

**SENDING THE MEN OVER FIRST: AMENDING SECTION
601(A) OF THE ILLEGAL IMMIGRATION REFORM AND
IMMIGRANT RESPONSIBILITY ACT TO ALLOW ASYLUM
FOR SPOUSES AND PARTNERS**

INTRODUCTION

My name is Jian Yu Zheng.¹ I married my wife when I turned 22, the age at which men in our country can legally marry. After the wedding, we applied for a birth permit. We were very excited to start our family. My wife gave birth to our son a year after the family-planning officials had granted us a birth permit. We were a happy family for a while. But shortly after we celebrated our son's second birthday, the family-planning people arrived at our house and forced my wife and me to get in a van. Our son stayed behind with his grandmother. My wife and I could not look at each other; we knew what these people had come for.

We were driven to a maternity hospital. My wife, seventh months pregnant with our second child, was pulled from me and taken to a room. I sat in the waiting room watching other couples come through the doors. Some were much younger than my wife and me—too young to have been legally married. I tried not to imagine what was going on behind the closed doors. Eventually, my wife appeared before me, with two nurses on either side of her. They told me that they had injected a contraction-inducing hormone into my wife's abdomen. Before the end of the next day, my wife had given birth to our stillborn daughter.

My wife is now pregnant with our third child. We have fled our hometown and are staying with an elderly couple in the country. It is only a matter of time before the family-planning people find us again. Other couples who have experienced what we have gone through have fled to the United States; we have heard that there is a law there that grants refuge to families who are victims of our country's population-control program. My wife and I have decided that I should leave now and send for her and our son later. She does not want to arrive in a strange country with our young son and another child on the way, homeless and unemployed. We both know that it would be easier for me, as a man, to find a job that pays enough to allow me to establish a home for us in the new country before sending for my wife and children. We are not looking forward to this separation, but we know that it is what we have to do for the future of our family.

1. This fictional account is loosely based upon the facts in *Huang v. Ashcroft*, No. 03-3435, slip op. at 2–3 (6th Cir. Nov. 4, 2004), and Louisa Lim, *Cases of Forced Abortions Surface in China*, NAT'L PUB. RADIO, Apr. 23, 2007, <http://www.npr.org/templates/story/story.php?storyId=9766870>.

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Many Chinese citizens flee to the United States seeking refuge from the dehumanizing practices employed under China's one-child policy. In 1996, Congress addressed the human-rights violations stemming from China's population-control program when it passed section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).² Section 601(a) provides refugee status to individuals forced to undergo abortion or sterilization as part of their country's population-control program.

Ten years ago, the Board of Immigration Appeals (BIA) concluded that section 601(a) grants automatic or per se refugee status to the spouses of individuals who have undergone forced abortions and sterilizations, even if the spouses themselves had not been subjected to a forced procedure.³ From 1997 to 2007, those circuit courts addressing the issue of whether section 601(a) grants per se refugee status to an individual whose spouse has been subjected to forced abortion or sterilization deferred to the BIA's interpretation of the law.⁴ Under this interpretation, Jian Yu Zheng could seek asylum in the United States prior to his wife's arrival.

A general immigration trend internationally is that men are usually the first members of the family sent to the new country because they have a "better chance of getting established" than their female relatives.⁵ This trend is reflected in the fact that the number of Chinese men obtaining asylum in the United States under section 601(a) far outnumbers the number of women.⁶ However, the Second Circuit's recent decision in *Lin v. United States Department of Justice* would prevent a husband without an independent basis for asylum from seeking asylum prior to the time the United States grants his wife asylum.⁷

2. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1101(a)(42) (2000). The majority of scholarly material addressing the 1996 amendment of the IIRIRA refers to the amendment as "section 601(a)," the amendment's public law section number. For the sake of consistency, I will also refer to the amendment as section 601(a).

3. *In re C-Y-Z-*, 21 I. & N. Dec. 915, 919-20 (B.I.A. June 4, 1997).

4. *E.g.*, *Chen v. U.S. Att'y Gen.*, 491 F.3d 100 (3d Cir. 2007); *Zhang v. Gonzales*, 434 F.3d 993, 1001 (7th Cir. 2006); *Huang v. Ashcroft*, No. 03-3435, slip op. at 8 (6th Cir. Nov. 4, 2004); *He v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003); *Li v. Ashcroft*, No. 03-60242, slip op. at 2 (5th Cir. Nov. 21, 2003).

5. Patricia Wen, *Law Offers Chinese a Path to U.S.: Policy Giving Asylum to Those Facing Coerced Birth Control Benefits Mostly Men*, BOSTON GLOBE, Aug. 18, 2002, at B1.

6. *See id.* ("Of the 10,000 Chinese people who have obtained political asylum based on China's one-child policy, federal statistics show, three out of four are men.")

7. *Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 299 (2d Cir. 2007).

The Second Circuit's decision has had, and will continue to have, dire consequences for individuals whose only potential basis for asylum is eligibility under section 601(a). Not only does the Second Circuit hear the most asylum appeals after the Ninth Circuit, but between 70% and 80% of all asylum applicants within the Second Circuit are individuals seeking refuge from China's coercive population-control policies.⁸ As of April 17, 2008, the Second Circuit has affirmed the denial of thirty-nine petitions for asylum from men whose wives, fiancées, or girlfriends were subjected to coercive family-planning measures because the men could not establish an independent ground for asylum.⁹ If Jian Yu Zheng were unfortunate enough to petition for asylum in Connecticut, Vermont, or New York (the three states over which the Second Circuit has appellate jurisdiction), his petition would be denied.

In order to further the goals of United States immigration policy, Congress should amend the IIRIRA to explicitly extend asylum eligibility to both legally and non-legally married spouses of individuals who have been subjected to forced abortion or sterilization.

8. Petition for Writ of Certiorari at 1, 18, *Dong v. Mukasey*, No. 07-639 (2d Cir. Nov. 13, 2007) [hereinafter *Dong* Petition].

9. *Liu v. U.S. Dep't of Justice*, No. 07-4410-ag, slip op. at 2, 3-4 (2d Cir. Apr. 4, 2008); *Ou v. Mukasey*, No. 05-6776-ag, slip op. at 2, 3 (2d Cir. Mar. 19, 2008); *Li v. Mukasey*, No. 07-2668-ag, slip op. at 2 (2d Cir. Mar. 5, 2008); *Lin v. Mukasey*, No. 05-1197-ag, slip op. at 2, 4 (2d Cir. Feb. 29, 2008); *Ye v. Mukasey*, No. 06-5240-ag, slip op. at 2, 4 (2d Cir. Feb. 27, 2008); *Jiang v. U.S. Dep't of Justice*, No. 06-5389-ag, slip op. at 2, 3 (2d Cir. Feb. 26, 2008); *Lin v. Mukasey*, No. 06-5071-ag, slip op. at 2, 3 (2d Cir. Feb. 25, 2008); *Lin v. INS*, No. 07-0633-ag, slip op. at 2, 3 (2d Cir. Feb. 20, 2008); *Wang v. Mukasey*, No. 06-5191-ag, slip op. at 2, 3 (2d Cir. Feb. 15, 2008); *Qian v. U.S. Dep't of Justice*, No. 06-5729-ag, slip op. at 2, 3 (2d Cir. Feb. 15, 2008); *Chen v. INS*, No. 06-5707-ag, slip op. at 2 (2d Cir. Feb. 7, 2008); *Ni v. Mukasey*, No. 07-2172-ag, slip op. at 2, 3 (2d Cir. Feb. 7, 2008); *Huang v. Mukasey*, No. 07-1743-ag, slip op. at 2, 3 (2d Cir. Feb. 7, 2008); *Weng v. Mukasey*, No. 05-4794-ag, slip op. at 2, 3 (2d Cir. Jan. 29, 2008); *Chen v. Mukasey*, No. 06-5642-ag, slip op. at 2, 3 (2d Cir. Jan. 10, 2008); *Zhou v. U.S. Dep't of Justice*, No. 07-1373-ag, slip op. at 2, 3 (2d Cir. Jan. 10, 2008); *Zheng v. Mukasey*, No. 07-2357-ag, slip op. at 2, 3 (2d Cir. Jan. 8, 2008); *Li v. Mukasey*, No. 07-2010-ag, slip op. at 2, 4 (2d Cir. Jan. 8, 2008); *Jiang v. Mukasey*, No. 07-2067-ag, slip op. at 2, 3 (2d Cir. Jan. 8, 2008); *Li v. Mukasey*, No. 07-2261-ag, slip op. at 2, 4 (2d Cir. Dec. 21, 2007); *Lin v. U.S. Citizenship & Immigration Servs.*, No. 06-5158-ag, slip op. at 2, 4 (2d Cir. Dec. 13, 2007); *Ning v. Mukasey*, No. 07-0008-ag, slip op. at 2, 3 (2d Cir. Nov. 20, 2007); *Shi v. BIA*, No. 02-4646-ag, slip op. at 2, 3 (2d Cir. Nov. 5, 2007); *Yu v. Keisler*, No. 07-1213-ag, slip op. at 2, 3 (2d Cir. Oct. 31, 2007); *Chen v. Keisler*, No. 06-5207-ag, slip op. at 2, 3 (2d Cir. Oct. 29, 2007); *Nin v. Keisler*, No. 06-4990-ag, slip op. at 2, 3 (2d Cir. Oct. 29, 2007); *Xiong v. Keisler*, No. 06-5282-ag, slip op. at 2, 3 (2d Cir. Oct. 26, 2007); *Chen v. Keisler*, No. 07-0821-ag, slip op. at 2, 3 (2d Cir. Oct. 23, 2007); *Yuan-Pan v. Keisler*, No. 07-0622-ag, slip op. at 2, 3 (2d Cir. Oct. 16, 2007); *Chen v. Keisler*, No. 06-5679-ag, slip op. at 2, 3 (2d Cir. Oct. 12, 2007); *Liu v. Keisler*, No. 06-3434-ag, slip op. at 2, 3 (2d Cir. Oct. 3, 2007); *Jiang v. Keisler*, No. 07-0102-ag, slip op. at 2, 5 (2d Cir. Sept. 27, 2007); *Da v. Bd. of Immigration Appeals*, No. 06-3072-ag, slip op. at 2, 2-3 (2d Cir. Sept. 11, 2007); *Jiang v. Gonzales*, No. 06-5260-ag, slip op. at 2, 3 (2d Cir. Sept. 7, 2007); *Zheng v. Gonzales*, No. 06-4887-ag, slip op. at 2, 3 (2d Cir. Sept. 4, 2007); *Zheng v. Gonzales*, No. 03-40020-ag, slip op. at 2, 4 (2d Cir. Aug. 29, 2007); *Ni v. Bd. of Immigration Appeals*, No. 06-4480-ag, slip op. at 2, 3 (2d Cir. Aug. 24, 2007); *Chen v. Gonzales*, No. 06-5183-ag, slip op. at 2, 3 (2d Cir. Aug. 20, 2007); *Lin v. Gonzales*, No. 06-2439-ag, slip op. at 2 (2d Cir. Aug. 7, 2007).

Part I of this Note discusses China's coercive population-control program and details Congress's response to the human-rights violations that occur in the execution of China's reproductive policies. Part II discusses the BIA's interpretation of section 601(a) and outlines the split among the circuits concerning asylum for non-legally married spouses under this provision. Part II also evaluates the disagreement among the circuits regarding the BIA's conclusion that section e601(a) automatically grants refugee status to spouses. Part III contends that the Second Circuit correctly interpreted section 601(a), but argues that if the Second Circuit's interpretation of section 601(a) is correct, it will hinder the United States' immigration policy goals. Finally, Part III asserts that revising section 601(a) to cover spouses (whether legally or non-legally married) will better protect families that are victims of coercive family-planning policies.

I. BACKGROUND

A. *The Origins of China's One-Child Policy*

When Mao Zedong founded the People's Republic of China in 1949, he promoted a population policy that encouraged rapid population growth.¹⁰ His population policy was embodied in the slogan, "[t]he more babies the more glorious are their mothers."¹¹ However, China's population increased by nearly 300 million from the late 1940s to the late 1970s.¹² This drastic population boom impeded the country's social and economic development.¹³ To promote higher standards of living, China initiated its first formal family-planning program in 1971.¹⁴ Among other population-reducing schemes, the program limited the number of children per family to two.¹⁵ However, the Chinese government soon realized that the two-child policy would not achieve the desired target of 1.2 billion people and zero population growth by 2000.¹⁶ Therefore, China devised its one-child policy in 1979.¹⁷

10. Raina Nortick, Note, *Singled Out: A Proposal to Extend Asylum to the Unmarried Partners of Chinese Nationals Fleeing the One-Child Policy*, 75 *FORDHAM L. REV.* 2153, 2156 (2007).

11. Xiaorong Li, *License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family-Planning Program*, 8 *YALE J.L. & FEMINISM* 145, 148 (1996).

12. Nicole M. Skalla, Note, *China's One-Child Policy: Illegal Children and the Family Planning Law*, 30 *BROOK. J. INT'L L.* 329, 332 (2004).

13. Nortick, *supra* note 10, at 2156.

14. Xizhe Peng, *Population Policy and Program in China: Challenge and Prospective*, 35 *TEX. INT'L L.J.* 51, 52 (2000).

15. See Skalla, *supra* note 12, at 333 (discussing how the family-planning program "ordered couples to wait until later in life to marry, to wait longer between births, and to cap the number of children per family at two").

16. Peng, *supra* note 14, at 53.

Pursuant to that policy, the national government has delegated the responsibility of implementing population control to local officials.¹⁸ One commentator has grouped the local family-planning regulations into four main categories: (1) a strict one-child per family policy, adopted by the municipalities of Beijing, Tianjin, and Shanghai, and the provinces of Jiangsu and part of Sichuan; (2) a two-child policy if the first born is a girl, adopted in rural areas in eighteen provinces; (3) a policy allowing families two children born four years apart, adopted by the rural areas of the Guangdong, Hainan, Yunnan, Hebei, and Hunan provinces; and (4) a two- or three-child policy, adopted by autonomous regions such as Tibet.¹⁹ Although local officials enjoy some flexibility in implementing these policies, the national government punishes these officials when they fail to meet the birth quotas in their areas.²⁰ As a result, local officials employ coercive birth control techniques to meet established birth quotas.²¹ Women pregnant with an unauthorized child are forced to undergo abortions, sometimes as late as the ninth month of pregnancy.²² Additionally, one spouse can be forcibly sterilized if the couple has had an unauthorized child.²³

It was not until 2001 that China codified its one-child policy in the Population and Family Planning Law (Family Planning Law).²⁴ Prior to the law's enactment, experts in China's family-planning program postulated that a national law codifying the one-child policy would provide greater protection to individuals' reproductive rights.²⁵ However, the positive effect of the Family Planning Law on reproductive rights has not been realized. Local governments are still responsible for implementing and enforcing their

17. *Id.*

18. Kyle R. Rabkin, Comment, *The Zero-Child Policy: How The Board Of Immigration Appeals Discriminates Against Unmarried Asylum-Seekers Fleeing Coercive Family Planning Measures*, 101 NW. U. L. REV. 965, 970 (2007).

19. Peng, *supra* note 14, at 55.

20. Rabkin, *supra* note 18, at 970.

21. *Id.* at 969-970.

22. Ann Noonan, *One-Child Crackdown*, NAT'L REV. ONLINE, Aug. 16, 2001, <http://www.nationalreview.com/comment/comment-noonan081601.shtml>.

23. See Michael Weisskopf, *Abortion Policy Tears at China's Society*, WASH. POST, Jan. 7, 1985, at A1 (reporting statistics that 31 million Chinese women and 9.3 million Chinese men were sterilized between 1979 and 1984).

24. Law on the Population and Family Planning (promulgated by the Standing Committee People's Cong., Dec. 29, 2001, effective Sept. 1, 2002), art. 18, *translated in* LAWINFOCHINA (last visited Aug. 26, 2008) (P.R.C.), *available at* <http://www.lawinfochina.com/law/display.asp?db=1&id=2209>.

25. See, e.g., Peng, *supra* note 14, at 56 ("It is now commonly acknowledged that a National Family Planning Law will legalize China's family planning program, and thereby safeguard the basic rights of Chinese people in reproductive issues.").

own regulations to meet the population goals of the Family Planning Law, and are still punished for failing to adequately do so.²⁶ Thus, to meet the goals of the Family Planning Law and avoid disciplinary measures against local officials, 23% of China's provinces expressly mandate that women pregnant with an unauthorized child undergo abortions, and 31% of the provinces sanction abortions and sterilizations as appropriate "remedial measures."²⁷

*B. Congress's Response to China's One-Child Policy:
The 1996 Amendment to the Immigration and Nationality Act*

Before Congress passed section 601(a) of the IIRIRA, the government denied victims of China's one-child policy asylum protection under the Immigration and Nationality Act unless they could show that their government persecuted them, that they had a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," or that they have a well-founded fear of future persecution on these grounds.²⁸ The courts granted asylum to victims of China's one-child policy only if they could show that a coercive population-control measure was being applied to them because of "race, religion, nationality, membership in a particular social group, or political opinion."²⁹ For example, in *In re Chang*, the BIA stated that "[w]e do not find that the 'one couple, one child' policy of the Chinese Government is on its face persecutive."³⁰

Less than a month after the BIA issued this statement, the Chinese government sent thousands of soldiers to control protesters in Tiananmen Square, where they massacred an estimated 500 to 3000 or more unarmed civilians.³¹ Afterwards, human-rights violations in China leapt to the forefront of Congress's concerns. Congress paid particular attention to forced abortions and sterilizations under China's coercive population-control policies.³² Congress attempted to overrule *In re Chang* when it passed the Emergency Chinese Immigration Relief Act of 1989.³³ However, President George H.W.

26. Skalla, *supra* note 12, at 337.

27. S. COMM. ON FOREIGN REL., 109TH CONG., 1 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2004, at 696 (Comm. Print 2005).

28. 8 U.S.C. § 1101(a)(42) (2000).

29. *See, e.g., In re Chang*, 20 I. & N. Dec. 38, 42 (B.I.A. May 12, 1989) (citing 8 U.S.C. § 1101(a)(42)(A) (2000)) (denying asylum for failure to prove persecution according to the categories enumerated).

30. *Id.* at 43.

31. Tiananmen Square, Kirkby Times News, http://www.kirkbytimes.co.uk/news_items/2004_news/tiananmen_square.html (last visited Nov. 13, 2008).

32. Nortick, *supra* note 10, at 2163.

33. Emergency Chinese Immigration Relief Act of 1989, H.R. 2712, 101st Cong. § 3(a) (1989).

Bush vetoed the Act.³⁴ Instead, President Bush issued a directive to his Attorney General to grant “enhanced consideration” to Chinese citizens seeking asylum from coercive population-control measures.³⁵

The Attorney General sought to enforce the President’s directive by issuing an interim rule that recognized political persecution based on forced abortions and sterilizations.³⁶ However, the final published rule was silent on the issue of refugee status for individuals fleeing coercive population-control regimes. Thus, the Attorney General signed another rule on President Bush’s last day in office “mandat[ing] that refugee status be granted to individuals subject to or facing forced abortion or sterilization as part of their country’s family planning policy.”³⁷ However, this rule was never published by the Clinton administration.³⁸ Instead, the Clinton Administration urged the courts to follow the BIA’s decision in *In re Chang*.³⁹

Despite this setback, Congress finally granted victims of China’s coercive population-control program definitive protection in 1996 when it passed section 601(a) of the IIRIRA.⁴⁰ Section 601(a) extends refugee status to “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.”⁴¹

II. JUDICIAL TREATMENT OF SECTION 601(A)

A. *The BIA’s Interpretation of Section 601: In re C-Y-Z-*

Less than a year after Congress enacted section 601(a), the BIA expanded eligibility for refugee status under the new law. In *In re C-Y-Z-*, the petitioner was a Chinese citizen whose wife was forcibly sterilized after giving birth to a third child.⁴² He filed his application for asylum

34. Memorandum of Disapproval for the Bill Providing Emergency Chinese Immigration Relief, 2 PUB. PAPERS 1611 (Nov. 30, 1989) [hereinafter Memorandum of Disapproval].

35. Kimberly Sicard, Note, *Section 601 of IIRIRA: A Long Road to a Resolution of United States Asylum Policy Regarding Coercive Methods of Population Control*, 14 GEO. IMMIGR. L.J. 927, 933–34 (2000) (quoting Memorandum of Disapproval, *supra* note 34).

36. Refugee Status, Withholding of Deportation, and Asylum; Burden of Proof, 55 Fed. Reg. 2803, 2803–05 (Jan. 29, 1990).

37. Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881, 886 (2000).

38. *Id.* at 887.

39. Sicard, *supra* note 35, at 935.

40. Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009-689 (codified as amended at 8 U.S.C. § 1101(a)(42)(B) (2000)).

41. *Id.*

42. *In re C-Y-Z-*, 21 I. & N. Dec. 915, 916 (B.I.A. June 4, 1997).

prior to the passage of section 601(a), and the immigration judge denied his application for asylum because “[h]e, himself, has never been persecuted and he cannot show either past persecution or a reasonable fear of future persecution.”⁴³

On appeal, the Immigration and Naturalization Service (INS) conceded that “the husband of a sterilized wife can essentially stand in her shoes and make a *bona fide* and non-frivolous application for asylum based on problems impacting more intimately on her than on him.”⁴⁴ In light of the INS’s concession, the BIA ruled that “[i]n view of the enactment of section 601(a) of the IIRIRA and the agreement of the parties that forced sterilization of one spouse on account of a ground protected under the Act is an act of persecution against the other spouse, the applicant has established past persecution.”⁴⁵

B. The Circuit Split Regarding Deference to the BIA’s Determination that Section 601(a) Does Not Extend Asylum Rights to Individuals Who Are Not Legally Married

1. Granting Asylum to Unmarried Partners: The Ninth and Seventh Circuits Reject the BIA’s Determination that Section 601(a) Only Covers Legally Married Spouses

At the age of 19, Kui Rong Ma married his wife, Lei Chiu, in a traditional marriage ceremony.⁴⁶ Two months after the wedding, Lei Chiu became pregnant.⁴⁷ To avoid detection by the local family-planning officials, she hid in her husband’s aunt’s house.⁴⁸ Ma attempted to legally register his marriage, but was denied because he was not yet 22, the legal age for marriage in China.⁴⁹

The family-planning officials eventually discovered that Lei Chiu was pregnant.⁵⁰ She was forced to abort her pregnancy in the third trimester.⁵¹ Five months after his wife’s abortion, Ma fled to Guam.⁵² Lei Chiu was

43. *Id.* (quoting the Immigration Judge opinion) (internal quotation marks omitted).

44. *Id.* at 918 (quoting the Immigration Judge opinion).

45. *Id.* at 919.

46. Petitioner’s Brief for Review of a Decision of the Board of Immigration Appeals at 4, *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004) (No. 02-70956) [hereinafter *Petitioner’s Brief*].

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 4–5.

51. *Id.* at 5.

52. *Id.*

unable to travel with him because she had become mentally and physically ill after the abortion.⁵³

After arriving in Guam, Ma was taken into custody by the INS.⁵⁴ At a hearing on the merits of Ma's application for asylum, the immigration judge found Ma not credible and denied his application.⁵⁵ Ma appealed to the BIA.⁵⁶ The BIA affirmed the immigration judge's denial and held that "only a spouse in a marriage 'legally' registered with the Chinese government can establish past persecution and qualify as a refugee on the basis of his wife's forced abortion or sterilization."⁵⁷

In *Ma v. Ashcroft*, the Ninth Circuit reviewed the BIA's decision.⁵⁸ The court determined that the "prohibition against underage marriages is 'an integral part' of China's coercive population control program."⁵⁹ The court reasoned that denying asylum status to individuals who cannot legally register their marriages would contravene the purposes and immigration policies of the 1996 Amendment. This approach, according to the Ninth Circuit, would lead to "absurd results," such as "the separation of a husband and wife" and "the break-up of the family."⁶⁰ Thus, the court held that refugee status under section 601(a) extends to the non-legally married spouses of individuals who have undergone forced abortions or sterilizations.⁶¹

Junshao Zhang and his wife were married in a ceremony at home.⁶² The couple could not officially register their marriage with the Chinese government because neither Zhang nor his wife had reached the legal age for marriage in China.⁶³ When Zhang's wife became pregnant, she was forced to abort their child due to the fact that she was underage.⁶⁴ After the abortion, Zhang fled to the United States, while his wife remained in China to wait for Zhang to send for her after he had successfully applied for asylum.⁶⁵

53. *Ma v. Ashcroft*, 361 F.3d 553, 556 (9th Cir. 2004).

54. Petitioner's Brief, *supra* note 46, at 2.

55. *Id.* at 3.

56. *Id.*

57. *Ma*, 361 F.3d at 554.

58. *Id.* at 553.

59. *Id.* at 559 (quoting *Li v. Ashcroft*, 356 F.3d 1153, 1159 n.5 (9th Cir. 2004) (en banc)).

60. *Id.* at 561.

61. *Id.*

62. *Zhang v. Gonzales*, 434 F.3d 993, 995 (7th Cir. 2006).

63. *Id.*

64. *Id.*

65. Reply Brief of Petitioner at 4 n.3, *Zhang v. Gonzales*, 434 F.3d 993 (7th Cir. 2006) (No. 04-1706) [hereinafter Reply Brief].

Zhang entered the United States at New York's John F. Kennedy airport in January 1995.⁶⁶ Upon his arrival, he was detained and questioned about his fraudulent passport.⁶⁷ Zhang filed an application for asylum based on his wife's forced abortion and his opposition to China's coercive-population control policies.⁶⁸ At the immigration hearing, the judge credited Zhang's story, but denied his application based on the BIA's decision in *In re Chang*.⁶⁹ This case held that asylum applicants fleeing China's one-child policy were statutorily ineligible for asylum.⁷⁰

Zhang appealed, but the BIA dismissed his appeal for the same reason articulated by the immigration judge in the proceeding below.⁷¹ After Congress passed section 601(a), which superceded the ruling in *Chang*, Zhang filed a motion to reopen his case.⁷² This immigration hearing was conducted before a judge in Chicago since Zhang and his parents (both legal residents of the United States) had moved to Indiana.⁷³ The immigration judge denied Zhang's application on the grounds that even if Zhang's testimony regarding his wife's forced abortion were credited, Zhang would still be ineligible for asylum under section 601(a) since he and his wife were not legally married.⁷⁴ On appeal, the BIA affirmed the immigration judge's ruling.⁷⁵

On review of the BIA's order, the Seventh Circuit followed the Ninth Circuit's lead, ruling that Zhang was eligible for asylum under section 601(a).⁷⁶ Relying on *Ma v. Ashcroft*, the court found that denying asylum to the "unofficial" spouses of individuals forced to undergo abortions or sterilizations would "subvert" the immigration policy goals of section 601(a) to "ensure that *families* who are victims of forced abortion and sterilization under China's population control policy would receive asylum."⁷⁷

66. *Zhang*, 434 F.3d at 994.

67. Reply Brief, *supra* note 65, at 3 n.2.

68. Brief of Petitioner at 2, *Zhang v. Gonzales*, 434 F.3d 993 (7th Cir. 2006) (No. 04-1706).

69. *Id.* at 3.

70. *In re Chang*, 20 I. & N. Dec. 38, 44 (B.I.A. May 12, 1989).

71. Brief of Petitioner at 3, *Zhang*, 434 F.3d 993 (No. 04-1706).

72. *Id.*

73. *Id.* (noting that the Chicago Immigration Court has jurisdiction over Indiana).

74. *Id.* at 6.

75. *Id.*

76. *Zhang v. Gonzales*, 434 F.3d 993, 1001 (7th Cir. 2006).

77. *Id.* at 999 (emphasis added).

2. Denying Asylum Status to Unmarried Partners: The Third, Fifth, and Eleventh Circuits Defer to the BIA's Determination that Section 601(a) Only Covers Legally Married Spouses⁷⁸

Cai Luan Chen and his fiancée, Gui Jin, applied for a marriage license when they learned that Gui Jin was pregnant.⁷⁹ Authorities denied the couple a marriage license because they were underage.⁸⁰ The local officials informed the couple that the pregnancy would have to be aborted.⁸¹ The couple then went into hiding, and shortly thereafter, Chen left for the United States.⁸² Two months after his arrival in the United States, Chen learned that his fiancée had been forced to undergo an abortion in the eighth month of her pregnancy.⁸³ The immigration judge granted Chen asylum. However, the BIA reversed the immigration judge's ruling, noting that section 601(a) did not cover "unmarried partners."⁸⁴

In *Chen v. Ashcroft*, the Third Circuit affirmed the BIA's order denying Chen's application for asylum.⁸⁵ Following the Supreme Court's guidelines for review of an agency's interpretation of relevant statutes in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the court deferred to the BIA's determination that unmarried partners or "unofficial" spouses were ineligible for asylum under section 601(a).⁸⁶

Under *Chevron*, courts are required to defer to the agency's interpretation of a statute when "Congress [has] delegated authority to the agency generally to make rules carrying the force of law."⁸⁷ A two-step test determines the level of deference to be afforded: (1) where the statute unambiguously states Congress's intent, the agency and the courts are required to give effect to that intent; or (2) where "Congress 'has explicitly left a gap for the agency to fill' . . . the agency's [interpretation] is 'given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary

78. The Fourth, Sixth, and Eighth Circuits defer to the BIA's determination that spouses of persons subjected to forced abortion and sterilization are covered under section 601(a), but have not ruled on whether it is reasonable that the BIA denies asylum eligibility to non-legally married spouses. *Lin-Jian v. Gonzales*, 489 F.3d 182, 188 (4th Cir. 2007); *Cao v. Gonzales*, 442 F.3d 657, 660 (8th Cir. 2006); *Huang v. Ashcroft*, No. 03-3435, slip op. at 6 (6th Cir. Nov. 4, 2004).

79. *Chen v. Ashcroft*, 381 F.3d 221, 223 (3d Cir. 2004).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 235.

86. *Id.*

87. *Id.* at 223–24 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)).

to the statute.”⁸⁸ The Third Circuit opined that the BIA’s likely interests in administrative efficiency and fraud prevention satisfied the reasonableness prong of the *Chevron* deference test, and thus the BIA’s interpretation should be given “controlling weight.”⁸⁹

The Fifth Circuit has not addressed the issue of whether spouses married in a traditional, yet unofficial, ceremony ought to be afforded asylum protection. However, in *Zhang v. Ashcroft*, the Fifth Circuit held that section 601(a) does not cover the boyfriends of individuals forced to undergo abortions or sterilization.⁹⁰ Zhang sought asylum in the United States after his girlfriend was forced to have an abortion.⁹¹ The couple had wanted to get married, but could not because they were underage.⁹² The Fifth Circuit issued a one-page opinion in which it deferred to the BIA’s determination that Zhang was not eligible for asylum because he lacked “spousal status.”⁹³

Shortly after the Second Circuit issued its decision in *Lin v. United States Department of Justice*, the Eleventh Circuit addressed the question of whether the BIA’s decision to deny asylum eligibility to the unofficial spouses of individuals subject to forced abortion or sterilization was reasonable.⁹⁴ Yi Qiang Yang married his wife in a traditional ceremony as neither Yang nor his wife was of legal marrying age.⁹⁵ When Yang’s wife became pregnant, the couple hid at Yang’s grandmother’s house.⁹⁶ Local family-planning officials later captured Yang’s wife and forcibly aborted her pregnancy.⁹⁷ Two months after the abortion, Yang fled China and applied for asylum in the United States.⁹⁸

88. *Id.* at 224 (quoting *Household Credit Servs. Inc. v. Pfennig*, 541 U.S. 232, 239 (2004) (first alteration in original; second alteration in *Pfennig*).

89. *Id.*

90. *Zhang v. Ashcroft*, 395 F.3d 531, 532 (5th Cir. 2004).

91. *Id.*

92. Brief of Petitioner-Appellant at 2, *Zhang v. Ashcroft*, 395 F.3d 531 (5th Cir. 2004) (No. 04-60183).

93. *Zhang*, 395 F.3d at 532.

94. *Yang v. U.S. Att’y Gen.*, 494 F.3d 1311, 1317 (11th Cir. 2007). The Eleventh Circuit issued its original opinion in this case on July 12, 2007. *Id.* at 1312–13. After the Second Circuit issued its opinion in *Lin* on July 16, 2007, the Eleventh Circuit, *sua sponte*, granted rehearing and issued an amended opinion. *Id.* The amended opinion briefly discusses *Lin* and no longer contains dicta, included in the original opinion, which stated that legally married spouses are entitled to automatic asylum under section 601(a). Petition for a Writ of Certiorari at 10 n.1, *Yang v. Mukasey*, No. 07-756 (11th Cir. Dec. 6, 2007) [hereinafter *Yang Petition*].

95. Petitioner’s Brief at 4–5, *Yang v. U.S. Att’y Gen.*, 494 F.3d 1311 (11th Cir. 2007) (No. 06-15742-H).

96. *Id.* at 5.

97. *Id.* at 5–6.

98. *Id.* at 6–7.

Upon review of the BIA's order denying Yang's application for asylum, the Eleventh Circuit held that Yang was ineligible for asylum under section 601(a).⁹⁹ After conducting its own *Chevron* analysis, the court concluded that the BIA's interpretation of section 601(a) was reasonable in light of the "sanctity and long-term commitment" that legal marriage entails.¹⁰⁰ However, the court limited its inquiry to whether the BIA's decision to deny asylum eligibility under section 601(a) to "unofficial" spouses of individuals subjected to forced abortion or sterilization was reasonable.¹⁰¹ The court did not address the issue of whether section 601(a) covers the legally married spouses of these individuals.¹⁰²

On December 6, 2007, Yang filed a petition for a writ of certiorari.¹⁰³ The petition asked the Supreme Court to decide whether non-legally married spouses of individuals who suffered forced abortion or sterilization are entitled to asylum rights under section 601(a).¹⁰⁴ Although the petition noted the Second Circuit's decision in *Lin*, it does not ask the Supreme Court to resolve the split created by that decision regarding the application of section 601(a) to legally married spouses.¹⁰⁵

C. The Second Circuit's Split: No Coverage for Spouses

Aside from the Second Circuit, all of the circuits that have addressed the issue of asylum rights for legal spouses are in accord with the BIA's determination that legally married spouses are covered by section 601(a). Although the BIA never posited a rationale for its grant of per se asylum eligibility to legally married applicants in *In re C-Y-Z-*, the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits all defer to the BIA's interpretation. However, some circuits have either not addressed or do not defer to the BIA's interpretation that asylum rights do not extend to unmarried partners.¹⁰⁶

99. *Yang*, 494 F.3d at 1319.

100. *Id.* at 1317.

101. *Id.*

102. *Id.*

103. Yang Petition, *supra* note 94.

104. *Id.* at i.

105. *Id.* at 28.

106. See Nicholas Cutaia, Note, *A Circuit Split On Judicial Deference: Interpreting Asylum Claims By Fiancés and Boyfriends of Victims of China's Coercive Family Planning Policies*, 80 ST. JOHN'S L. REV. 1307, 1319 (2006) ("The BIA neither referenced the statutory language of the 1996 Amendment upon which its decision was based, nor provided an explicit rationale for adopting this view.").

1. The Second Circuit Questions the BIA's Rationale in *In re C-Y-Z*

In *Lin v. United States Department of Justice (Lin I)*, the Second Circuit consolidated the cases of two boyfriends and one fiancé claiming to have suffered persecution as defined by section 601(a).¹⁰⁷ Shi Liang Lin sought asylum after his girlfriend, who was too young for him to marry legally, was forced to have an abortion.¹⁰⁸ The immigration judge denied his application for asylum, finding that it would not be “appropriate to expand . . . *Matter of C-Y-Z* to include unmarried couples.”¹⁰⁹ Xian Zou also claimed to have suffered past persecution because his girlfriend was forced to have an abortion.¹¹⁰ The immigration judge rejected Zou’s application, stating that there was “absolutely no way that Section 101(a)(42) [(8 U.S.C. § 1101(a)(42))] of the Immigration and Nationality Act and supporting case law apply [to Zou].”¹¹¹ Finally, Zhen Hua Dong unsuccessfully applied for asylum after his fiancée was twice forced to abort her pregnancies.¹¹² The immigration judge held that Dong was ineligible for asylum because “the BIA has not ‘further extended the protections of [section 601(a)] to fiancées or girlfriends or boyfriends of people who have been forced to undergo an involuntary abortion or sterilization.’”¹¹³ The BIA summarily affirmed the immigration judges’ decisions in all three cases.¹¹⁴

The Second Circuit reviewed the immigration judges’ decisions directly.¹¹⁵ Reasoning that summarily affirmed immigration-judge opinions are not entitled to review under *Chevron* deference standards, the court determined that it would review the decision de novo.¹¹⁶ However, the court found it “impossible” to conduct a proper de novo review of the immigration judge’s decision because the “BIA never adequately explained how or why, in the first instance, it construed IIRIRA § 601(a) to permit spouses of those directly victimized by coercive family planning policies to

107. *Lin v. U.S. Dep’t of Justice*, 416 F.3d 184, 188 (2d Cir. 2005).

108. *Id.*

109. *Id.* (quoting the Immigration Judge opinion).

110. *Id.*

111. *Id.* (quoting the Immigration Judge opinion) (second alteration in original).

112. *Id.* at 188–189.

113. *Id.* at 189 (quoting the Immigration Judge opinion).

114. *Id.*

115. *See id.* (observing that “when the BIA summarily affirms an IJ’s decision, we review the decision of the IJ directly”).

116. *See id.* at 191 (“There is . . . no reason to believe that an IJ’s summarily affirmed decision contains the sort of authoritative and considered statutory construction that *Chevron* deference was designed to honor.”).

become eligible for asylum themselves.”¹¹⁷ Thus, the court remanded the case to the BIA for further explanation as to “why it established spousal eligibility in the first instance.”¹¹⁸

The most recent decisions from the Fifth, Sixth, and Seventh Circuits upholding the BIA’s interpretation of section 601(a) were issued before *In re S-L-L-*.¹¹⁹ Other commentators have noted that the Second Circuit’s remand in *Lin I* was the most appropriate response to the BIA’s interpretation of section 601(a) in *C-Y-Z-*, given the lack of explicit justification for the BIA’s holding.¹²⁰ Any future deference to the BIA’s interpretation of section 601(a) will be based on the Second Circuit’s holding in *In re S-L-L-*.¹²¹

2. The Second Circuit Gets an Answer: *In re S-L-L-*

The BIA issued its decision in Shi Liang Lin’s case over a year after the Second Circuit remanded the case.¹²² The BIA reaffirmed its reasoning in *In re C-Y-Z-* and outlined the underlying policies supporting its conclusion that section 601(a) automatically entitles the spouse of an individual who was forced to undergo an abortion or sterilization to asylum.¹²³ The BIA presented two main reasons why it had correctly interpreted section 601(a). First, Congress intended section 601(a) to “protect both spouses when the government has forced a married couple opposed to an abortion to submit to such a procedure.”¹²⁴ Second, “the 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.”¹²⁵ The BIA limited the scope of its holding to applicants who are legally married under Chinese law, and who, in fact, opposed their spouse’s abortion or sterilization.¹²⁶

117. *Id.*

118. *Id.* at 192.

119. *In re S-L-L-*, 24 I. & N. Dec.1 (B.I.A. Sept. 19, 2006).

120. *See, e.g.,* Cutaia, *supra* note 106, at 1331 (“[T]he Second Circuit adopted the most measured and appropriate approach to the BIA’s interpretation.”).

121. *In re S-L-L-*, 24 I. & N. Dec. at 1.

122. *Id.* at 2 n.1 (noting that the court would address the remands in Xian Zou and Zhen Hua Dong’s cases in separate decisions).

123. *Id.* at 8.

124. *Id.* at 6.

125. *Id.* at 7 (quoting *Chen v. Ashcroft*, 381 F.3d 221, 225 (3d Cir. 2004)).

126. *Id.* at 8.

3. The Second Circuit Rejects the BIA's Rationale: *Lin v. United States Department of Justice (Lin II)*

After the BIA issued its decision in *In re S-L-L-*, the Second Circuit ordered a rehearing *en banc* to ascertain whether the BIA's interpretation of section 601(a) was correct.¹²⁷ In a two-step analysis, the court first determined that the BIA's interpretation of section 601(a) was not entitled to *Chevron* deference, and next concluded that the BIA had not reasonably construed section 601(a).¹²⁸

The majority began its analysis under *Chevron* by asking "whether Congress has spoken directly to the question of whether an individual can establish past persecution based solely on his spouse or partner's forced abortion or sterilization," and concluded that Congress had spoken directly to this question.¹²⁹ The majority found that the language of section 601(a) was unambiguous.¹³⁰ In so concluding, the court observed "two cardinal rules" of statutory construction: (1) "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose";¹³¹ and (2) "Congress says in a statute what it means and means in a statute what it says there."¹³²

The court noted that all clauses of section 601(a) refer to "a person" and that "a person" unambiguously refers to an individual.¹³³ The court pointed out that if Congress had intended to include the spouse or partner of "a person" who had been subjected to an involuntary abortion or sterilization, "it could simply have said so."¹³⁴ Additionally, the court observed that other definitions of "refugee" under § 1101(a)(42) require that a person seeking asylum must have personally experienced "persecution or a well-founded fear of persecution."¹³⁵ Thus, in light of the "overall statutory scheme," the court concluded that Congress had definitively limited the scope of individuals covered by the amended definition of "refugee" contained in the provisions of section 601(a).¹³⁶

127. *Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 299 (2d Cir. 2007).

128. *Id.* at 300.

129. *Id.* at 304.

130. *Id.* at 300.

131. *Id.* at 305 (quoting *Park 'N Fly, Inc., v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)) (alteration in original).

132. *Id.* (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

133. *Id.* at 306.

134. *Id.* at 305 (quoting *Hartford*, 530 U.S. at 2).

135. *Id.* at 306 (quoting 8 U.S.C. § 1101(a)(42) (2000)).

136. *Id.* at 306-07.

The court then examined the legislative history of the statute, although it made clear that examining the legislative history of the statute was not necessary because the statutory language is unambiguous.¹³⁷ Rather, the court looked to the legislative history to confirm that its interpretation of section 601(a) was in harmony with congressional intent.¹³⁸ Relying on the House Report recommending passage of the amendment, the court emphasized a section of the report stating that “[s]ection [601(a)] is not intended to protect persons who have not actually been subjected to coercive measures or specifically threatened with such measures.”¹³⁹ The court reasoned that this report indicates Congress’s intent to provide protection only to individuals who were actually subjected to or had a well-founded fear of coercive abortion or sterilization.¹⁴⁰ The court determined that Congress did not intend to grant automatic refugee status to spouses under section 601(a) because another statute already provides derivative asylum rights.¹⁴¹ There was no room for the BIA to interpret the statute otherwise because Congress had spoken directly to the issue of per se asylum eligibility for spouses of individuals that are victims of a coercive population control program.¹⁴²

However, the court acknowledged that the phrase “other resistance is ambiguous and [thus] leaves room for the BIA’s reasonable interpretation where the applicant relies on something beyond his spouse’s or partner’s persecution.”¹⁴³ The court provided guidance for the BIA’s future interpretation of “resistance,” asserting that “the fact that an individual’s spouse has been forced to have an abortion or undergo involuntary sterilization does not, on its own, constitute resistance to coercive family planning policies.”¹⁴⁴

Three concurring judges and one dissenting judge vehemently opposed the majority’s treatment of the issue of spousal eligibility since that question was not before the court. Two judges wrote separate concurring opinions in which they criticized the majority’s *Chevron* deference analysis.¹⁴⁵ They argued that the language of section 601(a) is ambiguous

137. *Id.* at 310.

138. *Id.*

139. *Id.* at 311 (quoting H.R. REP. No. 104-469, pt. 1, at 174 (1996)) (emphasis added and second alteration in *Lin*).

140. *Id.*

141. *Id.* at 312 (referencing the provision of derivative asylum rights to spouses and children of individuals granted asylum by 8 U.S.C. § 1158(b)(3)(A)).

142. *Id.*

143. *Id.*

144. *Id.* at 313.

145. *Id.* at 327, 334.

and that the majority failed to consider the context of the entire statute that it amended.¹⁴⁶ They observed that the rest of the statute contains general language that does not “explicitly address[] whether the spouses of those who have been forced to undergo an abortion or sterilization are entitled to asylum relief.”¹⁴⁷ Thus, because the statute is ambiguous, it is the BIA’s place, not the courts’, place to interpret the statute.¹⁴⁸

The dissenting judge believed that the concurring judges had responded as if the BIA had made a ruling under § 1101(a)(42)(A), when the BIA had in fact only considered *per se* asylum eligibility under section 601(a).¹⁴⁹ The dissent agreed that the majority had correctly rejected the BIA’s interpretation of section 601(a), but asserted that the case should be remanded to the BIA to consider *per se* asylum eligibility for spouses and unmarried partners under § 1101(a)(42)(A).¹⁵⁰ The dissent remarked that “we will never know” what rule the BIA would have adopted if the case had been sent back to determine the issue.¹⁵¹

III. ANALYSIS

A. *The Second Circuit Correctly Interpreted Section 601(a)*

The BIA espoused credible policy reasons in *In re S-L-L-* for extending protection to spouses of individuals who have been forced to undergo abortions or sterilization. However, the honorable goal of extending protection to the spouse of one who has suffered from the forced abortion of the couple’s prospective child cannot be accomplished by misinterpreting section 601(a).

Chinese nationals seeking asylum in the United States benefit from the misinterpretation of section 601(a). In other instances, misinterpreting a statute will likely result in prejudice. At least one commentator has argued that the danger of prejudice arises when courts avoid the plain meaning of a statute.¹⁵² Furthermore, as the current circuit split

146. *Id.*

147. *Id.* at 318.

148. *Id.* at 322.

149. *Id.* at 335 (Calabresi, J., dissenting).

150. *Id.* at 343.

151. *Id.* at 339.

152. See Judith Brodtkin, Note, *Procedural Law—Florida Supreme Court Creates a Bright-Line Rule That Court Orders Entered to Resolve Good Faith Motions Should Automatically Be Treated as Activity, Thus Precluding Dismissal—Wilson v. Salamon*, 923 So. 2d 363 (Fla. 2005), 33 FLA. ST. U. L. REV. 1227, 1262 (2006). “Whenever the plain meaning of a statute is unambiguous, it should be adhered to in order to avoid inconsistency. The fewer subjective decisions a court has to make, the less chance there is for prejudice.” *Id.*

demonstrates, court-given rights that are not built on a firm jurisprudential foundation are easily taken away.¹⁵³

The BIA's reasoning in *In re S-L-L-* provided little more than *In re C-Y-Z-* in explaining why a spouse should receive asylum rights based on his wife's forced abortion or sterilization.¹⁵⁴ The decision provided little guidance as to the specific statutory language the BIA relied on when it deemed that spouses were included in section 601(a)'s amended definition of "refugee." Therefore, on rehearing, the Second Circuit had to first examine the text of section 601(a) to determine whether the statute was ambiguous.¹⁵⁵ Only after this analysis could the court properly determine if the second inquiry under *Chevron*—whether the BIA's construction of section 601(a) was permissible—was necessary.¹⁵⁶

The BIA's avoidance of a text-based analysis suggests that the BIA could find no support in the language of the statute itself for its interpretation that section 601(a) automatically extends refugee status to spouses. Instead, the BIA relied solely on policy.¹⁵⁷ However, the starting point in statutory construction must be the language of the statute itself.¹⁵⁸ The phrase "a person" unambiguously refers to one person. If Congress intended a "broad and inclusive meaning," it would not have chosen the restrictive phrase "a person."¹⁵⁹

The concurring opinions in *Lin II* contended that the language of section 601(a) is ambiguous because the term "persecution" is not clearly defined.¹⁶⁰ They reasoned that the term "persecution" is ambiguous because Congress amended § 1101(a)(42) to "clarify what it means to be persecuted

153. See, e.g., Alec Walen, *Consensual Sex Without Assuming the Risk of Carrying an Unwanted Fetus; Another Foundation for the Right to an Abortion*, 63 BROOK. L. REV. 1051, 1059 (1997) (criticizing the foundation upon which *Roe v. Wade* established a woman's "right to an abortion," stating that "[s]ince a woman's right is linked to viability, it will surely be eroded as technology improves").

154. See *Chen v. U.S. Att'y Gen.*, 491 F.3d 100, 115 (3d Cir. 2007) (McKee, J., dissenting) ("*S-L-L-* is devoid of any real analysis . . . *S-L-L-* is little more than an essay on the virtues of the sanctity of procreation and marriage.").

155. *Lin*, 494 F.3d at 304.

156. *Id.*

157. See *supra* Part II.C.2 (discussing the rationale behind the BIA's interpretation of section 601(a)).

158. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979) ("As is true in every case involving the construction of a statute, our starting point must be the language employed by Congress.").

159. Cf. *id.* at 338 ("Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning.") (emphasis added). A necessary corollary to the Court's conclusion that the phrase "any person" has a "broad and inclusive meaning" is that the phrase "a person" has a narrow and exclusive meaning.

160. See *Lin*, 494 F.3d at 324 (Katzmann, J., concurring) ("I do not think that § 601(a) unambiguously defines the term persecution . . ."); *Id.* at 329 (Sotomayor, J., concurring). "There is no indication whatsoever of how personal or direct the harm or injury must be, only that persecution to an individual can merit asylum protection . . . As with any ambiguous statutory term, it is for the BIA to determine . . . what exactly constitutes 'persecution' . . ." *Id.*

‘on account of political opinion.’”¹⁶¹ However, although it may be true that the “emotional and psychological harm one suffers when one’s spouse is forced to undergo an abortion or sterilization” can rise to the level of persecution, this does not change the fact that the statute refers only to “a person” who has been forced to undergo such procedures.¹⁶²

In her concurrence, Judge Katzmann also looked to the Ninth and Seventh Circuits’ determination that it was Congress’s intent when it passed section 601(a) to provide protection to “both members of couples that are targeted under China’s family planning policy.”¹⁶³ In addition, the majority observed that the House Report recommending passage of section 601(a) explicitly stated that the amendment “is not intended to protect persons who have not actually been subjected to coercive measures or specifically threatened with such measures.”¹⁶⁴ Notably, section 601(a) was passed at a time when the United States was particularly hostile to immigration.¹⁶⁵ Thus, section 601(a) represented a conservative response—compared to the Attorney General’s order signed on the last day of President Bush’s administration, which explicitly granted asylum to spouses of individuals forced to undergo abortions or sterilizations¹⁶⁶—to increasing reports of human-rights violations under China’s one-child policy.¹⁶⁷

*B. Congress Should Amend the Immigration and Nationality Act to
Explicitly Extend Protection to Both Legally Married and Non-Legally
Married Spouses*

Other commentators have already addressed how the courts’ interpretation of section 601(a)—to exclude the “unmarried partners” of individuals directly victimized by China’s one-child policy—contravenes important immigration-policy goals. These goals include protecting entire families from coercive population-control programs and keeping these

161. *Id.* at 324 (Katzmann, J., concurring) (quoting 8 U.S.C. § 1101(a)(42) (2000)).

162. *Id.*

163. *Id.* at 322 (citing *Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006); *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004)).

164. *Id.* at 311 (majority opinion) (quoting H.R. REP. NO. 104-469, pt. 1, at 174 (1996)).

165. See Sicard, *supra* note 35, at 935 (discussing how the Clinton administration sought to deter Chinese immigration in the face of “growing anti-immigration hostility”).

166. *Lin v. U.S. Dep’t of Justice*, 494 F.3d 296, 311 n.12 (2d Cir. 2007).

167. See Rabkin, *supra* note 18, at 973–74 (detailing the *Golden Venture* tragedy in which a freighter ran aground off Long Island with most of the nearly 300 smuggled Chinese refugees on board claiming persecution as victims of China’s coercive population-control policies, and President Clinton’s subsequent announcement that Chinese nationals who could show that they had suffered harm from coercive birth-control policies would not be deported).

families together.¹⁶⁸ These commentators have argued that other courts should not follow these decisions.¹⁶⁹ An amendment to the language of section 601(a) can resolve the disagreement among the circuits, as well as between the circuits and the BIA.¹⁷⁰ The Second Circuit is the only court to have performed a stringent text-based analysis of section 601(a). Its interpretation of the amendment must be deemed more persuasive than courts that automatically deferred to the BIA's interpretation or avoided construing the language altogether.¹⁷¹ While five circuits have interpreted section 601(a) contrary to the Second Circuit, it is not unlikely that other courts, including the BIA, might adopt its interpretation.¹⁷² In light of the circuit split, the Attorney General has commenced proceedings to address the question of whether spouses should be eligible for asylum under section 601(a).¹⁷³ However, even "[i]f the Attorney General affirms the BIA's recognition that asylum should be extended to spouses, a circuit split on the issue will persist There . . . is no prospect that the Second Circuit will defer to a contrary administrative conclusion."¹⁷⁴

On November 13, 2007, Zhen Hua Dong, the only remaining petitioner in *Lin II*, filed a petition for a writ of certiorari asking the Supreme Court to

168. See *id.* at 995 (“[T]he BIA should . . . further the United States immigration policy goal of uniting families.”); see also Nortick, *supra* note 10, at 2191 (“The United States should extend derivative asylum rights to Chinese nationals fleeing the one-child policy, regardless of marital status.”); Moshe S. Berman, Note, *The Appropriate Response of the United States to Forced Abortion in China: Should Section 601(a) of the IIRIRA Be Extended to Allow Asylum for Unmarried Couples?*, 41 NEW ENG. L. REV. 339, 372 (2007). “American society now acknowledges that a family does not necessarily include a married mother and father [H]ow can the legal system, in good conscience, hold that the pain and suffering of unmarried victims of forced abortions is less important than the pain suffered by a married couple?” *Id.* See also Eloisa A. Rivera, Comment, *Authorized Marriages Only? Refugee Relief Under Section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 40 U.C. DAVIS L. REV. 229, 257 (2006) (“Denying relief [to persons whose marriages China does not legally recognize] will separate husbands, wives, and children from one another.”).

169. See *supra* note 168.

170. In light of the Second Circuit's decision in *Lin II*, the House passed a bill, proposed by Representative Vito Fossella from New York, which would “prohibit[] the Justice Department from using funding in its 2008 budget to enforce the 2nd Circuit Court's ruling.” Press Release, Congressman Vito J. Fossella, Rep. Fossella's Amendment to Help the Victims of China's Barbaric Forced Sterilization Policy Passes the House (July 26, 2007), http://www.house.gov/list/press/ny13_fossella/070726_china.html. On September 17, 2007, Fossella introduced a bill that would amend section 601(a) to grant asylum status to the “legally recognized spouse” of individuals who have undergone forced abortions or sterilization. H.R. 3552, 110th Cong. (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3552ih.txt.pdf.

171. See, e.g., *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1551 (2007) (Kennedy, J., concurring) (expressing concern that putting policy before text would improperly shape “judicial interpretation of statutes”).

172. See *Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 314 (2d Cir. 2007) (recognizing that the court's decision could result in “a change in the BIA's interpretation of section 601(a)”).

173. Yang Petition, *supra* note 94, at 10–11.

174. *Id.* at 28.

address the question of whether section 601(a) applies to the legally married spouse of an individual who has suffered forced abortion or sterilization.¹⁷⁵ The petition states: “Only review by this Court can remove the uncertainty [that] the ruling below has injected into the asylum system across the country.”¹⁷⁶ The Supreme Court has yet to grant certiorari, and it is uncertain to what extent the Court is likely to expand asylum rights under section 601(a). Therefore, only an amendment to section 601(a) that explicitly grants asylum eligibility to both legally and non-legally married spouses of individuals subjected to forced abortion or sterilization will provide absolute protection for families seeking refuge from China’s coercive population-control policies.¹⁷⁷

1. The Plain Language of Section 601(a) Ignores the Reality of Families Who Wish to Escape China’s Coercive Population-Control Program by Seeking Asylum in the United States

Immigration trends indicate that women currently make up the majority of immigrants coming to the United States.¹⁷⁸ However, the number of men seeking asylum under section 601(a) is significantly greater than the number of women.¹⁷⁹ Historically, Chinese men have immigrated first; they found work and established themselves before sending for the rest of their family.¹⁸⁰ Sociological studies have shown that immigrant women, especially those from countries in Asia, face severe socioeconomic disadvantages.¹⁸¹ The stories of the men petitioning for review of adverse asylum-application judgments in the circuit courts illuminate why Chinese men whose partners have undergone

175. Dong Petition, *supra* note 8, at i.

176. *Id.* at 18.

177. Assuming *arguendo* that the Supreme Court did rule that spouses are eligible for asylum under section 601(a), such a ruling would not provide the firm protection to families fleeing China’s inhumane population-control practices that an amendment would provide. See *supra* Part III.A and text accompanying note 153 (“[C]ourt-given rights that are not built on a firm jurisprudential foundation are easily taken away.”).

178. See, e.g., Leslye Orloff, *Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 WM. & MARY J. WOMEN & L. 597, 602 (2001) (“Combining both legal and undocumented immigration statistics reveals that more than half of all U.S. immigrants are women.”).

179. See Rabkin, *supra* note 18, at 992–93 (“[I]n the first five years after Congress passed Section 601, approximately three quarters of those Chinese immigrants granted asylum under its provisions were men.”).

180. *Id.* at 993.

181. Rebeca Rajzman & Moshe Semyonov, *Gender, Ethnicity, and Immigration: Double Disadvantage and Triple Disadvantage among Recent Immigrant Women in the Israeli Labor Market*, 11 GENDER & SOC’Y 108, 110 (1997).

forced abortions or sterilization immigrate to the United States before their partners.

In *Lin II*, Shi Liang Lin left China after his girlfriend was forced to abort her pregnancy.¹⁸² His girlfriend stayed behind because she was too weak to travel.¹⁸³ In *Ma v. Ashcroft*, Kui Rong Ma's partner became mentally and physically ill after she was forced to abort her pregnancy in the third trimester.¹⁸⁴ She urged Ma to leave for the United States first and send for her later.¹⁸⁵ In *Huang v. Ashcroft*, Guang Hua Huang's wife was forced to have an abortion when she became pregnant after the birth of their first child.¹⁸⁶ He and his wife decided to leave China when she became pregnant a third time.¹⁸⁷ He was smuggled into the United States in the hull of a boat while his wife remained in China to await the birth of their second child.¹⁸⁸

As these cases illustrate, asylum protection granted under the "other resistance" provision of section 601(a)¹⁸⁹ or under 8 U.S.C. § 1158(b)(3)(A)¹⁹⁰ is insufficient. Often, the spouse or partner cannot meet the heavy burden of showing "other resistance" to China's coercive population-control policies. For instance, Lin opposed his girlfriend's abortion; however, the Second Circuit reaffirmed the Fifth Circuit's determination that "[m]erely impregnating one's *girlfriend* is not alone an act of 'resistance.'"¹⁹¹ Thus, Lin would need to have shown "past persecution or a fear of future persecution for 'resistance' that is directly related to his . . . own opposition to a coercive family planning policy."¹⁹² Given the rigorous credibility assessments that asylum applicants

182. *Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 301 (2d Cir. 2007).

183. *Id.*

184. *Ma v. Ashcroft*, 361 F.3d 553, 556 (9th Cir. 2004).

185. *Id.*

186. *Huang v. Ashcroft*, No. 03-3435, slip op. at 2 (6th Cir. Nov. 4, 2004).

187. *Id.* at 2-3.

188. *Id.* at 3.

189. 8 U.S.C. § 1101(a)(42)(B) (2000) ("[A] person who has been . . . persecuted for . . . other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion.").

190. 8 U.S.C. § 1158(b)(3)(A). This provision provides:

A spouse or child (as defined in section 1101(b)(1) (A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if *accompanying, or following to join*, such alien.

Id. (emphasis added).

191. *Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 313 (2d Cir. 2007) (quoting *Zhang v. Ashcroft*, 395 F.3d 531, 532 (5th Cir. 2004)) (alteration in original).

192. *Id.*

undergo, it would be difficult to show the requisite “resistance” to coercive population-control policies.¹⁹³

Similarly, 8 U.S.C. § 1158(b)(3)(A) provides little relief to an individual seeking asylum before his spouse or partner enters the United States. Under the statute, derivative asylum rights are conditioned on the spouse already having been granted asylum. Furthermore, the statute does not extend derivative asylum rights to unmarried partners.¹⁹⁴ The Second Circuit properly observed that the statute “reflects a policy decision to encourage the preservation of families [The statute’s] structure encourages couples to remain together, or, in circumstances where this is not possible, facilitates reunion.”¹⁹⁵ However, this structure impedes families from successfully receiving asylum protection when it is impossible or impractical for the member of the family who is the “direct victim” to immigrate to the United States. As Lin, Ma, and Huang’s stories reveal, it is not always feasible or preferable for a woman to accompany or precede her husband or partner’s entry into the United States. Thus, 8 U.S.C. § 1158(b)(3)(A) does not provide adequate protection to Chinese nationals who flee their country’s coercive population control program.

2. More-Inclusive Statutory Protection for Families Fleeing China’s Coercive Population-Control Policies Will Not Lead to Widespread Abuse of the System

Critics of extending asylum protection to spouses and unmarried partners worry that creating an even more expansive definition of “refugee” will increase fraudulent claims of persecution.¹⁹⁶ Opponents argue that section 601(a) is “exploited” by Chinese men because it provides them with

193. See, e.g., Joanna Ruppel, *The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applicants*, 23 COLUM. HUM. RTS. L. REV. 1, 2 (1991) (“Once in the United States, it may be difficult for the asylum-seeker to procure affidavits of witnesses or relatives attesting to the events which underlie the asylum-seeker’s claim.”). On the other hand, family planning officials usually issue abortion and sterilization certificates, thus providing invaluable documentary evidence for an asylum seeker. No doubt this is why many asylum applicants falsify such certificates in order to gain permanent residence in the United States. See, e.g., *Liu v. Gonzales*, No. 06-5508, slip op. at 3 (2d Cir. Sept. 7, 2007) (explaining that the petitioner admitted to creating fraudulent sterilization certificate “for the sole purpose of succeeding in an asylum application before the Immigration Court.”).

194. 8 U.S.C. § 1158(b)(3)(A) (2000).

195. *Lin*, 494 F.3d at 312.

196. See, e.g., Cleo J. Kung, Comment, *Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the U.S. Statutory Definition Of “Refugee”*, 90 J. CRIM. L. & CRIMINOLOGY 1271, 1305 (2000) (arguing that section 601(a) should be repealed because it “facilitated a dramatic rise in the number of Chinese migrants smuggled into the U.S.” seeking asylum based on fraudulent claims of persecution under China’s one-child policy).

an easy path into the United States.¹⁹⁷ Additionally, opponents worry that the direct victims of China's coercive population-control policies could suffer from extending asylum rights to spouses or unmarried partners.¹⁹⁸ Opponents also argue that expanding the coverage of section 601(a) would result in a "flood of refugees."¹⁹⁹

Other commentators have rebutted these arguments, noting: (1) the high standard of proof during credibility assessments requires the asylum seeker to provide "[s]pecific, detailed and credible testimony, or a combination of detailed testimony and corroborative background evidence;"²⁰⁰ and (2) The number of applicants who have valid asylum claims as the spouses or partners of individuals forced to undergo abortions or sterilization would account for a small portion of the total influx of asylum applicants to the United States.²⁰¹ Lastly, the argument that extending asylum protection to spouses or unmarried partners would encourage men to abandon their wives or girlfriends is unfounded. This conclusion ignores the fact that women may be physically unable to travel, or that they face greater socioeconomic disadvantages. Thus, immigrant men are generally more capable of establishing a stable home for their families in the United States.²⁰²

CONCLUSION

Extending asylum protection to both legally and non-legally married spouses of individuals who have undergone forced abortions or sterilization will help families flee China's persecutory family-planning policies. Often, a woman's only chance of escape is for her husband or partner to establish himself in the United States and then send for her and any children they

197. See Wen, *supra* note 5, at B1 (discussing immigration specialists' concerns that Chinese men will be granted asylum based on fraudulent claims under section 601(a)); Kung, *supra* note 196, at 1315 ("The Amendment grants Chinese applicants prima facie asylum eligibility even though the majority of their claims are fraudulent.").

198. See, e.g., *In re C-Y-Z-*, 21 I. & N. Dec. 915, 916 (B.I.A. June 4, 1997) (noting that "[C-Y-Z's] wife . . . did not gain anything from having the applicant abandon her and her children for the United States").

199. See Berman, *supra* note 168, at 373-75 (discussing opponents' fears that extending asylum rights beyond those directly subjected to forced abortions and sterilization would create "a flood of frivolous claims").

200. Rabkin, *supra* note 18, at 993 (quoting *Qiu v. Ashcroft*, 329 F.3d 140, 150 (2d Cir. 2003) (alteration in original)).

201. See, e.g., Nortick, *supra* note 10, at 2185 (providing statistics from 2003 showing that only "7000 refugees applied for asylum based on coercive family planning measures," and commenting that this is "hardly an overwhelming number").

202. See *supra* Part III.B.1 (recounting the stories of men who left their wives or partners in China to come to the United States and the reasons that they did so).

may have. Moreover, extending asylum rights to spouses and unmarried partners recognizes that forced abortions or sterilizations have a devastating effect on not only the individual directly subjected to such procedures, but also on that individual's spouse or partner. However, these goals should not be accomplished by misinterpreting the text of section 601(a). Therefore, section 601(a) should be amended to explicitly entitle asylum protection to legally and non-legally married spouses of individuals who have undergone forced abortions or sterilization.

* * *

My name is Zhu Hua Zheng. Two months ago, my husband left for the United States. We were hoping to start a new life there, where we could live without the fear of the family-planning officials coming to take away the child I am now carrying. These hopes for a new life are gone. I received a letter from Jian Yu telling me that he had been detained by immigration officials when he crossed the Canadian border into Vermont. The officials denied his application for asylum because he cannot claim to be a victim of our country's family-planning laws based on the termination of my pregnancy. They will deport him in a few weeks. My only remaining hope is that the family-planning officials will not discover that I am pregnant. I could not endure losing another child.

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