



1 for review of a final order of the Board of Immigration  
2 Appeals affirming the decision of an Immigration Judge which  
3 denied her application for asylum, withholding of removal,  
4 and withholding under the Convention Against Torture. The  
5 petition was denied primarily on the ground that Lin  
6 "assisted or participated" in the persecution of others by  
7 serving as a nurse in the maternity ward of a hospital which  
8 performed forced abortions and that she was therefore  
9 subject to the statutory "persecutor bar" of the Immigration  
10 and Nationality Act, 8 U.S.C. §§ 1101(a)(42),  
11 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). The petition is granted  
12 in part, denied in part, and remanded.

13 STUART ALTMAN, Law Offices of  
14 Stuart Altman, New York, New  
15 York, for Petitioner.

16  
17 STACY STIFFEL PADDACK, (Anthony  
18 Norwood, Sherrie Waldrup, on the  
19 brief), Office of Immigration  
20 Litigation, for Gregory G.  
21 Katsas, Assistant Attorney  
22 General, United States  
23 Department of Justice, Civil  
24 Division, Washington, D.C., for  
25 Respondent.

26  
27  
28 DENNIS JACOBS, Chief Judge:

29 Petitioner Yan Yan Lin ("Lin" or "Petitioner"), a

1 native and citizen of the People's Republic of China, seeks  
2 review of the December 17, 2007 order of the Board of  
3 Immigration Appeals ("BIA") affirming the January 24, 2006  
4 decision of Immigration Judge ("IJ") Vivienne E. Gordon-  
5 Uruakpa denying her application for asylum, withholding of  
6 removal, and relief under the Convention Against Torture  
7 ("CAT"). In re Yan Yan Lin, No. A95 709 889 (B.I.A. Dec.  
8 17, 2007), aff'g No. A95 709 889 (Immig. Ct. N.Y. City, Jan.  
9 24, 2006). Lin was a maternity nurse employed by a state  
10 general hospital that (sometimes) performed forced abortions  
11 pursuant to China's family planning policy. The IJ denied  
12 relief (in part) on the ground that Lin was therefore a  
13 "persecutor" and statutorily ineligible for asylum or  
14 withholding of removal under the Immigration and Nationality  
15 Act ("INA"). See 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i),  
16 1231(b)(3)(B)(i). The IJ also denied Lin's request for CAT  
17 protection because Lin failed to demonstrate that it was  
18 "more likely than not" that she would be tortured if removed  
19 to China. See 8 C.F.R. § 208.16(c)(2). The BIA affirmed  
20 the IJ's decision and dismissed the appeal. This petition

1 for review followed.

2 The main issue on appeal is whether Lin's activity as a  
3 nurse in China amounted to "assistance or participation" in  
4 persecution which would render her ineligible for asylum or  
5 withholding of removal under the INA's "persecutor bar." We  
6 conclude that it did not.

7 **I**

8 The facts bearing on this appeal are based on Lin's  
9 testimony, which was found to be credible.

10 From 2002 to 2005, Lin was employed in the obstetrics  
11 and gynecology department of the state-run "People's Number  
12 One Hospital" in China. Her duties included, among other  
13 things, tending to pregnant women, assisting in the  
14 performance of ultrasound and other prenatal examinations,  
15 participating in live-birth deliveries, caring for newborns,  
16 and providing recovery care to women who had undergone  
17 forced abortions. Lin did not participate in the abortion  
18 procedure itself, but the examinations in which Lin assisted  
19 were sometimes used to determine a fetus's position so that  
20 a forced abortion could be performed without threatening the

1 life of the mother.

2 In July 2004, a woman Lin knew arrived at the hospital  
3 escorted by family planning authorities. The woman was five  
4 months pregnant and was scheduled to undergo a forced  
5 abortion in accordance with China's family planning policy.  
6 A pre-abortion examination at which Lin assisted revealed a  
7 complication that would delay the procedure for two days.  
8 During the delay, Lin found the woman crying in her room;  
9 the woman stated that she wished to bear the child, and  
10 wanted Lin's help avoiding the abortion. At around one  
11 o'clock in the morning, after Lin's shift ended and the  
12 person guarding the woman's room had fallen asleep, Lin  
13 opened a side door of the hospital and the woman escaped by  
14 motorcycle with her husband, whom Lin had alerted to come to  
15 the hospital. Questioned the next day, Lin denied any  
16 knowledge of the escape.

17 Seven months later, in February 2005, a doctor and  
18 several family planning officials came to Lin's house to  
19 question her again about the incident. (They apparently  
20 learned of her involvement after interrogating the woman who

1 had escaped.) Lin was not home at the time, but was warned  
2 of the visit and fled to her aunt's house, where she learned  
3 that she had been dismissed from the hospital and that  
4 officials continued to search for her. So she decided to  
5 leave China.

6 Lin arrived in Los Angeles on March 27, 2005 without  
7 valid entry documents, and applied for admission. Lin was  
8 taken into custody and served with a notice to appear,  
9 charging her with being subject to removal for her failure  
10 to possess valid travel documents under section  
11 212(a)(7)(i)(I) of the INA, 8 U.S.C. § 1182(a)(7)(A)(i)(I).  
12 Thereafter, Lin was released from custody, paroled into the  
13 United States, and notified of the date for her removal  
14 hearings.

15 On June 23, 2005, Lin appeared with counsel before the  
16 IJ and admitted that she lacked proper documentation, but  
17 filed an application for asylum, withholding of removal, and  
18 withholding under the Convention Against Torture. Lin  
19 admitted that she had never been arrested, detained, or  
20 physically mistreated in China, but alleged fear of

1 persecution for her resistance to China's family planning  
2 policy.

3       Following a January 24, 2006 hearing on the merits, the  
4 IJ found that Lin had "for the most part been a credible  
5 witness." Relying on Lin's testimony, the IJ found that she  
6 had "participated in the persecution of other individuals on  
7 account of their political opinion" and concluded that she  
8 was therefore "statutorily barred from the relief of asylum  
9 and [w]ithholding of [r]emoval" under the INA provisions  
10 barring relief for individuals who themselves engaged in the  
11 persecution of others. See 8 U.S.C. §§ 1101(a)(42),  
12 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). The finding was based  
13 on the grounds that: (i) Lin knew that several of the women  
14 she assisted in examining were scheduled to undergo forced  
15 abortions (because they were escorted to the hospital by  
16 uniformed cadre and guarded during their stay), (ii) Lin's  
17 assistance to doctors in the examinations provided a  
18 "necessary step for the involuntary abortion," and (iii)  
19 Lin's actions "further[ed] the persecution of these women."  
20 The IJ also determined that Lin "failed to demonstrate that

1 it [was] more likely than not that she would be tortured  
2 . . . [if] removed to China." Accordingly, the IJ denied  
3 her applications for asylum and withholding of removal, and  
4 her request for CAT protection, and ordered her removed from  
5 the United States to China.

6 The BIA dismissed Lin's appeal on December 17, 2007,  
7 concluding that Lin failed to show by a preponderance of the  
8 evidence "that she did not assist doctors in carrying out  
9 forced abortions," and could not demonstrate that her  
10 actions were only "tangential" to the procedure. Instead,  
11 the BIA concluded that Lin's conduct "as a whole" was  
12 "active and contributed directly to the persecution of  
13 others." The BIA acknowledged that Lin helped one woman  
14 escape a forced abortion, but decided that this "redemptive  
15 behavior . . . [did] not serve as a basis for relieving the  
16 respondent of the consequences of having previously assisted  
17 in persecution." As to the CAT claim, the BIA agreed with  
18 the IJ that Lin failed to demonstrate eligibility for CAT  
19 protection because she conceded that she had never been  
20 arrested, detained, or physically mistreated in China, and



1 she presented no other evidence to indicate that if she were  
2 returned to China, she would be tortured. Accordingly, the  
3 BIA dismissed Lin's appeal in its entirety.

## 4 II

5 We review the BIA's factual findings under the  
6 "substantial evidence" standard, and uphold them "if they  
7 are supported by 'reasonable, substantial and probative  
8 evidence in the record.'" Weng v. Holder, 562 F.3d 510, 513  
9 (2d Cir. 2009) ("Weng") (quoting Lin Zhong v. U.S. Dep't of  
10 Justice, 480 F.3d 104, 116 (2d Cir. 2007)). The BIA's  
11 application of law to fact is reviewed de novo. Id.

12 Where "the BIA did not expressly 'adopt' the IJ's  
13 decision, but its brief opinion closely tracks the IJ's  
14 reasoning," we consider in the interest of completeness both  
15 the IJ and BIA opinions, especially where doing so does not  
16 affect the outcome. Wangchuck v. Dep't of Homeland Sec.,  
17 448 F.3d 524, 528 (2d Cir. 2006).

## 18 III

19 The Secretary of Homeland Security or the Attorney  
20 General may grant asylum to an alien determined to be a

1 "refugee" within the meaning of the INA. 8 U.S.C.  
2 § 1158(b)(1)(A). The INA defines a "refugee" as a person  
3 "who is unable or unwilling to return to . . . [a] country  
4 because of persecution or a well-founded fear of persecution  
5 on account of race, religion, nationality, membership in a  
6 particular social group, or political opinion." 8 U.S.C.  
7 § 1101(a)(42). Excluded from that definition is "any person  
8 who ordered, incited, assisted, or otherwise participated in  
9 the persecution of any person on account of race, religion,  
10 nationality, membership in a particular social group, or  
11 political opinion." Id.; see also 8 U.S.C.  
12 § 1158(b)(2)(A)(i). This exclusion, the so-called  
13 "persecutor bar," prevents those who have persecuted others  
14 (or assisted or participated in the persecution of others)  
15 from gaining refugee status and seeking asylum in the United  
16 States. See 8 U.S.C. § 1231(b)(3)(B)(i); Negusie v. Holder,  
17 129 S. Ct. 1159, 1162 (2009); Weng, 562 F.3d at 513-14. The  
18 bar also applies to those seeking withholding of removal,  
19 see 8 U.S.C. § 1231(b)(3)(B)(i), but "[i]t does not  
20 disqualify an alien from receiving a temporary deferral of

1 removal under the Convention Against Torture.” Negusie, 129  
2 S. Ct. at 1162; see also 8 C.F.R. § 208.17(a).

3 In this Circuit, four relevant factors determine  
4 whether the persecutor bar applies to a particular alien:  
5 (1) whether the alien was “involved in” acts of persecution  
6 by ordering, inciting, or actively carrying out the acts;  
7 (2) whether there is a nexus between the persecution and the  
8 victim’s race, religion, nationality, membership in a  
9 particular social group, or political opinion; (3) whether  
10 the alien’s actions, if not outright “involvement” under the  
11 first factor, amount to assistance or participation in  
12 persecution; and (4) whether the alien had sufficient  
13 knowledge that her actions might assist in persecution to  
14 make those actions culpable. See Weng, 562 F.3d at 514;  
15 Balachova v. Mukasey, 547 F.3d 374, 384-85 (2d Cir. 2008).  
16 For the persecutor bar to apply, an alien’s conduct must be  
17 persecution under either the first or third factors, and  
18 must also satisfy the second and fourth factors. In short,  
19 Lin is a persecutor if she knowingly did or assisted acts  
20 that would be persecution on account of the victim’s

1 victim's race, religion, nationality, membership in a  
2 particular social group, or political opinion.

3 It is settled law that forced abortion is persecution  
4 on account of political opinion. See 8 U.S.C. § 1101(a)(42)  
5 (see text in the margin<sup>1</sup>). And knowledge is not an issue in  
6 this case. The critical question, then, is whether Lin did  
7 or assisted acts of persecution. It is undisputed that Lin  
8 did not order, incite, or actively carry out the forced  
9 abortions; so Lin's conduct does not amount to "involvement"  
10 under the first factor. See Balachova, 547 F.3d at 384.  
11 Our focus therefore is on whether Lin "assisted or  
12 participated" in persecution under the third factor.

13 "In determining whether . . . conduct amounts to  
14 'assistance' in persecution, we look to [the alien's]

---

<sup>1</sup> "[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 . . . shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion." 8 U.S.C. § 1101(a)(42); see also Weng, 562 F.3d at 514.

1 behavior as a whole.” Weng, 562 F.3d at 514. “Where the  
2 [alien’s] conduct [is] active and [has] direct consequences  
3 for the victims . . . it [is] ‘assistance in persecution.’  
4 Where the conduct [is] tangential to the acts of oppression  
5 and passive in nature, however, we decline[] to hold that it  
6 amount[s] to such assistance.” Zhang Jian Xie v. INS, 434  
7 F.3d 136, 143 (2d Cir. 2006) (“Xie”).

8 Two cases, Xie and Weng, discuss forced abortion  
9 practices in this context and illustrate conduct that  
10 amounts to persecution and conduct that does not. Weng, 562  
11 F.3d at 514-15; Xie, 434 F.3d at 143. Lin’s case falls in a  
12 zone between the events and behaviors described in those  
13 decisions.

14 In Xie, the petitioner worked as a driver for the  
15 county health department in China. Among other duties, he  
16 occasionally “transported pregnant women to hospitals in the  
17 locked back of a van, against their will, so that county  
18 officials could perform forced abortions on them pursuant to  
19 China’s mandatory family planning policies.” 434 F.3d at  
20 138. We agreed with the BIA’s conclusion that the

1 petitioner was subject to the persecutor bar because his  
2 actions "contributed directly" to the persecution: "[b]y  
3 driving the van in which the women were locked, Xie ensured  
4 that they were delivered to the place of their persecution.  
5 . . . [He] played an active and direct, if arguably minor,  
6 role." Id. at 143. We rejected Xie's argument that his  
7 actions were involuntary, and therefore excusable, in the  
8 sense that they were required by his job because "nothing in  
9 the record indicate[d] that Xie did not have the ability to  
10 quit his job as a driver at any time in order to avoid the  
11 persecution of women." Id. We also rejected Xie's argument  
12 that his petition should have been saved by a redemptive act  
13 (he once allowed an unguarded pregnant woman he was  
14 transporting to go free after she pleaded with him). We  
15 explained that "redemptive behavior is [not] necessarily  
16 irrelevant to the inquiry as to whether an applicant has  
17 assisted in persecution," but "the BIA was not in error"  
18 when it determined that Xie was ineligible for asylum.  
19 Id. at 144.

20 In Weng, the petitioner worked as a nurse's assistant

1 at a public hospital in China. 562 F.3d at 512. She  
2 performed administrative tasks such as registration of  
3 patients and maintenance of files, but she also provided  
4 post-surgical care, including the taking of temperature and  
5 the recording of vital signs. Id. at 512, 515. On one  
6 occasion, Weng “guarded” women scheduled for forced  
7 abortions by sitting outside the locked door of her regular  
8 shift room while the women waited inside. Id. at 515. On  
9 that evening, Weng helped one of the women to escape the  
10 hospital before the procedure. Id. at 512-13, 515.

11 In deciding whether Weng had provided “assistance” in  
12 persecution, we observed that the Supreme Court, deciding  
13 the same question, had “easily distinguished between the  
14 conduct of a concentration camp barber who did not assist  
15 persecution and that of armed guards who did.” Id. at 515  
16 (citing Fedorenko v. United States, 449 U.S. 490, 512 n.34  
17 (1981)). Nevertheless, the case law “offered scant guidance  
18 on how to classify less overtly culpable conduct.” Id.

19 We decided in Weng that the “post-surgical care did not  
20 contribute to, or facilitate, the victims’ forced abortions

1 in any 'direct' or 'active' way [because] [Weng's] conduct  
2 neither caused the abortions, nor made it easier or more  
3 likely that they would occur[;] [the] actions were, at most,  
4 'tangential,' 'passive accommodation' of the conduct of  
5 others" and did not trigger the persecutor bar. Id. As to  
6 the single incident where Weng "guarded" forced abortion  
7 patients, the Court observed that "guarding patients  
8 awaiting forced abortions comes closer to active assistance  
9 than does post-operative monitoring of vital signs," but  
10 that Weng "was unarmed, . . . performed actual guard duties  
11 for only approximately ten minutes before accompanying one  
12 of the patients to the restroom, . . . helped one of the  
13 patients to escape, and . . . lost her job as a result."  
14 Id. Under those circumstances, the Court concluded that  
15 "Weng's conduct, considered in its entirety, was tangential,  
16 and not sufficiently direct, active, or integral to the  
17 administering of forced abortions as to amount to assistance  
18 in persecution." Id.

19 Lin's case is closer to Weng than to Xie. Lin did not  
20 participate directly in forced abortions, and the following



1 circumstances are decisive:

2 1. Lin assisted examinations in the maternity ward  
3 that were used to detect the position and health of the  
4 fetus. The kinds of examinations in which Lin assisted  
5 (e.g., ultrasounds) are given to all pregnant women, whether  
6 the pregnancy is scheduled to result in a live birth, a  
7 voluntary abortion, or a forced abortion. The exams are  
8 more akin to routine patient care than a protocol specific  
9 to forced abortions.

10 2. As in Weng, the examinations in which Lin assisted  
11 "did not contribute to, or facilitate, the victims' forced  
12 abortions in any 'direct' or 'active' way" because they did  
13 not "cause[] the abortions, nor [did they make] it . . .  
14 more likely that they would occur." Id. Lin's actions were  
15 therefore "tangential, and not sufficiently direct, active,  
16 or integral to the administering of forced abortions as to  
17 amount to assistance in persecution." Id.

18 Our conclusion is further bolstered by Lin's redemptive  
19 act. Although the act itself is not dispositive, we must  
20 view Lin's conduct "as a whole," id., and the act suggests

1 that she did not actively "assist" or participate in  
2 persecution. We conclude as a matter of law that Lin's  
3 conduct does not subject her to the persecutor bar. We  
4 grant Lin's petition with respect to the BIA's denial of her  
5 applications for asylum and withholding of removal, and  
6 remand for the BIA to determine, in the first instance, if  
7 Lin is eligible for such relief.

8 (A) The CAT Determination

9 In order to establish eligibility for CAT withholding,  
10 the petitioner must demonstrate that she will "more likely  
11 than not" be tortured if removed to her home country. See 8  
12 C.F.R. § 208.16(c)(2). Here, the IJ and the BIA concluded  
13 that Lin failed to sustain her burden of demonstrating that  
14 it was "more likely than not" that she would be tortured in  
15 China because she affirmatively testified that she had never  
16 been arrested, detained, or physically mistreated in her  
17 home country. We see no error in this conclusion and deny  
18 Lin's petition for review on this ground.

19 **CONCLUSION**

20 For the foregoing reasons, Lin's petition for review is

1 granted as to her applications for asylum and withholding of  
2 removal, and denied as to withholding of removal under CAT;  
3 the petition is remanded to the BIA for further proceedings  
4 consistent with this opinion.