Florida State University Journal of Transnational Law & Policy

Volume 5 | Issue 1 Article 3

1995

Xin-Chang Zhang v. Slattery: An Illustration of the Need for a Change in the United States' Immigration Laws to Provide Appropriate Consideration of Asylum Claims by Chinese Nationals Fleeing China's Coercive Population Control

Jason D. Lazarus

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Cover Page Footnote

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XIN-CHANG ZHANG V. SLATTERY: AN ILLUSTRATION OF THE NEED FOR A CHANGE IN THE UNITED STATES' IMMIGRATION LAWS TO PROVIDE APPROPRIATE CONSIDERATION OF ASYLUM CLAIMS BY CHINESE NATIONALS FLEEING CHINA'S COERCIVE POPULATION CONTROL

JASON D. LAZARUS*

"Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming Shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!"[1]

I. INTRODUCTION

In *Xin-Chang Zhang v. Slattery*,[2] the Second Circuit Court of Appeals denied Chinese national Xin-Chang Zhang's writ of habeas corpus. As a result, the decision of the Board of Immigration Appeals' denying his claim for asylum and placing him in exclusion

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1. EMMA LAZARUS, THE NEW COLOSSUS. The New Colossus is a poem inscribed on the Statute of Liberty. Unfortunately, the poem's message does not ring true for Chinese nationals fleeing China's coercive population control policies who are refused asylum in the United States.

2. 55 F.3d 732 (2d Cir. 1995).

rather than commencing deportation proceedings was not reviewed. Xin-Chang Zhang ("Zhang") was fleeing China's "one-couple, one-child" policy and its coercive enforcement. The decision is correct under the *current* state of the law. However, the decision illustrates all too clearly the failed attempts of both the legislative and the executive branches to rectify the asylum problems for those persons fleeing the Coercive Population Control Policy of the People's Republic of China ("PRC").[3] Judge Jacobs, Circuit Judge, delivered the opinion of the court reversing the district court's[4] remand of the case to the Board of Immigration Appeals ("BIA").[5] The court held that Zhang's fear of forcible sterilization upon return to China did not entitle him to asylum or withholding of return, and he did not achieve entry into the United States.[6] The *Zhang* decision is one more in a series of decisions that have denied relief to Chinese nationals fleeing China's Coercive Population Control Policy.

Part I of this note discusses China's population control policy in the past and up to the present. Part II examines the legal background of asylum claims and contains a detailed account of the Immigration Court's treatment of asylum claims by Chinese nationals fleeing the "one-couple, one-child" policy. Part II also examines the confusing treatment the executive and legislative branches have given to asylum claims by Chinese nationals attempting to escape China's coercive population control program. Part III discusses the factual and procedural background of *Zhang* and argues why the Second Circuit correctly decided the case under the *current* state of the law. Finally, part IV argues for intervention by either the legislative or executive branches of the United States, or both, to provide appropriate consideration of asylum claims by Chinese nationals fleeing coercive population control policies. Such intervention will allow the judicial branch to appropriately consider asylum claims.

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3. *Id.* at 732. The *Zhang* court stated that its "result is ironic in light of seemingly purposeful efforts by the executive branch and the houses of Congress to achieve the opposite outcome." *Id.* at 737.

4. Xin-Chang Zhang v. Slattery, 859 F. Supp. 708 (S.D.N.Y. 1994), *rev'd*, 55 F.3d 732 (2d Cir. 1995). Federal District Judge Robert P. Patterson held that the Immigration Judge and the Board of Immigration Appeals had (1) improperly relied on Matter of Chang, Int. Dec. No. 3107, 1989 BIA LEXIS 13 (BIA May 12, 1989), the seminal BIA decision concerning asylum claims based on China's coercive population control policy, since *Chang* had been overruled by an unpublished final rule put out by the Attorney General and (2) incorrectly subjected Zhang to exclusion proceedings by placing the burden on Zhang to prove that he was free from official restraint after crossing the territorial limits of the United States. *Id.* Therefore, he remanded the case to the BIA for proceedings not inconsistent with his opinion. *Id.* at 715. The United States Government appealed to the Second Circuit.

5. *Zhang*, 55 F.3d 732.

6. *Id.* at 737.

II. CHINA'S POPULATION CONTROL POLICY

In Chinese tradition having children is extremely important and is viewed "as an act of filial piety."[7] While the urban population has moved away from this ideal, the rural population still embraces such tradition.[8] In rural areas, children are seen as an economic necessity since they provide additional hands to work the land and support to the Chinese farmers in their old age.[9] Furthermore, according to Chinese tradition, daughters join their husband's family and can offer little support to their own parents. Therefore, couples need to have at least one son to take care of them in their later years.[10] The one-child policy[11] imposes a hardship upon couples who have a daughter rather than a son, and upon many rural families.

Mao Zedong began population control policies in 1956.[12] During this time, Chinese authorities determined that birth control was no longer a "private affair," but instead a matter of importance for the national welfare and was thus an "affair of the state."[13] Chinese officials declared that birth control "was not to be forced on anybody," and that "acts of compulsion must be avoided."[14] One example of how the policy operated during this period was that in some cities women factory workers were required to adopt a birth plan under which they agreed to have no children for five years.[15] If the women did not agree, they would be denounced by having their pictures posted on the walls of the factory.[16] These methods employed by the

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7. *Human Rights and U.S. Reactions to the Chinese Family Planning Program, 1995: Testimony Before the House Subcomm. on International Operations and Human Rights*, 1995 WL 301597, at *8 (F.D.C.H.) (1995) (statement of John S. Aird, Former Senior research specialist on China at the U.S. Bureau of the Census) [hereinafter *Human Rights Testimony*].

8. *Id.*

9. *See id.*; *see also* Michael Weisskopf, *One Couple, One Child: Abortion Policy Tears at China's Society*, WASH. POST, Jan. 7, 1985, at A1 [hereinafter *Abortion Policy Tears*]. Michael Weisskopf spent four years on assignment in China as a Peking correspondent for the Washington Post and was present during the initial implementation of China's policy of "one-couple, one-child."

10. *Human Rights Testimony*, *supra* note 7, at *8.

11. The Policy was instituted by China in 1979. *Id.*

12. JOHN S. AIRD, SLAUGHTER OF THE INNOCENTS 20 (1990). Ironically, when China's new government was established in 1949 and before Mao had a change of heart, Mao stated "[i]t is a very good thing that China has a big population. Even if China's population multiplies many times, she is fully capable of finding a solution .... Of all things in the world, people are the most precious." *Id.* The Ministry of Public Health, in August 1956, promulgated a directive to local health agencies requiring them to promote birth control actively. *Id.* at 21. Thereafter, a large scale propaganda campaign was waged. *Id.*

13. *Id.* at 22.

14. *Id.*

15. *Id.*; E. Tobin Shiers, *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).

16. AIRD, *supra* note 12, at 22.

Chinese government led to the belief that birth control was mandatory.[17]

In 1979, because population goals were not being met, China implemented its "one-couple, one-child" policy.[18] The one-child program was designed to cap China's population at 1.2 billion by the year 2000 and reduce it even further during the next century.[19] In attempting to reach these goals, the Chinese government has engaged in "a pattern of official coercion and brutality in the name of birth control."[20] There are reports of roundups of pregnant women for abortions, infanticide and forced sterilizations.[21] As a result of the implementation of the one-child policy, female infanticide became particularly problematic.[22] In the face of evidence to the contrary, Chinese officials claim that accounts of forced abortion, sterilization and infanticides are "rumor" and "fabrication."[23] Nevertheless, some Chinese officials have admitted that although it runs counter to "official policy," forced abortions and sterilizations do occur in some instances.[24] Ample evidence exists that China's "official policy" advocates the use of coercion to accomplish the goals of its population control program.[25]

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17. *See* AIRD, *supra* note 12, at 22; Shiers, *supra* note 15, at 1011.

18. AIRD, *supra* note 12, at 28.

19. Michael Weisskopf, *Shanghai's Curse: Too Many Fight for Too Little*, WASH. POST, Jan. 6, 1985, at A1 [hereinafter *Shanghai's Curse*].

20. *Id.*

21. *Id.* In September of 1983, at the height of coerciveness of the one-child program, family planning work teams spread out across the country conducting 21 million sterilizations, 18 million IUD insertions, and 14 million abortions, many of which were involuntary. *Human Rights Testimony, supra* note 7, at *5.

22. AIRD, *supra* note 12, at 28.

23. *Forced Abortion in Tibet "Sheer Fabrication"*, Chinese Official Says, THE XINHUA GENERAL OVERSEAS NEWS SERVICE, Mar. 23, 1989. China's President Li Ziannian, in 1985, described as "a fabrication and distortion" a measure approved in 1985 by the House, which accused China of forced abortion and sterilization. John F. Burns, *President of China Assails U.S. Move on Birth Control*, N.Y. TIMES, July 12, 1985 at A3.

24. *Is China's Birth Control Program Still Coercive?: Hearings Before the Senate Comm. on Foreign Relations*, 100th Cong., 1st Sess. 223 (1987) (statement of John S. Aird, Former Senior Research Specialist on China at the U.S. Bureau of the Census) [hereinafter *Still Coercive*].

25. *Human Rights Testimony, supra* note 7, at *9. In 1981, Deng Xiaoping was quoted by Vice-Premier Chen Muhua as stating that "[i]n order to reduce the population, use whatever means you must, but do it." *Id.* Again, in June of 1983, the then-Premier Zhao Ziyang told a national Party congress that it was essential to "prevent additional births by all means." *Id.* The message which these statements carry is clear, do what you must to reduce the population and that is precisely what occurred and what is occurring.

In a more recent publication from 1993, a major Chinese population journal stated that "so far the reduction in China's rural fertility has been the result of external constraints; that is, the mechanism involved has been a coercion based reduction mechanism." *Id.* at *9-10. In an April 1993 article in a Chinese legal journal the article advocated:

> [F]amily planning work needs to be backed by forcible measures provided for by the law . . . It is necessary to have legal rules providing for relevant forcible,

There are many horrid and sad tales of the methods employed by Chinese authorities in implementing their one-child policy.[26] One of these methods is coerced[27] or even forced abortion. For example, in Dongguan in Southern China, abortion posses rounded up expectant mothers, many in their last trimester.[28] These women were "trussed, handcuffed, herded into hog cages, and delivered by the truckload to operating tables of rural clinics, according to eyewitness accounts."[29] China's policy enforces the contention that a mother who becomes

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> restrictive measures . . . such as . . . forcible termination of pregnancy, forcible abortion, or induced abortion. It is necessary to forcibly sterilize those couples who have failed to be sterilized . . . after having . . . two births.

Id. at *9. These statements by the controlled Chinese press without disavowal by the government indicate approval by the Chinese authorities to the statements contained therein. *Id.* at *10.

26. The methods utilized by the Chinese government, including coerced or forced abortion, sterilization, and automatic intrauterine implants are violations of the reproductive freedom principles embodied in international human rights instruments. Rebecca O. Bresnick, *Reproductive Ability as a Sixth Ground of Persecution Under the Domestic and International Definitions of Refugee*, 21 SYRACUSE J. INT'L. & COM. 121, 122 (1995). According to one commentator:

> These [international human rights] instruments include The Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979 art. 16, 1259 No. T.S. 13, *reprinted in* 19 I.L.M. 33 (1980)(mandating that member states ensure one's right to freely decide the number and spacing of one's children and access to the information and means to be able to exercise these rights); The Universal Declaration of Human Rights, Dec. 10, 1948, art. 3, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc A/810 (1948)("Everyone has the right to life, liberty and security of person") and art. 16, § 1 (granting people the right to marry and found a family); and The International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 23, § 2, 999 U.N.T.S. 171, No. 14668, *reprinted in* 6 I.L.M. 368 (recognizing the right of people to marry and found a family) and art. 17, § 1 ("No one shall be subject to arbitrary or unlawful interference with his privacy, family, home . . .").

Id. at 122 n.6. According to The World Population Plan of Action, reproductive rights are components of 'the basic right of couples and individuals to decide freely and responsibly the number and spacing of their children . . .'" *Id.* at 122 n. 7 (citing REPORT OF THE UNITED NATIONS WORLD POPULATION CONFERENCE, 1974, at § 14(f), U.N. Sales No. E. 75 XII.3 (19-30 Aug. 1974).

27. An article in the Washington Post detailed the horrendous experience of one Chinese woman. Steven W. Mosher, *'One Family, One Child': China's Brutal Birth Ban; For Chinese Women, It's Abortion or Sterilization*, WASH. POST, Oct. 18, 1987, at D1. Chen Guohan's wife decided she wanted to have a second child so she found a midwife to remove her intrauterine device which was automatically inserted after the birth of her first child. *Id.* She became pregnant and hid her pregnancy for several months until she was ordered to go for a pelvic exam after arousing the suspicions of population control workers. *Id.* The Chens decided that she would go to live with a cousin in a neighboring county until after the birth. *Id.* However, Chen's wife was found and brought back when she was seven months pregnant. *Id.* Chen's factory director ordered Chen's wife confined to the factory dormitory with at least one member of the birth control committee with her at all times harassing her to accept an abortion. *Id.* She finally gave in and was immediately taken to a medical clinic and given an injection of an "abortifacient drug." *Id.*

28. *Abortion Policy Tears*, *supra* note 9, at *A1.

29. *Id.* Dongguan, in 1981, was subjected to an intense birth control campaign by local officials. *Id.* "In 50 days, 19,000 abortions were performed—almost as many as the country's live births in all of 1981." *Id.*

pregnant without official authorization after having one child is required to have an abortion.[30] Ironically, as late as 1950 abortion was criminally punishable as murder in China.[31] However, today abortion is readily accepted without debate.[32] Many abortions are performed in the last trimester of pregnancy, even as late as in the ninth month.[33]

Another method employed is sterilization.[34] Typically, couples who already have two or more children are targeted[35] and at least one parent is required by the state to undergo the sterilization procedure.[36] Automatic intrauterine device ("IUD") implants have also been utilized. IUD's are inserted in some hospitals after a woman gives birth, typically without informing or seeking prior consent of the woman.[37] Economic disincentives are also doled out to violators of the one-child policy. One official levied fines that equaled almost three times the mother's annual income, stripped land away from her family, and refused rations for the second child.[38] Additionally, some couples with two children are required to pay an annual fee equal to one-tenth of the family income until the second child reaches the age of sixteen.[39]

China's population control policies are just as coercive today as they were in the past. Early in 1991, a major escalation of family

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30. *Id.* From 1979 to 1984, 53 million abortions were performed according to the Ministry of Public Health. *Id.* This five year total of abortions equals the population of France. *Id.*

31. *Id.*

32. *Id.* Xu Fangling, a birth control official stated that "[i]t's more humane to kill children before they are born than to bring them into a society of too many people." *Id.* Furthermore, he stated that "[i]f you consider the serious difficulties overpopulation creates for people living today, the moral problem of abortion isn't too serious." *Id.*

33. *Abortion Policy Tears, supra* note 9, at *A1. Late term pregnancies are normally aborted by injecting an herbal drug into the womb, killing the fetus and inducing labor (the dead fetus is usually expelled in 24 hours). *Id.* There are other more gruesome methods employed. One of these methods is to smash the baby's skull with forceps as it emerges from the womb. *Id.* Another method is to inject formaldehyde into the soft spot of the baby's head. *Id.* One doctor rationalized these procedures because "[i]f you kill the baby while it's still partly in the womb, it's considered an abortion." *Id.*

34. *Id.* Statistics show that 31 million women and 9.3 million men were sterilized between 1979 and 1984 which represents almost one-third of all married, productive couples in China. *Id.*

35. *Id.* Local officials will use methods ranging from monetary incentives to coercion to get the parent to submit to the sterilization procedure. *Id.*

36. *Id.* Typically the sterilizations are done in masse by roving surgical teams. *Id.* In some cases, to avoid women fleeing, "surprise attacks" are planned and sleeping women are hustled from their beds to 24 hour sterilization clinics. *Id.*

37. *Id.* Tragically, many women pay "hook wielders" to remove IUD's with homemade metal hooks. *Id.* Hundreds of deaths and injuries have been reportedly caused by "penetration of the uterus and intestines with unsterilized bicycle spokes or bamboo sticks." *Id.*

38. *Id.*

39. Shiers, *supra* note 16, at 1013.

planning efforts was implemented with increasing reports of coercive measures being utilized.[40] In January of 1991, Peng Peiyun, the current minister in charge of the State Family Planning Commission ("SFPC"), sent a letter to family planning workers throughout the country stating that they must "unwaveringly use the basic [family planning] practices that have been effective for many years."[41] In March of 1991, Party General Secretary Jiang Zemin and Premier Li Peng proclaimed that family planning policies would not be changed for the rest of the century and called for implementation "with no wavering whatsoever."[42] A formal directive from the Party Central Committee and the State Council, the highest authority in China, was issued in May of 1991 after which signs of escalation were reported.[43] The results of the 1991 escalation are startling—the birth rate dropped significantly, China's total fertility rate dipped below the target for the year 2000, and the percentage of sterilized couples rose significantly.[44]

On March 19, 1995, Jiang Zemin stated that "under no circumstances" could efforts be relaxed.[45] Furthermore, Li Peng commented that current policies would remain unchanged to the end of the century.[46] These statements indicate that the 1991 crackdown is still continuing today and that China's leaders will continue their coercive policies at least through the year 2000.[47]

A high percentage of the Chinese population, including local party and government cadres oppose population control programs. In 1988, a SFPC survey revealed that 72 percent of all couples and 90 percent of rural couples wanted more than one child.[48] Furthermore,

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40. *Human Rights Testimony, supra* note 7, at *15.

41. *Id.* Peng Peiyun, in February of 1991, demanded that the country's fertility rate be lowered from the 1990 level of 2.3 children per woman to 2.1 by 1995 and then to 2.0 by the year 2000. 2.0 by 2000 is below replacement level. *Id.* A fertility rate of almost 2.2 children is needed to maintain China's present population. Lena H. Sun, *China Lowers Birth Rate to Levels in West; 6.5 Million Sterilized in '92, Official Says,* WASH. POST, Apr. 22, 1993, at A1.

42. *Human Rights Testimony, supra* note 7, at *15.

43. *Id.*

44. *Nicholas D. Kristof, China's Crackdown on Births: A Stunning, and Harsh, Success,* N.Y. TIMES, Apr. 25, 1993, at A1. The birth rate in 1990 was 21.1 per 1,000 population, then in 1992 it dropped to 18.2 per 1,000 population. *Id.* In 1990, China's total fertility rate was 2.3 and had never dipped below 2 until recently. Based on 1992's birth data, each Chinese woman can expect to have an average of 1.8 or 1.9 children in her lifetime. *Id.* These figures are below the goal of 2.0 in 2000 set by the Chinese government. In 1992, the percentage of couples of child bearing age who are sterilized or use contraception rose to 83.4 percent. *Id.* In 1991 and 1992, 16.5 million Chinese were sterilized, *supra* note 42, at *A4. *Id.*

45. *Human Rights Testimony, supra* note 7, at *16. This statement was made at a national family planning forum.

46. *Id.*

47. *Id.*

48. *Still Coercive, supra* note 24, at 213.

a demographic journal reported that 88 percent of Chinese couples wanted both a boy and a girl.[49] Due to this wide spread resistance and traditional Chinese values[50] which emphasize the importance of having children, persuasion generally fails to achieve compliance.[51] Therefore, local officials, who are under pressure from senior Chinese officials, have and continue to resort to coercion.[52] This situation seems unlikely to change given China's commitment to its family planning policies through the year 2000. Thus, the United States will continue to find Chinese nationals, such as Zhang, seeking asylum in the United States of America. Until the legislative or executive branches take action, most claims for asylum based on China's coercive population control policies will receive the same inappropriate consideration as Zhang's. The next section discusses why asylum claims based on coercive population control fail, and details the attempts of the judicial, executive, and legislative branches to solve this problem.

III. LEGAL & REGULATORY BACKGROUND OF ASYLUM CLAIMS BASED ON CHINA'S POPULATION CONTROL PROGRAMS

A. The Legal Framework of Asylum Claims

The two alternative forms of relief for aliens who claim that they will be persecuted if forced to return to their homelands are withholding of return and asylum.[53] Withholding of return is an "entitlement" for any alien who can show a "clear probability" that his or her "life or freedom would be threatened in [a] country on account of race, religion, nationality, membership in a particular social group, or political opinion."[54] While withholding of return is "non-discretionary," eligibility for this type of relief places a higher burden of proof on the alien than do asylum claims.[55]

According to 8 U.S.C. § 1158, part of the Immigration and Nationality Act ("INA"), an "alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines

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49. *Id.*

50. *See supra* notes 7-10 and accompanying text.

51. *Human Rights Testimony, supra* note 7, at *15.

52. *Id.*

53. *Zhang*, 55 F.3d at 737. Asylum requires proof "that the fear of persecution is well founded,"while withholding of return requires proof of "a 'clear probability' of persecution if returned home." *Id.* A grant of asylum gives an alien the right to remain in the U.S., while withholding of return enables the alien to avoid only "returning to the country in which the persecution would occur. *Id.*

54. *Id.* at 738 (citing 8 U.S.C. 1253(h)(1) (1994)).

55. *Id.*

that such alien is a refugee within the meaning of section 1101(a)(42)(A)." Section 1101(a)(42)(A) defines refugee as:

> [A]ny person who is outside any country of such person's nationality . . . who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[56]

The alien seeking asylum bears the burden to show past persecution or a well-founded fear of future persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion.[57] If the alien meets this burden and qualifies as a refugee, asylum is not automatic. The Attorney General still has the discretion to grant or deny asylum.[58]

China's borders have been essentially closed to emigration until recently.[59] Since the late 1980's, refugees have begun to seek asylum in the United States in order to escape China's coercive family planning practices.[60] As a result, asylum claims based on China's family planning practices were not contemplated in 1982 when the Immigration and Naturalization Act was adopted.[61] Consequently, none of the five categories contained in Section 1101(a)(42)(A) really fit the circumstances of refugees fleeing from China's family planning policy.[62]

The Attorney General delegated to the BIA the authority to grant asylum to refugees, under the INA, through adjudication of claims in administrative deportation and exclusion proceedings.[63] Since the BIA has the authority to grant asylum through adjudication of claims, a discussion of the seminal BIA case on asylum for those fleeing China's coercive population control policies follows.

B. The BIA's Interpretation of the Definition of Refugee

The BIA's decision in *Matter of Chang*[64] interpreted Section 1101's definition of refugee in such a way that few Chinese seeking asylum

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56. 8 U.S.C. § 1101(a)(42)(A) (1994).

57. *Zhang*, 55 F.3d at 737-38.

58. *Id.* at 738; *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 428 n.5 (1987) ("It is important to note that the Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee.").

59. *Human Rights Testimony, supra* note 7, at *10.

60. *Id.*

61. *Id.*

62. *Id.*

63. Lan v. Waters, 869 F. Supp. 1483, 1489 (N.D. Cal. 1994) (citing Accardi v. Shaughnessy, 347 U.S. 260, 266-67 (1954)).

64. Int.Dec. 3107, 1989 BIA LEXIS 13 (BIA May 12 1989).

due to China's coercive family planning program would qualify.[65] The BIA stated in *Chang* that "[w]e cannot find that implementation of the 'one couple, one child' policy in and of itself, even to the extent that involuntary sterilizations may occur, is persecution or creates a well founded fear of persecution 'on account of race, religion, nationality, membership in a particular social group, or political opinion'."[66] The *Chang* court added that "[t]o the extent . . . that such a [population control] policy is solely tied to controlling population, rather than as a guise for acting against people for reasons protected by the Act, we cannot find that persons who do not wish to have the policy applied to them are victims of persecution or have a well-founded fear of persecution within the *present scope* of the Act."[67] *Matter of Chang*, by construing the Immigration and Nationalization Act so narrowly, ensured that most, if not all, asylum seekers attempting to escape China's family planning program would fail to qualify for asylum. The BIA, since issuing *Chang*, has consistently followed it.[68] Furthermore, because it is a reasonable interpretation of the INA, federal courts have deferred to it.[69]

Chang's narrow interpretation of the INA has caused many problems for Chinese asylum seekers fleeing coercive population control. If a change is going to be made, it must start with legislative action to overrule the BIA's decision in *Chang*. The next section discusses the regulatory history before and after *Chang* including the failed attempts by the legislative and executive branches to overrule it.

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65. *Human Rights Testimony, supra* note 7, at *10.

66. 1989 BIA LEXIS at *14. The Chang court did go on to note that "[t]his is not to say that such a policy could not be implemented in such a way as to individuals or categories of persons so as to be persecution on account of a ground protected by the Act." *Id.*

67. *Id.* at *14-15 (emphasis added). The BIA made it entirely clear that asylum claims based on being subjected to China's population control policy must fail by stating:

> An individual claiming asylum for reasons related to this policy must establish, based on additional facts present in his case, that the application of the policy to him was in fact persecutive or that he had a well-founded fear that it would be persecutive on account of one of the five reasons enumerated in section 101(a)(42)(A) [8 U.S.C. § 1101(a)(42)(A)]. For example, this might include evidence that the policy was being selectively applied against members of particular religious groups or was in fact being used to punish individuals for their political opinions. This does not mean that all who show that they opposed the policy, but were subjected to it anyway, have demonstrated that they are being 'punished' for their opinions. Rather, there must be evidence that the governmental action arises for a reason other than general population control.

Id. at *15-16.

68. *See, e.g.*, Matter of G—, Int.Dec. 3215, 1993 BIA LEXIS 14 (BIA Dec. 8, 1993).

69. *See infra* note 107.

C. *Regulatory History*

Federal Judge T.S. Ellis III, in *Guo v. Carroll*,[70] called the no fewer than nine inconsistent administrative and executive pronouncements regarding asylum eligibility based on opposition to China's coercive population control program an "administrative cacophony."[71] Judge Ellis created the following table which illustrates some of these inconsistencies:

Pronouncement	Asylum Eligibility
1. August 5, 1988 Guidelines promulgated by then Attorney General Edwin Meese	asylum permitted
2. *Matter of Chang*, Int. Dec. 3108 (BIA May, 1989)	asylum not permitted
3. January, 1990 Interim Rule promulgated by then Attorney General Richard Thornburg.	asylum permitted
4. Executive Order No. 12,711, 55 Fed. Reg. 13, 897 (1990), issued by President George Bush.	asylum permitted
5. July, 1990 Rule	asylum not addressed
6. November, 1991 Memorandum from the General Counsel of the I.N.S.	determining that PRC's coercive family planning practices constitute persecution on account of political opinion
7. January, 1993 Rule promulgated by then Attorney General William Barr	asylum permitted
8. *Matter of Chu*, A 71 824 281 (BIA June 7, 1993), *Matter of Tsun*, A 71 824 320 (BIA June 7, 1993), and *Matter of G---*, A 72 761 974 (BIA Dec. 8, 1993)	asylum not permitted
9. December 7, 1993 pronouncement by Attorney General Janet Reno	declined to address conflicting views in Chang and Executive Order 12,711[72]

In the following section, these administrative and executive pronouncements will be discussed in detail along with other pertinent pronouncements.

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70. 842 F. Supp. 858 (E.D. Va. 1994).
71. *Id.* at 867.
72. *Id.* at 866-67.

Almost a year before *Chang*, in August of 1988, Attorney General Edwin Meese issued guidelines[73] to the Immigration and Naturalization Service ("INS"). These guidelines were issued to ensure that asylum could be granted to aliens who were able to show a well-founded fear of persecution by the Chinese government arising out of the PRC's population control program.[74] The INS never implemented these guidelines and the BIA concluded in *Chang* that the guidelines did not control its decision because they were "directed to the Immigration and Naturalization Service, rather than the immigration judges and [the BIA]."[75]

Soon after the May 1989 decision of *Chang*, Congress considered the Emergency Chinese Immigration Relief Act of 1989 ("1989 Act").[76] Senators William L. Armstrong and Dennis DeConcini proposed an amendment[77] to the 1989 Act which would have provided

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73. The guidelines provided that:

> All INS asylum adjudicators are to give careful consideration to applications from nationals of 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. If such refusal is undertaken as an act of conscience with full awareness of the urgent priority assigned to that policy by high level PRC officials and local party cadres at all levels as well as of the severe consequences which may be imposed for violation of the policy, it 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).

Zhang, 55 F.3d at 738 (quoting Mem. from the Office of Attorney General Meese to INS Commissioner Alan Nelson, at 1 (Aug. 5, 1988)) Joint Appendix ("JA") at 1682)). The Congressional record described these guidelines as follows:

> DOJ guidelines, noting that the PRC government views such defiance [i.e., opposition to involuntary sterilization] as an act of 'political dissent,' state that 'a finding of the requisite well-founded fear or persecution under these circumstances is reasonable.' This constitutes persecution for 'political opinion' under the Immigration Act and would result in a grant of asylum.

Guo, 842 F. Supp. at 863 n.3 (quoting 135 CONG. REC. S8244 (daily ed. July 19, 1989.))

74. *Zhang*, 55 F.3d at 738.

75. *Id.* (quoting *Chang*, 1989 BIA LEXIS 13, at *11-12).

76. *Id.* at 739. The Emergency Chinese Immigration Relief Act of 1989 was introduced in response to the events occurring in Tiananmen Square in June of 1989. Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1336 (4th Cir. 1995).

77. As amended, the 1989 Act provided in relevant part:

> Sec. 3 STANDARDS TO BE APPLIED IN ADJUDICATING APPLICATIONS FOR ASYLUM, WITHHOLDING OF DEPORTATION, AND REFUGEE STATUS FROM CHINESE FLEEING COERCIVE POPULATION CONTROL POLICIES.
>
> (a) IN GENERAL.—With respect to the adjudication of all applications for asylum, withholding of deportation, or refugee status from nationals of China filed before, on, or after the date of the enactment of this Act, careful consideration shall be given to such an applicant who expresses a fear of persecution upon return to China related to China's 'one couple, one child' family planning policy. If the applicant establishes that such applicant has refused to abort or be sterilized, such applicant shall be considered to have established a well-founded fear of persecution, if returned to China, on the basis of political opinion consistent with

for "careful consideration" of any asylum applicant who expressed fear of persecution if returned to China due to the coercive population control policies.[78] The obvious purpose of the amendment was to overrule *Chang*. The Senate passed the amendment unanimously[79] and the House voted 300-115[80] to concur in the amendment. However, President George Bush vetoed the 1989 Act, finding that it was an intrusion into his constitutional and statutory authority and claiming that he could "'accomplish the laudable objective of Congress' by executive action."[81] Accordingly, in his Memorandum of Disapproval, President Bush directed the Attorney General to give "enhanced consideration [to] . . . individuals from any country who express a fear of persecution upon returning to their country related to their country's policy of forced abortion or coerced sterilization."[82] Congress attempted to override President Bush's veto.[83] Although the House voted to override the veto, the Senate fell short by five votes.[84]

Attorney General Richard Thornburgh, in response to President Bush's directive, promulgated an interim rule on January 29, 1990 ("1990 interim rule").[85] This rule amended 8 C.F.R. § 208.5, the burden of proof regulation, to provide in relevant part, that:

> (1) Aliens who have a well-founded fear that they will be required to abort a pregnancy or to be sterilized because of their country's family planning policies may be granted asylum on the ground of persecution on account of political opinion.
>
> (2) An applicant who establishes that the applicant (or applicant's spouse) has refused to abort a pregnancy or to be sterilized in violation of a country's family planning policy, and who has a well-founded fear that he or she will be required to abort the pregnancy or to be sterilized or otherwise persecuted if the applicant were returned to such country may be granted asylum.[86]

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paragraph (42)(a) of section 101(a) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)).

Chai, 48 F.3d. at 1336 n.3 (quoting the Emergency Chinese Immigration Relief Act of 1989, H.R. 2712, 101st Cong., 1st Sess. § 3(a), (1989)).

78. *Chai*, 48 F.3d at 1336.

79. 135 CONG. REC. S8241-55 (daily ed. July 19-20, 1989).

80. 135 CONG. REC. H7945-54 (daily ed. Nov. 2, 1989).

81. *Zhang*, 55 F.3d at 739 (quoting Mem. of Disapproval for the Emergency Chinese Relief Act of 1989, 25 Weekly Compilation of Presidential Documents at 1853-54 (1989)).

82. *Zhang*, 55 F. 3d at 739.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* (quoting 55 Fed. Reg. 2803, 2805 (Jan. 29, 1990)).

Three months later, President Bush issued Executive Order 12,711, which reinforced the substance of the 1990 interim rule.[87] Section 4 of the April 11, 1990 Executive Order provided:

> The Secretary of State and the Attorney General are directed to provide for enhanced consideration under the immigration laws for individuals from any country who express a fear of persecution upon return to their country related to that country's policy of forced abortion or coerced sterilization, as implemented by the Attorney General's regulation effective January 29, 1990.[88]

Nevertheless, on July 27, 1990 when the Attorney General published a final rule setting forth extensive changes to regulations pertaining to asylum and withholding of deportation, they curiously made no mention of the 1990 interim rule.[89] Furthermore, no reference was made to the issue of asylum for persecution on the basis of opposition to coercive population control policies.[90] Unfortunately, for those seeking asylum based on China's coercive population control policies, the 1990 interim rule vanished without explanation.[91]

In April of 1991, due to confusion over the status of the 1990 interim rule, the Chief Attorney Examiner of the BIA made a written inquiry to the Appellate Counsel of the INS requesting clarification on the matter.[92] The Appellate Counsel replied that the 1990 Interim Rule was still the policy of the INS since it had not been amended or repealed.[93] The Office of the General Counsel of the INS, in a November 1991 memorandum to Regional Counsel and District Counsel, indicated that Department of Justice and INS "policy with respect to aliens claiming asylum or withholding of deportation based upon coercive family planning policies is that the application of such coercive policies *does constitute* persecution on account of political opinion."[94]

On the last day of the Bush Administration,[95] Attorney General William Barr signed a final rule[96] ("1993 rule") which primarily

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87. *Chai*, 48 F.3d at 1337.

88. *Id.* (quoting Exec. Order No. 12,711, 55 Fed. Reg. 13897 § 4, (1990)).

89. *Guo*, 842 F.Supp. at 863.

90. *Id.*

91. However, "an October 1990 article entitled 'INS Asylum Regulations Mistakenly Supersede Regulations on PRC 'One Couple, One Child' Policy' notes that the July 1990 Rule 'is an example of the bureaucratic left hand not noticing what the bureaucratic right hand is doing.'" *Guo*, 842 F. Supp. at 869 n.20 (quoting 67 Interpreter Releases 1222 (Oct. 29, 1990)). Furthermore, the article quoted an INS representative who indicated "that new regulations would be issued to correct the omission." *Id.*

92. *Lan*, 869 F. Supp. at 1486.

93. *Id.* at 1486.

94. *Id.* (emphasis added).

95. January 22, 1993.

reiterated the 1990 interim rule. The rule provided that enforcement would take effect upon publication in the Federal Register, scheduled for January 25, 1993. The commentary to the 1993 final rule stated:

> One effect of this rule is to supersede the Board [of Immigration Appeals] in *Matter of Chang*, Int.Dec. No. 3107 (BIA 1989), to the extent it held that the threat of forced abortion or involuntary sterilization pursuant to a government family planning policy does not give rise to a well-founded fear of persecution on account of political opinion, without an additional showing on the issue of the applicant's actual political opinion.[97]

The 1993 rule clearly overruled *Chang* by its express language and was cast in terms such as "shall be found to be a refugee" upon the proper showing. However, on January 22, 1993, President Clinton was inaugurated and the proposed Director of the Office of Management and Budget, Leon Panetta, issued a memorandum requesting that each agency withdraw from publication all regulations that had not yet been published in the Federal Register so that they could be approved by an agency head appointed by the new administration.[98] Acting upon the directive, the Acting Assistant Attorney General sent a memorandum to the Office of the Federal Register requesting the withdrawal of, among others, the 1993 Rule.[99] Pursuant to this request, officials at the Office of the Federal Register withdrew the

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96. The pertinent parts of the 1993 rule were as follows:

> An applicant (and the applicant's spouse, if also an applicant) shall be found to be a refugee on the basis of past persecution on account of political opinion if the applicant establishes that, pursuant to the implementation by the country of the applicant's nationality or last habitual residence of a family planning policy that involves or results in forced abortion or coerced sterilization, the applicant has been forced to abort a pregnancy or to undergo sterilization or has been persecuted for failure or refusal to do so, and that the applicant is unable or unwilling to return to, or to avail himself or herself of the protection of, that country because of such persecution....
>
> ....
>
> An applicant (and the applicant's spouse, if also an applicant) shall be found to be a refugee on the basis of a well-founded fear of persecution on account of political opinion if the applicant establishes a well-founded fear that, pursuant to the implementation by the country of the applicant's nationality or last habitual residence of a family planning policy that involves or results in forced abortion or coerced sterilization, the applicant will be forced to abort a pregnancy or to undergo sterilization or will be persecuted for failure or refusal to do so, and that the applicant is unable or unwilling to return to, or to avail himself or herself of the protection of, that country because of such fear.

Zhang, 55 F.3d at 740 (quoting January 1993 Rule, §208.13(2)(ii), Att'y Gen. Order No. 1659-93, JA 1652, 1664-65)).

97. *Id.*

98. *Id.* at 741 (citing 58 Fed.Reg. 6074).

99. *Guo*, 842 F. Supp. at 864.

1993 Rule from the Federal Register.[100] The 1993 rule was never resubmitted or published in the Federal Register.[101]

Finally, in June of 1993, the BIA referred two BIA decisions to Attorney General Janet Reno for review pursuant to 8 C.F.R. § 3.1(h)(1).[102] The BIA had applied *Chang* in the two decisions and recognized a conflict between *Chang* and Executive Order 12,711. Accordingly, the BIA certified the cases for the Attorney General's review to allow her to resolve the conflict.[103] Although Attorney General Janet Reno granted the BIA's request for review, in December of 1993, the Attorney General declined to resolve the conflict because it was "apparent" to her that the resolution of the two cases presented did not "require a determination that one or the other of these standards [was] . . . lawful and binding."[104]

In spite of the government's numerous attempts to overrule *Chang*, the BIA has consistently followed[105] *Chang* and almost all federal courts have held that the decision is entitled to deference as a permissible interpretation of the INA.[106] Consequently, Chinese nationals fleeing coercive population control policies are being sent back to China where they can be and are subjected to sterilization and heavy fines. This unfortunate and confusing treatment of asylum claims by those fleeing China's coercive population control program makes evident the need for *clear* legislative and executive action to remedy the bizarre treatment of this type of asylum claim.

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100. *Id.*

101. *Id.*

102. *Chai*, 48 F.3d at 1338. 8 C.F.R. § 3.1(h)(1) provides, in its pertinent part:

> (h) Referral of cases to the Attorney General.
>
> (1) The Board shall refer to the Attorney General for review of its decision all cases which:
>
> ....
>
> (ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review.

8 C.F.R. § 3.1(h)(1) (1994).

103. *Chai*, 48 F.3d at 1338.

104. *Zhang*, 55 F.3d at 741 (quoting Att'y Gen. Order No. 1756-93; JA at 1650).

105. *See, e.g.*, Matter of G—, 1993 BIA LEXIS 14.

106. *See, e.g., Chai*, 48 F.3d at 1342 ("We conclude that the Board's interpretation of the asylum statute in *Matter of Chang* is entitled to deference."); *Zhang*, 55 F.3d at 732 (holding that *Chang* is entitled to deference); *Lan*, 869 F. Supp. 1483, 1489 (N.D.Cal. 1994) ("[T]he BIA's interpretation of the statute governing asylum claims in *Chang* is not unreasonable and at odds with the plain meaning of the statute."); Chen v. Slattery, 862 F. Supp. 814, 821 (E.D.N.Y. 1994) (holding that petitioner failed to show that *Chang* was an impermissible construction of the statute governing asylum claims). *But see, Guo*, 842 F. Supp. at 865-70 (finding *Chang* was not entitled to judicial deference).

IV. FACTUAL AND PROCEDURAL BACKGROUND OF ZHANG

Zhang is a native of the Fujian province.[107] In October of 1991, shortly after the birth of his first child, Zhang was contacted by Chinese officials who demanded that his wife agree to insertion of an IUD.[108] Even though Zhang's wife apparently complied with this request, Chang Le County officials, in the Fujian province, demanded that he or his wife undergo sterilization pursuant to China's "one-couple, one-child" program.[109] Zhang and his wife told the local officials that she was in ill health and therefore could not undergo the procedure. Local officials rejected Zhang's wife's excuse and insisted that one of them undergo the procedure, threatening that failure to obey would result in a fine and forced sterilization.[110]

According to Zhang, local officials in his province normally "do not pressure people to undergo sterilization after having only one child."[111] Zhang attributed this "singling out" to a quarrel he had with a powerful neighbor who had ties with government officials.[112] He believed that his neighbor convinced local officials to order the sterilization procedure.[113] Zhang and his wife opposed sterilization because they feared the health effects of sterilization surgery.[114] Furthermore, they resisted the procedure because they wished to have more children. They disagreed with China's "one-couple, one-child" policy and believed that people should be free to have as many children as they wish.[115]

In December of 1991, in order to avoid sterilization, Zhang, his wife, and his son fled from their home and went into hiding separately.[116] Zhang spent six months working in a nearby city, Fuzhou, while his wife and son remained in hiding.[117] Shortly thereafter, Zhang hired smugglers to transport him to the United States, paying $5,000 in advance and promising to pay the balance of $25,000 after arrival in the United States.[118] In February of 1993, Zhang left China

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107. *Zhang*, 55 F.3d at 741.
108. *Id.*
109. *Xin-Chang Zhang*, 859 F. Supp. at 710.
110. *Zhang*, 55 F.3d at 741.
111. *Xin-Chang Zhang*, 859 F. Supp at 710.
112. *Id.*
113. Stanford M. Lin, Recent Developments, *China's One-Couple, One-Child Family Planning Policy as Grounds for Granting Asylum*--Xin-Chang Zhang v. Slattery, No. 94 Civ. 2119 (S.D.N.Y. Aug. 5, 1994), 36 HARV. INT'L L.J. 231-32 (1995).
114. *Xin-Chang Zhang*, 859 F. Supp. at 710.
115. *Zhang*, 55 F.3d at 741.
116. *Xin-Chang Zhang*, 859 F. Supp. at 710.
117. *Zhang*, 55 F.3d. at 741.
118. *Id.*

aboard the "Golden Venture," a crowded immigrant ship.[119] The "Golden Venture" was packed with more than 300 undocumented Chinese immigrants.[120] The 17,000 mile voyage from the Far East took more than 3 months.[121] When it arrived in the United States, the "Golden Venture" ran aground[122] about 100 to 200 feet off of Rockaway Beach in Queens, New York.[123] After the ship ran aground, Zhang saw "helicopters with floodlights flying over the "Golden Venture" and rescue boats in the water."[124] He then climbed down a ladder into the choppy, 53-degree Atlantic waters, and swam to shore.[125] When Zhang reached the beach, he "walked a few steps and then collapsed to the ground."[126] The police then took Zhang into custody and thereafter he was transferred to the custody of the INS.[127]

A. Adjudication of Zhang's Claims in the Immigration Courts and by the United States District Court

On June 30, 1993, Zhang came before Immigration Judge Alan L. Page ("IJ") in New York City.[128] The IJ held that Zhang never

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119. *Id.*

120. *Chinese Jump Ship at NYC; 7 Die; Boat Carrying Aliens had Hit Beach,* DALLAS MORNING NEWS, June 7, 1993, at 1A [hereinafter *Jump Ship*].

121. Robert D. McFadden, *Smuggled to New York: The Overview – 7 Die as Crowded Immigrant Ship Grounds Off Queens; Chinese Aboard Are Seized for Illegal Entry,* N.Y. TIMES, June 7, 1993, A1. "The Golden Venture broke down in Kenya, steamed around the Cape of Good Hope and nearly capsized in the Atlantic—and may have even seen a mutiny among its crew." *Jump Ship, supra* note 120 at A1. The Chinese immigrants aboard the "Golden Venture" were kept in the hold of the ship, enduring horrible conditions. Diana Jean Schemo, *Smuggled to New York: On the Ship; Survivors Tell of Voyage of Little Daylight, Little Food and Only Hope,* N.Y. TIMES, June 7, 1993 at B5. The ship only had one toilet and most people simply relieved themselves wherever they were. *Id.* Passengers had no way to bathe since there was no running water. *Id.* They slept on bare decks and cots. *Id.* The only nourishment they received was one meal a day of rice and vegetables. *Id.*

122. One newspaper account described the grounding as follows:

> [T]he ship suddenly dead in the water, hull plates groaning as if coming apart, cries from the bridge, feet running on decks and ladders, figures rushing up out of holds and hatches to the rails, the lights of a city representing freedom twinkling like beacons in the distance, the silhouettes of people diving into the sea.

McFadden, *supra* note 121, at A1.

123. *Xin-Chang Zhang,* 859 F. Supp. at 711.

124. *Id.* (citing Lenihan Aff. Ex. 31, ¶ 44).

125. *Id.* At least seven refugees died when the "Golden Venture" ran aground, five drowned and two died from heart attacks. McFadden, *supra* note 121, at A1. "Survivors . . . came out of the thundering, 53-degree surf shivering with cold. Some waded or crawled in, some rode plastic-jug floats. Purple with exposure, they collapsed on the beach." *Id.*

126. *Xin-Chang Zhang,* 859 F. Supp. at 711 (citing Lenihan Aff. Ex. 31, ¶ 46).

127. *Id.*

128. *Zhang,* 55 F.3d at 742. The Immigration Judge has the authority to make a determination as to an alien's application for withholding of deportation and/or asylum. Lin, *supra* note

effected "entry" into the United States, therefore, he had properly been placed into exclusion proceedings.[129] On July 9, 1993, Zhang filed a formal motion to terminate the proceedings challenging the IJ's holding.[130] On July 16, 1993, the IJ denied Zhang's motion.[131]

On the same day that his motion to terminate the exclusion proceedings was denied, Zhang filed an application for asylum and withholding of return.[132] The application contained details of the circumstances surrounding Zhang's flight from China and asserted that he had a well-founded fear of persecution.[133] The IJ issued a written opinion denying the application for asylum and withholding of return stating that Zhang had failed to substantiate that he had a "well-founded fear of persecution within the meaning of [the] asylum laws."[134] The IJ primarily relied upon and concluded that he was bound by the BIA's decision in *Chang*.[135]

Zhang then brought an appeal before the BIA, challenging the IJ's denial of his claims for asylum and withholding of return, as well as the IJ's rejection of his motion to terminate exclusion proceedings.[136] The BIA affirmed the IJ's decision relying primarily on its own decision in *Chang*.[137] In affirming the IJ's denial of Zhang's motion to terminate exclusion proceedings, the BIA stated that Zhang had "clearly failed to sustain his burden of showing that he was, at any relevant time, free from official restraint."[138]

113, at 231 (citing 8 C.F.R. § 242.8 (1994)). An Immigration Judge's decision is appealable to the BIA. *Id.* (citing 8 C.F.R. § 242.21 (1994)).

129. *Zhang*, 55 F.3d at 742. Section 101(a)(13) of the INA defines "entry" as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise." 8 U.S.C. § 1101(a)(13) (1970 and Supp. 1994). Failure to achieve entry, results in an alien being subjected to exclusion proceedings, instead of deportation. Lin, *supra* note 113, at 231. "Deportation proceedings are generally more favorable to the alien than exclusion proceedings." Correa v. Thornburgh, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990). Specifically, "[r]ights available in deportation but not exclusion include advance notice of the charges, a burden of proof placed on the government, direct appeal to the Court of Appeals, the right to seek suspension of the order, and the right to designate the country of destination." *Id.* Therefore, the IJ's determination that Zhang failed to achieve "entry" deprived him of the aforementioned rights in a deportation proceeding.

130. *Zhang*, 55 F.3d at 742.

131. *Id.* Zhang appealed the denial of his motion and the IJ's findings to the BIA, which on December 22, 1993, refused to consider the interlocutory appeal. *Id.*

132. *Id.* For a discussion of asylum and withholding of return claims, see *supra*, notes 53-62 and accompanying text.

133. *Zhang*, 55 F.3d at 742. Zhang's alleged fear of persecution was due to forced sterilization pursuant to China's "one-couple, one-child" policy.

134. *Id.* (quoting the Immigration Judge's written opinion). The opinion was issued on September 22, 1993. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* The decisions was affirmed on March 22, 1994. *Id.*

138. *Zhang*, 55 F.3d at 742 (quoting the BIA's opinion).

Zhang then filed a petition for writ of habeas corpus in the Southern District of New York, contesting the BIA's rejection of his claim of asylum and withholding of return claims.[139] Zhang also contested the finding that he never achieved "entry" into the United States.[140] The district court issued an opinion and order remanding Zhang's case to the BIA for "application of the appropriate legal standard."[141] Federal District Judge Robert P. Patterson concluded that the Immigration Judge and the Board of Immigration Appeals had improperly relied on *Matter of Chang* since *Chang* had been overruled by the 1993 Rule promulgated by then-Attorney General Barr.[142] Judge Patterson found that the case should have been decided based upon the standards promulgated by the 1993 Rule.[143] He also held that the IJ and BIA incorrectly subjected Zhang to exclusion proceedings by placing the burden on Zhang to prove that he was free from official restraint after crossing the territorial limits of the United States.[144] The United States subsequently appealed the district court's decision to the Second Circuit, challenging its holding as to the status of *Chang* and the allocation of the burden to prove "entry."

B. The Second Circuit's Decision

The Second Circuit reversed both of the district court's holdings and concluded that *Chang* had not been overruled or displaced by the various executive and legislative initiatives[145] concerning asylum for Chinese nationals fleeing coercive population control policies. The Second Circuit also found that Zhang's claim of entry into the United States was without merit.[146] Accordingly, the court dismissed Zhang's petition for a writ of habeas corpus.[147] The following is a more detailed discussion of the court's holding, its underlying reasoning, and explanations of why the court was correct.

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139. *Id.* at 742-43. Judicial review by way of habeas corpus is available for an alien against whom a final order of exclusion has been made. 8 U.S.C. § 1105a(b) (1994).

140. *Zhang*, 55 F.3d. at 742

141. *Zhang*, 55 F.3d. at 743 (quoting *Xin-Chang Zhang*, 859 F. Supp. at 713). The order was issued on August 8, 1994. *Id.*

142. *Id.* at 743.

143. *Id.*

144. *Id.*

145. The *Zhang* court stated that "[t]he executive and legislative branches together have ample power to consummate any goal affecting the country's immigration laws. However, where they fail to do so, we will not amend the deficiency." *Id.* at 737.

146. *Id.*

147. *Id.*

1. None of the Administrative Efforts Overruled Chang

The Second Circuit's inquiry began with the issue of whether *Chang* was still good law.[148] The circuit court addressed each of the acts of the Bush administration which Zhang argued overruled *Chang*. These include the January 1990 Interim Rule, Executive Order No. 12,711, and the 1993 Final Rule. First, citing the Administrative Procedure Act, Second Circuit Judge Jacobs found that the 1990 Interim Rule was never properly promulgated.[149] The Judge continued that even if the rule had been properly promulgated, it would have been repealed by the publication of subsequent regulations which made no mention of the 1990 Interim Rule.[150] Under the Administrative Procedure Act ("APA"), federal courts may "hold unlawful and set aside agency action, findings and conclusions found to be . . . without observance of procedure required by law."[151] Before taking effect, the APA requires an agency "rule" to go through a notice and comment period.[152] The term "rule" is defined by the APA as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[153] Attorney General Thornburgh's 1990 Interim Rule was clearly "designed to implement, interpret, or prescribe law or policy" since it provided a new basis for asylum of aliens. Therefore' the 1990 Interim Rule was a "rule" as defined by the APA and required notice and comment to be properly promulgated.

Nevertheless, the *Zhang* court considered three potentially applicable exceptions to the APA's notice and comment requirement offered by amici,[154] which included foreign affairs,[155] interpretive rulings,[156] and good cause.[157] According to the District of Columbia

148. *Id.* at 744.

149. *Id.*

150. *Id.*

151. *Id.* (quoting 5 U.S.C. § 706(2)).

152. *Id.* (citing 5 U.S.C. § 553). However, the code provides several exceptions when the notice and comment period need not be observed.

153. *Id.* at n.7 (quoting 5 U.S.C. § 551(4)).

154. *Id.* at 744.

155. "The notice and comment provisions of the APA are inapplicable to rules involving 'a military or foreign affairs function of the United States'." *Id.* (quoting 5 U.S.C. § 553(a)(1) (1994)). The *Zhang* court pointed out that the purpose of this exception was "presumably to avoid the public airing of matters that might enflame or embarrass relations with other countries." *Id.* at 744.

156. The APA's notice and comment provisions do not apply "to interpretive rules [or to] general statements of policy." *Id.* at 745 (quoting 5 U.S.C. § 553(b)(A)) (1994).

157. "[W]hen [an] . . . agency . . . finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest" notice and comment is unnecessary under the APA. *Id.* at 746 (quoting 5 U.S.C. § 553(b)(B)) (1994).

Circuit, the aforementioned exceptions to the APA should be "narrowly construed and only reluctantly countenanced."[158] Following this principle, the court found that none of the exceptions were applicable to the 1990 Interim Rule.[159] Therefore, the 1990 Interim Rule fell within the purview of the APA. Because there was no notice or comment on the rule, the court was correct in finding that the Rule was never properly promulgated under the APA.

Furthermore, even if the 1990 Interim Rule was properly promulgated, it was superseded by the July 1990 Final Asylum Regulations that made no mention of the 1990 Interim Rule and provided no special consideration for those aliens fleeing coercive population control policies.[160] Zhang argued that the silent repeal of the 1990 Interim Rule violated the notice and comment provisions of the APA.[161] According to the United States Supreme Court, a "settled course of behavior embodies [an] . . . agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress . . . [and] an agency is obliged to supply a reasoned analysis for the change."[162] However, the Interim Rule was never applied and was expressly rejected by the BIA in *Chang*. Therefore, the rule could not be deemed "settled" within the rubric of the Supreme Court's pronouncement in *Motor Vehicle Manufacturers*.[163] Thus, no "reasoned analysis for the change" was needed.[164] Accordingly, the Court appropriately concluded that the 1990 Interim Rule had no effect whatsoever on the validity of the BIA's decision in *Chang*.[165]

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158. Methodist Hosp. of Sacramento v. Shalala, 38 F.3d 1225, 1236 (D.C. Cir. 1994) (citation omitted).

159. *Zhang*, 55 F.3d at 744. In finding that the foreign affairs exception did not apply, the *Zhang* court stated that "[t]here are no 'definitely undesirable international consequences' that would have resulted from following standard rule-making procedure in this case." *Id.* Thus, the court concluded that the § 553(a)(1) foreign affairs exception did not apply. *Id.* Second, as to the interpretive rule exception, the court pointed out that the 1990 Interim Rule was labeled interpretive, however, it created a new basis on which aliens may be granted refugee status and therefore, changed existing policy. *Id.* at 745-46. Consequently, the 1990 Interim Rule was deemed legislative in character, obviously removing it from the interpretive rule exception. *Id.* Finally, the good cause exception did not apply according to the court because it was not impracticable to subject the 1990 Interim Rule to notice and comment, and notice and comment could not be considered unnecessary since the changes it made were not minor or "merely technical." *Id.* at 747.

160. *Id.*

161. *Id.*

162. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41-42 (1983) (citation and internal quotations omitted).

163. *Zhang*, 55 F.3d at 747; *see also, Motor Vehicle Mfrs.*, 463 U.S. at 42.

164. *Motor Vehicle Mfrs.*, 463 U.S. at 42.

165. *Zhang*, 55 F.3d at 747. Authorities have held that the 1990 Interim Rule did not serve to overrule *Chang*. *See* Peng-Fei Si v. Slattery, 864 F. Supp. 397 (S.D.N.Y. 1994); *Chen*, 862 F.

Next, President Bush's Executive Order was examined to determine whether it served to overrule *Chang*. Executive Order No. 12,711 required the Attorney General to provide "enhanced consideration" of applications for asylum by aliens fleeing a country's policy of forced abortions or sterilizations.[166] The Executive Order did not expressly overrule *Chang*. Furthermore, according to the Third Circuit Court of Appeals, "[g]enerally, there is no private right of action to enforce obligations imposed on executive branch officials by executive orders."[167] The *Zhang* court correctly found that Executive Order No. 12,711 imposed an obligation on an executive branch official and therefore no private right of action existed.

However, if an executive order has a "specific foundation in Congressional action" it is "judicially enforceable in private civil suits."[168] Nevertheless, there was no foundation in Congressional action for Executive Order No. 12,711 since President Bush vetoed the Emergency Chinese Immigration Relief Act. President Bush's Executive Order did not create enforceable obligations. Therefore, the court was correct in concluding that it did not and could not serve to overrule *Chang*.[169]

Finally, the court considered the 1993 Final Rule which District Judge Patterson held overruled *Chang*.[170] The district court relied upon the Freedom of Information Act to find that the 1993 rule became effective despite not being published.[171] Furthermore, the district court cited two Second Circuit cases, *Montilla v. Immigration and Naturalization Service*[172] and *New York v. Lyng*,[173] and a Ninth

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Supp. 814; Chen Chaun Fei v. Carroll, 866 F. Supp. 283 (E.D. Va. 1994); *Guo*, 842 F. Supp. 858; Jia-Hu Gao v. Waters, 869 F. Supp. 1474 (N.D.Cal. 1994); Shan Ming Wang v. Slattery, 877 F. Supp. 133 (S.D.N.Y. 1995).

166. *Zhang*, 55 F.3d at 747.

167. Facchiano Constr. Co. v. United States Dep't of Labor, 987 F.2d 206, 210 (3d Cir. 1993), *cert. denied*, 502 U.S. 1122 (1992).

168. *Zhang*, 55 F.3d at 747-48 (citing and quoting *In re* Surface Mining Regulation Litig., 627 F.2d 1346, 1357 (D.C. Cir. 1980)).

169. The majority view is that Executive Order 12,711 did not serve to overrule *Chang*. *See Peng-Fei Si*, 864 F. Supp. at 402; *Chen*, 862 F. Supp. at 822; *Chen Chaun Fei*, 866 F. Supp. at 287; *Gao*, 869 F. Supp. at 1480; *Shan Ming Wang*, 877 F. Supp. at 138.

170. *Zhang*, 55 F.3d at 748.

171. 5 U.S.C. § 552(A)(1)(D) (1994); *see also Xin-Chang Zhang*, 859 F. Supp. at 712. The Freedom of Information Act states in pertinent part:

> Each agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency . . . . [A] person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.

5 U.S.C. § 552(A)(1)(D) (1994).

172. 926 F.2d 162 (2d Cir. 1991).

Circuit case, *Nyguyen v. United States*,[174] for the proposition that "where a rule confers a substantive benefit to a person, an agency must comply with it, even if the rule is not published."[175] However, it does not necessarily follow that "a non-published rule be accorded legal effect when it contradicts an agency's consistently applied policy."[176] Moreover, none of these cases held that an agency must follow an unpublished rule.[177] "Perhaps most importantly, none of these cases presented the situation faced here in which an unpublished rule not only deviated from agency policy (as consistently applied by the BIA's decision in *Chang*) but was actually withdrawn by the agency from publication."[178]

Furthermore, "the requirement of publication [noted in the Freedom of Information Act] attaches only to matters which if not published would adversely affect a member of the public."[179] The Second Circuit pointed out that the 1993 Final Rule, by not being published, did not adversely affect any member of the public, but it only conferred possible benefits.[180]

In the end, for the rule to have become operational, it must have become effective.[181] The 1993 Final Rule provided that it would take effect upon publication in the Federal Register.[182] This never occurred since it was withdrawn from publication in the Federal Register by President Clinton's administration.[183] The Final Rule never became effective under its own plain language. According to the *Zhang* court "[n]onpublication in the Federal Register is a strong indication that a rule has not taken effect."[184] Therefore, the district court erred when it found the 1993 Final Rule overruled *Chang* and was properly reversed by the Second Circuit.[185] The Second Circuit's

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173. 829 F.2d 346 (2d Cir. 1987).
174. 824 F.2d 697 (9th Cir. 1987).
175. *Xin-Chang Zhang*, 859 F. Supp. at 712 (citing and quoting *Montilla*, 926 F.2d at 162).
176. Dong v. Slattery, 870 F. Supp. 53, 59 (S.D.N.Y. 1994).
177. *Shang Ming Wang*, 877 F. Supp. at 139.
178. *Id.* at 139-40.
179. *Zhang*, 55 F.3d at 749 (quoting *Lyng*, 829 F.2d at 354).
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 748.
185. Most authorities disagreed with the district court's holding that the 1993 Final Rule overruled *Chang*. *See Dong*, 870 F. Supp. at 53 ("I respectfully disagree with the decision in Xin-Chang Zhang v. Slattery, 859 F. Supp. 708 (S.D.N.Y. 1994) which held that *Chang* was superseded by the January 1993 Rule notwithstanding that rule was withdrawn from publication in the Federal Register."); *see also Peng-Fei* Si, 864 F. Supp. at 403 (disagreeing with District Judge Patterson's finding that the 1993 Final Rule overruled *Chang*); *Chen*, 862 F. Supp. at 822-23 (disagreeing with District Judge Patterson's finding that the 1993 Final Rule superseded *Chang*); *Shan Ming Wang*, 877 F. Supp at 139 ("I accordingly conclude that the Attorney

finding that none of the actions taken by the Bush Administration overruled *Chang* is therefore correct.

2. Chang is Entitled to Deference

According to the United States Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[186] a court reviewing "an agency's construction of the statute which it administers, . . . is confronted with two questions."[187] First, is whether "Congress has directly spoken to the precise question at issue."[188] If Congress has spoken, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[189] If, however, Congress has not so addressed that question, the second "question for the court is whether the agency's answer is based on a permissible construction of the statute."[190] A "court may not substitute its own construction of a statutory provision for a reasonable interpretation" by an agency.[191]

The BIA administers the provisions of the INA to determine eligibility for asylum. Congress has not directly addressed whether an alien may qualify as a refugee because he or she is subjected to coercive family planning policies (notwithstanding the Emergency Chinese Immigration Relief Act which was vetoed by President Bush). Moreover, the statute in question is silent with respect to this issue. Therefore, under *Chevron*, the Second Circuit applied the correct standard by deciding to review whether the BIA's decision in *Chang* was "based on a permissible construction of the statute."[192]

Zhang's primary argument against deference was that there had been no consistent policy to which the court could defer.[193] While noting that consistency of an agency's position is a factor in assessing whether that position is entitled to deference, the Second Circuit correctly found that the BIA had consistently followed the position it set forth in *Chang*.[194] "[I]consistency of policy is not, by itself,

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General's final unpublished rule, never having become effective, did not overrule *Chang*. In so doing, I respectively disagree with Judge Patterson's contrary conclusion in *Zhang*.").

186. 467 U.S. 837, *reh'g denied*, 468 U.S. 1227 (1984).

187. *Id.* at 842.

188. *Id.*

189. *Id.* at 842-43.

190. *Id.*

191. *Id.* at 844.

192. *Id.*; *see also Shan Ming Wang*, 877 F. Supp. at 141 ("Because the statute neither explicitly nor implicitly addresses whether opposition to population control policies can form the basis of asylum eligibility, Congress has not spoken on the issue and it therefore is left to this court to determine only whether the BIA's interpretation of the statute is reasonable.").

193. *Zhang*, 55 F.3d at 750.

194. *Id.* For an example of the BIA's consistent application of *Chang*, *see supra* note 106.

sufficient to require less deference to an agency's determination. An interpretation will be rejected only where it is unreasonable and at odds with the plain meaning of the statute."[195] Furthermore, the inconsistencies which Zhang referred to were positions taken by Congress and President Bush's administration, but not the BIA.[196] The court ultimately decided for the aforementioned reasons that *Chang* was entitled to deference and then examined the decision with appropriate deference.

3. Examination of Chang Under the Deferential Standard

The *Zhang* court evaluated the BIA's decision in *Chang* to determine whether it was a reasonable interpretation of the INA by comparing the decision with the United States Supreme Court's decision in *Immigration and Naturalization Service v. Elias-Zacarias*,[197] a decision which examined persecution on account of political opinion under the INA after *Chang*. In *Elias-Zacarias* the alien sought asylum and withholding of deportation based on a claim of persecution due to his political opinion and coerced membership in a guerrilla organization.[198] The Court found that, even assuming that the alien's resistance to joining the guerrilla forces could be seen as a political opinion, the asylum claim must be rejected because the alien failed to prove "the guerrillas will persecute him because of that political opinion, rather than because of his refusal to fight with them."[199] The Court found that the focus should be on whether the victim would suffer persecution for *his own* political opinion and not on the existence of some political motive underlying the persecutor's action.[200] The alien must provide some evidence that the persecutor's objective was to persecute on account of the political opinion of the victim.[201]

Thus, even assuming the refusal to cooperate with China's population control program can be characterized as a political opinion, a Chinese national seeking asylum would still need to show that the policy was being enforced against him on account of that opinion, instead of just enforcement of the "one-couple, one-child" policy.[202]

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195. *Chen*, 862 F. Supp. at 821.

196. *Zhang*, 55 F.3d at 751. *But see Guo*, 842 F. Supp. at 867 (holding *Chang* was not entitled to deference due to the "administrative cacophony" of the legislative and executive branches).

197. 502 U.S. 478 (1992).

198. *Id.*

199. *Id.* at 483.

200. *Id.*

201. *Id.*

202. *Peng-Fei Si*, 864 F. Supp. at 405.

China's "one-couple, one-child" policy is applied to the entire Chinese population, albeit more harshly in different areas of the country. Chinese asylum seekers fleeing China due to the country's coercive population control program fear enforcement of a "facially neutral Chinese law."[203] Therefore, "[i]t follows from the plain meaning of refugee under the Immigration Act, as set forth in *Elias-Zacarias*, that a PRC citizen prosecuted for opposition to a universally applied coercive family planning policy is not being persecuted for his political opinion."[204] Under the "one-couple, one-child" policy, it is the failure to comply with the policy that results in punishment and not expression of an individual's political opinion.[205]

Elias-Zacaris is consistent with the BIA's holding in *Chang* that to qualify for asylum, an alien must offer evidence that China's population control policy was implemented against him as the result of one of the protected grounds in the INA.[206] *Chang* does recognize that some applications of the "one-couple, one-child" policy could be done in such a way as to constitute persecution on account of a ground protected by the INA.[207]

Therefore, under the *current* definition of "refugee" in the INA, *Chang* is a permissible construction of the statute. Consequently, the Second Circuit was correct when it found that "[i]t is difficult to frame a result different from the holding of *Chang* that would be 'reasonable' under both *Elias-Zacarias* and the *existing* immigration laws."[208] The BIA's interpretation in *Chang* of the statute governing asylum claims is reasonable, and is consistent with the Supreme Court's interpretation of that same statute.[209] *Chang* is still good law and, accordingly, the Second Circuit properly deferred to *Chang* and reversed the district court's finding that the 1993 Final Rule overruled *Chang*.

Some courts have gone through a convoluted analysis in order to find a way to determine that *Chang* has been overruled.[210] These courts are plainly in error.[211] Under the *Chevron* standard enunciated

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203. *Zhang*, 55 F.3d at 751.

204. *Dong*, 870 F. Supp. at 58.

205. *Id.*

206. *Shan Ming Wang*, 877 F. Supp. at 141.

207. 1989 BIA LEXIS, at *12.

208. *Zhang*, 55 F.3d at 752 (emphasis added).

209. *Peng-Fei Si*, 864 F. Supp. at 405.

210. *See Xin-Chang Zhang*, 859 F. Supp. at 712 (finding that the 1993 Final Rule, although unpublished, became effective and superseded *Chang*); *see also Guo*, 842 F. Supp. at 867 (holding *Chang* was not entitled to deference due to the "administrative cacophony" of the legislative and executive branches).

211. "No doubt, the President and the Congress *acting together* have power to create an exception to the existing immigration laws for PRC citizens, but it is doubtful that such an

by the United States Supreme Court, *Chang* is clearly entitled to deference because it is a reasonable interpretation of the INA.[212] The courts are not a valid place to overrule *Chang*.[213] As the note argues *infra*, the change should and must come from the executive or legislative branch. The Second Circuit's refusal to "exercise judicial power to repair or improve upon the incomplete initiatives of other government branches, particularly where the issue entails politically-charged issues with profound ramifications" is in accord with this note's argument.[214]

4. Zhang Did Not Achieve "Entry" into the United States

"Entry" is defined as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise."[215] The Second Circuit, in *Correa v. Thornburgh*,[216] adopted a more precise definition of entry formulated by the BIA in *Matter of Pierre*.[217] The *Pierre* definition provides that "[a]n entry involves: (1) a crossing into the territorial limits of the United States, i.e. physical presence; (2)(a) an inspection and admission by an immigration officer or (b) actual and intentional evasion of inspection as the nearest inspection point; and (3) freedom from official restraint."[218] The BIA concluded that Zhang did not achieve "entry" into the United States.[219] The result of this decision was that Zhang was placed into exclusion proceedings instead of deportation.[220] The Second Circuit found that the BIA's decision was correct and should not have been disturbed by the district court.[221]

As a general principle, a court "must uphold the BIA's or the IJ's factual findings regarding . . . eligibility for asylum . . . or withholding of deportation . . . if they are reasonably supported by

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exception could be accomplished solely through *administrative* action." *Zhang*, 55 F.3d at 752 (emphasis added). The court correctly refused to interpret the actions by Congress and President Bush's administration together as overruling *Chang* and setting up a different policy.

212. *Chevron*, 467 U.S. at 844.

213. *Shan Ming Wang*, 877 F. Supp. at 142-43. "[T]he courts' powers are constrained in immigration matters. They may be contrasted in that regard with the Attorney General, who has the power to promulgate consistent and coherent guidelines in this and other areas of immigration law." *Id.*

214. *Zhang*, 55 F.3d at 752.

215. *Id.* (quoting 8 U.S.C. § 1101(a)(13)).

216. Correa v. Thornburgh, 901 F.2d 1166, 1171 (2d. Cir. 1990).

217. Int.Dec. 3215, 1973 WL 29484 (BIA 1973).

218. *Correa*, 901 F.2d at 1171.

219. *Zhang*, 55 F.3d at 752.

220. *See supra* note 129 for a discussion of the differences between deportation and exclusion proceedings.

221. *Zhang*, 55 F.3d at 753.

substantial evidence on the record."[222] An alien seeking to reverse a BIA factual determination must show "'that the evidence he presented was so compelling that no reasonable fact finder could fail' to agree with these factual findings."[223]

The Second Circuit concluded that Zhang did not achieve physical presence, under the *Pierre* test, until he reached the beach and that he was never free from official restraint.[224] Following its own precedent in *Correa*,[225] the Second Circuit correctly found that Zhang did not achieve physical presence until he reached the beach. Moreover, according to *Correa*, "[f]reedom from official restraint' means that an alien who is attempting entry is no longer under constraint emanating from the government that would otherwise prevent [him or] her from physically passing on."[226] By Zhang's own admission, he and the other passengers aboard the "Golden Venture" were being monitored when the ship ran aground, evidenced by his statement that "there were helicopters with floodlights flying over the Golden Venture and rescue boats in the water."[227] "Continuous surveillance by immigration authorities can be sufficient to place an alien under official restraint."[228] Moreover, as soon as Zhang reached the shore he was approached by police officers who took him immediately into custody. Zhang clearly was never free from official restraint within the meaning of the *Pierre* test and the district court's disturbance of the BIA's findings was properly reversed by the Second Circuit. Therefore, Zhang failed to meet his burden of showing "that the evidence he presented was so compelling that no reasonable factfinder could fail to agree with these factual findings."[229]

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222. *Id.* at 752 (quoting Osorio v. INS, 18 F.3d 1017, 1022 (2d Cir. 1994)).

223. *Id.* (quoting *Elias-Zacarias*, 502 U.S. at 483-84).

224. *Zhang*, 55 F.3d at 754-55.

225. In *Correa*, the alien arrived in the United States via a commercial airline flight from Guatemala. *Correa*, 901 F.2d 1166. The *Correa* court found that the alien "satisfied the first prong [of the *Pierre* test], 'physical presence', when she disembarked her Avianaca flight from Guatemala to Houston." *Id.* at 1171. In *Zhang*, the court concluded that under this interpretation, the earliest Zhang could have been physically present was when he disembarked the "Golden Venture" by jumping into the ocean. *Zhang*, 55 F.3d at 754. However, the court stated that immigration law is "designed to regulate the travel of human beings, whose habitat is land, not the comings and going of fish or birds" and held that an alien attempting to "enter the United States by sea has not satisfied the physical presence element of *Pierre* at least until he has landed." *Id.*

226. *Correa*, 901 F.2d at 1172 (citations omitted).

227. *Zhang*, 55 F.3d at 755.

228. United States v. Aguilar, 883 F.2d 662, 681 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991).

229. *Zhang*, 55 F.3d at 752 (quoting *Elias-Zacarias*, 502 U.S. at 483-84).

The district court remanded Zhang's claim back to the BIA on the entry issue because it found that the BIA erred in placing the burden of proof on Zhang.[230] The Second Circuit noted that the BIA repeatedly placed the burden on the alien.[231] The court also recognized that there was no statutory provision allocating the burden of proof for "entry."[232] Therefore, the *Zhang* court rightly decided to defer, under *Chevron*, to the BIA's interpretation of the INA and properly concluded it was not an unreasonable interpretation of the INA.

V. A CALL FOR LEGISLATIVE AND EXECUTIVE INTERVENTION TO SOLVE THE ASYLUM PROBLEMS OF CHINESE NATIONALS FLEEING CHINA'S COERCIVE POPULATION CONTROL PROGRAM

While this note has argued that the BIA's decision in *Chang* is entitled to deference and that the *Zhang* court properly deferred to *Chang*, the decision does not seem correct for humanitarian reasons. There is a vast difference between a decision of an agency being entitled to deference and whether the decision was morally wrong or cruel as applied to, in this case, an asylum seeker named Xin-Chang Zhang.

The BIA in *Chang* seemed implicitly to approve of the methods utilized by China in handling its population problems and did not wish to grant asylum to a Chinese citizen fleeing these methods. For example, the BIA stated that "[f]or China to fail to take steps to prevent births might well mean that many millions of people would be condemned to, at best, the most marginal existence."[233] Moreover, the *Chang* court turned a blind eye to reality and merely stated that "[t]he Chinese Government has stated that it does not condone forced sterilizations and that its policy is to take action against local officials who violate this policy."[234] The BIA's sympathies seem to lie with the Chinese Government instead of with those who are being persecuted, albeit not under *current* immigration laws, for trying to have more than one child in violation of the "one-couple, one-child" policy.

In *Chang*, BIA found that "[t]he issue before . . . [them was] not whether China's population control policies, in whole or in part, should be encouraged or discouraged to the fullest extent possible by the United States and the world community."[235] However, some

230. *Id.* at 755.
231. *Id.* at 756.
232. *Id.*
233. 1989 BIA LEXIS 13, at *13.
234. *Id.*
235. *Id.* at *21-*22.

branch of the United States government must address this issue. "Whether . . . [China's population control] policies are such that the immigration laws should be amended to provide temporary or permanent relief from deportation to all individuals who face the possibility of forced sterilization as part of a country's population control program is a matter for Congress to resolve legislatively" in conjunction with the executive branch.[236]

Since 1988, the legislative and executive branches have tried to address this issue, but have not succeeded. It is incomprehensible that with all the power the legislative and executive branches exercise they have failed to overrule *Chang* by creating an exception to the immigration law for Chinese asylum seekers fleeing China's coercive population program. However, this could change if the Senate passes and the President signs into law the American Overseas Interests Act ("Act")[237] passed by the House 222 to 192, on June 8, 1995.[238] On June 14, 1995, the Senate Committee on Foreign Relations began considering the Act. The Act's purpose is to consolidate the foreign affairs agencies of the United States, to authorize appropriations for the Department of State and related agencies for fiscal years 1996 to 1997, to responsibly reduce the authorizations of appropriations for United States foreign assistance programs for fiscal years 1996 and 1997, and for other purposes.[239] The Act contains an amendment authored by Representative Chris Smith[240] which proposes to amend section 101(a)(42) of the INA, the definition of refugee, to include the following text at the end of the definition:

> 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 subjected to persecution for such failure, refusal, or resistance *shall* be deemed to have a well founded fear of persecution on account of political opinion.[241]

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236. *Id.* at *22.

237. H.R. 1561, 104th Cong., 1st Sess. (1995).

238. Michael Ross, *House Backs Foreign Aid Bill; Veto Expected*, L.A. TIMES, June 9, 1995, at A1.

239. H.R. 1561, 104th Cong., 1st Sess. (1995).

240. Representative Smith is a Republican from New Jersey.

241. H.R. 1561 at § 2252 (emphasis added).

Unfortunately, the same fate that befell the Armstrong-DeConcini Amendment to the Emergency Chinese Immigration Relief Act of 1989—a presidential veto—may await the American Overseas Interests Act and Representative Smith's amendment, assuming it passes the Senate. Secretary of State Warren Christopher stated, in a letter indicating that President Clinton would veto the bill, that the American Overseas Interests Act's restrictions "would tie the president's hands and amount to 'an extraordinary assault on [his] constitutional authority to manage foreign policy'."[242] If the House vote on the act is any indication, a veto by President Clinton would mean certain death for the American Overseas Interests Act and the amendment to section 1101(42)(a) since the House would not be able to garner the two-thirds majority necessary to override a presidential veto.[243]

A change in the immigration laws for Chinese asylum seekers fleeing coercive population control has support from several human rights groups. One such group, the Lawyers Committee for Human Rights, in a letter to Chairman Ben Gilman of the House International Relations Committee, stated:

> The forced abortion and sterilization of those who refuse to comply with coercive government policies violates the most fundamental of human rights—the right to bodily integrity. These invasive and inhumane [p]ractices, imposed by Chinese government officials, in our view clearly constitute persecution within the meaning of the Refugee Act .... We applaud your efforts [referring to the Act] to correct this injustice and clarify the scope of the law.[244]

Another group, Amnesty International U.S.A., stated the following:

> [I]f a person can show that he or she has resisted coercive family planning practices imposed by the authorities, that person is eligible for protection under asylum law, as they are a member of a group which may be targeted for abuse .... [A]ssuming that such persons do not qualify for protection under some interpretations of US asylum law, Amnesty International would endorse any effort to provide them with such protection....[245]

The American Overseas Interests Act's provision regarding asylum for those fleeing coercive population control programs was endorsed

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242. *House Approves Foreign Affairs Bill*, STAR TRIB., June 9, 1995, at 2A.

243. *Id.*

244. *Population Control in China, 1995: Hearings Before the Subcomm. on International Operations and Human Rights*, 104th Cong., 1st Sess., 1995 WL 435761 (F.D.C.H.) (1995) (opening statement by Congressman Christopher H. Smith, Chairman of the House Subcommittee on International Operations and Human Rights).

245. *Id.*

by the Lawyers Committee for Human Rights, Amnesty International, the United States Catholic Conference, the Council of Jewish Federations, and the Women's Commission for Refugee Women and Children.[246]

With popular support behind changing immigration laws to provide appropriate consideration of asylum claims based on coercive population control programs and increased attention to human rights abuses in China, it *may* only be a matter of time until needed change becomes a reality. However, it is now up to the Senate and the President to determine the fate of the American Overseas Interests Act and Representative Smith's amendment to the definition of refugee contained in the INA.

While President Clinton has made efforts to help the plight of Chinese asylum seekers,[247] if he vetoes the Act as promised, his administration becomes an accessory to China's forced abortion and sterilization policies by failing to provide adequate consideration of asylum claims by such aliens. Moreover, a veto would be another chapter in the confusing administrative history surrounding attempts to provide proper consideration of asylum claims by Chinese nationals fleeing the "one-couple, one-child" policy.

Both the legislative and the executive branches should take the opportunity to correct the injustices that have been done over the past seven years and that will continue to occur if a change is not made. U.S. immigration laws need to change so that they recognize valid claims of asylum based on persecution under China's coercive population control programs. Few Chinese are able to actually escape China's "one-couple, one-child" policy. Therefore, the United States need not fear an invasion of immigrants from China. However, the United States is responsible for those Chinese nationals that do make it to this country's shores and should provide them with appropriate consideration of their asylum claims. If our government ships them back without giving their asylum claims proper consideration, the United States becomes an accessory to the horrors

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246. *Id.*

247. In August of 1994, President Clinton created a "humanitarian relief" program to protect Chinese refugees fleeing China's coercive population control program. Robert Suro, *U.S. to Ease Strict Chinese Asylum Policy*, WASH. POST, August 5, 1994, at A18. Under this program, directors of Immigration and Naturalization Service district offices were given leeway to grant stays of deportation on humanitarian grounds. *Id.* However, the program provides only temporary relief, it is not asylum, and may be revoked at any moment. Robert Suro, *Chinese Join Haitians in Special "Relief" Status*, WASH. POST, August 7, 1994, § 1, at A10. While these efforts are applaudable, the Clinton administration's stance on asylum based on humanitarian concerns for Chinese nationals fleeing coercive population control would be severely discredited by a veto of the entire American Overseas Interests Act which contains Representative Smith's amendment.

committed by the Chinese government in the name of birth control. The legislative and executive branches must work together to solve this pressing problem by either passing the American Overseas Interests Act or by some other piece of legislation.

VI. CONCLUSION

Even though China's policy of forced sterilization and abortion is cruel, our *current* asylum laws do not provide relief on such grounds. *Zhang* clearly has the weight of precedent behind it and the decision is legally sound.[248] However, this does not make the decision morally correct or justify the treatment by the United States of Chinese nationals who seek asylum in this country. The United States must do more to help the plight of those fleeing coercive population control policies.[249]

This note does not criticize the judiciary for its deference to *Chang*. The court's place is not to legislate a change in immigration laws.[250] Instead, the legislative or the executive branch must intercede on behalf of Chinese nationals. Congress must pass the American Overseas Interests Act and President Clinton must sign the legislation into law so that aliens, such as Zhang, receive appropriate consideration of their asylum claims.

If, however, the American Overseas Interests Act does not become law, the legislative and executive branches must work together to find a solution to the asylum problems of Chinese nationals fleeing China's coercive population control program. If the courts' hands are to be untied, *Chang* must be overruled by *clear* legislative and executive action.

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248. *See, e.g., Chai*, 48 F.3d 1331; *Peng-Fei Si*, 864 F. Supp. 397; *Dong*, 870 F. Supp. 53; *Shan Ming Wang*, 877 F. Supp. 133.

249. The United States should not turn a cold shoulder to the problems facing Chinese asylum seekers or immigrants, such as Senator Feinstein's office's treatment of Alan Wanrong Lin. Robert Novak, *No Sympathy Over a Forced Abortion*, CHI. SUN-TIMES, May 23, 1994, Editorial, at 23. Mr. Lin, a Chinese immigrant living in California, contacted the office of Senator Dianne Feinstein on April 28, 1994, requesting help for his five month pregnant wife. *Id.* She faced an abortion because, at age 22, she was one year too young for a "birth license" in the Fujian Province. *Id.* Mr Lin wanted the senator's help in getting his wife a visa to enter the United States. *Id.* According to Lin, David Swerdlick, the Democratic senator's case officer, stated that "[t]he senator is not interested in the birth-control policies in another country." *Id.* Fearing for his wife's life, Lin told his wife to succumb and the baby was aborted that day, April 29th. *Id.* "This abortion, one of millions forced by China's draconian birth-control policy, shows what happens in official U.S. circles when human rights and abortion rights collide." *Id.*

250. *See Shang Ming Wang*, 877 F. Supp. at 142-43; *see also supra* note 213.