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The Immigration Law Advisor is a professional monthly newsletter of the Executive Office for Immigration Review ("EOIR") that is intended solely as an educational resource to disseminate information on developments in immigration law pertinent to the Immigration Courts and the Board of Immigration Appeals. Any views expressed are those of the authors and do not represent the positions of EOIR, the Department of Justice, the Attorney General, or the U.S. Government. This publication contains no legal advice and may not be construed to create or limit any rights enforceable by law. EOIR will not answer questions concerning the publication's content or how it may pertain to any individual case. Guidance concerning proceedings before EOIR may be found in the Immigration Court Practice Manual and/or the Board of Immigration Appeals Practice Manual.

Survey: Circuit Court Treatment of Documents Commonly Submitted in CPC Asylum Claims

by Corey Lazar and Lindsay Murphy

New developments have arisen in recent years regarding the showing necessary to establish an objective fear of persecution in Chinese coercive population control ("CPC") asylum claims. A number of CPC claims have been filed by Chinese citizens who have given birth to two or more children, whether in China or the United States. The applicants allege that they fear the threat of forced sterilization if returned to China, and many have proffered the same documents in support of their claims. In three cases arising out of New York, the Board of Immigration Appeals held that these commonly submitted documents fail to establish grounds for an objective fear of persecution in China for violation of the one-child policy. *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007); *Matter of J-H-S-*, 24 I&N Dec. 196 (BIA 2007); *Matter of J-W-S-*, 24 I&N Dec. 185 (BIA 2007). In these decisions, the Board found that the documents do not support a finding either (1) that a policy of forced sterilization exists nationally or in Fujian Province, or (2) that foreign-born children are counted for purposes of the CPC policy. While in the past circuit courts of appeals have taken varying approaches in their treatment of these commonly submitted documents, their analyses have become more uniform since the Board decisions were rendered in 2007. This article will consider the documentary evidence assessed in the three Board cases of note and will briefly survey the treatment of the same or similar documents by the various circuit courts.

Analysis by the Board and the United States Court of Appeals for the Second Circuit of Commonly Submitted Documentary Evidence

Matter of J-H-S-

Matter of J-H-S-, 24 I&N Dec. 196, which was decided by the Board on June 7, 2007, involved an asylum applicant who fathered two children in the Fujian Province of China in apparent violation of China's family

planning policy. The applicant fled to the United States and applied for asylum, claiming that he would be forcibly sterilized if he returned to China. The Board held that in order to meet his burden of establishing an objective fear of forced sterilization, the applicant was required to show (1) that a national or local one-child policy existed and that no exceptions applied, (2) that the applicant, in fact, violated the policy, and (3) that the policy would likely be enforced in a manner that constitutes persecution, namely forced sterilization. See *J-H-S-*, 24 I&N Dec. at 199.

In this case, the documentary evidence consisted of background information compiled by the Department of State. Specifically, the Board considered the documents entitled *China: Profile of Asylum Claims and Country Conditions* (“*Profiles*”) for 1998, 2005, and 2007, and *China Country Reports on Human Rights Practices* (“*Country Reports*”) for 2001, 2005 and 2006. None of these documents, in the Board’s view, contained persuasive evidence that the birth of the respondent’s second child in China would be deemed a violation or would trigger enforcement of the one-child policy in Fujian Province. The Board noted that neither the *Profiles* nor the *Country Reports* indicated that sterilizations were forced upon violators of the family planning policy. Rather, they supported an overall finding that the enforcement of the family planning policy was “lax’ and ‘uneven.’” *Id.* at 202 (quoting the 1998 *Profile*).

Matter of J-W-S-

Matter of J-W-S-, 24 I&N Dec. 185, also decided on June 7, 2007, involved a Chinese asylum applicant who fathered two children in the United States and argued that he would be forcibly sterilized upon returning to China. In addition to submitting Department of State *Country Reports* and *Profiles*, the applicant also offered (1) two affidavits by John Shields Aird (“Aird affidavits”) from 2002 and 2004 disputing the Department of State assertions that the family planning policy does not apply to the returning parents of United States citizen children,¹ (2) Chinese provincial and municipal administrative opinions regarding applicability of the family planning policy to an individual named Zheng Yu He, and (3) a Changle City (Fujian Province) municipal policy stating that sterilization is required in cases of an unauthorized birth.

As in *J-H-S-*, the Board rejected the respondent’s reading of the Department of State *Profiles* and *Country*

Reports, finding instead that they indicated that enforcement of the family planning policy in China appeared to vary from location to location. The respondent’s additional documentary submissions failed to persuade the Board that his native Changle City was one of the areas where the policy was strictly enforced. These documents will each be discussed in turn.

First, the Board found the Aird affidavits to be less persuasive than the State Department documents. *J-W-S-*, 24 I&N Dec. at 192. Citing its decision in *Matter of C-C-*, 23 I&N Dec. 899 (BIA 2006), the Board stated that the Aird affidavits were “not based on personal knowledge of conditions in China, but rather on a review of documents concerning events and practices in that country . . . [and they] provide 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 189. The Board therefore ruled that the Aird affidavits did not demonstrate how the family planning policy is actually applied.

After close examination of the *China Country Reports* and *Profiles*, the Board concluded, contrary to the Aird affidavits, that the Chinese Government largely achieved compliance with the family planning policy through incentives and economic pressure, and not by means of forced sterilizations and abortions. The Board emphasized that isolated reports of forced sterilization referenced in the *Country Reports* did not support a finding of the existence of a nationwide pattern or practice of forcibly sterilizing Chinese citizens who had children abroad. It also concluded that the evidence did not support a finding that the respondent would be singled out for a forced sterilization procedure in his home village. The Board relied on the 2007 *Profile* indicating that foreign-born children are not counted against their parents’ number of permitted births and that economic sanctions and penalties were far more likely to be imposed than physically coercive sanctions. It also cited the 2005 *Profile*, which stated that United States diplomats in China were unaware of returnees from the United States being subject to the forced sterilization procedure, as well as the Chinese Government’s national policy forbidding the practice of forced sterilization. *Id.* at 191-94.

In *J-W-S-* the Board also considered administrative decisions rendered by the Fujian Province Department of Family-Planning Administration and the Changle City

Family-Planning Board. These decisions concluded that the family planning policy was applicable to a Government employee, Zheng Yu He, whose wife had given birth to a second child while on a trip to the United States. The Board noted that while these decisions found that the birth of Zheng Yu He's second child abroad was a violation of the family planning policy, "[n]either document refer[red] to sterilization, much less forced sterilization." *Id.* at 192. Therefore, the Board found the administrative decisions unpersuasive in showing that a policy of forced sterilization existed.

Finally, the Board considered a 1995 opinion by the Changle City Family Planning Policy Leading Team. The Board quoted the opinion as stating that "subjects' who give 'out-of-plan birth . . . must be imposed with sterilization.'" *Id.* (quoting the Changle City Family Planning Leading Team opinion). The Board concluded that the respondent did not establish that the sterilizations referenced would be forced, and it again noted that central government policy prohibited sterilizations procured by physical coercion. In reaching this conclusion, the Board relied on Department of State reports indicating that enforcement of the policy in Fujian Province was "lax" and "uneven" and that there was "a 'wide variation' in Fujian Province with regard to 'social compensation fees' for 'out-of-plan' births." *Id.* at 193-94 (quoting from "published reports and court decisions" and the 2005 *Profile*). The Board also noted that no visa applicants in 2006 had complained of being subject to forced abortion. *Id.* at 194.

Matter of S-Y-G-

Matter of S-Y-G-, 24 I&N Dec. 247, which was decided in August 2007, involved a native of Fujian Province who gave birth to one child in China and one child in the United States. Her asylum claim was initially denied based on an adverse credibility finding by the Immigration Judge. In evaluating the subsequent denial of the respondent's motion to reopen, the Board considered the 2003 Fujian Province and Changle City Family Planning Department administrative decisions regarding Zheng Yu He that it had previously discounted in *J-W-S-*. The Board reached the same conclusion with respect to these documents. It found that children born abroad typically were not counted against their parents' number of permitted births, and it relied on a letter issued by the Department of State indicating it was unaware of

any national or provincial policy calling for the practice of forced sterilization. The Board distinguished the Changle City and Fujian Province administrative decisions, which found that the family planning policy did apply to Zheng Yu He, noting that the respondent was not a Government employee or Communist Party member, unlike Mr. Zheng, who may have been subjected to stricter enforcement of the family planning policy on that basis. Therefore, the Board concluded that the opinions did not establish that the respondent had an objective fear of forced sterilization. Finally, the Board also opined that the sanctions imposed against Mr. Zheng were likely to be economic in nature and held that "the mere mention of [isolated reports of forced sterilizations in the 2005 *Profile*], without details as to when, where, and how often this occurred, does not . . . indicate that it is widespread enough to find that the applicant has met her burden." *Id.* at 256.

In addition to the Chinese administrative opinions, the Board considered 1999 and 2005 "*Q&A Handbooks*" from Fujian Province.² *Id.* at 257. These documents appear to recite the rule in Changle City that a Chinese citizen woman must have an intrauterine device inserted after her first birth and a sterilization procedure performed after her second birth. The Board emphasized that these rules did not indicate that sterilization would be forcibly imposed should the woman resist. It also observed that the Chinese Government's efforts appeared to be focused on encouraging compliance through economic incentives and education, rather than forced sterilizations and abortions. The Board therefore found the documents did not support the respondent's claim of an objective fear of persecution.

Finally, in *S-Y-G-* the Board also considered a handful of news articles and reports describing enforcement of the family planning policy in provinces other than the respondent's native Fujian Province. *Id.* at 258. As these documents could not speak to how the family planning policy was enforced in Fujian Province, the Board ruled that they were too general to support the respondent's claim and thus were insufficient for her to establish eligibility for relief.

The Second Circuit

Each of these Board decisions was appealed to the Second Circuit. In October 2008, the court issued a consolidated opinion affirming the Board's holdings in

each case. *Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008). The Second Circuit found that the Board's treatment of the above-mentioned documents was reasonable and thus affirmed the Board's finding that the documents did not support the petitioners' claims of an objective fear of persecution.

Analysis by Other Circuits of Commonly Submitted Documentary Evidence

Following the Board's three decisions, documents offered to demonstrate a policy of forced sterilization in China have been largely discounted because, in the courts' views, they fail to indicate that the procedure will be imposed forcibly and they do not demonstrate a likelihood of enforcement against applicants with children born in the United States. Several of the circuit courts have preceded or joined the Second Circuit in affirming the Board's analysis of these commonly submitted documents. Now, in most circuit courts an asylum applicant seeking to prevail on a CPC claim would likely face long odds if he or she relied solely on any of the above-mentioned documents as corroboration of the claim.

The Aird Affidavits

Many petitioners have submitted the Aird affidavits not only to prove a nationwide policy of forced sterilization, but also to show that children born in the United States would be treated as Chinese citizens for the purposes of family planning policy enforcement. Because the circuit courts have typically adopted the Board's reasoning in *J-W-S-*, the petitioners have been largely unsuccessful. The Board's analysis of the Aird affidavits in *J-W-S-* followed its decision in *C-C-*, which held that the Aird affidavits did not prove that foreign-born children would be counted for family planning purposes in China. *J-W-S-*, 24 I&N Dec. at 189-92 (citing *C-C-*, 23 I&N Dec. 899). Additionally, the Board found that the Aird affidavits did not present evidence that compliance with the one-child policy was achieved through *forced* sterilizations or abortions. *J-W-S-*, 24 I&N Dec. at 192-93. Based on the Board's analysis, the First, Third, and Sixth Circuits have subsequently found that the Aird affidavits do not establish that there is a widespread policy of forced sterilization in China or that foreign-born children are counted under China's CPC policy. See *Zheng v. Att'y Gen. of U.S.*, 549 F.3d 260, 267 n.4 (3d Cir. 2008) ("We have rejected Aird's position, as has the BIA." (citations

omitted)); *Zheng v. Mukasey*, 546 F.3d 70 (1st Cir. 2008); *Huang v. Mukasey*, 523 F.3d 640, 652 (6th Cir. 2008); *Yu v. Att'y Gen. of U.S.*, 513 F.3d 346 (3d Cir. 2008).

For example, the Third Circuit determined in *Yu* that the Aird affidavits were less persuasive than the State Department documents. *Yu*, 513 F.3d at 348 ("[T]he BIA's explanation of why it decided to credit these reports over the Aird affidavit is well reasoned. It necessarily follows that the BIA's resolution of this matter was supported by substantial evidence."). The First Circuit noted in *Zheng* that the Aird affidavits were created almost entirely from documentary review, as opposed to personal knowledge, and, in any case, did not mention *forced* sterilizations. *Zheng*, 546 F.3d at 72. Similarly, in *Huang*, the Sixth Circuit referred to the Board's findings in *J-W-S-* and *S-Y-G-* to establish, contrary to the Aird affidavits, that children born abroad "are not counted for purposes of China's population-control policies." *Huang*, 523 F.3d at 652-53 (citing *S-Y-G-*, 24 I&N Dec. at 255; *J-W-S-*, 24 I&N Dec. at 192). Thus, in addition to the Second Circuit, the First, Third, and Sixth Circuits have determined that the Aird affidavits do not support the assertions that there is a policy of forced sterilization in China or that children born in the United States would be treated the same as children born in China for purposes of the one-child policy.

It is notable that only a few years ago the Aird affidavits were held to *support* a CPC applicant's claim. In 2004 and 2005, the Third and Eighth Circuits held, contrary to more recent circuit court decisions, that the Aird affidavits persuasively undermined the information found in the *Country Reports and Profiles*. See *Yang v. Gonzales*, 427 F.3d 1117, 1122 (8th Cir. 2005) ("Moreover, the petitioners here provided the Aird affidavits, which this court has found sufficient to dispute the information in the State Department reports." (citation omitted)); *Zheng v. Gonzales*, 415 F.3d 955, 962 (8th Cir. 2005) ("We likewise believe the BIA erred in determining Zheng failed to show she would be subject to China's one-child laws without addressing the evidence presented in Aird's affidavit."); *Guo v. Ashcroft*, 386 F.3d 556, 565 (3d Cir. 2004) ("We conclude that where a motion to reopen is accompanied by substantial support of the character provided by the Aird affidavit, the Government's introduction of a five-year-old State Department report, without more, hardly undermines Guo's *prima facie* showing."). Some of the cases that have given credence to the Aird affidavits note

that Mr. Aird criticized the *Profiles* and *Country Reports* for reliance on unreliable “anecdotal” evidence that children born abroad would not be counted for purposes of family planning policies once returned to China. *Zheng*, 415 F.3d at 961; *Guo* 386 F.3d at 565. However, after *C-C-* was published in 2006, the criticism began to turn, with many circuits emphasizing that Aird had no personal knowledge of the family planning policies he testified to and knew of no actual sterilizations of parents of foreign-born children. See *Zheng*, 546 F.3d at 72; *Huang*, 523 F.3d at 652 (quoting *C-C-*, 24 I&N Dec. at 901). In its 2007 decisions, the Board reiterated its disapproval of the Aird affidavits initially voiced in *C-C-*. The Third Circuit subsequently reevaluated its position on the affidavits, finding in *Yu* that the *Profiles* and *Country Reports* could reasonably be credited over the Aird affidavits. See *Yu*, 513 F.3d at 349.³

Perhaps the circuit courts’ shift toward finding the State Department documents more persuasive than the Aird affidavits can be explained by the evolving nature of the information provided in the *Profiles* and *Country Reports*. The Aird affidavits are fixed as written because Mr. Aird died in 2005, thus rendering them less reliable with the passing years. However, the *Profiles* and *Country Reports* are updated regularly and may contain new information to either support or conflict with an applicant’s claim. See, e.g., *Xiu Zhen Lin v. Mukasey*, 532 F.3d 596 (7th Cir. 2008) (holding the change in information from the 2001 *Country Report* to the 2006 *Country Report* was sufficient to find that enforcement of the family planning policy in Fujian Province was indeed enhanced and thus that the petitioner had adequately proven changed country conditions for a motion to reopen). The circuit courts may be more inclined to rely on the *Profiles* and *Country Reports* because, unlike the Aird affidavits, they contain regularly revised information, possibly lending them additional credibility and accuracy in the courts’ views.

Another reason why a court might accord the Aird affidavits less weight in some cases has to do with the type of relief at issue. For example, in *Yu* the Third Circuit asserted that the affidavits might provide sufficient corroboration to reopen an asylum case but not to establish asylum eligibility itself:

Contrary to petitioners’ suggestion, the conclusion we reach is not inconsistent with our decision in *Guo v. Ashcroft* where we held that a similar affidavit of

Dr. Aird could provide a *prima facie* case for reopening a removal proceeding. In this case, the issue before the BIA was not whether petitioners made a *prima facie* showing for reopening, but whether they had carried their ultimate burden of persuasion in making an asylum claim. Our role in this latter context is limited to determining whether there is substantial evidence to support the BIA’s conclusion with respect to that matter.

Yu, 513 F.3d at 349 (citations omitted).

The State Department China Profiles and Country Reports

Additionally, the circuit courts have engaged in a more generalized shift with respect to their analyses of the State Department documents. A recent trend among the circuit courts considering whether the documents support a CPC applicant’s claim has been to find that the *Country Reports* and *Profiles*, by themselves, do not support a finding of an objective fear of forced sterilization. To illustrate the shift in analysis, we find it instructive to view the Eleventh Circuit’s decision in *Li v. U.S. Att’y Gen.*, 488 F.3d 1371 (11th Cir. 2007), and observe how it contrasts with subsequent circuit court decisions. *Li* was decided only days after *J-W-S-* and *J-H-S-* and did not cite to either of those decisions. It was also decided 2 months before *S-Y-G-*.

In *Li* the Eleventh Circuit reversed and remanded the Board’s decision denying the petitioner’s motion to reopen. The court highlighted several reports of forced sterilizations contained in the 2004 and 2005 *Country Reports*, which it viewed as supporting the petitioner’s claim of an objective fear of persecution. It described the Board’s contrary findings as “nonsensical,” “incomprehensible,” and “erroneous.” *Id.* at 1375-77. In contrast, in decisions rendered after 2007, other circuit courts quoted the *Country Reports* and *Profiles* to deny petitioners’ claims. For example, the Third Circuit found that such reports of forced sterilizations cited in the *Country Reports* were not sufficient to show changed country conditions, and thus it affirmed the denial of a similar motion to reopen.⁴ *Liu*, 555 F.3d at 149-50. Similarly, in *Zheng* the First Circuit

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FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR MAY 2009

by John Guendelsberger

The United States courts of appeals issued 311 decisions in May 2009 in cases appealed from the Board. The courts affirmed the Board in 244 cases and reversed or remanded in 67, for an overall reversal rate of 21.5% compared to last month's 11.8%. The Ninth Circuit issued 31% of the total decisions and 76% of the reversals. There were no reversals from the First, Fourth, Fifth, Eighth, and Tenth Circuits.

The chart below provides the results from each circuit for May 2009 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	7	7	0	0.0
2nd	98	91	7	7.1
3rd	21	18	3	14.3
4th	12	12	0	0.0
5th	15	15	0	0.0
6th	18	16	2	11.1
7th	8	6	2	25.0
8th	10	10	0	0.0
9th	96	45	51	53.1
10th	4	4	0	0.0
11th	22	20	2	9.1
All:	311	244	67	21.5

We saw a much lower than usual output from the Ninth Circuit this month (only 98 cases) but a dramatic increase in the number of reversals or remands (51), for a reversal rate of over 53%. About half of these reversals or remands addressed asylum issues, including remands in 10 cases finding fault with an adverse credibility determination. Another five cases were remanded for failing to address the “disfavored group” argument in considering well-founded fear of persecution. Another dozen cases found error in determinations related to nexus, level of harm for past persecution, the 1-year bar, and a discretionary denial.

Another 10 cases or so were remanded for failure to address particular evidence or for insufficient reasoning in the Board’s decision. Several of these cases involved motions to reopen to reapply for asylum based on changed country conditions. Others were direct appeals in which the court found that the Board misstated or overlooked facts or did not fully address an argument raised on appeal. Two cases were remanded under *Cui v. Mukasey*, 538 F.3d 1289 (9th Cir. 2008), for abuse of discretion in denying a continuance to complete fingerprinting or background checks. Two more were remanded for lack of a clear explanation of waiver of the right to appeal as a quid pro quo for prehearing voluntary departure. The court also reversed a Board ruling that lawful permanent resident status could not be imputed to a minor child for cancellation of removal. Notably, only one of the reversals involved a criminal ground of removal, finding misapplication of the modified categorical approach when the record of conviction contained only an abstract of judgment.

The Second Circuit reversed in seven cases. These included three asylum cases involving nexus, past persecution, and a remand to further consider the persecutor bar under the Supreme Court’s decision in *Negusie v. Holder*, 129 S. Ct. 1159 (2009). The court also remanded in a case in which it found that the Board engaged in impermissible fact-finding in reversing an Immigration Judge’s grant of section 212(c) relief, and in a case in which it found that a child’s health problems had been overlooked in the assessment of exceptional and extremely unusual hardship for cancellation of removal. The other reversals involved a denial of a continuance and a notice of hearing issue.

The chart below shows the combined numbers for the first 5 months of 2009 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	%
9th	835	682	153	18.3
3rd	114	94	20	17.5
6th	73	64	9	12.3
7th	38	34	4	10.5
2nd	519	484	35	6.7
8th	32	30	2	6.3
10th	15	15	1	6.3
11th	134	126	8	6.0
5th	91	87	4	4.4
1st	30	29	1	3.3
4th	77	76	1	1.3
All:	1960	1722	238	12.1

Last year at this point there were 2018 total decisions and 289 reversals, for a 14.3% overall reversal rate.

John Guendelsberger is Senior Counsel to the Board Chairman and is currently serving as a temporary Board Member.

RECENT COURT DECISIONS

Supreme Court:

Nijhawan v. Holder, 555 U.S. ___, 2009 WL 1650187 (June 15, 2009): The Court denied the alien’s petition challenging an Immigration Judge’s determination that he was removable as an aggravated felon under section 101(a)(43)(M) of the Act. That statute requires a showing of fraud resulting in a loss to the victim exceeding \$10,000. The Court rejected the petitioner’s argument that the Immigration Judge erred in concluding that the \$10,000 threshold had been met based on the alien’s stipulation at sentencing, where the amount of loss was not an element of the crime for which he was convicted. Noting a split among the circuits as to whether the statute required the categorical approach advocated by the petitioner or the circumstance-specific method employed by the Immigration Judge, the Court determined that the latter fact-based approach was the proper one.

First Circuit:

Barbiene v. Holder, ___F.3d ___, 2009 WL 1508532 (1st Cir. June 1, 2009): The First Circuit denied the petition of a family from Lithuania from the Immigration Judge’s decision (affirmed by the Board) denying their application

for asylum. The court found no error in the Immigration Judge’s conclusion that the petitioners failed to establish a well-founded fear of persecution based on their fear of falling victim to human trafficking. In reaching this conclusion, the court noted that the record established that criminal elements were responsible for such trafficking, and that substantial evidence supported the Immigration Judge’s determination that the Lithuanian Government was neither responsible for the trafficking nor unable or unwilling to control it to an extent that it would constitute persecution under the Act.

Second Circuit:

Guzman v. Holder, ___F.3d ___, 2009 WL 1520052 (2d Cir. June 2, 2009): The Second Circuit granted the petition for review and remanded, holding that the Board had engaged in impermissible fact-finding when it reversed an Immigration Judge’s decision granting cancellation of removal. Finding that the petitioner was not deserving of such relief in the exercise of discretion, the Board reversed the Immigration Judge’s determination that information contained in the criminal complaint and presentence report (“PSR”) might be unreliable. The Board found the PSR and related documents to be the best evidence and noted the serious nature of the crime described and the petitioner’s reported lack of remorse. The court found the Board’s reliance on such “facts,” which were contested by the parties and expressly not found by the Immigration Judge, to be improper and remanded for further proceedings.

Sixth Circuit:

El-Moussa v. Holder, ___F.3d ___, 2009 WL 1675754 (6th Cir. June 17, 2009): The Sixth Circuit denied the petition of an asylum seeker from Lebanon who challenged the Immigration Judge’s denial of her application based on an adverse credibility determination. In upholding the credibility finding, the court acknowledged that the claim was governed by the amendments of the REAL ID Act, so the prior requirement that inconsistencies could not support an adverse credibility determination unless they went to the heart of the claim was not applicable.

Eighth Circuit:

Hernandez-Perez v. Holder, ___F.3d ___, 2009 WL 1660104 (8th Cir. June 16, 2009): The Eighth Circuit upheld an Immigration Judge’s determination that the petitioner’s Iowa conviction for child endangerment constituted a conviction for a crime involving moral turpitude and thus rendered him ineligible for cancellation of removal. The

court noted that while moral turpitude is typically found in crimes committed intentionally or knowingly, reckless conduct may suffice where an aggravating factor is present. According to the court, the Iowa statute's requirement of a conscious disregard of a substantial risk to a child in the defendant's care constituted such an aggravating factor.

Ninth Circuit:

Cinapian v. Holder, ___F.3d ___, 2009 WL 1532203 (9th Cir. June 3, 2009): The Ninth Circuit granted the petition, finding that the Immigration Judge's handling of the last minute proffer of forensics reports by the DHS violated the petitioner's due process rights and deprived them of a fair hearing. When the DHS offered the reports, which cast doubt on the veracity of key identity documents, at the merits hearing, the Immigration Judge noted that they should have been filed earlier but would neither continue the hearing nor exclude the reports, whose author was not available for cross-examination. Noting that forensics evaluations involve differing degrees of reliability and that possible explanations for a document's apparent lack of authenticity may exist, the court found that the DHS's failure to provide advance notice of the reports or to allow for cross-examination of the author resulted in an unfair hearing. The court further found prejudice where the decision appeared to have relied on the reports.

BIA PRECEDENT DECISIONS

Attorney General Holder weighed in on ineffective assistance of counsel claims in *Matter of Compean, Bangaly & J-E-C-*, 25 I&N Dec. 1 (A.G. 2009) ("Compean II"). The Attorney General vacated the decision issued by Attorney General Mukasey in January 2009 at 24 I&N Dec. 710 (A.G. 2009), which found that there is no constitutional right to effective assistance of counsel and set out new procedural and substantive standards for evaluating claims of ineffective assistance of counsel, overruling in part *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), and *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003). In Compean II, the Attorney General directed EOIR to initiate rulemaking procedures as soon as practicable to evaluate the *Lozada* framework and to determine what modifications should be proposed for public consideration. After soliciting information and public comment from all interested parties through publication of a proposed rule in the Federal Register, the Department of Justice may, if appropriate, proceed with the publication of a final rule. In regard to pending claims,

the Board and the Immigration Judges should apply the pre-*Compean* standards to all pending and future motions to reopen based on ineffective assistance of counsel, regardless of when such motions were filed. The Attorney General stated that Board has the discretion to consider claims of ineffective assistance of counsel based on conduct of counsel that occurred after a final order of removal has been entered. However, the Board may determine the scope of its discretion in this area. The Attorney General did not address whether ineffective assistance of counsel claims are grounded in the Fifth or Sixth Amendments but stated that the Department's litigating position would not change.

In *Matter of A-T-*, 25 I&N Dec. 4 (BIA 2009), the Board found that requests for asylum or withholding of removal premised on past persecution related to female genital mutilation must be adjudicated within the framework set out by the Attorney General in *Matter of A-T-*, 24 I&N Dec. 617 (A.G. 2008). This is the third published decision in this case. The Board remanded the case, indicating that the respondent should clearly indicate what enumerated ground she is relying upon in making a claim, including delineating the social group.

Turning to criminal matters in *Matter of Cardiel*, 25 I&N Dec. 12 (BIA 2009), the Board addressed the question whether the respondent's conviction for receiving stolen property under section 496(a) of the California Penal Code qualifies as a "theft offense (including receipt of stolen property)" under section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G). The respondent was admitted to the United States on May 3, 1989, as a lawful permanent resident. On December 12, 2006, the respondent was convicted in the California Superior Court for the offense of receiving stolen property in violation of California Penal Code section 496(a) and was sentenced to 1 year and 4 months' imprisonment. The respondent argued that the offense does not qualify categorically as a theft offense because one who is convicted of aiding in the concealment of stolen property can only be deemed to have committed a theft as an accessory after the fact, which is too attenuated to be considered theft. Secondly, he argued that section 496(a) encompasses offenses that are premised on extortion, a species of consensual taking that falls outside the generic definition of theft announced by the Supreme Court. Amicus argued that section 496(a) does not contain a specific intent to deprive, so

it cannot fall within the generic definition of receipt of stolen property.

The Board found that the respondent's conviction was for an aggravated felony offense under section 101(a)(43)(G) of the Act, reasoning that receipt of stolen property is a distinct offense, and noting that it is not necessary to establish the elements of theft to demonstrate a receipt of stolen property offense. As to the first argument above, the Board explained that receipt of stolen property involves more than just receipt; it also includes knowing possession, concealment, or retention of stolen property from its owner after the receipt. Concealment of stolen property is a continuing offense in California, separate from the receipt crime, and one who has been convicted of aiding in the concealment is a second-degree principal who is as susceptible to aggravated felony treatment as the original perpetrator. A survey of the phrase "aids in concealing" in State and Federal statutes revealed that many States and the Federal Government once included the phrase in their receipt statutes but have since removed it as redundant, as all States have abrogated the distinction between first-degree principals and aiders and abettors formerly classified as second-degree principals.

As to the respondent's second argument regarding extortion, the Board found that the concept of "consent" in California's statute is not traditional; it refers to coerced and unwilling consent compelled by wrongful use of force or fear. A survey of State theft statutes confirms that receipt of extorted property is included in section 101(a)(43)(G) theft offenses. As to the argument by amicus, California courts have repeatedly emphasized that only general criminal intent is necessary for a conviction under section 496(a) of the California Penal Code.

The Board ruled on the automatic and priority date retention provisions of the Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002) ("CSPA") in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009). The issue was whether a derivative beneficiary who has aged out of a fourth-preference visa petition may automatically convert her status to that of a beneficiary of a second-preference category filed by a different petitioner, and whether she can retain the priority date from the fourth-preference visa petition. The petitioner came to the United States based on a visa petition filed on his behalf in 1992 by his United States citizen sister. His daughter, the beneficiary, was a derivative beneficiary of that visa petition. She aged

out by the time her father's visa petition became current. Her father filed a visa petition in 2006 for the beneficiary as his unmarried daughter. He asked to retain the 1992 priority date.

The parties agreed that when the beneficiary turned 21 before the fourth-preference visa petition became current, she no longer qualified as a "child" under section 203(h)(1) of the Act, 8 U.S.C. § 1153(h)(1). The Board found that the automatic conversion and priority date retention provisions of section 203(h)(3) do not apply to the beneficiary, because those concepts have a different historical meaning in Federal regulations, which was codified elsewhere in the CSPA. First, there was no available category to which the beneficiary's petition could convert when she aged out because no category exists for the niece of a United States citizen. Moreover, the second-preference petition filed on her behalf cannot retain the priority date from the fourth-preference petition filed by her aunt because the second-preference petition has been filed by her father, a new petitioner. Absent clear legislative intent, which was not found in the history of the CSPA, the Board declined to apply the automatic conversion and priority date retention provisions of section 203(h) beyond their current bounds. Among other reasons, to find otherwise would mean that a derivative beneficiary would never age out or lose a previous priority date, regardless of the basis for any subsequent visa petitions. This would have the effect of displacing others who are waiting for visa numbers. The intent behind the CSPA was to address administrative processing delays, not the length of the visa queue.

In *Matter of Barcenas-Barrera*, 25 I&N Dec. 40 (BIA 2009), the Board found that an alien who willfully and knowingly makes a false representation of birth in the United States on a passport application is inadmissible under section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii), for making a false representation of United States citizenship. The respondent applied at a United States Post Office for a United States passport, indicating on her application that she was born in Texas. The respondent's status was later adjusted to that of a lawful permanent resident based on her marriage to a United States citizen. She was subsequently convicted of making a false statement on an application for a passport in violation of 18 U.S.C. § 1542. The Immigration Judge found that the respondent's false representation on the passport is not a false claim to citizenship because a

noncitizen national is eligible for a passport. The Board disagreed, stating that the respondent never claimed to be a national and that, in any case, a claim to birth in Texas would be inconsistent with such a claim. The Board also noted that obtaining a passport is a benefit within the scope of section 212(a)(6)(C)(ii).

REGULATORY UPDATE

74 Fed. Reg. 26,933

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

8 CFR Parts 1, 100, 103, 204, 207, 208, 211, 212, 214, 216, 236, 244, 245, 248, 264, 274a, 301, 316, 320, 322, 324, 327, 328, 329, 330, 334, and 392

Removing References to Filing Locations and Obsolete References to Legacy Immigration and Naturalization Service; Adding a Provision To Facilitate the Expansion of the Use of Approved Electronic Equivalents of Paper Forms

ACTION: Interim rule with request for comments.
SUMMARY: This rule amends Department of Homeland Security (DHS) regulations by eliminating certain references to the Immigration and Naturalization Service (INS) organizational structure and removing all references in the Code of Federal Regulations (CFR) to INS and U.S. Citizenship and Immigration Services (USCIS) Offices. This rule also removes all references in the CFR to filing locations, so that USCIS may provide such information on petition and application forms and through any other means. In addition, this rule adds a definition of the term “form” to the CFR, which will facilitate the expansion of the use of approved electronic equivalents of USCIS paper forms; this will support USCIS’ transition from a paper-based filing and processing environment to an electronic one. Overall, the rule is intended to eliminate confusion and certain obsolete references to the INS organizational structure from USCIS regulations, help the public determine where to file forms with USCIS, create a more efficient and streamlined process for future changes to filing instructions, and allow the component to better manage its workload through, among other things, affording greater flexibility to accept and process applications and petitions in an electronic environment.

DATES: Effective Date: This rule is effective July 6, 2009.

CPC Asylum Claims *continued*

relied on the State Department documents to conclude that there was no evidence of persecution in Fujian Province, specifically in the form of forced sterilization, so it also found denial of a motion to reopen appropriate. *Zheng*, 546 F.3d at 72-73.

The Eleventh Circuit in *Li* also found that the Board erroneously distinguished between Chinese-born children and foreign-born children in determining whether the family planning policy was applicable, although the court did not cite to any State Department documents in coming to that conclusion. *Li*, 488 F.3d at 1376 (stating that “it was arbitrary and capricious for the Board to rely on this factual distinction” between native-born and foreign-born children). In contrast, since the 2007 Board decisions, several circuit courts have relied on the *Profiles* and *Country Reports* as evidence that the distinction between Chinese-born and United States citizen children is dispositive when analyzing whether a Chinese asylum applicant’s fear of forced sterilization is objectively reasonable. See *Liu*, 555 F.3d at 149; *Zheng*, 546 F.3d at 72-73; *Huang*, 523 F.3d at 653; see also *Yu*, 513 F.3d at 348.

While the circuit courts have generally shifted in regard to the State Department documents, variations in the weight attributed to these documents may nonetheless arise depending on the type of relief at issue, as with the Aird affidavits. For example, in *Xiu Zhen Lin*, the Seventh Circuit was able to find changed country conditions with respect to a motion to reopen from statements in the 2006 *Country Reports*. *Xiu Zhen Lin*, 532 F.3d 596. The same documents, however, were not sufficient to corroborate a full asylum claim in the same circuit. *Song Wang v. Keisler*, 505 F.3d 615, 623-24 (7th Cir. 2008).

Local Chinese Government Regulations and Administrative Decisions

Additional documents commonly submitted by CPC asylum applicants are local Chinese Government regulations and administrative decisions, such as the Fujian or Changle City Family Planning Regulations. Of the circuit courts that have specifically reviewed these documents, all have found them insufficient to prove a policy of forced sterilization. *Liu*, 555 F.3d 145; *Zheng*,

546 F.3d 70; *Huang*, 523 F.3d 640. In each case, the circuit courts relied heavily on the decisions by the Board in conducting their analyses.

For example, the First Circuit noted that two documents from Fujian family planning offices (the Fujian State Population and the Family Planning Office of Ting Jiang Town) “together . . . suggest that a returnee with two children faces sterilization.” *Zheng*, 546 F.3d at 72. However, the First Circuit quoted several of the conclusions drawn in *J-W-S-* to ultimately decide that the documents were insufficient to establish a well-founded fear of persecution. *Id.* at 73 (stating that in *J-W-S-* the Board found “no evidence that [the policy] is implemented through physical force”; that “central government policy prohibits physical coercion to compel persons to submit to family planning enforcement”; and that “enforcement efforts in Fujian Province in particular are ‘lax’ and ‘uneven’” (quoting *J-W-S-*, 24 I&N Dec. at 192-93)). Similarly, when the Third Circuit was presented with a Chinese National Population and Family Planning Committee document, which was almost identical to the documents submitted to the First Circuit in *Zheng*, the Third Circuit paraphrased the findings in *J-W-S-* to conclude that “the Chinese government does not have a national policy of requiring forced sterilization of a parent who returns with a second child born outside of China.” *Liu*, 555 F.3d at 149-50.

Conclusion

The Board’s analysis of the documents commonly submitted by CPC asylum applicants has helped promote uniformity in the evaluation of these documents by the circuit courts. The 2007 decisions in *J-H-S-*, *J-W-S-*, and *S-Y-G-* held that documents such as the Aird affidavits, the State Department *Country Reports* and *Profiles*, and local Chinese Government regulations and administrative decisions, by themselves, do not demonstrate that a policy of forced sterilization exists in China or that family planning policies apply to citizens who have two or more children born in the United States. It is likely that as a result of these Board decisions, the circuit courts’ treatment of the documents has shifted in accordance with the Board’s analysis. Sometimes, courts have explicitly deferred to the Board. For example, in *Zheng* the First Circuit made the following comment about the Second Circuit’s remand in *Shou Yung Guo v. Gonzales*, 463 F.3d 109 (2d Cir. 2006), which resulted in the Board’s decision

in *S-Y-G-*: “[T]he Second Circuit remand was based on its belief that the BIA had yet to evaluate the significance of the *Shou Yung Guo* documents. The BIA, which the court acknowledged was in the best condition to perform the evaluation, has evaluated the evidence and concluded that the documents are insufficient to establish a well founded fear of persecution.” *Zheng*, 546 F.3d at 73. Thus, in light of the Board decisions in 2007, there appears to be a developing consensus among the circuit courts regarding how to evaluate these commonly submitted documents.

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1. John Shields Aird was a senior research specialist on China who worked for the Census Bureau as a demographer. Subsequent to his retirement in 1985, he testified before, and provided affidavits to, Congress suggesting that China’s one-child policy would apply to people returning to China from abroad with unauthorized children. See Patricia Sullivan, *John Aird, 85; was population specialist, China critic*, Boston Globe, Oct. 31, 2005, available at http://www.boston.com/news/globe/obituaries/articles/2005/10/31/john_aird_85_was_population_specialist_china_critic/.
2. The *Q&A Handbooks* “allegedly reflect implementation polices relating to the family planning laws of Fujian Province.” *S-Y-G-*, 24 I&N Dec. at 257.
3. The Eighth Circuit has yet to issue any decisions addressing the Aird affidavits in light of the 2007 Board decisions.
4. The Third Circuit cited to the 2006 *Country Reports*, which are substantially similar, in relevant part, to the 2004 and 2005 *Country Reports* cited by the Eleventh Circuit in *Li*.

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