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THE CHINESE DILEMMA: PRACTICAL SOLUTIONS TO IRRESPONSIBLE IMMIGRATION REFORM AND THE ENSUING CIRCUIT COURT TRAFFIC JAM

*Zachary Slapsys**

I. INTRODUCTION

Recent changes in the immigration administrative review process have burdened the federal courts with a nearly unmanageable caseload, compromising the ability of federal judges to conduct a full and fair review in the interest of justice. These initiatives shifted the burden of the immigration appeals cases from the administrative level within the Justice Department to the judicial branch via the federal appellate courts. Implemented with the intention of reducing the administrative caseload, the effect of the new rules have instead “created havoc everywhere,” according to Roseann B. MacKechnie, clerk of the court for the Second Circuit.¹

There is no question that most immigration appeals concern denials of asylum applications.² In fact, the majority of immigration appeals finding their way to the Second and Ninth Circuits, the two circuits that carry the lion’s share of immigration appeals nationwide, are asylum-based. A substantial number of these cases involve claims by Chinese nationals based on China’s coercive population control methods.³ In the Second Circuit, 70% to 80% “of the appellants are Chinese seeking asylum to escape their homeland’s family planning policies,” according to Elizabeth Cronin, Director of Legal Affairs for the circuit.⁴ Moreover, a substantial number of those cases involve Chinese nationals seeking asylum based on the birth of children in the United States, which they claim may place them in violation of China’s “one child policy”

* J.D., City University of New York School of Law, May 2006. I would like to thank Theodore N. Cox, Esq., for the opportunity and guidance he has provided me over the last five years. I would also like to especially thank a great friend and mentor, Joshua Bardavid, Esq., the architect behind the legal arguments discussed in this Article.

² Tom Brune, *Burdened by Appeals: A Justice Department Plan to Reduce Backlog of Immigration Cases Has Done So, But Also Driven Up Federal Appeals*, *NEWSDAY*, Dec. 15, 2004, at A7, available at 2004 WL 3630930.

³ Stanley Mailman & Stephen Yale-Loehr, *Immigration Appeals Overwhelm Federal Courts*, 232 N.Y.L.J. 122, Dec. 27, 2004, at 6.

⁴ *Id.*

when repatriated.⁵

The incredible number of Chinese family-planning-based asylum cases that are appealed within this revamped Justice Department immigration policy is in large part responsible for the congested federal docket and the tailspin of justice which has followed. However, there are solutions to this growing problem—both at the behest of the circuit courts themselves and on the initiative of the immigration judges—to recognize the alternatives available to Chinese asylum-seekers in immigration court.

This Article will examine two currently developing solutions to the Chinese asylee problem. First, this Article will discuss the decision in *Guo v. Ashcroft*,⁶ where the Third Circuit attempted to clean out its backlog of appeals it receives from the Board of Immigration Appeals (BIA or Board) by simplifying review at the Board level. Specifically, it allowed reopening as a matter of law when U.S.-born children are presented as prima facie evidence of a well-founded fear of persecution. Second, this Article will examine a method, based on careful reading of the legislative intent of current asylum law, that allows Chinese nationals with U.S.-born children to avoid the administrative level altogether by simply filing another or “successive” asylum application.⁷

Both of these developing solutions would help to restore order to the immigration appeals process by lightening the caseload on the circuit courts. Moreover, because circuit courts may only review what is in the record when they receive the appeal, each of these remedies would afford the Chinese national a fair review of her claim at the lower court, where additional evidence may be filed and where the factual issues are examined in detail.

II. THE PROBLEM

A. “Streamlining” the Board of Immigration Appeals: An Irresponsible Attempt at Reform Results in an Explosion of Federal Appeals

In 2002, former Attorney General John Ashcroft, faced with a 56,000-case backlog at the Board of Immigration Appeals, implemented “streamlining rules” for virtually all Board appeals.⁸ The

⁵ *BIA Appeals Remain High in 2nd and 9th Circuits*, THE THIRD BRANCH: NEWSLETTER OF THE FED. CTS. (Admin. Office of the U.S. Cts. Office of the Pub. Affairs, D.C.), Feb. 2005, available at <http://www.uscourts.gov/ttb/feb05ttb/bia/index.html>.

⁶ Mailman & Yale-Loehr, *supra* note 2.

⁷ 386 F.3d 556 (3d Cir. 2004).

⁸ This procedure is suggested by both the Second and Ninth Circuit Courts as an alternative to a motion to reopen and immigration judges should exercise a favorable

most drastic change is the ability of a single Board member to decide a case, departing from the traditional three-member panel review.⁹ More importantly, the Board member may rubber-stamp each case by issuing an “affirmance without opinion,” a one-sentence decision that simply upholds the immigration judge’s conclusion without a de novo review of the facts.¹⁰ The rule dramatically decreases the size of the Board and the accuracy of its review. With Board membership reduced from twenty-three judges to eleven, each of the present members has to decide approximately thirty-two cases each workday, or more than one case every ten minutes.¹¹ Consequently, “[s]ince September 2002, almost every appeal has been reviewed—and denied—within 90 days by one BIA judge” while “[t]he immigrant receives only a form that says, ‘The Board affirms without opinion the result of the decision below.’”¹² Overall, rejection rates of Board appeals are now disturbingly high—up from a 75% rejection rate before the reforms to the current 90%.¹³

The result is a 600% increase in the immigration caseload of the circuit courts.¹⁴ On a nationwide scale, appeals from Board decisions accounted for approximately 2% of the circuit court docket in 2001 before the reforms; after the reforms were securely in place by 2003, that number jumped to 15%.¹⁵ Moreover, in the circuits most densely populated by immigrants, the Second and the Ninth Circuits, immigration cases account for an astounding 40% of the docket.¹⁶

B. The Streamlining Effect: Reducing the Ability for Meaningful Review

This overwhelming federal docket increase, given the streamline reform, is neither surprising nor difficult to understand, and

use of their discretion by allowing such applications. See *Guan v. Bd. of Immigration Appeals*, 345 F.3d 47, 49 (2d Cir. 2003).

⁹ Claire Cooper & Emily Bazar, *Immigration Appeals Swamp Federal Courts*, SACRAMENTO BEE, Sept. 5, 2004, at A1, available at 2004 WLNR 17504469.

¹⁰ See Board of Immigration Appeals, Procedural Reforms to Improve Case Management, Final Rule, 67 Fed. Reg. 54,878, 54,879 (proposed Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3).

¹¹ *Id.*

¹² See Cooper & Bazar, *supra* note 8; 67 Fed. Reg. at 54,881.

¹³ Cooper & Bazar, *supra* note 8.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; see also ADMIN. OFFICE OF U.S. COURTS, U.S. COURTS, TABLE B3, SOURCES OF APPEALS AND ORIGINAL PROCEEDINGS COMMENCED, BY CIRCUIT, DURING THE TWELVE-MONTH PERIODS ENDING SEPTEMBER 30, 1999 THROUGH 2003 (2004), <http://www.uscourts.gov/judbus2003/appendices/b3.pdf>.

rejected applicants are appealing to the circuit courts at ever-increasing rates.¹⁷ Although the Justice Department maintains that the increasing number of federal cases is the result of “attempts to postpone deportation,” in reality the increase is “because the board no longer provides meaningful review when it issues decisions without accompanying opinions.”¹⁸ For example, former BIA judge Lory Rosenberg, who resigned her post rather “than participate in reviews she considered perfunctory,” stated that in many cases immigrants simply want an explanation and not just a one-line answer.¹⁹

Rising along with the number of federal appeals is the number of concerns among judges and elected officials as to whether justice can be properly served under such an inefficient system. The federal courts are inundated with the sheer number of appeals, which results in an increasing shortfall of justice in each individual case. Recently, Seventh Circuit Chief Judge Joel Flaum suggested to the government attorney at an oral argument that he “carry the word back to Washington that the courts need the board to write at least one or two sentences about its reasons for affirming the immigration judge decisions.”²⁰ Moreover, Ninth Circuit Chief Judge Mary Schroeder stated that the court is “very concerned about the possibility that the quality of justice will be adversely affected in immigration cases because of the number [of appeals].”²¹

Accordingly, the lack of meaningful review often extends to the circuit courts, which try to reduce the docket by dismissing cases on questionable jurisdictional grounds.²² U.S. Representative Howard Berman, Democrat from California, best summarized the problem: In its attempt to fix the backlog of immigration cases at the administrative level, Congress has “taken any modicum of jus-

¹⁷ ADMIN. OFFICE OF U.S. COURTS, *supra* note 15; *see also* Brune, *supra* note 1.

¹⁸ Cooper & Bazar, *supra* note 8. “Rejected applicants, fearing persecution in their homelands or long separation from American families, or merely fabricating stories to gain months or years in the United States, are appealing to the circuit courts at increasing rates, hoping for better outcomes.” *Id.*

¹⁹ Brune, *supra* note 1. “‘The idea that you could just rubber stamp a lot of cases at the agency and they would go away was just mistaken,’ said Nancy Morawetz, a professor of clinical law at New York University School of Law. ‘If you don’t get fair consideration at the agency, it’s not surprising that you’d get a greater number appealed to the court.’” *Id.*

²⁰ Cooper & Bazar, *supra* note 8; *see also* Lory Diana Rosenberg, *Lacking Appeal: Mandatory Affirmance by the BIA*, 9 BENDER’S IMMIGR. BULL. 91 (2004).

²¹ Geoff Heeren, Lisa Palumbo & Diana White, Letter to the Editor, *Immigration Bill Courting Disaster*, CHICAGO SUN TIMES, Apr. 20, 2005, at 62, *available at* 2005 WLNR 6517280.

²² Cooper & Bazar, *supra* note 8.

tice out of the immigration review process . . . the treatment of immigrants [is] 'unconscionable' and the burden on the circuit courts 'stunning.'"²³

C. *The Chinese Case Problem: Bedlam at the Administrative Level*

Many of the problems facing the circuit courts, as discussed above, stem from the inability of the lower courts and the administrative system to properly handle the immense load of family planning cases. Asylum claims based on a coercive population control policy have a complex history of administrative enactments and judicial review. In 1989, the Board determined that an asylum applicant subject to China's one-child policy could not allege persecution based on one of the permissible grounds enumerated in the Immigration and Nationality Act (INA).²⁴ However, following a series of hearings in 1995, Congress finally succeeded in reversing this policy.²⁵ In 1996, Congress amended the definition of refugee to include those who resist coercive family planning policies.²⁶ This statutory amendment:

[D]irects a finding of refugee status for any person who previously was subjected to coercive population control procedures (abortion or sterilization); who previously was persecuted for resistance to such procedure or to a coercive program; or who currently has a well-founded fear of being forced to undergo an abortion or sterilization or of being persecuted for resisting such measures.²⁷

²³ *Id.*

²⁴ *Id.*

²⁵ Pursuant to the INA, an alien establishes refugee status by demonstrating that he or she is "unable or unwilling to return . . . [to the country of his or her nationality] 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." INA §101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A); see *Matter of Chang*, 20 I. & N. Dec. 38, 44-47; see also *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995) (upholding *Chang* despite "seemingly purposeful efforts by the executive branch and the houses of Congress to achieve the opposite outcome").

²⁶ *Lin v. Ashcroft*, 385 F.3d 748, 752 (7th Cir. 2004) (quoting statement of Rep. Chris Smith, Chair in *Coercive Population Control in China: Hearings Before the Subcomm. on Int'l Operations and Human Rights of the House Comm. on Int'l Relations*, 104th Cong. 2 (1995): "I am proud to report that legislation drafted and marked up . . . would make it clear once and for all that the United States will not send people back to forced abortions, will not send people back to forced sterilizations.").

²⁷ INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B).

For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opin-

In general, to establish a well-founded fear of persecution, the alien must demonstrate that he or she faces a reasonable possibility of persecution if returned to his or her homeland on account of one of the statutorily protected groups.²⁸

Despite the statutory amendment, many issues within these cases remain unresolved.²⁹ The countless motions of Chinese nationals to the BIA to reopen their cases based on their newly born U.S.-citizen children is one of the most pressing of these unresolved issues overwhelming the federal courts. A motion to reopen an asylum hearing may be filed to the Board within ninety days of an immigration judge's decision if it is based on "changes in objective circumstances relating to the applicant in the United States" and if he or she can show a *prima facie* case of asylum.³⁰ If outside of the ninety-day period, a motion may be filed based on "changed country conditions."³¹ Thousands of Chinese nationals timely move to the Board to reopen these cases based on changed circumstances via newborn children, only to fall victim to an arbitrary denial without proper review or, at times, without an opinion. Moreover, those who attempt to reopen after ninety days based on "changed country conditions" are doing nothing more than wasting time. The Board does not allow the existence of U.S.-born children to be brought as a "country conditions" claim; thus these motions only fruitlessly add to the backlog. Either way, the next

ion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

Id.

²⁸ *In re C-Y-Z-*, 21 I. & N. Dec. 915, 927-28 (B.I.A. 1997) (Filppu, J., concurring in part and dissenting in part).

²⁹ 8 C.F.R. § 208.13(b)(2)(i)(A) (2005); *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (B.I.A. 1987).

³⁰ *Mailman & Yale-Loehr*, *supra* note 2.

For example, Chinese citizens can't legally marry until they are a certain age, usually twenty-two. If a Chinese couple marries earlier and then one of them is forcibly sterilized or has to undergo an abortion, is that a ground for asylum? In *Ma v. Ashcroft*, 361 F.3d 553, 560 (9th Cir. 2004), the Ninth Circuit found that because the early marriage prohibition was inextricably linked to the restrictions on childbirth, limiting asylum eligibility to exclude husbands who married their spouses before the authorized age contravened the purpose of the asylum statute.

Id.

³¹ 8 U.S.C. § 1229a(c)(6)(C)(i) (2004); 104 Pub. L. No. 208, § 304(a)(3) (amending § 240(c)(6)(C)(i) of the INA, 8 U.S.C. § 1229a). "Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." *Id.* See also 8 C.F.R. § 208.4(a)(4)(i) (2005) (defining "changed circumstances").

step is predictably the same: an appeal to the circuit court of the summary denial of the motion by the Board.

This situation constructively forces the circuit courts to choose between factually reviewing hundreds of immigration judge decisions, remanding cases back to the Board and further adding to its workload, or becoming another rubber stamp.³² One Ninth Circuit panel even went so far as to hold that it was “powerless to second guess” an immigration judge’s decision against a Chinese immigrant asserting a well-founded fear of persecution based on U.S.-born children.³³

None of these choices is optimal for reasons of efficiency or justice, especially in the context of the family planning cases. Stanley Mailman and Stephen Yale-Loehr point out that “[t]he courts and the BIA can also act to decide common issues and thus resolve many cases at the same time.”³⁴ They further suggest that, in terms of family planning cases, “[t]he Second Circuit and other courts of appeals may also want to give an opinion on this issue quickly to give guidance to the BIA and the many asylum claimants who raise the same issue.”³⁵ Until the circuit courts do in fact decide to hold the Board responsible for some direction in their decisions in these cases, they will not overcome the burden of the streamlining effect. As the Second Circuit has noted, “application of agency standards in a plainly inconsistent manner across similar situations evinces such a lack of rationality as to be arbitrary and capricious.”³⁶

III. *GUO V. ASHCROFT*: REMEDY AT THE ADMINISTRATIVE LEVEL

At least one circuit has attempted to resolve an aspect of this problem. In its recent decision in *Guo v. Ashcroft*, the Third Circuit Court of Appeals held as a matter of law that the mere existence of U.S.-born children accompanied with objective supporting documentary evidence of a well-founded fear based on the one-child policy in China constitutes prima facie evidence in support of a motion to reopen.³⁷ Moreover, the decision in *Guo* remedied a

³² INA §§ 240(c)(6)(A), (c)(6)(C)(ii) (2004), 8 U.S.C. §§ 240(c)(6)(A), (c)(6)(C)(ii) (2004); see also 8 C.F.R. § 1003.2(c)(3)(ii) (2002).

³³ Heeren, Palumbo & White, *supra* note 20.

³⁴ Although other Ninth Circuit panels came to the opposite conclusion. Cooper & Bazar, *supra* note 8.

³⁵ Mailman & Yale-Loehr, *supra* note 2.

³⁶ *Id.*

³⁷ *Zhao v. U.S. Dep’t of Justice*, 265 F.3d 83, 95 (2d Cir. 2001) (citing *Vargas v. INS*, 938 F.2d 358, 362 (2d Cir. 1991)).

gross inefficiency at the administrative level by correcting the Board on its misuse of the motion to reopen standard of review—undoubtedly an effect of the streamlining rules.

Requiring the Board to reopen asylum cases that make a *prima facie* showing in the Third Circuit and remand to the Immigration Court for a factual determination is a two-fold victory in the interests of justice and efficiency. The alien asserting the claim is given her day in court, and the Third Circuit is relieved of factually addressing the issue in the future. The Board should follow, and every circuit court should adopt, the holding of *Guo v. Ashcroft*.

A. *The Background of Guo's Appeal*

Guo v. Ashcroft is a good illustration of the typical Chinese asylum case that ends up on the federal docket. Jian Lian Guo, a native and citizen of the People's Republic of China, fled China and arrived in the United States without valid entry documentation on January 3, 2000.³⁸ Unmarried and without children, Guo had never before been subject to regulation under China's one-child policy. However, Guo's history of religious dissent in her homeland compelled her to file an application for asylum based upon religious persecution.³⁹ On August 2, 2000, the Immigration Court denied her application for relief based upon a disbelief of her claim and her failure to meet her burden of proof.⁴⁰ Guo appealed the decision to the Board.

Guo was not detained at the time of her case denial and continued to live her life pending her appeal. On March 21, 2001, Guo legally married in New York. On January 15, 2002, she gave birth to her first child.⁴¹ Nearly one year later, on October 29, 2002, the Board denied her appeal of the Immigration Court's decision in her original asylum application—she was now subject to removal to China.

Some weeks later, Guo discovered that she was pregnant with a second child, with a due date of July 30, 2003.⁴² She feared repatriation to China because of the one-child policy. Her asylum claim having already been denied and facing removal with her two children, Guo felt that her fears needed to be evaluated by the judge. Thus, on January 21, 2003, Guo submitted a motion to reopen her

³⁸ *Guo*, 386 F.3d at 564.

³⁹ *Id.* at 559.

⁴⁰ *Id.* at 560.

⁴¹ *Id.*

⁴² *Id.*

immigration proceedings to the Board based upon her fear of future persecution. Guo's statement that accompanied her motion stated that she "cannot go back to China" because she will have two children.⁴³ She explained that: "If I was sent back to China, I will be forcibly aborted. If I was sent back after I deliver the second child, either my husband or I will be sterilized by Chinese government because we violated family planning policy [sic]."⁴⁴

Moreover, she included objective evidence to support this claim in form of affidavits from experts in coercive family planning and State Department reports on the conditions in China. In spite of this, on June 16, 2003, the Board denied the motion, noting that Guo "has not established a 'well-founded fear' that a reasonable person in her circumstances would fear persecution."⁴⁵ Guo subsequently appealed the Board's decision in her case to the Third Circuit Court of Appeals.

B. The Motion to Reopen Standard: The Third Circuit Corrects the Board

Guo's appeal landed in federal court because the Board, in what can only be described as a showcase for its consistent failure to give individual asylum cases a meaningful review, applied the wrong standard to Guo's motion to reopen. The Board concluded that Guo "'has not *established* a 'well-founded fear' that a reasonable person in her circumstances would fear persecution' on a protected basis."⁴⁶ It further opined that "the evidence she had presented was insufficient to *establish* that 'officials punish returning Chinese nationals who are pregnant, have given birth to children in foreign countries, or prohibit them from having more children upon their return.'"⁴⁷

The Board incorrectly applied the law in Guo's case. Motions such as Guo's are not subject to the higher standards necessary to adjudicate an asylum application, in that an alien does not have to establish actual past persecution or a well-founded fear of future persecution within the substance of the motion. A motion to reopen should be granted if it establishes *prima facie* evidence of the relief requested based upon material evidence which was not avail-

⁴³ *Id.*

⁴⁴ Brief for Petitioner at 5, *Guo v. Ashcroft*, 386 F.3d 556 (3d Cir. Nov. 6, 2003) (No. 03-2972) (on file with the author).

⁴⁵ *Id.*

⁴⁶ *Id.* at 6.

⁴⁷ *Guo*, 386 F.3d at 560 (emphasis added).

able at the original hearing.⁴⁸ In order to establish *prima facie* eligibility for asylum, an applicant must submit evidentiary materials that, *if believable*, would satisfy the requirements for a grant of asylum.⁴⁹ These applicants do not need to meet the higher standard of *establishing* that there is a pattern or practice of enforcing the one-child family planning policy against those with U.S.-born children in their homelands, but only need to present *prima facie* evidence of a pattern or practice of persecution.⁵⁰

The Supreme Court has held that there are three grounds upon which the Board may deny a motion to reopen: (1) failure to establish a *prima facie* case for the relief sought; (2) failure to introduce previously unavailable material evidence; and (3) a determination that, even if these requirements were met, the movant would not be entitled to the discretionary relief sought.⁵¹ The Board asserted none of these reasons, but unreasonably held Guo to the higher standard of establishing asylum even though all she needed to show was a “reasonable likelihood” of success on remand.⁵²

The Third Circuit recognized the Board’s mistake, finding that it held Guo to an “excessively rigorous” standard, stating:

In this context, “establish” means the evidence for asylum outweighs the evidence against. A “reasonable likelihood” means merely showing a realistic chance that the petitioner can at a later time establish that asylum should be granted. The distinction may at first appear to be subtle shading, but without it “*prima facie*” (meaning at first sight) would lack meaning.⁵³

Children who were not born at the time of an original hearing are clearly the material evidence required, given that the relief sought is from persecution by means of the one-child policy in China. Therefore, what the Board should have evaluated is whether there was a “reasonable likelihood” that Guo would prevail on the merits if a motion to reopen was granted based on the evidence she sub-

⁴⁸ *Id.* (emphasis added).

⁴⁹ See 8 C.F.R. § 3.2(c)(1) (2005); *INS v. Abudu*, 485 U.S. 94, 97-98 (1988) (holding that a court will not grant a motion to reopen unless “the evidence sought to be offered is material, was not available, and could not have been discovered or presented at the time of the original hearing.” (citing 8 C.F.R. §§ 3.2, 103.5, and 242.22 (2005))).

⁵⁰ See *Reyes v. INS*, 673 F.2d 1087, 1090 (9th Cir. 1982).

⁵¹ See 8 C.F.R. § 3.2(c)(1) (2005).

⁵² See *INS v. Doherty*, 502 U.S. 314, 323 (1992); *Abudu*, 485 U.S. at 104-05; see also *Katsis v. INS*, 997 F.2d 1067, 1070 (3d Cir. 1993).

⁵³ *Guo*, 386 F.3d at 564.

mitted.⁵⁴ The Third Circuit found as a matter of law that, when applying the correct standard, Guo was entitled to a reopening because she submitted prima facie evidence showing a realistic chance of success on remand. As it should have been doing before, the Board should follow *Guo* when evaluating all reopening motions and apply the correct standard to the movant.

C. Sufficient Evidence: Reopening as a Matter of Law

The *Guo* court found that the evidence that Guo had two U.S.-born children, accompanied by an affidavit of a well-known Chinese expert in coercive family planning, showed a realistic chance of success on remand based on the reasonable likelihood of her satisfying both the subjective and objective prongs of a well-founded fear of persecution.⁵⁵ The subjective component is satisfied where the individual demonstrates her own personal fear through her own credible testimony.⁵⁶ The objective component requires a showing that persecution is a reasonable possibility.⁵⁷ The applicant for asylum need not prove that he or she will actually be persecuted, but rather must show only that a reasonable person in his or her shoes would fear persecution.⁵⁸ The court stated that Guo could satisfy the subjective prong by a showing that her fear was genuine to her, and a primary means of showing genuine fear is with credible testimony.⁵⁹ The court found the statement accompanying Guo's motion to reopen revealed that, on remand, there was a reasonable likelihood she would give credible testimony of genuine fear.⁶⁰

As to the objective reasonableness of her fear, the court found that Guo established the objective fear of persecution by submitting the affidavit of Dr. John Shields Aird, a retired demographer and expert on Chinese coercive population control policy. The affidavit detailed the harsh and systematic enforcement of the one-child policy in China. To the Third Circuit, this document was enough to show that a person in Guo's shoes would fear persecu-

⁵⁴ *Id.*

⁵⁵ *Id.* at 564.

⁵⁶ *Id.*

⁵⁷ *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999).

⁵⁸ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987); *see also* *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996); *Demirovski v. INS*, 39 F.3d 177, 180 (7th Cir. 1994); *Sadeghi v. INS*, 40 F.3d 1139, 1142 (10th Cir. 1994); *Huaman-Cornelio v. Bd. of Immigration Appeals*, 979 F.2d 995, 999 (4th Cir. 1992).

⁵⁹ 8 C.F.R. § 208.13(b)(2)(i)(A) (2005); *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); *Bastanipour v. INS*, 980 F.2d 1129, 1133 (7th Cir. 1992).

⁶⁰ *Guo*, 386 F.3d at 564.

tion if repatriated.⁶¹

The government made two primary arguments to rebut Guo's prima facie showing. First, they submitted a 1998 State Department report describing the Chinese population control program as lax in enforcement. The Third Circuit Court made quick work of this argument, stating that "the Government's introduction of a five-year-old State Department report, without more, hardly undermines Guo's prima facie showing."⁶² Second, the government stated that the affidavit submitted "does not demonstrate that any 'specific proportion or percentage' of couples returning to China will be subject to its family-planning policy, nor does Aird contest that variations occur in enforcement."⁶³ Though these assertions may be correct and some couples in Guo's situation might avoid serious repercussions upon returning to China, the court did not reach the merits of the case, so proving this was "not Guo's burden."⁶⁴

Ultimately, the Third Circuit came to the conclusion that Guo submitted prima facie evidence as a matter of law because the evidence "suggests at least a reasonable likelihood that Guo will establish a well-founded fear of persecution."⁶⁵ The Third Circuit applied the correct standard to the evaluation of the evidence. The Board, although now required in Third Circuit cases, should do the same in cases stemming from any circuit. In no circumstances should the Board apply the incorrect law, especially when a simple correction such as this can clear the federal docket of a bounty of cases.

D. The Third Circuit Court Was Correct in Finding that Guo Showed a Realistic Chance of Success on Remand

The Board, in denying Guo's motion, stated that the motion failed to present sufficient evidence "to establish that officials punish returning Chinese nationals who are pregnant, have given birth to children in foreign countries, or prohibit them from having more children upon their return."⁶⁶ The Third Circuit recognized that the Board, even assuming arguendo that Guo was required to prove her eligibility for asylum (rather than establish a prima facie case), erred in this determination of fact.

⁶¹ *Id.*

⁶² *Id.* at 565.

⁶³ *Id.*

⁶⁴ *Id.* at 566.

⁶⁵ *Id.*

⁶⁶ *Id.*

Although the court did not reach the merits itself, the court was correct in affirming that immigrants in Guo's situation, who make the requisite *prima facie* showing, deserve reopening. Affording an applicant who makes a *prima facie* showing such as Guo's an automatic remand—an opportunity at the lower court to present their case for a well-founded fear based on U.S.-born children in violation of China's one-child policy—was decided in the interests of fairness to the asylum-seeker.

Importantly, the court rejected blind adherence to the Department of State report on country conditions in China as a rebuttal to Guo's *prima facie* evidence. The Third Circuit's skepticism of the government's submission of a State Department report as their primary rebuttal to Guo's *prima facie* showing was consistent with the prevailing view that such reports are insufficient by themselves to rebut a claim of a well-founded fear. Thus, the Third Circuit importantly did not allow the government to win on the substance of the State Department report.

The Department of State addresses the coercive policies in the annual *Country Reports on Human Rights Practices for China*, discussing the "comprehensive and often intrusive family planning policies" as well as the "coercive measures such as forced abortion and sterilization, detention, and the destruction of property to enforce birth quotas."⁶⁷ However, the State Department report hardly gives a full and comprehensive overview of the extent to which the Chinese government applies harsh and systematic coercion in enforcing its policies. Because of this, the courts have consistently looked towards alternative sources to determine the extent of the coercive methods.⁶⁸ Simply put, the report de-emphasizes the extent of the one-child family planning policy, and therefore, the advice of the State Department is not binding on either the service or on the courts.⁶⁹

⁶⁷ *Id.* at 560.

⁶⁸ DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1998, CONG. REP. NO. 106-23, at 848-849 (1999), available at http://www.state.gov/www/global/human_rights/1998_hrp_report/china.html.

⁶⁹ *Hengan v. INS*, 79 F.3d 60, 62-63 (7th Cir. 1996) (holding that immigration officials may give greater weight to the views of human rights organizations than to the Department of State); *Lin*, 385 F.3d at 754 ("While the country [p]rofile is entitled to deference, it cannot serve as a substitute for the individualized determination required of the IJ . . ."); see also *Bace v. Ashcroft*, 352 F.3d 1133, 1139 (7th Cir. 2003) ("[I]t would be improper to find that a witness's testimony about specific events could be 'contradicted' by a generalized State Department report broadly discussing conditions in the applicant's country of origin."); *Toptchev v. INS*, 295 F.3d 714, 723 (7th Cir. 2002) (explaining that the BIA is entitled to consider State Department reports so long as it undertakes a "particularized review of the petitioners' case").

Although the State Department report maintains that physical coercion and forced sterilization were “systematically used . . . to enforce birth quotas,”⁷⁰ the report generally defers to the notion that such targets are met by “education, propaganda, and economic incentives, as well as . . . more coercive measures, including psychological pressure and economic penalties” imposed by local regulations.⁷¹ In reality, these coercive measures are far more methodical, organized, and ruthless. The courts recognize this reality. The Second Circuit in *Zhao v. Department of Justice* recently noted, “China has repeatedly cracked down on those who resist forced sterilization. It treats them as political and ideological criminals, and as enemies of the state.”⁷² The *Zhao* court adopted a view consistent with the leading critics of the coercive program, including reputable human rights groups, demographers, the U.S. Congress; and with accounts of those who have suffered from, and even worked for, policy enforcement.

The Third Circuit’s position on State Department reports offered into evidence by the government is clear: A State Department report on its own does not rebut a *prima facie* case for reopening where supporting evidence, such as the Aird affidavit, shows the asylum-seeker’s fear of persecution is remarkably well-founded. The circuit court did not find it necessary to delve into whether Guo’s evidence established asylum or whether the Department of State report established against it, leaving such burden to the immigration judge where the evidence can be evaluated in detail. Either way, it will no longer be the courts’ burden to decide what evidence warrants reopening in these cases because Guo’s evidence shows that she and those like her, “have a reasonable chance of success on remand”—which is all that is needed to reopen with the Board in the Third Circuit.

E. Guo v. Ashcroft is a Win on All Accounts

The Third Circuit made a much-needed leap after it identified that the Board held Guo to the wrong legal standard. As the court explains, in cases like this it “might ordinarily remand for applica-

⁷⁰ *Gailius v. INS*, 147 F.3d 34, 46 (1st Cir. 1998). “This is both because it is the Attorney General, not the Secretary of State, whom Congress has entrusted with the authority to grant asylum and because ‘there is perennial concern that *the [State] Department softpedals human rights violations by countries that the United States wants to have good relations with.*’” *Id.* (quoting *Gramatikov v. INS*, 128 F.3d 619, 620 (7th Cir. 1997)) (emphasis added).

⁷¹ DEP’T OF STATE, *supra* note 67, at 849.

⁷² *Id.* at 848.

tion of the proper standard.”⁷³ Instead, however, the court concluded *as a matter of law* that “the evidence submitted by Guo in support of her motion to reopen constitutes prima facie evidence,” entitling her to reopening. Now all Chinese nationals in the Third Circuit who present the evidence that Guo did—simply the existence of U.S.-born children, accompanied by a subjective statement of the well-founded fear and an affidavit by Dr. Aird—have thus presented prima facie evidence in support of reopening and are entitled as such.

Holding as a matter of law that the Board must remand the plethora of cases factually identical to Guo’s to the immigration court for a hearing alleviates this particular issue of reopening from ever presenting itself for federal review in the future. The court took a refreshing step by creating uniformity at the Board level on at least this issue by correcting an inefficient review at the administrative level—an approach that should be adopted by all the circuit courts.

Importantly, the court held Guo to the correct standard and, although it did not find that she was entitled to asylum, found “she at least deserves a hearing.”⁷⁴ Thus, when an alien brings a *Guo* claim with the requisite prima facie evidence to the Board in the Third Circuit, the case will be automatically reopened without the Board or circuit ever “reaching the merits.”⁷⁵ The Third Circuit left the factual decision-making process to the immigration court, freeing itself of the factual review of hundreds of similar cases. If the Board and Second and Ninth Circuits adopt the Third Circuit holding in *Guo*, they will cut down on a significant portion of their caseloads—allowing the lower courts to work through the substantive issues.

F. The Board’s Reaction to Guo: Inherently Ridiculous and Substantively Flawed

In response to *Guo*, the Board in *Matter of C-C-*, a Second Circuit case, ruled that the birth of a second child in the United States did not establish prima facie eligibility for reopening.⁷⁶ The petitioner in *C-C-* timely moved to reopen proceedings based on the birth of her second child in the United States, citing *Guo* as sup-

⁷³ *Zhao*, 265 F.3d at 92. “On that rationale, the PRC has inflicted harsh punishment on refugees who are returned, such as beatings and being sent to forced labor camps, and being sentenced to prison.” *Id.*

⁷⁴ *Guo*, 386 F.3d at 564.

⁷⁵ *Id.*

⁷⁶ *Id.*

port.⁷⁷ However, the Board conspicuously distinguished *Guo v. Ashcroft* on the facts,⁷⁸ and decided not to apply *Guo*'s matter-of-law ruling: "[*Guo v. Ashcroft*] is not binding case law in the Second Circuit, in whose jurisdiction this case lies."⁷⁹

Predictably, the Board reverted to its unfortunate practice of misapplying the relevant standards of reopening—creating yet another unnecessary issue for the circuit court to resolve. In *Matter of C-C-*, the Board required the applicant to demonstrate a "'realistic chance' that she would be forcibly sterilized."⁸⁰ Once again, the Board made a fundamental error of law: The standard that should have been applied was to require the alien to demonstrate *a realistic chance of establishing a well-founded fear* of sterilization.⁸¹ This distinction is more than semantics. While precisely what a "realistic chance" requires is not defined, it would certainly require a showing that something is more likely than not to occur.⁸² However, a realistic chance of a well-founded fear is significantly less than that, especially in light of the fact that even a 10% chance of an event occurring can constitute a well-founded fear.⁸³

Further, the Board erred in its factual conclusions as well. The Board faulted the Aird affidavit—the *prima facie* evidence in *Guo*—for being a "generalized" affidavit not prepared specifically for that case, though the Board relied on even more generalized country conditions reports to deny the claim.⁸⁴ This alone demonstrates the fallacy of the Board's conclusion. Unfortunately the Board once again used the wrong legal standard—a sign that it

⁷⁷ *Matter of C-C-*, 23 I. & N. Dec. 899 (B.I.A. 2006) (distinguishing *Guo v. Ashcroft*).

⁷⁸ *Id.* at 900.

⁷⁹ The Board factually distinguished *Guo*, stating:

The alien in *Guo v. Ashcroft* . . . had two children who were born in the United States about a year and a half apart. The record reflects that the respondent's first child was born in 1998 and her second child was born more than 6 years later in 2005. This age differential is significant because it bears on the objective reasonableness of the respondent's fear that she will be found to be in violation of China's population control policy and will be subjected to forced sterilization. China's population control policy generally allows individuals to seek permission to have a second child after a 4-year period.

Id.

⁸⁰ *Id.*

⁸¹ *Id.* at 903.

⁸² *Poradisova v. Gonzales*, 420 F.3d 70, 78 (2d Cir. 2005).

⁸³ The American Heritage Dictionary defines *realistic* as "[o]f or relating to the representation of objects, actions, or social conditions *as they actually are* . . ." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (emphasis added).

⁸⁴ *Cardoza-Fonseca*, 480 U.S. at 440.

intends to only distinguish *Guo* in the future; thus avoiding applying the correct legal standard. This can only mean that the heavy burden on the circuit courts to continuously correct the Board's wrong application of law will continue.

IV. ELIMINATING THE MIDDLE MAN: SUCCESSIVE ASYLUM APPLICATIONS

Guo addresses the problem of motions to reopen that are filed to the Board. However, a careful reading of the applicable statutes reveals that the immigration court may accept untimely "successive" asylum applications in its discretion without requiring the alien to first move to the Board to reopen. A favorable use of discretion to accept these applications would drastically reduce the Board's caseload—effectively "streamlining" untimely U.S.-born motions to reopen out of their pointless existence.

As a general rule, INA § 240 provides that an alien may only file one motion to reopen within ninety days of the original decision, except in instances of "changed country conditions arising in the country of nationality or the country to which removal has been ordered"⁸⁵ This definition of "changed circumstances" directly conflicts with the more expansive definition contained within 8 C.F.R. § 208.4(a)(4)(B), which defines "changed circumstances" as including "[c]hanges in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk."

On its face, this would create a legally and logically absurd paradigm whereby an alien is entitled to file an asylum application, but there is no procedure in which to do so. However, the regula-

⁸⁵ *Matter of C-C*, 23 I. & N. Dec. at 901-03. The Board stated of Dr. Aird's affidavit, "the affidavit provides only generalized statements that Chinese citizens who entered the United States illegally would be subject to the same punishments that apply to Chinese couples who violate the family planning laws in China." *Id.* at 901. However, the Board then cited the U.S. Department of State's 2005 *Profile of Asylum Claims and Country Conditions*, stating that unnamed American diplomats in China "are unaware of 'any cases in which returnees from the United States were forced to undergo sterilization procedures on their return.'" *Id.* at 903 (quoting Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, China: Profile of Asylum Claims and Country Conditions 28 (Oct. 2005)).

In fact, although not cited in *Matter of C-C*, the Bureau of Citizenship and Immigration Services' *Profile of Family Planning Policy and Practice in the People's Republic of China*, 2005 quotes its expert—John Aird—in reaching its conclusions about the family planning policy.

tory history of 8 C.F.R. § 208.4 establishes that an alien is not required to move to the court nor the Board of Immigration Appeals to reopen a prior claim. The Department of Justice's comments that accompanied the relevant regulations explicitly state that no such motion is required when pursuing a successive asylum application.

A. *Legislative History of 8 C.F.R. § 208.4*

On January 3, 1997, following the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the Department of Justice opened for comment proposed amendments to the Code of Federal Regulations. With respect to 8 C.F.R. 208, the Department of Justice proposed the following rule in January 1997:

§208.4 Filing the application

Except as prohibited in paragraph (a) of this section, asylum applications shall be filed in accordance with paragraph (b) of this section.

(a) *Prohibitions on filing.* Section 208(a)(2) of the Act prohibits certain aliens from filing for asylum on or after April 1, 1997, unless the alien can demonstrate that the exceptions in section 208(a)(2)(D) of the Act apply. For the purpose of making determinations under section 208(a)(2) of the Act, the following rules shall apply:

...
(2) The term "changed circumstances" in section 208(a)(2)(D) of the Act shall refer to circumstances materially affecting the applicant's eligibility for asylum that have arisen:

(i) For the purpose of section 208(a)(2)(C) of the Act, since the denial of the last asylum application by the alien. *Changed circumstances arising after the denial of the application but before the alien's departure or removal from the United States shall only be considered as part of a motion to reopen under section 240(c)(6) of the Act and §§3.2, 3.23 and 103.5 of this chapter . . .*⁸⁶

B. *Final Regulations: Requirement of Motion to Reopen Is Dropped*

The final promulgated regulations explicitly omitted the requirement that "[c]hanged circumstances arising after the denial of the application but before the alien's departure or removal from the United States shall only be considered as part of a motion to

⁸⁶ INA §§ 240(c)(6)(A) and (c)(6)(C)(ii), 8 U.S.C. § 1229a(c)(6)(A) and (c)(6)(C)(ii); see also 8 C.F.R. § 1003.2 (c)(3)(ii) (2002).

reopen” This omission was explained by the Department’s comments that accompanied the final published regulation:

Regarding the changed circumstances exception in section 208(a)(2)(D) . . . [t]he Department has . . . decided to provide a better definition of this exception by indicating that the definition may include either changed conditions in the home country or changes in objective circumstances relating to the applicant in the United States, including changes in applicable U.S. law, that create a reasonable possibility that the applicant may qualify for asylum. *Because of inconsistency between the formulation of changed circumstances in section 208(a)(2)(D) and the formulation in section 240(c)(5)(ii) of the Act . . . the Department has decided to drop the requirement that, for purposes of the prohibition in section 208(a)(2)(C), such exception may only be raised through a motion to reopen.*⁸⁷

C. *Following the Language of the Statute, Both the Second and the Ninth Circuits Suggest the Use of the Successive Asylum Application in Lieu of a Motion*

Quite clearly, an alien seeking to apply for an untimely successive asylum application based upon materially changed personal circumstances need not reopen his or her prior asylum application pursuant to 8 C.F.R. § 1003.2 to apply for this relief. In *Guan v. Board of Immigration Appeals*,⁸⁸ the Second Circuit denied petitioner Guan’s appeal because the motion to reopen, based on two U.S.-born children, was filed outside the ninety-day time limit. However, the court stated:

Although we find no legal error or abuse of discretion in the BIA’s denial of Guan’s motion for reopening, another administrative remedy may still be open to Guan. Under 8 U.S.C. §1158(a)(2)(D), an alien may request permission to file a successive, untimely asylum application based upon “changed circumstances which materially effect [her] eligibility for asylum.” The government agrees that the definition of such “changed circumstances” provided by 8 C.F.R. § 208.4(a) (2003) encompasses changed personal circumstances arising in the United States.⁸⁹

⁸⁷ Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures; Proposed Rule, 62 Fed. Reg. 444, 463 (Jan. 3, 1997) (emphasis added).

⁸⁸ Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures; Final Rule, 62 Fed. Reg. 10,312, 10,316 (Mar. 6, 1997) (emphasis added).

⁸⁹ 345 F.3d at 49.

By this reasoning, agreed to by the government, a successive asylum application is seemingly available to Chinese nationals with U.S.-born children.

The Ninth Circuit offered the same guidance to the petitioner in *Andreasian v. Ashcroft*, although the case was factually unrelated to coercive population control.⁹⁰ The court found the petitioner's changed personal circumstances sufficient to satisfy the "changed circumstances" exception under INA § 240, which allows an asylee to reapply for asylum after an untimely motion to reopen.⁹¹ However, the court explicitly stated that "[u]nder 8 U.S.C. § 1158(a)(2)(D), an alien may request permission to file a successive, untimely asylum application based upon 'changed circumstances which materially affect [her] eligibility for asylum.'"⁹² The court further noted that the definition of changed circumstances "encompasses changed personal circumstances arising in the United States"⁹³ and instructed that an alien may pursue successive asylum as a form of relief "even if further judicial review is unavailable."⁹⁴

D. Immigration Court Has, and Should, Allow Successive Asylum Applications

At least one immigration judge has allowed a successive asylum application to be filed in immigration court. On July 17, 2004, Immigration Judge Brennan, citing *Guan v. Board of Immigration Appeals*⁹⁵ and INA § 208 (a)(2)(D), exercised the court's "discretionary authority"⁹⁶ and granted a Chinese national's request to file an untimely successive asylum application. The respondent at issue filed the successive application to the Immigration Court directly, without first filing to the Board, based on a change in her personal circumstances, namely that she had given birth to two children in the United States and feared persecution under China's family planning policy.⁹⁷ The government argued that the respondent in this case was "required to reopen

⁹⁰ *Id.*

⁹¹ 94 F. App'x 624 (9th Cir. 2004).

⁹² *Id.* at 626. The court noted that, while it is not a change in circumstances in Armenia, "[t]he fact that [petitioner] revealed she is a lesbian may be a change in personal circumstances." *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 345 F.3d 47, 49 (2d Cir. 2003).

⁹⁷ In the Matter of Li Xia, No. A70 906 976 at 2 (Immigr. Ct. N.Y., July 17, 2004) (on file with the author).

her case in order to file an application for relief,” but the immigration judge noted that the respondent was specifically “not motioning to reopen her case; rather . . . motioning to file a successive asylum application as authorized by INA § 208(a)(2)(D).”⁹⁸

As Immigration Judge Brennan demonstrated, the immigration court has the discretion to accept successive, untimely asylum applications under the authority of the INA. The Second Circuit in *Guan* pointed out that such an application is a valid alternative remedy to filing a motion to the Board.⁹⁹ Favorable use of discretion at the lower court can potentially avert countless numbers of motions that otherwise would have been filed to the Board.

As in *Guan*, because the respondent before Immigration Judge Brennan brought her claim after the ninety-day reopening period, she was in a position where, if not allowed to file a successive asylum application, she would have most likely filed a motion to the Board based on “changed country conditions,” a futile and time-consuming endeavor almost guaranteed for denial at the administrative level. The successive application is clearly a remedy that should be exercised favorably in the discretion of the immigration court. A universal application of this procedure would eliminate what seems to be an unnecessary step: the motion to reopen. Eliminating the motion—the “middle man”—would relieve the Board, and subsequently the circuit courts, from what is clearly an unnecessary portion of its caseload.

V. IN THE INTEREST OF THE ALIEN

Both a *Guo* remand and the successive asylum application are necessary to help alleviate the congestion at the administrative and circuit court levels, providing an organized funnel for the excess of U.S.-born-children cases. However, the holding in *Guo*, as well as a favorable exercise in discretion for a successive asylum application, is also important to the substance of the U.S.-born-children claims.

The filing of a successive asylum application is as if the applicant were filing for asylum from the very beginning. Importantly, this allows the applicant to file, in addition to Dr. Aird’s affidavit submitted in *Guo*, any additional evidence for the court’s review.

⁹⁸ *Id.*

⁹⁹ *Id.* The government’s argument was dependent on the fact that, in this particular case, the respondent was past the ninety-day statutory period in which to file a motion to reopen to the Board. *Id.* The two-prong argument was that (1) the respondent had to move to reopen, and (2) the reopening would be untimely, effectively preventing her from any relief. *Id.*

Accordingly, the *Guo* court is right to afford a hearing to those in Guo's position not only to examine on the merits the evidence submitted in that particular case, but to afford Guo and others an opportunity to introduce the mountains of evidence that further support the claim of a well-founded fear. This is significant because, as substantiated by facts from the most reputable of sources, the Chinese coercive family planning policy is a ruthless and draconian method of population control. In the interests of justice, Chinese nationals with U.S.-born children deserve a hearing to examine their fear.

Since the 1996 amendment, a well-founded fear of sterilization is a ground for asylum under U.S. asylum law.¹⁰⁰ Even the possibility of sterilization based on family planning violations, without previous subjection to consequences of the policy, is sufficient to establish a well-founded fear.¹⁰¹ The Supreme Court supports the notion that a possibility of persecution by itself is adequate grounds to assert a well-founded fear, stating in *INS v. Cardoza-Fonseca*: "One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occasion taking place."¹⁰² In fact, the *Cardoza-Fonseca* Court noted that even a 10% chance of suffering persecution would result in a fear being well-founded.¹⁰³

The record of ongoing abuses in China by the enforcement of coercive family planning procedures is extensive and well-documented. As discussed, the United States Department of State's official position on the matter is that the Chinese government's use of coercive methods is only sporadically applied.¹⁰⁴ A closer examination of the situation in China paints a far harsher and more regimented picture of such family planning enforcement. The record shows that Chinese couples in violation of the one-child policy are in significant danger of falling victim to these draconian measures. Their well-founded fear of sterilization, among other conse-

¹⁰⁰ *Guan*, 345 F.3d at 49.

¹⁰¹ INA § 101(a)(42)(B); 8 U.S.C. § 1101(a)(42)(B); *see also Zhao*, 265 F.3d at 83.

¹⁰² INA § 101(a)(42)(B); 8 U.S.C. § 1101(a)(42)(B); *see also Zi Lin Chen v. Ashcroft*, 362 F.3d 611 (9th Cir. 2004) (remanding to determine whether, based on Chinese national's credible testimony, she had a well-founded fear of persecution when she had not previously been subjected to forced abortion or sterilization, but only that, because she was currently pregnant with her alleged second child, she would be subjected to such involuntary procedures if deported).

¹⁰³ *Cardoza-Fonseca*, 480 U.S. at 431.

¹⁰⁴ *Id.* at 440; *see also* Theodore N. Cox, *Well-Founded Fear of Being Persecuted: The Source and Application of a Criterion of Refugee Status*, 10 BROOK. J. INT'L L. 333 (1984) (cited in *Cardoza-Fonseca*, 480 U.S. at 440 n.24).

quences, is not only subjectively real but inherently probable—more than 10% probable, more than 50% probable, and almost certain.¹⁰⁵ Consequently, any person in violation of the “one child” policy, whether at home or abroad, faces a considerable and well-founded fear of persecution, and each Chinese national with U.S.-born children should have the opportunity to have those fears examined before an immigration judge.

A. *The Affidavit of China Family Planning Expert Dr. John Shields Aird; the Matter of Law Prima Facie Evidence in Guo*

The primary objective evidence behind the decision in *Guo* was the affidavit of retired demographer Dr. Aird,¹⁰⁶ a specialist on the demographic developments of China.¹⁰⁷ Dr. Aird is one of the leading experts on the Chinese coercive population control program. A successive asylum application would allow the alien to file with it an affidavit from Dr. Aird to the immigration court.

Dr. Aird’s continuously updated affidavit discusses the coercive nature of the program as a matter of official Chinese policy. It is an essential source of information referred to by the federal circuit courts during their respective analyses on the issue of asylum eligibility based on family-planning claims.¹⁰⁸ In his sixty-two page affidavit, Dr. Aird concludes that forced sterilization is inherently plausible for all Chinese asylum seekers, stating that the policy attempts to limit childbearing by requiring the “insertion of intrauterine devices (IUDs) in women who have had one child, sterilizing couples with two or more children, and aborting pregnancies begun without official permission.”¹⁰⁹

¹⁰⁵ DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2001, CONG. REP. NO. 107-2, at 846-47 (2002). “The Government’s human rights record throughout the year remained poor and the Government continued to commit numerous and serious abuses. . . . Violence against women (including imposition of a sometimes coercive birth control policy, including instances of forced abortion and forced sterilization) . . .” *Id.*

¹⁰⁶ *Cardoza-Fonseca*, 480 U.S. at 431, 440.

¹⁰⁷ Aff. of John Shields Aird, *Guo v. Ashcroft*, 386 F.3d 556 (3d. Cir. Jan. 27, 2005) (No. 03-2972) (on file with the author).

¹⁰⁸ See *China: Human Rights Violations and Coercion in One Child Policy Enforcement: Hearing Before H.R. Comm. On Int’l Relations*, (2004) (statement of Representative Chris Smith), http://www.house.gov/international_relations/108/smi121404.htm; see e.g. *Chen v. Ashcroft*, 117 F. App’x 853 (3d Cir. 2004).

¹⁰⁹ See, e.g., *Guo*, 386 F.3d at 565 (concluding as a matter of law that Chinese couples with two children present prima facie eligibility of asylum where a motion to reopen is accompanied by the “substantial support of the character provided by the Aird affidavit”); *Lin v. INS*, 78 F. App’x 784, 786, No. 01-4113, 2003 WL 22454477 (2d Cir. Oct. 29, 2003) (finding that the Aird affidavit presented new intelligence regarding China’s treatment of children born abroad to Chinese citizens and that the 2000

Importantly, for purposes of supporting his contention that the coercive nature of the program still exists in full force as national policy,¹¹⁰ Dr. Aird cites recently revised government directives asserting that all unauthorized pregnancies must be immediately aborted.¹¹¹ He cites Article 23 of the new regulations adopted by Guizhou province in July 1998¹¹² and Article 18 of Guangdong province's new regulations, adopted October 1998,¹¹³ both of which mandate sterilization in cases where couples give birth to two or more children. Dr. Aird notes that the same three birth control surgery requirements are repeated in Article 11 of Anhui's new regulations, adopted in June 1999¹¹⁴—a confirmation that these continue to be national policy.

Dr. Aird's research verifies his basic conclusion that all Chinese nationals who claim asylum based on a forced sterilization or abortion—or who fear such treatment if returned to China based on multiple children, including those born in the United States—are entitled to the “presumption of plausibility”¹¹⁵ as to the merits

Aird affidavit also contained new, previously unavailable evidence, which undermined State Department reports suggesting a recent relaxation of China's coercive family planning policies); *Chen*, 117 F. App'x at 855 (holding that petitioners had demonstrated prima facie eligibility for asylum based, in part, on Aird affidavit); *Jiang v. INS*, 118 F. App'x 565 (2d Cir. 2004) (remanding because petitioner introduced Dr. Aird's congressional testimony on the purpose and likely effects of the 2001 family planning law); *Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004) (where Dr. Aird filed amicus brief in support of petitioner's claims).

¹¹⁰ Aird, *supra* note 106, ¶ 11.

¹¹¹ See *Id.* ¶ 10. “The basic conclusion of my research is that the Chinese family planning program is intentionally coercive as a matter of national policy.” *Id.*

¹¹² *Id.* ¶ 11. The most recently published provincial planning regulations continue to affirm the three birth-control-surgery requirements.

¹¹³ *Id.* ¶ 31. “Husbands and wives of (childbearing age) who have given birth to a child shall carry out birth control measures; one of a couple who gave birth to two children should undergo a sterilization operation; and remedial measures should be taken to deal with unplanned pregnancy in a timely manner.” *Id.*

¹¹⁴ *Id.*

Women of reproductive age who have already had one child should choose [the] . . . IUD as their first choice of contraceptive measure; for couples who have two or more children, either one of them should choose tubal ligation or vasectomy as their first choice of contraceptive measure; corrective measures should be applied to pregnancy outside of planning as soon as possible.

Id.

¹¹⁵ *Id.* “Childbearing-age couples are required to periodically take part in pregnancy tests and practice effective contraceptive measures In the case of families already having two children, one of the parents are encouraged to undergo sterilization. Unplanned pregnancies must be aborted immediately.” *Id.* Dr. Aird qualifies the term encouraged: “The term ‘encouraged’ has long been used in Chinese birth control directives to conceal the fact that in practice people subject to them have no

of their claim and the veracity of their subjective fear.¹¹⁶ The Third Circuit's decision that Guo had a reasonable likelihood of success on the merits is irrefutable when backed up by the substance of Dr. Aird's affidavit.

B. Current Chinese Policy: No Exception for Children Born Abroad

No regulation or policy directive makes an exception to the one-child policy for couples who have children abroad. Dr. Aird concludes that a Chinese national has a well-founded fear of persecution upon return to China because U.S.-born children are not exempt from the one-child policy upon repatriation. Speaking directly to this misconception, Dr. Aird states, "Chinese couples or individuals who are repatriated after having sought asylum from the family program in another country have little chance of escaping mandatory surgery or any of the other penalties for which they are liable under current family planning policies."¹¹⁷ Dr. Aird further opines, "[t]he Chinese government cannot afford to let them off lightly for fear of encouraging other couples to follow their example."¹¹⁸

Again, the Third Circuit was right on target. Guo's motion established that she has two children, which is in violation of the Chinese one-child family planning policy, and that China enforces the one-child policy against Chinese nationals born in the United States. According to Dr. Aird, there is no reason to believe that the Chinese policy is applied differently to children born within the United States. The Third Circuit realized that to require Guo to disprove a non-existent exception to the one-child policy would be a farcical distortion of the well-founded fear requirement and *prima facie* standard.

VI. CONCLUSION

Both the successive application and the *Guo* remand assert not that asylum be granted for Chinese nationals with U.S.-born children, but stand for the premise that a hearing should take place for these applicants without a gratuitous and time-consuming factual examination at the administrative and circuit court level.

choice but compliance. The 'encouragement' quickly turns into compulsion for those who resist." *Id.*

¹¹⁶ *Id.* ¶ 11.

¹¹⁷ *Id.* "Such things [forced abortion and sterilization] happen in China by the millions." *Id.*

¹¹⁸ *Id.* ¶ 52.

The supporting evidence discussed in this article shows why the Third Circuit was correct in finding that Guo would likely prevail on the merits of her claim and why Immigration Judge Brennan was correct in exercising her discretion to allow a successive asylum application to be filed in her court. This evidence must be presented and discussed at the immigration court level so that each U.S.-born case can be properly evaluated in the interests of justice. The circuit courts and the Board should not be burdened with the monumental task of making such a factual determination.

The streamlining problem is a new problem. *Guo v. Ashcroft* and the successive asylum application only make a small dent in reducing the caseload of the courts while keeping within the interests of justice for the alien. However, keeping in mind the volume of immigration cases that are factually similar to *Guo*, if all the circuits adopted its holding and the Board was to follow, the net result would be less pressure on the courts as a whole and greater consideration of justice in each individual case. If the Third Circuit need no longer factually address what evidence constitutes prima facie evidence in *Guo*-type claims, why should the Second or Ninth Circuits have to concern themselves with such determinations in case after case? The successive asylum application, on the other hand, would relieve the Board of unnecessary motions to reopen, which in turn effectively relieves the circuit courts as well. A hearing is necessary for Guo and others like her to assert what is clearly a legitimate well-founded fear and, moreover, it relieves the courts of at least a little bit of what seems like an endless roll of red tape.