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To be argued by
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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PENG-FEI SI

Petitioner-Appellant,

vs.

WILLIAM SLATTERY, District Director
of the United States Immigration and
Naturalization Service, New York District,

Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of New York:
Petition for Writ of Habeas Corpus

REPLY BRIEF FOR PETITIONER-APPELLANT

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I. SUMMARY OF THE REPLY

On September 3, 1993, the Executive Office of Immigration Review ("EOIR") should have granted Peng-Fei Si's request for political asylum and withholding of deportation pursuant to a Department of Justice ("DOJ") policy over three years old promulgated by regulation and this Court's decision in Gomez v. INS, 947 F.2d 660 (2d Cir. 1991). The government has failed to demonstrate to the contrary.

First, the government has failed to show why the Board of Immigration Appeals ("BIA") deserves deference from this Court. Appellant Si does not dispute a BIA statutory interpretation, but rather the BIA's failure to pursue a DOJ policy duly promulgated and binding on the BIA by regulation. Further, the BIA made no factual findings from which to derive factual inferences, and, with regard to the Appellant's social group claim, the sub-agency made no ruling whatsoever. This Court must review this case de novo without deference to the BIA's errors below.

Second, the January 1990 Rule could not be repealed by omission. Both the Administrative Procedures Act ("APA") and case law require that an agency reversing its course must provide notice, reasons and opportunity for public comment. Repeal of the 1990 Rule and reversal of the longstanding DOJ policy that it embodied would constitute rulemaking, requiring full notice and comment procedures. Furthermore, the 1990 Rule continued to appear on the DOJ published

Regulatory Agenda in the *Federal Register* years after its promulgation, acknowledging its continuing validity.

Third, the January 1993 Final Rule ("1993 Rule") became effective upon filing with the Office of the Federal Register. Since the 1993 Rule and the 1990 Rule deeply affected the legal rights of individuals who relied on the regulations and the consistent policy they espoused, the Attorney General must affirmatively, with notice and reasons, repeal the regulation to reverse the policy. She has not done so.

Finally, the passengers of the Golden Venture qualify for asylum and withholding on the basis of membership in a particular social group. The government has failed to show that Appellant Si has failed to satisfy the requirements set forth in Gomez, and the BIA did not give reasons for failing to apply Gomez.

II. THE BIA'S DETERMINATIONS WITH RESPECT TO MR. SI'S ASYLUM AND WITHHOLDING ARE SUBJECT TO DE NOVO REVIEW.

The Government has conceded that the status of Matter of Chang, Interim Decision 3107, 1989 WL 247513 (BIA May 12, 1989) ("Chang"), is a question of law and hence subject to de novo review by this court. Resp't Br. at 25. Contrary to the government position, see Resp't Br. at 26, however, this Court does not owe "substantial deference" to the BIA's refusal to acknowledge the validity of the 1990 or the 1993 rule. The "substantial deference" exception only applies to agency decisions in their "interpretations of statutory law."

See Osorio v. INS, 18 F.3d 1017, 1022 (2d Cir. 1991).

Indeed, all cases relied upon by the respondent limit the "substantial deference" exception to agency interpretations of statutory provisions. See EPA v. Nat'l Crushed Stone Ass'n, 449 U.S. 64, 83 (1980) (reviewing EPA's interpretation of Federal Water Pollution Control Act); Rosendo-Ramirez v. INS, 32 F.3d 1085, 1087 & n.2 (7th Cir. 1994) (deferring to "BIA's reasonable interpretations of ambiguous provisions of the [INA]"); Silwany-Rodriguez v. INS, 975 F.2d 1157, 1160 (5th Cir. 1992) (reviewing BIA's decision interpreting 1990 amendments to INA and corresponding regulations).

The issue at bar is not the BIA's interpretation of a statutory provision, but rather its refusal to abide by the DOJ's longstanding policy embodied in the 1990 and 1993 Rules. Once the 1990 Rule was promulgated, the BIA was no longer required to interpret the INA with respect to coercive family planning; it was instead required to apply the 1990 and 1993 Rule to Mr. Si's claim.¹ Indeed, the BIA recognized the 1990 Rule as binding for over five months. See J.A. at 4. The BIA's determination was not an interpretation of the 1990 January Rule or the 1993 Rule, but rather a legal conclusion

¹ Respondents also urge that this court give due deference to the BIA's interpretation of "silent or ambiguous" statutes, unless the interpretation "is arbitrary, capricious, or manifestly contrary to the statute." Resp't Br. at 26. In this case the BIA did not need to interpret any "silent or ambiguous" provision of the INA, but rather needed to adhere to very clear administrative regulations. Neither the 1990 or 1993 Rules are silent or ambiguous with respect to political asylum and withholding for coercive family planning practices.

about their validity.² Accordingly, this Court owes no deference to the BIA's decision in 1993 to fail to adhere to a five-year-old DOJ policy and to fail to recognize valid regulations as binding.

This Court also owes no deference to the IJ and BIA's determination of whether Mr. Si established a well-founded fear of persecution based on his membership in a social group. The respondent claims that this Court must use a "substantial evidence" test with respect to the BIA's determinations on Mr. Si's social group claim, Resp't Br. at 27, and that this test applies to "inferences and conclusions drawn by the agency from the evidence, not merely to the facts found." Resp't Br. at 28.

No deference is necessary, however, since the BIA made no factual determinations with respect to Mr. Si's membership in a social group. Neither the IJ nor the BIA made any factual determinations in the present case, see J.A. at 2, 76-77, denying Mr. Si's application in the equivalent of a Fed. R. Civ. P. 12(b)(6) ruling. Therefore, the "substantial evidence" standard is inapplicable.

The respondent's suggestion that this court defer to "inferences and conclusions drawn by" the BIA despite no

² Indeed, a central focus of this claim, the regulations' validity under the Administrative Procedure Act, 5 U.S.C. § 551 et. seq., is clearly a question of administrative law over which this court has plenary power of de novo review. See Noel v. Chapman, 508 F.2d 1023, 1029 (2d Cir. 1975) ("[I]t would seem clear that we also have jurisdiction to determine whether or not INS followed the Act's rulemaking procedures.").

findings of fact is without merit. Indeed, as respondent's cases suggest, inferences and conclusions must follow a finding of underlying facts. See, e.g., Hosp. Corp. of America v. FTC, 807 F.2d 1381, 1385 (7th Cir. 1986), cert. denied, 481 U.S. 1030 (1987) (finding substantial evidence rule to apply to "ultimate as well as underlying facts, including economic judgments"); NLRB v. Birmingham Publishing Co., 262 F.2d 2, 5 (D.C. Cir. 1958) (using substantial evidence standard to review NLRB's choice between "two conflicting lines of testimony and two inconsistent inferences"); Califano v. Rodriguez, 431 F.Supp. 421, 423 (S.D.N.Y. 1977) ("substantial evidence rule applies not only . . . to basic evidentiary facts, but also to inferences and conclusions drawn therefrom"). Since the BIA made no underlying findings of fact but instead, similar to a finding under Fed. R. Civ. P. 12(b)(6), found that the facts as alleged failed to state a claim for asylum or withholding, it could not have drawn any conclusions or inferences subject to review under the "substantial evidence" standard.

Furthermore, the BIA entirely failed to address Mr. Si's claim as a member of a social group on account of his status as a passenger of the Golden Venture, see J.A. at 4, 6, and also failed to incorporate the relevant social group standards as set forth by this Court in Gomez v. INS, 947 F.2d 660 (2d Cir. 1991). The BIA only made a determination that neither illegal departure nor illegal departure of persons opposed to coercive family planning practices could,

by themselves, establish a fear of persecution on account of reasons provided by statute. J.A. at 6. As it did not even consider Mr. Si's claim as a passenger of the Golden Venture, the BIA's decision failed to make any findings of either underlying fact or any further inferences or conclusions, and is therefore undeserving of deference.

Therefore, Mr. Si's two central issues on appeal involve only legal conclusions by the IJ and BIA. This Court has plenary power to review this case de novo.

III. THE JANUARY 1990 RULE CANNOT BE OVERRULED BY OMISSION AND REMAINS BINDING UPON THE BIA TODAY.

A. The government has failed to provide any support for its theory of "repeal by omission."

The government has utterly failed to show that the July 1990 regulations had any effect upon the January 1990 Rule ("1990 Rule"). The government has failed to cite a single precedential case which supports the proposition that omission from the July 1990 regulations overruled the January 1990 Rule because no such cases exist. The government has relied upon two district court opinions which purportedly stand for that proposition, but those opinions also fail to cite binding or persuasive authority. See, e.g., Chen Chuan Fei v. Carroll, 866 F.Supp. 283, 286-87 (E.D.Va. 1994); Xiu Qin Chen v. Slattery, 862 F.Supp. 814, 821-22 (E.D.N.Y. 1994).³ A third district court which the government cites did

³ The government relies upon Xiu Qin Chen, 862 F.Supp. at 822, for the proposition that the omission of the 1990 Rule from the annual codification of Title 8 C.F.R. somehow

not explicitly rule on the issue and certainly did not assert reliance upon any precedent. Guo Chun Di v. Carroll, 842 F.Supp. 858, 869 (E.D.Va. 1994), appeal argued, No. 94-1416 (4th Cir. Dec. 2, 1994). None of these cases provide much support, if any, for the government's argument.

B. The DOJ did not repeal the regulation under the Administrative Procedures Act.

The Administrative Procedures Act ("APA") clearly requires that an agency which seeks to repeal a regulation granting rights to members of the public must affirmatively repeal such regulations through the established procedures. Although the government attempted to label the 1990 Rule as unadopted, Resp't Br. at 33, it was in fact validly promulgated and adopted immediately on January 29, 1990. Pet. Br. at 22-23.⁴ The District Court and the BIA have found

affected the force of the rule. Resp't Br. at 33. This is meritless. 5 U.S.C. § 553(b) requires publication in the *Federal Register*, which occurred in this case. See also 5 U.S.C. § 552(a)(1) (requiring agencies to publish information in *Federal Register* under Freedom of Information Act). For example, in Wiggins Bros., Inc. v. Dep't of Energy, 667 F.2d 77, 88 (Temp. Emer. Ct. App. 1981), cert. denied, 456 U.S. 905 (1982), the court found it clearly erroneous to disregard the preamble of a regulation published in the *Federal Register* but not in the Code of Federal Regulations ("CFR"). "The contents of the *Federal Register* are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510). . . . These two publications must be used together to determine the latest version of any given rule." Wiggins Bros., 667 F.2d at 89 (quoting "Explanation" included in each volume of CFR). Furthermore, as with its opinion that the July 1990 procedural regulations "effectively revoked" the 1990 Rule, the district court in Chen cited no authority for its position regarding omission from the Code of Federal Regulations. Xiu Qin Chen, 862 F.Supp. at 822.

⁴ The government has mischaracterized the reasons for the

lack of prior notice and comment for the 1990 Rule. Resp't Br. at 34 n.1. Notice and comment did occur after the promulgation of the rule, between January 29 and February 28, 1990. Pet. Br. Addendum at 3. At the time of promulgation, the rule offered three reasons for seeking notice and comment after the effective date of the regulation: 1) the regulation "constitute[d] interpretative rules and general statements of policy," 2) good cause existed because "the rules implement[ed] an interpretation of the statute that ha[d] already been announced by the Attorney General," and 3) such a period would have been "contrary to the public interest" and the "humanitarian goals underlying the Refugee Act." Pet. Br. Addendum at 3-4. Any one of these reasons alone satisfies the exceptions to notice and comment outlined in the Administrative Procedure Act. 5 U.S.C. §§ 553 (b) (A) and (B).

Appellant Si, contrary to the government's characterization, does not argue that prior notice and comment were waived for the 1990 Rule simply because the it was labeled "interpretive." In Lewis-Mota v. Secretary of Labor, 469 F.2d 478, 481-82 (2d Cir. 1972), which involved a class action by aliens opposing a directive suspending a "precertification list" that made aliens in particular jobs eligible for permanent residency, this Court stated that "the label that the particular agency puts upon its given exercise of administrative power is not, for our purposes, conclusive; rather it is what the agency does in fact." Since the parties agree that some Chinese nationals will qualify for asylum if the regulation is valid as the law and may not if it is not valid, the regulation is more than a mere interpretation of a statute. Regardless, the issue regarding the rule's status as "legislative" or "interpretative" has not arisen in this case.

Furthermore, even assuming arguendo that the 1990 Rule was interpretative in nature, repeal of the rule would be legislative. This Court, in Lewis-Mota, held that rules which "changed existing rights and obligations" of aliens under the law required prior "notice and opportunity for comment." Lewis-Mota, 469 F.2d at 482. According to the Attorney General, the 1990 Rule only "implement[ed] an interpretation of the statute that [had] already been announced" Pet. Br. Addendum at 3. Reversing the Department of Justice's position on this policy, however, would clearly "change the rights" of aliens, making Chinese fleeing from persecution through coercive family planning ineligible for asylum. "Only rules that do not change 'existing rights and obligations' are considered interpretive." Donovan v. Red Star Marine, 739 F.2d 774, 783 (2d Cir. 1984) (holding legal effects distinguish legislative and interpretive rules where operator of tugboat challenging regulation granting Secretary of Labor authority to seek ex parte inspection warrant), cert. denied, 470 U.S. 1003, 105

that the 1990 Rule was binding on the EOIR from January 29, 1990 through, at the very least, July 1990. J.A. at H58, 4. Appellant has also shown that the term "interim" does not in anyway vitiate the force or duration of a regulation; it simply reveals that the agency intends to revisit the rule at a later date. Pet. Br. at 23-24.⁵ The 1990 Rule did not

S.Ct. 1355 (1985); White v. Bowen, 636 F.Supp. 1235, 1241 (S.D.N.Y. 1986) (quoting Donovan 739 F.2d at 783) (involving class of disabled workers' challenge to calculation of retroactive benefits), aff'd 835 F.2d 1974 (2d Cir. 1987). Notably, notice and comment following repeal of the rule would not satisfy any exceptions to the APA. Under the APA and the previous rulings by this Court, revocation of the 1990 Rule would have been clearly legislative, and thus the July 1990 regulations could not have revoked it by omission. ⁵ Indeed, the DOJ has used interim regulations throughout its process of codifying the rules governing asylum. Notably, these interim regulations also had ex post comment periods. The first of these sets of interim regulations came on June 2, 1980. 45 Fed. Reg. 37,392. The DOJ itself stated that "[f]ine tuning of the regulations can be done at a later date in the form of final regulations after opportunity for public comment, and experience we gain from the interim regulations." 45 Fed. Reg. 77,906. The DOJ then finalized the jurisdictional aspects of the regulations by publishing them in the *Federal Register* in final rule form, and this occurred on February 8, 1983, nearly three years later. 48 Fed. Reg. 5,885. Next, the DOJ promulgated a proposed rule to amend the procedural aspects of asylum on August 28, 1987. 52 Fed. Reg. 32,552. The DOJ revised the procedural rule on April 6, 1988. 53 Fed. Reg. 11,300. A final rule establishing procedures for asylum was published on July 27, 1990, nearly three years after the original promulgation. Pet. Br. Addendum at 7-21. Finally, the DOJ has begun to establish the substantive rules of asylum. First, the DOJ published the 1990 Rule. Pet. Br. at 2-4. The Attorney General filed a copy of the 1993 Rule with the Office of the Federal Register in January of 1993, nearly three years later. Pet. Br. at 22-36.

The pattern is obvious. The DOJ has sought to codify the jurisdiction, procedural, and substantive rules of asylum in that order. The process consisted of the issuance of an interim rule, a comment period of approximately three years while the interim rule was in effect, and then finalization of the rule. The 1990 Rule and the 1993 Rule fall into this pattern, and thus the 1990 Rule clearly survived finalization

America v. Federal Energy Regulatory Commission, 673 F.2d 425, 446 (D.C. Cir. 1982) (holding one-house legislative veto provision of Natural Gas Policy Act of 1978 unconstitutional). Repealing the validly promulgated 1990 Rule would thus require the satisfaction of all of the APA's rule making requirements. Among others, these include general notice, a general statement of the new rule's purpose, and publication thirty days before its effective date. 5 U.S.C. § 553(b)-(d). The July 1990 procedural regulations did not in any way provide the first two requirements. At the very least, repeal of the 1990 Rule would require these "affirmative steps."

C. Reversal of agency policy requires reasoned explanation, public notice, and time for comment because the reversal is not a "logical outgrowth" of an interim rule.

This Court has ruled that, "[w]hile a final rule need not be an exact replica of the rule proposed in the Notice, the final rule must be a 'logical outgrowth' of the rule proposed." National Black Media Coalition v. F.C.C., 791 F.2d 1016, 1022 (2d Cir. 1985) (citations omitted) ("NBMC"). There, in 1980, the Federal Communications Commission ("FCC") applied eligibility criteria which waived certain requirements for minority-owned enterprises and non-commercial entities and allowed them to broadcast on AM stations, 25 AM channels known as the U.S. Class I-A clear channels. Id. at 1019. Then, in March 1984, 14 new AM stations became available, and the FCC published in the

Federal Register notice of its intent to apply the 1980 criteria when awarding licenses for the new stations. Id. In May 1985, an FCC report and order decided not to apply the criteria after all. Id. Thus, this Court has bound an agency to an intention published in the *Federal Register* based upon the fact that interested persons were not fairly apprised of the agency's decision to reverse that intention.

Here, the July 1990 procedural regulations, if intended to repeal the 1990 Rule by omission, were not a logical outgrowth of the 1990 Rule, but an unannounced reversal in policy. Assuming the July 1990 procedural regulations were intended to repeal the 1990 Rule, "the notice given . . . was wholly inadequate to enable interested parties to have the opportunity to provide meaningful and timely comment on the proposal which culminated in the final decision of the agency to delete the non-technical requirements." Id. "The adequacy of notice is a critical starting point which affects the integrity of an administrative proceeding." Id. This Court should conclude here, as it concluded in NBMC, "in failing to provide notice of its decision to abandon its . . . policy," the DOJ "did not comply with the notice provision of the Administrative Procedure Act." Id. at 1024. If the FCC, which at least published its intention not to adopt the criteria, failed to provide adequate notice, the DOJ, which did not include any mention of the 1990 Rule in the July 1990 procedural regulations, failed completely in providing adequate notice. Administrative agencies simply cannot

repeal by omission but rather must "indicat[e] that prior policies and standards are being deliberately changed, not casually ignored." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) (concerning FCC criteria for renewal of license of television station), cert. denied, 403 U.S. 923 (1971).

Furthermore, the government fails to distinguish adequately Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983). It is true that the regulation there had a long history, but the length of the regulation's existence did not figure into the Court's final ruling nearly as much as the lack of reasoning behind the last repeal of the rule. "We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner." Id. at 48-49. The "complex and convoluted" history barely entered into the Court's discussion of the last repeal of the rule, which the Court reversed for lack of reasonable explanation.

The government then cites Chen Chuan Fei, decided in the Eastern District of Virginia, for the novel proposition that State Farm did not apply to the 1990 Rule since it was "not settled." Resp't Br. at 34. The regulation in State Farm was far from settled, "having been repeatedly imposed, amended and rescinded over the course of twenty-five years in some sixty rulemaking notices." Id. Further, both Chen Chuan Fei and the government's brief, however, failed to give any explanation or basis for describing as "unsettled" a rule

Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 191, 199 (1947), why did the DOJ fail to raise the issue earlier? In support of the claim of exemption from the APA, the government has cited three cases from other circuits, all of which involved Iranian immigration cases in the aftermath of the Iranian revolution and the hostage crisis. See, e.g., Nademi v. INS, 679 F.2d 811 (10th Cir. 1982) (involving Iranian students' challenge to INS Commissioner's regulation limiting voluntary departure to 15 days for Iranian nationals), cert. denied, 459 U.S. 872 (1982); Malek-Marzban v. INS, 653 F.2d 113 (4th Cir. 1981) (involving Iranian tourists' challenge to voluntary departure regulation); Yassini v. Crosland, 618 F.2d 1356 (9th Cir. 1980) (involving Iranian student challenge directive repealing grant of deferred departure). Yassini itself states that the foreign affairs exemption "would become distended if applied to I.N.S. actions generally, even though immigration matters typically implicate foreign affairs." Yassini, 618 F.2d at 1360 n.4. These cases, on their face, obviously invoked the President's foreign affairs function because they involved responses to the takeover of the American embassy in Tehran. No such international emergency has arisen here.

E. The January 1993 Final Rule only confirmed the validity of the January 1990 Rule.

Finally, the government asserts that the issuance of the 1993 Rule conceded the 1990 Rule had been repealed. No evidence supports this conclusion. Moreover, the fact that

the educated layperson unable to determine that the rule had been repealed by omission in July 1990 violates the fundamental tenet that the government must act in a rational manner which conforms to the public's expectations. When the agency has, instead, acted in an arbitrary and capricious manner, this Court must uphold the duly promulgated regulations upon which the public reasonably relied.

IV. THE JANUARY 1993 FINAL RULE BECAME BINDING UPON THE DOJ WHEN SIGNED BY THE ATTORNEY GENERAL AND FILED WITH THE FEDERAL REGISTER, AND IT REMAINS VALID TODAY.

The government's contention that the 1993 Rule "never took effect" and that "[n]on-publication in the Federal Register is a strong, if not conclusive, indication that the 1993 Rule never took effect," Resp't Br. at 39, are contrary to the law.⁸ The 1993 Rule became valid by reasons of its adoption and promulgation by the Attorney General, notwithstanding its withdrawal from publication.

A. The Attorney General effectively promulgated the January 1993 Final Rule.

The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(1), requires that agencies "publish . . . rules . . . adopted by the agency," and that statement necessarily

⁸ Actually, the Office of Management and Budget Director designate's attempted withdrawal of the rule even though the rule became effective upon filing with the Office of the Federal Register caused that office to violate its duty to publish the rule "immediately." See 44 U.S.C. § 1507; 44 U.S.C. § 1504. The new Administration did not successfully repeal the 1993 Rule by its withdrawal; it simply prevented the Office of the Federal Register from publishing an effective and binding rule.

1022 (quoting Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C.Cir. 1983)). Binding the DOJ to the unpublished rule, then, causes no harm since the educated layperson was still relying upon the last pronouncement of the DOJ, of which the 1993 Rule is a logical outgrowth.

C. As in Morton v. Ruiz, where the U.S. Supreme Court held the Board of Indian Affairs to an unpublished but binding operating instruction on which the public relied, here this Court should hold the DOJ to an unpublished but binding regulation on which Mr. Si relied.

The government makes an attempt to distinguish the holding in Morton v. Ruiz, 415 U.S. 199 (1974). In Morton, the Supreme Court held the Bureau of Indian Affairs to an operating instruction never published in the *Federal Register*.⁹ Id. at 235. The operating instruction required the agency to publish eligibility standards in the *Federal Register* and the Code of Federal Regulations. Id. at 233.

The government attempts to distinguish this case by claiming "no procedural violation occurred here." Resp't Br. at 42. Something far worse than a procedural violation occurred here. Here, a sub-agency failed to follow DOJ policy as codified in the unpublished but nevertheless

⁹ Following Morton, the INS itself has been held bound by internal, unpublished operating instructions ("OI") and memoranda that benefit aliens. See, e.g., Nicholson v. INS, 590 F.2d 802, 807-08 (9th Cir. 1979) (binding INS to OI regarding deferred action status); Noorani v. Smith, 810 F.Supp. 280, 282 (W.D. Wash. 1993) (binding INS to OI regarding parole); Piper v. Crosland, 519 F.Supp. 962, 965 (E.D.N.Y. 1981) (binding INS to OI governing deportation of aliens while a relative's claims are being adjudicated).

binding 1993 Rule. As a result, a worthy applicant has been wrongly denied asylum and withholding since September 3, 1993, and wrongly detained throughout the period.

In Morton, the United States Supreme Court required the Bureau of Indian Affairs to follow an unpublished but nevertheless binding operating instruction. Id. at 233-35. Here, this Court must require the DOJ to follow an unpublished but nevertheless binding regulation. "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." Morton, 415 U.S. at 235. The 1993 Rule codified a longstanding standard for the DOJ in coercive planning cases. It is incumbent upon the DOJ that that standard be followed.

D. Although empowered to do so, the Attorney General has never effectively repealed the January 1993 Final Rule.

In addition, the government argues that "the new Administration exercised its lawful prerogative to prevent the 1993 Rule . . . from ever taking effect." Resp't Br. at 42. Appellant Si does not argue that the Attorney General does not have the prerogative to repeal the 1993 Rule. Rather, the Attorney General did not follow the procedures required for her to exercise that discretion. Had she simply followed the steps set forth in the APA, the Attorney General could have repealed the rule in 30 days. Until she does so, the 1993 Rule stands.

Finally, it is true that the Attorney General has failed to resolve the dispute by reviewing cases which involved the

passenger, nor its sufficiency as an independent asylum and withholding claim.

The appellee, as well as the court below, maintains that recognition of the members of the Golden Venture passengers as a social group would "require the conferral of asylum whenever another government suffers the embarrassment at the exodus of substantial numbers of its citizens." Resp't Br. at 49-50. This deceptive generalization fails to take into account the extraordinary and unique circumstances that surrounded the story of the Golden Venture. First, the event occurred under particular historic circumstances resulting in Beijing's humiliating rejection by the Olympic Committee. See J.A. at H266, 382. Second, the Golden Venture's indiscreet crash into New York City and the massive rescue effort that followed achieved enormous notoriety for the ship as well as its unfortunate passengers. J.A. at 994-99, 974-78. Finally, the eight deaths, as well as the well-publicized, squalid conditions of the vessel endured by the Golden Venture passengers make them far more distinctive than, as appellee has characterized them, "a group of diverse aliens on a boat." Resp't Br. at 48 n.*.

Appellee's argument that the Golden Venture passengers were not "actuated by some common impulse or interest," Resp't Br. at 48, ignores the shared wish of all passengers to escape from China illegally, an action automatically political in the eyes of the PRC. The appellee also ignores the importance of the events that occurred once the ship set

sail. Doe v. INS confirms the relevance of weighing the events that occurred after a person's departure from his home country. 867 F.2d 285 (6th Cir. 1989). In Doe the court decided that an immigration judge had abused his discretion by refusing to request a second advisory opinion from the State Department regarding the petitioner's religious activities after entering the U.S. 867 F.2d at 289. The relevance of Mr. Doe's post-departure activities to his asylum claim is analogous to the importance of the events which occurred to the Golden Venture passengers after leaving China. To the Chinese government, the Golden Venture passengers have become a symbol for the embarrassing international recognition of their poor human rights record.¹⁰

The surviving passengers satisfy the three Gomez criteria used by this Court in determining a social group for the purposes of asylum and withholding. 976 F.2d at 664. First, the group is closely affiliated by their three month journey as well as their common impulse of risking their lives to flee China illegally. Second, the extraordinary circumstances of the ship make its passengers highly distinguishable from other ships of citizens fleeing the PRC. Finally, the membership in this group is both discrete and recognizable due to the extensive publicity given to the crash.

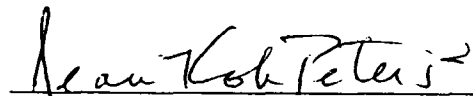
¹⁰ Even without the circumstances surrounding the Golden Venture, the emigrants could qualify on account of political opinion on the basis set forth in Matter of Janus & Janek, Int. Dec. 1900, 1968 BIA LEXIS 99 (BIA 1968).

The PRC's treatment of Mr. Si's family already signals little hope for returned passengers of the Golden Venture. Incensed by Mr. Si's wife and sister's picture in an American newspaper discussing the Golden Venture, J.A. at H382, PRC officials interrogated the two women about Mr. Si's flight and detained them for fifteen days. J.A. at H381. Therefore, among a group that already has a well-founded fear of persecution upon return, Mr. Si has an even greater likelihood of detection and harsh retribution.

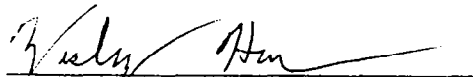
VI. CONCLUSION

For all the foregoing reasons, appellant respectfully requests that this Court rule that Mr. Si has presented a claim eligible for asylum and withholding and remand the case for proceedings consistent with the Attorney General's 1990 and 1993 regulations, and this Court's holding in Gomez v. INS.

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