No. 06-1264

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

HONG YIN GAO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding, in the first instance and without prior resolution of the questions by the Attorney General, that women whose marriages are arranged can and do constitute a "particular social group" of "women sold into forced marriages," and that the alien would suffer "persecution" "on account of" that status.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, Alberto R. Gonzales, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 440 F.3d 62. The order of the Board of Immigration Appeals (App., *infra*, 19a), and the oral decision of the immigration judge (App., *infra*, 20a-26a), are unreported.

JURISDICTION

The court of appeals entered its judgment on March 3, 2006. A petition for rehearing was denied on October

19, 2006 (App., *infra*, 27a-28a). On January 8, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including February 16, 2007. On February 6, 2007, Justice Ginsburg further extended the time to March 18, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at App., *infra*, 29a-35a.

STATEMENT

In this case, the Second Circuit held that an alien, respondent Hong Ying Gao, could qualify as a "refugee" under the asylum and withholding provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, based on a finding that her parents had arranged a marriage for her and that, when she declined to enter the marriage, her fiancé harassed her family either to follow through with the marriage or to return the money he had paid for the arrangement. The Second Circuit reasoned that being a woman whose parents have agreed to an arranged marriage for her in a region where such arrangements are considered valid and enforceable amounts to being "sold * * * into [a] forced marriage[]," App., *infra*, 14a, and thereby renders the woman a member of a "particular social group," which is one of the grounds for protection under the INA, 8 U.S.C. 1101(a)(42)(A).

That issue, and the interpretation of "membership in a particular social group" more generally, are of considerable significance in the administration of the INA. Although the Second Circuit acknowledged that the Board of Immigration Appeals and the immigration judge had failed to analyze the question whether respon-

dent qualified as a member of that "particular social group," the court of appeals definitively resolved that issue rather than remanding as required by *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam). The court then compounded its violation of *Ventura* by proceeding to decide, de novo, the questions of whether the prospective arranged marriage would itself be a form of "persecution" and whether that harassment was "on account of" Gao's membership in a social group, as opposed to the parent's refusal to refund the fiancé's money.

In *Gonzales* v. *Thomas*, 126 S. Ct. 1613 (2006) (per curiam), this Court reconfirmed the erroneousness of the approach taken by the Second Circuit here. In *Thomas*, the Court reiterated that courts of appeals may not resolve issues in immigration cases that have not been decided by the Attorney General in the first instance. Because the Ninth Circuit had ignored that principle by deciding, in the first instance, that a group was a "particular social group" within the meaning of the statute, this Court in *Thomas* summarily reversed that court of appeals' en banc decision. *Id*. at 1614.

The Second Circuit here violated the same established principles of judicial review of agency action that supported summary reversal in *Thomas* and *Ventura*. The court committed those errors, moreover, in the course of establishing a novel and potentially sweeping interpretation of the INA that could have far-reaching implications for the Executive Branch's enforcement of immigration law in the highly sensitive context of culturally diverse approaches to marriage. Indeed, the Department of Homeland Security estimates that approximately 60% of all marriages worldwide, and 96% of marriages in India, are arranged on terms that are often similar to those that the Second Circuit held in this case

give rise to protected membership in a particular social group. Accordingly, this case merits vacatur and remand in light of *Thomas*.

1. a. Congress has charged the Secretary of Homeland Security (Secretary) "with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. 1103(a)(1) (Supp. IV 2004), as amended by the Homeland Security Act Amendments of 2003, Pub. L. No. 108-7, Div. L, § 105(1), 117 Stat. 531. Congress vested the Secretary with the authority to make asylum determinations for aliens who are not in removal proceedings. See 6 U.S.C. 271(b)(3) (Supp. IV 2004); see also 8 C.F.R. 208.2(a), 208.4(b), 208.9(a).

The Attorney General is responsible for conducting administrative removal proceedings against an alien charged by the Department of Homeland Security with being removable. See 8 U.S.C. 1101(a)(1), 1229a(a)(1). Removal hearings are conducted by immigration judges in the Executive Office for Immigration Review within the Department of Justice, and the Board of Immigration Appeals (Board) hears appeals from decisions of the immigration judges. See 8 C.F.R. 1003.1, 1240.1(a)(1), 1240.15. The Attorney General has the authority to review any decision of the Board. See 8 C.F.R. 1003.1(h). The INA further directs that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. 1103(a)(1) (Supp. IV 2004).

b. An alien may be granted asylum, in the Attorney General's discretion, if "the Attorney General determines that such alien is a refugee." REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101(a)(1), 119 Stat. 302 (to be codified at 8 U.S.C. 1158(b)(1)(A) (Supp. V

2005)). The INA defines a "refugee" as a person who is unwilling or unable to return to his or her country of origin "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." 8 U.S.C. 1101(a)(42)(A).

In addition to the discretionary relief of asylum, mandatory withholding of removal from a particular country is available if "the Attorney General decides" than an alien's "life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A).

For purposes of those forms of protection from removal, "persecution" refers to significant mistreatment, and it must be inflicted by either the government of the applicant's country of origin, or by groups or individuals the government is "unable or unwilling to control." *In re Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987); see *In re Villalta*, 20 I. & N. Dec. 142, 147 (BIA 1990). Persecution is an "extreme concept." *Fatin* v. *INS*, 12 F.3d 1233, 1243 (3d Cir. 1993) (Alito, J.). "[M]ere 'repugnance of . . . a governmental policy to our own concepts of . . . freedom' [is] not sufficient to justify labelling that policy as persecution." *Id.* at 1240 (quoting *Blazina* v. *Bouchard*, 286 F.2d 507, 511 (3d Cir.), cert. denied, 366 U.S. 950 (1961)). Adversities arising from personal relationships unconnected to a protected ground are not covered. See *In re Y-G-*, 20 I. & N. Dec. 794, 799-800 (BIA 1994); see also *Molina-Morales* v. *INS*, 237 F.3d 1048, 1051 (9th Cir. 2001).

c. The term "particular social group" in the definition of "refugee" and in the withholding of removal provision is not further defined in the Act. The Attorney General, through the Board, has interpreted "particular social group" in general terms to require, at a minimum, that the asserted group be a

> group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.

Acosta, 19 I. &. N. Dec. at 233. The group characteristic must be one which "the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Ibid.* The group's shared characteristic, moreover, must "generally be recognizable by others in the community," and the group thus must have "social visibility" and be "perceived as a group by society." *In re A-M-E-*, 24 I. & N. Dec. 69, 74 (BIA 2007); see *In re C-A-*, 23 I. & N. Dec. 951, 959-960 (BIA 2006). The group "cannot be defined exclusively by the fact that its members have been subjected to harm." *In re A-M-E-*, 24 I. & N. Dec. at 74. Given the difficulty of defining "particular social group" in the abstract, as well as the potential issues of administrability and immigration and foreign policy implicated in recognizing social groups, the Board has held that identifying the "particular kind of group characteristic[s]" that will constitute a "particular social group" should be determined on a "case-by-case basis." *Acosta*, 19 I. & N. Dec. at 233.

2. Hong Yin Gao is a female native of the People's Republic of China who attempted to enter the United States without proper documentation in 2001. App., *infra*, 21a-22a. When she was placed in removal proceedings, she applied for asylum and withholding of removal. *Id.* at 21a. She testified that her parents contracted with a "go-between in her local village" to arrange a marriage for her. *Id.* at 22a. A man interested in a marriage, Chen Zhi, paid the "go-between" 18,800 RMB (approximately $2200) to be matched with Gao when she turned 21. *Ibid.* The go-between then provided Zhi's money to Gao's mother, who used the funds to pay family bills. *Id.* at 22a-23a.

Initially, Gao considered Zhi to be "a rather acceptable potential husband." App., *infra*, 23a. She changed her mind, however, when she determined that he had a "bad temperament" and gambled. According to her testimony, the relationship soured when Zhi refused to pay back his debts, and he once slapped her and refused to cancel the engagement. *Ibid.*

At that point, Gao decided not to marry Zhi and moved to the City of Mawei, which is about an hour away by boat from her home. App., *infra*, 3a, 23a. After her departure, Zhi occasionally harassed her family looking to have either his money returned or the marriage contract fulfilled. *Id.* at 23a. On one occasion, Zhi "smashed * * * something" in their home. Immigration Judge (IJ) Hearing Tr. 21 (Admin. R. 63); see *id.* at 23a; Admin. R. 104 (letter from Gao's mother). Once, when Gao was visiting her family, Zhi followed her to the boat when she departed and thus allegedly deduced the identity of the city to which she had moved. *Ibid.* There was no evidence, however, that Zhi attempted to follow Gao or to locate her during the six months that

she lived in Mawei. Gao also testified that Zhi had threatened to have his uncle sue the family for his lost money. No lawsuit was ever filed though. *Id.* at 24a-25a; IJ Hearing Tr. 17, 22, 27-28 (Admin. R. 59, 64, 69-70). Gao further testified that she once had become "somehow concerned" when she heard that, "on one occasion [the uncle] took with him some people and make arrests for another individuals." IJ Hearing Tr. 28 (Admin. R. 70).

When Gao told her mother that she refused to marry Zhi, her mother paid a smuggler to bring her to the United States. App., *infra*, 24a. When asked why she did not "just relocate to somewhere else in China," she replied that she "thought about going to some other places," but she heard about people coming to the United States and "eventually I wanted to come to the United States." IJ Hearing Tr. 24 (Admin. R. 66). "And," she added, "I heard the other people say you could apply for political asylum here." *Ibid.*

In addition to her testimony, Gao submitted a State Department report that noted a problem in China of widespread domestic violence and "trafficking in brides and prostitutes." App., *infra*, 3a-4a. The report further explained that the central government was attempting to prevent such trafficking, but that it was impeded by official corruption and occasional resistance by local officials. *Ibid.*

3. The immigration judge held that Gao was removable as charged and denied her applications for asylum and withholding of removal. App., *infra*, 20a-26a.[1] The

[1] The immigration judge also denied her application for withholding of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85. See App., *infra*, 4a, 26a.

immigration judge found that the alleged persecution was, in fact, "clearly a dispute between two families" over the broken contract, and that Zhi's anger was the product of losing "both his potential bride and his money." *Id.* at 24a. The immigration judge also rejected Gao's argument that the government could not protect her against Zhi's efforts to force the marriage to go through, holding that "the record does not establish that." *Ibid.* The immigration judge reasoned that Zhi's threat to have his uncle sue the family "does not establish that the government would not protect her," and that it is all "speculation" in any event because no lawsuit was ever brought. *Id.* at 24a-25a.

With respect to Gao's assertion that she was a member of a particular social group of "females who are in arranged marriages," the immigration judge determined that there was no "immutable characteristic that she is unable or unwilling to change." App., *infra*, 25a. The immigration judge said nothing more about that issue. Finally, the immigration judge held that the record established that Gao "was able to relocate safely to another city," and thus that there was no evidence demonstrating that it was "necessary for [Gao] to come all the way to the United States to be safe from this man." *Ibid.*

4. Gao appealed to the Board of Immigration Appeals, arguing that she was persecuted on account of her membership in a particular social group composed of "young women of Fuchow ethnicity, who have not [*sic*] had traditional marriage, arranged by parents and go-between, as practiced by that Fuchow ethnicity, and who oppose the arrangement and who do not have protection against it." Gao BIA Br. 6-7 (Admin. R. 10-11). The

Board summarily affirmed "the results of the decision below" without opinion. App., *infra*, 19a.

5. The court of appeals reversed. App., *infra*, 1a-18a. The court first held, without record citation, that Gao lived in a region of China where "parents routinely sell their daughters into marriage, and this practice is sanctioned by society and by the local authorities." *Id.* at 2a. The court then held that Gao was a member of a particular social group, which the court defined as consisting of women who have been "sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable." *Id.* at 14a. In so holding, the court noted that the immigration judge (i) had "failed to apply the correct definition of the 'particular social group' ground," *id.* at 2a, (ii) had "failed to analyze" whether Gao had established that she faced persecution on account of some immutable characteristic or otherwise to address her particular social group claim, *id.* at 15a, and (iii) had not "explained" why this dispute between the families over the marriage arrangement did not establish that Gao was a refugee, *ibid.* In addition, in the court's view, "[b]ecause the [immigration judge]'s analysis of the 'particular social group' issue is (to say the least) sparse," no deference was due to the immigration judge's decision. *Id.* at 15a-16a.

The court then held that Gao had established that "she might well be persecuted in China—in the form of lifelong, involuntary marriage," App., *infra*, 14a, because "the possibility remains that if [the family] continue[s] to be unable to repay his money, Zhi will force Gao to marry him," *id.* at 15a. The court further concluded that this form of persecution would be "on ac-

count of" Gao's membership in the particular social group of women in "forced marriages." *Id.* at 14a.

With respect to the question whether Zhi's private conduct amounted to persecution by the government or individuals the government was unable or unwilling to control, the court held that there was no substantial basis for the immigration judge's rejection of Gao's argument that the government would not protect her. App., *infra*, 16a-17a. The court criticized the immigration judge for "fail[ing] to mention" the State Department report about trafficking in women for marriage and prostitution. *Id.* at 16a. Given that report—together with Gao's testimony that Zhi's uncle had once had individuals arrested and the lack of evidence that local officials "*would* protect [Gao]"—the court concluded that respondent's contention "was not the least bit speculative." *Ibid.*

Finally, the court of appeals overturned the immigration judge's factual finding that Gao could safely relocate elsewhere in China to avoid Zhi. The court held that finding to be "contradicted by the record," because Zhi had followed her to a boat once and thus knew that she lived somewhere in Mawei and because Zhi had harassed her parents to either return the money or fulfill the contract. App., *infra*, 17a.[2]

REASONS FOR GRANTING THE PETITION

The decision of the Second Circuit usurps the Executive Branch's statutorily assigned role in interpreting and enforcing the immigration laws, and its constitution-

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[2] The court of appeals denied the government's petition for rehearing and rehearing en banc, which sought further review based on the panel's departure from *Ventura* and *Thomas*. See App., *infra*, 27a-28a; see also Gov't Pet. for Reh'g 7-15.

ally assigned role in making the sensitive domestic and foreign-policy judgments that inhere in identifying which categories of individuals may receive refuge in the United States from persecution in their home land. The court's decision defies the most basic rules for judicial review of agency action and, in so doing, flatly conflicts with this Court's decisions in *Gonzales* v. *Thomas*, 126 S. Ct. 1613 (2006) (per curiam), and *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam), which both summarily reversed court of appeals' decisions that similarly preempted the Board's consideration of important questions of asylum law. The court of appeals' error is especially significant because it reached out to identify a broad new category of aliens (women in arranged marriages) entitled to seek asylum—a decision that has far-reaching ramifications for immigration policy in light of the fact that approximately 60% of marriages worldwide are arranged.

1. The decision of the court of appeals appropriated for the judiciary a task—the interpretation and application of the immigration law in asylum cases—that "Congress has exclusively entrusted" to the Executive Branch in the first instance, *Ventura*, 537 U.S. at 16 (quoting *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943)). That decision cannot be reconciled with this Court's recent ruling in *Thomas*, *supra*, which summarily reversed the court of appeals for committing the same error that occurred here. In that case, the Ninth Circuit reached out to hold in the first instance that an individual family may, and did, constitute a "particular social group" within the meaning of the INA and was harmed on that account. 126 S. Ct. at 1614. This Court explained that the court of appeals' error was "'obvious in light of *Ventura*,' itself a summary reversal." *Ibid.*

In so holding, this Court reiterated and reemphasized its holding in *Ventura* that, "[w]ithin broad limits," federal immigration law "entrusts the agency to make the basic asylum eligibility decision." *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16). "A court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'" *Ibid.* (quoting *Ventura*, 537 U.S. at 16, which in turn quoted *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985)). Rather, "the function of the reviewing court ends when an error of law is laid bare." *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). At that juncture, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16, which in turn quoted *Florida Power & Light*, 470 U.S. at 744). A "judicial judgment cannot be made to do service for an administrative judgment." *Ibid.* (quoting *Ventura*, 537 U.S. at 16, which in turn quoted *Chenery Corp.*, 318 U.S. at 88).

Here, just as the Ninth Circuit did in *Thomas*, the Second Circuit has reached out to mint a new and controversial rule of immigration law that permits individuals to qualify for asylum and withholding of removal based on their involvement in an arranged marriage and the attendant familial or cultural pressure to participate in the marriage—or at least to choose between getting married or repaying the other party the money received in anticipation of the marriage. The court's opinion confesses that it did so despite, or perhaps because, the immigration judge had "failed to analyze" the question and had not "explained" her reasoning, and her consider-

ation of the question was "to say the least[,] sparse." App., *infra*, 15a (parentheses omitted). The Board, moreover, had summarily affirmed the "results" of the immigration judge's decision, with no independent analysis. *Id.* at 19a.

Under *Thomas* and *Ventura*, it is clear that, in these circumstances, once the court of appeals identified deficiencies in the agency decision, the court "should have applied the 'ordinary remand rule,'" *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 18), and allowed the Board to decide, in the first instance, whether and when individuals in an arranged marriage or an anticipatory arranged marriage constitute a "particular social group" under the INA. Instead, the court proceeded to resolve that threshold legal question definitively, thereby establishing circuit-wide precedent with sweeping implications for immigration law.

2. The Second Circuit's disregard of this Court's decisions in *Ventura* and *Thomas*, and the fundamental principles of judicial review and restraint that they enforce, did not stop there. The court went on to hold both that Gao had established that she might be "persecuted" in China—"in the form of lifelong, involuntary marriage," App., *infra*, 14a. Reaching out further still, the court also held that the persecution was "on account of" her membership in the court's newly identified particular social group of women "sold * * * into forced marriages," *ibid.* See *id.* at 14a-16a. The court decided both of those questions even though the agency had not addressed either issue. Indeed, the agency had no occasion to do so, having already held that the mere dispute between the families over the marriage arrangement did not render Gao a refugee and that Gao did not fall within any protected class. *Id.* at 24a-25a.

The court's holding that Gao had established a prospect of "persecution" in the form of a contingent risk of a "lifelong, involuntary marriage" raises significant issues of immigration and foreign policy. The court reached that conclusion on the basis of a record that shows nothing more than an arranged future marriage of a sort that is prevalent in much of the world. See pp. 19-22, *infra*.

The court of appeals' conclusion that a contingent future event can amount to "persecution" is also of substantial concern. In rejecting the immigration judge's conclusion that Gao did not face the requisite risk of persecution, the court acknowledged and accepted the immigration judge's finding that it was Gao's parents' breach of the contract and refusal to repay Zhi his money that "caused the anger of the boyfriend in this situation." App., *infra*, 15a; see IJ Hearing Tr. 22 (Admin. R. 64) (Gao testifies that, "[b]ecause my family took his money at the time of the engagement * * * he could sue my family as cheating him for the money."). The court nevertheless held that Gao herself faced persecution on account of her status in a prospective arranged marriage because "the possibility remains that *if they continue to be unable to repay his money*," then "Zhi will force Gao to marry him." App., *infra*, 15a (emphasis added). In other words, in the court's view, a "possibility" of persecution that is itself contingent upon a separate event can constitute "persecution" "on account of" a protected status.

The court of appeals' conclusions regarding the nature of "persecution" "on account of" a protected status were made without any consideration or analysis by the Board and without any citation of any Board precedent or any other principle of immigration law. As with the

court of appeals' independent resolution of the "particular social group" question, discussed below, the implications of that decision trigger all of the concerns about limitations on the judicial role and respect for agency expertise that are embodied in the ordinary remand rule of *Thomas* and *Ventura*. Whatever the proper resolution of those novel questions, the expert agency should have the opportunity to consider them in the first instance.

3. The Second Circuit's violation of the ordinary remand rule with respect to the "particular social group" issue was especially pointed because it framed the social group it identified in terms that had not been argued to, let alone considered by, the agency. Before both the immigration judge and the Board, Gao argued that she was a member of a social group consisting of females (or females within her geographical region) in "arranged marriages." App., *infra,* 25a; see Gao BIA Br. 6-7. Only in the court of appeals did the asserted social group get transmogrified into women "sold into * * * forced marriages," App., *infra*, 14a. That reformulation of the alien's claim transgressed established rules of administrative review in four respects.

a. First, the court of appeals' reformulation of Gao's social group from women anticipating an arranged marriage to women "sold into * * * [a] forced marriage[]," App., *infra*, 14a, defied the record before the agency. The immigration judge specifically found—and the court of appeals did not overturn the findings—that (i) "at first" Gao considered Zhi to be "a rather acceptable potential husband," *id.* at 23a; (ii) when Gao decided to cancel the engagement, she was able to get a job and move away from both home and Zhi, *ibid.*; (iii) Gao's family, rather than forcing her to marry, actually helped

her to leave for the United States, *ibid.*; and (iv) none of Zhi's threats to force the marriage or sue the family ever materialized, *id.* at 24a-25a.

Thus the court of appeals' conclusion that the combination of an arranged marriage contract (which can be fully consistent with cultural tradition) and an effort to renege or cancel the contract constitutes being "sold into" a "forced marriage[]," underscores the potential sweep of the court's newly created particular social group. It also magnifies the court's disregard of established principles of administrative review that require not only that "the basic asylum eligibility decision" be made by the agency in the first instance, *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16), but also that courts not reach out to decide factual or legal questions that were not squarely presented to the agency and are not supported by the administrative record. Cf. *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992).

b. Second, by recognizing a potentially expansive "particular social group" that had not been squarely presented to or analyzed by the Board, the court of appeals supplanted the Attorney General's statutorily assigned authority and long-established expertise in interpreting federal immigration law. See 8 U.S.C. 1103(a)(1) (Supp. IV 2004) (the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling"); 8 U.S.C. 1158(b)(1)(A) (eligibility for asylum turns on whether the "Attorney General determines" that the criteria have been satisfied); 8 U.S.C. 1231(b)(3)(A) (eligibility for withholding turns on what the "Attorney General decides"); see also *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context.").

Indeed, at the same time that the Second Circuit imposed its own conception of particular social group in this case, the Board was in the process of clarifying the *Acosta* definition of particular social group. See *In re C-A-*, 23 I. & N. Dec. 951, 960 (BIA 2006). In so doing, the Board concluded that one "important element in identifying the existence of a particular social group" is the "recognizability" and "social visibility[] of the group in question." *Id.* at 959-960. In other words, a particular social group should have a distinct and visible social identity within the country "recognizable by others in the community," and that identity "cannot be defined exclusively by the fact that its members have been subjected to harm." *In re A-M-E-*, 24 I. & N. Dec. 69, 74 (BIA 2007); see *In re C-A-*, 23 I. & N. Dec. at 960.

The Board has further held that the group must be at "greater risk" of differential treatment because of its social visibility and distinctness, and the group must be defined with "particularity" so as not to sweep in indiscriminately broad swaths of the population. *In re A-M-E-*, 24 I. & N. Dec. at 74, 76; see *id.* at 76 (rejecting the use of wealth to define a particular social group because it could sweep in "as much as 20 percent of the population or more").

Had the court of appeals remanded the question of whether and when persons in prospective arranged marriages might constitute a particular social group to the Board, as required by the "ordinary 'remand' rule" of *Thomas* and *Ventura*, see *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 18), the Board would have had the opportunity to apply its expertise in construing the INA and determining, for example, the proper role of United Nations interpretations in applying United States law in the course of addressing Gao's social group

claim, see *Aguirre-Aguirre*, *supra*; cf. *In re A-M-E-*, 24 I. & N. Dec. at 74; *In re C-A-*, 23 I. & N. Dec. at 956. The Board would also have had the opportunity to decide whether the social group proposed by the court would have sufficient particularity, given that, in countries like India, approximately 96% of all marriages are arranged. The Board simply cannot perform its statutorily assigned role of interpreting the INA in the first instance if courts of appeals are free to adopt different standards on their own and, in the process, unravel the Board's law. See *In re A-M-E-*, 24 I. & N. Dec. at 75 n.7 (noting the discrepancy and tension between the Second Circuit's decision in this case and the Board's criteria for "particular social group").

c. Third, the court of appeals' preemption of the agency's opportunity to consider whether and when prospective or completed arranged marriages become forced marriages, and whether and when persons in or facing forced marriages constitute a particular social group, deprived the Board of the opportunity to bring its substantial expertise to bear on not just the law, but also the sensitive foreign policy and cultural questions implicated by the broad variety of marriage traditions and practices that exist worldwide.

For example, the Department of Homeland Security has informed this Office that approximately 60% of marriages worldwide are arranged and, in some countries, virtually all marriages are arranged.[3] The court of appeals, however, defined its particular social group (and

[3] Although rare, arranged marriages also occur within the United States. One article explains that "[a]rranged marriage is the norm in many ultra-Orthodox communities." Barak D. Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 Law & Soc. Inquiry 383, 408 (2006).

found a reasonable fear of persecution on account of an arranged marriage) without the creation of any agency record or any agency findings addressing the prevalence and variety of arranged marriage practices or their enforcement. Moreover, the court of appeals was quick to equate arranged marriages with women being sold into forced marriages—and, in an even bigger logical leap, to equate them with the type of human kidnapping and trafficking that the State Department Report addressed and on which the court repeatedly relied, App., *infra*, 3a-4a, 16a; see Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *China—Country Reports on Human Rights Practices—2001*, at 24, 32-33 (Mar. 4, 2002) (Admin. R. 130, 138-139).

Had the Board been given the opportunity to address the court's proposed social group, those critical distinctions could have been fleshed out and the Board's unique expertise employed. As *Ventura* contemplates, remand also could have led "to the presentation of further evidence," 537 U.S. at 18, including a State Department report explaining that "[a]rranged marriages have been a long-standing tradition in many cultures and countries," and that there is a "clear distinction between a forced marriage and an arranged marriage." 7 Department of State, *Foreign Affairs Manual* § 1459(b) (2005); see Ratna Kapur, *Travel Plans: Border Crossings and the Rights of Transnational Migrants*, 18 Harv. Hum. Rts. J. 107, 123 (2005) (distinguishing forced marriages from arranged marriages in analyzing immigration policy in the United Kingdom).

Furthermore, while the court of appeals assumed that membership in its social group would be limited to women, App., *infra*, 14a, the court offered no explanation for why men who allege that they were socially

pressured into such marriages would not enjoy similar protection. Indeed, the Second Circuit recently went even further than that, directing the Board to consider, in light of its decision in this case, whether the boyfriends of women facing arranged marriages with other men are also members of a particular social group. See *Tang* v. *Gonzales*, 200 Fed. Appx. 68 (2006).

The potentially far-reaching implications of the Second Circuit's decision do not stop there. The immigration law also *prohibits* the Attorney General from granting asylum or withholding of removal to any person who has "assisted, or otherwise participated in the persecution of any person" on account of, *inter alia*, that person's "membership in a particular social group." 8 U.S.C. 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). The court of appeals' decision thus threatens to expand the statutory bar on asylum and withholding to individuals who become involved in "a dispute between two families" arising out of an arranged marriage, App., *infra*, 24a, notwithstanding broad cultural and religious acceptance of such arrangements in the country of origin.

Beyond that, the court stressed in the decision below that its ruling "does not reflect any outer limit of cognizable social groups," and expressly raised and reserved the question whether all "young, unmarried women in rural China comprise a 'particular social group,' " given the court's findings about the prevalence of the practice of arranged marriages. App., *infra*, 14a n.6. As a result, the implications of the court's decision for immigration policy would be difficult to overstate.

d. Fourth and relatedly, the court of appeals lacked the Executive Branch's experience in international relations, and thus was ill-equipped to tackle the complex question of the implications of arranged-marriage prac-

tices for United States immigration law and policy. The Constitution charges the Executive Branch, not the courts, with conducting the Nation's foreign affairs. See *Regan* v. *Wald*, 468 U.S. 222, 242 (1984) ("Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'") (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)). Indeed, this Court has recognized that construing the scope of asylum law is an "especially sensitive political function[] that implicate[s] questions of foreign relations." *Aguirre-Aguirre*, 526 U.S. at 425 (quoting *INS* v. *Abudu*, 485 U.S. 94, 110 (1988)).

Given the prevalence of arranged marriages and the deep roots of such practices in the cultures and religions of a number of foreign nations, determining whether the circumstances surrounding such marriages might establish a particular social group—and amount to a form of "persecution"—requires the type of "highly complex and sensitive" judgment that only the political branches can make. *Ventura*, 537 U.S. at 17. The Second Circuit was "not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *Aguirre-Aguirre*, 526 U.S. at 425. As a result, the court of appeals did not and institutionally could not grapple with the foreign affairs and immigration policy implications of declaring arranged marriages—especially attempted arrangements that entail only a resulting contract dispute and the minimal social pressure documented in the record here—to be a form of persecution so severe as to qualify its participants as "refugees" under United States law.

The ordinary remand rule reinforces that fundamental principle of separation of powers, and the consider-

ations that "classically support[] the law's ordinary remand requirement" clearly applied here. *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 17). "The agency [could] bring its expertise to bear" on the questions of whether or when individuals in or facing arranged marriages qualify as members of a particular social group and whether they suffer "persecution" within the meaning of the INA. In addition, on remand, the agency could develop the record and "evaluate the evidence," and could "make [the] initial determination" of the proper interpretation of the INA "through informed discussion and analysis," and through application of its substantial expertise in matters of immigration and foreign policy, which are so acutely implicated by the social group claimed here. *Ibid.*

In sum, as in *Ventura* and *Thomas*, the scope and implications of the court's disregard of this Court's precedent merits this Court's review. In light of this Court's recent summary reversal of the Ninth Circuit in *Thomas* for committing the same failure-to-remand error and the Court's explication in that case of the proper role of judicial review, the Court should grant the petition for a writ of certiorari in this case, vacate the judgment below, and remand for reconsideration in light of *Thomas*. That is the course the Court recently took in *Gonzales* v. *Tchoukhrova*, 127 S. Ct. 57 (2006), which presented an analogous departure from the ordinary remand rule. Because of the sweeping implications of the court of appeals' decision and its potential effect on the proper administration of immigration law and policy, a similar disposition is warranted here.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to that court for further consideration in light of *Gonzales* v. *Thomas*, 126 S. Ct. 1613 (2006).

Respectfully submitted.

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MARCH 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 04-1874-ag

HONG YING GAO, PETITIONERS

v.

ALBERTO GONZALES[1]

Submitted: Jan. 30, 2006
Decided: Mar. 3, 2006

OPINION

STRAUB, Circuit Judge.

Petitioner Hong Ying Gao ("Gao") petitions for review of a Board of Immigration Appeals ("BIA") decision summarily affirming an Immigration Judge's ("IJ") denial of her claims for asylum, withholding of removal, and protection under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Dec. 10, 1984, S. Treaty Doc. No.100-20 (1988), 1465 U.N.T.S. 85. Gao argues that the IJ erred in finding that she did not have a well-founded fear of forced marriage and in

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[1] United States Attorney General Alberto Gonzales is substituted as Respondent. *See* Fed. R. App. P. 43(c)(2).

finding that a forced marriage, even were it to occur, would not constitute persecution under paragraph 1101(a)(42) of Title 8 of the United States Code, which sets forth the grounds for establishing asylum eligibility.

We agree with Gao that the IJ, in finding that Gao's problems were not "on account of" a legally protected ground, failed to apply the correct definition of the "particular social group" ground as established by BIA and judicial precedent. As this precedent makes clear, the statutory term "particular social group" is broad enough to encompass groups whose main shared trait is a common one, such as gender, at least so long as the group shares a further characteristic that is identifiable to would-be persecutors and is immutable or fundamental. We further find that the IJ's decision was based, in part, on certain factual conclusions reached without substantial evidence: namely, that the government might be willing and able to protect Gao and that Gao could internally relocate within China. Accordingly, we remand for further proceedings.

BACKGROUND

I. Factual History

Because the IJ found Gao to be credible, we take as true the facts Gao presented to the IJ. *See Bocova v. Gonzales,* 412 F.3d 257, 262-63 (1st Cir. 2005). Gao, who was twenty years old when she left China, grew up in a rural village in the Fujian Province. In this region of China, parents routinely sell their daughters into marriage, and this practice is sanctioned by society and by the local authorities.

When Gao was nineteen years old, her parents, through a broker, sold Gao to a man named Chen Zhi; in

return for an up-front payment of 18,800 RBM, Gao's parents promised that Gao would marry Zhi when she turned twenty-one. Gao's parents used this money to pay off previous debts. At first, Gao acquiesced in the arrangement under pressure from her parents. However, because Zhi soon proved to be bad-tempered, and gambled, and beat her when she refused to give him money, Gao decided that she did not want to marry Zhi. When Gao tried to break their engagement, Zhi threatened her. He also threatened that, if she refused to marry him, his uncle, a powerful local official, would arrest her. Gao had heard that Zhi's uncle had arrested other individuals for personal reasons, and so she was afraid the same would happen to her.

To escape Zhi, Gao moved an hour away by boat and took a job in the Mawei district of Fuchou. Zhi continued to visit Gao's family and demand that she marry him, and when her parents refused to tell him where she had moved, he vandalized their home. Zhi also figured out that Gao was living in Mawei by following her to her boat one night when she was returning from a visit with her family. About half a year later, Gao fled to the United States out of fear that, if she remained in China, she would be forced to marry Zhi. Since Gao left, Zhi and his cohorts have continued to harass her family, to the point where the family has had to move repeatedly.

II. Procedural History

At her hearing, Gao testified to the events described above. In addition to Gao's testimony and a corroborating affidavit from her mother, the IJ had before her the 2001 State Department Country Report on Human Rights Practices in China ("Country Report"), which described widespread domestic violence and trafficking in

brides and prostitutes. The Country Report explained that this problem is fueled by the gender imbalance that has resulted from selective abortions and infanticides of female offspring, and that the problem is worse in rural areas. The Country Report also stated that, although the central government has been trying to prevent trafficking in women, its efforts have been hampered by official corruption and by active resistance on the part of village authorities.

At the end of the hearing, the IJ issued an oral decision denying Gao asylum, withholding of removal, and CAT relief. The IJ found Gao credible, but concluded that Gao had not made out a claim for asylum or withholding of removal. Specifically, the IJ found that Gao's predicament did not arise from a protected ground such as membership in a particular social group, but was simply "a dispute between two families." The IJ also found that the record did not establish that the government would not protect her from Zhi. Finally, the IJ found that because Gao "was able to relocate safely to another city," she did not need asylum in the United States. The IJ also, without separate analysis, denied Gao's CAT claim. The BIA summarily affirmed.

DISCUSSION

I. Standard of Review

We review *de novo* the IJ's determination of mixed questions of law and fact, as well as the IJ's application of law to facts. *Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003). We review BIA interpretations of ambiguous Immigration and Nationality Act language—such as the meaning of "particular social group"—with the deference described in *Chevron U.S.A. Inc. v. Natu-*

ral Res. Def. Council, Inc., 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). We do not, however, give *Chevron* deference to summary BIA affirmances of *IJ* interpretations. *See Shi Liang Lin v. U.S. Dep't of Justice,* 416 F.3d 184, 190-91 (2d Cir. 2005).[2]

By contrast, the scope of our review of an IJ's factual findings is narrow, and we uphold such findings so long as they are supported by "substantial evidence." *Jin Shui Qiu v. Ashcroft,* 329 F.3d 140, 148 (2d Cir. 2003) (internal quotation marks omitted). The "substantial evidence" standard, however, is slightly stricter than the clear-error standard generally applied to a district court's factual findings. *Id.* at 149. We require "more than a mere scintilla" of evidence, or "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Alvarado-Carillo v. INS,* 251 F.3d 44, 49 (2d Cir. 2001) (internal quotation marks omitted). We also "require some indication that the IJ considered material evidence supporting a petitioner's claim." *Poradisova v. Gonzales,* 420 F.3d 70, 77 (2d Cir. 2005); *see also Anderson v. McElroy,* 953 F.2d 803, 806 (2d Cir. 1992) ("[W]e cannot assume that the BIA considered factors that it failed to mention in its decision."

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[2] This Court has not yet decided whether IJ decisions are ever entitled to a lesser form of deference: "*Skidmore* deference." *See Shi Liang Lin,* 416 F.3d at 191 (noting this open question). Under *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944), individual agency interpretations carry persuasive power based on "the thoroughness evident in [their] consideration, the validity of [their] reasoning, [and their] consistency with earlier and later pronouncements." As explained below, the present case does not require us to resolve this issue because the *Skidmore* factors would not counsel deference to the particular IJ decision at issue.

(internal quotation marks omitted)). It is not our role, moreover, to assume factual findings supporting denial "on the basis of record evidence not relied on by the BIA." *Jin Shui Qiu,* 329 F.3d at 149.

Applying these principles here, we review *de novo* the IJ's interpretation of the legal term "particular social group"; assume without deciding that the IJ's interpretation might be entitled to *Skidmore* deference based on its inherent persuasiveness; accord *Chevron* deference to relevant BIA precedent; and review under the "substantial evidence" standard the IJ's findings of fact as to whether Gao could have sought government protection and/or relocated within China.

To establish eligibility for the discretionary relief of asylum, a petitioner must show that she has suffered past persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion," or that she has a well-founded fear of future persecution on these grounds. *See* 8 U.S.C. 1101(a)(42). "An alien's fear may be well-founded even if there is only a slight, though discernible, chance of persecution." *Diallo v. INS,* 232 F.3d 279, 284 (2d Cir. 2000) (citing *INS v. Cardoza-Fonseca,* 480 U.S. 421, 431, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987)). If an applicant satisfies the higher burden of demonstrating that such persecution is more likely than not, she is automatically entitled to withholding of removal under 8 U.S.C. § 1231(b)(3). *See Diallo,* 232 F.3d at 284-85. An applicant is also entitled to CAT relief if she establishes that it is more likely than not that she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 1208.16(c)(2); *see Ramsameachire v. Ashcroft,* 357 F.3d 169, 184 (2d Cir. 2004).

The three issues in this case, which we address in turn, are: 1) whether Gao established that she might be forced into marriage "on account of . . . membership in a particular social group"; 2) whether the IJ had a substantial basis for finding insufficient evidence that the Chinese authorities would not protect Gao; and 3) whether the IJ had a substantial basis for finding that Gao could safely relocate within China. The government appears to concede, as it must, that forced marriage is a form of abuse that rises to the level of persecution. Moreover, as the IJ and BIA failed to address Gao's CAT claim, we simply remand that claim for consideration by an IJ or the BIA in the first instance.

A. Particular Social Group

The five grounds protected under paragraph 1101(a)(42)—race, religion, nationality, membership in a particular social group, and political opinion—derive verbatim from the United Nations Protocol Relating to the Status of Refugees ("Protocol"), Jan. 31, 1967, 19 U.S.T. 6223 (entered into force Nov. 1, 1968); Congress expressly modeled its law on the Protocol so that the two would be "consistent." H. R. Rep. No. 781, at 20 (1980) (Conf. Rep.), *as reprinted in* 1980 U.S.C.C.A.N. 160, 161. Of the various categories, "particular social group" is the least well-defined on its face, and the diplomatic and legislative histories shed no light on how it was understood by the parties to the Protocol or by Congress. There is, fortunately, a substantial body of case law, although its value as precedent is somewhat limited by the fact-specific nature of asylum cases.

The landmark BIA case for what can constitute a social group is *Matter of Acosta*, which, in the context of holding that Salvadoran taxi drivers were not a cogniz-

able social group because they could change professions, set forth the following standard:

> [W]e interpret the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share *a common, immutable characteristic. The shared characteristic might be an innate one such as sex,* color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

19 I. & N. Dec. 211, 233-34 (BIA 1985) (emphasis added), *overruled in part on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987); *see also In re Fauziya Kasinga,* 21 I. & N. Dec. 357, 358 (BIA 1996) (recognizing as a particular social group "young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation], as practiced by that tribe, and who oppose the practice"); *Matter of Toboso-Alfonso,* 20 I. & N. Dec. 819, 822 (BIA 1990) (recognizing Cuban homosexuals as a particular social group); *cf. Matter of Fuentes,* 19 I. & N. Dec. 658, 662 (BIA 1988) (recognizing that former members of the Salvadoran national police could comprise a particular social group, but finding insufficient evidence of future danger).

Courts of Appeals have deferred to *Matter of Acosta*'s broad interpretation of "particular social group" as encompassing any group, however populous, persecuted because of shared characteristics that are either immutable or fundamental. In *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993), for example, then-Judge Alito writing for the Third Circuit considered and rejected a petition by an Iranian woman who had been living in Iran since before the Islamic revolution and who claimed that, if she were removed to Iran, she would be forced to conform to fundamentalist Islamic norms. *Id.* at 1235-36. The court reasoned thus:

> We believe that there are three [elements that an alien must establish in order to qualify for withholding of deportation or asylum based on membership in such a group]. The alien must (1) identify a group that constitutes a "particular social group" within the interpretation just discussed, (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership.
>
> In the excerpt from *Acosta* quoted above, the Board specifically mentioned "sex" as an innate characteristic that could link the members of a "particular social group." Thus, to the extent that the petitioner in this case suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has satisfied the first of the three elements that we have noted. She has not, however, satisfied the third element; that is, she has not shown that she would suffer or that she has a well-founded fear of suffering "persecution" based solely on her gender.

Id. at 1240. The court reached this last conclusion because there was no record evidence that women in Iran were systematically persecuted *for being women. Id*. at 1241.

The *Fatin* court went on to consider Fatin's suggestion that her social group was "those Iranian women who find those laws so abhorrent that they refuse to conform—even though, according to the petitioners' brief, the routine penalty for noncompliance is 74 lashes, a year's imprisonment, and in many cases brutal rapes and death." *Id*. (internal quotation marks omitted). The court agreed that this "may well" be a cognizable social group under the asylum law but found that Fatin had not demonstrated that she was part of such a social group because she was not politically active here, testified that she would try to avoid complying with the government's dress code and other norms but not that she would take any risk necessary, and failed to establish that the new Iranian norms were abhorrent to her, as opposed to merely objectionable. *Id*. at 1241-42.

The reasoning in *Fatin* may be taken to suggest that the proper balance to strike is to interpret "particular social group" broadly (requiring only one or more shared characteristics that are either immutable or fundamental) while interpreting "on account of" strictly (such that an applicant must prove that these characteristics are a central reason why she has been, or may be, targeted for persecution). As the Tenth Circuit explained in *Niang v. Gonzales,* "the focus with respect to [gender-related] claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that

they are persecuted 'on account of' their membership." 422 F.3d 1187, 1199-1200 (10th Cir. 2005) (quoting 8 U.S.C. § 1101(a) 42(A)).

Other circuits have also deferred to *Matter of Acosta's* broad definition of "particular social group." *See Hernandez-Montiel v. INS,* 225 F.3d 1084, 1093 (9th Cir. 2000) (recognizing as a "particular social group" in Mexico gay men with female sexual identities, and holding "that a 'particular social group' is one united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it"); *Lwin v. INS,* 144 F.3d 505, 512 (7th Cir. 1998) (recognizing parents of political dissidents as "particular social group" under *Matter of Acosta's* immutability test); *Ananeh-Firempong v. INS,* 766 F.2d 621, 626 (1st Cir. 1985) (recognizing petitioner's family as a "particular social group").[3] Courts of Appeals have also followed

[3] We also note that the Department of Homeland Security ("DHS") has recently taken a similar stance in *Matter of R-A-*. Initially, the BIA held, reversing an IJ, that a Guatemalan woman facing domestic abuse was not facing persecution on account of social group membership. 22 I. & N. Dec. 906 (BIA 1999). Then-Attorney General Janet Reno overturned the decision, proposed new regulations for gender-related asylum claims (affirming that gender can be a sufficiently unifying characteristic), and ordered the BIA to reconsider the case after these regulations were finalized. While these regulations have not yet been finalized, DHS has since argued in a brief to the Attorney General that he should grant *R-A-*asylum under the *Matter of Acosta* standard. *See* Department of Homeland Security's Position on Respondent's Eligibility for Relief, Feb. 19, 2004, *available at* http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf (visited Feb. 10, 2006). Specifically, the DHS now takes the position that "married women in Guatemala who are unable to leave the relationship" are a particular social

the BIA's holding in *In re Fauziya Kasinga,* 21 I. & N. Dec. at 358, that young women who reasonably fear customary genital mutilation are eligible for asylum under the "particular social group" rubric. *See Mohammed v. Gonzales,* 400 F.3d 785, 796-98 (9th Cir. 2005); *Niang,* 422 F.3d at 1199-1200; *Abay v. Ashcroft,* 368 F.3d 634, 638 (6th Cir. 2004). Although this Court has not had occasion to consider *de novo* whether women facing genital mutilation could comprise a "particular social group," we did find an applicant eligible for asylum based on her fear of genital mutilation in a case where the BIA *conceded* that the alleged harm was on account of Abankwah's social group but found that she had not presented sufficient proof of past or future harm. *See Abankwah v. INS,* 185 F.3d 18, 21 (2d Cir. 1999); *accord Balogun v. Ashcroft,* 374 F.3d 492, 499 (7th Cir. 2004) (noting agency concession).

The general law in our own Circuit on particular social groups is less clear. In *Gomez v. INS,* we denied the petition of a woman whose asylum claim was based on the fact that she had been raped and beaten by guerilla forces on five different occasions between the ages of twelve and fourteen. 947 F.2d 660, 664 (2d Cir. 1991). Gomez argued that, because of her past, she belonged to a particular social group—"women who have been previously battered and raped by Salvadoran guerillas" that was likely to be singled out for further persecution. *Id.* at 663-64. In rejecting this argument, we used broad language that could (and has) been read as conflicting with *Matter of Acosta*, s*ee, e.g., Niang,* 422 F.3d at 1199.

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group under the law. *Id*. at 27-28. The Attorney General remanded the case to the BIA in January 2005, *see Matter of R-A-*, 23 I. & N. Dec. 694 (AG 2005), where it is currently pending.

In particular, in our general statement of law, we wrote that "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group." *Gomez,* 947 F.2d at 664; [4] *see also Saleh v. U.S. Dept. of Justice,* 962 F.2d 234, 240 (2d Cir. 1992) (citing *Gomez,* and rejecting as potential social groups "Yemeni Moslems residing outside of Yemen" and "poor Yemenis who could not afford to pay 'blood money' to buy their way out of a death sentence [for murder]")).

However, in the analysis portion of *Gomez,* this Court rejected Gomez's claim not because the social group she defined was too "broadly-based" but rather because "there is no [indication] that Gomez *will be singled out* for further brutalization on [the basis of her past victimization]." 947 F.2d at 664 (emphasis added). In other words, *Gomez* can reasonably be read as limited to situations in which an applicant fails to show a *risk* of future persecution on the basis of the "particular social group" claimed, rather than as setting an *a priori* rule for which social groups are cognizable. Indeed, the former reading would appear to conform better to the BIA's reasonable interpretation of 8 U.S.C. § 1101(a)(42) in *Matter of Acosta* and the consensus among the other circuits.[5]

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[4] We based this statement on a formulation from the Ninth Circuit which that court has since disavowed as dicta and as inconsistent with BIA and other circuit precedent. *See Gomez,* 947 F.2d at 664 (citing *Sanchez-Trujillo v. INS,* 801 F.2d 1571 (9th Cir. 1986)); *Hernandez-Montiel,*225 F.3d at 1092-93 & n.5 (disavowing *Sanchez-Trujillo*).

[5] The fear of future persecution, both subjective and objective, is evaluated with respect to the specific individual who asserts that fear. To the extent that the social group of which the petitioner claims to be a member is exceptionally broad, the need for the individual to prove

We need not decide the exact scope of *Gomez* here because Gao belongs to a particular social group that shares more than a common gender. Gao's social group consists of women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable.[6] Clearly, these common characteristics satisfy the *Matter of Acosta* test. Moreover, Gao's testimony, which the IJ credited, also establishes that she might well be persecuted in China-in the form of lifelong, involuntary marriage—"on account of" her membership in this group.

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that he, in particular, reasonably fears being persecuted is certainly greater. This can be done either by showing that a significant portion of even the very broad group will be persecuted, or by establishing that there are good reasons for thinking that the particular alien will be singled out for persecution. The need for such proof will depend, of course, on the nature as well as the breadth of the social group, e.g., it may be readily assumed in the circumstances of a particular country that virtually every individual in a racial or ethnic group may reasonably fear future persecution, even though the group is very large.

[6] To avoid unnecessary circularity or complexity, we choose this definition of Gao's group, rather than one that includes as an additional element that the individuals in question object to their compulsory marriage. Needless to say, however, if a victim ceases to object to her forced marriage and seeks United States residence purely for other reasons, then she is not, as the statute requires, "unable or unwilling to avail . . . herself of the *protection* of . . . [her country of origin] *because of* persecution or a well-founded fear of persecution." 8 U.S.C. § 1101(a)(42) (emphasis added).

We note, additionally, that our definition of Gao's social group is tailored to the facts of this case and does not reflect any outer limit of cognizable social groups. We do not here reach, for example, whether young, unmarried women in rural China comprise a "particular social group" under asylum law such that, if they have a well-founded fear of being forced into marriage, they are eligible for asylum

The IJ's reasons for reaching the opposite conclusion are unclear. The IJ recited the requirement that persecution be on account of "some immutable characteristic," yet failed to analyze whether such was the case here. The IJ appears to have concluded that Gao did not face persecution on account of an immutable characteristic because her situation arose from "a dispute between two families," but the logical connection between the IJ's premise and conclusion is not evident, nor is it explained in the IJ's opinion. The IJ also wrote that "[t]he other reason that [Gao] does not establish that she is a member of a particularly persecuted social group of female [sic] is because her mother violated the oral [marriage] contract that she had with this go-between, and that is what caused the anger by the boyfriend in this situation . . . ." To the extent the IJ might have reasoned that the financial arrangement between the *families* somehow precluded a finding that Zhi's motive in targeting *Gao* was discriminatory, we reject this logic as antithetical to the very notion of individual rights on which asylum law is based. While Zhi may have a legitimate *financial* claim against Gao's parents, the possibility remains that if they continue to be unable to repay his money, Zhi will force Gao to marry him.[7]

Because the IJ's analysis of the "particular social group" issue is (to say the least) sparse, we need not reach the issue of whether *Skidmore* deference to IJ interpretations is appropriate. Even if *Skidmore* defer-

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[7] Nor does it make any difference that Zhi is the only person likely to claim Gao as his property. The law does not distinguish between single persecutors and mobs, provided that the persecution is based on a specified ground and that the government is unable or unwilling to protect the victim(s).

ence is appropriate, the *Skidmore* factors—"the thoroughness evident in [an official interpretation], the validity of its reasoning, [and] its consistency with earlier and later pronouncements"—do not counsel deference here. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944).

For the reasons stated above, we hold that Gao has established a nexus between the persecution she fears and the "particular social group" to which she belongs. The only remaining questions, therefore, are whether the IJ had a substantial basis for finding that the government was willing and able to protect Gao or that Gao could reasonably relocate within China. We address these in turn.

B. Government Protection

The IJ found that Gao had not met her burden of establishing that the Chinese government would not protect her. In so finding, the IJ dismissed as "mere speculation" Gao's assertion that the government would not protect her from Zhi. We agree with Gao that this finding of fact was without substantial basis. The Country Report, which was included in the record before the IJ but which the IJ failed to mention in her opinion, states that trafficking in women, for marriage and prostitution, is widespread, and that official efforts to combat the problem have been hampered by corruption and by active resistence [*sic*] by village leaders. Given this evidence, together with the testimony that Zhi threatened to have his uncle, a powerful government official, arrest Gao and with the lack of any evidence that the local officials in Gao's village *would* protect her, Gao's contention was not the least bit speculative. *See Ivanishvili v. U.S. Dep't of Justice,* 433 F.3d 332, 342

(2d Cir. 2006) ("[I]t is well established that private acts may be persecution if the government has proved unwilling to control such actions."). We therefore vacate this finding of fact.

C. Relocation Within China

The IJ also found, although it is unclear whether she gave this finding significant weight, that Gao could have relocated within China because she "was able to relocate safely to another city." This finding is contradicted by the record. As set forth above, Gao testified that, six months before she fled China, she attempted to escape Zhi by moving an hour away. She further testified that Zhi continued to harass her family, vandalized their home, and even followed her when she returned home to visit and thereby succeeded in figuring out that she had moved to Mawei. Given that Gao fled China soon after Zhi made this discovery and that Zhi continued to harass Gao's parents thereafter, the record in no way suggests that Gao "was able to relocate safely." We therefore vacate this finding and remand for further consideration of this issue (should the BIA deem it a significant one).

We remind the BIA that to deny a claim based on the availability of internal refuge, the BIA must find not only that Gao could avoid persecution by relocating, but *also* that "under all the circumstances it would be reasonable to expect the applicant to do so," 8 C.F.R. § 208.13(b)(2)(ii). The regulations, further, direct the BIA to consider, among other things, "whether the applicant would face other serious harm in the place of suggested relocation; . . . administrative, economic, or judicial infrastructure; geographical limitations; and

social and cultural constraints, such as age, gender, health, and social and familial ties." *Id.* § 208.13(b)(3).

CONCLUSION

For the foregoing reasons the petition for review is Granted, the decision of the BIA is Vacated, and the case is Remanded to the BIA for further proceedings consistent with this opinion. The motion for a stay of removal, previously granted, shall expire upon issuance of the mandate.

APPENDIX B

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Date: [Mar. 15 2004]

FILE: A77-994-017 - NEW YORK

In Re: GAO, HONG YING

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Morry Cheng, Esquire

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. § 1003.1(e)(4).

/s/ *ILLEGIBLE*
FOR THE BOARD

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
New York, New York

File A 77 994 017

HONG YING GAO, PETITIONERS

v.

ALBERTO GONZALES, RESPONDENT

Jan. 24, 2003

CHARGE:

Section 212 (a) (7) (A) (i) (I) of the Immigration and Nationality Act, who did not have documents presented for admission to the United States.

APPLICATION:

Asylum, withholding of removal, and protection under the Convention Against Torture.

ON BEHALF OF RESPONDENT:

Morry Cheng, Esquire

ON BEHALF OF SERVICE:

Richard Van Veldhuisen, Esqure

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of China, born on December 8th 1980, making her approximately 22 years today the date of the hearing. She has been charged in the Notice to Appear, Exhibit 1, as an arriving alien without documents and I find that the Government has sustain their burden of establishing that she is removable as charged. She has admitted those allegations in a change of venue. Respondent has applied today for the relief of asylum, withholding of removal, and protection under the Convention Against Torture. I find that as an arriving alien, it is her burden of proof to establish clearly and beyond a doubt that she is entitled to be admitted to this country which she has failed to do. She has declined to designate a country of removal, and the Court will designate the People's Republic of China.

An applicant for asylum bears the burden of proof and persuasion. It's the application's burden to establish that they're eligible, that they're a refugee. *See Matter of Acosta*, 19 I&N Dec. 211 (BIA 1995). See also § C.F.R. Section 208.5; 8 C.F.R. Section 42.17c. An alien who is seeking a discretionary grant of asylum must demonstrate status as a refugee as defined by INA Section 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A). That definition includes the requirement the alien is unable or unwilling to return to his or her country because of persecution or well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or circumstances under which a reasonable person would fear persecution. *See Matter of Mocharrabi*, 19 I&N Dec. 439 (BIA 1987). An alien who is seeking withholding of removal from the United States must show that the alien's life or freedom would be threat-

ened in such country on account of race, religion, nationality, membership in a particular social group, or a particular political opinion. See Section 243(h)(1) of the Act. *Also see INS* v. *Stevic*, 467 U.S. 407, 413 (1984). An alien seeking relief under the Convention Against Torture must show clear probability standard, that is that it more likely than not that the alien would be tortured if returned to their home country. See 8 C.F.R. 208.18(a).

FACTS

Respondent testified today that she arrived in the United States on November 1st, 2001, with a fraudulent passport. Although she had a passport that she had obtained in China, she did not use that to obtain entry in the United States. She testified and the documents in this case support that she paid a smuggler in her attempt to enter the United States. She testified today that she came to the United States to apply for political asylum because she heard that many Chinese were doing that. When she arrived in the United States and underwent an immigration interview, she told the INS officer that she came to the United States because she wanted to live and work here.

Respondent's mother apparently had an arrangement with a what respondent testified was a go-between in her local village. This go-between was to setup a marriage for respondent. Respondent's mother paid 500 RMB, for this arrangement to the go-between. The go-between found a potential husband for her. The potential husband's name was Chen Zhi. Mr. Zhi, paid 18,800 RMB to the go-between. This 18,800 RMB was given to respondent's mother. Respondent's mother used that

money to pay family bills. Respondent testified that some of the money was used for school bills and other family debts. The respondent testified that in this marriage arrangement there were no written documents. Apparently no contracts. It was just an understanding and arrangement were money was exchanged hands by both parties through the go-between.

Respondent testified that at first Mr. Chen Zhi was a rather acceptable potential husband. She later discovered that he had a bad temperament. He gambled. The respondent tried to persuade him to pay back his debts, but he refused to do so; and the relationship soured. Mr. Chen Zhi threatened respondent when she tried to cancel the arrangement. And one time he slapped her and refused to cancel the engagement. Mr. Chen Zhi attempted to get his money back, but there was no money to pay back because respondent's mother had spent the money on other family's debts.

The respondent testified that in the winter of 2000, she went to work as a cashier in a photo studio. It was about an hour away by boat from her house. At first, Mr. Chen Zhi went to her mother's house looking for her, could not locate her, became angry, smashed things. On one occasion the respondent came home to visit her mother, Mr. Zhi followed respondent back on the boat, learned were she lived, or at least learned the city that she was living in, but didn't go know her exact location. When respondent attempted to end the marriage relationship and Mr. Chen Zhi would not allow it. He came to the mother's house several times. Eventually, on one occasion, he created such a disturbance that the neighbors told him that respondent had left the United States and that respondent would work hard to pay him back

the money. When respondent was unable to terminate the marriage relationship, she and her mother decided that she should come to the United States and somehow the mother was able to arrange a smuggler with a fraudulent passport and respondent arrived in the United States on October 31st, 2001.

CONCLUSIONS OF LAW

I found the respondent to be a credible witness. I believe she has testified truthfully today. However, it is respondent's burden of proof to establish that she is a refugee, that her circumstances fit under the definition of a refuges; that is to say that she was persecuted because of her race, religion, nationality, membership in a particular social group, or political opinion. The respondent has failed to establish that she's a refugee. Her testimony today indicates that there is dispute between the families over this marriage arrangement. When respondent attempted to break the engagement her mother had already spent the money and she was unable to pay back Mr. Chen Zhi, and Mr. Chen Zhi became angry when he lost both his potential bride and his money.

This is clearly a dispute between two families and does not establish that respondent is a refugee. Although respondent's attorney has argued that she has established that she is a refugee because there's no way that she could be protected by the government, the record does not establish that. There was some kind of a contract, although it may not have been a written contract. Mr. Chen Zhi said that he would get his uncle to sue the family. That does not establish that the government would not protect her. Moreover, that's mere

speculation. Apparently, there has been no lawsuit up until this point in time. Respondent has also argued that she's a member of a social group, in his area consisting of females who are in arranged marriages. However, to establish that she is a member of a social group respondent needs to establish that there is some immutable characteristic that she is unable or unwilling to change.

In this particular case, respondent was able to relocate safely to another city. Therefore, I find that she could have relocated to other parts of China. It was not necessary for her to come all the way to the United States to be safe from this man. The other reason that she does not establish that she is a member of a particularly persecuted social group of female is because her mother violated the oral contract that she had with this go-between, and that is what caused the anger by the boyfriend in this situation and not political opinion or a particular social group membership.

THE ORDER

Accordingly, respondent's application for asylum is denied on the grounds that she has not established that she is a refugee.

Respondent's application for withholding of removal is denied.

Respondent's application for protection under the Convention Against Torture is denied, and respondent is ordered removed to the People's Republic of China.

/s/ SARAH M. BURR for Christine Bither
SARAH M. BURR
Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL, U.S. COURTHOUSE
46 FOLEY SQUARE
NEW YORK 10807

No. 04-1874-ag

HONG YING GAO, PETITIONER

v.

JOHN ASHCROFT, ATTORNEY GENERAL, RESPONDENT

[Oct. 19, 2006]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 5th day of October two thousand six.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Appellee Alberto Gonzales. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: /s/ ILLEGIBLE
Motion Staff Attorney

APPENDIX E

1. 8 U.S.C. 1101(a)(42) provides in pertinent part:

§ 1101. Definitions

(a) As used in this chapter—

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, 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 opinion, 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.

2. 8 U.S.C. 1103(a)(1) (Supp. IV 2004) provides:

§ 1103. Powers and duties of the Secretary, the Under Secretary, and the Attorney General

(a) Secretary of Homeland Security

(1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

3. 8 U.S.C. 1158 (2000 & Supp. IV 2004) provides in pertinent part:

§ 1158. Asylum

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

* * * * *

§ 1158(b), as amended by REAL ID ACT of 2005, Pub. L. No. 109-13, § 101(a), 119 Stat. 302 (to be codified at 18 U.S.C. 1158(b))

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(B) Burden of proof

(i) In general

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious non-political crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

* * * * *

4. 8 U.S.C. 1231 (2000 & Supp. IV 2004) provides in pertinent part:

§ 1231. Detention and removal of aliens ordered removed

* * * * *

(b) Countries to which aliens may be removed

* * * * *

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

* * * * *