

Refugee Law and Policy

A Comparative and International Approach

Third Edition

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The Decision of *Matter of J-S* is a supplement to the readings in the casebook in Chapter 6, section C.3.b.

U.S. Department of Justice
Office of the Attorney General

**MATTER OF J-S- , RESPONDENT
24 I & N Dec. 520**

Decided by Attorney General May 15, 2008

(1) The spouse of a person who has been physically subjected to a forced abortion or sterilization procedure is not per se entitled to refugee status under section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of [Pub. L. No 104-208, 110 Stat. 3009-546, 3009-689](#), codified at section 101(a)(42) of the Immigration and Nationality Act, [8 U.S.C. § 1101\(a\)\(42\)](#) (2000). The holding to the contrary in [Matter of S-L-L-, 24 I&N Dec. 1 \(BIA 2006\)](#); [Matter of C-Y-Z-, 21 I&N Dec. 915 \(BIA 1997\)](#), overruled.

(2) Persons who have not physically undergone a forced abortion or sterilization procedure may still qualify as a refugee on account of a well-founded fear of persecution of being forced to undergo such a procedure, or on account of persecution or a well-founded fear of persecution for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, or on other grounds enumerated in the Immigration and Nationality Act.

BEFORE THE ATTORNEY GENERAL

(May 15, 2008)

On September 4, 2007, pursuant to his authority under [8 C.F.R. § 1003.1\(h\)\(1\)\(i\)](#) (2006), Attorney General Gonzales directed the Board of Immigration Appeals to refer to him for review its decision in *Matter of J-S*-(BIA 2006). The Board's decision was then stayed pending a decision by the Attorney General. For the reasons set forth in the accompanying opinion, I overrule the Board's decisions in [Matter of C- Y- Z-, 21 I&N Dec 915 \(BIA 1997\)](#) (en banc), and [Matter of S-L-L-, 24 I&N Dec. 1 \(BIA 2006\)](#) (en banc), to the extent those decisions hold that the spouse of a person who has been physically subjected to a forced abortion or sterilization procedure is per se entitled to refugee status under section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of [Pub. L. No. 104-208, 110 Stat 3009-546, 3009-689](#), codified at section 101(a)(42) of the Immigration and Nationality Act, [8 U.S.C. § 1101\(a\)\(42\)](#) (2000). In light of this change in the applicable legal framework, I vacate the Board and Immigration Judge decisions denying respondent's claims for relief and remand this case for further proceeding consistent with this opinion.

OPINION

On September 4, 2007, Attorney General Gonzales directed the Board of Immigration Appeals, pursuant to [8 C.F.R. § 1003.1\(h\)\(1\)\(i\)](#) (2006), to refer to him for review the Board's decision in this matter. This case was certified for Attorney General review in order to provide a final administrative ruling on a statutory question that has divided the Federal courts of appeals. As explained below, that question is whether section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of [Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-689](#) ("IIRIRA"), codified at section 101(a)(42) of the Immigration and Nationality Act, [8 U.S.C. § 1101\(a\)\(42\)](#) (2000) ("the Act") can be read to confer automatic or presumptive (hereinafter "per se") refugee status on the spouses of persons who have physically been subjected to a forced abortion or sterilization procedure pursuant to a foreign government's coercive population control program, such as China's "One Couple, One Child" program. The Board held that the provision could be read to confer such status in decisions from 1997, [Matter of C- Y- Z-](#), [21 I&N Dec. 915 \(BIA 1997\)](#) (en banc) ("C- Y- Z-"), and 2006, [Matter of S-L-L-](#), [24 I&N Dec. 1 \(BIA 2006\)](#) (en banc) ("S-L-L-"), but that determination has not been addressed in an opinion by the Attorney General.

After considering the text, structure, history, and purpose of the Immigration and Nationality Act as amended by IIRIRA, as well as the relevant administrative and judicial decisions and the briefs submitted, I conclude that the Department of Justice should not adhere to the Board's decisions in *C- Y- Z-* and *S-L-L-*. I therefore overrule the Board's decisions in *C- Y- Z-* and *S-L-L-* to the extent those cases hold that the spouse of a person who has been physically subjected to a forced abortion or sterilization procedure is per se entitled to refugee status under section 601(a) of IIRIRA. Furthermore, for the reasons stated below, I vacate the Immigration Judge's decision in this case and remand for reconsideration consistent with this opinion.

Section 601(a) of IIRIRA defines the circumstances in which the enforcement against a person of a coercive population control program constitutes "persecution on account of political opinion" and thus qualifies that person for political asylum under the Act. Section 601(a) amended the Act to state:

For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

Section 101(a)(42) of the Act.

The year after section 601(a) was enacted, the former Immigration and Naturalization Service ("INS") stipulated, and the Board held, that section 601(a) provides per se refugee status not only to persons who have physically undergone forced abortion or sterilization procedures, but also to the spouses of such persons. See *Matter of C-Y-Z-*, *supra*. This determination later was questioned by the INS and by some courts, see, e.g., *Cai Luan Chen v. Ashcroft*, [381 F.3d 221, 226 \(3d Cir. 2004\)](#) (Alito, J.), and in 2005 the United States Court of Appeals for the Second Circuit directed the Board to explain the basis for its decision in *C-Y-Z-*, see *Shi Liang Lin v. U.S. Dep't of Justice*, [416 F.3d 184, 191-92 \(2d Cir. 2005\)](#) ("*Lin I*").

In 2006, a divided Board reaffirmed the interpretation it adopted in *C-Y-Z-* on the grounds that (i) section 601(a) is ambiguous and (ii) interpreting the provision to confer per se refugee status to the spouses of persons who physically undergo forced abortion or sterilization procedures best accords with congressional intent. See *Matter of S-L-L-*, *supra*. Sitting en banc, the Second Circuit reversed *S-L-L-*, holding that section 601(a) "is unambiguous

and ... does not extend automatic refugee status to spouses or unmarried partners of individuals § 601 expressly protects.” *Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 300 (2d Cir. 2007) (en banc) (“*Lin II*”). The Second Circuit's ruling created a circuit split because it conflicted with decisions of other courts of appeals that had deferred to the Board's interpretation of section 601(a) in *C-Y-Z-* as reasonable. *Id.*; see *infra* note 3.

In this case, respondent is a married Chinese national whose wife remains in China. He seeks political asylum in the United States under section 601(a) because his wife allegedly was forced to undergo an “involuntary sterilization” procedure. Section 101(a)(42) of the Act. Applying *C-Y-Z-* and *S-L-L-*, the Immigration Judge agreed with respondent that section 601(a) provides refugee status to men whose spouses are forced to undergo abortion or involuntary sterilization procedures, but denied his application on the ground that the procedure performed on his wife (forced insertion and monitoring of an intrauterine device (“IUD”)) was not a “sterilization” procedure covered by the statute. Respondent appealed this decision to the Third Circuit, which, upon learning of the Second Circuit's decision in *Lin II*, sua sponte ordered en banc consideration and asked the Department to brief whether it adheres to the Board's interpretation of section 601(a) or whether it joins the Second Circuit in rejecting the Board's construction of section 601(a).

After receiving the Third Circuit's request for supplemental briefing, Attorney General Gonzales directed the Board, pursuant to [8 C.F.R. § 1003.1\(h\)\(1\)\(i\)](#) (2006), to refer to him for review the Board's decision in this matter. [\[FN1\]](#) The Attorney General's order certifying this case for review directed the parties to submit briefs addressing all relevant statutory questions, including, but not limited to, whether IIRIRA § 601(a) ... is ambiguous or silent on the availability of refugee status for spouses or partners of individuals who have been subjected to forced abortion or sterilization, and whether the BIA interpretation of section 601(a) in [Matter of C-Y-Z-, 21 I&N Dec. 915 \(BIA 1997\)](#) and [In re S-L-L-, 24 I&N Dec. 1 \(BIA 2006\)](#) is correct.

In addition to the briefs I received from the parties, I received two amicus briefs in support of respondent. [\[FN2\]](#)

Respondent's reliance on section 601(a) presents the key question in this case: whether the Department of Justice should adhere to the Board's interpretation of that provision as conferring per se refugee status on the spouses of persons who have physically been subjected to a forced abortion or sterilization procedure. After considering the text, structure, history, and purpose of the Act as amended by IIRIRA, as well as the relevant administrative and judicial decisions and the briefs submitted, I conclude, as stated above, that it should not. I therefore overrule the Board's decisions in *C- Y- Z-* and *S-L-L-* to the extent those cases hold that the spouse of a person who has been physically subjected to a forced abortion or sterilization procedure is per se entitled to refugee status under section 601(a) of IIRIRA. It is important to emphasize that this decision does not prevent the spouse of a person who has physically undergone a forced abortion or sterilization procedure from qualifying for political asylum under section 601(a)'s

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“failure,” “refusal,” “other resistance,” or “well founded fear” provisions set forth above, or from obtaining asylum under other provisions of the Act, if that person satisfies the relevant statutory criteria. My decision holds only that spouses are not entitled to the same per se refugee status that section 601(a) expressly accords persons who have physically undergone forced abortion or sterilization procedures.

Accordingly, and for the reasons stated below, I vacate as no longer necessary to the determination of respondent's claims the Immigration Judge's decision that the procedures performed on respondent's wife are not “sterilization” procedures that support per se asylum under section 601(a), and remand respondent's claims for reconsideration consistent with this opinion.

I.

Respondent was placed in removal proceedings after entering the country without being admitted or paroled. He conceded removability but applied for political asylum, withholding of removal to China, and relief under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10 1984 G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) (hereinafter "Convention Against Torture" or "CAT"). At respondent's 2004 hearing before the Immigration Judge, he testified that Chinese officials prevented him and his wife from having more than one child by forcing his wife to submit to medical insertion of an IUD and to report for periodic medical visits to confirm the IUD's continued presence and effectiveness. Respondent said he was at home when the officials forcibly removed his wife in order to insert the IUD, but that he "didn't want to interfere" because he did not want to further jeopardize his wife. After the IUD was inserted in 1993, respondent on three separate occasions requested permission from the Chinese family planning officials to have another child, but his requests were denied each time. After the last denial in 1995 respondent "gave up hope" and used false documents to enter the United States in 2001.

On November 8, 2004, the Immigration Judge denied respondent's request for asylum and withholding of removal. Respondent's evidence of past persecution and a well-founded fear of future persecution consisted of documents and testimony, which the Immigration Judge found "credible," that he and his wife were fined for marrying below the age prescribed by China's coercive population control program; that his wife was forced to submit to the insertion and monitoring of an IUD shortly after their son was born; that family planning officials warned him that, if he and his wife tried to have another child, they would abort the pregnancy and permanently sterilize respondent or his wife as they had allegedly sterilized respondent's sister and mother; and that respondent expected to be "fined" and/or "incarcerated" if returned to China because he could not prove that he left the country legally.

In her oral decision, the Immigration Judge emphasized respondent's testimony that he came to the United States partly "for financial reasons," as well as his admissions that he (i) "did not violate [China's] birth control planning policies" and (ii) "waited some eight years after the events in question before ... coming to the United States." The Immigration Judge stated further that respondent had provided no evidence that, "during the eight years that he remained in the People's Republic of China ... *he* was the victim of any persecution or repercussions," such as arrest, "that would establish any past persecution on account of any enumerated ground" in the Act or IIRIRA. The Immigration Judge explained:

In this particular case, the only one reality appears to be that [respondent's] wife was forced to undergo insertion of an intrauterine device. And, it's clear that this, in and of itself, cannot be the basis to establish a claim for asylum based on past persecution. The forcible insertion of an intrauterine device is not tantamount to sterilization nor to abortion. ... While the concept of [respondent's] wife being forced to undergo an insertion of an intrauterine device may be repugnant, offensive, even unlawful, or unfair, and may be viewed as such by some individuals, this, in and of itself, does not constitute persecution *per se*, and does not meet the definition of refugee.

Accordingly, the Immigration Judge denied respondent's application for asylum and ordered him removed to the People's Republic of China.

On February 24, 2006, the Board affirmed the Immigration Judge's decision without opinion and respondent appealed to the Third Circuit. Respondent's appeal was fully briefed and scheduled for submission to a panel when, in July 2007, the Second Circuit issued its en banc decision rejecting *C-Y-Z*'s and *S-L-L*'s *per se* rule of spousal eligibility and departing from the decisions of several courts of appeals that had deferred to the Board's

interpretation of section 601(a) in *C-Y-Z*. [FN3] See [Lin II, 494 F.3d at 300](#).

The Second Circuit in *Lin II* reversed the Board's interpretation of section 601(a) in *C-Y-Z* and *S-L-L*, concluding, as other circuits had not, that the text of section 601(a) is neither silent nor ambiguous on the question of spousal eligibility. Accordingly, the Second Circuit did not focus on whether the Board's per se rule was "a permissible construction" of the statute under step two of the interpretive framework in [Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 \(1984\)](#). Instead, *Lin II* concluded that section 601(a)'s forced abortion and sterilization provisions unambiguously foreclose an interpretation that accords per se refugee status to the spouses of persons who physically undergo such procedures. See [Lin II, 494 F.3d at 305, 309](#). Having reached this conclusion based on section 601(a)'s text, the court declined to defer to the Board's interpretation, although the court did observe in dictum that the legislative history and policy on which the Board relied also did not support the Board's reading of the statute. See [id. at 312-13](#).

After ordering en banc consideration of respondent's appeal, the Third Circuit directed the parties to brief whether that circuit should "adopt any or all of the reasoning announced in" *Lin II*. See *J-S- v. Att'y Gen. of the United States*, No. 06-1952 (3d Cir. July 27, 2007). Respondent urged the Third Circuit to defer to the Board's interpretation of section 601(a) in *C-Y-Z* and *S-L-L* and reject the Second Circuit's reasoning in *Lin II*. The Government did not file a response because the Third Circuit dismissed respondent's appeal following receipt of Attorney General Gonzales's certification order.

II.

Respondent appeals the Immigration Judge and Board decisions denying his application for asylum solely under section 601(a) of IIRIRA. [FN4] The key question in this case is whether the Department of Justice should adhere to the Board's interpretation of section 601(a) in *C-Y-Z* and *S-L-L* as conferring per se refugee status on the spouses of persons who have physically been subjected to a forced abortion or sterilization procedure. For the reasons stated in this opinion, I conclude it should not.

A.

An alien seeking political asylum in the United States must establish that he or she is a refugee. Section 208(b)(1)(A) of the Act, [8 U.S.C. § 1158\(b\)\(1\)\(A\)](#) (2000). [Section 101\(a\)\(42\)](#) of the Act defines a "refugee" as any person who is outside any country of such person's nationality ... and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country *because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion*. [Section 101\(a\)\(42\)](#) of the Act (emphases added).

As noted section 601(a) of IIRIRA amended [section 101\(a\)\(42\)](#) of the Act to specify the circumstances in which victims of coercive population control programs could qualify for political asylum:

For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, *shall be deemed to have been persecuted on account of political opinion*, and a person who has a well founded fear that he or she will be

forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

Id. (emphasis added). Section 601(a) thus created four new and specific classes of refugees:

1. “person[s] who ha[ve] been forced to abort a pregnancy”;
2. “person[s] who ha[ve] been forced ... to undergo involuntary sterilization”;
3. “person[s] ... who ha[ve] been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program”;
- and
4. “person[s] who ha[ve] ... a well founded fear that [they] will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance.”

The third and fourth categories above specifically accord refugee status to persons who have not physically undergone forced abortion or sterilization procedures if such persons can prove (i) past persecution for “fail[ing] or refus[ing]” to “undergo” a forced abortion or sterilization procedure; (ii) past persecution for some “other resistance” to a coercive population control program; or (iii) a “well founded fear” that they will be forced to undergo an abortion or involuntary or refusing to undergo such a procedure or for otherwise “resisting” a coercive population control program. Persons such as respondent thus may be able to qualify for asylum under these categories upon an appropriate factual showing.

The question remains, however whether persons such as respondent—i.e, persons who have not physically undergone a forced abortion or sterilization procedure—can also qualify for asylum under the first and second categories above. Respondent argues that they can, and that he personally qualifies for asylum under category two (“forced ... to undergo involuntary sterilization”), pursuant to the per se rule of spousal eligibility set forth in *C-Y-Z-* and *S-L-L-*. That rule begins with the uncontroversial proposition that categories one and two accord per se refugee status to any individual who has physically undergone a forced abortion or sterilization procedure because all such persons should be presumed to have been persecuted for resisting a coercive population control program. However, the rule goes on to encompass the much more doubtful proposition, which respondent invokes here, that the *spouse* of any individual who physically undergoes one of the referenced procedures is *also* entitled to per se refugee status. Respondent defends this position on the ground that section 601(a)'s text is silent on the question of spousal eligibility, and accordingly should be construed to permit his claim of past persecution under the “joint spousal persecution” theory underlying the Board's per se rule. [FNS] The Department of Homeland Security (“DHS”) contends that I should adopt the Second Circuit's reasoning in *Lin II* and conclude that the text of the relevant provision unambiguously forecloses respondent's claim and compels reversal of the interpretation set forth in the Board decisions in *C-Y-Z-* and *S-L-L-*.

The text of section 601(a) is the first, and most important, basis for my rejection of the per se rule of spousal eligibility the Board adopted in *C-Y-Z-* and *d S-L-L-*. The “language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose” cut strongly against the statutory interpretation respondent urges and the Board has adopted. [Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 \(1985\)](#). Section 601(a)'s forced sterilization provision refers to “a person who has been forced to ... undergo involuntary sterilization.” [Section 101\(a\)\(42\)](#) of the Act (emphases added) Consistent with ordinary usage and the Act's definition of the term, “a person” refers to “an individual” and, specifically here, the individual who has “undergo[ne]” the sterilization procedure at issue. See [Section 101\(b\)\(3\)](#) of the Act, [8 U.S.C. § 1101\(b\)\(3\)](#) (2000) (defining the term “a person” for purposes of title I of the Act, which includes [section 101\(a\)\(42\)](#), to mean “an individual or an organization”); [Lin II, 494 F.3d at 311](#) (“[T]he language Congress employed in § 601(a)'s forced abortion and sterilization provisions] demonstrates that it wanted to cover ‘a person,’ not ‘a couple,’ not a ‘significant other’ and not an ‘intimate friend.’”). Furthermore, “undergo” means “to submit to,” e.g., *Merriam Webster's Collegiate Dictionary* 1288 (10th ed. 1994), and in the medical context, a

person who “undergoes” a procedure is the person upon whom the procedure *529 is *physically* performed, *see, e.g.*, Milton Hollenberg et al., *Predictors of Postoperative Myocardial Ischemia in Patients Undergoing Noncardiac Surgery*, JAMA, vol. 268, no. 2 (July 8, 1992); [Lin](#), 494 F.3d at 305-06. Accordingly, reading section 601(a)'s involuntary sterilization provision to refer only to persons who have themselves undergone forced sterilization procedures interprets the statute in the manner that gives its words “their ‘ordinary or natural’ meaning,” whereas interpreting it to include spouses does not. *E.g.*, [Leocal v. Ashcroft](#), 543 U.S. 1, 9 (2004) (quoting [Smith v. United States](#), 508 U.S. 223, 228 (1993)); *see also* [INS v. Cardoza-Fonseca](#), 480 U.S. 421, 431 (1987) (“With regard to this very statutory scheme [the Act], we have considered ourselves bound to “assume that the legislative purpose is expressed by the ordinary meaning of the words used.”” (quoting [INS v. Phinpathya](#), 464 U.S. 183, 189 (1984) (quoting [American Tobacco Co. v. Patterson](#), 456 U.S. 63, 68 (1982))))).

The same may be said of the statute's reference to “a person forced to abort a pregnancy.” For the reasons set forth above, this clause is properly read to refer to the person physically forced to abort the pregnancy (the would-be mother) because the clause refers to “a person forced to abort a pregnancy,” and not to “a couple” or “a married couple” forced to do so. Section 601(a)'s subsequent description of an abortion as a “procedure” that “a person” is forced to “undergo” further supports this reading. Because this latter description of a forced abortion can naturally be read only to refer to *one* person—the person upon whom the “procedure” is physically performed—it would be inconsistent with the text and structure of section 601(a) to read the opening clause on abortion to encompass *two* people (the would-be mother and the would-be father). *See, e.g.*, [King v. St. Vincent's Hosp.](#), 502 U.S. 215, 221 (1991) (stating that it is a “cardinal rule that a statute is to be read as a whole since the meaning of statutory language, plain or not, depends on context” (citation omitted)); [Davis v. Michigan Dep't of Treas.](#), 489 U.S. 803, 809 (1989) (same). As the Second Circuit explained in *Lin II*, “Congress's specific designation of some persons (i.e., those who fear, resist, or undergo particular medical procedures)” as refugees eligible for political asylum “is incompatible with the view that others (e.g., their spouses) should also be granted asylum *per se*” regardless whether they fall within one of the specific refugee classes enumerated in the statute. [Lin II](#), 494 F.3d at 307 (“The inclusion of some obviously results in the exclusion of others.”). Had Congress wanted to include spouses in section 601(a)'s forced abortion and sterilization provisions, “it could simply have said so.” *Id.* at 305 (quoting [Hartford Underwriter Ins. Co. v. Union Planters Bank, N.A.](#), 530 U.S. 1, 7 (2000)).

The foregoing textual evidence that section 601(a)'s forced abortion and sterilization clauses extend refugee status only to those persons who have physically undergone the referenced procedures is bolstered by reading section 601(a) in harmony with other provisions of the Act conferring refugee status. *See, e.g.*, [King v. St. Vincent's Hosp.](#), 502 U.S. at 221. The *per se* rule of spousal eligibility the Board attributes to section 601(a) is difficult to reconcile with the Act's separate and express provision specifying that “spouse[s]” of persecuted individuals are eligible for derivative asylum if such spouses do not themselves qualify as refugees, but *only* if they “accompany [], or follow[] to join,” the alien who is eligible for, and is actually granted, asylum. Section 208 (b)(3)(A) of the Act. Interpreting section 601(a) to confer *per se* refugee status on *all* spouses of persons who have undergone forced abortion or sterilization procedures, even spouses who do not themselves qualify as refugees and are *not* accompanied by a qualifying alien, circumvents with an implied rule the requirements for derivative asylum that the Act expressly sets forth in section 208(b)(3)(A).

Such an interpretation of section 601(a) also departs from, and creates tension with, the Act's general requirement that every applicant for personal asylum (as distinct from statutorily prescribed derivative asylum) must establish *his or her own* eligibility for relief under specific provisions of the statute. *See* section 208(b)(1)(B)(i) of the Act (providing that the “burden of proof is on the applicant” to “establish that *the applicant* is a refugee” (emphasis added)); [INS v. Elias-Zacarias](#), 502 U.S. 478, 482 (1992) (stating that “‘persecution on account of ... political opinion’ in [§ 101\(a\)\(42\)](#) is persecution on account of the *victim's* political opinion,” not on account of the political

opinion of someone else). The interpretation of section 601(a) I adopt in this opinion avoids this “critical defect” in the Board's per se rule because it does not “effectively absolve[] large numbers of asylum applicants of the statutory burden to prove” that they themselves have either been persecuted, or have a well-founded fear of being persecuted, on account of their political opinion. [Lin II, 494 F.3d at 308.](#)

In concluding that section 601(a) does not support the per se rule of spousal eligibility the Board adopted in *C-Y-Z-* and *SLL-*, I recognize that section 601(a) does not explicitly exclude spouses from its purview I also recognize that several courts, along with the Board, emphasized this in accepting various arguments for interpreting section 601(a) in a manner that brings spouses within the purview of the provision's forced abortion and sterilization clauses. The starting point for all such arguments is that, because section 601(a) does not expressly address the refugee status of spouses one way or the other, it is improper to conclude that the statute unambiguously forecloses interpretations that would support the per se rule of spousal eligibility the Board adopted in *C-Y-Z-*.

Any court that accepted this starting point was limited to reviewing whether the Board's approach represented a “reasonable” interpretation of the statute, see [Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837](#), which some courts concluded it was. [FN6] My review of the Board's interpretation of section 601(a), however, is not so limited. The appellate courts that reviewed the per se rule established in *C-Y-Z-* were bound to accept the Board's interpretation of section 601(a) if they concluded that that interpretation was not “unambiguously foreclosed” by the statutory text and could be considered “reasonable” under the broad standard applied by the Supreme Court. See [Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980, 983 \(2005\)](#). My review of Board decisions, by contrast, is plenary. See, e.g., section 103(a)(1) of the Act, [8 U.S.C. § 1103\(a\)\(1\)](#) (Supp. IV 2004) (“[T]h[e] determination and ruling by the Attorney General with respect to all questions of law shall be controlling.”); [Matter of D-J-, 23 I&N Dec. 572, 575 \(A.G. 2003\)](#) (Attorney General's review of a Board decision is de novo; delegated authority of the Board is superseded and Attorney General is “authorized to make the determination based on [his] own conclusions on the facts and the law”). Accordingly, I need not opine on the circuit split regarding the proper outcome of *Chevron's* two-step *judicial* test for reviewing Board decisions in order to reverse the *C-Y-Z-* and *S-L-L-* interpretation of section 601(a) as erroneous.

As I have explained, I reach this result first and foremost because neither *C-Y-Z-* nor *S-L-L-* addresses what I consider to be the proper reading of section 601(a)'s plain text. Indeed, *C-Y-Z-* did not even decide the issue of per se spousal eligibility for asylum as a contested issue. See *Matter of C-Y-Z-, supra*, at 918 (concluding that “the applicant in this case has established eligibility for asylum by virtue of his wife's forced sterilization” because “[t]his position is not in dispute”). The Board simply based its ruling on the INS's stipulation that the “husband of a sterilized wife can essentially stand in her shoes,” *id.*, even though “[n]either the [INS] brief nor the General Counsel's memorandum set[] forth the reasoning behind this position on ‘joint spousal persecution,’” *id.* at 928 (Filppu, concurring and dissenting). Although DHS has abandoned the INS's prior support for *C-Y-Z-*'s per se rule on spousal eligibility as inconsistent with section 601(a)'s text and purpose, *S-L-L-* reaffirmed *C-Y-Z-* on the grounds that *C-Y-Z-* was (i) “long standing” precedent to which courts and Congress have deferred and (ii) consistent with the “policy” and “intent” behind section 601(a). *Matter of S-L-L-, supra*, at 4-8. Neither of these grounds persuades me to affirm the per se rule of spousal eligibility the Board majority embraced in *S-L-L-*.

Respect for precedent is undeniably important for any adjudicative body. But it does not prevent the Department of Justice from reversing administrative decisions when there is good reason for doing so. Indeed, the Supreme Court has emphasized that one of the primary purposes of *Chevron* deference is to allow agencies to do just that. See [Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. at 981-82](#) (stating that courts must defer to agency interpretations as those interpretations evolve in response to, inter alia “changed factual circumstances” or “reversal of agency policy”); [Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc., 467 U.S. at 863-64](#)

(emphasizing that an “agency ... must consider varying interpretations and the wisdom of its policy on a continuing basis”) Accordingly, that several courts have deferred to the Board's interpretation of [section 101\(a\)\(42\)](#) of the Act as amended by IIRIRA does not alter my decision to reverse that interpretation as unsupported by the provision's text, structure, history, and purpose. [\[FN7\]](#)

My decision is similarly unaffected by the fact that Congress, presumptively aware of the Board's interpretation of section 601(a), in 2005 amended the statutory limit on the number of refugees who may be admitted pursuant to section 601(a), but did not otherwise alter the provision's text. *See* REAL ID Act of 2005 Div. B of [Pub. L. No. 109-13, § 101\(g\)\(2\)](#), 119 Stat. 231, 305 (repealing former section 207(a)(5) of the Act, [8 U.S.C § 1157\(a\)\(5\)](#) (2000)). Because “Congress takes no governmental action except by legislation,” what respondent and others view as Congress's 2005 acquiescence-by-inaction in the statutory interpretation espoused in *C-Y-Z-* could also, to use the Supreme Court's words, “appropriately be called Congress's failure to express any opinion” on the then-current agency interpretation of the statute. [Rapanos v. United States, 547 U.S. 715, 749-50 \(2006\)](#) (emphasizing the Court's “oft-expressed skepticism towards reading the tea leaves of congressional inaction”); *see also Matter of S-L-L-, supra*, at 14 n.2 (Pauley, concurring) (“I do not read into [Congress's recent] elimination [of the annual cap] congressional approval of *Matter of C-Y-Z-*, but instead merely a practical recognition that, over the years, the unrealistically low cap had produced an unhealthy backlog of applicants awaiting permanent asylee status, including those women and men who *themselves had* been forcibly sterilized or aborted.”). Moreover, even if the lack of congressional reaction to *C-Y-Z-* were to undercut the argument that section 601(a) “unambiguously forecloses” the Board's interpretation for purposes of *Chevron* deference, it “does not definitively mean that Congress intended to protect spouses,” [Lin II, 494 F.3d at 323](#) (Katzmann, J., concurring in the judgment), and certainly does not require section 601(a) to be read to accord spouses per se refugee status. Accordingly, nothing in Congress's 2005 inaction precludes my interpretation of section 601(a).

The Board's discussion of section 601(a)'s “policy” and “intent” also does not persuade me to support its per se rule of spousal eligibility. *See Matter of S-L-L-, supra*, at 5-8. Asserting that section 601(a)'s text provides “no clear or obvious answer to the scope of” its protections, *id.* at 4, the majority in *S-L-L-* reasoned that the per se rule in *C-Y-Z-* can be justified based on an examination of the provision's purpose in light of the “nexus and level of harm” the Act requires for asylum:

When considered in light of the reasons Congress expanded the refugee protections to include persecution based on coercive family planning, and the well-established principles regarding nexus and level of harm for past persecution, we understand the husband, as well as the wife, to have been subjected to the coercive family planning policy when the government forces an abortion [or sterilization] on a married couple.

Id. at 6. I disagree.

The “nexus and level of harm” to which the Board refers is the connection (nexus) that [section 101\(a\)\(42\)](#) of the Act requires between an asylum seeker's “race, religion, nationality, membership in a particular social group, or political opinion” and the persecution (level of harm) that he or she suffered or has a well-founded fear of suffering “on account of” such characteristics, membership, or opinion. In 1989 and 1993, the Board held that persecution on account of a person's response to a coercive population control program does not establish eligibility for asylum under [section 101\(a\)\(42\)](#) because such persecution is not “on account of ... political opinion” or any other ground enumerated in the statute. *See Matter of Chang, 20 I&N Dec. 38 (BIA 1989); Matter of G-, 20 I&N Dec. 764, 778 (BIA 1993)*. In response to these decisions, *see H.R. Rep. 104-469(I), at 173-74 (1996)*, Congress passed the language in section 601(a) of IIRIRA that amended [section 101\(a\)\(42\)](#) to state that a person “*shall be deemed* to have been persecuted on account of political opinion” if that person was forced (or has a well-founded fear of being forced) to “undergo” an abortion or sterilization “procedure” *or* if he or she was (or has a well-founded fear of being) persecuted for “failure or refusal to undergo such a procedure *or* for

other resistance to” a coercive population control program. [Section 101\(a\)\(42\)](#) of the Act (emphases added).

The relationship between the foregoing language and the underlying “nexus and level of harm” that [section 101\(a\)\(42\)](#) of the Act requires is clear. Section 601(a) “deem[s]” the nexus and level of harm required for political asylum under section 101(a)(42) to be satisfied if “a person” has been, or has a well-founded fear of being, “persecuted” for engaging in various forms of “resistance” to a coercive population control program. [Section 101\(a\)\(42\)](#) of the Act; *see also* REAL ID Act, [§ 101\(g\)\(2\)](#), 199 Stat. at 305 (characterizing section 601(a)'s amendment to section 101(a)(42) of the Act as a provision for “persons *resisting* coercive population control” (emphasis added)). The reason section 601(a) makes an applicant's “resistance” to a coercive population control program the trigger for refugee status is obvious: If mere enforcement of a coercive population control program were the trigger, most of China's population would qualify as refugees under the provision. That is not what section 601(a) provides. Section 601(a) extends political asylum to persons who have been, or who have a well-founded fear of being, “persecuted on account of” their “resistance” to a coercive population control program. [Section 101\(a\)\(42\)](#) of the Act. It then spells out that certain specific persons—namely, persons who are “forced to undergo” abortion or sterilization “procedure[s]” required by a coercive population control program—are *per se* considered to have engaged in the kind of “resistance” necessary for asylum. *Id.* By contrast, persons who cannot show they have undergone such procedures must prove persecution or a well-founded fear of persecution for “fail[ing] or refus[ing]” to undergo such procedures or for some “other resistance” to a coercive population control program to qualify as refugees. *Id.*

The fatal flaw in the *per se* approach to spousal eligibility under section 601(a) is that it ignores the foregoing analysis and simply assumes the requisite statutory “nexus and level of harm” in *all* cases where the asylum seeker is married to a person who was forced to undergo an abortion or involuntary sterilization procedure. Section 601(a) does not permit this blanket assumption for good reason: Some spouses may not have “resisted,” and in fact may have affirmatively supported, the forced abortion or sterilization procedure that was performed on the spouse who remains in China. Such applicants should not (and as I read section 601(a) cannot) use the sole fact of their spouse's persecution automatically to qualify for political asylum under the statute's coercive population control “resistance” provisions. Instead, such applicants must present proof, of which their spouse's treatment may be a part, of persecution for refusing to undergo forced abortion or sterilization procedures or for engaging in “other resistance” to a coercive population control program, or of persecution on account of another ground for asylum enumerated in the Act. The Board recognized the point that not all spouses oppose coercive procedures in *S-L-L-* and insisted that the rule it announced in *C-Y-Z-* “was not intended to, and does not, include” cases where the applicant supported or acquiesced in the coercive procedure physically performed on his or her spouse. *Matter of S-L-L-*, *supra*, at 8. This assertion, however, does not accord with the Board's holding that, “*absent* evidence” that the spouse seeking asylum affirmatively supported or acquiesced in the coercive procedure performed on his or her partner, the Board will continue to “interpret the forced abortion and sterilization clause of section [601(a)], in light of the overall purpose of the amendment, to include both parties to a marriage.” [\[FN8\]](#) *Id.* (emphasis added) (expressly rejecting an approach that would require some demonstrable resistance by one spouse to the other spouse's abortion or sterilization for that spouse to qualify for direct asylum in his or her own right under section 601(a)).

In cases where the physically persecuted spouse remains in China, there will rarely be affirmative evidence that the spouse seeking *per se* refugee status supported or failed to resist the coercive procedure at issue. Moreover, unless Immigration Judges presume that the Chinese Government is aware of what would normally be a “private family dispute” over whether the physically victimized spouse should submit to an abortion or sterilization procedure required by a coercive population control program, it is “impossible to understand” the Board's conclusion that the Chinese Government's use of such abortion and sterilization procedures should be understood

to “punish ‘the married couple as an entity’ *only* in those cases where there is joint opposition to the abortion [or sterilization].” *Matter of S-L-L*, 24 I&N Dec. at 17 (Filppu, concurring and dissenting) (emphasis added) (noting that the majority's concession that certain spouses fall outside the per se rule is fundamentally in tension with its assertion that section 601(a)'s forced abortion and sterilization clauses pertain to “the married couple as an entity”).

For all the foregoing reasons, I conclude that, at least as to political asylum or withholding of removal claims predicated on the enforcement of coercive population control programs, [FN9] the ordinary meaning of the statutory term “resistance,” coupled with the text of [section 101\(a\)\(42\)](#) of the Act, as amended by IIRIRA, and settled principles of asylum law, does not support the per se rule of spousal eligibility the Board adopted in *C-Y-Z* and reaffirmed in *S-L-L*. This conclusion, like the text of section 601(a) itself, simply reflects the logic of limiting per se refugee status to persons who have physically undergone a coercive birth control procedure. As the Board itself conceded in *S-L-L*, *unlike* a person who has physically undergone a *forced* abortion or sterilization procedure, the spouse of such a person *may or may not* have “resist[ed]” the procedure (and, thus, the coercive population control program pursuant to which the procedure was performed) in the manner the Act requires for asylum. *Matter of S-L-L*, *supra*, at 8 (conceding that “*C-Y-Z* was not intended to, and does not,” provide “asylum for husbands who were not, in fact, opposed to a spouse's abortion”). If this is true, which the text, structure, history, and purpose of the relevant statutory provisions demonstrate it is, the spouse of the physical victim of such a procedure is *not* someone who can be considered per se to have faced, or to have a well-founded fear of facing, “persecution” “on account of” “resisting” a coercive population control program under [section 101\(a\)\(42\)](#) of the Act based solely on the fact that he or she is married to the victim. See [Lin II, 494 F.3d at 309-10](#); *Matter of C-Y-Z*, *supra*, at 928-29 (Filppu, concurring and dissenting).

Accordingly, from now on, [FN10] the Board and Immigration Judges shall cease to apply the per se rule of spousal eligibility articulated in *C-Y-Z* and *S-L-L* and shall instead engage in a case-by-case assessment of whether a section 601(a) applicant who has not physically undergone a forced abortion or sterilization procedure can demonstrate that (i) he or she qualifies as a refugee under section 601(a) on account of persecution for “failure or refusal” to undergo such a procedure or for “other resistance” to a coercive population control program; (ii) he or she has a well-founded fear of being forced to undergo an abortion or involuntary sterilization procedure or of being persecuted for failing or refusing to undergo such a procedure or for “other resistance” to a coercive population control program; (iii) the specific facts of his or her case justify asylum on grounds other than those articulated in section 601(a); or (iv) he or she satisfies the requirements for derivative asylum expressly set forth in section 208(b)(3)(A) of the Act.

B.

Respondent and amici contend that, notwithstanding the analysis above, I should affirm the Board's per se rule of spousal eligibility on policy grounds they argue are reflected in section 601(a)'s legislative and enforcement history. I disagree. To the extent this history is relevant to the proper interpretation of section 601(a), it, like section 601(a)'s underlying policy goals, are more consistent with my interpretation than with the Board's interpretation.

In reaching this conclusion, I considered the portions of the legislative history identified in the briefs, including the brief submitted by Representatives Smith and Hyde. For several reasons, this history does not alter my decision. Most notably, section 601(a)'s legislative history does not expressly address whether the spouse of a person subjected to a forced abortion or sterilization procedure is entitled to per se refugee status. The Smith/Hyde Brief's references to House Report and floor discussion regarding “couples” or “women and men ...

fleeing from forced abortion” indicate that some in Congress expected the new provision to benefit both members of a couple where each member is able to satisfy the Act's requirements for asylum. But these references say nothing about whether Congress intended a person presumptively to qualify for asylum solely on the ground that a spouse had been physically subjected to one of the coercive procedures specified in the legislation. [FN11] See, e.g., [H.R. Rep. No. 104-469\(I\), at 174-75 \(1996\)](#) (referring to “a person who has been compelled to undergo an abortion or sterilization, or has been severely punished for refusal to submit to such a procedure,” as well as to “women ... subjected to involuntary abortions” and “men and women” who may be “forcibly sterilized,” and concluding that “[t]he United States should not deny protection to persons subjected to such treatment”) (emphases added); see also [S-L-L-, 24 I&N Dec. at 18](#) (Filppu, concurring and dissenting) (noting that the legislative history of section 601(a), to the extent it focuses on particular individuals at all, appears to have focused on women, not their spouses or partners, when addressing the issue of extending refugee status to victims of forced procedures) (citing sources). If anything, the House Report counsels against interpreting section 601(a) as conferring per se refugee status on the spouses of persons expressly covered by the provision because the report declares that section 601(a) does *not* change the Act's general requirement that applicants prove eligibility for direct asylum on an individual basis:

The Committee emphasizes that the burden of proof remains on the applicant, *as in every other case*, to establish by credible evidence that *he or she* has been subject to persecution—in this case, to coercive abortion or sterilization—or has a well-founded fear of such treatment.... Section [601(a)] is not intended to protect persons who have *not actually been subjected* to coercive measures or specifically threatened with such measures

[H.R. Rep. No. 104-469\(I\)](#), at 174 (emphases added).

Respondent and amici contend also that section 601(a) should be interpreted in light of the content of an earlier bill and proposed regulations that were previously (and unsuccessfully) offered in response to the same Board decisions section 601(a) ultimately addressed. Such proposals, however, lack the force of law, and the Supreme Court has counseled against relying upon failed legislative proposals. See, e.g., [Rapanos v. United States, 547 U.S. at 749](#). Nonetheless, I will address these failed proposals briefly because the parties have raised them and because they further support my interpretation of section 601(a).

The failed bill at issue is the Emergency Chinese Immigration Relief Act of 1989 (“ECIR”). Section 3(a) of that bill, which was vetoed by the President, would have required that “careful consideration shall be given to ... an applicant who expresses a fear of persecution upon return to China related to China's ‘one couple, one child’ family planning policy,” and would have directed that “[i]f 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 ... on the basis of political opinion.” H.R. 2712, 101st Cong. § 3(a) (1989) (emphases added). Section 3(b) of ECIR would then have required the Attorney General to promulgate regulations providing that an applicant shall be considered to have established a well-founded fear of persecution if the applicant establishes that

(1) the applicant (*or applicant's spouse*) has refused to abort a pregnancy or resisted sterilization in violation of China's family planning policy directives, *and* (2) ... in the case of an applicant for asylum or refugee status, there is good reason to believe that *the applicant* will be required to abort the pregnancy or to be sterilized or will otherwise be persecuted if the applicant were returned to China.

Id. § 3(b) (emphases added).

This failed bill language, which expressly references “spouse[s]” who “refuse [] to abort a pregnancy or resist[] sterilization,” shows at most that if Congress wanted to cover spouses in section 601(a)'s forced abortion and sterilization clauses, it knew how to do so. The language does *not* show a “clearly expressed legislative intention”

in ECIR—much less in the different language that Congress enacted as section 601(a) several years later—to confer per se refugee status on the spouses of persons who undergo forced abortion or sterilization procedures. [INS v. Cardoza-Fonseca](#), 480 U.S. at 432 n.12 (quoting [United States v. James](#), 478 U.S. 597, 606 (1986)). Rather, the provisions above suggest that, even had ECIR been enacted, it would *not* have been enough for an applicant merely to show that his spouse endured a forced abortion or sterilization procedure; the applicant would *also* have had to show that *he* would likely be subjected to a coercive procedure or would otherwise be persecuted if returned to his country of origin. Thus, even assuming the failed ECIR legislation is relevant to interpreting section 601(a), *but see* [Rapanos v. United States](#), 547 U.S. at 749, that legislation does not establish the proposition respondent and amici advance—namely, that Congress clearly intended section 601(a) to confer per se refugee status on any applicant who is married to someone who has undergone a forced abortion or sterilization procedure. [FN12] Accordingly, I disagree that the failed legislative proposal and Executive Branch rules that preceded section 601(a) support the per se rule in *C-Y-Z*, and conclude instead that this history supports the interpretation of section 601(a) in this opinion.

I view the policy goals underlying section 601(a) the same way. I understand that the purpose of section 601(a) was to *expand* the asylum relief available to victims of coercive population control programs who had been denied relief under the Board's 1989 and 1993 decisions, and I agree that application of coercive population control procedures may constitute “obtrusive government interference into a married couple's decisions regarding children and family” that may have “a profound impact on both parties to the marriage,” *Matter of S-L-L*, *supra*, at 6-7. The construction of section 601(a) set forth in this opinion, however, does not foreclose spouses from obtaining asylum on a case-by-case basis even if they are not accompanied by their physically persecuted partners. The one thing I reject is a rule that does not accord with the statutory text and that extends to these spouses the same per se refugee status that section 601(a) facially affords those who have physically undergone the coercive procedures referenced in the statute. *See supra* Part II.A.

My conclusion on this point is bolstered by DHS's decision to abandon the INS's previous support for *C-Y-Z*'s interpretation of section 601(a), and by the Second Circuit's observation in *Lin II* that “hundreds of cases in the courts illustrate” that the Board's per se rule has had the unforeseen effect of allowing “a married man to ‘capitalize on the persecution of his wife to obtain asylum even though he has left his wife behind and she might never join him and he might intend that she not do so.’” [Lin II](#), 494 F.3d at 312 (quoting [He Chun Chen v. Ashcroft](#), 376 F.3d 215, 223 n.2 (3d Cir. 2004)). Although many husbands may genuinely intend eventually to bring their wives and children to the United States, the numerous cases that the Second Circuit and DHS reference suggest that this is not always true. The behavior in such cases should not be rewarded, particularly when the Act already provides a means for husbands and wives to obtain asylum together or seriatim, including through derivative asylum. *See id.*; section 208(b)(3)(A) of the Act. As DHS and the Second Circuit have emphasized, the existing (and express) derivative asylum provision in section 208(b)(3)(A) “encourage[s] the preservation of families,” whereas the Board's interpretation “has the perverse effect of creating incentives for husbands to leave their wives.” [FN13] [Lin II](#), 494 F.3d at 312.

III.

Having rejected the per se, or joint spousal, eligibility rule articulated in *C-Y-Z* and *S-L-L*, I consider respondent's claims under section 601(a). Because respondent seeks refugee status under section 601(a) but has not physically undergone a forced abortion or sterilization procedure, resolution of his claims requires a careful examination of the record to determine whether respondent (i) “resisted” China's coercive population control program, (ii) suffered or has a well-founded fear that he will suffer “persecution” by the Chinese Government, and (iii) can show that such persecution was inflicted, or that he has a well-founded fear that it would be inflicted,

“on account of” his resistance to the coercive population control program.

I decline to make these complex and fact-specific determinations in the first instance, and instead vacate the Immigration Judge's decision that the procedures performed on respondent's wife are not “sterilization” procedures supporting per se asylum within the meaning of section 601(a) and remand this case for further proceedings consistent with this opinion. I remand so that the Board or Immigration Judge can reconsider, as necessary, respondent's claims (including his claim that he has a well-founded fear of future persecution based on, among other things, Chinese family planning officials' threats to sterilize him personally) in light of the facts in the record, respondent's testimony, which the Immigration Judge expressly found “credible,” and the legal framework I announce in this opinion. I vacate the Immigration Judge's holding on whether forced insertion of an IUD constitutes “sterilization” under section 601(a) because that determination is no longer necessary to this case. [\[FN14\]](#) The Immigration Judge was required to decide whether the procedures performed on respondent's wife constitute “sterilization” procedures under section 601(a) because the per se rule for spousal eligibility was controlling precedent when the Immigration Judge issued her decision. My reversal of the Board's per se rule alters the legal framework that governs respondent's claims by refocusing the evaluation of his eligibility for asylum on the merits of *his* experience and fears, rather than on a determination whether procedures performed on his *wife* constitute “sterilization” under the statute. Accordingly, I remand respondent's claims for reconsideration and do not—because I need not—decide whether the forced insertion and monitoring of an IUD constitutes “sterilization” under section 601(a). [\[FN15\]](#)

So ordered.

[FN1.](#) The Third Circuit entered a final order dismissing respondent's appeal after the court received notice of Attorney General Gonzales's decision to conduct further administrative review of this case.

[FN2.](#) Brief of Amici Representative Chris Smith and Former Representative Henry Hyde, Sponsors and Drafters of Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act; Brief of Amici the United States Conference of Catholic Bishops, Advocates International, the Jubilee Campaign, and the National Advocacy Center of the Sisters of the Good Shepherd.

[FN3.](#) See, e.g., *Chen Lin-Jian v. Gonzales*, 489 F.3d 182, 188 (4th Cir. 2007); *Junshao Zhang v. Gonzales*, 434 F.3d 993, 1001 (7th Cir. 2006); *Wang He v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003); *Guang Hua Huang v. Ashcroft*, 113 Fed. Appx. 695, 700 (6th Cir. 2004) (unpublished opinion); *Gong Fu Li v. Ashcroft*, 82 Fed. Appx. 357, 358 (5th Cir. 2003) (unpublished per curiam opinion).

[FN4.](#) The only alternative claim respondent raised below was a claim under the Convention Against Torture. In order to qualify for protection from removal under the CAT, an applicant must establish that “it is more likely than not that he or she would be tortured if removed to the proposed country of removal.” [8 C.F.R. § 1208.16\(c\)\(2\)](#) (2008). The Immigration Judge concluded that respondent did not satisfy this standard, and respondent does not challenge this determination in his current brief.

[FN5.](#) According to this theory, a forced abortion or sterilization procedure performed on one spouse should be “imputed” to the other spouse because the procedure causes both spouses emotional and other suffering, and because “the law considers” the “reproductive opportunities” of one spouse “to be bound up” with the “reproductive opportunities” and harms of the other. See *Matter of S-L-L*, *supra*, at 8 (quoting *Cai Luan Chen*

[v. Ashcroft, 381 F.3d 221, 226 \(3d Cir. 2004\)](#)).

FN6. These courts appear to have reached this conclusion based on one of two theories. First, that “the forced sterilization [or abortion procedure performed on] a wife could be “imputed” to her husband, “whose reproductive opportunities the law considers to be bound up with those of his wife.”” *Matter of S-L-L-*, *supra*, at 8 (quoting Judge Alito's panel (9th Cir. 2004), in which the Ninth Circuit concluded that forced sterilization of a wife could reasonably be “imputed” to her husband, “whose reproductive opportunities the law considers to be bound up with those of his wife”). And, second, that “persecution of one spouse by means of a forced abortion or sterilization causes the other spouse to experience intense sympathetic suffering that rises to the level of persecution.” *Matter of S-L-L-*, *supra*, at 7 (stating that “the ruling in *Matter of C-Y-Z-* is plausibly based on” the theory of “sympathetic suffering” the Third Circuit identified in *Cai Luan Chen*, as well as on the fact that the “PRC Government explicitly imposes joint responsibility on married couples for decisions related to family planning” such that its decision to “force an abortion or sterilization” can reasonably be considered “persecut[ion] [of] the married couple as an entity”); *see also Cai Luan Chen, 381 F.3d at 225-26* (citing cases in which the “mental suffering” that an asylum seeker endured from “being forced to witness the pain and suffering of” a close family member constituted persecution of the asylum seeker (quoting *Abay v. Ashcroft, 368 F.3d 634,642* (6th Cir. 2004))).

FN7. In addition, because it is important that administration of the Act be consistent throughout the country, administrative stare decisis principles carry less weight where, as here, Federal courts have divided on whether an administrative decision is correct and entitled to deference.

FN8. I agree with Board Member Filppu that the above-referenced flaw in the Board's approach is “further illustrated in its treatment of ‘boyfriends, fiancés, and other unmarried partners.’” *Matter of S-L-L-*, *supra*, at 19 (Filppu, concurring and dissenting) (quoting the majority opinion at 8). As Member Filppu explains, the Board “rel[ies] on its construct of family entity persecution” to “craft[] a rule that treats a father as ‘a person who has been forced to abort a pregnancy’ if the father is both legally married to the woman who was forced to undergo such a procedure and if the father opposed the abortion.” *Id.* However, the majority never justifies “how a father ceases to be ‘a person’ forced to abort a pregnancy when it comes to unmarried”—or, to complicate the situation further, divorced or otherwise separated—partners. *Id.* Although the Board provides plausible “policy reasons for ‘drawing the line at marriage,’ and for refusing to extend to a boyfriend or fiancé ‘the nexus and level of harm’ it attributes to a husband,” I agree with Member Filppu that this “entire discussion is only necessary because of the underlying [joint spousal] rule it invents in the first place.” *Id.* (quoting the majority opinion at 9).

FN9. I agree with DHS that what the Act means by the phrase “persecution on account of ... political opinion” is a “complex issue that need not be fully resolved here” because this case does not concern the application of that phrase in contexts other than political asylum claims predicated on “persecution” for “resisting” a coercive population control program. Accordingly, I confine my analysis to that context, and do not purport to address whether the phrase would support a per se rule in other contexts such as, for example, Judge Calabresi's hypothetical in which the Board interprets [section 101\(a\)\(42\)](#) to support a rule that “any child who sees his parents tortured and murdered before him by a totalitarian government—say, the Nazis—is persecuted, and therefore eligible for asylum.” [Lin II, 494 F.3d at 335](#) (Calabresi, J., concurring and dissenting).

FN10. In his concurrence in *S-L-L-*, Board Member Pauley stated that although he believed *C- Y- Z-* “was wrongly decided,” he would not overrule it because “it is too late in the day for the Board to upset the apple cart” and overruling the decision could enable DHS to “seek termination of [existing grants of] asylum under section 208(c)(2)(A)” of the Act on the grounds that the new interpretation constitutes a “fundamental change in

circumstances.” *Matter of S-L-L-*, *supra*, at 14 & n.2 (Pauley, concurring).

I agree with the en banc Second Circuit that reversal of the statutory interpretation set forth in *C-Y-Z-* should not be considered a “fundamental change in circumstances” that would allow DHS to terminate existing final grants of asylum under the regulations implementing section 208(c)(2)(A) of the Act. See [Lin II, 494 F.3d at 314](#) (stating that the regulations permit DHS to seek the termination of asylum when an alien no longer qualifies for refugee status “because, owing to a fundamental change in circumstances relating to the original claim, the alien's life or freedom no longer would be threatened on account of ... political opinion *in the country from which deportation or removal was withheld*” (quoting [8 C.F.R. § 208.24\(b\)\(1\)](#))). Specifically, just as courts have concluded that a “change in United States asylum law does not qualify as a ‘change in circumstances’ sufficient to reopen an asylum case under [8 C.F.R. § 1003.2\(c\)\(3\)\(ii\)](#)” based on “changed circumstances arising in the country of nationality,” my reversal of the Board's interpretation of section 601(a) should “not be seen as a ‘fundamental change in circumstances’” under [8 C.F.R. § 208.24\(b\)\(1\)](#) that allows the termination of asylum claims that have already been granted. [Lin II, 494 F.3d at 314](#); see also *Matter of S-L-L-*, *supra*, at 21 n.2 (Filippu, concurring and dissenting) (“We are not now concerned with reopening past cases.”).

My decision overruling the per se rule of spousal eligibility in *C-Y-Z-* and *S-L-L-* does, however, apply to all cases pending now or in the future before asylum officers, the Immigration Judges, or the Board, and to cases pending on judicial review. My decision also applies to cases in which a motion to reconsider is filed within 30 days of a final decision. See [Matter of O-S-G-](#), 24 I&N Dec. 56, 57 (BIA 2006) (“A motion to reconsider is a “request that the Board reexamine its decision in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case which was overlooked.”” (quoting [Matter of Ramos](#), 23 I&N Dec. 336, 338 (BIA 2002) (quoting [Matter of Cerna](#), 20 I&N Dec. 399, 402 n.2 (BIA 1991))). And my decision applies to cases in which a final ruling on asylum or withholding of removal was issued prior to the date of this opinion if such cases are later reopened for reasons unrelated to the reasoning in this opinion. By contrast, my decision shall not serve as the sole basis for reopening cases where a final grant of asylum or withholding of removal has been made, and is subject only to the procedures of [8 C.F.R. §§ 1003.1\(d\)\(6\)](#) and [1003.47](#) where applicable if the time for seeking reconsideration or judicial review has expired or such opportunities for administrative or judicial review have already been exhausted.

[FN11](#). The reference in the House Report to the Board's decision in *Matter of G-*, *supra*, is not to the contrary. The applicant in that case did not base his request solely on the threatened sterilization of his wife, but rather on his fear that he himself would be subjected to sterilization and other punishment (including a fine that had already been imposed on him for having a second child) based on his violation of China's family planning policy. See *id.* at 774, 778.

[FN12](#). Similarly, the various Executive Branch documents cited by respondent and amici do not alter my interpretation of section 601(a). Those documents consist primarily of a 1990 executive order directing the Secretary of State and the Attorney General to grant “enhanced consideration” to claims of persecution based upon a country's policy of forced abortion or coerced sterilization, [Exec. Order No. 12711](#), 3 C.F.R. § 283 (1991), and a putative final (but never published) Justice Department rule intended to advance the policy expressed in the executive order. The most recent (1993) version of that rule would have provided:

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 ... 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.

Att'y Gen. Order No. 1659-93, at 13-14 (Jan. 15, 1993) (emphases added).

Nothing in this never-published rule, however, unambiguously provides that an applicant establishes refugee status solely by being married to a non-accompanying spouse who was subjected to a forced abortion or sterilization procedure. Indeed, the preamble to the rule indicates that the rule would *not* have addressed that situation, and, like section 208(b)(3)(A) of the Act, contemplates derivative asylum for spouses only if the physically persecuted person was a successful applicant for asylum. Att'y Gen. Order No. 1659-93, at 5 (stating that “[a]t least in the situation provided for in the rule, in which a directly threatened person is an applicant for relief *along with* his or her spouse, affording such relief to both is warranted” (emphasis added)).

[FN13](#). Although I reject the per se rule articulated in *C-Y-Z-* and *S-L-L-*, the interpretation of section 601(a) I adopt in this opinion allows both members of the “spousal unit” to begin the asylum effort in the United States, either by coming here together or by having one lead and the other follow. The only difference between my interpretation and the per se rule for purposes of who initiates the asylum effort is that, in cases where the spouse who begins the asylum effort is the spouse who was *not* physically subjected to a forced abortion or sterilization procedure, that spouse must be able to establish his or her personal eligibility for asylum on the facts of his or her own case. As the Second Circuit noted in *Lin II*, “that [the applicant’s] spouse has been subjected to a forced abortion or sterilization would *not be* irrelevant” to this determination. [Lin II, 494 F.3d at 313](#) (emphasis added). This fact would simply not allow the applicant, if he or she left the physically persecuted spouse behind, to qualify for per se refugee status.

[FN14](#). In any event, the question whether forced insertion of an IUD constitutes “sterilization” under section 601(a) is already being considered by the Board in more appropriate cases. *See, e.g., Chao Qun Jiang v. Bureau of Citizenship & Immig. Servs., 520 F.3d 132 (2d Cir. 2008)* (remanding to the Board to consider whether forced insertion of an IUD constitutes “persecution” under the Act); *Ying Zheng v. Gonzales, 497 F.3d 201 (2d Cir. 2007)* (same).

[FN15](#). Whether the Board and the courts should remand other cases for reconsideration in light of this opinion depends on the particularized facts of those cases. Where, as here, a case that was decided principally on the basis of the per se rule appears to involve credible evidence of threats or action against the applicant that might support relief under the legal framework set forth herein, but that were not adequately considered or developed before the Immigration Judge, it may be an appropriate exercise of the Board’s discretion to order a remand.

The following decisions are a supplement to the readings in the casebook in Chapter 10, section E.3.

**Salimatou BAH, Mariama DIALLO and Haby DIALLO,
Petitioners,**

v.

Michael B. MUKASEY, Attorney General, Respondent.*
529 F.3d 99 (2nd Cir. 2008)

Before: STRAUB, POOLER, and SOTOMAYOR, Circuit Judges.

Judges STRAUB and SOTOMAYOR also concur in separate opinions.

STRAUB, *Circuit Judge*:

Petitioners, three women from Guinea who underwent female genital mutilation in the past, petition for review of decisions of the Board of Immigration Appeals (“BIA”) affirming, *inter alia*, the denial of their claims for withholding of removal and Convention Against Torture (“CAT”) relief based on female genital mutilation. The agency held that because the genital mutilation had already occurred, the presumption that petitioners' lives or freedom would be threatened in the future was automatically rebutted by the fact that it had occurred. *See* 8 C.F.R. § 1208.16(b)(1)(i)(A).

Because the agency committed significant errors in the application of its own regulatory framework for withholding of removal claims, we grant in part and dismiss in part the petitions for review with respect to petitioners' withholding of removal and CAT claims based on female genital mutilation.

BACKGROUND

I. Female Genital Mutilation

Female genital mutilation “is the collective name given to a series of surgical operations, involving the removal of some or all of the external genitalia, performed on girls and women primarily in Africa and Asia.” *Abankwah v. INS*, 185 F.3d 18, 23 (2d Cir.1999). According to the World Health Organization, female genital mutilation can be classified into four different categories:

Type I Excision of the prepuce with or without excision of part or all of the clitoris.

Type II Excision of the prepuce and clitoris together with partial or total excision of the labia minora.

Type III Excision of part or all of the external genitalia and stitching/ narrowing of the vaginal opening (infibulation).

* Some footnotes have been omitted. Footnotes have been renumbered consecutively in this version.

Type IV Unclassified: Includes pricking, piercing or incision of clitoris and/or labia; stretching of clitoris and/or labia; cauterization by burning of clitoris and surrounding tissues; scraping ... of the vaginal orifice or cutting ... of the vagina; Introduction of corrosive substances into the vagina to cause bleeding or herbs into the vagina with the aim of tightening or narrowing the vagina; any other procedure which falls under the definition of FGM

World Health Organization, *Female Genital Mutilation: Information Pack*, at 2 (August 1996) (hereinafter “WHO Information Pack”). The U.S. Department of State has largely adopted this classification. See Office of the Senior Coordinator for Women's Issues, U.S. Dep't of State, *Prevalence of the Practice of Female Genital Mutilation (FGM); Laws Prohibiting FGM and Their Enforcement; Recommendations on How to Best Work to Eliminate FGM*, U.S. Dept. of State 5 (June 27, 2001), available at www.state.gov/g/wi/rls/rep/c6466.htm or <http://www.state.gov/documents/organization/9424.pdf> (last visited June 10, 2008).

Genital mutilation “is often performed under unsanitary conditions with highly rudimentary instruments.” *Abankwah*, 185 F.3d at 23.

The procedure is carried out with special knives, scissors, scalpels, pieces of glass or razor blades [in] poor light and septic conditions. The procedures are usually carried out by an elderly woman of the village who has been specially designated for this task, or by traditional birth attendants.... Anaesthetics and antiseptics are not generally used. Assistants and/or family members hold down the girl to prevent her struggling. ... Paste mixtures made of herbs, local porridge, ashes, or other mixtures are rubbed on to the wound to stop bleeding.

WHO Information Pack at 3. Genital mutilation can have devastating, permanent effects on its victims, including immediate and long-term physical problems such as infection, difficulty during urination and menstruation, incontinence, and sexual dysfunction; complications during child birth such as fetal and maternal death, birth defects, and internal damage to the mother; and severe psychological problems. *Id.* at 7-10.

The reasons for infliction of genital mutilation vary. *Id.* at 4. Some of the most prevalent reasons for genital mutilation are to preserve virginity before marriage and encourage fidelity during marriage. See, e.g., James Rice, *A Successful Case is Made for Granting Refugee Status to a Woman Fleeing Her Own Country to Protect Her Daughter from Female Genital Mutilation*, *Gonz. J. Int'l L.*, Vol. 4, No. 4, at 3 (2000-2001) (“To a large extent, [female genital mutilation] is done to discourage sexual activity before marriage.”); Leigh A. Trueblood, *Female Genital Mutilation: A Discussion of International Human Rights Instruments, Cultural Sovereignty and Dominance Theory*, 28 *Denv. J. Int'l L. & Pol'y* 437, 449 (Fall 2000) (“Supporters of FGM believe that they can reduce sexual desire in females by eliminating the sensitive tissue of the outer genitalia, particularly the clitoris. By attenuating women's sexual desire, the women can maintain their chastity and

virginity before marriage and fidelity during marriage. ... They also believe that removal of female genitalia results in higher male sexual pleasure.”); WHO Information Pack at 4 (listing “protection of virginity and prevention of promiscuity” as reasons for the practice).

In light of the long-lasting and severe consequences of genital mutilation, paired with the reasons for its infliction, the practice has been largely condemned by the international community. *See, e.g.*, World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO (2008), http://www.who.int/reproductive-health/publications/fgm/fgm_statement_2008.pdf (last visited June 10, 2008); Committee on the Elimination of All Forms of Discrimination Against Women, Female Circumcision General Recommendation No. 14, U.N. GAOR, 45th Sess., Supp. No. 38 & Corr. 1, at 80, ¶ 438, U.N. Doc. A/45/38 (1990); Declaration on the Elimination of Violence against Women, G.A. Res. 104, U.N. GAOR, 48th Sess., Art. 2(a), U.N. Doc. A/48/629 (1993) (including female genital mutilation as an example of violence sought to be eliminated). It has also been criticized and condemned by many activist groups within the countries where it is practiced. *See, e.g.*, Inter-African Committee on Traditional Practices Homepage, <http://www.iac-ciaf.com> (last visited June 10, 2008) (stating that the “IAC was the first and largest NGO network in Africa to take up the issue of FGM at the grassroots, regional and international levels”); WHO Information Pack at 15 (stating that various conferences and seminars in Africa and Asia have recommended that “governments should adopt clear national policies to abolish FGM”). Moreover, in recognition of the harmful effects of genital mutilation, the United States Congress has criminalized female genital mutilation of minors in the United States. *See* 18 U.S.C. § 116(a) (providing that “whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years” shall be fined or imprisoned for up to five years).

II. Petitioner Salimatou Bah

Petitioner Salimatou Bah seeks review of the March 26, 2007 order of the BIA affirming the August 23, 2005 decision of Immigration Judge (“IJ”) Barbara A. Nelson denying her applications for asylum, withholding of removal, and relief under the CAT. *In re Salimatou Bah*, No. A98 648 305 (B.I.A. Mar. 26, 2007), *aff’g* No. A98 648 305 (Immig. Ct. N.Y. City Aug. 23, 2005). Salimatou, a native and citizen of Guinea, entered the United States without valid travel documents in June 2003, and in January 2005 was placed in removal proceedings by service of a Notice to Appear (“NTA”). She applied for asylum, withholding of removal, and relief under the CAT, alleging, *inter alia*, that as a young girl she “suffered” the “barbarous act” of female genital mutilation, and the event “still has dire consequences on [her] adult life.”

In a statement accompanying her application, Salimatou explained that she belongs to the Fulani ethnic group, which strongly supports the practice of genital mutilation as “the best way to prevent the Fulani girls from having pre-marital sex,” and “to force the Fulani girls to keep their virginity until the marriage.” She claimed that at the age of eleven, her mother and aunt took her

to a “small area fenced with wood and stuffed with coconut leaves.” She was taken into a tent where five “old ladies” with knives and other tools undressed her and had her lie on the ground. Salimatou, “scared and shaking,” tried to escape, but the women restrained her. She was then held down by two of the women while two others opened her legs so that a fifth could make a “deep cut of [her] ‘private part’ ” without “any anesthetic or sanitary precaution.” Salimatou screamed throughout the mutilation, and experienced “pain all over [her] body.” She began “bleeding heavily” and feeling dizzy to the point where she was unable to stand on her own. After she was given “traditional medicines,” she convalesced for weeks during which time she was “treated traditionally with dried leaves and some other local potions.” Salimatou further stated that she later had “problems with [her] menstrual period,” as well as complications during the deliveries of her children. She also stated that she “can barely feel any pleasure” during sexual intercourse with her husband. She sought asylum in order to “live free from that barbarous act still in practice” in Guinea.

On August 23, 2005, at the conclusion of her merits hearing, the IJ denied all of Salimatou's claims. The IJ pretermitted Salimatou's asylum application based on a finding that the application failed to meet the one-year deadline set forth in 8 U.S.C. § 1158(a)(2)(B). With respect to her withholding of removal claim based on female genital mutilation, the IJ found that although Salimatou had established past persecution, she had not established that there was any clear probability of future persecution if returned to Guinea. The IJ found that although Salimatou's “circumcision [was] a very unfortunate event,” it could not be repeated. The IJ accordingly denied the withholding of removal claim on that basis and further found that Salimatou did not qualify for CAT relief because she “offered insufficient evidence to establish it is more likely than not that she would be tortured if returned to Guinea.”

Salimatou appealed the decision to the BIA, and in a one-member unpublished order signed by Board Member Roger Pauley, the BIA affirmed the IJ's decision that the asylum application had been untimely filed. With respect to her withholding of removal claim, the BIA acknowledged that Salimatou had “already had FGM”; however, it held that “assuming *arguendo* that she is a member of a particular social group who suffered past persecution [,] there is no chance that she would be personally persecuted again by the procedure.” (internal alterations, footnote, and quotation marks omitted). The BIA then went on to assess whether female genital mutilation should be considered “continuing persecution” as found by the Ninth Circuit in *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir.2005). In *Mohammed*, the Ninth Circuit held in the asylum context that female genital mutilation constituted a “permanent and continuing” act of persecution such that the presumption of well founded fear of future persecution “cannot be rebutted.” *Id.* at 801. The BIA in this case explicitly disagreed with *Mohammed*. In so doing, it distinguished *In re Y-T-L-*, 23 I. & N. Dec. 601 (B.I.A.2003) (en banc) (“*Y-T-L-*”), in which the BIA held that forced sterilization amounted to continuing persecution. The BIA in the present case reasoned that “persons who suffered [forced sterilization] have been *singled out* by Congress as having a basis for asylum ... on the strength of the past harm by itself,” and because “Congress has not seen fit to recognize FGM ... in similar fashion,” the BIA declined to define the genital mutilation that Salimatou suffered as continuing persecution. Finally, the BIA noted that while humanitarian asylum might be warranted in some genital mutilation cases “notwithstanding the low likelihood of future persecution,” such discretionary relief is not available in withholding of removal cases. The BIA further agreed with the IJ's denial of the CAT claim because Salimatou “failed to present evidence that she more likely than not would be tortured if returned to Guinea.” Accordingly, the BIA dismissed Salimatou's appeal as to the withholding of removal and CAT claims based on genital mutilation.

III. Petitioner Mariama Diallo

Petitioner Mariama Diallo seeks review of an April 12, 2007 order of the BIA affirming the July 1, 2005 decision of IJ Barbara A. Nelson denying her applications for asylum, withholding of removal, relief under the CAT, and cancellation of removal. *In re Mariama Diallo, Amadou Sow*, Nos. A97 849 373; A97 849 374 (B.I.A. Apr. 12, 2007), *aff'g* Nos. A97 849 373; A97 849 374 (Immig. Ct. N.Y. City July 1, 2005). Mariama, also a native and citizen of Guinea and a member of the Fulani ethnic group, was admitted into the United States in May 1992 on a nonimmigrant visa, which she overstayed. In September 2003, Mariama filed an application for asylum, withholding of removal, and CAT relief. In February 2005, Mariama amended her application to include a claim that she had been subjected to female genital mutilation as a child. She also *106 filed a separate application for cancellation of removal.

At a merits hearing in March 2005, Mariama testified that she underwent genital mutilation, including “removal of [her] clitoris,” when she was eight years old. According to Mariama, her parents were opposed to the practice of FGM, but her aunt and grandmother arranged for her to undergo the mutilation without their knowledge. Mariama further testified that she was ill for a month after the mutilation, suffering constant pain, excessive bleeding, and loss of consciousness. Mariama testified that childbirth was extremely difficult for her, and that she experiences pain every time she engages in intercourse as a result of the genital mutilation. She further testified that she suffered two miscarriages. Finally, Mariama stated that she feared that her daughters would be subject to genital mutilation were she forced to return to Guinea. In support of her female genital mutilation claim, she submitted a gynecologist's report stating, *inter alia*: “Evaluation of the pelvis demonstrated a scarred anterior fourchette and surgically absent clitoris. The labia minora were rudimentary and anteriorly fused.” The report further stated that Mariama “has compromised intimacy and sexual satisfaction,” and that she “requires repetitive surgical correction of her anterior fourchette to accommodate vaginal deliveries.”

At the conclusion of the hearing, the IJ denied Mariama's applications in their entirety. First, the IJ found that Mariama's asylum claim was time-barred because she entered the country in 1992 but did not file her application until 2003. As to her withholding of removal claim, the IJ concluded that Mariama had established past persecution by submitting reliable evidence that she had undergone female genital mutilation. Nevertheless, the IJ denied the withholding of removal claim based on genital mutilation because there was “obviously no chance” that she would be subjected to genital mutilation again in the future. Finally, the IJ denied Mariama's application for cancellation of removal.

Mariama timely appealed the denial of her applications to the BIA. In a three-member unpublished order issued by Board Members Patricia A. Cole, Lauri S. Filppu (author), and Roger Pauley, the BIA found that the IJ properly pretermitted Mariama's asylum application. The BIA further concluded that the fact that Mariama had undergone genital mutilation was not a basis for the grant of withholding of removal, “even assuming *arguendo* that she is a member of a particular social group who suffered past persecution.” As in *Salimatou's* case, the BIA reasoned that because genital mutilation could be performed only once, Mariama had not established a possibility of future persecution. The BIA explicitly rejected Mariama's argument that the genital mutilation constituted continuing persecution. The BIA again distinguished genital mutilation from forced sterilization, reasoning that Congress specifically singled out sterilization as a basis for asylum but has not designated genital mutilation in the same way. It also noted that Mariama was ineligible for discretionary relief on humanitarian grounds due to the fact that her asylum application was untimely filed. With respect to Mariama's CAT claim, the BIA concluded

that Mariama had presented no evidence suggesting that she would more likely than not be tortured if she returned to Guinea. Finally, the BIA affirmed the denial of Mariama's application for cancellation of removal.

IV. Petitioner Haby Diallo

Petitioner Haby Diallo seeks review of an April 20, 2007 order of the BIA affirming the August 12, 2005 decision of IJ *107 Sandy K. Hom denying her applications for asylum, withholding of removal, and relief under the CAT. *In re Haby Diallo*, No. A97 924 445 (B.I.A. Apr. 20, 2007), *aff'g* No. A97 924 445 (Immig. Ct. N.Y. City Aug. 12, 2005).

Haby is also a native and citizen of Guinea and member of the Fulani ethnic group. She applied for asylum, withholding of removal, and relief under the CAT, alleging that she had been subjected to female genital mutilation as a child, that she “totally opposed” the practice, and that she did not want her “future daughters” to be subjected to it. At her merits hearing, Haby testified that she was forced to undergo genital mutilation when she was eight years old. She testified that during a visit to her grandmother, she was taken by “three old women” to “the bush.” There, one woman held her down while another spread her legs apart and the third performed the mutilation with a knife. Haby testified that she “suffered a lot” initially, and although she was bleeding heavily, she was not taken to a hospital. Instead, she was treated with “traditional medicine.” She further testified that she has problems menstruating as a result of the genital mutilation, and that she does “not have any type of pleasure when [she is] having [] sexual intercourse with a man.” Finally, she testified that she is “definitely” against female genital mutilation. In support of her claim, she submitted an affidavit from a doctor stating that his physical examination yielded results “compatible with” her allegation of having been subject to genital mutilation in the past.

In August 2005, the IJ denied Haby's application in its entirety. The IJ pretermitted Haby's asylum claim because Haby failed to establish that her application was filed within one year of her entry into the United States. The IJ further found Haby's claim that she had experienced genital mutilation “to be insufficient and lacking” because a doctor's written statement was “insufficient,” and both the doctor's failure to testify and the absence of affidavits from Haby's family members were “adverse” to her claim. Finally, the IJ found that Haby failed to demonstrate that it was more likely than not that she would be subjected to torture if she were returned to Guinea.

Haby timely appealed the IJ's decision to the BIA, and in a one-member unpublished order signed by Board Member Roger Pauley, the BIA dismissed Haby's appeal. The BIA affirmed the IJ's decision as to the one-year asylum bar. With respect to the IJ's denial of Haby's claims for relief based on female genital mutilation, the BIA agreed with the “overall outcome of the instant proceedings for reasons different” from those of the IJ. The BIA stated that Haby had “already had FGM,” but that, even “assuming arguendo that she is a member of a particular social group who suffered past persecution,” she was not entitled to withholding of removal because she would not be subjected to the procedure in the future. The BIA again rejected the Ninth Circuit's reasoning in *Mohammed*, and it again noted that Haby was ineligible for humanitarian relief. Finally, the BIA found that because Haby failed to establish eligibility for asylum, she necessarily failed to satisfy the higher standard for withholding of removal and CAT relief.

V. *In re A-T-*

Soon after the BIA issued the unpublished decisions in these three cases, the *108 BIA issued a three-member published decision affirming the denial of a claim for withholding of removal based on female genital mutilation, for reasons substantially similar to those given by the BIA in the present cases. *See In re A-T-*, 24 I.

& N. Dec. 296 (B.I.A.2007) (“*A-T-*”), *appeal docketed*, No. 07-2080 (4th Cir. Nov. 1, 2007). The government in the cases before us contends that petitioners' arguments are foreclosed by *A-T-*; accordingly, some background as to that case is necessary.

Alima Traore, a native and citizen of Mali, claimed that she underwent genital mutilation as a young girl, that she opposed the practice, and that were she to have a daughter, she would oppose having genital mutilation performed on her daughter. She further claimed that if she were returned to Mali, she would be forcibly married to her cousin. She sought asylum, withholding of removal, and CAT relief. *Id.* at 296-97. As in the present cases, the IJ found Traore ineligible for asylum because her asylum application was untimely filed. The IJ further found that Traore's past experience with genital mutilation did not qualify her for the “prospective relief” of withholding of removal, and that Traore had not demonstrated that it was more likely than not that she would be forcibly married to her cousin. Finally, the IJ found that Traore failed to establish that it was more likely than not that she would be tortured upon return to Mali. Accordingly, the IJ denied her application in its entirety. *Id.* at 297.

Traore appealed to the BIA, and the BIA affirmed the IJ's decision in all respects. First, while recognizing that female genital mutilation constituted persecution under its own precedent, the BIA held that “even assuming arguendo that [Traore] is a member of a particular social group, there is no chance that she would be personally persecuted again by the procedure.” *Id.* at 299 (internal alteration and quotation marks omitted). Accordingly, the BIA found that “[a]ny presumption of future FGM persecution is thus rebutted by the fundamental change in the respondent's situation arising from the reprehensible, but one-time, infliction of FGM upon her.” *Id.* The BIA again went on to “disagree with the analysis” in the Ninth Circuit's decision in *Mohammed*, stating that it viewed *Y-T-L-*'s “continuing persecution” reasoning in the forced sterilization context “to represent a unique departure from the ordinarily applicable principles regarding asylum and withholding of removal.” *A-T-*, 24 I. & N. Dec. at 299. The BIA explained that even though it viewed forced sterilization as a “past harm” in *Y-T-L-*, it considered forced sterilization to be continuing persecution in order to give “full force to the intent of Congress in extending asylum to those who have sustained such family planning persecution in the past.” *Id.* at 300 (internal quotation marks omitted). The BIA analogized genital mutilation to the “loss of a limb,” which “also gives rise to enduring harm to the victim,” but is “assessed under the past persecution standards specified in the asylum and withholding of removal regulations.” *Id.* at 301. The BIA also recognized the availability of a discretionary grant of asylum based on the severity of the past persecution, but stated in any event that such a discretionary grant was not available to Traore, since she did not qualify for asylum. *Id.* at 302.¹

The BIA further affirmed the IJ's holding that Traore was not eligible for withholding of removal based on her fear of a forcible marriage. The BIA rejected Traore's argument that “her past experience with FGM creates a presumption that she is at risk of future persecution; that is, even if she cannot be subjected to FGM a second time, she may be vulnerable to other forms of persecution on account of her membership in a particular social group.” *Id.* at 303-04.² The BIA noted that the reasoning of *Hassan v. Gonzales*, 484 F.3d 513 (8th

¹ Subsequently, in *In re S-A-K- and H-A-H-*, 24 I. & N. Dec. 464 (B.I.A.2008), the BIA explicitly held that victims of past female genital mutilation could qualify for discretionary grants of asylum under 8 C.F.R. § 1208.13(b)(1)(iii)(A) based on the severity of the past harm alone.

² The BIA also affirmed the IJ's holding that Traore was not eligible for withholding of removal based solely on her fear of forcible marriage. The BIA initially “note[d] that an arranged marriage between adults is not generally considered per se persecution.” *A-T-*, 24 I. & N. Dec. at 302. It then reasoned that Traore had “presented insufficient evidence regarding the consequences she might face if she refuses to marry her intended fiancé,” that she could “reasonably relocate within Mali to avoid the marriage,” and that Traore “failed to demonstrate a nexus between any harm she may fear and a protected ground.”

Cir.2007), “appear[ed] to support [Traore's] theory,” but the BIA rejected it as “at odds” with the regulatory framework for asylum. *A-T-*, 24 I. & N. Dec. at 304. In *Hassan*, the Eighth Circuit held that the fact that a petitioner had undergone genital mutilation in the past does not mean that a fear of future persecution is automatically rebutted, stating that the court has “never held that a petitioner must fear the repetition of the exact harm that she has suffered in the past.” 484 F.3d at 518. The BIA found that this reasoning contravened the regulation, which provides that “[i]f the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.” *A-T-*, 24 I. & N. Dec. at 304 (quoting 8 C.F.R. § 1208.13(b)(1)). See also 8 C.F.R. § 1208.16(b)(1)(iii) (providing, in the context of withholding of removal claims, that “[i]f the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm”). The BIA reasoned that unlike female genital mutilation, “family pressures to accede to arranged marriages are not necessarily confined to females.” *A-T-*, 24 I. & N. Dec. at 304. The BIA then found, without discussing other forms of future persecution that Traore may have feared on account of her particular social group, that Traore's fear of forced marriage was unrelated to the genital mutilation she suffered in the past, and that Traore had failed to meet her burden of showing that she would be subject to such persecution in the future. *Id.* Finally, the BIA rejected Traore's CAT claim, holding that Traore “failed to present evidence that it is more likely than not that she would be tortured if she is returned to Mali.” *Id.*³

DISCUSSION

I. Standard of Review

We review the agency's factual findings under the substantial evidence standard, treating them as “conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.” 8 U.S.C. § 1252(b)(4)(B); see, e.g., *Manzur v. U.S. Dep't of Homeland Sec.*, 494 F.3d 281, 289 (2d Cir.2007). However, we will vacate and remand for new findings if the agency's reasoning or its fact-finding process was sufficiently flawed. See *Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 406 (2d Cir.2005); *Tian-Yong Chen v. INS*, 359 F.3d 121, 129 (2d Cir.2004). We review *de novo* questions of law and the application of law to undisputed fact. See *Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir.2003).

Id. at 303. The BIA stated that it doubted “that young Bambara women who oppose arranged marriage have the kind of social visibility that would make them readily identifiable to those who would be inclined to persecute them.” *Id.*

³Since publication of *A-T-*, various members of Congress as well as organizations have requested that the Attorney General certify the decision to himself pursuant to 8 C.F.R. § 1003.1(h)(1)(i) and reverse it. See, e.g., Letter and Addendum from Members of Congress to Michael Mukasey, U.S. Attorney General (Dec. 20, 2007; Mar. 24, 2008), http://cgrs.uchastings.edu/pdfs/DOC3-Addendum_FGML etter_HOUSE-032408.pdf (last visited June 10, 2008); Press Release, Reps. Lofgren and Conyers Call on Attorney General to Review Female Genital Mutilation Ruling (Jan. 30, 2008), <http://lofgren.house.gov/PRArticle.aspx?NewsID=1879> (last visited June 10, 2008); Press Release, Snowe, Levin Call on Attorney General to Review Female Genital Mutilation Ruling (Apr. 29, 2008), [http://snowe.senate.gov/public/\(click on press room/press releases, search for press release by date\)](http://snowe.senate.gov/public/(click%20on%20press%20room/press%20releases,search%20for%20press%20release%20by%20date)) (last visited June 10, 2008), text of letter available at http://cgrs.uchastings.edu/documents/advocacy/matterofat_senate_letter_Mukasey.pdf (last visited June 10, 2008); Letter from Physicians for Human Rights Asylum Network to Michael B. Mukasey, U.S. Attorney General (Mar. 6, 2008), http://cgrs.uchastings.edu/pdfs/DOC12-Letter_physicians_psychologists_PHR.pdf (last visited June 10, 2008); Letter from Barry M. Kamins, President, New York City Bar, to Michael B. Mukasey, U.S. Attorney General (Jan. 4, 2008), http://www.nycbar.org/pdf/report/0424_001.pdf (last visited June 10, 2008).

We review decisions by the BIA interpreting the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 et seq., according to the standard set forth in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*:

If the intent of Congress is clear, 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. If, however, the court determines Congress has not directly addressed the precise question at issue, ... the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).⁴ See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999) (holding that decisions of the BIA interpreting the INA are entitled to *Chevron* deference). And we give “substantial deference” to BIA decisions interpreting immigration regulations, *Delgado v. Mukasey*, 516 F.3d 65, 69 (2d Cir.2008), unless an interpretation is “plainly erroneous or inconsistent with the regulation,” *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). See also *Zhen Nan Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 262 (2d Cir.2006).

II. Regulatory Framework and Merits of the Petitions for Review

Pursuant to 8 U.S.C. § 1231(b)(3)(A), an alien may not be removed to a country if “the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.” Under the relevant regulations:

If [an] applicant [for withholding of removal] is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim.

8 C.F.R. § 1208.16(b)(1)(i). The presumption that arises upon a showing of past persecution can be rebutted if the IJ finds, by a preponderance of the evidence, that “[t]here has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country,” or that “[t]he applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.” 8 C.F.R. §§ 1208.16(b)(1)(i)(A), (B). If an applicant has established past persecution on account of one of the protected grounds, the government bears the burden of rebutting the presumption that the applicant's life or freedom will be threatened in the future by a preponderance of the evidence. 8 C.F.R. § 1208.16(b)(1)(ii).

For the reasons that follow, we hold that under the governing regulations the fact that an applicant has undergone female genital mutilation in the past cannot, in and of itself, be used to rebut the presumption that her

⁴ No such deference is warranted where, as here, the agency decisions are unpublished, because those decisions do not constitute binding agency interpretations of law. See *Mizrahi v. Gonzales*, 492 F.3d 156, 158 (2d Cir.2007). However, because the BIA subsequently issued a published decision containing essentially the same reasoning as that relied upon in the present cases, we will review the decisions—at least to the extent they are mirrored in A-T—under this deferential standard, as the government urges.

life or freedom will be threatened in the future. In so holding, we join in part the Eighth and Ninth Circuits, which have previously rejected facets of the reasoning the BIA now advances on this front.⁵

We pause only to say that we are deeply disturbed by what we perceive to be fairly obvious errors in the agency's application of its own regulatory framework. Congress has entrusted the agency with the weighty and consequential task of granting safe harbor to the deserving of those who flee to this country for protection. The claims of the petitioners before us, as set forth below, did not receive the type of careful analysis they were due. Our concern is only heightened by the very serious nature of the harm suffered by petitioners *112 in these cases, which the BIA itself has previously recognized.

A. Female Genital Mutilation as Past Persecution

In 1996, the BIA, acting en banc, held for the first time in a published opinion that female genital mutilation can constitute persecution on account of membership in a particular social group. *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A.1996) (en banc). The BIA reasoned:

FGM is extremely painful and at least temporarily incapacitating. It permanently disfigures the female genitalia. FGM exposes the girl or woman to the risk of serious, potentially life-threatening complications. These include, among others, bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus. It can result in permanent loss of genital sensation and can adversely affect sexual and erotic functions.

Id. at 361. Fauziya Kasinga, who was seeking asylum based on her fear that she would be subjected to genital mutilation if sent back to Togo, claimed that she was part of the social group consisting of “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.” *Id.* at 365. In finding that the genital mutilation that Kasinga feared constituted persecution on account of membership in a particular social group, the BIA reasoned: “FGM is practiced, at least in some significant part, to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to FGM. We therefore find that the persecution the applicant fears in Togo is ‘on account of’ her status as a member of the defined social group.” *Id.* at 367.

In *Abankwah*, we found that “FGM involves the infliction of grave harm constituting persecution”; a proposition that was “not disputed” in that case. *Abankwah*, 185 F.3d at 23. Since then, those of our sister circuits to have addressed the issue have agreed that female genital mutilation can constitute persecution for purposes of determining eligibility for asylum and withholding of removal. *See, e.g., Niang v. Gonzales*, 492 F.3d 505, 510 (4th Cir.2007); *Agbor v. Gonzales*, 487 F.3d 499, 502 (7th Cir.2007); *Hassan*, 484 F.3d at 517 (8th Cir.2007); *Mohammed*, 400 F.3d at 796 (9th Cir.2005); *Toure v. Ashcroft*, 400 F.3d 44, 49 n. 4 (1st Cir.2005);

⁵ The government argues that petitioners have failed to exhaust and have waived certain arguments raised by amicus with respect to their withholding of removal claims arising from their own genital mutilation. We disagree. All three petitioners argued in their briefs to the BIA as well as to this Court that the BIA erred in its application of the regulatory framework with respect to the genital mutilation claims. Moreover, the BIA addressed the vast majority of the issues we now review on appeal in its decisions. Those issues are therefore deemed exhausted, *see Xian Tuan Ye v. Dep't of Homeland Sec.*, 446 F.3d 289, 296-97 (2d Cir.2006) (per curiam); *Waldron v. INS*, 17 F.3d 511, 515 n. 7 (2d Cir.1994), and to the extent the BIA did not address certain issues, as explained below, we are remanding for the BIA to make those determinations in the first instance.

Abay v. Ashcroft, 368 F.3d 634, 638 (6th Cir.2004); *Niang v. Gonzales*, 422 F.3d 1187, 1197 (10th Cir.2005).⁶

In the cases before us, as in *A-T*, the BIA found that each of the petitioners had undergone genital mutilation, but “assum[ed] arguendo”—without deciding—that the petitioners had been persecuted on account of their membership in a particular social group. While the government does not dispute that the type of genital mutilation performed on the petitioners in the cases before us can rise to the level of persecution, it urges us to leave for the agency to decide in the first instance whether such harm was inflicted on account of the petitioners' social group.

As some of our sister circuits have found in cases involving claims of female genital mutilation, it appears to us that petitioners' gender—combined with their ethnicity, nationality, or tribal membership—satisfies the social group requirement. See, e.g., *Niang*, 422 F.3d at 1199; *Hassan*, 484 F.3d at 518; *Mohammed*, 400 F.3d at 798.⁷ Nevertheless, we will allow the agency to decide this issue as well as to define the parameters of the social group in the first instance, as the government urges. Cf. *Ucelo-Gomez v. Gonzales*, 464 F.3d 163, 168-72 (2d Cir.2006) (remanding to allow the BIA to determine, in the first instance, whether the proffered particular social group is protectible under the INA).⁸ In the meantime, we proceed with our analysis on the assumption made by the agency: that petitioners have suffered persecution on account of a protected ground.⁹

⁶ FN17. In addition, we note that the Third Circuit has recognized that female genital mutilation can constitute persecution in an unpublished opinion. See *Moshud v. Blackman*, 68 Fed.Appx. 328 (3d Cir.2003).

⁷ In *Abankwah*, we noted that the government “did not dispute that Abankwah's fear of genital mutilation was on account of her membership in a cognizable social group” and held that she had demonstrated a well founded fear of future mutilation. 185 F.3d at 21, 23-26.

⁸ Although petitioners and amicus argue that the BIA's “assum [ption]” of a social group is sufficient to vest in this Court the authority to determine petitioners' social groups, we need not decide this issue. Because we are remanding these cases to the BIA to properly apply the regulatory framework in any event, we leave it to the agency to define the particular social groups in the first instance.

⁹ The BIA in *Kasinga*, adopting a definition similar to the one advanced by the parties in that case, defined the applicant's particular social group as “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.” 21 I. & N. Dec. at 365. Since then, our sister circuits have criticized the BIA's inclusion of opposition to genital mutilation in its definition of the social group. See, e.g., *Niang*, 422 F.3d at 1200 (“[O]pposition is not a necessary component of a social group otherwise defined by gender and tribal membership.”); *Mohammed*, 400 F.3d at 797 n. 16 (“We believe that opposition is not required in order to meet the ‘on account of’ prong in female genital mutilation cases.”). Indeed, the BIA in *Kasinga* explained why gender and tribal membership comported with its previously established framework for particular social groups, but failed to explain its reasoning for including opposition to the practice. See 21 I. & N. Dec. at 366. Moreover, the petitioners in this case testified that they underwent genital mutilation as children. There are obvious difficulties with trying to ascertain whether a child opposed or resisted a practice imposed upon them by adults in their community, sometimes even family members. See, e.g., *Bah v. Gonzales*, 462 F.3d 637, 643 (6th Cir.2006) (Gibbons, C.J., concurring) (“An eight year old girl's failure to physically resist a procedure performed by medical personnel and endorsed by her mother hardly establishes her consent or renders the procedure unable to be categorized as persecution.”) (internal footnote omitted). Accordingly, although we leave the issue for the agency to decide in the first instance, unless the BIA reasonably explains why opposition to the practice is a necessary prerequisite, we tend to agree with the Ninth Circuit's observation that “the shared characteristic that motivates the persecution is not opposition, but the fact that the victims are female in a culture that mutilates the genitalia of its females.” *Mohammed*, 400 F.3d at 797 n. 16.

B. Well Founded Fear of Future Threats to Life or Freedom

As stated above, the regulations provide that once past persecution on account of a protected ground such as a particular social group is established, the petitioner benefits from a presumption that her “life or freedom would be threatened in the future in the country of removal on the basis of the original claim.” 8 C.F.R. § 1208.16(b)(1)(i). At that point, the burden shifts to the government, which may rebut the presumption upon a showing by a preponderance of the evidence that “[t]here has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five [protected grounds for relief] upon the applicant's removal to that country.” 8 C.F.R. § 1208.16(b)(1)(i)(A). *Cf., e.g., Hassan*, 484 F.3d at 518 (stating under the asylum regulation that after a showing of past *114 persecution, “[t]he proof burden should have then shifted to the government to show by a preponderance of the evidence that [circumstances] have changed to such an extent that Hassan's well-founded fear of future persecution if returned to Somalia has ceased.”); *accord Niang*, 422 F.3d at 1202; *Mohammed*, 400 F.3d at 798-99. In the cases before us—as in *A-T*—the BIA failed to shift the burden to the government. Instead, the BIA stated conclusorily that the fact that petitioners had already undergone genital mutilation in and of itself rebutted the presumption that their lives or freedom would be threatened in the future, because, in its view, genital mutilation is a “one-time” act. *See* 24 I. & N. Dec. at 299-300. In so doing, the BIA committed two significant errors, which we address in turn below.

1. The BIA Erred in Assuming Categorically that Female Genital Mutilation is a “One-Time” Act

First, the BIA erred in stating categorically without citation to the record or relevant reports that female genital mutilation is a “one-time” act. *See A-T*, 24 I. & N. Dec. at 299. A recent BIA decision reveals the error. In *In re S-A-K- and H-A-H-*, 24 I. & N. Dec. 464 (B.I.A.2008), where the BIA granted humanitarian asylum to two victims of past FGM, the BIA stated with respect to one applicant that “her vaginal opening was sewn shut [approximately five times] after being opened to allow for sexual intercourse and child birth.” *Id.* With respect to the other applicant, it stated that her “vaginal opening was sewn shut with a thorn,” so that “the man she was given to in marriage, who ultimately raped her, could not penetrate her for sexual intercourse. He was only able to rape her by cutting her open, causing her to bleed for many days.” *Id.* As these examples illustrate, female genital mutilation is not necessarily a one time event. *See also, e.g., Bah*, 462 F.3d at 644 n. 3 (Gibbons, J., concurring) (“In several cases asylum applicants have successfully produced evidence indicating a risk of further mutilation.”); *Mohammed*, 400 F.3d at 800 (“[The Petitioner] might also be at risk of further genital mutilation.”); *Tunis v. Gonzales*, 447 F.3d 547, 550 (7th Cir.2006) (petitioner “fear[ed] that if ... returned to Sierra Leone she w[ould] be forced to undergo the procedure again”). Although it is not petitioners' burden to show that the mutilation will be repeated, record evidence reveals that genital mutilation, such as infibulation, is often repeated in Guinea.

Accordingly, the BIA erred in stating categorically that genital mutilation could only be performed once, without placing the burden on the government to show that these particular petitioners are not at risk of further mutilation. *Cf., e.g., Tambadou v. Gonzales*, 446 F.3d 298, 303-04 (2d Cir.2006) (stating that the BIA is required to perform an “individualized analysis” as to whether the presumption of fear of future persecution has been rebutted by a showing of changed circumstances); *Berishaj v. Ashcroft*, 378 F.3d 314, 327 (3d Cir.2004) (“[T]he [government] is obligated to introduce evidence that, on an individualized basis, rebuts a particular applicant's specific grounds for his well-founded fear of future persecution.” (quoting *Rios v. Ashcroft*, 287 F.3d 895, 901 (9th Cir.2002))). Moreover, the BIA's assumption that mutilation is a “one-time” act, without citation to record

evidence or country reports, amounted to impermissible speculation. See *Cao He Lin*, 428 F.3d at 405 (holding that “absent record evidence of practices in foreign countries, the [agency] must not speculate as to the existence or nature of such practices”).

On remand, the agency must hold the government to its regulatory burden of *115 showing, by a preponderance of the evidence, that petitioners would not be subject to further mutilation upon return to Guinea.

2. The BIA Erred in Failing to Consider Other Forms of Persecution

Second, the BIA erred in assuming that genital mutilation is the only type of persecution relevant to the analysis of whether petitioners merited withholding of removal. See *A-T-*, 24 I. & N. Dec. at 299 (“[T]he fact that FGM is generally performed only once ... eliminat[es] the risk of *identical* future persecution.”) (emphasis added). Nothing in the regulation suggests that the future threats to life or freedom must come in the same form or be the same act as the past persecution. The withholding regulation triggers a presumption that “the applicant's life or freedom would be threatened in the future ... on the basis of the original claim.” 8 C.F.R. § 1208.16(b)(1)(i). Thus, to rebut the regulatory presumption, the government must show that changed conditions obviate the risk to life or freedom related to the original claim, e.g., persecution on account of membership in her particular social group. It cannot satisfy its burden solely by showing that the particular act of persecution suffered by the victim in the past will not recur. See *Hassan*, 484 F.3d at 518 (“The government's argument erroneously assumes that FGM is the only form of persecution in Somalia and that having undergone the procedure, Hassan, as a Somali woman, is no longer at risk of other prevalent forms of persecution. We have never held that a petitioner must fear the repetition of the exact harm that she has suffered in the past. Our definition of persecution is not that narrow.”) (internal citations omitted); *Mohammed*, 400 F.3d at 800 (“The State Department Reports in the record make clear that the subordination and persecution of women in Somalia is not limited to genital mutilation.”). As amicus argues, it would be incongruous to hold, for example, that the fact that an applicant's tongue was severed because he spoke out against the government in and of itself rebutted the presumption that his life or freedom would be threatened in the future simply because his tongue could not be cut off again. Indeed, having provided time to conduct the necessary research, we asked the parties to provide examples of any case outside the genital mutilation context where the BIA held that the presumption of fear of future persecution or threats to life or freedom had been rebutted simply by virtue of the fact that the exact same act of persecution—such as removal of a limb or organ—physically could not be repeated. The parties, not surprisingly, were unable to find any such case. Thus, there is no basis for denying withholding relief to victims of female genital mutilation simply because, as the BIA erroneously held, they may not be subject to the “risk of identical future persecution.” *A-T-*, 24 I. & N. Dec. at 299.¹⁰

¹⁰ FN21. As noted above, the BIA in *A-T-* rejected the Eighth Circuit's holding in *Hassan* as “at odds with the regulatory structure” for withholding of removal claims. In so doing, the BIA relied on 8 C.F.R. § 1208.16(b)(1)(iii), which provides that “[i]f the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.” Here, the record reveals that petitioners are potentially at risk of forms of persecution based on the same social group on account of which they were subject to genital mutilation. Thus, section 1208.16(b)(1)(iii) does not provide a basis for placing the burden on petitioners in these cases.

Apparently recognizing this error, the BIA in an unpublished and non-precedential opinion denying reconsideration in *A-T-*, conceded that Traore had made “a *116 legitimate argument” that genital mutilation and forced marriage were inflicted on account of membership in the same social group, and that “an asylum applicant could present a successful claim on a theory that FGM is a single type of harm in a series of injuries inflicted on account of one’s membership in a particular social group,” such that “she continues to have a well founded fear of future persecution based on the potential for related harm.” Nevertheless, the BIA denied reconsideration, inexplicably concluding that Traore failed to “me[et] her burden” of showing that her life or freedom would be threatened in the future in this manner, and that she failed to “show [] that she could not reasonably relocate elsewhere in Mali to avoid the marriage.” *In re Alima Traore*, No. A72 169 850 (B.I.A. Apr. 14, 2008) (emphasis added). The regulations clearly provide, however, that the burden is on the *government* to show that her life or freedom would *not* be threatened, or that she *could* safely relocate. 8 C.F.R. §§ 1208.16(b)(1)(i), (ii).

Here, the records below provide ample evidence that Guinean and/or Fulani women are routinely subjected to various forms of persecution and harm beyond genital mutilation. For example, the 2004 State Department Country Report on Human Rights Practices for Guinea states that “[d]omestic violence against women [is] common,” and that “police rarely interven[e] [] in domestic disputes.” *Id.* at 9. Moreover, the report states that women in Guinea are commonly subject, without recourse, to crimes such as rape and sex trafficking. *Id.* at 10. The government in these cases did not even attempt to argue that petitioners would not be subject to forms of persecution other than genital mutilation on account of their membership in particular social groups upon return to Guinea.

Under the regulations, once the petitioners established past persecution on account of a protected ground in the form of female genital mutilation, it should have been presumed that their lives or freedom would be threatened in the future. By failing to require the government to show, by a preponderance of the evidence, that petitioners would not endure further mutilation or other threats to their lives or freedom upon return, the BIA turned the presumption on its head. The agency must, on remand, hold the government to its regulatory burden.

Because we find that the case must be remanded based on the errors identified above, we do not reach the issue of whether the agency also erred in declining to apply its “continuing persecution” reasoning to claims based on female genital mutilation.¹¹

¹¹ All three petitioners also argue before this Court that they should be granted withholding of removal based on their fears that their daughters (or potential daughters) will be subject to genital mutilation should they be forced to return to Guinea; however, each petitioner failed to raise this argument in her brief to the BIA. Accordingly, as these arguments are unexhausted, we will not consider them. *See* 8 U.S.C. § 1252(d)(1); *Lin Zhong v. U.S. Dep’t of Justice*, 480 F.3d 104, 121-22, 124 (2d Cir.2007) (holding that issue exhaustion is mandatory, even if not a statutory jurisdictional requirement). Although Mariama briefly raised the fact that her daughters might be subject to genital mutilation upon return to Guinea in her brief to the BIA, she did so only in relation to her cancellation of removal claim, and the BIA addressed the issue only with respect to that claim. Any such argument in relation to her withholding of removal claim is therefore unexhausted, and her cancellation of removal claim is addressed in the separately filed summary order. Moreover, each petitioner failed to meaningfully argue before this Court or the BIA any claim for CAT relief based on genital mutilation. Accordingly, we deem any such argument unexhausted and waived. *Lin Zhong*, 480 F.3d at 121-22; *Yueqing Zhang v. Gonzales*, 426 F.3d 540, 541 n. 1, 545 n. 7 (2d Cir.2005). These portions of the petitions for review must therefore be dismissed. The BIA is, of course, free to consider these claims on remand.

CONCLUSION

In sum, we find that the BIA erred in its application of the withholding of removal regulatory framework to female genital mutilation claims. We accordingly decline to adopt the reasoning and holding of *A-T-* in our Circuit, and the cases before us must therefore be remanded to the BIA. “To the extent there is a need for further development of the factual record[s], a task outside the scope of the BIA's authority, *see* 8 C.F.R. §§ 1003.1(d)(3)(i), (iv), we instruct that on remand, the BIA send th[ese] case[s] to an IJ for further findings of fact.” *Delgado v. Mukasey*, 508 F.3d 702, 708 (2d Cir.2007). *See also Gui Yin Liu v. INS*, 508 F.3d 716, 723 (2d Cir.2007) (per curiam) (remanding to the BIA with instructions to remand to the IJ “if necessary” to further develop factual record).

For the foregoing reasons, the petitions for review are GRANTED in part and DISMISSED in part with respect to the claims relating to female genital mutilation. Other portions of the petitions for review are DENIED in part and DISMISSED in part for the reasons set forth in a separately filed summary order. The decisions of the BIA are VACATED, and the cases are REMANDED to the BIA for proceedings consistent with this opinion.

STRAUB, *Circuit Judge*, concurring:

I write separately because, although my colleagues believe we need not reach the issue of whether the BIA erred in declining to apply its “continuing persecution” reasoning in the genital mutilation context, I believe it prudent to decide the issue, as it provides petitioners with another potential avenue for relief.¹² For the reasons that follow, I conclude that even assuming the government had met its burden of demonstrating that the petitioners will not be subject to further mutilation or other related threats to their lives or freedom in the future, the BIA erred in failing to recognize female genital mutilation as a form of continuing persecution.

I. Forced Sterilization and *Y-T-L-*

In *In re Y-T-L-*, 23 I. & N. Dec. 601 (B.I.A.2003) (en banc), the BIA, assessing the asylum application of an applicant fleeing China due to its “one child” policy, held that even though forced sterilization was an act of persecution that would not be repeated, the fact that the act had occurred in the past could not in and of itself be used to rebut the presumption of a fear of future persecution because forced sterilization, unlike most other forms of persecution, constituted continuing persecution. *Id.* at 605. I conclude that the BIA erred in failing to treat female genital mutilation in the same manner, but in order to more fully explain my reasoning, some background as to the evolution of the assessment of forced sterilization claims is necessary.

Initially, in *In re Chang*, 20 I. & N. Dec. 38 (B.I.A.1989), *superseded by statute as stated in Guan Shan Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 65 (2d Cir.2002), the BIA held that forced sterilization did not constitute persecution on account of any of the protected grounds. *Id.* at 44. *See also In re G-*, 20 I. & N. Dec.

¹² In particular, I note that the two bases for remand identified in the majority opinion are not necessarily determinative of the outcome of petitioners' applications. *Cf., e.g., Fay v. Oxford Health Plan*, 287 F.3d 96, 103 (2d Cir.2002) (“Because this Court finds the first two issues dispositive, it does not reach the third issue.”). *See also Vumi v. Gonzales*, 502 F.3d 150, 156 (2d Cir.2007) (“It bears underscoring that the BIA must apply the correct standard on remand....”). Moreover, all parties and amicus have exhaustively briefed this issue. *Cf., e.g., LNC Invs., Inc. v. First Fid. Bank, N.A.*, 173 F.3d 454, 468 (2d Cir.1999) (“Our decision not to reach this issue on the merits is reinforced by the fact that it has not been adequately briefed and argued before this Court.”).

764, 775 (B.I.A.1993) (“[W]e remain of the opinion that our interpretation of the law regarding China's one couple, one child policy articulated in *Matter of Chang* is legally correct”) (citation omitted). In so holding, the BIA in *Chang* explicitly highlighted the need for congressional action as to this issue. *See* 20 I. & N. Dec. at 47 (“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 response, Congress amended the INA as follows:

[A] person who has been forced ... to undergo involuntary sterilization ... 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 ... shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. § 1101(a)(42). At the time Congress enacted this amendment, the regulations provided that the presumption of a well founded fear of future persecution could only be rebutted by changed country conditions. *See* 8 C.F.R. § 208.13(b)(1)(i) (1997). Accordingly, the fact that a person had been forcibly sterilized in the past could not, in and of itself, be used to rebut the presumption of fear of future persecution. In 2000, however, the regulation was amended to provide that any fundamental change in circumstances could be used to rebut the presumption. *See* 8 C.F.R. § 1208.13(b)(1)(i); 65 Fed.Reg. 76121-01 (Dec. 6, 2000).

In *Y-T-L-*, the BIA, acting en banc, applied the new regulatory framework to a case involving past forced sterilization. The BIA stated that “the [applicant] has no reasonable basis to fear [forced sterilization] in the future, based on the very fact that he has already been persecuted,” and that, as a result, under the new regulatory scheme, the presumption of fear of future persecution might be viewed as having been rebutted. 23 I. & N. Dec. at 606. However, the BIA, emphasizing “the special nature of the persecution at issue here,” as well as Congress's intent in defining forced sterilization as persecution on account of political opinion, held that the fact that an applicant had been forcibly sterilized in the past could not itself be used to rebut the presumption of a fear of future persecution. *Id.* at 605-07. Specifically, the BIA reasoned:

The Immigration Judge's conclusion fails to take into account the continuing nature of the persecution inflicted on the respondent and his wife. Moreover, the principal reason that the respondent and his wife no longer fear a coerced sterilization or abortion, or future fines for “over-birth,” is the fact that they have been rendered incapable of having children. *Thus, the Immigration Judge's rationale could lead to the anomalous result that the act of persecution itself would also constitute the change in circumstances that would result in the denial of asylum to persons such as the respondent.*¹³

¹³ To the extent that the BIA by these words is interpreting the regulations as a general matter to prohibit an act of persecution itself from being the “fundamental *change* in circumstances” that rebuts the presumption of fear of future persecution or threats to life or freedom, I agree. The regulations specifically provide that once past persecution is established, it takes a showing of a “fundamental change in circumstances” to rebut the presumption. 8 C.F.R. §§ 1208.13(b)(1)(i)(A), 1208.16(b)(1)(i)(A) (emphasis added). It stands to reason that the “change” contemplated by the regulations must have occurred since the past persecution occurred; otherwise, the “fundamental change in circumstances” portion of the regulations would be superfluous; the regulations could merely have provided that the presumption could be rebutted by a showing that the applicant would not be persecuted in the future or that the applicant's life or freedom would no longer be threatened in the future. As the authoring member of *A-T-* noted in his dissent in *Y-T-L-*, such language was indeed proposed, but the “fundamental change in circumstances” language was adopted so as to account for those individuals whose affected group did not fear future persecution but who had

Id. at 605 (emphasis added). The BIA further reasoned that “[t]he act of forced sterilization should not be viewed as a discrete, onetime act, comparable to a term in prison, or an incident of severe beating or even torture.” *Id.* at 607. Instead, forced sterilization is “better viewed as a permanent and continuing act of persecution.” *Id.* Accordingly, the BIA granted the application for asylum, holding that “the regulatory presumption of a well-founded fear of persecution arising from such past persecution has not been rebutted.” *Id.* at 607-08.¹⁴

The agency's understanding of certain types of persecution as constituting continuing persecution is consistent with the language of the regulations. See *Zhen Nan Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 262 (2d Cir.2006); *Qili Qu v. Gonzales*, 399 F.3d 1195, 1203 (9th Cir.2005). The BIA, acting within the regulatory framework, reasonably determined that the fact that an individual had already undergone forced sterilization could not itself rebut the presumption of a fear of future persecution because, unlike other types of persecution, the act of forced sterilization is “permanent and continuing.” *Y-T-L-*, 23 I. & N. Dec. at 607. That is to say, even though the actual act of forced sterilization occurred in the past, the act continues to “deprive[] a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them.” *Id.* Unlike most other types of persecution, such as “a term in prison, or an incident of severe beating or even torture,” *id.*, forced sterilization is performed once because it need only be performed once: it is for life. It stands to reason that if an applicant continues to be persecuted into the future, the presumption that the applicant's life or freedom would be threatened in the future cannot be rebutted.

II. Application of the “Continuing Persecution” Reasoning to the Female Genital Mutilation Context

Because female genital mutilation, like forced sterilization, is a continuing act of persecution that, at a minimum, permanently deprives a woman of certain aspects of her sexuality, it follows that, like forced sterilization, the act of mutilation itself could not rebut the presumption that the applicant's life or freedom would be threatened in the future.¹⁵ See *Mohammed v. Gonzales*, 400 F.3d 785, 799 n. 22 (9th Cir.2005) (“[T]he

themselves experienced past persecution. See *Y-T-L-*, 23 I. & N. Dec. at 617 (Filppu, Board Member, dissenting). Because it is not clear whether the BIA indeed intended to express such an interpretation, I do not rest my concurrence on this ground. Cf. *Delgado v. Mukasey*, 516 F.3d 65, 69 (2d Cir.2008) (“[W]e give ‘substantial deference’ to BIA decisions interpreting immigration regulations.”). I note, however, that the BIA did not address this possible interpretation of the regulations in the present cases or in *A-T-*, even though it is potentially determinative of the issue at hand, and I would encourage the BIA to do so on remand.

¹⁴ I note that in *Y-T-L-*, it was the applicant's wife—as opposed to the applicant himself—who had been sterilized. We subsequently held in *Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296 (2d Cir.2007) (en banc), that applicants could not obtain asylum based solely on the forced sterilization of their partners, *id.* at 300, and recently, the Attorney General came to this same conclusion in a published opinion, *In re J-S-*, 24 I. & N. Dec. 520 (A.G.2008). But these decisions did nothing to alter the basic holding of *Y-T-L-*—that past forced sterilization cannot in and of itself be used to rebut the presumption of fear of future persecution because the persecution is “continuing.”

¹⁵ My colleague attempts to distinguish these cases from *Y-T-L-* by noting that withholding of removal “is a form of relief that by statute is prospective looking only.” However, this observation does nothing to distinguish *Y-T-L-*, where the BIA also noted that asylum is a “prospective” form of relief. 23 I. & N. Dec. at 606 (“[T]his prospective view is not only unobjectionable, but is a bedrock principle of refugee law....”). Indeed, the asylum regulations provide that the only way an asylum applicant can be granted asylum based on the past persecution alone is based on the severity of the past persecution, see 8 C.F.R. § 1208.13(b)(1)(iii)(A), but the BIA was not operating under this regulation in *Y-T-L-*.

principle that the fact of sterilization cannot be used by the government to rebut the fear of future harm was developed by the BIA ... as a recognition of the special, continuing, and permanent nature of coercive population control.... [T]he reasoning in the forced sterilization cases would appear to apply equally to the case of genital mutilation.”).

Since the day after it issued its decision in *Y-T-L-* on May 22, 2003, the BIA has, on numerous occasions in unpublished decisions, granted asylum or withholding of removal to victims of genital mutilation based on the finding that female genital mutilation is a continuing form of persecution. See, e.g., *In re Bosede Olawumi*, No. A70 651 629 (B.I.A. May 23, 2003) (per curiam) (“Forced female genital mutilation is better viewed as a permanent and continuing act of persecution that has permanently removed from a woman a physical part of her body, deprived her of the chance for sexual enjoyment as a result of such removal, and has forced her to [sic] potential medical problems relating to this removal.”); *In re Mariama Dalanda Bah*, No. A97 166 217 (B.I.A. Sept. 1, 2005) (per curiam) (“The persecution resulting from FGM is therefore continuing and permanent. Considering the continuing effects of such persecution, we find that the presumption of future harm has not been adequately rebutted simply because the procedure may not be repeated on the [applicant].”); *In re Aisatou Sillah*, No. A72 784 955 (B.I.A. Nov. 7, 2005) (“[T]he [IJ] observed in his decisions that the [applicant], who had been subjected to FGM, had suffered past persecution on account of a protected ground. The [IJ] noted that there was no indication that the effects of her persecution would dissipate and may be taken as permanent.... We find that the [IJ]’s observations are fully consistent with our decision in *Matter of Y-T-L-*.”) (citations omitted). Nevertheless, in September 2007, the BIA issued *In re A-T-*, 24 I. & N. Dec. 296 (B.I.A.2007), in which it reversed course and held that female genital mutilation was not a continuing form of persecution.¹⁶ In so holding, the BIA in my view committed several errors in reasoning.

First, in *A-T-*, the BIA reasoned that it “treated sterilization as continuing persecution [in *Y-T-L-*] because it would have contradicted Congress’s purpose to find that the very act that constituted persecution under the coerced population control provisions was itself a ‘fundamental change in circumstances’ that obviated a future well-founded fear.” *A-T-*, 24 I. & N. Dec. at 300 (quoting 8 C.F.R. § 1208.13(b)(1)(i)(A)). This was because, in the BIA’s view, unlike victims of genital mutilation, “[t]he statute defined victims of forced sterilization ... as qualifying for relief.” *Id.* But the fact that Congress specifically defined forced sterilization as persecution does nothing to meaningfully distinguish it from female genital mutilation, which, as set forth in the majority opinion, has been found to constitute persecution by the BIA and the vast majority of the courts of appeals.

In *Y-T-L-*, the BIA itself noted that Congress’s purpose in amending section 1101(a)(42) was to supersede prior BIA decisions that had held that forced sterilization did not constitute persecution on account of a protected ground. See 23 I. & N. Dec. at 603-04, 607 (“The principal issue of contention ... was whether such harm was on account of a ground protected under the Act. Congress has definitively answered that question”) (internal citations omitted). The legislative history of the amendment confirms this notion. See, e.g., H.R.Rep. No. 104-469(I) at 173-74, 1996 WL 168955 (1996) (“The primary intent of [the amendment] is to overturn several

The BIA was operating only within the parameters of the forward-looking portion of the asylum framework, and it satisfied the provisions of that framework by reasoning that forced sterilization was a form of persecution that continued on into the future. Accordingly, for the reasons set forth below, this reasoning applies with equal force in the context of withholding of removal claims based on female genital mutilation.

¹⁶ The BIA apparently, for some unspecified period in advance of *A-T-*, began issuing unpublished decisions, such as the ones before us now, advancing the reasoning which later appeared in *A-T-*.

decisions of the Board of Immigration Appeals, principally *Matter of Chang* and *Matter of G-....* Nothing in [the amendment] is intended to lower the evidentiary burden of proof for any alien, no matter how serious the nature of the claim.”). Congress, in effect, did for forced sterilization claims what the BIA did in *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A.1996) (en banc), for genital mutilation claims: it provided for basic qualification for asylum and withholding of removal by defining forced sterilization as persecution on account of one of the protected grounds, without altering the regulatory framework for assessing such claims.¹⁷ See *Shi Liang Lin*, 494 F.3d at 309 (“Congress has relieved ... persons who actually experienced, or are threatened with, a forcible abortion or sterilization from the burden of proving a political nexus in their particular cases.”). Thus, the reasoning of *Y-T-L-* - that it would be “anomalous” under the statutory and regulatory framework to allow the “act of persecution itself [to] constitute the change in circumstances that would result in the denial of asylum,” 23 I. & N. Dec. at 605 - applies with equal force in the forced sterilization and female genital mutilation contexts. Accordingly, in my view, the BIA's attempt in *A-T-* to distinguish the two contexts in this manner fails.¹⁸ See *Fox Television Stations, Inc. v. Fed. Comm'n's Comm'n*, 489 F.3d 444, 456 (2d Cir.2007) (“[Agencies] must provide a reasoned analysis for departing from prior precedent.”), *cert. granted*, --- U.S. ---, 128 S.Ct. 1647, 170 L.Ed.2d 352 (2008); *Ke Zhen Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 95 (2d Cir.2001) (“[A]pplication of agency standards in a plainly inconsistent manner across similar situations evinces such a lack of rationality as to be arbitrary and capricious.”); *cf. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) (“[I]f the agency *adequately explains* the reasons for a reversal of policy, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.”) (internal quotation marks omitted) (emphasis added).

¹⁷ Although the BIA's unpublished decisions are not precedential, see *Ajdin v. BCIS*, 437 F.3d 261, 264-65 (2d Cir.2006) (per curiam), I note in passing that this conclusion is supported by the fact that immediately following the issuance of *Y-T-L-*, the BIA, even in three-member decisions, began applying the “continuing persecution” reasoning in FGM cases without distinguishing the two contexts based on the amendment.

¹⁸ To the extent that the BIA in *A-T-* now attempts to distinguish the two contexts on the ground that the amendment provides automatic relief to forced sterilization victims, such an interpretation is belied by the reasoning and holding of *Y-T-L-*. The BIA in *Y-T-L-* determined *how* to apply the new regulatory framework to forced sterilization cases, not that it need not apply it at all. But if the BIA in *Y-T-L-* had truly interpreted the statute as conferring per se relief to anyone who had suffered forced sterilization in the past, the “continuing persecution” reasoning would not be necessary because such cases would not be subject to the burden shifting regulations. See *Mohammed*, 400 F.3d at 799 n. 22. Indeed, the authoring member of *A-T-* noted as much in his dissent in *Y-T-L-*, which was joined by yet another member on *A-T-*. See *Y-T-L-*, 23 I. & N. Dec. at 613 (Filppu, Board Member, dissenting) (“The majority is correct that the statute equates persecution arising from a coercive population control program as being persecution ‘on account of political opinion.’ The statute, however, does not direct that persons suffering such persecution be exempt from the normal rules that apply to all persons who have suffered past persecution on account of political opinion but who lack a reasonable fear of future persecution.”). To the extent applicants now receive relief based on the past act of forced sterilization alone, it is because of the reasoning set forth in *Y-T-L-*, namely that the persecution is continuing and thus a fear of future persecution cannot be rebutted. See *Xue Hong Yang v. U.S. Dep't of Justice*, 426 F.3d 520, 522 (2d Cir.2005) (“The BIA has held that forced sterilization constitutes a form of permanent and continuing persecution that qualifies an alien for asylum under the INA.”) (citing *Y-T-L-*, 23 I. & N. Dec. at 606-07); *Li Yong Cao v. U.S. Dep't of Justice*, 421 F.3d 149, 155-56 (2d Cir.2005) (“The BIA has held that because the persecution of forcible sterilization or abortion is ‘permanent and continuous,’ it inherently generates an irrebuttable presumption of a well-founded fear of future persecution.”) (citing *Y-T-L-*, 23 I. & N. Dec. at 605-08).

Like forced sterilization and unlike most other types of persecution, female genital mutilation continues to persecute its victims well beyond the initial act of mutilation. In *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A.1985), *overruled in part on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A.1987), in which the BIA for the first time announced parameters for the statutory term “particular social group,” the BIA stated that the purpose of persecution is to “punish [an individual] for possessing a belief or characteristic a persecutor seeks to overcome.” *Id.* at 223. In *Kasinga*, the BIA affirmed that genital mutilation fulfills this purpose, because “FGM is practiced, at least in some significant part, to overcome sexual characteristics of young women.” 21 I. & N. Dec. at 367. *See also Mohammed*, 400 F.3d at 798. In particular, as stated above, female genital mutilation is often performed in order to eliminate sexual pleasure in its victims, *see, e.g., Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir.2004); *Abankwah v. INS*, 185 F.3d 18, 23 (2d Cir.1999), in order to ensure the victim's fidelity in marriage, *see, e.g., Niang v. Gonzales*, 422 F.3d 1187, 1192 (10th Cir.2005), or to prevent the victim from or punish her for engaging in premarital sex, *see, e.g., Abay*, 368 F.3d at 644 (Sutton, J., concurring); *Abankwah*, 185 F.3d at 20. In the cases before us, petitioners testified that as a result of the genital mutilation they suffered, they continue either to feel no pleasure or to experience pain during intercourse.

The BIA-in the present cases and in *A-T*--again attempts to distinguish female genital mutilation from forced sterilization, stating that it is more analogous to other “lasting disabilit[ies], such as the loss of a limb,” *A-T*, 24 I. & N. Dec. at 300, and reasoning, “[t]he loss of a limb also gives rise to enduring harm to the victim, but such forms of past persecution are routinely assessed under the past persecution standards specified in the asylum and withholding of removal regulations,” *id.* at 301.¹⁹ But the BIA conveniently stops short of taking this analogy to its logical conclusion. The loss of a limb or organ on account of a protected ground could never, in and of itself, be used to rebut a fear of future persecution or threats to life or freedom.²⁰ Indeed, as noted in the majority opinion, the parties have been unable to point us to a single instance outside the genital mutilation context where the BIA has accepted such an argument.

More importantly, in advancing this analogy, the BIA conflates continuing persecution with continuing harm. Compare *Y-T-L-*, 23 I. & N. Dec. at 607 (forced sterilization is viewed as a “permanent and continuing act of persecution”), with *A-T-*, 24 I. & N. Dec. at 299-300 (stating that female genital mutilation is a “continuing harm” that “has ongoing physical and emotional effects”). While the loss of a limb or organ undoubtedly carries with it lasting physical effects and continuing harm, the physical effects and harm will rarely be directly related to the protected ground on account of which the victim was persecuted. In contrast, in the genital mutilation context, as in the forced sterilization context, the *form* of persecution itself--and consequently the harm suffered by the victim--is directly related to the victim's protected group and the “characteristic[s][the] persecutor seeks to overcome,” *Acosta*, 19 I. & N. Dec. at 223, i.e., in the forced sterilization context, the ability to have children, and in the genital mutilation context, the woman's “sexual characteristics,” *Kasinga*, 21 I. & N. Dec. at 367. As substantiated by petitioners' testimony--including that they will for life be unable to experience pleasure from intercourse--and record evidence, at least some of the “sexual characteristics” of victims of female genital mutilation are suppressed by the act of mutilation itself and will continue to be suppressed for the rest of their lives as a result of the act. Such victims, therefore, not only continue to be harmed as a result of the form of

¹⁹ Similarly, in the cases before us, the BIA analogized genital mutilation to the loss of “a bodily organ.”

²⁰ *See Diallo v. Mukasey*, 268 Fed.Appx. 373, ----, 2008 WL 508622, at * 11 (6th Cir.2008) (Moore, J., dissenting) (“We would not take seriously the argument that someone who lost a limb in the course of persecution on account of his social-group membership categorically could not establish a well-founded fear of future persecution only because he could not again lose that same limb.”).

persecution they endured, but also continue to be persecuted. In contrast, victims of most other types of persecution may experience lasting effects or harm resulting from the persecution, but the characteristics their persecutors “seek[] to overcome” will not have been suppressed or overcome for life based solely on the method of persecution. Thus, even accepting as true the BIA's unfounded assertion that genital mutilation is only performed once, like forced sterilization and unlike most other forms of persecution (including those with lasting adverse effects), it is only performed once because it *need* only be performed once: even after the initial act of mutilation, the persecution endures.²¹ Accordingly, just as in the forced sterilization context, it stands to reason that because a victim of female genital mutilation continues to be persecuted into the future, the presumption that her life or freedom will be threatened in the future on account of one of the protected grounds cannot be rebutted.²²

* * *

In sum, although I agree with my colleagues that the errors identified in the majority opinion themselves require remand, I would further hold that the BIA erred in failing to recognize female genital mutilation as continuing persecution because (1) the “continuing persecution” reasoning, which has been fully briefed and argued by all parties and amicus, provides petitioners with another potential avenue for relief; (2) the agency's understanding of certain types of persecution, such as forced sterilization, as constituting continuing persecution is consistent with the regulatory framework for asylum and withholding of removal; and (3) the BIA's attempt to distinguish female genital mutilation from forced sterilization does not withstand scrutiny.

I conclude by expressing my strong disapproval of the actions of the BIA in these cases. The BIA in the cases before us and in *A-T-* has attempted (unsuccessfully, in my opinion) to limit the reasoning and holding of *Y-T-L-* to the forced sterilization context. In so doing, as set forth in our majority opinion, it has failed even to treat claims based on female genital mutilation as it would (and should) claims based on any other type of persecution. The BIA refers, in passing, to the act of female genital mutilation as “reprehensible,” *Matter of A-T-*, 24 I. & N. Dec. at 299, but its entirely dismissive treatment of such claims in these cases belies any sentiment to that effect. I am aware of the limited resources available to the agency in adjudicating its cases, *see, e.g., Kadia v. Gonzales*, 501 F.3d 817, 820-21 (7th Cir.2007); however, despite difficulties that may be presented by a lack of time or staffing, the BIA is expected to adequately fulfill its adjudicatory role by “exercis[ing] care commensurate with the stakes” in cases such as these. *Id.* at 821. As set forth in the majority opinion, and as the BIA and the vast majority of the courts of appeals have recognized, female genital mutilation is a horrendous act of persecution that can have serious, life-long consequences. Victims of this practice, such as the petitioners before us, are, at the

²¹ This distinction obviates the concern hinted at in my colleague's concurrence that all cases “where ongoing physical or emotional harm from a prior persecutory act is alleged” would have to be granted under the “continuing persecution” reasoning. In order to invoke the “continuing persecution” reasoning in other contexts, victims of past persecution would have to show that they continued to be *persecuted*-not merely *harmed*-as a result of the form of persecution, that is to say, their particular “characteristic[s]” that their persecutors sought “to overcome” continue to be suppressed or overcome into the future as a result of the method of past persecution. Such a showing will be impossible in most cases outside the forced sterilization and female genital mutilation contexts.

²² I am mindful of the fact that the continuing persecution that results from genital mutilation would occur regardless of whether the applicant was located in this country or in her home country; however, this fact does not serve to distinguish genital mutilation from forced sterilization. Moreover, there are obvious concerns with sending a person who continues to be persecuted to live among her persecutors.

very minimum, entitled to careful analysis as to whether they qualify for relief under the statutory and regulatory framework for asylum and withholding of removal claims. On this score, the agency has simply failed.

SOTOMAYOR, Circuit Judge, concurring:

I fully join the majority opinion. I write separately only to note that I do not necessarily agree with my colleague's analysis or conclusions in his concurring opinion on the issue of "continuing persecution," and to further explain why I think it is imprudent for us to rule on the matter at this time. Withholding of removal is a form of relief that by statute is prospective looking only. 8 U.S.C. § 1231(b)(3)(A). It is only by regulation that a finding of past persecution gives rise to a presumption of a future threat to life or freedom for purposes of withholding of removal eligibility. 8 C.F.R. § 1208.16(b)(1)(i). Thus, in the event that the government is able on remand to satisfy its burden of proving the unlikelihood of a future threat to petitioners' life or freedom upon their return to Guinea, I cannot say at this time that it would be impermissible for the agency to deem petitioners ineligible for withholding relief. *Cf. Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (substantial deference owed to agency's interpretation of its own regulation unless the interpretation is "plainly erroneous or inconsistent with the regulation") (internal quotation marks and citation omitted). However, because deciding the continuing persecution issue is (i) unnecessary to our disposition of these tandem cases, (ii) may never need to be decided after our instructions on remand are complied with, and (iii) could have far reaching implications in other types of cases where ongoing physical or emotional harm from a prior persecutory act is alleged, I think it is imprudent for us now to decide the issue one way or the other.

IN RE A-K- 24 I & N Dec. 275 (BIA 2007)

BEFORE: Board Panel: COLE, FILPPU, and PAULEY, Board Members.

PAULEY, Board Member:

In a decision dated October 26, 2006, an Immigration Judge found the respondent removable but granted his request for withholding of removal pursuant to section 241(b)(3)(A) of the Immigration and Nationality Act, [8 U.S.C. § 1231\(b\)\(3\)\(A\)](#) (2000). Because he granted that application, the Immigration Judge denied as moot the respondent's application for protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. Res. 39/46. 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (*entered into force* June 26, 1987; for the United States Apr. 18, 1988) (“Convention Against Torture”). The Department of Homeland Security (“DHS”) has filed a timely appeal of that decision, contesting the Immigration Judge's grant of withholding of removal under section 241(b)(3)(A) of the Act. The appeal will be sustained, the decision of the Immigration Judge will be vacated, and the respondent will be ordered removed from the United States.

The respondent is a native and citizen of Senegal who sought relief from removal based on his claim that his two minor United States citizen daughters would be subjected to female genital mutilation (“FGM”) in his home country. The Immigration Judge determined that the respondent was entitled to withholding of removal under section 241(b)(3)(A) of the Act, primarily based on his finding that the respondent's daughters would more likely than not be forced to undergo FGM in the future in Senegal. We conclude that this determination is both factually flawed and legally unsound.

It does not appear that the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this matter arises, has published any case law addressing the issue whether an alien parent can establish eligibility for asylum or withholding of removal based on his fear that his child will be persecuted. However, we observe that two sister circuits have recently published cases addressing this issue. While these cases, which involved differing factual scenarios, reached opposite results, neither case holds, or even suggests, that an applicant is eligible for asylum or withholding of removal on the basis of feared future harm to his United States citizen child.

In [Oforji v. Ashcroft, 354 F.3d 609 \(7th Cir. 2003\)](#), the Seventh Circuit determined that an alien parent, a citizen of Nigeria who had no legal standing to remain in the United States, could not establish her own claim for asylum based on potential persecution to her United States citizen children, who had the right to remain in the United States in the event of the alien's deportation, even where her children allegedly faced FGM if they returned with her to Nigeria. Of particular note, the Seventh Circuit distinguished that case from its prior decision in [Salamed v. INS, 70 F.3d 447 \(7th Cir. 1995\)](#), in which the court directed us to consider hardship to an alien's noncitizen child who would be “constructively deported” along with his parents. The Seventh Circuit factually distinguished the situation presented in *Oforji* from that in *Salamed*, noting that in *Oforji* the alien's two female children were both United States citizens and therefore had the legal right to remain in this country in the event of the alien's deportation, unlike the child in *Salamed*. *Oforji v. Ashcroft, supra*, at 616. Moreover, the court observed that *Salamed* involved a situation where both parents of the child were being deported, whereas the alien in *Oforji* failed to establish that her husband would be deported. *Id.*

In [Abay v. Ashcroft, 368 F.3d 634 \(6th Cir. 2004\)](#), the Sixth Circuit determined that an alien parent, a

citizen of Ethiopia, established her own reasonable fear of future persecution based on her fear that her daughter, who was also an Ethiopian citizen with no legal right to remain in the United States, would be forced to undergo FGM if they were to return to Ethiopia. The Sixth Circuit embraced a “governing principle in favor of refugee status in cases where a parent and protector is faced with exposing her child to the clear risk of being subjected against her will to a practice that is a form of physical torture causing grave and permanent harm.” *Abay v. Ashcroft*, supra, at 642.

We observe that the Fourth Circuit has explicitly declined to follow *Abay v. Ashcroft*, supra, insofar as it held that a parent applicant could establish eligibility for asylum based on the incidental psychological suffering of the parent occasioned by harm to her child. *Niang v. Gonzales*, 492 F.3d 505 (4th Cir. 2007). Noting that “*Abay* is the only federal decision permitting a parent to seek relief, in her own right, based solely on the psychological suffering she will endure if her daughter will be subjected to FGM upon removal,” the Fourth Circuit concluded that “because ‘persecution’ cannot be based on a fear of psychological harm alone, Niang’s withholding claim fails as a matter of law because it focuses solely on the psychological harm she claims she will suffer if her daughter accompanies her to Senegal and is there subjected to FGM.” *Niang v. Gonzales*, supra, at 512. As discussed below, we find that a similar result is required in the instant case.

Factually, we find that this case is nearly identical to *Oforji v. Ashcroft*, supra, as there is no dispute that the two minor children in question are both United States citizens and have a legal right to remain in this country. Furthermore, as in *Oforji*, only one parent is in removal proceedings. By contrast, *Abay v. Ashcroft*, supra, is factually distinguishable, as that case involved a situation where the daughter of the alien in removal proceedings had no lawful status in the United States and could not legally remain in the country in the event of her mother’s removal in order to avoid persecution. Thus, unlike the situation in *Abay*, where the alien parent was “faced with exposing her child to the clear risk” of FGM, *id.* at 642, the children in the instant matter could avoid this risk altogether by remaining in the United States, which they are legally entitled to do, either by staying with the parent who is not currently in removal proceedings, or through the appointment of a guardian to ensure their welfare until such time as they reach majority. Finally, in *Abay*, the Sixth Circuit determined that the practice of FGM in Ethiopia was “‘nearly universal,’” and thus that there was little doubt that the respondent’s daughters would undergo the procedure if they accompanied their mother to that country. *Id.* at 636, 642 (quoting Department of State reports).

By contrast, the State Department’s 2005 country report on human rights practices in Senegal indicates that FGM is common only in certain areas of the country. See Bureau of Democracy, Human Rights, and Labor, U.S. Dep’t of State, *Senegal Country Reports on Human Rights Practices-2005* (Mar. 8, 2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61589.htm>. A State Department asylum profile of Senegal also indicates that FGM is not practiced at all by the country’s largest social group. See Bureau of Democracy, Human Rights, and Labor, U.S. Dep’t of State, *Senegal Profile of Asylum Claims and Country Conditions* 9 (June 1998). Accordingly, it appears that even if the respondent’s children were to accompany him to Senegal, they could avoid FGM by relocating to an area of comparative safety. [8 C.F.R. § 1208.16\(b\)\(1\)\(i\)\(B\) \(2007\)](#).

Moreover, even if the respondent’s children went with him to Senegal and faced a risk of FGM, we would decline to find that he could establish eligibility for withholding of removal under the circumstances presented in this case. Various circuit courts that have addressed an applicant’s claim of future persecution based on harm to his family members have generally indicated that acts of persecution against the family members do not serve to establish a risk of future persecution to the applicant himself, absent a pattern of persecution tied to the applicant personally. See, e.g., *Akhtar v. Gonzales*, 406 F.3d 399 (6th Cir. 2005); *Nyonzele v. INS*, 83 F.3d 975 (8th Cir. 1996); *Arriaga-Barrientos v. U.S. INS*, 937 F.2d 411 (9th Cir. 1991); see also *Tamas-Mercea v. Reno*, 222 F.3d

[417, 424 \(7th Cir. 2000\)](#) (rejecting an alien's claim for asylum based solely on harm to family members). In particular, courts have found that an applicant can establish a well-founded fear of persecution in cases where he faces a reasonable possibility of persecution based on imputed political opinion where his family was persecuted on the basis of *their* political beliefs or activities, and it is reasonable to believe that the applicant himself would falsely be perceived to share his family's beliefs upon returning to his home country. *See, e.g., Makonnen v. INS*, [44 F.3d 1378 \(8th Cir. 1995\)](#); *Ramirez Rivas v. INS*, [899 F.2d 864 \(9th Cir. 1990\)](#). However, in this case, there is no such risk to the applicant.

We recognize that there may also be cases where a person persecutes someone close to an applicant, such as a spouse, parent, child or other relative, with the intended purpose of causing emotional harm to the applicant, but does not directly harm the applicant himself. However, in such a case, the persecution would not be “derivative,” as the applicant himself would be the target of the emotional persecution that arises from physical harm to a loved one. Automatically treating harm to a family member as being persecution to others within the family is inconsistent with the derivative asylum provisions, as it would obviate the need for these provisions in many respects.

Thus, allowing an applicant to obtain asylum or withholding of removal through persecution to his child would require granting relief outside the statutory asylum scheme established by Congress.²³ In the context of asylum claims, the Act contemplates that a spouse or child of an alien who is granted asylum based on persecution may, if not otherwise eligible for asylum himself, be granted the same status as the alien if accompanying, or following to join, the alien who has been granted asylum. Section 208(b)(3)(A) of the Act, [8 U.S.C. § 1158\(b\)\(3\)\(A\)](#) (Supp. IV 2004). However, the converse is not true; there is no statutory basis for a grant of derivative asylum status to a parent based on the grant of asylum to his child. Furthermore, in situations contemplated by section 208(b)(3)(A) of the Act, the principal applicant must first establish entitlement to asylum in his own right, following which the spouse or child of the principal applicant may then be afforded asylum status through him. In the matter at hand, the children who are alleged to face persecution, and through whom the respondent in this matter seeks to derive relief, are not applicants for asylum, as they are United States citizens with a legal right to remain in this country.

Furthermore, while section 208(b)(3)(A) of the Act provides for derivative asylum in certain circumstances, the Act does not permit derivative withholding of removal under any circumstances. In this regard, we agree with the conclusion reached by the Fourth Circuit in *Niang v. Gonzales*, *supra*, as to the issue of derivative withholding of removal. In that decision, the Fourth Circuit found the following:

Where, as here, an alien is not eligible for relief under § 1229b [pertaining to cancellation of removal], there is simply no statutory or regulatory authority for her to claim withholding of removal based on threatened hardship to her U.S. citizen minor daughter. As Congress has not provided for such a derivative withholding claim, we will not judicially amend the statute to create one.

²³ We recognize that in *Tchoukhrova v. Gonzales*, [404 F.3d 1181 \(9th Cir. 2005\)](#), the Ninth Circuit held that the harm suffered by the disabled child of an asylum applicant could be imputed to the applicant, the child's mother, in support of her application. However, the United States Supreme Court recently vacated this judgment and remanded the matter to the Ninth Circuit for further consideration in light of its decision in *Gonzales v. Thomas*, [547 U.S. 183 \(2006\)](#) (finding that it was improper for the Ninth Circuit to determine that an alien's family constituted a “particular social group” for asylum purposes, as the proper course was to remand this issue to the Board for an initial agency determination). *Gonzales v. Tchoukhrova*, [127 S. Ct. 57 \(2006\)](#).

Id. at 512 (footnote omitted). Accordingly, we disagree with the Immigration Judge's conclusion that the respondent has established eligibility for withholding of removal based on his fear that his two United States citizen children would be forced to undergo FGM in Senegal.

We also reject the Immigration Judge's alternative grant of withholding of removal to the respondent on "humanitarian grounds" based on the severity of the potential harm to his children. Section 241(b)(3)(A) of the Act does not contain a discretionary component and does not allow an Immigration Judge to award "relief" for humanitarian reasons if a probability of qualifying persecution to the applicant is not shown.

The Immigration Judge also found that there was evidence that the respondent himself would be subject to persecution for his opposition to FGM if he were returned to Senegal. The Immigration Judge noted that both the respondent and his wife had testified that they opposed FGM, and he found that "members of respondent's family and respondent's wife's family, as well as other members of the Fulani tribe, would take whatever steps were necessary to insure that respondent's two young U.S. citizen daughters were subjected to the FGM procedure if returned to Senegal." In this regard, the *280 respondent argues on appeal that he should be found to be a member of a particular social group, which includes fathers of daughters who have not been subjected to FGM, but who nonetheless oppose the practice. We decline to find such a particular social group in this case.

First, while the respondent may be subject to harassment on account of his opposition to FGM, we find that he has not shown that it is more likely than not that his life or freedom would be threatened on account of his opposition to this practice, particularly in light of his repeated and specific testimony that he has no fear of any persecution to himself if he were to return to Senegal. Furthermore, the statement of the Immigration Judge quoted above is highly speculative and assumes that the respondent's two United States citizen children would return with the respondent to Senegal, which is factually questionable if the respondent truly believes that they would definitely be tortured there, and which is in no way legally required of the children.

Similarly, the respondent argues on appeal that he would be persecuted in Senegal on account of his political opinion, i.e., his opposition to the practice of FGM. However, we again find no evidence to indicate that the respondent himself would be subject to any substantial harm (as opposed to harm to his children) on account of his personal opposition to this tribal practice. The respondent testified that his family and tribe are interested in performing FGM on his daughters and appear to be concerned only in what happens to these children, not what their father feels about the practice. For example, he stated that tribal officials "won't beat" him for opposing FGM for his daughters but might "humiliate" him for his views. In addition, it is not apparent that FGM is a practice which the Government of Senegal is unable or unwilling to end. We note in this regard the evidence indicating that the Government of Senegal has made the performance of FGM a criminal offense carrying a lengthy term of imprisonment, has actively prosecuted those caught engaging in the practice, and is vigorously fighting to end it.

Moreover, we find that a remand for the Immigration Judge to consider the respondent's application for protection under the Convention Against Torture is not required in this case. There is no legal basis for a derivative grant of such protection where, as here, the respondent has not alleged any past torture, or fear of future torture, to himself. *See Oforji v. Ashcroft, supra*. Accordingly, the respondent has not met his burden of establishing that it is more likely than not that he will be subjected in Senegal to torture that is "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." [8 C.F.R. § 1208.18\(a\)\(1\) \(2007\)](#); *see also Matter of M-B-A-*, 23 I&N Dec. 474 (BIA 2002); *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002); *Matter of Y-L-, A-G-, & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002); [8 C.F.R. §§](#)

[1208.16\(c\)](#), [1208.18\(a\)\(2\)-\(5\)](#).

On appeal, the respondent also seeks a remand of the record to allow him to apply for asylum. The regulations provide that the Immigration Judge may set and extend time limits for the filing of applications. [8 C.F.R. § 1003.31\(c\) \(2007\)](#). At the time of the respondent's May 18, 2006, Master Calendar hearing, the Immigration Judge gave him additional time to apply for all forms of relief for which he was eligible and advised him that any application that was not received at the time of the next hearing would be considered abandoned. However, at the time of the next hearing, which was held on July 5, 2006, counsel for the respondent indicated that he was only applying for withholding of removal under section 241(b)(3) of the Act and protection pursuant to the Convention Against Torture.²⁴ According to the regulations, “[i]f an application or document is not filed within the time set by the Immigration judge, the opportunity to file that application or document shall be deemed waived.” [8 C.F.R. § 1003.31\(c\)](#). We therefore find no basis for a remand for consideration of the respondent's asylum claim in this matter.

We conclude that the Immigration Judge erred in granting the respondent's application for withholding of removal pursuant to section 241(b)(3)(A) of the Act. Accordingly, we will sustain the DHS's appeal, vacate the Immigration Judge's decision, and order the respondent removed.

ORDER: The appeal of the Department of Homeland Security is sustained.

FURTHER ORDER: The order of the Immigration Judge granting withholding of removal is vacated.

FURTHER ORDER: The respondent is ordered removed from the United States to Senegal.

²⁴ The respondent also filed a separate application for cancellation of removal, which he subsequently withdrew after conceding that he was ineligible for this form of relief from removal.

IN RE A-T-, RESPONDENT 24 I & N Dec. 296 (BIA 2007)

BEFORE: Board Panel: COLE, FILPPU, and PAULEY, Board Members.

FILPPU, Board Member:

In a decision dated January 19, 2005, an Immigration Judge denied the respondent's applications for asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. Res. 39/46. 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (*entered into force* June 26, 1987; for the United States Apr. 18, 1988) ("Convention Against Torture"). The respondent has appealed from that decision. The respondent's request for oral argument is denied. See [8 C.F.R. § 1003.1\(e\)\(7\) \(2007\)](#). The appeal will be dismissed.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a 28-year-old native and citizen of Mali who was admitted into the United States as a visitor on October 4, 2000, and applied for asylum on May 12, 2004. The respondent testified that she underwent female genital mutilation ("FGM") as a young girl but has no memory of the procedure. According to the respondent, she is opposed to the practice of FGM and, if she were to have a daughter in the future, would actively oppose having the procedure performed on her child. The respondent further stated that she had recently learned that her father had arranged for her to marry her first cousin and that she fears the consequences of refusing to comply with her family's wishes. The respondent's uncle also testified on her behalf.

The Immigration Judge determined that the respondent failed to file her application for asylum within 1 year of arriving in the United States, as required by section 208(a)(2)(B) of the Immigration and Nationality Act, [8 U.S.C. § 1158\(a\)\(2\)\(B\)](#) (2000), and failed to demonstrate eligibility for an exception based on changed circumstances. See [8 C.F.R. § 1208.4\(a\)\(4\) \(2005\)](#). Thus, the Immigration Judge found the respondent statutorily ineligible for asylum and considered only her applications for withholding of removal and protection under the Convention Against Torture. The Immigration Judge found that the respondent's past experience with FGM did not qualify her for the prospective relief of withholding of removal. Further, the Immigration Judge determined that the respondent had failed to demonstrate that it is more likely than not that she would be forced into an arranged marriage against her will, and that she had therefore failed to meet the burden of proof for withholding of removal on that basis. Finally, the Immigration Judge concluded that the respondent had failed to establish that it is more likely than not that she would be tortured if she is returned to Mali.

II. APPLICABLE LAW

An applicant for asylum has the burden of establishing that she is a “refugee” within the meaning of section 101(a)(42) of the Act, [8 U.S.C. § 1101\(a\)\(42\)](#) (2000). *See* section 208 of the Act. To do this, the alien may demonstrate that she has suffered past persecution on account of one of the five enumerated grounds in section 101(a)(42) of the Act, which include race, religion, nationality, membership in a particular social group, or political opinion. *See* [INS v. Elias-Zacarias](#), 502 U.S. 478 (1992); [INS v. Cardoza-Fonseca](#), 480 U.S. 421 (1987).

Once an alien has shown past persecution, she is presumed to have a well-founded fear of future persecution. [8 C.F.R. § 1208.13\(b\)\(1\)](#) (2007). The presumption is based on the possibility that a persecutor, having once shown an interest in harming the applicant, might seek to do so again if provided the opportunity. *See* [Matter of N-M-A-](#), 22 I&N Dec. 312, 318 (BIA 1998). In such cases, the burden of proof then shifts to the Department of Homeland Security (“DHS”) to rebut the presumption of a well-founded fear. [8 C.F.R. § 1208.13\(b\)\(1\)\(ii\)](#). One way the DHS may meet its burden is to demonstrate by a preponderance of the evidence that there has been a “fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution.” [8 C.F.R. § 1208.13\(b\)\(1\)\(i\)\(A\)](#). If the Government successfully rebuts the presumption, the burden shifts back to the applicant to demonstrate a well-founded fear of future persecution. Aliens who cannot show past persecution may otherwise obtain asylum under the Act if they can demonstrate an objectively reasonable well-founded fear of future persecution on account of a protected ground. [8 C.F.R. § 1208.13\(b\)\(2\)\(i\)\(B\)](#); *see also* [Matter of Mogharrabi](#), 19 I&N Dec. 439 (BIA 1987).

As we observed in *Matter of N-M-A-*, *supra*, at 318, asylum is a forward-looking form of relief that provides “prophylactic protection” for individuals who might face persecution in the future. The rationale for considering past persecution is that the “past serves as an evidentiary proxy for the future.” *Id.* (quoting [Marquez v. INS](#), 105 F.3d 374, 379 (7th Cir. 1997)). Nevertheless, in certain cases where the applicant has established past persecution but there is little likelihood of future persecution, a favorable exercise of discretion may still be warranted if the alien demonstrates compelling reasons for her unwillingness to return to her country arising out of the severity of the past persecution, or a reasonable possibility that she may suffer other serious harm upon removal to that country. *See* [8 C.F.R. § 1208.13\(b\)\(1\)\(iii\)](#); *see also* [Matter of Chen](#), 20 I&N Dec. 16 (BIA 1989).

An alien who is seeking withholding of removal must show that her life or freedom would be threatened on account of her race, religion, nationality, membership in a particular social group, or political opinion. *See* section 241(b)(3)(A) of the Act, [8 U.S.C. § 1231\(b\)\(3\)\(A\)](#) (2000). In order to make this showing, the alien has the burden of proving that it is more likely than not that she will be persecuted on account of a protected ground. *See* [INS v. Stevic](#), 467 U.S. 407, 413 (1984); [8 C.F.R. § 1208.16\(b\)\(2\)](#) (2007). As with asylum, an alien’s showing of past persecution in

the proposed country of removal gives rise to a presumption that her life or freedom would be threatened there in the future.²⁵ *See* [8 C.F.R. § 1208.16\(b\)\(1\)](#).

Finally, in order to qualify for protection under the Convention Against Torture, an alien must establish that if she is removed, it is more likely than not that she will be subject to torture, as it is defined by regulation.

²⁵ Unlike asylum, however, the regulations governing withholding of removal do not provide for a discretionary grant of relief based solely on the severity of past harm.

See [8 C.F.R. §§ 1208.16\(c\), 1208.18\(a\) \(2007\)](#).

III. ANALYSIS

On appeal, the respondent argues that her past experience with FGM constitutes a continuing harm that renders her eligible for asylum. She further asserts that she has a well-founded fear of persecution if she returns to Mali because she may someday give birth to a daughter who will also be subjected to FGM. Additionally, the respondent claims to fear that her family will force her to enter into an arranged marriage with her first cousin.

A. Female Genital Mutilation: “Continuing Persecution” Theory

In *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), we recognized that FGM can be a form of persecution and found that young women from a certain tribe in Togo who feared such a practice constituted a particular social group. Like the asylum applicant in *Matter of Kasinga*, the respondent is from a country in which FGM continues to be widespread. According to the Department of State 2006 country report on human rights practices in Mali, there are currently no laws prohibiting FGM.²⁶ See Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *Mali Country Reports on Human Rights Practices-2006* (Mar. 6, 2007), available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78745.htm>; see also [8 C.F.R. § 1003.1\(d\)\(3\)\(iv\)](#) (allowing the Board to take administrative notice of the contents of official documents). In *Kasinga*, however, the applicant had not yet undergone FGM and was facing an imminent threat of being subjected to the procedure if returned to her country of origin. The respondent in this case has already undergone FGM. Consequently, even assuming arguendo that she is a member of a particular social group who suffered past persecution, “there is no chance that she would be personally [persecuted] again by the procedure.” *Oforji v. Ashcroft*, 354 F.3d 609, 615 (7th Cir. 2003). Any presumption of future FGM persecution is thus rebutted by the fundamental change in the respondent's situation arising from the reprehensible, but one-time, infliction of FGM upon her. [8 C.F.R. § 1208.16\(b\)\(1\)\(i\)\(A\)](#).

Nevertheless, the fact that FGM is generally performed only once, thereby eliminating the risk of identical future persecution, does not end the discussion. In *Mohammed v. Gonzales*, 400 F.3d 785, 800-01 (9th Cir. 2005), the United States Court of Appeals for the Ninth Circuit held that FGM constitutes a continuing harm for purposes of asylum, analogizing the procedure to forced sterilization, which we found to be continuing persecution in *Matter of Y-T-L-*, 23 I&N Dec. 601 (BIA 2003). We disagree with the analysis in *Mohammed v. Gonzales* and consider *Matter of Y-T-L-* to represent a unique departure from the ordinarily applicable principles regarding asylum and withholding of removal. See also *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007) (implicitly rejecting the theory that FGM constitutes continuing persecution such that the presumption of a well-founded fear of persecution can never be overcome).

Generally, persons who have experienced past persecution, but who have no present well-founded fear, may obtain refugee status only if they demonstrate compelling reasons for being unwilling to return to their country arising out of the severity of the past persecution, or they face a reasonable possibility of other serious harm in the future. See *Matter of N-M-A-*, *supra*, at 318. This principle, derived originally from case law such as *Matter of Chen*, *supra*, is embodied in the regulations that govern asylum adjudications. See [8 C.F.R. § 1208.13\(b\)\(1\)\(iii\)](#).

²⁶ In the United States, female genital mutilation is a felony punishable by up to 5 years of imprisonment. See [18 U.S.C. § 116 \(2000\)](#).

We nevertheless found in *Matter of Y-T-L-*, *supra*, that involuntary sterilization and abortion represented an exception to this principle and constituted continuing persecution, because persons who suffered such harm have been singled out by Congress as having a basis for asylum in the “refugee” definition of section 101(a)(42) of the Act on the strength of the past harm alone. While FGM is similar to forced sterilization in the sense that it is a harm that is normally performed only once but has ongoing physical and emotional effects, Congress has not seen fit to recognize FGM (or any other specific kind of persecution) in similar fashion with special statutory provisions. Hence, we deem it consistent with the statutory and regulatory scheme to view FGM in the same category as most other past injuries that rise to the level of persecution, including those that involve some lasting disability, such as the loss of a limb. We therefore do not subscribe to the Ninth Circuit’s continuing harm analysis.

Stated another way, in *Matter of Y-T-L-*, *supra*, we treated sterilization as continuing persecution because it would have contradicted Congress’s purpose to find that the very act that constituted persecution under the coerced population control provisions was itself a “fundamental change in circumstances” that obviated a future well-founded fear. [8 C.F.R. § 1208.13\(b\)\(1\)\(i\)\(A\)](#). The statute defined victims of forced sterilization, for example, as qualifying for relief. Thus, it would have been anomalous to rule that the sterilization also formed a basis for denying relief. In *Matter of Y-T-L-*, *supra*, at 606, we specifically spoke of the “dilemma” presented between the “bedrock principle” that refugee law in the main requires a “prospective view” of persecution and the “manifestly clear” intent of Congress to make past victims of China’s coercive family planning policy eligible for asylum, “not simply those who could be [future] victims if returned to China.” We resolved this dilemma by recognizing the “special nature of the persecution at issue” in the coercive family planning context, and by giving “full force to the intent of Congress in extending asylum to those who have sustained” such family planning persecution in the past. *Id.*

Here, in sharp contrast, there is no separate statutory ground of persecution predicated on an alien’s being subjected to FGM. Consequently, there is no basis for following an approach outside the regulatory formula for assessing persecution claims founded on past persecution alone. Simply put, we do not face a “dilemma” between the fundamental principles of refugee law and the application of specific statutory directives.

The loss of a limb also gives rise to enduring harm to the victim, but such forms of past persecution are routinely assessed under the past persecution standards specified in the asylum and withholding of removal regulations. See [8 C.F.R. §§ 1208.13\(b\)\(1\)](#), [1208.16\(b\)\(1\)](#). Neither set of regulations adopts a “continuing” harm or continuing persecution theory for injuries that have a lingering or permanent impact on the victim. We do not consider the ruling in *Matter of Y-T-L-*, *supra*, to amount to a general repeal or revision of these regulations, such as the asylum provisions specifying the nature of the inquiry for a grant of asylum based on past persecution in the absence of a well-founded fear of future persecution. See [8 C.F.R. § 1208.13\(b\)\(1\)\(iii\)](#). In the absence of a specific contrary statutory provision, such as the one at issue in *Y-T-L-*, we consider these regulations to be binding. Accordingly, because we reject the continuing persecution theory, we are unable to find the respondent eligible for withholding of removal based on her past experience with FGM.²⁷ Further, as previously explained,

²⁷ The Fourth Circuit, in which this case arises, cited *Mohammed v. Gonzales*, *supra*, with approval in [Barry v. Gonzales](#), [445 F.3d 741, 745 \(4th Cir. 2006\)](#). However, the opinion cited *Mohammed* (along with authorities from two other circuits) only for the proposition that FGM is persecution and did not address the merits of the Ninth Circuit’s continuing persecution theory. As such, *Barry* represents mere dicta in this regard and is not binding on us here. See also [Niang v. Gonzales](#), [492 F.3d 505, 510 \(4th Cir. 2007\)](#) (recognizing as “settled principle” the view that the imminent threat of FGM may form the basis of a claim for asylum or withholding of removal).

the regulations do not provide for a discretionary grant of withholding of removal based on the severity of past persecution.

B. Asylum 1-Year Bar

The respondent entered the United States in October 2000 and filed her asylum application in May 2004. The Immigration Judge determined that the respondent was statutorily barred from asylum for failure to file her application within 1 year of arriving in the United States, as required by section 208(a)(2)(B) of the Act, and that she failed to demonstrate eligibility for an exception based on changed circumstances. *See* [8 C.F.R. § 1208.4\(a\)\(4\)](#). We agree with the Immigration Judge's conclusion. Although the respondent testified that she did not find out that her parents had arranged for her to marry her first cousin until August 2003, a letter from her father reflects that she likely had some awareness of the arrangement much earlier. Moreover, even accepting the respondent's testimony that she discovered her parents' plans in August 2003, she has not explained why she waited an additional 9 months before filing her asylum application. *See* [8 C.F.R. § 1208.4\(a\)\(4\)\(ii\)](#) (requiring applications to be filed within a "reasonable period" after discovering changed circumstances). We therefore conclude that the respondent is ineligible for asylum and may be considered only for withholding of removal and protection under the Convention Against Torture.

Because we have rejected the continuing persecution theory put forth in *Mohammed v. Gonzales, supra*, we are unable to find the respondent eligible for withholding of removal based on her past experience with FGM. Moreover, despite the severity of harm she endured as a victim of FGM, she is ineligible for a humanitarian grant of asylum under [8 C.F.R. § 1208.13\(b\)\(1\)\(iii\)](#). Additionally, the respondent's current status as an unmarried woman with no children renders her claim that her future child or children may be subjected to FGM in Mali too speculative to warrant consideration. *See generally* [Matter of J-F-F-, 23 I&N Dec. 912 \(A.G. 2006\)](#). Moreover, we held in [Matter of A-K-, 24 I&N Dec. 275 \(BIA 2007\)](#), that an alien may not establish eligibility for asylum or withholding of removal based solely on the fear that his or her daughter might be forced to undergo FGM in the alien's home country. *See also* [Niang v. Gonzales, 492 F.3d 505, 512 \(4th Cir. 2007\)](#) (rejecting an alien's withholding claim "based solely on the psychological suffering" she might endure if her daughter were required to submit to FGM in Senegal).

C. Arranged Marriage

Finally, we agree with the Immigration Judge that the respondent failed to establish eligibility for withholding of removal on the basis of her fear of an arranged marriage. Initially, we note that an arranged marriage between adults is not generally considered per se persecution. *See, e.g.,* [Mansour v. Ashcroft, 390 F.3d 667, 680 \(9th Cir. 2004\)](#) (observing that arranged marriage, "while unfortunate and deplorable, may not constitute persecution if imposed on an adult"). It appears from the record that the respondent and her intended fiancé are of similar ages and backgrounds, given the respondent's testimony that she and her cousin played together as children, and that the family used to joke that they would one day marry. Thus, if the respondent were to return to Mali and proceed with the marriage, it is not likely that she would be in a disadvantaged position in relation to her husband on account of her age or economic status.

It is understandable that the respondent, an educated young woman, would prefer to choose her own spouse rather than acquiesce to pressure from her family to marry someone she does not love and with whom she expects to be unhappy. The respondent has also expressed valid concerns about possible birth defects resulting

from a union with her first cousin. While we do not discount the respondent's concerns, we do not see how the reluctant acceptance of family tradition over personal preference can form the basis for a withholding of removal claim.

Moreover, the respondent has presented insufficient evidence regarding the consequences she might face if she refuses to marry her intended fiancé. She stated in her affidavit that her father “will stop at nothing to force me to marry who he dictates,” but she gives little indication of what he might do if she disobeys him. The respondent testified that her father might take out his anger on her mother and dissolve their marriage, but a letter from the respondent's mother expresses no such concerns. Likewise, a letter from the respondent's father states that she must proceed with the marriage “to uphold the reputation of our family,” but it includes no indication of possible consequences for failing to comply with the arrangement. Further, the respondent testified that if she refused to marry her cousin and was then shunned by her family, she could not relocate elsewhere in Mali because single women living alone are viewed as prostitutes. However, the respondent's uncle, who testified on her behalf, conceded that single women are indeed able to live alone and support themselves in Mali. Thus, we agree with the Immigration Judge that the respondent could reasonably relocate within Mali to avoid the marriage. See [8 C.F.R. § 1208.16\(b\)\(3\)](#).

Additionally, we concur with the Immigration Judge that the respondent failed to demonstrate a nexus between any harm she may fear and a protected ground. The respondent suggests that young female members of the Bambara tribe who oppose arranged marriage constitute a particular social group. Cf. [Gao v. Gonzales](#), 440 F.3d 62 (2d Cir. 2006), petition for cert. filed, 75 U.S.L.W. 3513 (U.S. Mar. 16, 2007) (No. 06-1264). We question the viability of the respondent's proposed group, as we are doubtful that young Bambara women who oppose arranged marriage have the kind of social visibility that would make them readily identifiable to those who would be inclined to persecute them. See [Matter of A-M-E- & J-G-U-](#), 24 I&N Dec. 69, 74-75 (BIA 2007) (holding that “affluent Guatemalans” did not constitute a particular social group, partly because the perception of wealth is highly subjective); [Matter of C-A-](#), 23 I&N Dec. 951, 959-61 (BIA 2006) (finding that noncriminal informants working against the Cali drug cartel in Colombia were not sufficiently visible to be a particular social group), *aff'd*, [Castillo-Arias v. U.S. Att'y Gen.](#), 446 F.3d 1190 (11th Cir. 2006), cert. denied *sub nom.* [Castillo-Arias v. Gonzales](#), 127 S. Ct. 977 (2007). Moreover, even accepting the respondent's status as a member of such a group, we conclude that she has failed to demonstrate a clear probability that she would be persecuted on that basis. Rather, the respondent has expressed only a generalized fear of disobeying her authoritarian father.

Finally, the respondent seems to suggest on appeal that her past experience with FGM creates a presumption that she is at risk of future persecution; that is, even if she cannot be subjected to FGM a second time, she may be vulnerable to other forms of persecution on account of her membership in a particular social group. *Hassan v. Gonzales*, *supra*, appears to support the respondent's theory. In *Hassan*, the Eighth Circuit recognized FGM as past persecution and Somali women as a particular social group.²⁸ *Id.* at 518 (quoting *Mohammed v. Gonzales*, *supra*, at 797, in observing that “the immutable trait of being female is a motivating factor” for FGM). It held that although FGM is a form of persecution that can happen only once, the DHS nevertheless retains the burden of rebutting the presumption of a well-founded fear with regard to other common types of persecution a Somali woman might endure, such as rape. *Id.* at 518-19.

²⁸ Because gender is an immutable trait that is generally recognizable, Somali women would appear to meet the social visibility requirement discussed above. We find it unnecessary in this instance to resolve whether such a broadly defined group could constitute a particular social group for purposes of asylum and withholding of removal.

However, we find *Hassan* to be at odds with the regulatory structure for asylum, which provides: “If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.” [8 C.F.R. § 1208.13\(b\)\(1\)](#); *see also Matter of N-M-A-*, *supra*, at 321-23 (finding that an asylum applicant who suffered past persecution under a regime no longer in power bears the burden of demonstrating a well-founded fear of future persecution from a new persecutor); [8 C.F.R. § 1208.16\(b\)\(1\)\(B\)\(iii\)](#) (placing the same burden on applicants for withholding of removal). Unlike FGM, family pressures to accede to arranged marriages are not necessarily confined to females. Within the contemplation of [8 C.F.R. § 1208.16\(b\)\(1\)\(B\)\(iii\)](#), we find that the FGM suffered by the respondent is unrelated to her father's desire that she uphold her family's reputation by marrying her cousin. In this instance, the respondent has not met her burden of showing a clear probability either that she would be forced into an arranged marriage against her will or that she would be persecuted on account of her rejection of the marriage.

D. Convention Against Torture

The Immigration Judge found that the respondent failed to present evidence that it is more likely than not that she would be tortured if she is returned to Mali. We agree and find that she does not qualify for protection under the Convention Against Torture. See [8 C.F.R. §§ 1208.16\(c\), 1208.18\(a\)](#).

IV. CONCLUSION

The Immigration Judge correctly determined that the respondent is barred from seeking asylum because her application was not timely filed or subject to an exception. We also concur with the Immigration Judge's conclusion that the respondent has failed to establish eligibility for withholding of removal or protection under the Convention Against Torture. Accordingly, the respondent's appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security. See section 240B(b) of the Act, [8 U.S.C. § 1229c\(b\)](#) (2000); [8 C.F.R. §§ 1240.26\(c\), \(f\)](#) (2007). In the event the respondent fails to so depart, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty of not less than \$1,000 and not more than \$5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act, [8 U.S.C. §§ 1229b, 1255, 1258, and 1259](#) (2000). See section 240B(d) of the Act.