

The Unintended Consequence of Section 601 of The Illegal Immigration Reform and the Immigrant Responsibility Act:

The Rise of U.S.-Based Claims and Their Impact on The Board of
Immigration Appeals, Federal Judiciary, and Mass Media

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INTRODUCTION

In 1996, Congress passed the Illegal Immigration Reform and the Immigrant Responsibility Act.¹ Though the law was generally considered a setback for asylum seekers,² human rights activists applauded one provision: Section 601. This provision deems past persecution or fear of future persecution based on subjection to coercive methods of population control equivalent to persecution on the basis of political opinion, are cognized statutory ground for asylum eligibility.³ Facially, this provision applies to individuals from any country that employs coercive population control methods. However, the statute's true target was the People's Republic of China and its One Child Policy. Since its inception, Section 601 has benefited thousands of Chinese immigrants.⁴

Almost twenty years after the passage of Section 601, a new category of asylum claims is on the rise. Historically, asylum seekers filing One Child Policy claims secured protection by showing that they either underwent forced abortion or sterilization in China, or fled the country to escape these inhumane procedures.⁵ In contrast, the new claims are based on asylum seekers' American-born children.⁶ These asylum seekers typically have resided in the United States for a significant period of time, despite having been ordered removed, and file for asylum applications upon the birth of their second or third child in the U.S.⁷

Commentators have paid little attention to this new category of asylum claims. Much of the literature on Section 601 focuses on whether it should be extended to

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1. Illegal Immigration Reform and the Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, Div. C, 110 Stat. 3009, 3009–546 (1996).

2. IIRIRA instituted a series of provisions unfriendly to asylum seekers. It created an expedited removal procedure that restricts the hearing, review, and appeal process for aliens at the port of entry. It imposed a one-year filing deadline to asylum seekers, with a limited number of exceptions. It requires mandatory detention of certain aliens until an asylum officer determines that they have “credible fear.” Furthermore, it barred asylum to aliens who could be returned to a “safe-third country.” See *Asylum Abuse: Is It Overwhelming Our Borders? Hearing Before the H. Comm. on the Judiciary H.R.*, 113th Cong. 53–54 (2013) (statement of Ruth Ellen Wasem, Specialist in Immigration Policy, Congressional Research Service).

3. Pub. L. No. 104–208, Div. C, § 601, 110 Stat. 3009, 3009–689 (1996) (codified as amended 8 U.S.C. § 1101(a)(42) (2012)).

4. Section 601 placed an annual cap of 1,000 on the number of asylum applications that can be granted based on the coercive population control method. China has been the only country of origin for asylum claims filed under Section 601, and the annual cap has been exceeded every year since 1998. See Jamie Jordan, *Ten Years of Resistance to Coercive Population Control: Section 601 of the IIRIRA of 1996 to Section 101 of The Real ID Act of 2005*, 18 HASTINGS WOMEN'S L.J. 229, 242–43 (2007). As of the end of fiscal year 2003, approximately 13,000 Chinese received asylum under Section 601. See Ruth Ellen Wasem, *U.S. Immigr. Policy on Asylum Seekers*, Cong. Res. Service (2005), available at <http://www.fas.org/spp/crs/misc/RL32621.pdf>. The cap was removed when Congress enacted the REAL ID Act of 2005. See REAL ID Act of 2005, Pub. L. 109–13, § 101(g), 119 Stat. 231, 304–05.

5. See *infra* Part I.B.

6. See *infra* Part II.A.

7. *Id.*

unmarried partners or spouses whose marriages are not legally recognized under Chinese law.⁸ The lack of attention to these new claims is unfortunate because their sheer number has clogged both the Board of Immigration Appeals (“Board”), the federal agency among other things adjudicating these claims and federal courts reviewing the agency’s decisions.⁹ Therefore, the size of this issue and its notable impact on federal resources justify academic attention.

This article attempts to fill this current void. Rather than advocating for or against this new category of asylum claims, I choose to study their impact on both the Board and the judiciary, as well as on the perceptions of Chinese asylum seekers in mass media. I will also trace the origin of these claims and the reasons for their proliferation. I examined cases¹⁰ that capture courts and the Board’s struggles in addressing this new category of asylum seekers and provide valuable insights on their approach towards the new claims. However, I recognize the inherent deficiencies associated with an empirical research approach.¹¹ To minimize these deficiencies, the pool of cases I have analyzed includes all of the on-point, precedential opinions decided by the Board and the federal judiciary. Because the Board and courts have chosen to accord precedential value to these opinions, they are presumed to be a reflection of their views. I have also included a representative sampling of relevant non-precedential opinions as they help paint a fuller picture of the situation.

This article is divided into three parts. Part I presents Section 601 and its legislative history, and I will argue that Congress did not intend Section 601 to be applicable to the new claims. Part II explains the proliferation of these claims

8. See, e.g., Moshe S. Berman, *The Appropriate Response of the United States to Forced Abortion in China: Should Section 601(a) of the IIRIRA Be Extended to Allow Asylum for Unmarried Couples?*, 41 NEW ENG. L. REV. 339, 340 (2007) (arguing to extend Section 601 to unmarried partners); Sean T. Masson, *Cracking Open The Golden Door: Revisiting U.S. Asylum Law’s Response to China’s One-China Policy*, 37 HOFSTRA L. REV. 1135, 1136 (2009) (arguing for an amendment to Section 601 to extend protection to both the legally and traditionally married spouses of direct victims of the coercive population control policy); Raina Nortick, *Singled Out: A Proposal to Extend Asylum to the Unmarried Partners of Chinese Nationals Fleeing the One-Child Policy*, 75 FORDHAM L. REV. 2153, 2154 (2007) (arguing to extend Section 601 to unmarried partners); The only article that touches upon the new claims is Zachary Slapsys, *The Chinese Dilemma: Practical Solutions to Irresponsible Immigration Reform and the Ensuing Circuit Court Traffic Jam*, 9 N.Y. CITY L. REV. 183 (2005). Slapsys advocated for reopening Chinese asylum seekers’ cases as a matter of law when U.S.-born children are presented as prima facie evidence of a well-founded fear of persecution. *Id.* at 190–99.

9. See Slapsys, *supra* note 8, at 187–88 (noting that family planning cases, including “thousands of” motions to reopen, contributed to the Second Circuit’s traffic jam).

10. I have read all published Board of Immigration Appeals and federal court opinions that were decided as of December 31, 2014 to adjudicate the new claims made through a motion to reopen. I have also read some unpublished federal court opinions. However, because of the sheer volume of unpublished opinions on this issue, I was unable to read all of them. A list of cases that I have read is attached in the Appendix.

11. Empirical research can suffer from inadequate data, sloppy survey techniques, skewed samples, and sweeping generalizations from unrepresentative findings. These, according to one author, are among the “most common problems” in legal empirical research. See Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1343 (2002); see also Lee Epstein & Gary King, *The Roles of Inference*, 69 U. CHI. L. REV. 1, 83 (2002) (noting that uncertainty of conclusions is inherent in an empirical research and one can only reduce but not eliminate such uncertainty).

and the legal vehicle through which they enter the asylum system. I will argue that the discrepancy between Section 601's broad statutory language and the narrower legislative intent incentivized the filing of the new claims. Part III documents how the Board and the courts reviewing the Board's decisions have reacted to these new claims. It also examines the ramifications that these claims have on the media's portrayals of Chinese asylum seekers. I will argue that the new claims have prompted deep suspicion, both at the agency level and from federal courts, of Chinese asylum seekers who have filed these claims. I will argue that, as a result, the Board probably has adopted a policy of wholesale rejection against these claims by excessively exercising its discretion, and courts have been reluctant to check the Board's near-abusive behavior absent any egregious errors. I will conclude by arguing that the claim have contributed to and reinforced the stereotype of Chinese asylum seekers as law-breakers.

I. THE LEGISLATIVE HISTORY OF SECTION 601: A CLEAR INTENTION TO ADDRESS CHINA-BASED CLAIMS

A. OVERVIEW OF U.S. ASYLUM REGIME

Congress established the procedure for granting asylum when it enacted the Refugee Act of 1980 to amend the Immigration and Nationality Act ("INA").¹² An alien can either apply for asylum affirmatively with an asylum officer, or defensively with an immigration judge ("IJ") if he has been placed in removal proceedings.¹³ To establish eligibility for asylum, the statute requires aliens to demonstrate that they are refugees.¹⁴ Additionally, both the Attorney General and the Secretary of Homeland Security have discretion to grant a refugee asylum.¹⁵

The INA defines a refugee as "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion

12. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.). In enacting the Refugee Act, Congress brought U.S. law into conformity with the United Nations Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6233, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967). The INA was enacted in 1952 to provide an extensive immigration, naturalization, and nationality code. *See* *Immigr. and Nat'lity Act*, H.R. Rep. No. 1365, 82d Cong., 2d Sess. 5 (1952), reprinted in 1952 U.S.C.C.A.N. 1653, 1653. Since its enactment, it has undergone many changes. The following were among the important legislative acts that amended the INA: REAL ID Act of 2005, Pub. L. 109-13, § 101(g), div. B, 119 Stat. 231 (2005); Homeland Security Act of 2002, Pub. L. No. 107-296, tit. IV, 116 Stat. 2135; Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, div. C, 110 Stat. 3009 (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; *Immigr. Reform and Control Act of 1986*, Pub. L. No. 99-603, 100 Stat. 3359; *Immigr. Marriage Fraud Amendments Act of 1986*, Pub. L. No. 99-639, 100 Stat. 3537; *Refugee Act of 1980*, Pub. L. No. 96-212, 94 Stat. 102.

13. 8 U.S.C. § 1158(a) (2012); *see also* U.S. CITIZENSHIP & IMMIGR. SERVICES, INSTRUCTIONS FOR I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL, available at <http://www.uscis.gov/sites/default/files/files/form/i-589instr.pdf> (last visited Apr. 20, 2014).

14. 8 U.S.C. § 1158(b)(1)(A) (2012).

15. *Id.*

...¹⁶ To demonstrate a well-founded fear of future persecution, an asylum applicant bears the burden to prove that his fear of persecution is both subjectively genuine and objectively reasonable.¹⁷ The applicant must also show a nexus between the fear of persecution and the applicant's race, religion, nationality, or membership in a particular social group or political opinion.¹⁸

If an asylum applicant loses his case before an IJ, he can appeal to the Board, an agency under the Department of Justice that is in charge of interpreting the INA.¹⁹ If the applicant loses again before the Board, he may petition a federal appeals court to review his case.²⁰

B. U.S. RESPONSE TO CHINA'S POPULATION CONTROL POLICY: PRE-SECTION 601 ERA

In 1979, the Chinese government formally adopted a population control policy to address the explosive population growth.²¹ Termed "one couple, one child," the One Child Policy ("OCP") encouraged couples to limit themselves to only one child.²² There are some exceptions such that ethnic minorities are allowed to have more than one child per couple and all couples living in rural areas whose first child is female are allowed to have a second child.²³ The policy's overall goal was to achieve zero population growth by the turn of the 21st century.²⁴

China's central government prohibited the use of any physical and coercive measures to enforce the policy.²⁵ Rather, local officials were supposed to use a number of social and economic incentives and disincentives to foster compliance.²⁶ Incentives included monthly stipends and preferential medical and educational benefits.²⁷ Disincentives included fines, job demotions, and the withholding of social services.²⁸ Unfortunately, local officials sometimes defied the prohibition and

16. 8 U.S.C. § 1101(a)(42) (2012).

17. *Id.* § 1158(b)(1)(B) (2012); *see also* Velarde v. INS, 140 F.3d 1305, 1309 (9th Cir. 1998); Garcia v. Gonzales, 500 F.3d 615, 618 (7th Cir. 2007).

18. *Id.*; *see also* KAREN MUSALO ET AL., REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 5 (2011).

19. 8 C.F.R. § 1003.1 (a), (b) (2013).

20. 8 U.S.C. § 1252 (2012).

21. Kimberly Sicard, *Section 601 of IIRIRA: A Long Road to A Resolution of United States Asylum Policy Regarding Coercive Methods of Population Control*, 14 GEO. IMMIGR. L.J. 927, 927-28 (2000).

22. Gerrie Zhang, Comment, *U.S. Asylum Policy and Population Control in the People's Republic of China*, 18 HOUS. J. INT'L L. 557, 561-62 (1996).

23. *See id.*

24. Charles E. Schulman, Note, *The Grant of Asylum to Chinese Citizens Who Oppose China's One-Child Policy: A Policy of Persecution or Population Control?*, 16 B.C. THIRD WORLD L.J. 313, 317 (1996). The purpose of the policy was to solve the problem of massive starvation as well as economic and social stagnation. *Id.* at 318.

25. E. Tobin Shiers, Note, *Coercive Population Control Policies: An Illustration of the Need for A Conscientious Objector Provision for Asylum Seekers*, 30 VA. J. INT'L L. 1007, 1011 (1990).

26. Sicard, *supra* note 21, at 929-30.

27. *Id.*

28. *Id.* The Board held in *Matter of T-Z-* that nonphysical forms harm, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life, may amount to persecution. 24 I. & N. Dec. 163 (BIA 2007). The Board, however,

resorted to physically coercive methods.²⁹ This occurred because the central government had incentivized the local officials' use of unauthorized tactics by tying promotions to the achievement of population growth targets.³⁰

The coercive tactics deployed in enforcing the OCP quickly drew international attention, including from American media and scholars who widely reported on the topic. For example, in 1985, the Washington Post reported that Chinese local officials launched late-night surprise attacks by “hustling sleeping women from their beds to 24-hour sterilization clinics.”³¹ The article also described doctors who used various methods to kill fetuses and who claimed that such methods did not qualify as murder.³² Testifying before Congress in 1987, John S. Aird, a former senior research specialist on China at the U.S. Census Bureau, claimed that 1983 was a peak year for coercion — all women with one child were required to submit to an Intrauterine Device insertion, and couples with two or more children had to submit to sterilization, which was a “key measure” in the campaign to hit the statistical population growth target.³³

The mounting evidence of coercive implementation of the OCP put enormous pressure on the U.S. government to act.³⁴ Internationally, the United States withdrew its financial support from the United Nations Fund for Population Activities.³⁵ Domestically, it began granting asylum to Chinese applicants who fled to the United States due to fear of persecution based on the OCP.³⁶ In 1988, Attorney General Edwin Meese III outlined the U.S. government's first official pronouncement on asylum claims based on the OCP.³⁷ In a memorandum to the then-Commissioner of the Immigration and Naturalization Service (INS),³⁸ Meese directed the following:

made it clear that mere threat of economic harm would not suffice to be considered as persecution. *Id.* at 169–70. Fines must be “extraordinarily severe” to rise to the level of persecution. *Id.* at 171.

29. Shiers, *supra* note 25, at 1011–12.

30. *Id.*

31. Michael Weisskopf, *Abortion Policy Tears at China's Society*, WASH. POST, Jan. 7, 1985, at A1.

32. *Id.*; see also Michael Weisskopf, *China's Birth Control Policy Drives Some to Kill Baby Girls*, WASH. POST, Jan. 8, 1985, at A1.

33. *Is China's Birth Control Program Still Coercive?: Hearings Before the S. Comm. on Foreign Relations*, 100th Cong. 223 (1987) (statement of John S. Aird, Former Senior Research Specialist on China at the U.S. Bureau of the Census).

34. See John D. Griffin, Comment, *The Chinese Student Protection Act and “Enhanced Consideration” for PRC Nationals: Legitimizing Foreign Policy While Averting False Positives in Asylum Law*, 66 U. COLO. L. REV. 1105, 1123 (stating that U.S. government's reaction to one-child policy achieved “an ideological foreign policy goal — opposition to abortion”); see also 1985 Country Reports on Human Rights Practice, H. Comm. on Foreign Affairs, S. Comm. on Foreign Relations, 99th Cong. 741 (1986).

35. Sicard, *supra* note 21, at 932–33.

36. *Id.*

37. *Id.* at 933.

38. Until 2003, the INS was the principal agency charged with administering the immigration laws. In 2003, the INS was abolished and most of its responsibilities were transferred to the newly created Department of Homeland Security. See DAVID A. MARTIN ET AL., FORCED MIGRATION: LAW AND POLICY 76 n.3 (2007).

All INS adjudicators are to give careful consideration to applications from nationals from the People's Republic of China who express a fear of persecution upon return to the PRC because they *refuse to abort* a pregnancy or *resist sterilization* after the birth of a second or subsequent child in violation of Chinese Communist Party directives on population. . . . [I]t may be appropriate to view such refusal as an act of *political defiance* sufficient to establish refugee status under 8 U.S.C. § 1101(a)(42)(A).³⁹

Although the memorandum provided guidance to INS's field officers, it suffered two legal shortcomings: it was not legally binding and was not addressed to the Board whose precedential decisions were binding on all INS personnel. These legal shortcomings, therefore, left open the possibility that subsequent Board decisions might disregard the memorandum and reach an opposite conclusion.

One year after Meese's memorandum, the Board decided *Matter of Chang*, the first reported case to address the issue of eligibility for asylum based on an applicant's opposition to the OCP.⁴⁰ In *Chang*, a Chinese male claimed that he and his wife had two children in China.⁴¹ The local government attempted to forcibly sterilize both of them to prevent them from having more children.⁴² He managed to flee China.⁴³ In his asylum application, he argued that he was a member of a social group comprised of those who opposed the OCP and therefore was eligible for asylum.⁴⁴

The Board disagreed. After discrediting Meese's memorandum as not legally binding,⁴⁵ the Board determined that the applicant could not be protected unless it was proven that the OCP was applied more harshly to his particular group.⁴⁶ Additionally, if local officials were the ones carrying out the alleged persecutions, the applicant had to show that redress was unavailable from higher levels of government.⁴⁷ Because it was nearly impossible for an applicant to satisfy both requirements, *Chang* effectively foreclosed OCP-based asylum applications.⁴⁸

Despite the fluctuation of U.S. policy on OCP-related claims during the period before the Illegal Immigration Reform and the Immigrant Responsibility Act ("IIRIRA"), one theme remained consistent: the policy targeted Chinese couples who suffered or feared persecution *while in China* due to the coercive implementation of the OCP. This is evidenced by Meese's memorandum, which clearly stated

39. Liu Di Wang v. Reno, 862 F. Supp. 801, 801 n.4 (E.D.N.Y. 1994) (quoting from the Memorandum from Edwin Meese II, Attorney General, to Alan C. Nelson, Commissioner, Immigration & Naturalization Service (August 5, 1988)) (emphasis added).

40. Sicard, *supra* note 19, at 933.

41. *Matter of Chang*, 20 I&N. Dec. 38, 39 (BIA 1989).

42. *Id.*

43. *Id.*

44. *Id.* at 43.

45. *See id.*

46. *Id.* at 45. The Board justified this requirement by stating that the implementation of the OCP was not "on its face persecutive." *Id.* at 43–44.

47. *Id.* at 45.

48. Jordan, *supra* note 4, at 239–40.

that asylum was available to those who “refuse to abort a pregnancy” or “resist sterilization.” Similarly, the *Chang* case was decided on a factual scenario where a Chinese husband, after fathering two children in China, refused to be forcibly sterilized and fled the country. Thus, even though U.S. asylum policy on OCP-related asylum claims evolved overtime, the foundation upon which it was formed remained the same. I term this foundation as “China-based claims,” and I argue that Congress enacted Section 601 of the IIRIRA to address these China-based claims.

C. SECTION 601: TARGETING CHINA-BASED ONE-CHILD-POLICY CLAIMS

Congress passed IIRIRA in 1996.⁴⁹ Section 601 of IIRIRA repealed *Chang* and allowed OCP-based applicants to gain asylum eligibility.⁵⁰ A detailed examination of the legislative history of Section 601 reveals that it was intended to address China-based claims only.

During the Congressional debates leading up to the enactment of IIRIRA, the House of Representatives conducted four hearings on the OCP.⁵¹ All testifying witnesses focused exclusively on China-based claims. For example, one witness, an asylum seeker, recounted the story of how she aborted her third child how “cadres of the local government” forcibly sterilized her.⁵² Another witness, also an asylum seeker, stated that she was forced to have an abortion while six months pregnant.⁵³ She was also later forcibly sterilized.⁵⁴ Aird, the aforementioned former U.S. Census Bureau specialist who pioneered the study on the OCP, testified as well. He emphasized that couples in China who had two or more children would be sterilized,⁵⁵ and recounted the periods in time when coercive methods were at their peak.⁵⁶ He also criticized *Chang*.⁵⁷

49. *See supra* note 1.

50. *See infra* notes _____. For those interested in the fate of *Chang*, Sicard’s article provided an excellent account. Three weeks after the Board decided *Chang*, the Tiananmen Square incident occurred triggering an anti-China-communism sentiment within Congress. The Bush Administration deferred enforcing departure of Chinese nationals in the U.S. for a year, and Congress proposed the Armstrong-DeConcini Amendment to the Emergency Chinese Immigration Relief Act of 1989 for the express purpose of overruling *Chang*. The Amendment, however, was vetoed by President Bush. President Bush instead directed the Attorney General to give greater consideration to those who claimed persecution based on China’s coercive population control methods. But the Attorney General never promulgated a final rule to overrule *Chang*. As a result, *Chang* remained controlling law. When President Clinton took office, he initially sought to deter mass immigration from China and declared that his administration would follow *Chang*. It was not until 1994 when President Clinton changed his position and supported Congressional action to provide shelter to those who might be harmed in China due to its one-child policy. *See Sicard, supra* note 21, at 933–36. For a defense of the OCP and *Chang*, see Mona Ma, *A Tale of Two Policies: A Defense of China’s Population Policy and An Examination of U.S. Asylum Policy*, 59 CLEV. ST. L. REV. 237 (2011).

51. *Coercive Population Control in China: Hearings Before the Subcomm. on Int’l Operations and Human Rights of the H. Comm. on Int’l Relations*, 104th Cong. 1 (1995).

52. *Id.* at 56–59 (statement of Chen Yun Fei, Asylum Seeker).

53. *Id.* at 60 (statement of Hu Shuye, Asylum Seeker).

54. *Id.*

55. *Id.* at 5 (statement of John Aird, Demographer).

56. *Id.* at 8–9, 12.

57. *Id.* at 13–14

Representative Chris Smith (R-NJ), the chairman of the House Subcommittee on International Operations and Human Rights, arranged and presided over the hearings.⁵⁸ He later introduced a provision that eventually became Section 601 of IIRIRA. This provision would amend INA's definition of "refugee" by adding:

For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political 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.⁵⁹

In justifying this amendment, Smith, during the floor debate, told the story of thirteen Chinese women in INS detention at the time: "Five of these women had fled China after being forced to have abortions" and "[o]thers had been forcibly sterilized, or had escaped after being ordered to undergo abortion and/or sterilization."⁶⁰ It is important to note that Smith's account addressed only China-based claims. Smith also tried to assure his colleagues that his amendment would not open the floodgate for Chinese asylum seekers. Commenting on the "track record" of OCP-based asylum seekers, Smith stated that "[t]he number of [such] people involved . . . is very small" because historically "[t]he number of people granted asylum on the ground of persecution for resistance to the PRC population control policy was *between 100 and 150 per year* – not 1.2 billion."⁶¹ Aware of the potential for abuse and his role in advocating for the amendment, Smith hedged his assurances by arguing that "[p]eople who are willing to lie in order to get asylum will simply switch to some other story" and that there was no evidence "that denying asylum to people whose claims are based on forced abortion or forced sterilization will be of any use in preventing false claims."⁶² According to Smith, "[t]he solution to credibility problems is careful case-by-case adjudication, not wholesale denial."⁶³

The House Judiciary Committee passed Smith's amendment, along with the entire immigration reform bill in 1996.⁶⁴ The Committee Report explained that "[t]he primary intent of Section [601] is to overturn several decisions of the Board of Immigration Appeals, principally *Matter of Chang* and *Matter of G-*."⁶⁵ It then justified Section 601 by referring to China-based claims:

58. *Id.* at 1, 29, 53 (statements of Representative Christopher H. Smith, Chairman, Subcomm. on Int'l Operations and Human Rights of the H. Comm. on Int'l Relations).

59. Immigration in the Nat'l Interest Act of 1995, H.R. 2002, 104th Cong. § 522 (as recommended by H. Comm. on the Judiciary, March 4, 1996).

60. 142 CONG. REC. 6008 (1996) (statement of Rep. Christopher H. Smith).

61. *Id.* (emphasis added).

62. *Id.* at 6009.

63. *Id.*

64. H.R. Rep. No. 104-469, pt. 1 at 1 (1996).

65. *Id.* at 173. The Board reiterated the validity of *Chang* in *Matter of G-*, 20 I. & N. Dec. 764, 765

In the People's Republic of China, some women with "unauthorized" second or third pregnancies are subjected to involuntary abortions, often late in their pregnancies. Both men and women who have met their "quota" for children may be forcibly sterilized. Couples with unauthorized children are subject to excessive fines, and sometimes their homes and possessions are destroyed. These measures are carried out by government agents, at the regional or local level.

The United States should not deny protection to persons subjected to such treatment⁶⁶

As Smith's amendment made its way around the House, the Senate started its own debate on another immigration reform bill.⁶⁷ Senator Mike DeWine (R-OH), introduced a provision that was very similar to the amendment that Smith had introduced in the House.⁶⁸ Arguing for his provision, DeWine spoke of Chinese women seeking asylum, ranging from "a college teacher *in China* who is forced to have not one, two, three, but four abortions by her government" to a woman who was notified by a "local commune sterilization committee" to "report in and get sterilized" immediately after the birth of her second child.⁶⁹ Responding to concerns that the U.S. "would face a deluge of millions of people flooding our shores" should the provision become law, DeWine also stated that only "*between 100 and 150 people*" would benefit from this provision annually.⁷⁰

Ultimately, Congress enacted Section 601 of IIRIRA, which used the language found in Smith's amendment.⁷¹ As the legislative history illustrates, Congressional intent was to overrule *Chang* and address only China-based claims.

(BIA 1993). Because Section 601 of the IIRIRA is identical to Smith's amendment, which is Section 522 of a 1995 House bill, I replaced Section 522 as used in the Judiciary Committee Report with Section 601. For those who are interested, the 1995 House bill is the Immigration in the National Interest Act of 1995.

66. H.R. Rep. No.104-469, pt. 1. at 174 (1996) (emphasis added).

67. 142 CONG. REC. S4, 590 (daily ed. May 2, 1996) (debating the Immigration Control and Financial Responsibility Act of 1996).

68. 142 CONG. REC. S4, 592 (daily ed. May 2, 1996). Specifically, Senator DeWine proposed the following:

SEC. 197. PERSECUTION FOR RESISTANCE TO COERCIVE POPULATION CONTROL METHODS.

"Section 101(a)(42) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(42)) is amended by adding at the end the following: 'For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or 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.'"

Id.

69. *Id.* at 4,593 (statement of Sen. Richard M. DeWine) (emphasis added).

70. *Id.* (emphasis added).

71. Pub. L. No. 104-208, Div. C, § 601, 110 Stat. 3009, 3009-689 (1996) (codified as amended 8 U.S.C. § 1101(a)(42)).

Indeed, the House Judiciary Committee Report specifically warned against accommodating any non-China-based claims: “[Section 601] is not intended to protect persons *who have not actually been subjected to coercive measures or specifically threatened with such measures*, but merely speculate that they will be so mistreated at some point in the future.”⁷²

II. THE PROLIFERATION OF U.S.-BASED CLAIMS AND THE LEGAL VENUE TO ASSERT THEM

From the perspective of Asian American jurisprudence, Section 601 of IIRIRA is arguably a piece of pro-Asian legislation: it leveled the playing field for Chinese asylum applicants vis-à-vis applicants from other countries. Specifically, a Chinese asylum applicant with an OCP-based claim would have the same opportunity to go through the judicial process in seeking the same immigration benefits as other asylum seekers.⁷³ Indeed, before Section 601 was passed, a commentator likened *Chang* to the Chinese Exclusion Acts of the late nineteenth century and argued that it was just another “manifestation of anti-Chinese bias in U.S. immigration law and practice.”⁷⁴ I argue, however, that Section 601 has produced unintended incentives for certain Chinese immigrants to prolong their illegal stay in the United States, and to use the statute as a second or even third chance to apply for asylum. As a result, the statute created an unfavorable view towards Chinese immigrants among courts and the Board which contributed and reinforced the law-breaking image of Chinese asylum seekers in mass media.

A. THE PROLIFERATION OF U.S.-BASED CLAIMS

In the years immediately following the passage of IIRIRA, Chinese asylum seekers’ OCP claims were exclusively based on facts occurring within China.⁷⁵ As time went by, however, a new class of claims began to emerge.

Consider the case of a woman named Xue Xian Jiang. Jiang illegally entered the U.S. through Miami in May 1999 and was charged as removable for not possessing a valid immigrant visa.⁷⁶ She missed her immigration court hearing and was ordered removed *in absentia*.⁷⁷ Instead of leaving the United States, she moved to New York City, married a fellow Chinese citizen in 2002, and gave birth to two

72. R. Rep. No.104-469, pt. 1, at 174 (1996) (emphasis added). Because Section 601 of the IIRIRA is identical to Section 522 of the House bill, I replaced Section 522 as used in the Judiciary Committee Report with Section 601.

73. The House Judiciary Committee Report made it clear that Section 522 was not “intended to lower the evidentiary burden of proof for any alien” and emphasized that “the burden of proof remains on the applicant, as in every other case, to establish by credible evidence that he or she has been subject to persecution – in this case, to coercive abortion or sterilization – or has a well-founded fear of such treatment.” *Id.*

74. Jan C. Ting, “*Other Than a Chinaman*”: How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration, 4 TEMP. POL. & CIV. RTS. L. REV. 301, 303–04, 312–13 (1995).

75. See *supra* Part I.B.

76. Jiang v. U.S. Att’y Gen., 568 F.3d 1252, 1254 (11th Cir. 2009).

77. *Id.*

children in 2002 and in 2004 respectively.⁷⁸ She then filed a motion to reopen her case in 2006.⁷⁹ The type of claim she asserted in that motion is unknown, but the motion was denied.⁸⁰ Jiang, however, did not give up. In 2007, she filed another motion to reopen.⁸¹ This time, she asserted that she could be forcibly sterilized if she returned to China because she bore two *American-born* children, which allegedly violated the OCP.⁸²

Consider another case involving a man named Hang Chen. Chen entered the U.S. without inspection in 1996 and was charged as removable on that ground.⁸³ He applied for asylum in 1997 based in part on religious persecution.⁸⁴ After hearing Chen's case, an IJ determined that he was not credible and denied his application.⁸⁵ The IJ, however, granted Chen voluntary departure.⁸⁶ Although Chen's lawyer told the government that Chen complied with the departure order, Chen never did.⁸⁷ He stayed in the United States, formed a family, and fathered three children, all of whom were born between 2004 and 2009.⁸⁸ In 2010, after being apprehended again by the government, he filed a motion to reopen his case, arguing ineffective assistance of his former counsel.⁸⁹ This argument was unsuccessful.⁹⁰ Undeterred, Chen immediately filed a second motion to reopen after the denial of his first motion. This time he expressed fear of being forcibly sterilized upon returning to China.⁹¹ As in Jiang's case, Chen based his motion in part on his three *American-born* children, claiming that he violated the OCP because he fathered multiple children.⁹²

Jiang and Chen represent a growing number of Chinese asylum seekers who have raised what I term U.S.-based OCP claims. Unlike China-based claimants, U.S.-based OCP claimants have neither suffered nor been threatened with any coercive population control methods while *in China*. In fact, most of them were not married and did not have any children when they came to the United States. After they settled in, they started to raise families and became parents of two or more U.S.-born children. At that point, they applied for asylum, claiming fear of forcible sterilization if they were forced to return to China and their *American-born* children formed the basis of their alleged violation of the OCP.

Although the exact number of U.S.-based OCP claims is unclear, they are on the rise. One federal court commented in 2013 that it has "received scores of

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Hang Chen v. Holder*, 675 F.3d 100, 102 (1st Cir. 2012).

84. *Id.*

85. *Id.* at 103.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 104.

92. *Id.*

strikingly similar [claims] . . . in recent years” and handling such cases has become a “routine.”⁹³ In 2008, another federal court considering such claims said: “We address these [U.S.-based claims] in a single opinion because similar well-founded fear claims are now pending in *hundreds* of petitions for review in this court.”⁹⁴ Indeed, a survey of recent federal courts of appeals’ dockets showed that U.S.-based claims were found in all circuits,⁹⁵ except in the Federal Circuit, which does not hear immigration cases,⁹⁶ and the D.C. Circuit, whose jurisdiction does not cover any immigration cases.⁹⁷

U.S.-based claims are possible because of the discrepancy between the broad language of Section 601 and the relatively narrow goal Congress intended to achieve. As I argued in Part I, Section 601 was intended to target China-based claims only. But, the statutory language of Section 601 fails to accurately reflect this legislative intent. Under Section 601, any persons who demonstrate a “well-founded fear” that they “will be forced to undergo [forced abortion or forced sterilization] or subject to persecution for [failure, refusal or resistance to undergo such procedure]” are deemed to be eligible for asylum on account of their political opinion.⁹⁸ The plain meaning of Section 601, therefore, does not differentiate between China-based claims and U.S.-based claims. So long as a U.S.-based claimant is able to carry his burden of proof,⁹⁹ Section 601 would favor granting asylum.

Because Section 601 does not differentiate U.S.-based claims from China-based claims, it has incentivized the filing of U.S.-based claims. This is especially true of Chinese asylum seekers who failed on their first attempt to apply for asylum and have been ordered removed. The sheer volume of motion to reopen asserting U.S.-based OCP claims is a testament to Section 601’s popularity amongst Chinese asylum seekers. Because these cases best illustrate the unintended consequences of Section 601, I will focus the rest of my comment on them. Before diving more deeply into the issue, I will first provide a brief explanation of the legal standard for a motion to reopen.

B. MOTION TO REOPEN IN THE CONTEXT OF U.S.-BASED ONE-CHILD-POLICY CLAIMS

A motion to reopen is a peculiar aspect of the United States’ asylum regime. Typically, once an alien has his asylum claim adjudicated by an IJ and has exhausted all appeals, the case is closed. Congress, however, permits the alien to move the

93. *Ni v. Holder*, 715 F.3d 620, 622 (7th Cir. 2013) (emphasis added).

94. *Shao v. Mukasey*, 546 F.3d 138, 142 (2d Cir. 2008) (emphasis added).

95. I searched “motion to reopen” and “one child” or “family planning,” using WestlawNext and Lexisnexis. See Appendix.

96. See 28 U.S.C. § 1295 (2012). The Court of Appeals for the Federal Circuit does not have jurisdiction to hear immigration cases.

97. *EOIR Immigration Court Listing*, DEP’T OF JUSTICE, <http://www.justice.gov/eoir/sibpages/ICadr.htm> (last visited April 2014).

98. 8 U.S.C. § 1101(a)(42) (2013).

99. See *Jiang v. Att’y Gen. of U.S.*, 568 F.3d 1252 (11th Cir. 2009); *Zhang v. U.S. Att’y Gen.*, 572 F.3d 1316 (11th Cir. 2009). As I show in Part III, the burden of proof put on U.S.-based claimant is a heavy one. But it is not something impossible to satisfy. Courts, though rare, have granted motions to reopen filed by U.S.-based OCP claimants

Board to reopen the case. Such motions typically can only be filed once, and must be filed within 90 days after the asylum adjudication becomes final, i.e., when the Board affirms the IJ's decision.¹⁰⁰ The numerical and time limits, however, will not apply if the alien seeks reopening "based on changed circumstances arising in the country of nationality . . . if such evidence is material and was not available and could not have been discovered or presented at the previous hearing."¹⁰¹ Commonly referred to as a "changed country condition" motion, it was designed to ensure "that aliens are getting a fair chance to have their claims heard."¹⁰²

Good intentions aside, "changed country condition" motions have become the predominant legal vehicle through which Chinese asylum seekers raise their U.S.-based OCP claims. This is because the 90-day limit typically will have already passed between the time of the final adjudication of asylum seekers' first claims and when they give birth to their second or third U.S. born child. These applicants are, therefore, time-barred from taking advantage of a motion to reopen unless they resort to the "changed country condition" route.¹⁰³

Congress has not specified how the "changed country condition" motion should be applied in the context of U.S.-based OCP claims. Thus, this task falls on the Board. Through a series of precedential decisions,¹⁰⁴ the Board has outlined a three-prong analytical framework. Under the framework, an alien can successfully reopen a removal proceeding if he presents:

genuine, authentic, and objectively reasonable evidence [to] prove that (1) relevant change in country conditions occurred; (2) the [alien] has violated family planning policy as established in that alien's local province, municipality, or other relevant areas, and (3) the violation would be punished in a way that would give rise to a well-founded fear of persecution.¹⁰⁵

Although the Board emphasizes its "case-by-case" approach in adjudicating "changed country condition" motions,¹⁰⁶ it places a very heavy burden on an U.S.-based OCP claimant.¹⁰⁷ Indeed, there is anecdotal evidence suggesting that the Board wanted to use these precedential decisions to deter any future filing of such motions.¹⁰⁸ The reality, of course, is far from what the Board had hoped for. A

100. 8 U.S.C. § 1229a(c)(7)(C) (2012); 8 C.F.R. § 1003.2(c)(3)(ii) (2013).

101. *Id.*

102. *Kucana v. Holder*, 558 U.S. 233, 248 (2010).

103. *See Guo v. Ashcroft*, 386 F.3d 556 (3d Cir. 2004). Such cases, however, are rare because of the timing issue discussed. It is possible that a U.S.-based OCP claimant parented a child in China and gave birth to or became pregnant of a U.S. citizen child within the 90-day reopen period.

104. *Matter of S-Y-G-*, 24 I. & N. Dec. 247, 256-57 (BIA 2007); *Matter of J-W-S-*, 24 I. & N. Dec. 185 (BIA 2007).

105. *Matter of S-Y-G-*, 24 I. & N. Dec. at 251; *See Matter of C-C-*, 23 I. & N. Dec. 899 (BIA 2006).

106. *Id.*

107. *Id.*

108. *See, e.g., Zheng v. Att'y Gen. of U.S.*, 549 F.3d 260, 268 (3d Cir. 2008) ("[T]he [Board] did little more than quote passages from its earlier decision . . . without identifying-let alone discussing-the various statements contained in the record."). In a number of cases, the Board simply quoted language from its precedential decisions and then denied a motion to reopen that raised U.S.-based OCP claims;

record number of U.S.-based OCP claims flooded into the system,¹⁰⁹ forcing the Board and the federal courts reviewing the Board's decisions to confront them.

III. THE IMPACT OF U.S.-BASED CLAIMS ON THE BOARD, FEDERAL JUDICIARY AND MASS MEDIA

In this Part, I will present cases that demonstrate the Board and federal courts' deep suspicion towards U.S.-based OCP claims as well as their unfavorable views of the individuals who file them. Some of these views are subtle, such as those evidenced by the Board's excessive use of discretion in denying these claims. Some of these views are explicit, such as federal courts' statements expressing disbelief over such claims. The purpose is not to pass judgment on whether the Board or federal courts have reached the correct result, but to show that the discrepancy between the intended purpose of Section 601 and the plain language that incentivized U.S.-based OCP claims has resulted in unfavorable views about certain groups of Chinese asylum seekers, both within the formal asylum system and in mass media.

A. THE BOARD: PUSHING THE LIMITS OF ITS DISCRETION

The hallmark of the Board's disbelief of U.S.-based OCP claims is the way in which it uses its discretion. Anecdotal evidence suggests that the Board, sometimes with the blessing of federal courts, has exercised discretion against U.S.-based OCP claimants to a near-abusive extent. I will focus on three types of near-abusive discretion: (1) freely taking administrative notice of extra-record evidence; (2) freely discrediting a claimant's unauthenticated evidence; and (3) ignoring or cherry-picking a claimant's evidence.

1. Taking Administrative Notice of Extra-Record Evidence

The Board's own regulation permits it to take "administrative notice of *commonly known facts* such as current events or the contents of official documents."¹¹⁰ Whether or not to take notice of a particular document or event, however, is within the Board's discretion. As federal courts have recognized, the Board enjoys "wide latitude in taking official notice."¹¹¹ This does not mean that the exercise of such discretion is limitless. The regulation itself requires the Board only to note "commonly known facts." In addition, due to concern about depriving an applicant's right to due process, federal courts have generally required the Board to give applicants an opportunity to challenge both the truth and significance of facts of which the Board

Xi Que Li v. Att'y Gen. of U.S., 336 Fed. Appx. 140, 142 (3d Cir. 2009) ("The [Board]'s entire analysis of the evidence Li submitted amounted to a discussion of [its precedential decision] and a conclusory statement.").

109. See *supra* note 92–93.

110. 8 C.F.R. § 1003.1(d)(3)(iv) (2013) (emphasis added).

111. Kaczmarczyk v. INS, 933 F.2d 588, 596 (7th Cir. 1991). See also *Baka v. INS*, 963 F.2d 1376 (10th Cir. 1992); *Rivera-Cruz v. INS*, 948 F.2d 962 (5th Cir. 1991) (holding that taking administrative notice is "committed to the broad discretion" of the Board).

has taken notice.¹¹² The concern is particularly acute in the context of a motion to reopen filed with the Board. If the Board takes notice of facts unfavorable to the alien, the alien will not be able to present additional evidence on appeal to refute such facts, leaving the reviewing courts a record favorable to the government.¹¹³

An examination of the relevant cases reveals that the Board *almost always* takes administrative notice of the U.S. State Department's 2007 China Profile of Asylum Claims and Country Conditions ("2007 Profile") when adjudicating U.S.-based OCP claims.¹¹⁴ State Department officers "with country-specific expertise and experience" wrote the 2007 Profile, and it was reviewed by "overseas posts and within the Department."¹¹⁵ It was intended to provide asylum adjudicators, including the Board, with information that may be relevant to their decisions.¹¹⁶

To understand the 2007 Profile's popularity with the Board, it is worthwhile to explore its content and the evidentiary weight the Board has generally afforded to documents produced by the State Department. According to the 2007 Profile, U.S. consulate officers conducted interviews with Chinese visa applicants who represented "a wide cross-section of society," and they found "no evidence of forced abortion or property confiscation."¹¹⁷ In addition, consulate officers who visited Fujian province where most U.S.-based OCP claimants are from¹¹⁸ found no "cases of physical force employed in connection with abortion or sterilization."¹¹⁹ With respect to U.S.-born children, the 2007 Profile states "U.S. officials in China are *not aware of* [any] official policy, at national or provincial level, mandating the

112. See, e.g., *Chhetry v. U.S. Dep't of Justice*, 490 F.3d 196, 200 (2d Cir. 2007); *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1099 (10th Cir. 1994); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1029 (9th Cir. 1991).

113. See, e.g., *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1283 (11th Cir. 2001) (holding that a reviewing court will not consider evidence not before the Board).

114. OFFICE OF COUNTRY REPORTS & ASYLUM AFFAIRS, DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, CHINA PROFILE OF ASYLUM CLAIMS AND COUNTRY CONDITIONS (2007) [hereinafter 2007 PROFILE]. For cases where the Board took administrative notice of the 2007 Profile. See e.g., *Lin v. Holder*, 540 Fed. Appx. 500, 505 (6th Cir. 2013) (permitting the Board to take administrative notice of the 2007 Profile by referring to its precedential decision that considered the Profile); *Lin v. U.S. Att'y Gen.*, 441 Fed. Appx. 667, 670 (11th Cir. 2011) (same); *Zheng v. Mukasey*, 546 F.3d 70, 73 (1st Cir. 2008) (same). See also *Chen v. Holder*, 675 F.3d 100, 104, 108 (1st Cir. 2012) (permitting the Board to take administrative notice of the 2007 Profile); *Lin v. Holder*, 452 Fed. Appx. 369, 372 (4th Cir. 2011) (same); *Liu v. Holder*, 412 Fed. Appx. 860, 863 (6th Cir. 2011) (same); *Chen v. Holder*, 397 Fed. Appx. 111, 114 (6th Cir. 2010) (same); *Liang v. Holder*, 626 F.3d 983, 990 (7th Cir. 2010) (same); *Shao v. U.S. Att'y Gen.*, 346 Fed. Appx. 552, 554-55 (11th Cir. 2009) (same). Because some court of appeals summarily affirmed the Board's denial of U.S.-based OCP claims, details of the Board's decisions are not available given that those decision are not published. See, e.g., *Zhang v. Holder*, 481 Fed. Appx. 952 (5th Cir. 2012) (affirming, summarily, the Board's denial of motion to reopen); *Dong v. Mukasey*, 286 Fed. Appx. 148 (5th Cir. 2008) (same).

115. 2007 PROFILE, *supra* note 98, at 1.

116. *Id.*

117. *Id.* at 27 (emphasis added).

118. See the Appendix attached to this article. See also *Ji Cheng Ni v. Holder*, 715 F.3d 620, 622 (7th Cir. 2013) ("The courts of appeals have received scores of strikingly similar petitions for review involving Fujian Province in recent years.").

119. 2007 PROFILE, *supra* note 98, at 27.

sterilization of one partner of couples that have given birth to two children, at least one of whom was born abroad.”¹²⁰ Furthermore, U.S. officials found that in Fujian Province, “children born abroad, if not registered as permanent residents of China . . . are *not* counted against the number of children allowed under China’s family planning law.”¹²¹ Even when those children are registered as Chinese permanent residents and therefore counted towards the number of children allowed, the sanctions against parents would be “economic penalties” rather than forced sterilization or abortion.¹²²

Undoubtedly, the 2007 Profile contains statements damaging to U.S.-based OCP claimants. If admitted into evidence, the 2007 Profile would, at the very least, undermine a claimant’s efforts to satisfy two of the three requirements necessary to successfully pursue a motion to reopen: the violation prong¹²³ and the persecution prong.¹²⁴ If a claimant’s first removal proceeding was conducted before 2007, the 2007 Profile would also cut against the “changed country condition” prong, because it suggests that the Chinese government has reduced its use of physical coercive methods in enforcing the OCP since the initial proceeding and as a result the country condition in China either remains unchanged or is getting “better.”¹²⁵

The evidentiary weight that courts allow the Board to give to documents like the 2007 Profile has worsened the situation for a U.S.-based OCP claimant. Federal courts have consistently given State Department country reports more evidentiary weight than other evidence.¹²⁶ Saone court put it, State Department reports are “usually the *best* available source of information” on country conditions.¹²⁷ Consequently, the Board aggressively took administrative notice of the 2007 Profile, especially the portions most damaging to U.S.-based OCP claimants. In fact, this is exactly what the Board did when it rendered its precedential decisions on U.S.-based OCP claims.¹²⁸

120. *Id.* at 31 (emphasis added).

121. *Id.* at 32 (emphasis added).

122. *Id.*

123. *See, e.g.,* Shao v. U.S. Att’y Gen., 346 Fed. Appx. 552, 554-55 (11th Cir. 2009) (endorsing the Board’s reliance on the 2007 Profile to conclude that foreign-born children will not be counted against the number of children allowed under the OCP).

124. *See, e.g.,* Chen v. Holder, 397 Fed. Appx. 111, 114 (6th Cir. 2010) (endorsing the Board’s reference to the 2007 Profile and its conclusion that parent with foreign-born children will not be subject to forced sterilization).

125. *See, e.g.,* Liang v. Holder, 626 F.3d 983, 991 (7th Cir. 2010) (comparing the 2007 Profile with State Department’s 2002 Country Report on China’s Human Rights Practice and concluding that “conditions have remained largely the same”).

126. *See* Victoria Rapoport, *The Politicization of United States Asylum and Refugee Policies*, 11 SCHOLAR 195, 212 (2009).

127. Xiao Ji Chen v. U.S. Dep’t of Justice, 471 F.3d 315, 341–42 (2d Cir. 2006) (internal quotation omitted) (emphasis added); *see also* Kazemzadeh v. U.S. Att’y Gen., 577 F.3d 1341, 1354 (11th Cir. 2009) (accorded “special weight” to Department of States reports on country conditions).

128. *See* In re J-W-S-, 24 I. &N. Dec. 185, 190–91 (B.I.A. 2007) (taking administrative notice of and citing extensive the 2007 Profile). *Cf.* In re C-C-, 23 I. &N. Dec. 899, 902–03 (B.I.A. 2006) (taking administrative notice of and citing extensive of the 2005 China Profile of Asylum Claims and Country Conditions, which contains statements very similar to those in the 2007 Profile); In re S-Y-G-, 24 I. &N.

Such practice, however, is problematic for two reasons. First, it is disputable as to whether the statements made in the 2007 Profile are “commonly known facts,” at least based on available materials written in English. For example, after doing research on its own initiative, such as visiting the English version of Chinese government websites, the Seventh Circuit Court of Appeals concluded that there was “considerable uncertainty about the application of the one-child policy, and about the sanctions for violating it when a second or subsequent Chinese child is born abroad.”¹²⁹ The court found some evidence suggesting that U.S.-born children could sometimes be counted against the number of children permitted under the OCP, and sterilization of returning parents could be “mandatory” in certain areas.¹³⁰ Given this “fog of uncertainty,”¹³¹ the court recommended that instead of relying heavily on State Department reports, the Board establish a pool of “vocational experts” so that “recurrent issues” such as U.S.-based OCP claims could be handled uniformly.¹³²

The disputable nature of the 2007 Profile makes it even more important for U.S.-based OCP claimants to have the opportunity to challenge it. However, the Board has never given claimants such an opportunity,¹³³ and courts have condoned the Board’s practice. The Second Circuit Court of Appeals, for example, gave such practice a pass despite acknowledging its reluctance to do so.¹³⁴ The court reasoned that as long as the 2007 Profile was not the “sole basis for denying . . . relief,” the Board did not deprive a claimant’s procedural due process rights.¹³⁵ Perhaps worried that the standard it set was too easy for the Board to satisfy, the court cautioned in a footnote against continued use of the tactic: “[W]e strongly encourage the [Board] to adopt procedures to alert the parties of any agency intent to take judicial notice of extra-record facts and to afford them an opportunity to be heard.”¹³⁶

The warning, along with the recommendation for hiring vocational experts, has largely been ignored.¹³⁷ No pool of vocational experts has ever been established,

Dec. 247, 256–57 (B.I.A. 2007) (same).

129. *Qiu Yun Chen v. Holder*, 715 F.3d 207, 214 (7th Cir. 2013) (Posner, J.). In *Qiu Yun Chen*, the Board again relied upon the 2007 Profile. *Id.* at 210. Posner, however, was not satisfied with what the 2007 Profile stated. He took an unusual step: doing research himself, including visiting the English version of Chinese government website. *Id.* at 213–14.

130. *Id.* at 212–14.

131. *Id.* at 214.

132. *Chun Hua Zheng v. Holder*, 666 F.3d 1064, 1068 (7th Cir. 2012) (Posner, J.).

133. Some U.S.-based OCP claimants, probably under the advice of their counsels who know that the Board would take notice of the 2007 Profile, have preventively challenged the 2007 Profile. *See Hang Chen v. Holder*, 675 F.3d 100, 108 (1st Cir. 2012) (rejecting preventive challenge of the 2007 Profile); *Ji Cheng Ni v. Holder*, 715 F.3d 620, 625 (7th Cir. 2013) (same). This is, however, different from a voluntary offer by the Board to allow claimants to cast doubt on the Profile after taking administrative notice of it.

134. *Shao v. Mukasey*, 546 F.3d 138, 167–68 (2d Cir. 2008).

135. *Id.*

136. *Id.* at 167 n.29.

137. The Board has not formed a panel of vocational experts.

and the Second Circuit has not questioned the Board's practice since.¹³⁸ In the cases I examined, the Board routinely takes administrative notice of the 2007 Profile without giving notice to U.S.-based OCP claimants.¹³⁹ This practice has been so frequent that it is debatable whether the Board has ever actually exercised discretion or whether it has been enforcing a *de facto* rule. In some cases, the Board did not even bother to refer to the 2007 Profile and quote its language. Rather, it simply cited its precedential decisions that quoted the 2007 Profile, thereby referring to the 2007 Profile indirectly.¹⁴⁰

2. Discrediting Claimant's Unauthenticated Evidence

The Board's regulation requires the authentication of an "official record."¹⁴¹ It mandates that such record must be either "evidenced by an official publication" or "certified by an officer in the Foreign Service of the United States, stationed in the foreign country where the record is kept."¹⁴² However, the Board has discretion to determine whether an unauthenticated foreign official document can be excluded from evidence, and what evidentiary weight should be given such document if it is admitted into evidence.¹⁴³ Courts have limited the exercise of this discretion, recognizing that "it may not be possible for an applicant filing a motion to reopen to obtain from a foreign government valid and proper authentication of a document [that] purports to threaten persecution."¹⁴⁴ Thus, even if the regulation only provides two methods of authentication, courts have expanded the available methods to "any recognized procedure,"¹⁴⁵ which includes "offer[ing] information on how the document was obtained, identify[ing] the source of the information contained in the document, or show[ing] that there are consistencies between the information

138. The Second Circuit went even further: It basically adopted a categorical approach to decide motions to reopen filed by U.S.-based OCP claimants. *See infra* notes 201-209 and accompanying text.

139. *See supra* note 98 and accompanying text.

140. *See, e.g.,* Zheng v. Mukasey, 546 F.3d 70, 73 (1st Cir. 2008) (permitting the Board to take administrative notice of the 2007 Profile by referring to its precedential decisions that considered the Profile); Xiang Can Lin v. Holder, 540 Fed. Appx. 500, 505 (6th Cir. 2013) (same); Bin Bin Lin v. U.S. Att'y Gen., 441 Fed. Appx. 667, 670 (11th Cir. 2011) (same)

141. 8 C.F.R. § 1287.6 (2013). The language of this provision is identical to 8 C.F.R. § 287.6 (2013). The only meaningful distinction is that 8 C.F.R. § 287.6 applies to proceedings before an Immigration Judge, whereas 8 C.F.R. § 1287.6 applies to proceedings before the Board. Because U.S.-based OCP claimants file motion to reopen overwhelmingly with the Board, I only address 8 C.F.R. § 1287.6.

142. 8 C.F.R. § 1287.6 (2013).

143. *See, e.g.,* Zheng v. Att'y Gen. 549 F.3d 260, 266 (3d Cir. 2008); Le Bi Zhu v. Holder, 622 F.3d 87, 92 (1st Cir. 2010).

144. Qin Wen Zheng v. Gonzales, 500 F.3d 143, 149 (2d Cir. 2007). Another court, when justifying the relaxation of authentication requirement, wrote: "It is obvious that one who escapes persecution in his or her own land will rarely be in a position to bring documentary evidence or other kinds of corroboration to support a subsequent claim for asylum Common sense establishes that it is escape and flight, not litigation and corroboration, that is foremost in the mind of an alien who comes to these shores fleeing detention, torture and persecution." Senathirajah v. INS, 157 F.3d 210, 215-16 (3d Cir. 1998).

145. Georgis v. Ashcroft, 328 F.3d 962, 969 (7th Cir. 2003); *see also* Shtarov v. Gonzales, 435 F.3d 711, 717 (9th Cir. 2001); Gen Lin v. Att'y Gen. of U.S., 700 F.3d 683, 687 (3d Cir. 2012); Jiang v. Gonzales, 474 F.3d 25, 29 (1st Cir. 2007).

contained in the otherwise unauthenticated document and authenticated documents.”¹⁴⁶ Additionally, courts have warned the Board to not automatically exclude a foreign official document *solely* because an asylum applicant fails to authenticate it.¹⁴⁷

For U.S.-based OCP claimants, the stakes are high as to how the Board exercises its discretion under the authentication regulation. To support their claim, claimants would typically proffer two types of evidence, among others: (1) letters from relatives and friends who are still in China and (2) documents from Chinese local family planning offices (collectively referred hereinafter as “China Documents”). Although in most of the cases I examined courts have only provided a brief summary of China Documents, one court opted to quote them in length, thereby vividly illustrating their significance to U.S.-based OCP claims.

That case involved two U.S.-based OCP claimants. One claimant’s mother wrote in a letter:

Recently, the Chinese government has *strengthened the enforcement* of the [OCP]. During the last year, there were a lot of enforced abortions and sterilizations in our hometown. The situation is *much worse* than before. For example, a resident in our village named Gamg Zheng has two daughters. He wanted to have a son. However, his wife, Hua Qin, was forced to undergo an involuntary sterilization on March 3. Secondly, there is a couple in our village, Mr. and Mrs. Jianping Chen. They have two daughters and also wanted a son. Unfortunately, Mr. Chen was sterilized in April, 2006¹⁴⁸

Another claimant submitted “what *purports to be*” a document authored by the government of his own town, which states: “Although you are currently residing in the United States, you are still a citizen of the People’s Republic of China who had three children, and therefore you will *definitely* be targeted [sic] . . . sterilization.”¹⁴⁹

Materials similar to those above would certainly bolster a U.S.-based OCP claim should they be admitted into evidence and given evidentiary weight. They would tend to show a stricter enforcement of the OCP, and courts have held that stricter enforcement, such as an increased use of forced sterilization and abortion, could constitute a “changed country condition.”¹⁵⁰ In addition, these materials would help to satisfy both the violation and persecution prongs because they would tend to prove that U.S.-born children are counted for OCP purposes, thereby endangering a returning parent with forceful sterilization. In fact, relying in part on

146. Fei Yan Zhu v. Att’y Gen. of U.S., 744 F.3d 268, 274 (3d Cir. 2014).

147. See, e.g., Liu v. Ashcroft, 372 F.3d 529, 532 (3d Cir. 2004); *Shtaro*, 435 F.3d at 717; Vatyán v. Mukasey, 508 F.3d 1179, 1182–84 (9th Cir. 2007).

148. Zheng v. Att’y Gen. of U.S., 549 F.3d 260, 264 (3d Cir. 2008) (emphasis added).

149. *Id.* at 263–64 (emphasis added).

150. Xiu Zhen Lin v. Mukasey, 532 F.3d 596, 598 (7th Cir. 2008); Ji Cheng Ni v. Holder, 715 F.3d 620, 627–29 (7th Cir. 2013); Li v. U.S. Att’y Gen., 488 F.3d 1371, 1375–76 (11th Cir. 2007); Jiang v. U.S. Att’y Gen., 568 F.3d 1252, 1258 (11th Cir. 2009); Zhang v. U.S. Att’y Gen., 572 F.3d 1316, 1320 (11th Cir. 2009).

similar materials, the Eleventh Circuit Court of Appeals granted a motion to reopen involving U.S.-based OCP claims.¹⁵¹ The same court, however, upheld the Board's denial of a motion to reopen in another case.¹⁵² It distinguished its precedent partly on the ground that letters provided by the claimant "did not state or indicate that local officials had changed or increased their enforcement of the family planning policy in [claimant's] area."¹⁵³

The Board, perhaps recognizing the significance of China Documents to U.S.-based OCP claimants, have systematically discredited these documents for lack of authentication.¹⁵⁴ The discretion has been exercised in a manner that likely results in a wholesale rejection of China Documents, disregarding their alleged source and whether efforts permitted by courts have been made to authenticate those documents. In some cases, the Board discredited all China Documents provided by a claimant because none of them were authenticated.¹⁵⁵ This directly contradicts the Board's own regulation, which only requires "official records" to be authenticated and does not cover unofficial documents such as letters from family members and relatives.¹⁵⁶ However, some courts failed to recognize this crucial distinction and simply rubberstamped the Board's decisions.¹⁵⁷ In other cases, the Board has discredited certain China Documents because a U.S.-based OCP claimant failed to authenticate them in the manner specified by the Board's regulation

151. *Jiang v. U.S. Att'y Gen.*, 568 F.3d 1252, 1258 (11th Cir. 2009). *Jiang* is an unusual case, not only because the Board did not take administrative notice of the 2007 Profile or cite to its precedential decisions on U.S.-based claims decided in 2007, but also because the Eleventh Circuit did not seem to have conducted a "thorough review" of the case as it claimed. *Id.* at 1254. The court did not consider any of the Board's precedents that are on point. Nor did it compare the country condition at the time *Jiang*'s removal proceeding was conducted with the country condition at the time she filed motion to reopen. A possible explanation of what the court did could be that it was simply mad at the Board's ignorance of the court's precedential decision *Li v. Att'y Gen.*, 488 F.3d 1371 (11th Cir. 2007), in which the court remanded the case to the Board for further consideration of evidence favorable to the U.S.-based OCP claimant. The *Jiang* court, citing *Li* extensively, concluded that *Jiang*'s case is of "no discernable difference" from *Li*'s case. *Id.* at 1258. It then took the very unusual step to direct the Board to grant the motion to reopen, rather than remanding the case which is what ordinarily a reviewing court would do. *Id.* This unusual move further evidenced the court's dissatisfaction with how the Board treated *Li*. *Id.*

152. *Wen Xiu Jiang v. U.S. Att'y Gen.*, 353 Fed. Appx. 201, 203, 206 (11th Cir. 2009).

153. *Id.*

154. *See, e.g., Le Bin Zhu v. Holder*, 622 F.3d 87, 91–92 (1st Cir. 2010) (upholding the Board's discrediting an unauthenticated notice from local Chinese government); *Hang Chen v. Holder*, 676 F.3d 100, 105, 107 (1st Cir. 2012) (upholding the Board's discrediting of all China Documents that were not authenticated); *Qi Hua Li v. Holder*, 354 Fed. Appx. 46, 48 (5th Cir. 2009) (same); *Gi Kuan Tsai v. Holder*, 505 Fed. Appx. 4, 8 (1st Cir. 2013) (upholding the Board's discrediting unauthenticated Chinese hospital records); *Chen v. Holder*, 397 Fed. Appx. 111, 114, 117 (6th Cir. 2010) (upholding the Board's discrediting an unauthenticated letter from local Chinese government). *But see Fei Yan Zhu v. Att'y Gen. of U.S.*, 744 F.3d 268, 274 (3d Cir. 2014) (criticizing the Board for discrediting unauthenticated documents regardless of whether efforts were made to authenticate them and if so why they failed).

155. *See, e.g., Hang Chen*, 675 F.3d at 105, 107; *Qi Hua Li*, 354 Fed. Appx. at 48.

156. *See supra* notes 141–143 and accompanying text; *see also Gebreeyesus v. Gonzales*, 482 F.3d 952, 955 (7th Cir. 2007) (holding that authentication is not required for "unsworn statements of facts or letters from family members").

157. *Hang Chen*, 675 F.3d at 107 (holding that the Board has discretion to discredit all of the unauthenticated China Documents which include "letters"); *Qi Hua Li*, 354 Fed. Appx. at 48.

despite the fact that courts have consistently held that authentication can be done in “any recognized procedure.”¹⁵⁸ For instance, the Board has discredited documents that have been posted on a Chinese government website while courts have regarded the very same documents as “presumptively authentic.”¹⁵⁹ Even in cases where the Board did not raise the authentication issue, it could be that the Board felt it had already marshaled sufficient basis to deny a U.S.-based OCP claimant there was no need to use the “authentication” card.¹⁶⁰

From a claimant’s perspective, perhaps the most detrimental consequence of the Board’s unfavorable exercise of discretion under the authentication regulation is when it is used in conjunction with taking administrative notice of the 2007 Profile. In a section titled Documentation, the 2007 Profile suggests the unreliability of the China Documents: “Documentation from China, particularly from Fujian Province, is subject to widespread *fabrication and fraud*. This includes documents that purportedly verify identities, personal histories, births and *birth control measures*, and notices from public security authorities.”¹⁶¹ In numerous cases, the Board has cited these sentences, along with the lack of authentication, to discredit a claimant’s China Documents.¹⁶² Because courts only prohibit the Board from using lack of authentication as the *sole* ground to exclude a piece of evidence, the added concern of fraud makes the Board’s evidentiary decision almost infallible. Indeed, courts have generally upheld the Board’s evidentiary decision whenever these two tactics are deployed concurrently.¹⁶³

3. Ignoring or Cherry-Picking Claimants’ Evidence

Claimants frequently offer background evidence to corroborate China Documents.¹⁶⁴ The most common types of background evidence are the annual report of the Congressional-Executive Commission on China (“CECC”)¹⁶⁵ and the State

158. *See supra* note 145.

159. *Diang Lin v. Holder*, 554 Fed. Appx. 604 (9th Cir. 2014).

160. *See, e.g.*, *Matter of S-Y-G-*, 24 I. & N. Dec. 247, 251, 259 (B.I.A. 2007) (assuming the authentication of China Documents but denying the U.S.-based OCP motion to reopen anyway); *Ji Cheng Ni v. Holder*, 715 F.3d 620, 624–25, 627–28 (7th Cir. 2013) (noting the Board’s denial of the U.S.-based OCP motion to reopen without questioning the authentication of China Documents).

161. 2007 PROFILE, *supra* note 114 (emphasis added).

162. *See, e.g.*, *Bi Feng Liu v. Holder*, 412 Fed. Appx. 860, 864 (6th Cir. 2011) (“[A]ccording to the State Department reports the Board relied upon, Liu’s particular region of China is hotbed for forged documents that would assist an alien in obtaining asylum.”); *Xiao Jun Liang v. Holder*, 626 F.3d 983, 987 (7th Cir. 2010) (“[T]he Board noted that the [2007 Profile], of which it took administrative notice, described widespread fabrication and fraud in documents from Fujian Province.”).

163. *See, e.g.*, *Bi Feng Liu*, 412 Fed. Appx. at 864 (upholding the Board’s decision to discredit Chinese Documents); *Xiao Jun Liang*, 626 F.3d at 990 (same).

164. For examples of claimants offering U.S. documents, *see Zheng v. Att’y Gen. of U.S.*, 549 F.3d 260, 268–71 (3d Cir. 2008); *Xi Que Li v. Att’y Gen. of U.S.*, 336 Fed. Appx. 140, 142–43 (3d Cir. 2009); *Jiang v. U.S. Att’y Gen.*, 568 F.3d 1252, 1258 (11th Cir. 2009); *Fei Yan Zhu v. Att’y Gen. U.S.*, 744 F.3d 268, 277–78 (3d Cir. 2014); *Ji Cheng Ni v. Holder*, 715 F.3d 620, 626–27 (7th Cir. 2013); *Diang Lin v. Holder*, 554 Fed. Appx. 604 (9th Cir. 2014).

165. The Congressional-Executive Commission on China (CECC) was created by the China Relations Act of 2000, Pub. L. No. 106-286, as part of the deal to grant China permanent normal trade

Department's annual country human rights report (together, "U.S. Documents").¹⁶⁶ If credited, U.S. Documents tend to support the persecution prong. For example, the 2009 CECC report identified Fujian Province, the home province of most U.S.-based OCP claimants, as one of the provinces that authorized the use of "compulsory abortion."¹⁶⁷ This report went on documenting the official policy of a town in Fujian Province to reach a "100 percent" abortion rate for women who had "multiple out-of-plan children."¹⁶⁸ It also described a campaign-style implementation of the OCP by Fujian Province officials, which was designed to ensure that "out-of-plan pregnancies" were dealt with "promptly and reliabl[y]."¹⁶⁹ The State Department's country human rights reports also repeatedly stated that the OCP "retained harshly coercive elements in law and practice."¹⁷⁰ One year's report specifically singled out Fujian Province where women were "reportedly forcibly sterilized."¹⁷¹

In addition to lending support to the persecution prong, U.S. Documents sometimes helped a claimant satisfy the changed country condition prong. This is especially true when a claimant's initial removal proceeding was conducted in 2007. Such a claimant could strategically choose not to challenge the administratively noticed 2007 Profile.¹⁷² By tactically conceding what was stated in the 2007 Profile, the claimant could then compare it with the more recent State Department's

relations. The CECC comprises of nine Senators, nine members of the House of Representatives, and five senior Administration officials appointed by the President. It is tasked to monitor China's human rights practices and the development of the rule of law in China. See Frequently Asked Questions, Congressional-Executive Commission on China, <http://www.cecc.gov/about/frequently-asked-questions>.

166. The State Department, mandated by the Foreign Assistance Act of 1961 and the Trade Act of 1974, submits to the Congress annual Country Reports on Human Rights Practices on all countries receiving assistance and all United Nations member states. See Human Rights Reports, U.S. Department of State, <http://www.state.gov/j/drl/rls/hrrpt/>.

167. Congressional-Executive Commission on China, Annual Report 153 (2009), available at <http://www.cecc.gov/sites/chinacommission.house.gov/files/2009%20CECC%20Annual%20Report.PDF>

168. *Id.* at 154.

169. *Id.*

170. U.S. Department of State, 2012 Country Reports on Human Rights Practices—China, <http://www.state.gov/j/drl/rls/hrrpt/2012humanrightsreport/index.htm#wrapper>; U.S. Department of State, 2011 Country Reports on Human Rights Practices—China, <http://www.state.gov/j/drl/rls/hrrpt/2011humanrightsreport/index.htm#wrapper>; U.S. Department of State, 2010 Country Reports on Human Rights Practices—China, <http://www.state.gov/j/drl/rls/hrrpt/2010/eap/154382.htm>; U.S. Department of State, 2009 Country Reports on Human Rights Practices—China, <http://www.state.gov/j/drl/rls/hrrpt/2009/eap/135989.htm>; U.S. Department of State, 2008 Country Reports on Human Rights Practices—China, <http://www.state.gov/j/drl/rls/hrrpt/2008/eap/119037.htm>; U.S. Department of State, 2007 Country Reports on Human Rights Practices—China, <http://www.state.gov/j/drl/rls/hrrpt/2007/100518.htm> [hereinafter 2007 COUNTRY REPORT]; U.S. Department of State, 2006 Country Reports on Human Rights Practices—China, <http://www.state.gov/j/drl/rls/hrrpt/2006/78771.htm>.

171. 2007 COUNTRY REPORT, *supra* note 149.

172. Claimants have mounted unsuccessful challenges to the Board's reliance on the 2007 Profile. See *Ni v. Holder*, 715 F.3d 620, 625 (7th Cir. 2013) (upholding the Board's reliance on the 2007 Profile and noting that at least nineteen appellate cases from six circuits have held the same).

human rights report or the CECC annual report, thereby showing that enforcement of the OCP has intensified since prior proceedings.¹⁷³

With the use of China Documents in jeopardy due to the Board's unfavorable exercise of discretion under the authentication regulation, U.S. Documents are arguably the strongest evidence that U.S.-based OCP claimants can rely upon to prove their cases. This is because U.S. Documents, unlike China Documents, are authored by the U.S. government and are generally considered reliable by courts.¹⁷⁴ Furthermore, U.S. Documents and the 2007 Profile sometimes present competing views on how the OCP was actually implemented,¹⁷⁵ which potentially could undercut, if not completely undermine, the Board's reliance on the 2007 Profile.

However, the Board has found other ways to deal with U.S. Documents. While courts have required the Board to address evidence offered by a claimant, especially those that "materially bear on his claim,"¹⁷⁶ they have also afforded the Board the discretion to not expressly parse or refute on the record each individual piece of evidence.¹⁷⁷ Several courts have held that the Board may consider evidence "in summary fashion without a reviewing court presuming that it has abused its

173. This is exactly the litigation strategy adopted by Ji Cheng Ni and his counsel, and a court vacated the Board's denial of Ni's motion to reopen and remanded the case for further proceedings. *See Ji Cheng Ni*, 715 F.3d at 625-26.

174. This is exactly the litigation strategy adopted by Ji Cheng Ni and his counsel, and a court vacated the Board's denial of Ni's motion to reopen and remanded the case for further proceedings. *See Ni*, 715 F.3d at 625-26.

See, e.g., *Jiang v. Gonzales*, 485 F.3d 992, 994-97 (7th Cir. 2007) (referring to State Department reports as "generally the best source of information on conditions in foreign nations"); *Lin v. Gonzales*, 446 F.3d 395, 400 (2d Cir. 2006); *McAllister v. U.S. Att'y Gen.*, 444 F.3d 178, 189 (3d Cir. 2006) (referring to State Department reports as "the most appropriate and perhaps the best resource for information on political situations in foreign nations"); *Negaya v. Gonzales*, 417 F.3d 78, 84 (1st Cir. 2005) (referring to the Country Report as "authoritative documentary evidence"); *Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 164-65 (2d Cir. 2006); *Alemu v. Gonzales*, 403 F.3d 572, 575 (8th Cir. 2005) (recognizing the State Department's "expertise in international affairs"); *Gonahasa v. U.S. INS*, 181 F.3d 538, 542 (4th Cir. 1999) ("A State Department report on country conditions is highly probative evidence in a well-founded fear case.").

175. *Compare* 2007 PROFILE, *supra* note 98 (finding "no cases" of forced sterilization in Fujian Province) *with* 2007 COUNTRY REPORT, *supra* note 149 (stating that there were "reportedly forcibly sterilized women" in Fujian Province). The irony is that these two documents were authored by the same agency, the State Department, in the same year, describing the enforcement of the OCP in the same province and yet depicting a completely opposite picture. No wonder academics have mocked the reliability of any reports authored by the State Department and argued that they were largely politically oriented. *See* David Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1331 (1990).

176. *See, e.g.,* *Guo v. Gonzales*, 463 F.3d 109, 115 (2d Cir. 2006).

177. *See, e.g.,* *Chen v. Holder*, 397 Fed. Appx. 111, 115-16 (6th Cir. 2010); *Feng Gui Lin v. Holder*, 588 F.3d 981, 987 (9th Cir. 2009); *Wang v. BIA*, 437F.3d 270, 275 (2d Cir. 2006).

discretion.”¹⁷⁸ The Board has taken full advantage of this great flexibility, sometimes to an extent that borders on abuse.¹⁷⁹

One extreme manifestation of such abuse is the Board’s decision in a number of cases to completely ignore U.S. Documents. The courts, unsurprisingly, were dismayed by such a practice.¹⁸⁰ Caught red-handed, the Board developed a new tactic: cherry-picking. For example, it would quote or refer to statements from U.S. Documents that indicated the use of administrative punishments to enforce the OCP, which generally do not constitute evidence of persecution, while making no mention of the statements pertaining to forced sterilization and abortion, which are direct evidence of persecution.¹⁸¹ Some courts did not catch such cherry-picking.¹⁸² Others were more perceptive and questioned “why the [Board] found the [CECC Reports’] discussion of certain ‘administrative punishments’ and coercive tactics to be persuasive, but found the Reports’ discussion of forced sterilizations and abortions in Fujian Province not to be persuasive.”¹⁸³

Another type of cherry-picking includes giving the 2007 Profile more evidentiary weight than U.S. Documents, even though both are products of the U.S. government. For instance, one of the Board’s precedential decisions that laid the groundwork for the three-prong framework “acknowledged” reports of forced sterilization documented by the State Department’s country human rights report, but curiously also emphasized the 2007 Profile’s statement that there was “no evidence” of forced abortions.¹⁸⁴ Notwithstanding the fact that evidence of “forced sterilization” is different from evidence of “forced abortion,” either of which is direct evidence of persecution, the Board concluded, “on balance, the evidence suggests that physical coercion to achieve compliance with family planning goals

178. *Wang v. BIA*, 437 F.3d 270, 275 (2d Cir. 2006); *Zheng v. Att’y Gen. of U.S.*, 549 F.3d 260, 268 (3d Cir. 2008); *Lin v. Holder*, 588 F.3d 981, 987 (9th Cir. 2009). *Cf.* *Chen v. Holder*, 675 F.3d 100, 106 (1st Cir. 2012) (“This court has held that the each piece of evidence need not be discussed in a [Board] decision.”) (internal citation and quotation marks omitted).

179. To be clear, the Board may properly conclude, after reviewing U.S. Documents, which these materials do not establish “changed country condition” because they fail to show worsened enforcement of the OCP since the year in which a claimant’s removal proceedings were concluded. *See, e.g., Zhang v. Holder*, 487 Fed. Appx. 949, 951–52 (5th Cir. 2012); *Xiao Jun Liang v. Holder*, 626 F.3d 983, 991 (7th Cir. 2010); *Gong Geng Chen v. Holder*, 444 Fed. Appx. 305, 309 (10th Cir. 2011).

180. *See, e.g., Li v. Att’y Gen. of U.S.*, 336 Fed. Appx. 140, 142–43 (3d Cir. 2009) (granting motions to reopen in part because the Board failed to adequately consider U.S. Document); *Jiang v. U.S. Att’y Gen.*, 568 F.3d 1252, 1258 (11th Cir. 2009) (same); *Zheng v. Att’y Gen. of U.S.*, 549 F.3d 260, 268–71 (3d Cir. 2008) (same).

181. *See, e.g., Zhu v. Att’y Gen. U.S.*, 744 F.3d 268, 277–78 (3d Cir. 2014); *Ni v. Holder*, 715 F.3d 620, 626–27 (7th Cir. 2013); *Lin v. Holder*, 2014 WL 448542, *1 (9th Cir. 2014). Administrative punishments include, but not limited to social compensation fees, job loss or demotion, and destruction of property. To be clear, they could amount to persecution if they are “extraordinarily severe,” a threshold that is very difficult to satisfy. *See Matter of T-Z-*, 24 I. & N. 163, 169–71 (BIA 2007).

182. *See, e.g., Lin v. Holder*, 540 Fed. Appx. 500, 508 (6th Cir. 2013) (failure to catch the Board’s selective quotation of the 2010 CECC report); *Lin v. Holder*, 452 Fed. Appx. 369, 372–73 (4th Cir. 2011) (failure to catch the Board’s selective quotation of the 2009 CECC report).

183. *Zhu*, 744 F.3d at 277–78; *Ni*, 715 F.3d at 626–27; *Lin*, 2014 WL 448542 at *1.

184. *Matter of J-H-S-*, 24 I. & N. Dec. 196, 202–03 (BIA 2007).

is uncommon.¹⁸⁵ The Board never explained its decision favoring the 2007 Profile over the human rights report, both of which were authored by the State Department, and the reviewing court never required the Board to do so.¹⁸⁶

The Board's pattern of employing an aggressive use of discretion against U.S.-based OCP claims is likely not a coincidence. Though speculative, this pattern seems to be due to the Board's deep suspicion of such claims and the accompanying negative views of the Chinese asylum seekers who file them. This suspicion, in turn, has prompted the Board to systematically deny U.S.-based OCP claimants' motions to reopen, regardless of whether a particular claim might have merits under the statute. In *Matter of S-Y-G*, the decision in which the Board set forth its three-prong analytical framework, the Board wrote in a footnote:

Although the situation in *Wang v. BIA* . . . related to an alien who had United States children born to him while he was under an order of deportation, the case is nevertheless relevant to the applicant's situation, because she was living without status in the United States when she gave birth to her United States citizen daughter, lost her asylum case, and apparently waited for additional evidence to "accumulate" for purposes of reopening while she remained in contravention of the deportation order.¹⁸⁷

The case cited by the Board, *Wang v. BIA*, held that an alien's changed *personal* circumstances *alone*, such as giving birth to U.S.-born children, was insufficient to overcome the time and number limits of filing a motion to reopen.¹⁸⁸ *Wang*, therefore, addresses a situation easily distinguishable from most U.S.-based OCP claims, where claimants both parent U.S.-born children *and* present voluminous documents to prove the "changed country condition."¹⁸⁹ Yet, the Board seemed to believe that these claimants are fundamentally no different from the Chinese asylum seeker in *Wang*. Perhaps the following quotes from *Wang*, which the Board did not write explicitly in footnote but is on the page it cited, best summarize the Board's view about U.S.-based OCP claimants:

[I]t would be ironic, indeed, if petitioners like Wang, who have remained in the United States illegally following an order of deportation, were permitted to have a second and third bite at the apple simply because they managed to marry and have children while evading authorities. *This apparent gaming of the system in an effort to avoid deportation is not tolerated by the existing regulatory scheme.*¹⁹⁰

185. *Id.* at 203.

186. *Shao v. Mukasey*, 546 F.3d 138, 158-62 (2d Cir. 2008) (upholding *Matter of J-H-S*). In some other cases, the Board favored the 2007 Profile over the CECC annual reports, and courts have blessed such favoritism, too. See *Lin*, 452 Fed. Appx. at 372-73; *Lin*, 540 Fed. Appx. at 508.

187. *Matter of S-Y-G*, 24 I. & N. Dec. 247, 253 n.3 (BIA 2007) (citing *Wang v. BIA*, 437 F.3d 270, 274 (2d Cir. 2006)).

188. *Wang v. BIA*, 437 F.3d 270, 274 (2d Cir. 2006).

189. *Zhu v. Att'y Gen. of U.S.*, 744 F.3d 268, 271 (3d Cir. 2014) (describing the documents filed by a U.S.-based OCP claimant as "voluminous").

190. *Wang*, 437 F.3d at 274 (emphasis added).

B. FEDERAL JUDICIARY: NEUTRAL-MINDED TOWARDS U.S.-BASED ONE-CHILD-POLICY CLAIMANTS?

For U.S.-based OCP claimants, federal appellate courts are effectively the court of last resort because the Supreme Court rarely reviews asylum cases, especially in the context of a motion to reopen.¹⁹¹ As the fate of a U.S.-based OCP claimant will be determined by a three-judge panel, these judges' personal views of the claimant matter.¹⁹² Some of the discussions in Part III.A have suggested that some federal appellate courts do not believe U.S.-based OCP claims.¹⁹³ But this inference is indirect and cannot be confirmed. In this section, I will explore what courts actually thought of U.S.-based OCP claims. I will argue that, although courts may not like the Board's excessive use of its discretion, they also dislike U.S.-based OCP claims.

1. Emphasizing the Immigration Status of U.S.-Based One-Child-Policy Claimants

A judicial opinion is like a novel; it tells a story.¹⁹⁴ Though judges are supposed to describe facts objectively, a judge's chosen narrative ostensibly reflects his personal view.¹⁹⁵ For U.S.-based OCP claims, the characters of the narrative are all claimants who have already been ordered removed. The very fact that they are filing a motion to reopen their case is evidence of their continued stay in this country without any lawful immigration status. Since the claimants' immigration status is a given and has no legal bearing on the outcome of their claims, a court's decision to emphasize it may be a reflection of a judge's view on the merits of such claims.

Here is how a court described Fei Yan Zhu, a U.S.-based OCP claimant who filed three motions to reopen:

Zhu is from Changmen Village, Guantou Town, Lianjiang County, Fujian Province, China

On February 15, 2000, Zhu appeared before [an Immigration Judge]

In 2002, Zhu filed a timely motion to reopen, alleging

In 2008, Zhu filed a second motion to reopen, alleging

191. The Supreme Court has only decided three cases on motion to reopen, with one of them concerning whether federal courts have jurisdiction to review the Board's denial of such a motion. *See* *Kucana v. Holder*, 557 U.S. 233 (2010); *INS v. Doherty*, 502 U.S. 314 (1992); *INS v. Abudu*, 485 U.S. 314 (1988).

192. In 1931, Karl N. Llewellyn proclaimed that the indeterminacy of law is the norm and "personality of the judge" must to some degree explain case outcomes. Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1242 (1931). This legal realism view has since dominated American jurisprudence and empirical research has suggested that judges' political views, their prior professional experience, and their other personality did affect the outcome of a case. *See* Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 835–45 (2008).

193. *See supra* Part III.A.

194. John Leubsdorf, *The Structure of Judicial Opinion*, 86 MINN. L. REV. 447, 447–48 (2001).

195. *See id.* at 458–59.

On January 14, 2013, Zhu filed a third motion to reopen [asserting U.S.-based OCP claims]¹⁹⁶

These are the first sentences of each paragraph in the opening section of the court's opinion. They mapped out the procedural history of the case and did not include any additional comments on Zhu's immigration status. While the language is dry, it at least maintains the appearance of neutrality.

In contrast, consider how another court described Hang Chen, the U.S.-based OCP claimant I mentioned in Part II.A. After summarizing Chen's failed attempt to apply for asylum and an IJ's order granting him voluntary departure, the court opened a new paragraph with the following sentences: "The papers, however, did not reflect reality. *Chen had not returned to China. Instead, he was living in the United States* and was married and starting a family, which grew to include three children."¹⁹⁷ The court went on describing Chen's first motion to reopen that the Board eventually denied.¹⁹⁸ The court then wrote: "*Undeterred*, Chen filed a second motion to reopen"¹⁹⁹ Not only did the court emphasize Chen's illegal status, it also sought to portray Chen as a persistent applicant who defied the removal order and prolonged his unlawful stay simply to gain another opportunity to file a new motion to reopen.

The *Hang Chen* court was not alone. Below are some similar descriptions in other court opinions:

"Wang *never left* the United States, *opting instead* to remain here *well beyond* the time he was told to depart."²⁰⁰

"Liu is a citizen of the People's Republic of China from Fujian Province who has resided in the United States since 1999 *even though she does not have a lawful presence here and an immigration judge ("IJ") ordered her removed.*"²⁰¹

"But Liu *did not leave* the United States, even though she *did not have legal status and the IJ, affirmed by the [Board], ordered her removed.* Rather, she remained in this country, married and had two children."²⁰²

"*Despite the removal order*, Lin remained in the United States, and nine years later . . . she filed with the Board a motion to reopen her removal proceedings."²⁰³

"The IJ rejected Chen's claims . . . ordering her removed to China Chen *nevertheless remained* in the United States with her family."²⁰⁴

196. Zhu v. Att'y Gen. of U.S., 744 F.3d 268, 270–71 (3d Cir. 2014).

197. Chen v. Holder, 675 F.3d 100, 103 (1st Cir. 2012) (emphasis added).

198. *Id.* at 103–04.

199. *Id.* at 104 (emphasis added).

200. Wang v. BIA, 437 F.3d 270, 272 (2d Cir. 2006) (emphasis added).

201. Liu v. Att'y Gen. of U.S., 555 F.3d 145, 146 (3d Cir. 2009) (emphasis added).

202. *Id.* at 147.

203. Lin v. Att'y Gen. of U.S., 2014 WL 1599440 (3d Cir. 2014) (emphasis added).

204. Chen v. Holder, 397 Fed. Appx. 111, 112 (6th Cir. 2010).

It is unsurprising that none of the individuals mentioned above won their cases.²⁰⁵ But, such unfavorable descriptions are not confined to cases where a court ruled against U.S.-based OCP claimants. Even in cases where a U.S.-based OCP claimant won, courts sometimes commented on the claimant's unlawful immigration status. For example, in *Ji Cheng Ni v. Holder*, the Seventh Circuit Court of Appeals remanded the case to the Board for further proceeding.²⁰⁶ This was a victory for Ni. Yet, in the opening paragraph of the opinion, the court wrote: "Despite [the removal] order, Ni *managed to remain* in the United States, and he has since started a family."²⁰⁷ Despite the positive outcome of the case, the sentence arguably conveys the court's disapproval of Ni's continued unlawful stay while accumulating time to file a motion to reopen.

2. Signaling Agreement with the Board's Denial of U.S.-Based Claims

Apart from emphasizing a claimant's immigration status, courts have also shown their disdain for U.S.-based claims by signaling their agreement with the Board's denial of such claims in cases that were remanded to the Board for procedural errors. Sometimes those signals are so strong that they practically guarantee a second denial of a claimant's motion to reopen.

For example, in *Zheng v. Att'y Gen. of U.S.*,²⁰⁸ the Third Circuit Court of Appeals expressed its disapproval when the Board ignored a bulk of the evidence submitted by two U.S.-OCP claimants.²⁰⁹ Specifically, it reminded the Board to diligently carry out its "duty to explicitly consider any country conditions evidence submitted by an applicant that materially bears on his claim"²¹⁰ and remanded the case for further review.²¹¹ However, this was not the end of the story. The court, while criticizing the Board, suggested that it actually agreed with the Board's denial of the claimants' motion to reopen. In the opening paragraphs of the opinion, it wrote: "In [remanding the case], we make clear that we do not suggest that we disagree with the result the [Board] reached on the records before it as we predicate our holding solely on the procedural deficiencies that we find existed in the [Board] proceedings."²¹² Then, in the middle of the opinion, the court signaled its approval again: "Even though the [Board] *may have been correct in its summary conclusion*, there is no escape from the reality that it did not explain why the evidence that Chen submitted was not sufficient."²¹³ As if the signals were not strong enough, the court reiterated its approval for the third time at the end of the opinion:

205. *Wang*, 437 F.3d at 276 (petition for review denied); *Liu*, 555 F.3d at 152 (same); *Fen Lin*, 2004 WL 1599440, *3 (same); *Chen*, 397 Fed. Appx. at 119 (same).

206. 715 F.3d 620, 631 (7th Cir. 2013).

207. *Id.* at 622.

208. *Zheng v. Att'y Gen. of U.S.*, 549 F.3d 260 (3d Cir. 2006).

209. *Id.* at 266–71.

210. *Id.* at 268.

211. *Id.* at 272.

212. *Id.* at 261.

213. *Id.* at 271 (emphasis added).

We also reiterate that in reaching our conclusion that we will remand these cases to the [Board], we do so exclusively by reason of procedural shortcomings that we find existed in the [Board] proceedings, and thus we do not imply that the [Board] reached an incorrect result predicated on the records before it in either case. In short, the abuse of discretion relates to how the [Board] reached its result and *not the result itself*. Indeed, we are well aware that [the government] contends that the documents the [U.S.-based OCP claimants] presented should not lead to the reopening of their proceedings. Certainly, if the [Board] agrees with this contention it is free to say so on the remands as we do not reject [the government's] contentions on this point.²¹⁴

The Board's decision on remand is not available because it is unpublished, but it would not be surprising if the Board rejected the motion once again.

One might wonder what motivated the *Zheng* court to repeatedly indicate its agreement with the Board's denial of the U.S.-based OCP claim. A year after the Third Circuit ruled on *Zheng*, it decided yet another U.S.-based OCP case. This time, the court thought the Board not only came to the correct outcome (i.e., denying the motion to reopen) but also utilized the correct process.²¹⁵ Commending the Board's decision, the court took "the unusual step of quoting the [Board]'s conclusions at length" to "demonstrate the type of findings that are sufficient" under the court's reviewing standard.²¹⁶ The court effectively assured the Board that it would not second-guess the denial of U.S.-based OCP claims so long as the Board followed the court's "model answer."²¹⁷ This goes far beyond *Zheng*, and the court here did not make any effort to hide its disbelief of U.S.-based OCP claims. In a footnote, the court finally revealed why it viewed these claims with deep suspicion: "It is significant that Chinese officials *correctly* understand that children born in the United States to Chinese parents are United States citizens. After all, it seems *entirely logical* that the Chinese officials would exclude United States citizens when considering its birth control policies, as such persons are likely to live in this country."²¹⁸ In other words, U.S.-based OCP claims, according to the Third Circuit, are without merit.

Cases like *Zheng* and its progeny, where courts openly express their disbelief of U.S.-based OCP claims, are rare. Instead, courts generally signal their agreement with the Board on the merits in a subtle manner that requires a deeper reading of the opinions. Recall *Ji Cheng Ni* in which a court remanded the case to the Board.²¹⁹ Ni submitted dozens of official Chinese publications, none of which were authenticated.²²⁰ These documents tended to prove intensified enforcement of the OCP in

214. *Id.* at 272 (emphasis added).

215. *Liu v. Att'y Gen. of U.S.*, 555 F.3d 145, 149–51 (3d Cir. 2009).

216. *Id.* at 149.

217. *See id.* at 149–50. In essence, the Third Circuit suggested that it would affirm the Board's denial of a U.S.-based OCP claim as long as the Board in its decision explicitly recounted the key evidence submitted by a claimant and provided the rationale for rejecting such evidence.

218. *Id.* at 150 n.5 (emphasis added).

219. *See supra* notes 206–207.

220. *Ni v. Holder*, 715 F.3d 620, 627–28 (7th Cir. 2013).

Ni's hometown.²²¹ The Board, however, did not raise the authentication issue in its denial of Ni's motion to reopen.²²² After faulting the Board for conducting a "perfunctory" review of the documents, the court commented: "If these documents are genuine — and *this remains an important 'if'* — they constitute strong evidence that harrowing practices are common in [areas] from which Ni hails."²²³ It is unfortunate that the Board's case on remand was decided in an unpublished opinion. It is possible, though, that the Board took the court's implicit suggestion and discredited the documents for their lack of authenticity.

3. The *De Facto* Category Approach

The large number of motions to reopen has burdened some courts and requires them to properly balance the interests of individual justice on the one hand and judicial economy on the other.²²⁴ The courts' views of U.S.-based OCP claims may be reflected in the result of such balancing, especially when a court has implemented a *de facto* category approach in reviewing the Board's denial of these claims.

In the year after the Board outlined its three-prong analytical framework, the Second Circuit decided *Shao v. Mukasey*.²²⁵ One of *Shao*'s key holdings is its endorsement of the Board's analytical framework and the case-by-case approach to adjudicate motions to reopen raising U.S.-based OCP claims.²²⁶ The court also reiterated its rejection of a category approach: "We now accord *Chevron* deference to the [Board]'s statutory construction, which rejects a categorical application of [Section 601] to [U.S.-based OCP] claims in favor of case-by-case review."²²⁷

Subsequent developments, however, have proved that the Second Circuit only paid lip service to the "case-by-case review." Since *Shao*, the court has never doubted any Board decision that denied a motion to reopen raising U.S.-based OCP claims.²²⁸

221. *Id.*

222. *Id.* at 629. As I suggested, this is probably because the Board felt it had already had enough basis to deny the motion that raising the authentication issue became unnecessary. See *supra* note 140 and accompanying text.

223. *Id.* at 627–28.

224. See New York State Bar Association, Commercial and Federal Litigation Section, *THE CONTINUING SURGE IN IMMIGRATION APPEALS IN THE SECOND CIRCUIT: THE PAST, THE PRESENT AND THE FUTURE* (2010), available at http://www.nysba.org/Sections/Commercial_Federal_Litigation/ComFed_Display_Tabs/Reports/ImmigrationAppealsinthe2dCircuitFinalReport1-29-10_pdf.html. The Second Circuit is one of the federal appeals court that has seen a mounting number of immigration appeal cases; Slapsys, *supra* note 8, at 187–88 (noting that family planning cases, including "thousands of" motions to reopen, contributed to the Second Circuit's traffic jam). Though the exact percentage is unclear, motions to reopen raising U.S.-based OCP claims are chief among the cases that contribute to the surge. Cf. John R.B. Palmer, *The Nature and Causes of The Immigration Surge in The Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13 (2006) (explaining the causes of increased immigration appeals cases).

225. 546 F.3d 138 (2d Cir. 2008).

226. *Id.* at 156–57.

227. *Id.* at 156–57, 174.

228. I searched Westlaw and LexisNexis, using the key words "motion to reopen" and "asylum." As of the writing of this article, the Second Circuit has not granted a single motion to reopen raising U.S.-based OCP claims since *Shao*.

Frequently, the court would start its opinion with standard language to dismiss a challenge to the Board's denial. A common example would be: "The [Board] did not abuse its discretion in finding that [the alien] failed to establish a material change in the Chinese government's enforcement of the family planning policy or his prima facie case for relief based on the birth of his U.S. citizen children. [The alien]'s arguments are *foreclosed* by our decision in [*Shao*]."229 Another common example would state: "For largely the same reasons as this Court set forth in [*Shao*], we find no error in the agency's determination that petitioners failed to demonstrate their eligibility for relief."230 Such sentences would be preceded or followed by a bare minimum discussion of the Board's decision and the evidence submitted by the U.S.-based OCP claimant.²³¹ A typical opinion of this sort spans no more than two pages.²³² The irony is self-evident: the court would systematically foreclose a U.S.-based OCP claimant's argument by citing a precedent that championed individualized attention to each case.

The Second Circuit's practice of lumping together multiple appeals that challenge the Board's denial of motions to reopen and decide these appeals in a single decision using standard language further evidences the court's disdain towards U.S.-based OCP claims. For example, in one opinion, the court lumped together twenty-seven cases and disposed of all of them in a mere nine paragraphs which include an opening paragraph discussing the standard of review and concluding paragraph summarizing the decision.²³³ Twenty-seven cases resolved with a nine-paragraph decision maybe the extreme, but it is not uncommon for the court to issue a single opinion that combines anywhere from four to ten cases.²³⁴ This practice of lumping cases together could hardly be characterized as a "case-by-case review." It would arguably be more appropriate to label this process as a "factory assembly line," whereby U.S.-based claims are rushed through the reviewing process and are denied as quickly as possible.

229. See, e.g., *Chen v. Holder*, 448 Fed. Appx. 147, 149 (2d Cir. 2011) (emphasis added); see also *Zheng v. Holder*, 473 Fed. Appx. 99, 99 (2d Cir. 2012).

230. See, e.g., *Lin v. Holder*, 2014 WL 1243827 (2d Cir. 2014); *Jiang v. Holder*, 531 Fed. Appx. 35, 36 (2d Cir. 2013); *Lin v. Holder*, 474 Fed. Appx. 42, 42 (2d Cir. 2012); *Chen v. Holder*, 474 Fed. Appx. 840, 840 (2d Cir. 2012); *Pan v. Holder*, 491 Fed. Appx. 235, 236 (2d Cir. 2012); *Zheng v. Holder*, 473 Fed. Appx. 95, 96 (2d Cir. 2012); *Zhou v. Holder*, 490 Fed. Appx. 374, 375 (2d Cir. 2012); *Zhu v. Holder*, 472 Fed. Appx. 94, 95 (2d Cir. 2012).

231. See, e.g., *Qiyao Chen*, 448 Fed. Appx. 147, 149 (two paragraphs' discussion); *Mei Ying Zheng v. Holder*, 473 Fed. Appx. 99, 99 (2d Cir. 2012) (same); *Xue Yan Zhou v. Holder*, 490 Fed. Appx. 374, 375 (2d Cir. 2012) (same); *Ming Sheng Zhu*, 472 Fed. Appx. at 94 (same).

232. See, e.g., *Cuirong Lin*, 2014 WL 1243827, at *1 (one-page opinion); *Ming Zhing Jiang*, 531 Fed. Appx. 36 (two-page opinion); *Xiu Lan Lin*, 473 Fed. Appx. 42 (one-page opinion); *Mengjun Chen*, 474 Fed. Appx. 840 (two-page opinion); *Sai Yun Pan*, 491 Fed. Appx. 236 (three-page opinion with ten cases being lumped together); *Zhi Bao Zheng*, 473 Fed. Appx. 96 (three-page opinion); *Xue Yan Zhou*, 490 Fed. Appx. 375 (three-page opinion); *Ming Sheng Zhu*, 472 Fed. Appx. 95 (two-page opinion).

233. *Huang v. Holder*, 455 Fed. Appx. 67 (2d Cir. 2012).

234. See, e.g., *Jiang v. Holder*, 531 Fed. Appx. 35, 36 (2d Cir. 2013) (lumping five cases together); *Lin v. Holder*, 474 Fed. Appx. 42, 42 (2d Cir. 2012) (lumping seven cases together); *Pan v. Holder*, 491 Fed. Appx. 235, 235 (2d Cir. 2012) (lumping ten cases together); *Zhu v. Holder*, 472 Fed. Appx. 94, 95 (2d Cir. 2012) (lumping ten cases together).

The Second Circuit's *de facto* category approach is troubling, not only because it demonstrates the court's negative attitudes towards U.S.-based OCP claims, but also because it illustrates the willingness of reviewing courts to rubber stamp the Board's decisions. The court's failure to adhere to its pronounced case-by-case approach essentially encourages the Board to systematically reject U.S.-based OCP claimants' motions to reopen through excessive use of discretion. The court's post-*Shao* perfunctory treatment of U.S.-based OCP claims has made it impossible to gauge the strength of evidence submitted by a claimant.

Take, for example, a case much like the one discussed in Part III.A.3, where a claimant tactically concedes the reliability of the 2007 Profile and uses it as a baseline to establish enhanced coercive enforcement of the OCP by introducing post-2007 U.S. Documents.²³⁵ While such a case certainly could be distinguished from *Shao*, which was decided on a record with the 2007 Profile as the latest piece of evidence, it could also be easily buried by the *de facto* category approach and go unnoticed. That a claimant will be deprived of any meaningful judicial review is a real concern. As another court eloquently warned: "Routine can be numbing, however, and it can lead to errors."²³⁶

After this documented review of the federal courts' disdain towards U.S.-based OCP claims, and by extension, the claimants who filed them, I close by quoting a court's rare moment of confession regarding the difficulties it faces in adjudicating OCP-related asylum applications. Although the statement does not directly address U.S.-based OCP claims, I suspect it touches upon a concern lurking in the mind of every court that is confronted with these claims:

How to apply these principles to persons seeking asylum based on opposition to China's population control policy has challenged both the agency and the courts. The issue is complicated by both political and practical concerns China's population control policy applies in a country of more than 1.3 billion people. The person opposed to the policy, *i.e.*, the potential applicants for asylum in the United States from that policy, could therefore easily number in millions. Further complicating the issue is *the ease with which opposition to the state's population policy might be invoked to support asylum claims by large number of Chinese nationals whose real reason for seeking entry into the United States is the historic motivation for generations of immigrants: the search for better economic opportunities.*²³⁷

C. REINFORCING THE LAW-BREAKING IMAGE OF CHINESE ASYLUM SEEKERS IN MASS MEDIA

The sheer number of U.S.-based OCP claims, resulting from the discrepancy between Section 601's narrow purpose and its broad statutory language, has generated negative opinions about certain Chinese asylum seekers from the Board and

235. See *supra* notes 151–152 and accompanying text.

236. *Ni v. Holder*, 715 F.3d 620, 622 (7th Cir. 2013).

237. *Wong v. Holder*, 533 F.2d 64, 68–69 (2d Cir. 2011) (emphasis added).

federal courts. It has also contributed to and reinforced the law-breaking image of Chinese asylum seekers in the mass media. To some Americans, Chinese aliens filing for asylum are simply taking advantage of the American legal system to gain permanent residency.²³⁸ Asylum applicants have previously done this by fabricating stories, lying to authorities, and producing fake documents.²³⁹ In a recent, well-publicized article, the New York Times depicted a Chinese-asylum world riddled with fraud.²⁴⁰ According to the article, law firms recycled narratives and documents from one Chinese asylum applicant to another, with only the names and dates changed.²⁴¹ The firms would then coach the applicants on how to respond to questions posed by U.S. asylum officers and immigration judges.²⁴² The applicants would do whatever their lawyers told them to do.²⁴³ As these applicants continuously, enter the system, one after another, the Chinese have become the number one immigrant group applying for asylum in the United States.²⁴⁴

Although there is no hard evidence that U.S.-based OCP claims are legally fraudulent, they do fit into certain patterns consistent with asylum fraud. First and foremost is their voluminous number. While it may seem unfair, some Americans, including members of Congress, judge the integrity of a group's asylum applications solely by their numbers. During a recent Congressional hearing, Representative Robert William Goodlatte (R-VA), the Chairman of the House Judiciary Committee, expressed his view that a rise in asylum claims indicated that immigrants had been gaming the system.²⁴⁵ The same view is also held by some anti-immigration organizations. One such organization, the Federation for American Immigration Reform ("FAIR"), has constantly criticized the enactment of Section 601

238. Tony Freemantle, *For Many Chinese, Political Asylum A Key to U.S.*, HOUSTON CHRONICLE, Apr. 6, 2013, <http://www.houstonchronicle.com/news/houston-texas/houston/article/For-many-Chinese-political-asylum-a-key-to-U-S-4415265.php>.

239. See Susan Sachs, *Cracks in Façade of Refugee; Documentary Shows Pitfalls in Process of Seeking Asylum*, N.Y. TIMES, Dec. 19, 1999, at A53 (discussing a documentary called *Well-Founded Fear* that gives a behind-the-scenes look at the asylum process in New York). The documentary in Sachs's article tells the story of "[a] Chinese man follow[ing] the instructions of the smuggler who brought him to the United States and concocts an improbable story of fleeing his country's one-child policy." It also reports that in the view of some long-time asylum interviewers, most of the stories told by applicants are contrived and thus the interviewers oftentimes have to rely on nothing more than their "gut feelings" in determining whether to approve the application. The documentary further tells of many interviewers' resentment over being lied to and shows one interviewer, Jim, who mutters, "Oh, another Chinese" and who later rolls his eyes when the person cannot get his story straight. *Id.* See also Orly Gez, *A Compromise Solution to Prevent Fraudulent Claims Under IIRIRA Section 601(a): A System of Conditional Grant*, 74 BROOKLYN L. REV. 1147, 1172-74 (2009).

240. Kirk Semple et. al., *Asylum Fraud in Chinatown: An Industry of Lies*, N.Y. TIMES, Feb. 22, 2014, <http://www.nytimes.com/2014/02/23/nyregion/asylum-fraud-in-chinatown-industry-of-lies.html>.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Asylum Abuse: Is It Overwhelming Our Borders?: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 2-3 (2013) (statement of Rep. Goodlatte, Chairman, H. Comm. on the Judiciary).

on the basis that it has increased fraudulent asylum applications.²⁴⁶ To support its argument, FAIR has cited to the ever-increasing number of Chinese asylum applicants who have filed OCP-related claims.²⁴⁷ The trend of rising U.S.-based OCP claims will undoubtedly further solidify the arguments of organizations like FAIR, especially at a time when the overall number of asylum seekers is declining.²⁴⁸

Another aspect of U.S.-based OCP claims that maybe easily portrayed as fraudulent is the appearance of recycled application materials. There appears to be a small number of law firms that specialize in U.S.-based OCP claims,²⁴⁹ and the applications they have filed appear to follow a pre-fixed format.²⁵⁰ A typical application will consist of: (1) an affidavit from the asylum seeker who recounted forced sterilizations suffered by one or two fellow villagers who are still in China; (2) letters from relatives and friends that would corroborate the asylum seeker's affidavit; (3) some sort of official letter or notice from the locality where the asylum seeker is from, stating that the asylum seeker would be sterilized upon return to China; and (4) a large set of U.S. Documents serving as background material on country conditions.²⁵¹ In some applications, even the language used in an asylum seeker's affidavit was strikingly similar, except for the name and date.²⁵² These

246. Dan Stein, *Statement Submitted for Immigration Subcommittee of the Senate Judiciary Committee*, FAIR, <http://www.fairus.org/testimony/u-s-asylum-policy-reforms-needed-in-current-system> (last visited April 20, 2014); see also Jack Martin, *Asylum Fraud by Chinese Illegal Aliens*, ImmigrationReform.com (Dec. 19, 2012), <http://immigrationreform.com/2012/12/19/asylum-fraud-by-chinese-illegal-aliens/>.

247. *Id.*

248. *Asylum Abuse: Is It Overwhelming Our Borders?: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 47, 56-57 (2013) (written submission of Ruth Ellen Wasen, Specialist in Immigration Policy, Congressional Research Service).

249. See, e.g., *Ni v. Holder*, 715 F.3d 620, 622 (7th Cir. 2013) (Gary J. Yerman as counsel); *Liu v. Att'y Gen. of U.S.*, 555 F.3d 145, 146 (3d Cir. 2009) (same); *Li v. Att'y Gen. of U.S.*, 335 Fed. Appx. 140, 140 (3d Cir. 2009) (same); *Lin v. Holder*, 588 F.3d 981, 982 (9th Cir. 2009) (same); *Shao v. Mukasey*, 546 F.3d 138, 141 (2d Cir. 2008) (same); *Zheng v. Att'y Gen. of U.S.*, 549 F.3d 260, 260 (3d Cir. 2008) (same); *Dong v. Mukasey*, 286 Fed. Appx. 146, 147 (5th Cir. 2008) (same); *Lin v. Mukasey*, 532 F.3d 596, 596 (7th Cir. 2008) (same); *Zheng v. Mukasey*, 523 F.3d 893, 893 (8th Cir. 2008) (same); *Li v. U.S. Att'y Gen. of U.S.*, 488 F.3d 1371, 1372 (11th Cir. 2007) (same); *Wang v. BIA*, 437 F.3d 270, 271 (2d Cir. 2006) (same); see also *Lin v. Holder*, 2014 WL 448542, *1 (9th Cir. 2014) (Theodore N. Cox as counsel); *Zhu v. Att'y Gen. of U.S.*, 744 F.3d 268, 270 (3d Cir. 2014) (same); *Zhang v. Holder*, 487 Fed. Appx. 949, 949 (5th Cir. 2012) (same); *Chen v. Holder*, 675 F.3d 100, 102 (1st Cir. 2012) (same).

250. One court went so far as to characterize a claimant's motion to reopen as "boilerplate." *Lin v. Mukasey*, 526 F.3d 1164, 1166 (8th Cir. 2008).

251. See, e.g., *Zheng*, 549 F.3d at 261-64; *Liu*, 555 F.3d at 149; *Lin*, 532 F.3d at 597; *Ni*, 715 F.3d at 626-28; *Zheng*, 523 F.3d at 894-95; *Lin*, 588 F.3d at 983.

252. A comparison of affidavits written by two U.S.-based OCP claimants who happen to hire the same lawyer to represent them illustrates the point. One claimant's affidavit states:

In my recent phone contacts with my family and friends in China, I was told that in the past year, the government had increased the use of labor camp, forced abortions and sterilization . . . Those who resist and violate the new law would not only be forced to undergo abortion operations or sterilization procedures, but also face criminal prosecution . . .

....

My parents told me that the village officials were already aware that I had two children in the United States. An official letter issued by the villager committee in response to my inquiry

highly similar U.S.-based OCP claims could simply reflect the fact that most U.S.-based OCP claimants are from the same province (Fujian Province), or they could result from the fact that the same counsel is advising them. Regardless, they provide fertile ground for critics to argue fraud.

IV. CONCLUSION

“[Section 601] does not enact a special rule for people who resist the [People’s Republic of China] population control program. It merely gives each applicant an opportunity to prove his or her case under exactly the same rules as every other applicant . . . It’s the right thing to [enact] it.”²⁵³ This is what Representative Chris Smith (R-NJ) proclaimed as he was passionately advocating for the passage of Section 601. Designed to level the playing field for Chinese asylum seekers to file China-based claims, Section 601 has instead incentivized the filing of U.S.-based claims. What Smith did not foresee were the hundreds, if not thousands, of Chinese asylum seekers who have attempted to take advantage of this provision by claiming fear of persecution based in part on their American-born children. The surge of these claims has prompted negative views, by both the Board and federal courts, toward Chinese asylum seekers. This has led to (1) the Board’s wholesale rejection of these asylum claims by excessively exercising its discretion to reject evidence, and (2) the courts’ reluctance to check the Board’s behavior absent any egregious errors. The results, therefore, are far from the “case-by-case adjudication” that Smith had promised.²⁵⁴ Moreover, the rising number of U.S.-based claims has contributed to or reinforced the law-breaking image of Chinese asylum seekers. Section 601 saved lives, but the question is at what expense? Only the passage of time will tell.²⁵⁵

stated that I was still considered . . . a citizen of China and had to undergo necessary family planning procedures within one week once I return to China.

Another claimant’s affidavit states:

In my recent phone contacts with my family and friends in China, I was told that in the past year, the government had increased the use of forced abortions and sterilization. Those who resist and violate the new law would not only be forced to undergo abortion operations or sterilization procedures, but also face criminal prosecution

My parents told me that the village officials were already aware that I had two children in the United States. They also told me that since I do not have legal status in the United States, I was still considered . . . a citizen of China, not an overseas Chinese, therefore once I return to China, I have to undergo necessary family planning procedures such as abortions and sterilizations.

Zheng, 549 F.3d at 262-64.

253. 142 CONG. REC. 6,008 (1996) (statement of Rep. Christopher H. Smith).

254. See *supra* note 63 and the accompanying text.

255. *C.f.* Kitty Calavita, *The Paradoxes of Race, Class, Identity, and “Passing”*: Enforcing The Chinese Exclusion Acts, 1882-1910, 25 LAW & SOC. INQUIRY 1 (2000) (arguing that the enforcement of the Chinese Exclusion Acts facilitated Chinese immigrants’ resistance to the full force of the law); see also Neil Gotanda, *New Directions In Asian American Jurisprudence*, 17 ASIAN AM. L.J. 5, 37-41 (2010) (arguing that the Chinese Exclusion Acts facilitated the creation of a new Chinese racial category).

**APPENDIX: LIST OF MOTION TO REOPEN CASES EXAMINED
AS OF DECEMBER 31, 2014²⁵⁶**

CASE	ALIEN'S HOME PROVINCE	RESULT
Matter of C-C-, 23 I. & N. Dec. 899 (BIA 2006)	Not Known ²⁵⁷	Denial of Motion to Reopen
Matter of S-Y-G-, 24 I. & N. Dec. 247 (BIA 2007)	Fujian Province	Denial of Motion to Reopen
Zheng v. Mukasey, 546 F.3d 70 (1st Cir. 2008)	Fujian Province	Denial of Motion Affirmed
Le Bin Zhu, 622 F.3d 87 (1st Cir. 2010)	Not Known	Denial of Motion Affirmed
Hang Chen, 675 F.3d 100 (1st Cir. 2012)	Not Known	Denial of Motion Affirmed
Yong Xiu Lin v. Holder, 754 F.3d 9 (1st Cir. 2014)	Fujian Providence	Denial of Motion Affirmed
Wang v. Board of Immigration Appeals, 437 F.3d 270 (2d Cir. 2006)	Not Known	Denial of Motion Affirmed
Shou Yung Guo v. Gonzales, 463 F.3d 109 (2d Cir. 2006)	Fujian Province	Remand to the Board for further consideration
Gao v. Mukasey, 508 F.3d 86 (2d Cir. 2007)	Fujian Province	Remand to the Board for further consideration
Shao v. Mukasey, 546 F.3d 138 (2d Cir. 2008)	3 aliens, all from Fujian Province	Denial of Motion Affirmed
Xiu Qin Huang v. Holder, 455 Fed. Appx. 67 (2d Cir. 2012)	27 aliens	Denial of Motion Affirmed
Ming Sheng Zhu v. Holder, 472 Fed. Appx. 94 (2d Cir. 2012)	Not Known	Denial of Motion Affirmed
Xue Yan Zhou v. Holder, 490 Fed. Appx. 374 (2d Cir. 2012)	Not Known	Denial of Motion Affirmed
Xue Yan Zhou v. Holder, 490 Fed. Appx. 235 (2d Cir. 2012)	Not Known	Denial of Motion Affirmed
Zhi Bao Zheng v. Holder, 473 Fed. Appx. 95 (2d Cir. 2012)	Not Known	Denial of Motion Affirmed
Sai Yun Pan v. Holder, 491 Fed. Appx. 235 (2d Cir. 2012)	Not Known	Denial of Motion Affirmed
Mengjun Chen v. Holder, 474 Fed. Appx. 840 (2d Cir. 2012)	Not Known	Denial of Motion Affirmed
Xiu Lan Lin v. Holder, 473 Fed. Appx. 42 (2d Cir. 2012)	Not Known	Denial of Motion Affirmed
Ming Zhing Jiang v. Holder, 531 Fed. Appx. 35 (2d Cir. 2013)	Not Known	Denial of Motion Affirmed
Cuirong Lin v. Holder, 2014 WL 1243827, ___ Fed. Appx. ___ (2d Cir. 2014)	Not Known	Denial of Motion Affirmed

256. The Fifth Circuit and Sixth Circuit have not issued any precedential opinions on point.

257. The court does not specify the home town of the Chinese petitioner. The same also applies to the rest of "Not Known" in this list.

CASE	ALIEN'S HOME PROVINCE	RESULT
Zheng v. Att'y Gen. of U.S., 549 F.3d 260 (3d Cir. 2008)	Fujian Province	Remand to the Board for further consideration
Liu v. Att'y Gen. of U.S., 555 F.3d 145 (3d Cir. 2009)	Fujian Province	Denial of Motion Affirmed
Fei Yan Zhu v. Att'y Gen. of U.S., 744 F.3d 268 (3d Cir. 2014)	Fujian Province	Remand to the Board for further consideration
Xi Que Li v. Att'y Gen. of U.S., 336 Fed. Appx. 140 (3d Cir. 2009)	Fujian Province	Remand to the Board for further consideration
Fen Lin v. Att'y Gen. of U.S., ___ Fed. Appx. ___ (3d Cir. 2014)	Fujian Province	Denial of Motion Affirmed
Xiu Qin Lin v. Mukasey, 275 Fed. Appx. 249 (4th Cir. 2008)	Fujian Province	Remand to the Board for further consideration
Wanrong Lin v. Holder, 452 Fed. Appx. 369 (4th Cir. 2011)	Fujian Province	Denial of Motion Affirmed
Wanrong Lin v. Holder, 771 F.3d 177 (4th Cir. 2014)	Fujian Province	Denial of Motion Affirmed
Zhen Dong v. Mukasey, 286 Fed. Appx. 146 (5th Cir. 2008)	Not Known	Denial of Motion Affirmed
Qi Hua Li v. Holder, 354 Fed. Appx. 46 (5th Cir. 2009)	Not Known	Denial of Motion Affirmed
Zhang v. Holder, 481 Fed. Appx. 950 (5th Cir. 2012)	Not Known	Denial of Motion Affirmed
Ru Jian Zhang v. Holder, 487 Fed. Appx. 949 (5th Cir. 2012)	Fujian Province	Denial of Motion Affirmed
Yu Yun Zhang v. Holder, 702 F.3d 878 (6th Cir. 2012)	Fujian Province	Remand to the Board for further consideration ²⁵⁸
Bi Feng Liu v. Holder, 412 Fed. Appx. 860 (6th Cir. 2011)	Fujian Province	Denial of Motion Affirmed
Xiang Can Lin v. Holder, 540 Fed. Appx. 500 (6th Cir. 2013)	Fujian Province	Denial of Motion Affirmed
Xiu Zhen Lin v. Mukasey, 532 F.3d 596 (7th Cir. 2008)	Fujian Province	Remand to the Board for further consideration
Xiao Jun Liang v. Holder, 626 F.3d 983 (7th Cir. 2010)	Fujian Province	Denial of Motion Affirmed
Ji Cheng Ni v. Holder, 715 F.3d 620 (7th Cir. 2013)	Fujian Province	Remand to the Board for further consideration
Zhong Qin Zheng v. Mukasey, 523 F.3d 893 (8th Cir. 2008)	Fujian Province	Denial of Motion Affirmed
Li Yun Lin v. Mukasey, 526 F.3d 1164 (8th Cir. 2008)	Fujian Province	Denial of Motion Affirmed

258. Note that the Chinese movant in *Yu Yun Zhang* raised two claims in her motion to reopen: one is U.S.-based OCP claim, and the other is fear of persecution on account of her religious belief. The court granted petition to review as to her religion claim, but denied the petition as to the U.S.-based OCP claim. *Yu Yun Zhang*, 702 F.3d at 882.

CASE	ALIEN'S HOME PROVINCE	RESULT
Xiu Ling Chen v. Holder, 751 F.3d 876 (8th Cir. 2014)	Fujian Providence	Denial of Motion Affirmed
He v. Gonzales, 501 F.3d 1128 (9th Cir. 2007)	Fujian Province	Denial of Motion Affirmed
Feng Gui Lin v. Holder, 588 F.3d 981 (9th Cir. 2009)	Fujian Province	Denial of Motion Affirmed
Diang Lin v. Holder, 2014 WL 448542, ___ Fed. Appx. ___ (9th Cir. 2014)	Fujian Province	Remand to the Board for further consideration
Wei v. Mukasey, 545 F.3d 1248 (10th Cir. 2008)	Fujian Province	Denial of Motion Affirmed
Gong Geng Chen v. Holder, 444 Fed. Appx. 305 (10th Cir. 2011)	Fujian Province	Denial of Motion Affirmed
Li v. U.S. Att'y Gen., 488 F.3d 1371 (11th Cir. 2007)	Fujian Province	Remand to the Board for further consideration
Jiang v. U.S. Att'y Gen., 568 F.3d 1252 (11th Cir. 2009)	Fujian Province	Direct the Board to reopen the removal proceeding
Zhang v. U.S. Att'y Gen., 572 F.3d 1316 (11th Cir. 2009)	Fujian Province	Direct the Board to reopen the removal proceeding
Mei Yu Chen v. U.S. Att'y Gen., 255 Fed. Appx. 451 (11th Cir. 2007)	Not Known	Denial of Motion Affirmed
Lian Qing v. U.S. Att'y Gen., 261 Fed. Appx. 263 (11th Cir. 2008)	Not Known	Denial of Motion Affirmed
Ru Zheng v. U.S. Att'y Gen., 343 Fed. Appx. 493 (11th Cir. 2009)	Fujian Province	Denial of Motion Affirmed
Hua Jiang Yan v. U.S. Att'y Gen., 315 Fed. Appx. 873 (11th Cir. 2009)	Heilongjiang Province	Denial of Motion Affirmed
Mei Shao v. v. U.S. Att'y Gen., 346 Fed. Appx. 552 (11th Cir. 2009)	Not Known	Denial of Motion Affirmed
Wen Xiu Jiang v. U.S. Att'y Gen., 353 Fed. Appx. 201 (11th Cir. 2009)	Fujian Province	Denial of Motion Affirmed
Wen-Xing Wang v. v. U.S. Att'y Gen., 379 Fed. Appx. 827 (11th Cir. 2010)	Fujian Province	Denial of Motion Affirmed
Whan Quang Ming v. U.S. Att'y Gen., 428 Fed. Appx. 928 (11th Cir. 2011)	Zhejiang Province	Denial of Motion Affirmed
Bin Bin Lin v. U.S. Att'y Gen., 441 Fed. Appx. 667 (11th Cir. 2011)	Fujian Province	Denial of Motion Affirmed
Xia Jiang Wei v. U.S. Att'y Gen., 493 Fed. Appx. 2 (11th Cir. 2012)	Fujian Province	Denial of Motion Affirmed
Mu Ying Wu v. U.S. Att'y Gen., 745 F.3d 1140 (11th Cir. 2014)	Fujian Province	Denial of Motion Affirmed

