

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2007

(Argued: December 12, 2007

Decided: August 15, 2008

Errta filed: September 12, 2009)

Docket Nos. 05-5485-ag, 05-6367-ag, 06-0004-ag, 06-2998-ag

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YUEN JIN,

Petitioner,

-- v. --

MICHAEL B. MUKASEY,* ATTORNEY GENERAL OF THE UNITED
STATES,

Respondent;

SHAN HU ZHENG,

Petitioner,

-- v. --

BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES,

Respondent;

JIAO FANG CHEN,

Petitioner,

-- v. --

UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL
MICHAEL B. MUKASEY,*

Respondents.

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2),
Attorney General Michael B. Mukasey is automatically substituted
for former Attorney General Alberto R. Gonzales as the respondent
in these cases.

1
2 HUA ZENG,

3
4 Petitioner,

5
6 -- v. --

7
8 BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES,

9
10 Respondent;

11
12 -----x

13
14 B e f o r e : WALKER, CABRANES, and SACK, Circuit Judges.

15 Appeal by petitioners Yuen Jin, Shan Hu Zheng, Jiao Fang
16 Chen, and Hua Zeng from decisions of the Board of Immigration
17 Appeals (BIA) denying petitioners' motions to reopen and to file
18 successive asylum applications. Petitioners, who are all under
19 final orders of removal, argue that they should be permitted to
20 reopen their proceedings or file successive asylum petitions on
21 account of changed personal circumstances - namely, the birth of
22 additional children in the United States. In light of the BIA's
23 recent published decision in In re C-W-L, to which we accord
24 Chevron deference, we hold that an alien who is subject to a
25 final removal order and who wishes to file a successive asylum
26 application must do so in conjunction with a motion to reopen
27 pursuant to 8 C.F.R. § 1003.2(c)(3)(ii) and thus may not do so
28 based solely on changed personal circumstances.

29 Petitions for review DENIED.

30 Judge SACK concurs in a separate opinion.

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14 06-2998-ag.
15

16 JOHN M. WALKER, JR., Circuit Judge:

17 These cases, argued in tandem, require us to decide whether
18 an alien subject to a final order of removal who files a
19 successive asylum application based only on changed personal
20 circumstances must also file a motion to reopen based on changed
21 country conditions pursuant to 8 C.F.R. § 1003.2(c)(3)(ii), when
22 the ninety-day deadline has passed for such a motion.

23 Petitioners Yuen Jin, Shan Hu Zheng, Jiao Fang Chen, and Hua
24 Zeng, all Chinese citizens, sought to advance successive asylum
25 claims years after their initial asylum applications were denied
26 and they were ordered removed. Petitioners moved to reopen their
27 proceedings and requested permission to file successive asylum
28 applications, arguing that they were newly eligible for asylum
29 based on the birth of additional U.S.-born children after the
30 entry of their final removal orders.

31 The Board of Immigration Appeals (BIA) denied the motions
32 and refused leave to file successive asylum petitions because

1 petitioners had alleged only changed personal circumstances and
2 not changed country conditions.¹ The latter, the agency
3 concluded, was required for consideration of an untimely motion
4 to reopen, and petitioners could not assert successive asylum
5 claims in the absence of an accompanying motion to reopen
6 pursuant to 8 C.F.R. § 1003.2(c)(3)(ii). The BIA subsequently
7 adopted this conclusion as the holding of its published,
8 precedential opinion, In re C-W-L, 24 I. & N. Dec. 346 (B.I.A.
9 2007). Because we have determined that the agency's
10 interpretation of the relevant statutory provisions is not
11 arbitrary, capricious, or manifestly contrary to the statute, we
12 defer to the BIA's decision in In re C-W-L and accordingly deny
13 the petitions for review.

14 BACKGROUND

15 I. Yuen Jin

16 In December 1998, Petitioner Yuen Jin arrived in the United
17 States from Fujian Province, China, and was detained after
18 presenting a fraudulent passport. In January 1999, the INS
19 served her with a Notice to Appear and placed her in removal

1 ¹ Jin's motion to reopen was denied on September 16, 2005.
2 See In re Jin, No. A 77 107 473 (B.I.A. Sept. 16, 2005). The BIA
3 denied Zheng's motion to reopen on July 7, 2005. See In re
4 Zheng, No. A 73 605 767 (B.I.A. July 7, 2005). Chen's motion to
5 reopen was denied on December 22, 2005. See In re Chen, No. A 77
6 777 126 (B.I.A. Dec. 22, 2005). The BIA affirmed the IJ's denial
7 of Zeng's motion on June 21, 2006. See In re Zeng, No. A 77 552
8 277 (B.I.A. June 21, 2006), aff'g No. A 77 552 277 (Immig. Ct.
9 N.Y. City Jan. 24, 2006).

1 proceedings. In May 1999, Jin sought asylum, withholding of
2 removal, and relief under the Convention Against Torture (CAT) on
3 the grounds that Chinese authorities forced her to undergo an
4 abortion and that she feared future persecution for illegally
5 departing China.

6 In September 1999, Jin married Jian Geng Zheng, and in
7 October of that year, she appeared at a hearing before an
8 Immigration Judge (IJ). Finding the petitioner not credible, the
9 IJ issued a decision in December 1999 denying Jin's applications
10 for relief and ordering her removed. In April 2000, while her
11 appeal was pending before the BIA, Jin had her first child.
12 Jin's removal order became final in September 2002 when the BIA
13 affirmed the IJ's decision; Jin did not file a petition for
14 review in this court.

15 In January 2005, Jin gave birth to her second child, and in
16 July 2005, nearly three years after the BIA issued a final order
17 of removal, Jin filed a motion to reopen her proceedings,
18 claiming that, in light of China's family planning policies, the
19 birth of her second child constituted changed personal
20 circumstances that affected her eligibility for asylum. She also
21 submitted a second asylum application accompanied by supporting
22 documents.

23 In September 2005, the BIA denied Jin's untimely motion,
24 finding that she had not demonstrated changed country conditions

1 as required for the Board to consider a motion to reopen filed
2 more than ninety days after the entry of a final removal order.
3 The BIA did not address Jin's successive asylum petition but
4 construed Jin's motion only as a motion to reopen. Jin filed a
5 timely petition for review of the Board's decision in this court.

6 **II. Shan Hu Zheng**

7 In December 1994, Petitioner Shan Hu Zheng left Fujian
8 Province, China, for the United States, where she arrived without
9 inspection. She filed an initial asylum application, alleging
10 religious persecution. In November 1995, the IJ denied Zheng's
11 application and ordered her deported, finding that the evidence
12 of harassment that she had presented did not rise to the level of
13 persecution. The BIA affirmed in May 1996.

14 In October 2000, Zheng married Hong Tao Lin, a naturalized
15 U.S. citizen, and later gave birth to two children - one in
16 February 2002, and another in May 2003. After filing
17 unsuccessful motions to reopen in 1999 and 2002, Zheng filed a
18 third motion to reopen in June 2005, claiming that the birth of
19 her second child constituted changed circumstances that warranted
20 the granting of an untimely motion to reopen and made her newly
21 eligible for asylum. Based on her changed personal
22 circumstances, Zheng argued that she could file a successive
23 asylum application.

24 In July 2005, the BIA denied the motion as both number-

1 barred and time-barred. The BIA found that Zheng's motion did
2 not fall within an exception to those procedural limitations
3 because the birth of children in the United States did not amount
4 to changed country conditions. Four months later, the BIA
5 reopened Zheng's proceedings sua sponte based on an ineffective
6 assistance of counsel claim. The BIA then reissued its July 2005
7 decision to enable Zheng to timely file the instant petition for
8 review in this court.

9 **III. Jiao Fang Chen**

10 Petitioner Jiao Fang Chen entered the United States in
11 August 1999 as a non-immigrant visitor without a valid entry
12 document. She was subsequently placed in removal proceedings.
13 In June 2000, she filed applications for asylum, withholding of
14 deportation, and CAT relief, claiming that family planning
15 authorities in China forcibly inserted an IUD after the birth of
16 her first child in 1995, that she had secretly removed it, and
17 that she left China to avoid reinsertion of the device. In June
18 2000, Chen gave birth to her second child, and at her asylum
19 hearing, Chen claimed that she would be forcibly sterilized if
20 returned to China, because she now had more than one child.

21 The IJ denied Chen's claims and ordered her removed after
22 making an adverse credibility determination and finding that Chen
23 had not adduced sufficient persuasive evidence of systematic
24 forced sterilization under China's one-child policy. In April

1 2002, the BIA summarily affirmed. Chen did not file a petition
2 for review of that decision.

3 In August 2005, Chen filed a motion to reopen and a new
4 asylum application with the BIA, arguing that her untimely filing
5 should be excused because (1) she was now pregnant with her third
6 child and "would definitely be unable to avoid sterilization,"
7 and (2) the enforcement of China's family planning laws had
8 become harsher and more widespread since 2002. The BIA denied
9 the motion as untimely, noting that Chen's third pregnancy was
10 not a change arising in China, that changed personal
11 circumstances did not excuse her late filing, and that no change
12 in China's enforcement policy had occurred. The BIA did not
13 address Chen's new asylum application. Chen now petitions for
14 review of that decision.

15 **IV. Hua Zeng**

16 Petitioner Hua Zeng, born in Fujian Province, arrived in the
17 United States without inspection in March 1999. He applied for
18 asylum, withholding of removal, and relief under the CAT in July
19 of that year. In his asylum application, Zeng stated that he
20 left China because local officials harassed, attacked, and
21 arrested him after he spoke out against the government. In
22 September 1999, he was placed in removal proceedings, and in
23 February 2000, the IJ ordered Zeng removed in absentia when he
24 failed to attend his removal hearing. The February 23, 2000

1 removal order became final after Zeng failed to appeal the IJ's
2 order.

3 In June 2000, Zeng filed a motion to reopen his proceedings,
4 alleging that he had missed his master calendar hearing because
5 of circumstances beyond his control. The IJ granted him two
6 weeks to file a detailed affidavit and supporting documentation,
7 but Zeng did not file anything more and did not appeal the IJ's
8 denial of the motion.

9 After the removal order became final, Zeng remained in the
10 United States, married, and fathered two children - one born in
11 December 2002 and the other in October 2005. In January 2006,
12 more than five years after he was ordered removed, Zeng filed
13 with the immigration court a motion to reopen based on his
14 changed personal circumstances. He argued that the birth of his
15 two sons made him newly eligible for asylum relief because he
16 would be forcibly sterilized if removed to China. Zeng also
17 requested permission to file an untimely successive asylum
18 application based on his changed personal circumstances, despite
19 his concession that country conditions had not changed.

20 The IJ denied the motion, noting that a previous motion to
21 reopen filed by Zeng had been denied on July 14, 2000, and that
22 his current motion to reopen thus violated both the time and
23 numerical restrictions set forth in the applicable regulations.
24 The IJ did not act upon Zeng's request for permission to file a

1 second asylum application.

2 In April 2006, Zeng appealed the IJ's decision to the BIA,
3 arguing that no motion to reopen was required in order to file a
4 successive asylum application. The BIA rejected this argument
5 and dismissed Zeng's appeal. The Board agreed with the IJ that
6 Zeng's second motion to reopen was both time-barred and number-
7 barred and, in addition, found the motion to be ineligible for an
8 exception based on changed country conditions because it was
9 based only on a change in personal circumstances. Zeng then
10 filed a timely petition for review in this court.

11 **DISCUSSION**

12 Petitioners' cases present the common question of whether an
13 alien subject to a final removal order may file a successive
14 asylum petition based solely on changed personal circumstances,
15 unaccompanied by a motion to reopen based on changed country
16 conditions. Consistent with its ruling in each of the cases at
17 bar, the BIA recently answered this question in the negative in
18 In re C-W-L, 24 I. & N. Dec. 346, holding that when a petitioner
19 is subject to a final order of removal, his successive asylum
20 application is subject to the same procedural requirements as a
21 motion to reopen and must therefore allege changed country
22 conditions if it is filed more than ninety days after the entry
23 of the final order. Cf. 8 U.S.C. § 1101(a)(47)(B) (providing
24 that a removal order becomes final "upon the earlier of - (i) a

1 determination by the Board of Immigration appeals affirming such
2 order; or (ii) the expiration of the period in which the alien is
3 permitted to seek review of such order by the Board of
4 Immigration Appeals”).

5 We review the BIA’s denial of a motion to reopen for abuse
6 of discretion, Kaur v. BIA, 413 F.3d 232, 233 (2d Cir. 2005) (per
7 curiam), and its legal conclusions de novo, “with the caveat that
8 the BIA’s interpretations of ambiguous provisions of the INA are
9 owed substantial deference unless ‘arbitrary, capricious, or
10 manifestly contrary to the statute,’” Perez Suriel de Batista v.
11 Gonzales, 494 F.3d 67, 69 (2d Cir. 2007) (per curiam) (internal
12 quotation marks and citation omitted) (quoting Chevron U.S.A.
13 Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844
14 (1984)). Precedential BIA decisions (i.e., those that have been
15 published), such as In re C-W-L, “are eligible for Chevron
16 deference insofar as they represent the agency’s authoritative
17 interpretations of statutes.” Maiwand v. Gonzales, 501 F.3d 101,
18 104 (2d Cir. 2007). And the BIA’s interpretation of its own
19 regulation is entitled to “controlling weight unless it is
20 plainly erroneous or inconsistent with the regulation.” Bowles
21 v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); see also
22 Jigme Wangchuck v. Dep’t of Homeland Sec., 448 F.3d 524, 528 (2d
23 Cir. 2006) (according “substantial deference” to the BIA’s
24 interpretations of immigration regulations).

1 **I. The Statutory and Regulatory Scheme**

2 As a general rule, an alien who has filed a previous asylum
3 application that has been denied may not apply again for asylum.
4 8 U.S.C. § 1158(a)(2)(C). There is, however, an exception “if
5 the alien demonstrates to the satisfaction of the Attorney
6 General . . . the existence of changed circumstances which
7 materially affect the applicant’s eligibility for asylum.” Id. §
8 1158(a)(2)(D) (emphasis added). Pursuant to its expressly
9 delegated authority to “provide by regulation for any other
10 conditions or limitations on the consideration of an application
11 for asylum not inconsistent with this chapter,” id. §
12 1158(d)(5)(B), the agency promulgated 8 C.F.R. § 1208.4.
13 Subsection (a)(4)(i) of that regulation provides that the term
14 “changed circumstances” can refer to either changed country
15 conditions or changed personal circumstances, which include
16 “activities the applicant becomes involved in outside the country
17 of feared persecution that place the applicant at risk.” 8
18 C.F.R. § 1208.4(a)(4)(i)(A)-(B). Petitioners argue, based on
19 these statutory and regulatory provisions, that § 1158(a)(2)(D)
20 permits an alien under a final removal order to file a successive
21 asylum petition on the basis of changed personal circumstances,
22 such as the birth of a second or third child in the United
23 States. See Wei Guang Wang v. BIA, 437 F.3d 270, 273-74 (2d Cir.
24 2006).

1 Petitioners' argument is complicated, however, by additional
2 provisions of the Immigration and Nationality Act (INA) and their
3 implementing regulations. Under 8 C.F.R. § 1208.4(b)(3)(ii),
4 "[a]fter completion of . . . removal proceedings, and in
5 conjunction with a motion to reopen pursuant to 8 CFR part 1003
6 where applicable," an asylum application must be filed with the
7 immigration court having jurisdiction over the prior proceeding.
8 Id. § 1208.4(b)(3)(ii) (emphasis added). An alien who is subject
9 to a final removal order and who wishes to reopen his proceedings
10 generally may file only one motion to reopen and must file that
11 motion within ninety days of the date of entry of the final
12 order. 8 U.S.C. § 1229a(c)(7)(A), (C)(i); see also 8 C.F.R. §
13 1003.2(c)(2). These numerical and time limitations do not apply,
14 however, if the motion is based on changed country conditions and
15 the relevant evidence was unavailable during the prior
16 proceeding. 8 U.S.C. § 1229a(c)(7)(C)(ii);² see also 8 C.F.R. §

1 ² The statute provides:

2
3 There is no time limit on the filing of a motion to reopen
4 if the basis of the motion is to apply for relief under
5 sections 1158 or 1231(b)(3) of this title and is based on
6 changed country conditions arising in the country of
7 nationality or the country to which removal has been
8 ordered, if such evidence is material and was not available
9 and would not have been discovered or presented at the
10 previous proceeding.

11
12 8 U.S.C. § 1229a(c)(7)(C)(ii).

1 1003.2(c)(3)(ii).³ Unlike in the case of a successive asylum
2 application filed under 8 U.S.C. § 1158(a)(2)(D), changed
3 personal circumstances are insufficient to excuse an alien from
4 the procedural requirements of a motion to reopen. See, e.g.,
5 Wang, 437 F.3d at 274 (“The law is clear that a petitioner must
6 show changed country conditions in order to exceed the 90-day
7 filing requirement for seeking to reopen removal proceedings. A
8 self-induced change in personal circumstances cannot suffice.”
9 (citation omitted)); Jian Huan Guan v. BIA, 345 F.3d 47, 49 (2d
10 Cir. 2003) (per curiam) (holding that an alien was not entitled
11 to relief from the ninety-day motion to reopen deadline because
12 she had established only changed personal circumstances, “which
13 does not fit under the exception set forth in 8 C.F.R. [§
14 1003.2](c)(3)(ii)”).

15 Reading all of these provisions together, the BIA has
16 interpreted them to provide that: (1) an alien who has completed

1 ³ The regulation provides:

2
3 The time and numerical limitations set forth in paragraph
4 (c)(2) of this section shall not apply to a motion to reopen
5 proceedings:

6
7 To apply or reapply for asylum or withholding of deportation
8 based on changed circumstances arising in the country of
9 nationality or in the country to which deportation has been
10 ordered, if such evidence is material and was not available
11 and could not have been discovered or presented at the
12 previous hearing[.]

13
14 8 C.F.R. § 1003.2(c)(3)(ii).

1 removal proceedings and is under a final order of removal, and
2 who wishes to file a new asylum application, must do so in
3 conjunction with a motion to reopen those proceedings; and (2) if
4 such a motion is filed more than ninety days after entry of the
5 final order, the motion must be denied unless the alien can
6 establish changed country conditions. See In re C-W-L, 24 I. &
7 N. Dec. at 351 (“[T]he regulations require that all asylum
8 applications filed with the Immigration Court after the close of
9 removal, deportation, or exclusion proceedings be accompanied by
10 a properly filed motion to reopen.”); id. at 350 (“[8 U.S.C. §
11 1158(a)(2)(D)], on which the respondent relies for his premise
12 that changes in personal circumstances justify the new asylum
13 application, simply does not apply to a situation where an asylum
14 applicant has already been ordered removed.”).

15 For the reasons expressed below, we hold that the BIA’s
16 interpretation of the relevant INA provisions is not arbitrary,
17 capricious, or manifestly contrary to the statute, and that its
18 regulatory interpretation - in particular, its reading of 8
19 C.F.R. § 1208.4(b)(3)(ii) - is not plainly erroneous or
20 inconsistent with the regulations. We therefore accord those
21 interpretations deference under Chevron, 467 U.S. 837.

22 The Board’s determination that a properly filed motion to
23 reopen is a prerequisite to the filing of a new asylum petition
24 when the petitioner is under a final removal order has recently

1 been affirmed by four other circuits and is based on sound
2 reasoning. See Qing Li Chen v. Mukasey, 524 F.3d 1028, 1030 (9th
3 Cir. 2008) (“We conclude that the BIA’s interpretation of [8
4 U.S.C. §§ 1158 and 1229a(c)(7)], as they affect each other, is a
5 reasonable one, and we defer to that interpretation.”); Wen Ying
6 Zheng v. Mukasey, 509 F.3d 869, 872 (8th Cir. 2007) (“[T]he BIA
7 reasonably harmonized the relevant statutes and regulations in
8 concluding that an alien under a final order of removal must
9 successfully reopen under 8 U.S.C. § 1229a(c)(7)(C)(ii) in order
10 to pursue an untimely or successive asylum application under 8
11 U.S.C. § 1158(a)(2)(D).”); Hai Fan Huang v. Attorney Gen. of the
12 U.S., 249 F. App’x 293, 298 (3d Cir. 2007) (unpublished opinion)
13 (“[W]e cannot say the BIA’s requirement that an alien under a
14 final administrative order of exclusion or removal must file a
15 motion to reopen is an arbitrary or capricious interpretation of
16 the immigration laws.”); Cheng Chen v. Gonzales, 498 F.3d 758,
17 760 (7th Cir. 2007) (agreeing with the BIA that 8 U.S.C. §
18 1229a(c)(7)(C)(ii)’s requirements govern the successive asylum
19 application of a petitioner subject to a final removal order).

20 The Board’s treatment and application of 8 U.S.C. §
21 1229a(c)(7)(C)(ii) under the facts presented is not inconsistent
22 with 8 U.S.C. § 1158(a)(2)(D). Any potential tension between 8
23 U.S.C. § 1208.4(a)(4)’s broad provision that changed country
24 conditions or changed personal circumstances can support a new

1 asylum application under § 1158(a)(2)(D) and the BIA's
2 determination that only changed country conditions can support a
3 new asylum application filed by an alien under a final removal
4 order is easily resolved. As the Seventh Circuit noted in Cheng
5 Chen, § 1158(a)(2)(D) "says nothing about the situation in which
6 the applicant has already been ordered removed, the order has
7 become final, and the time for reopening the removal proceeding
8 has expired." 498 F.3d at 760. Thus, 8 C.F.R. §
9 1208.4(b)(3)(ii), which discusses the filing of an asylum
10 application "in conjunction with a motion to reopen" when removal
11 proceedings have been completed,⁴ and 8 U.S.C. §

1 ⁴ In relevant part, 8 C.F.R. § 1208.4(b)(3)(ii) states:
2
3 Asylum applications shall be filed directly with the
4 Immigration Court having jurisdiction over the case in the
5 following circumstances:

6
7

8
9 After completion of exclusion, deportation, or removal
10 proceedings, and in conjunction with a motion to reopen
11 pursuant to 8 CFR part 1003 where applicable, with the
12 Immigration Court having jurisdiction over the prior
13 proceeding. Any such motion must reasonably explain the
14 failure to request asylum prior to the completion of the
15 proceedings.

16
17 The regulation does not explicitly require that a motion to
18 reopen accompany an asylum application. Nevertheless, for the
19 reasons stated below, we agree with the BIA that the regulatory
20 scheme as a whole makes "clear that an asylum application may
21 only be filed with the Immigration Court in conjunction with a
22 motion to reopen." In re C-W-L, 24 I. & N. Dec. at 350 (internal
23 quotation marks and citation omitted).
24

1 1229(a)(c)(7)(C), which delineates the requirements for such a
2 motion when a final order has issued, can properly be read as
3 filling this gap by setting forth the mechanism by which an alien
4 may file a successive asylum petition when the alien has already
5 been ordered removed.

6 The BIA's interpretation of the INA gives meaning to both 8
7 U.S.C. § 1229a(c)(7)(C) and 8 U.S.C. § 1158(a)(2)(D). Under that
8 interpretation, an alien may file a successive asylum application
9 based on changed personal circumstances or changed country
10 conditions, pursuant to 8 U.S.C. § 1158(a)(2)(D), "at any time
11 during proceedings before the entry of a final order of removal
12 or within the 90-day deadline for a motion to reopen. Outside of
13 those circumstances, changed country conditions [under §
14 1229a(c)(7)(C)] must be shown." In re C-W-L, 24 I. & N. Dec. at
15 353. The statutory provisions each play a role and apply at
16 different points in the immigration proceeding, with §
17 1158(a)(2)(D) "apply[ing] principally at an earlier stage of
18 proceedings than[] the 90-day reopening provisions in [§
19 1229a(c)(7)(C)]." Id.

20 It is "a cardinal principle of statutory construction that a
21 statute ought, upon the whole, to be so construed that, if it can
22 be prevented, no clause, sentence, or word shall be superfluous,
23 void, or insignificant." Alaska Dep't of Env'tl. Conservation v.
24 EPA, 540 U.S. 461, 489 n.13 (2004) (internal quotation marks and

1 citation omitted). But, as the BIA reasoned, petitioners'
2 proposed interpretation that an alien may file a new asylum
3 application at any time - even when subject to a final removal
4 order - without a motion to reopen, and by showing either changed
5 personal circumstances or changed country conditions, would
6 render § 1229a(c)(7)(C) superfluous. See In re C-W-L, 24 I. & N.
7 Dec. at 351. An alien could completely bypass the more stringent
8 procedural requirements for a motion to reopen by filing a
9 successive asylum application; neither § 1229a(c)(7)(C)'s ninety-
10 day deadline nor its exception in the case of changed country
11 conditions would ever apply, even after the entry of a final
12 order of removal.

13 The Board's determination is also consistent with its
14 general administrative procedures. As the BIA acknowledged in In
15 re C-W-L, as a procedural matter a motion to reopen must be filed
16 with a successive asylum petition after the completion of removal
17 proceedings because the agency could not otherwise consider the
18 new issue raised by the petitioner. 24 I. & N. Dec. at 350
19 (noting that, in the case presented, the applicant "filed no
20 motion to reopen proceedings, a prerequisite to our taking up any
21 issue arising in his case, given the entry of the removal order
22 against him"); see also id. at 351 (stating that "[t]he only way
23 for us to acquire jurisdiction over a petition for further relief
24 (such as a 'successive asylum application')" when a final order

1 of removal is in place "is through a properly filed motion to
2 reconsider or reopen"); id. at 354. Nor could the petitioner
3 benefit from a grant of asylum on his successive application
4 unless he first provided the agency with a means of reopening his
5 proceedings to vacate the removal order. See 8 C.F.R. §
6 209.2(a)(1)(v) (providing that an alien who has been granted
7 asylum may not adjust his status unless he is admissible to the
8 United States).

9 Petitioners contend that the BIA's interpretation of the INA
10 is contrary to the statutory scheme and to Congress's intent
11 because it would leave without any avenue of relief aliens whose
12 personal circumstances had genuinely changed more than ninety
13 days after a final agency decision in a removal proceeding. We
14 disagree. Notwithstanding the fact that any such aliens would
15 likely have remained in the country in violation of the
16 immigration laws, see 8 U.S.C. § 1253(a)(1)(A) (setting forth
17 penalties for an alien who "willfully fails or refuses to depart
18 from the United States within a period of 90 days from the date
19 of the final order of removal under administrative processes"), 8
20 C.F.R. § 1003.2(c)(3)(iii) provides that the time and numerical
21 limitations for a motion to reopen "shall not apply to a motion
22 to reopen proceedings . . . [a]greed upon by all parties and
23 jointly filed." Thus, with the government's consent, an alien
24 alleging only changed personal circumstances could reopen his

1 proceedings and file a successive asylum petition. Furthermore,
2 it is within the BIA's discretion to reopen proceedings sua
3 sponte if it determines, based on a petitioner's particular
4 circumstances, that reopening is warranted. See 8 C.F.R. §
5 1003.2(a) ("The Board may at any time reopen or reconsider on its
6 own motion any case in which it has rendered a decision.").

7 Petitioners also claim that the regulatory history of 8
8 C.F.R. § 1208.4 "unambiguously establishes" that they are not
9 required to file a motion to reopen with their successive asylum
10 applications. They point, in particular, to the Department of
11 Justice's explicit decision not to include such a requirement in
12 the final version of the regulation:

13 Because of inconsistency between the formulation of changed
14 circumstances in [8 U.S.C. § 1158(a)(2)(D)] and the
15 formulation in [8 U.S.C. § 1229a(c)(7)(C)(ii)], which
16 permits an alien to file a motion to reopen beyond the time
17 limit normally applicable to such a motion, the Department
18 has decided to drop the requirement that, for purposes of
19 the prohibition in [8 U.S.C. § 1158(a)(2)(C)], [the changed
20 circumstances] exception may only be raised through a motion
21 to reopen.

22
23 62 Fed. Reg. 10,312, 10,316 (Mar. 6, 1997); cf. 62 Fed. Reg. 444,
24 463 (proposed Jan. 3, 1997) ("Changed circumstances arising after
25 the denial of the application but before the alien's departure or
26 removal from the United States shall only be considered as part
27 of a motion to reopen").

28 This argument was considered and rejected by the Third,
29 Seventh, Eighth, and Ninth Circuits and by the BIA in In re C-W-

1 L, and we reject it as well. We find persuasive the BIA's
2 reasoning that

3 [t]he cited regulatory history nowhere states that an alien
4 may file unlimited "successive asylum applications" after
5 the entry of a final administrative order of removal without
6 filing a motion to reopen. At best, the cited regulatory
7 provisions implementing [8 U.S.C. § 1158(a)(2)(D)] are
8 silent on the issue of reopening, most likely because the
9 requirement of an accompanying motion to reopen once a final
10 order of removal has been entered is clearly set forth in
11 other parts of the statutory and regulatory scheme.

12
13 In re C-W-L, 24 I. & N. Dec. at 352. Thus, the regulation's
14 history does not unambiguously support petitioners' argument. As
15 we have discussed, the current regulation can be read, consistent
16 with 8 U.S.C. § 1158(a)(2)(D), 8 U.S.C. § 1229a(c)(7)(C), and 8
17 C.F.R. § 1003.2, to provide that a successive asylum application
18 may be filed without a motion to reopen before a final removal
19 order has entered. See Zheng, 509 F.3d at 872 ("[C]hanging the
20 regulations . . . does not reflect a clear intent to weaken the
21 requirements of a motion to reopen when an alien under a final
22 order of removal seeks to file a[] . . . successive asylum
23 application."). Petitioners' regulatory history argument
24 therefore does not undermine the reasonableness of the BIA's
25 statutory and regulatory interpretations.

26 The BIA's determination is further supported by policy
27 considerations that several courts of appeals have recognized as
28 important. The decisions of the Third, Seventh, and Eighth
29 Circuits were influenced by principles that we articulated in Wei

1 Guang Wang v. BIA, 437 F.3d 270. See Zheng, 509 F.3d at 871
2 (stating that “practical realities support [the BIA’s]
3 interpretation,” and discussing Wang); Huang, 249 F. App’x at
4 298; Cheng Chen, 498 F.3d at 760. In Wang, we discussed the
5 policy behind extending the ninety-day deadline for a motion to
6 reopen based on changed country conditions, but not on changed
7 personal circumstances. We noted that it would be “ironic” to
8 allow aliens to reopen their cases following a final order of
9 deportation simply because they were able to change their own
10 personal circumstances (e.g., by giving birth to additional
11 children) while remaining in the United States illegally:

12 It is quite a different situation . . . where a petitioner
13 is seeking to reopen his asylum case due to circumstances
14 entirely of his own making after being ordered to leave the
15 United States. In such a situation, it would be ironic,
16 indeed, if petitioners . . . were permitted to have a second
17 and third bite at the apple simply because they managed to
18 marry and have children while evading authorities. This
19 apparent gaming of the system in an effort to avoid
20 deportation is not tolerated by the existing regulatory
21 scheme. The law is clear that a petitioner must show
22 changed country conditions in order to exceed the 90-day
23 filing requirement for seeking to reopen removal
24 proceedings. A self-induced change in personal
25 circumstances cannot suffice.

26 Wang, 437 F.3d at 274 (citations omitted).

27 We find this logic equally applicable to successive asylum
28 petitions filed after the BIA has issued a final removal order.
29 Were we to accept petitioners’ argument that an alien subject to
30 such an order may file, more than ninety days after its entry, a
31 second asylum application without a motion to reopen, and on the

1 basis of only changed personal circumstances, we would be
2 permitting extensive "gaming of the system" because those
3 circumstances could be "entirely of [the alien's] own making."
4 Id. Aliens would have every incentive to disregard their removal
5 orders and remain in the United States long enough to change
6 their personal circumstances (e.g., by having children or
7 practicing a persecuted religion) and initiate new proceedings
8 via a new asylum application.⁵

9 As the Seventh Circuit suggested in Cheng Chen, some
10 restriction that cannot be manipulated by petitioners must be in
11 place, lest petitioners take advantage of the system by
12 "manufacturing" a new case for asylum. See 498 F.3d at 760 ("It
13 makes no sense to allow an alien who manages to elude capture . .
14 . for years after he has been ordered to leave the country, and
15 has exhausted all his legal remedies against removal, to use this
16 interval of unauthorized presence in the United States to
17 manufacture a case for asylum."). Requiring a petitioner to file
18 a motion to reopen in order to file a new asylum application, and
19 therefore to show changed country conditions if the motion is

1 ⁵ Catholic Charities Community Services, as amicus, suggests
2 that an alien's intentions (whether "good-faith" or not) are
3 irrelevant if the changed personal circumstances place the alien
4 at risk of persecution upon return to his country of origin. Of
5 course, there is no indication that the petitioner in Wang, or
6 the petitioners in the instant cases, have engaged in bad-faith
7 gamesmanship of the immigration process. We note, however, that
8 the rules governing successive asylum petitions are designed to
9 avoid such manipulation.

1 untimely, provides one such restriction against manufacturing a
2 case for asylum.

3 Such a requirement also promotes the agency's interest in
4 finality. The Supreme Court has recognized this interest as
5 important in the immigration context. See INS v. Doherty, 502
6 U.S. 314, 323 (1992) (noting that "[m]otions for reopening of
7 immigration proceedings are disfavored" because "as a general
8 matter, every delay works to the advantage of the deportable
9 alien who wishes merely to remain in the United States"); INS v.
10 Abudu, 485 U.S. 94, 107-08 (1988) (noting the "strong public
11 interest" in finality, and endorsing the view that the INS should
12 have the right to be restrictive in granting motions to reopen
13 because "[g]ranted such motions too freely will permit endless
14 delay of deportation by aliens creative and fertile enough to
15 continuously produce new and material facts"). Accepting
16 petitioners' argument would permit aliens to file a new asylum
17 application at any time, virtually without restriction,
18 undermining significantly the finality of immigration
19 proceedings.

20 We conclude that the BIA's interpretation of the INA and its
21 implementing regulations are reasonable, fully consistent with
22 the relevant statutory and regulatory provisions, and comport
23 with sound and well-established policy considerations. We
24 therefore affirm its holding that an alien under a final removal

1 order must file a successive asylum application in conjunction
2 with a motion to reopen and in accordance with those procedural
3 requirements. We also note that we are not bound by our comment
4 in Jian Huan Guan v. BIA, 345 F.3d 47 (2d Cir. 2003) (per
5 curiam), that such an alien may request permission to file a
6 successive, untimely asylum application based only on changed
7 personal circumstances, because that comment was contained in
8 dicta. See id. at 49; see also Zheng, 509 F.3d at 872 (stating
9 that the language in Guan was dictum); Cheng Chen, 498 F.3d at
10 760 (same); In re C-W-L, 24 I. & N. Dec. at 353 (same); cf. Chang
11 Hua He v. Gonzales, 501 F.3d 1128, 1133 n.9 (9th Cir. 2007)
12 (suggesting, in dicta, that the petitioner could file a
13 successive asylum application without a motion to reopen); Haddad
14 v. Gonzales, 437 F.3d 515, 518 (6th Cir. 2006) (same); cf. also
15 Qing Li Chen, 524 F.3d at 1033 (“[W]e are not bound by He’s
16 offhand observation.”); Xiao Xing Ni v. Gonzales, 494 F.3d 260,
17 272-73 (2d Cir. 2007) (Calabresi, J., concurring).

18 **II. Constitutional Challenges**

19 Petitioners raise two constitutional challenges to the BIA’s
20 determination, both of which we reject as meritless.

21 **A. Due Process**

22 Petitioners contend that the BIA’s interpretation of the INA
23 violates aliens’ due process rights by depriving them of a
24 hearing when they have experienced only changed personal

1 circumstances. But petitioners have not established any liberty
2 or property interest in asylum that warrants Fifth Amendment
3 protection. We agree with the views of other circuits that have
4 addressed similar due process claims in the context of
5 discretionary relief. See, e.g., Smith v. Ashcroft, 295 F.3d
6 425, 430 (4th Cir. 2002) (noting that aliens have no protected
7 liberty or property interest in a waiver of deportation under
8 former INA § 212(c) because such relief is discretionary, “a
9 circumstance fatal to [a] due process claim”); Oguejiofor v.
10 Attorney Gen. of the U.S., 277 F.3d 1305, 1309 (11th Cir. 2002)
11 (“[A]n alien has no constitutionally-protected right to
12 discretionary relief or to be eligible for discretionary relief.”
13 (emphasis added)). We hold that an alien who has already filed
14 one asylum application, been adjudicated removable and ordered
15 deported, and who has nevertheless remained in the country
16 illegally for several years, does not have a liberty or property
17 interest in a discretionary grant of asylum. In other contexts,
18 we have suggested in dicta that an alien’s interest “in not being
19 returned [to a country where he fears persecution] may well enjoy
20 some due process protection not available to an alien claiming
21 only admission.” Yiu Sing Chun v. Sava, 708 F.2d 869, 877 (2d
22 Cir. 1983); see also Augustin v. Sava, 735 F.2d 32, 37 (2d Cir.
23 1984) (noting that the INA “prohibits the Attorney General from
24 deporting or returning an alien to a country in which his life or

1 freedom would be jeopardized," but leaving open the question of
2 "whether or not due process protections apply to an application
3 for a discretionary grant of asylum"). We do not consider those
4 situations here, nor do we address whether an applicant for
5 withholding of removal or relief under the CAT would have a
6 protectable interest in those mandatory forms of relief.

7 In any event, assuming *arguendo* that petitioners had a
8 protectable interest in relief under § 1158(a)(2)(D), they have
9 not been denied due process. We stated in Augustin v. Sava:

10 The requirements of the due process clause are flexible and
11 dependent on the circumstances of the particular situation
12 examined. Without attempting precisely to map the contours
13 of due process in the immigration area, we think that the
14 protected right to avoid deportation or return to a country
15 where the alien will be persecuted warrants a hearing where
16 the likelihood of persecution can be fairly evaluated.

17
18 735 F.2d at 37 (citation omitted). Any alien to whom the BIA's
19 determination would apply would have already had a full and fair
20 removal hearing (which resulted in a final removal order) as well
21 as the adjudication of their initial asylum application. The
22 alien is afforded additional process by the opportunity to submit
23 and offer evidence on a motion to reopen his earlier proceedings;
24 if the motion is granted, a hearing will be held. 8 U.S.C. §
25 1229a(c)(7)(B). Thus, petitioners cannot succeed on their due
26 process challenge.⁶

1 ⁶ In his concurrence, Judge Sack acknowledges that our
2 evaluation of petitioners' due process claim involves a two-part
3 inquiry, but he disagrees with the approach that we adopt -

1 **B. Equal Protection**

2 Petitioners also argue that the BIA's interpretation results
3 in an equal protection violation in that it treats aliens under a
4 final removal order who nevertheless remain illegally in the
5 United States differently than aliens under a final removal order
6 who comply with the order by leaving, but who later reenter the
7 United States illegally. The latter class may apply for
8 withholding of removal and is not required to present evidence of
9 changed country conditions to support a determination of
10 reasonable fear. See 8 C.F.R. § 1241.8(e); id. § 1208.31. Under
11 the BIA's rulings, however, the former class may not reopen
12 proceedings or submit a new asylum application without showing

1 namely, addressing the first part of the inquiry first. While he
2 notes that "we have not hesitated to dispose of the claim on the
3 second question alone," **Concurrence at 2-3**, it is also true that
4 we have not hesitated to rest our analysis on the first question
5 alone, see, e.g., Connolly v. McCall, 254 F.3d 36, 42 (2d Cir.
6 2001) (per curiam) (rejecting a due process claim on the ground
7 that the plaintiff could not establish a property interest in his
8 continued participation in a pension scheme). Indeed, we have
9 often found it prudent, as we have here, to rest our analysis on
10 the first question but nevertheless to address the second. See,
11 e.g., McMenemy v. City of Rochester, 241 F.3d 279, 286-88 (2d
12 Cir. 2001) (Sack, J.) (concluding that the plaintiff lacked a
13 cognizable property interest, "[b]ut even if he did have a
14 property interest, he was not deprived of it without due process
15 of law").

16
17 Nor is it at all clear, as the concurring opinion contends,
18 that the issue of petitioners' interests in asylum relief is
19 "unsettled" or less "easily answered" than whether the procedures
20 afforded were constitutionally adequate. **Concurrence at 2.**
21 Furthermore, any "complications" in due process analysis arising
22 from interests in withholding of removal or relief under the CAT
23 are not at issue here.

1 changed country conditions.

2 To successfully assert an equal protection challenge,
3 petitioners must first establish that the two classes at issue
4 are similarly situated. "[T]he government can treat persons
5 differently if they are not 'similarly situated.'" Jankowski-
6 Burczyk v. INS, 291 F.3d 172, 176 (2d Cir. 2002) (internal
7 quotation marks and citation omitted). Petitioners have failed
8 to do so here. Aliens who disregard a final removal order and
9 remain in the country illegally are not similarly situated to
10 aliens who have complied with a final order but subsequently
11 reenter the United States and try to seek relief. Cf. id. at 178
12 (concluding that legal permanent residents and non-legal
13 permanent residents are not similarly situated for purposes of
14 equal protection analysis).

15 Assuming arguendo that the two classes of aliens were
16 similarly situated, petitioners' equal protection claim would
17 fail on other grounds. The challenged classification is not
18 protected, and there is no fundamental right at stake, see supra
19 Part II.A; thus, the proper standard of review is rational basis.
20 See Heller v. Doe, 509 U.S. 312, 319-20 (1993) ("[A]
21 classification neither involving fundamental rights nor
22 proceeding along suspect lines is accorded a strong presumption
23 of validity. Such a classification cannot run afoul of the Equal
24 Protection Clause if there is a rational relationship between the

1 disparity of treatment and some legitimate governmental purpose.”
2 (citations omitted)). Furthermore, “[a] sufficient reason need
3 not be one actually considered by Congress.” Jankowski-Burczyk,
4 291 F.3d at 178. A classification subject to rational basis
5 review “must be upheld against [an] equal protection challenge if
6 there is any reasonably conceivable state of facts that could
7 provide a rational basis for the classification. Where there are
8 plausible reasons for Congress’ action, our inquiry is at an
9 end.” FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 313-14 (1993)
10 (emphasis added) (internal quotation marks and citations
11 omitted).

12 There is a rational basis for distinguishing between aliens
13 who comply with their final removal orders and those who do not,
14 and for giving the former greater legal protection than the
15 latter. As the government has argued, “[i]t is surely rational
16 for Congress to treat scofflaws who disobey orders of removal
17 less favorably than aliens who obey such orders.” Supplemental
18 Br. for Resp’t in No. 06-2998-ag at 48. Congress may well have
19 wanted to prevent abuse of the asylum process and to create an
20 incentive for aliens to comply with final orders of removal.
21 Furthermore, Congress could have determined that aliens who
22 complied with their removal orders were less likely upon return
23 to “game the system” by changing their personal circumstances,
24 compared to aliens who deliberately disobeyed their orders and

1 chose to remain in the country. Because any distinction drawn
2 between aliens who comply with their final removal orders and
3 those who do not is rationally related to a legitimate
4 governmental purpose, we conclude that there is no equal
5 protection violation.

6 **III. Treaty and Customary International Law-Based Challenges**

7 Finally, petitioners argue that under the United Nations
8 Protocol Relating to the Status of Refugees ("Protocol"), Jan.
9 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6557, and the United
10 Nations Convention Against Torture and Other Cruel, Inhuman, or
11 Degrading Treatment or Punishment (CAT), Dec. 10, 1984, S. Treaty
12 Doc. No. 100-20 (1988), the agency has an obligation to ensure
13 that aliens will not be returned to a country in which they are
14 likely to face persecution or torture. On that basis,
15 petitioners claim that the BIA's actions violated their rights
16 under international law because, if removed, they will be
17 persecuted for violating China's family planning policies.
18 Petitioners also argue that the BIA's interpretation violates
19 customary international law in general and the principles of non-
20 refoulement and protection of refugees "sur place" in particular.

21 But neither the Protocol nor the CAT are self-executing
22 treaties. See Pierre v. Gonzales, 502 F.3d 109, 119 (2d Cir.
23 2007) (CAT); Bertrand v. Sava, 684 F.2d 204, 218-19 (2d Cir.
24 1982) (Protocol); see also Purwantono v. Gonzales, 498 F.3d 822,

1 824 (8th Cir. 2007) (Protocol); Sukwanputra v. Gonzales, 434 F.3d
2 627, 632 (3d Cir. 2006) (same); Singh v. Ashcroft, 398 F.3d 396,
3 404 n.3 (6th Cir. 2005) (CAT); Auguste v. Ridge, 395 F.3d 123,
4 132 (3d Cir. 2005) (same); cf. Medellin v. Texas, 128 S. Ct.
5 1346, 1365 (2008) (CAT). They therefore do not create private
6 rights that petitioners can enforce in this court beyond those
7 contained in their implementing statutes and regulations (i.e.,
8 the INA). See Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir.
9 1976) ("It is only when a treaty is self-executing, when it
10 prescribes rules by which private rights may be determined, that
11 it may be relied upon for the enforcement of such rights."). And
12 we have determined that the BIA's rulings are fully consistent
13 with the framework of the INA and its relevant regulations.
14 Furthermore, even if the treaties were self-executing, "there is
15 a strong presumption against inferring individual rights from
16 international treaties." United States v. De La Pava, 268 F.3d
17 157, 164 (2d Cir. 2001); see also Medellin, 128 S. Ct. at 1357
18 n.3 (collecting cases in the courts of appeals acknowledging such
19 a presumption). Accordingly, we reject petitioners' treaty-based
20 argument.

21 Petitioners have also presented no evidence that the BIA's
22 interpretation of the statutory provisions conflicts with
23 principles of customary international law. And even if there
24 were a conflict, "United States law is not subordinate to

1 customary international law or necessarily subordinate to treaty-
2 based international law and, in fact, may conflict with both.”
3 United States v. Yousef, 327 F.3d 56, 91 (2d Cir. 2003); see also
4 Sosa v. Alvarez-Machain, 542 U.S. 692, 731 (2004) (noting that
5 Congress may “shut the door to the law of nations entirely[] . .
6 . at any time (explicitly, or implicitly by treaties or statutes
7 that occupy the field), just as it may modify or cancel any
8 judicial decision so far as it rests on recognizing an
9 international norm as such”). We have said repeatedly that when
10 there is a conflict between a statute and customary international
11 law, the statute controls. See Pierre, 502 F.3d at 119 (“An act
12 of Congress will govern in domestic courts in derogation of
13 previous treaties and customary international law.”); Olivia v.
14 U.S. Dep’t of Justice, 433 F.3d 229, 236 (2d Cir. 2005) (“[C]lear
15 congressional action trumps customary international law. This
16 rule, of course, applies in immigration matters.” (internal
17 quotation marks and citations omitted)). Thus, petitioners’
18 argument based on customary international law also fails.

19 **IV. Disposition of the Instant Cases**

20 Applying the agency’s statutory interpretation, which we
21 affirm, to petitioners’ cases, we conclude that the BIA did not
22 abuse its discretion in denying petitioners’ motions to reopen.
23 Petitioners were all subject to final orders of removal after
24 their initial asylum applications were denied. They were

1 therefore required to properly file a motion to reopen to pursue
2 a new asylum application. Because petitioners filed their
3 requests for relief more than ninety days, indeed several years,
4 after the entry of their final removal orders, their motions to
5 reopen were untimely and, pursuant to 8 U.S.C. §
6 1229a(c)(7)(C)(ii) and 8 C.F.R. 1003.2(c)(3)(ii), they were
7 required to demonstrate that conditions in China had changed.

8 Petitioners requested reopening and asylum based on the
9 birth of a second or third child in the United States. But it is
10 well settled in this circuit that the birth of additional
11 children in the United States is evidence of changed personal
12 circumstances, not changed country conditions within the meaning
13 of 8 C.F.R. § 1003.2(c)(3)(ii). See, e.g., Wang, 437 F.3d at
14 273-74; Guan, 345 F.3d at 49 (“Guan’s evidence is essentially of
15 changed personal circumstances in the United States based on the
16 birth of her two sons”). Because petitioners failed to
17 satisfy the requirements for a motion to reopen, the BIA did not
18 err in denying their motions or failing to consider their
19 successive asylum applications.

20 Petitioners raise some additional arguments that pertain to
21 their individual cases. We have considered those arguments and
22 find all of them to be without merit.

1 **CONCLUSION**

2 For the foregoing reasons, the petitions for review are
3 DENIED. Having completed our review, any stay of removal that
4 the court previously granted in these proceedings is VACATED, and
5 any pending motion for a stay of removal is DISMISSED as moot.

1 Jin v. Mukasey, No. 05-5485-ag
2 Zheng v. B.C.I.S., No. 05-6367-ag
3 Chen v. U.S. Dep't of Justice, No. 06-0004-ag
4 Zeng v. B.C.I.S., No. 06-2998-ag
5
6

7 SACK, Circuit Judge, concurring in part:
8
9

10 I concur in the judgment of the majority. I also join
11 in Judge Walker's opinion for the majority, with one exception.

12 The majority resolves the petitioners' due process
13 challenge by concluding, first, that "an alien who has already
14 filed one asylum application, been adjudicated removable and
15 ordered deported, and who has nevertheless remained in the
16 country illegally for several years, does not have a liberty or
17 property interest in a discretionary grant of asylum," ante at
18 [28]; and second, that "[i]n any event, assuming arguendo that
19 petitioners had a protectable interest in relief [they sought],
20 they have not been denied due process," ante at [29]. As to the
21 first point -- the existence of a liberty or property interest --
22 the majority may well be right.¹ But I would prefer not to

1 ¹ Because I think we ought not reach this issue, I arrive at
2 no conclusion with respect to it. I point out, nonetheless, that
3 the issue may not be as simple as the majority makes it appear.
4 Although asylum is a discretionary form of relief, INS v.
5 Aguirre-Aguirre, 526 U.S. 415, 420 (1999), and the Due Process
6 Clause does not protect benefits that "government officials may
7 grant or deny . . . in their discretion," Town of Castle Rock,
8 Colo. v. Gonzales, 545 U.S. 748, 756 (2005), every asylum
9 applicant is nonetheless entitled to due process in establishing
10 her eligibility for that form of relief, see, e.g., Ali v.
11 Mukasey, 529 F.3d 478, 490 (2d Cir. 2008); Burger v. Gonzales,
12 498 F.3d 131, 134 (2d Cir. 2007); see also Zadvydas v. Davis, 533
13 U.S. 678, 693-94 (2001) ("[T]his Court has held that the Due
14 Process Clause protects an alien subject to a final order of
15 deportation, though the nature of that protection may vary
16 depending upon status and circumstance." (citations omitted)).

17 The due process issue is also complicated because,
18 unlike asylum, withholding of removal under 8 U.S.C. § 1231(b)(3)
19 and the Convention Against Torture is mandatory. Delgado v.
20 Mukasey, 508 F.3d 702, 705 (2d Cir. 2007); Yang v. Gonzales, 478
21 F.3d 133, 141 (2d Cir. 2007); 8 U.S.C. § 1231(b)(3)(A). We have
22 said that "some due process protection surrounds the
23 determination of whether an alien has sufficiently shown that

1 purport to decide categorically here this issue of first
2 impression. The same result obtains independently under the
3 majority's alternative rationale, with which I agree -- that due
4 process was, in fact, afforded to the petitioners.

5 Evaluating a due process claim involves a two-part
6 inquiry in which we ask: "1) whether plaintiffs possess a liberty
7 or property interest protected by the Due Process Clause; and, if
8 so, 2) whether existing . . . procedures are constitutionally
9 adequate." Kapps v. Wing, 404 F.3d 105, 112 (2d Cir. 2005).
10 When the first question is unsettled and the second question is
11 easily answered in the affirmative, we have not hesitated to
12 dispose of the claim on the second question alone. See, e.g.,
13 Gaston v. Coughlin, 249 F.3d 156, 162 (2d Cir. 2001); Rojas-Reyes
14 v. INS, 235 F.3d 115, 124 (2d Cir. 2000).²

15 I think we should do so here.

1 return to a particular country will jeopardize his life or
2 freedom so as to invoke the mandatory prohibition against his
3 return to that country." Augustin v. Sava, 735 F.2d 32, 37 (2d
4 Cir. 1984). Furthermore, the INA's implementing regulations
5 provide that "[a]n asylum application shall be deemed to
6 constitute at the same time an application for withholding of
7 removal." 8 C.F.R. § 208.3(b). Any BIA policy restricting the
8 ability to apply for asylum will therefore also implicate
9 withholding of removal, a form of relief that carries due process
10 protection.

11 I think we should refrain from addressing these and
12 related issues until we are required to do so.

1 ² I do not think the majority's citations to Connolly v.
2 McCall, 254 F.3d 36 (2d Cir. 2001) (per curiam), where the second
3 question was not easily answered in the affirmative, or McMenemy
4 v. City of Rochester, 241 F.3d 279 (2d Cir. 2001), where the
5 narrow first question -- whether the plaintiff had the property
6 interests he claimed -- was answered largely by reference to
7 well-settled Supreme Court, Second Circuit and New York law,
8 affect this conclusion.