 505 F.3d 615, 622 (7th Cir. 2007) (affording little weight to a certificate from an alien's village committee stating that he must be sterilized upon return to China on account of his two United States-born children because the certificate was unauthenticated and obtained for the purpose of the hearing). The respondent The respondent argues that village committee certificates are not 'official records' and therefore are not required to be authenticated under 8 C.F.R. § 1287.6. But the United States Court of Appeals for the Seventh Circuit, in whose jurisdiction this case arises, has applied the authentication requirement to village committee certifications. *See, e.g., Liang v. Holder*, 626 F.3d 983, 987 (7th Cir. 2010); *Song Wang v. Keisler, supra*, at 622. In

addition, as the Immigration Judge found, the documents do not address whether the respondent can avoid the application of the family planning policy by not registering her children (I.J. at 13). Further, a statement from the Fujian Province Population and Family Planning Commission indicates that villagers' committees are not authorized to make decisions on family planning issues and that certificates issued from such committees should be deemed ineffective (I.J. at 13; Exh. 3 at 21). The respondent argues that, even if a village committee cannot decide whether the family planning policy has been violated, it still has the authority to implement and enforce the policy (Resp. Br. at 13-14; Exh. 9, Tab C). We do not find this distinction meaningful here, where the respondent offers the village committee certificates as proof that she is subject to the family planning policy (Resp. Br. at 14).

"We are similarly unconvinced by the respondent's argument that the Immigration Judge relied too heavily on Department of State reports and gave too little weight to her evidentiary submissions in determining that she had not met her burden to show that the birth of her two children in the would be seen as a family planning policy violation (Resp. Br. at 14-15). First, Board and Circuit precedent hold that Department of State reports on country conditions are 'highly probative evidence and are usually the best source of information on conditions in foreign

nations.' *See Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 213 (BIA 2010); *see also Zheng v. Holder*, 701 F.3d 237, 242 (7th Cir. 2012) (finding that the Board did not abuse its discretion in adhering to the conclusions of a Department of State report). To the extent that the respondent argues that the Immigration Judge failed to explicitly consider her evidence supposedly contradicting the Department of State reports, the Immigration Judge need not discuss every single piece of evidence presented by a respondent when rendering a decision, as long as the decision reflects meaningful consideration of the relevant substantial evidence. The respondent has not established any clearly erroneous fact findings by the Immigration Judge, and we agree with his conclusion that she did not meet her burden to show a reasonable possibility that Chinese authorities would view the birth of her two children in the United States as a family planning policy violation (I.J. at 14)." R. at 4.

"We also agree with the Immigration Judge that the respondent has not shown a well-founded fear that she would suffer economic persecution (I.J. at 16-18). Enforcement efforts resulting in moderate economic impact would not, in general, prove a well-founded fear of persecution. *See Matter of J-W-S-*, 24 I&N Dec. 185, 191 (BIA 2007); *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007) (finding

that nonphysical forms of harm can amount to persecution, but applying a 'severe economic disadvantage' test to claims of economic persecution). According to the *Profile*, fines or social compensation fees in Fujian Province vary widely and, for families that are not wealthy, range from one to six times the average net or disposable per capita household income, measured at the county-level (I.J. at 17; Exh. 12 at 27). The respondent testified that she believes the fine would be approximately 30,000 rmb (\$4,500), and she submitted a document purportedly from the Tantou Town government indicating that the fine for someone in her situation in 2008 would have been approximately 39,510 to 45,456 rmb (\$5,900 to \$6,800) (I.J. at 17; Tr. at 90-91; Exh. 9, Tab G at 420). On appeal, the respondent argues that she would be fined two to three times her annual income or up to 10 times her annual disposable income (Resp. Br. at 19; Exh. 9, Tab C at 210, Tab I at 467, Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *China Country Reports on Human Rights Practices - 2007* (Mar. 2008)). The respondent, however, provided insufficient evidence of her financial circumstances or the hardship that she would suffer if such a fine were assessed (I.J. at 17). She testified that, before she bought the restaurant she now owns, she made enough to send a few hundred dollars to China monthly (I.J. at 17; Tr. at 84-86, 100-01). Based on this evidence, the Immigration Judge found that the respondent had not

met her burden to show a well-founded fear that any economic sanctions imposed against her would rise to the level of persecution, and we concur (I.J. at 17-18)."

R. at 5.

"In this fog of uncertainty one is tempted to treat the question whether the petitioner has a well founded fear of persecution if returned to Fujian as one of discretion, to be left to the Board to answer, in recognition of its greater experience with asylum applications than the federal courts of appeals have. But the right to exercise discretion in particular circumstances is earned rather than blindly bestowed. We find no indication, either in this case or in previous ones involving asylum applications based on fear of coercive enforcement of the one-child policy (most recently *Ni v. Holder, supra*), that the Board has attempted to marshal the considerable literature (academic, journalistic, diplomatic, judicial) on the nature and enforcement of the policy - that it has tried in other words to construct an empirical basis, however unavoidably crude rather than precise, for its skeptical attitude toward these applicants. What surely did not meet the Board's responsibility for the reasoned administration of asylum law in the present case was its brushing aside - with a cropped reference to the State Department report of May 2007 - the question whether the petitioner faces a substantial risk (however difficult to quantify) of compulsory sterilization if she is removed to China. The

combination of the Board's inaccurate representation of the report on which it so heavily relied, disregard of other evidence, and erratic treatment of the documents submitted by the petitioner deprives the Board's order denying asylum of a rational foundation. See also *Ni v. Holder, supra.* *Chen v. Holder*, No. 122563, 2013 WL 1908017*15-16 (7th Cir. May 9, 2013).

The Immigration Judge noted that the village committee certificates say she said she "must" be sterilized, but then engages in speculation as to whether "must" refers to forcible sterilization, or a sterilization coerced by economic sanctions. "The petitioner's family is not wealthy. The national law and the provincial regulations do not specify the consequence for a person who cannot pay the fee. The Board's treatment of the villager committee's letter is the most disturbing aspect of the case. After noting that the petitioner would 'be subjected to sterilization procedures' if she returned to her village, the Board said that she 'had not provided evidence that the policy is implemented through physical force or other means that would amount to persecution.' Reading this we wondered whether the Board believes that if the village government imposed a fine greater than the petitioner could pay, and if as a result she was required to undergo sterilization (which seems implicit in the reference to 'target for sterilization' and 'subjected to sterilization procedures'), the sterilization nevertheless would not

amount to persecution. At argument, the Justice Department's lawyer said that this was what the Board believes, while appropriately noting his personal reservations about the soundness of such a belief. The implication is that if a government tells a religious heretic we are going to fine you \$1 million for your heresy and if you cannot pay we are going to burn you at the stake, and the heretic cannot pay and is therefore executed, the burning of the heretic would not, in the Board's view, amount to persecution. We cannot imagine that this is really the Board's view, since in cases like *in re T-Z-*, 24 I. & N. Dec. 163, 173-175 (BIA 2007), the Board has said that 'a particularly onerous fine' can amount to persecution even if nonpayment does not subject the victim of the persecution to physical violence. The courts have ruled similarly. *Koval v. Gonzales*, 418 F.3d 798, 805 (7th Cir. 2005); *Edward v. Ashcroft*, 379 F.3d 182, 187 (5th Cir. 2004); *Shan Liao v. Department of Justice*, 293 F.3d 61, 70 (2d Cir. 2002); *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969). It is even clearer that, as the Board in *In re T-Z-*, *supra*, 24 I.& N. Dec. at 168-169, acknowledged, an economic penalty that effectively compels a person to undergo an abortion is a form of persecution. The courts, again, have ruled likewise. *Xiu Ling Chen v. Gonzales*, 489 F.3d 861, 863 (7th Cir. 2007) (for the average Chinese citizen, a fine of ten times her yearly income is 'particularly onerous' and if it were imposed

the 'only practical alternative would be to avoid having more children, if necessary by abortion or sterilization'); *Zhang v. Gonzales* 408 F.3d 1239, 1247-48 (9th Cir. 2005) (child was not allowed to attend school until parents paid a 'substantial fine,' and denial of educational opportunities can constitute persecution); *Li v. Attorney General*, 400 F.3d 157, 168 (3d Cir. 2005) (fine equal to 20 months' salary can amount to persecution); *Wang v. Ashcroft*, 341 F.3d 1015, 1020 (9th Cir. 2003) (petitioner's abortions in China were 'forced,' in part because officials threatened to impose unreasonably high fees if she gave birth). If the Board's view is as represented by the government's lawyer, and were sustained, the Board would have handed to the world's persecutors a formula for preventing victims of persecution from obtaining asylum in the United States. All a persecuting government would have to do would be to impose a fine in excess of the victim's ability to pay, with death as the back-up punishment if the victim was (as he would be) unable to pay the fine." *Lin v. Mukasey*, 532 F.3d 596, 597-598 (7th Cir. 2008).

"A translation of Changle's family-planning handbook offered to the second circuit stated that birth of a second child would result in mandatory sterilization. If the handbook is genuine and current, the translation accurate, and the threat serious (as opposed to Saberrattling), this would call into question the conclusion of *Matter of C-C-*[, 23 I.& N. Dec. 899 (BIA 2006)] that Fujian no longer uses force

in its family planning program." *Chen v. Gonzales*, 489 F.3d 861, 863 (7th Cir. 2007).

3. The Board Erred in Denying Withholding of Removal and CAT Relief.

"Inasmuch as the respondent has not met her burden of showing past persecution or a well-founded fear of persecution specifically on account of a protected ground as required for asylum, it follows that she has also not satisfied the higher standard of a clear probability of persecution as required for withholding of removal (I.J. at 18). See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *INS v. Stevic*, 467 U.S. 407 (1984)." R. at 6.

"Withholding, as I stated earlier, has a much higher standard than that of asylum. And the respondent would have had to establish a clear probability of persecution to warrant withholding. Since I found the respondent did not meet the lower standard for asylum I consequently find that she is not qualified for withholding either. That is not a discretionary determination, that is a determination of law because she has not met the clear probability standard." R. at 59.

In this case, the denial of Ms. Chen's application for withholding of removal and CAT relief is based upon the same reasoning as the denial of her application for asylum, so her argument in support of her appeal of the decision to deny her application

for withholding of removal and CAT relief are the same as with regard to her asylum application. "We complained in *Zheng v. Holder*, 666 F.3d 1064, 1068 (7th Cir. 2012), about the Board's insouciant attitude toward evidence of forced sterilization in Fujian, an attitude illustrated by the Board's opinion in this case. It relies heavily on a report by the State Department for the proposition that 'physical coercion to achieve compliance with population control goals is uncommon' and indeed that no evidence had been found 'of forced abortions or sterilization in Fujian in the prior 10 years.' That's not what the report says. It says that '*according to the Fujian Province Birth Planning Committee (FPBPC)*, there have been no cases of forced abortion or sterilization in Fujian in the last 10 years,' U.S. Department of State, Bureau of Democracy, Human Rights and Labor, Office of Country Reports and Asylum Affairs, *China: Profile of Asylum Claims and Country Conditions* 26 (May 2007) (emphasis added). Since forced sterilization is against China's publicly declared policy (though, as we noted, maybe not against Chinese law), one hardly expects local officials to be confessing publicly to engaging in the practice, though we'll note such a confessional statement shortly. The reports next sentence - ignored by the Board - is that 'it is impossible to confirm this claim [the claim of the Fujian Provincial Birth Planning Committee that there have been no forced abortions or sterilizations in Fujian for the last ten years], and, in 2006, reportedly, there were forced sterilizations in Fujian.' (The Justice Department's brief in this court is even more egregiously selective in its quotations from the May 2007

report, illustrating the frequently obstinate manner in which the Department defends the Board's rulings in asylum cases, see, e.g., *Smykiene v. Holder*, 707 F.3d 785, 790 (7th Cir. 2013); *Lam v. Holder*, 698 F.3d 529, 534-36 (7th Cir. 2012); *Pasha v. Gonzales*, 433 F.3d 530, 537 (7th Cir. 2005), as by repeatedly flouting the *Chenery* doctrine; see the following cases cited in *Smykiene*: *Sarhan v. Holder*, 658 F.3d 649, 661 (7th Cir. 2011); *Atunnise v. Mukasey*, 523 F.3d 830, 838 (7th Cir. 2008); *Comollari v. Ashcroft*, 378 F.3d 694, 696 (7th Cir. 2004); *Carpio v. Holder*, 592 F.3d 1091, 1096 (10th Cir. 2010).)" *Chen v. Holder*, No. 12-2563, 2013 WL 1908017*5-6 (7th Cir. May 9, 2013).

Ms. Chen's credible evidence and testimony also entitle her to withholding of removal as an alien whose ' . . . life or freedom would be threatened . . . ' due to her real and/or imputed political opinion. 8 U.S.C. § 1231(b)(3)(A) (2012).

"The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. § 208.16(c)(2) (2012). Ms. Chen's credible evidence and testimony also entitle her to withholding of removal under the Convention Against Torture.

Conclusion

The Board of Immigration Appeals and Immigration Judge erred in failing to grant the petitioner asylum, withholding of removal and withholding of removal pursuant to the Convention Against Torture. The petition should be granted and the case should be remanded for the Board to enter an order granting the Petitioner all of the relief from removal mentioned above.

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Dated: June 14, 2013

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I do certify that on July 10, 2013, a copy of this brief was sent, by ECF, to Jessica E. Sherman, Esq., Department of Justice, Office of Immigration Litigation, P.O. Box 878, Ben Franklin Station, Washington, DC 20044, and that on the same date, the brief was sent to the clerk of the Court.

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