

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2004

4 (Argued: May 12, 2005

5 Final Submission: August 24, 2005 Decided: January 18, 2006)

6 Docket No. 03-4202

7 -----  
8 JOSE JOAQUIN-PORRAS,

9 Petitioner,

10 - v. -

11 ALBERTO GONZALES,\* Attorney General of the United States,

12 Respondent.  
13 -----

14 Before: FEINBERG, CARDAMONE, and SACK, Circuit Judges.

15 Petition for review of the Board of Immigration  
16 Appeals' order affirming the decision of an Immigration Judge  
17 denying the petitioner's application for asylum, withholding of  
18 removal, and relief under the Convention Against Torture. The  
19 petitioner's asylum application was untimely. He also failed to  
20 prove his eligibility for withholding of removal or relief under  
21 the Convention.

22 Petition denied.

23 Eric W. Schultz, Robert D. Kolken,  
24 Sacks, Kolken & Schultz, Buffalo, NY,  
25 for Petitioner.

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\* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), we have substituted Attorney General Alberto Gonzales for former Attorney General John Ashcroft as the respondent in this case.

1 ALLEN F. LOUCKS, Assistant United States  
2 Attorney for the District of Maryland,  
3 Baltimore, MD (David Kelley, United  
4 States Attorney for the Southern  
5 District of New York, New York, NY, of  
6 counsel), for Respondent.

7 SACK, Circuit Judge:

8 The petitioner, Jose Joaquin-Porrás, entered the United  
9 States from Costa Rica in 1991 under a temporary work visa. He  
10 resided in this country continuously, except for a few brief  
11 excursions to Costa Rica pursuant to "paroles" granted by the  
12 Immigration and Naturalization Service ("INS"), until the INS  
13 initiated removal proceedings against him in 2000. On January  
14 18, 2001, less than a year after returning from his most recent  
15 parole to Costa Rica but almost ten years after the beginning of  
16 his otherwise continuous residency in the United States, Porrás<sup>1</sup>  
17 applied for asylum under 8 U.S.C. § 1158, statutory withholding  
18 of removal under 8 U.S.C. § 1231, and withholding of removal  
19 under the United Nations Convention Against Torture ("CAT") and  
20 its implementing regulations, 8 C.F.R. § 208.16(c).

21 The Immigration and Nationality Act ("INA") requires  
22 asylum applications to be filed "within 1 year after the date of  
23 the alien's arrival in the United States." INA § 208(a)(2)(B), 8  
24 U.S.C. § 1158(a)(2)(B). According to 8 C.F.R. § 208.4(a)(2)(ii),  
25 "The 1-year period shall be calculated from the date of the  
26 alien's last arrival in the United States or April 1, 1997,

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<sup>1</sup> The petitioner was referred to as Porrás, rather than Joaquin-Porrás, during the course of his administrative proceedings.

1 whichever is later." Porrás's asylum application was denied by  
2 an Immigration Judge ("IJ"), in a decision that was affirmed  
3 without opinion by the Board of Immigration Appeals ("BIA"), on  
4 the grounds that his asylum claim was untimely and that Porrás  
5 had failed to meet his burden of proving his eligibility for  
6 asylum, withholding of removal, or CAT relief. We agree with the  
7 IJ that Porrás's asylum application was untimely, and we agree  
8 that Porrás has failed to prove that he is eligible for  
9 withholding of removal or CAT relief. We therefore deny his  
10 petition.

#### 11 **BACKGROUND**

12 Petitioner Jose Joaquin-Porrás is a 38-year-old from  
13 Costa Rica who entered the United States on an 18-month J-1 visa  
14 in 1991 to work at a bed-and-breakfast inn in Ithaca, New York.  
15 In 1993, Porrás had his J-1 visa converted to an H-1B visa,  
16 allowing him to stay in the U.S. for three years to work at a  
17 catering company in Ithaca. In 1996, Porrás renewed his visa for  
18 an additional three years, thereby extending his legal residency  
19 in the U.S. until 1999.

#### 20 The Fraudulent Marriage

21 In 1998, Porrás, who is gay, married Kimberly Costanza,  
22 a lesbian. She was a friend of his and an American citizen.  
23 Porrás testified at his hearing before the IJ that the marriage  
24 was intended to provide companionship for both parties and to  
25 provide a safe home for Costanza, who was being sexually abused

1 by her stepfather. Porrás also testified, however, that the two  
2 did not cohabit after their marriage.

3 In June 1999, Porrás and Costanza applied for Porrás to  
4 receive permanent residency, advance parole, and employment  
5 authorization based on their marriage. Porrás falsely stated on  
6 the application that he and Costanza lived together. Having been  
7 granted advance parole, Porrás left the country to visit his  
8 family in Costa Rica in early January 2000, and returned several  
9 weeks later, on January 27, 2000. Approximately two weeks  
10 thereafter, Porrás and Costanza were interviewed by an INS agent  
11 regarding Porrás's permanent residency application. Porrás  
12 either continued to maintain, or did not dissuade the interviewer  
13 from thinking, during the interview, that he and Costanza lived  
14 together. Immediately following the interview, however, Costanza  
15 withdrew the application. Soon thereafter, the INS initiated  
16 removal proceedings against Porrás, permitting him to remain free  
17 during their pendency. At his hearing, Porrás admitted to the IJ  
18 that he had lied when he told the INS that he lived with  
19 Costanza, and he promised, "I would never lie again. I pay a  
20 very high price after that. I will never, ever lie again." Hr'g  
21 Tr., Oct. 15, 2001, at 37.

#### 22 The Asylum Application

23 On January 18, 2001, Porrás applied for asylum,  
24 withholding of removal, and relief under the CAT. His claim of  
25 persecution rests principally on two incidents, one of which, he  
26 testified to the IJ, occurred in 1984 when Porrás was 17 years

1 old, and one of which, he further testified, occurred in January  
2 2000 while Porrás was visiting Costa Rica during his most recent  
3 parole.

4           Porrás testified that one night in 1984, he was walking  
5 home from night school at approximately 10 p.m. when he was  
6 stopped by a police officer and asked to produce identification.  
7 The police officer then forcibly placed Porrás in the front seat  
8 of his police car, asked him if he "like[d] men," and raped him.  
9 Id. at 50. The police officer released Porrás after warning him  
10 never to tell anyone about the incident. Porrás did not report  
11 the assault to the police.

12           Porrás also testified that on a night in 2000, when he  
13 was leaving a gay bar while he was visiting San José, a police  
14 officer stopped him and asked him for identification. After  
15 Porrás produced his New York State driver's license, the police  
16 officer ordered Porrás into the officer's police car, drove him  
17 to the police station, locked him in a cell, and began verbally  
18 assaulting him. Porrás testified before the IJ, in English, that  
19 the police officer yelled various epithets at him, including that  
20 Costa Rica is being ruined because "[it's] full of faggots."<sup>2</sup>  
21 Id. at 68. Porrás further testified that the police officer  
22 released him after taking all the money in his wallet --  
23 approximately forty dollars' worth of local currency -- but left

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<sup>2</sup> Whether the words actually spoken were in Spanish and Porrás's account purported to be a translation of them into English is not apparent from the record.

1 Porras with the equivalent of about three dollars to pay the  
2 taxicab fare for his return to where he was staying. Again,  
3 Porras did not report the incident to law enforcement  
4 authorities.

5 In addition to these two incidents, Porras testified  
6 before the IJ that prior to his first entry into the United  
7 States, he concealed his sexual orientation because he thought he  
8 would not be able to obtain the university job he sought had his  
9 sexual orientation been known. Porras explained that he feared  
10 ostracism and discrimination should he be returned to Costa Rica,  
11 and that he thought that his educational and employment  
12 opportunities in that country would be limited because of his  
13 sexual orientation. To substantiate these concerns, Porras  
14 pointed to several newspaper reports regarding harassment,  
15 attacks, and governmental discrimination against homosexuals in  
16 that country. Although Porras's asylum application was submitted  
17 in January 2001, the most recent article he provided was from  
18 December 1998.

19 Porras also provided a copy of the State Department's  
20 country conditions report on Costa Rica from the year 2000. The  
21 report notes that the country is a "longstanding, stable,  
22 constitutional democracy" that "generally respect[s] the human  
23 rights of its citizens." U.S. Dep't of State, Country Report on  
24 Human Rights Practices, 2000, Costa Rica (Feb. 2001) available at  
25 <http://www.state.gov/g/drl/rls/hrrpt/2000/wha/746.htm>. The  
26 report notes, however, that "[t]here were some instances of

1 physical abuse by police and prison guards, and reports of police  
2 abuse of authority or misconduct." Id. The report suggests that  
3 privacy rights are generally respected. Id.

4 Porras also provided a significant amount of  
5 information concerning his character and community standing,  
6 including multiple character reference letters, copies of his  
7 United States income tax returns dating back to 1993, and the  
8 deed to his home. The submissions included a letter from the  
9 President Emeritus of Cornell University, where Porras was last  
10 employed, who described Porras as "an individual of fine and  
11 upright character" and "an exemplary member of the Ithaca  
12 community." Letter from Frank H.T. Rhodes, President Emeritus,  
13 Cornell University, to the Honorable Michael Rocco, Immigration  
14 Judge (May 8, 2001). Another university administrator, who had  
15 frequent professional contact with Porras, stated, "I truly  
16 believe that no one could be more deserving of staying in the  
17 United States." Letter from Mary Ahl, Administrative Manager,  
18 Society for the Humanities, Cornell University (Apr. 15, 2001).  
19 The references as a whole paint a portrait of a hardworking,  
20 well-liked, and community-minded person who has excelled  
21 professionally.

#### 22 The IJ's Decision

23 In reviewing Porras's asylum application, the IJ  
24 concluded as an initial matter that the application was untimely  
25 under section 208(a)(2)(B) of the INA, 8 U.S.C. § 1158(a)(2)(B),  
26 which provides that the right to apply for asylum "shall not

1 apply to an alien unless the alien demonstrates by clear and  
2 convincing evidence that the application has been filed within 1  
3 year after the date of the alien's arrival in the United States,"  
4 id., and the related regulation, which states that "[t]he 1-year  
5 period shall be calculated from the date of the alien's last  
6 arrival in the United States or April 1, 1997, whichever is  
7 later," 8 C.F.R. § 208.4(a)(2)(ii) (emphasis added).

8           The IJ acknowledged that Porras "last arrived in the  
9 United States on January 27, 2000" -- within one year of his  
10 January 18, 2001 asylum application -- but concluded that Porras  
11 "was, in actuality, present in the United States since his first  
12 arrival on September 13, 1991 where he remained (with the  
13 exception of brief absences of no more than one to three weeks  
14 for vacations) under various non-immigrant categories and  
15 finally, as a parolee." Oral Decision of the Immigration Judge,  
16 dated Oct. 19, 2001 ("Oral Decision"), Tr. at 6. Accordingly,  
17 the IJ said, "[t]his continuity of presence . . . leads the Court  
18 to believe that [Porras's] eligibility for Asylum should be  
19 determined not from the date of his last arrival to the United  
20 States on January 27, 2000, but from April 1, 1997, the effective  
21 date of the regulation in the statute requiring submission of an  
22 application for Asylum." Id. at 6-7. Thus, the IJ assumed that  
23 Porras's return from temporary parole was his "last arrival" in  
24 the United States, but nevertheless found the application  
25 untimely.



1           The IJ further determined that Porras did not qualify  
2 for a "changed" or "extraordinary" circumstances exception to the  
3 one-year deadline provision, 8 U.S.C. § 1158(a)(2)(D). He noted  
4 that Porras "is not an unsophisticated alien. He is educated and  
5 either directly or indirectly, was aware of certain Immigration  
6 processes which he used not only to change his status, but to  
7 extend his non-immigrant stay." Oral Decision at 7. The IJ  
8 stated that "[i]nstead of pursuing lawful remedies, [Porras]  
9 chose to engage in an elaborate scheme to perpetrate a fraud [on]  
10 the Government, the only purpose of which was to remain in the  
11 United States, electing this approach over another that might  
12 have had less likelihood of success." Id. In addition, the IJ  
13 determined that Porras's "brief detention and verbal abuse during  
14 his last sojourn to Costa Rica without formal charge . . .  
15 establishes no basis for Asylum or circumstances materially  
16 affecting his eligibility therefore." Id. at 8.

17           As an alternative basis for his holding, the IJ  
18 concluded that Porras "failed to sustain his burden of  
19 demonstrating either that he has suffered persecution in the  
20 past, or that he has a well-founded fear of future persecution."  
21 Id. In reaching this conclusion, the IJ treated Porras's  
22 testimony regarding his experiences in Costa Rica as credible,  
23 and acknowledged that homosexuality can be a qualifying factor  
24 for asylum based on "persecution on account of his membership in  
25 a particular social group." Id. at 10. The IJ concluded,  
26 however, that Porras's sexual assault, while "despicable and

1 abhorrent[,] . . . present[ed] a picture of an isolated act of  
2 random violence perpetrated by a corrupt police official  
3 and . . . [was therefore] insufficient to establish eligibility  
4 for Asylum." Id. The IJ noted that Porrás continued to live in  
5 Costa Rica without incident for seven years following his rape.  
6 He also concluded that Porrás's "brief detention, release without  
7 harm, and verbal abuse" on his most recent visit to Costa Rica  
8 "do not establish persecution within the meaning of the [INA]."  
9 Id. at 11.

10 With respect to fear of future persecution, the IJ  
11 referred to the State Department report on conditions in Costa  
12 Rica and concluded that Porrás "failed to demonstrate that there  
13 exists in Costa Rica[] a pattern of systematic persecution  
14 against a group of which [Porrás] claims membership and . . .  
15 that the government of Costa Rica is unable or unwilling to  
16 protect him." Id. at 12. Accordingly, the IJ denied Porrás's  
17 application for asylum, withholding of removal, and protection  
18 under the CAT. The Board of Immigration Appeals affirmed the  
19 IJ's decision without opinion. Porrás petitions for our review  
20 of those decisions.

### 21 **Discussion**

22 Porrás argues that the one-year deadline to file for  
23 asylum should have been measured from the date of his return to  
24 the United States from parole on January 27, 2000, and that the  
25 IJ therefore erred in deeming his application untimely. In the  
26 alternative, Porrás contends that he should have been granted a

1 "changed circumstances" exception to the one-year deadline based  
2 on his brief detention in Costa Rica in January of 2000. Porras  
3 also challenges the merits of the IJ's decisions denying him  
4 asylum, withholding of removal, and CAT relief.

5 I. The One-Year Deadline

6 A. Jurisdiction

7 The INA, by its terms, precludes judicial review of the  
8 Attorney General's determinations regarding the one-year deadline  
9 provided in 8 U.S.C. § 1158(a)(2). See 8 U.S.C. § 1158(a)(3)  
10 ("No court shall have jurisdiction to review any determination of  
11 the Attorney General under paragraph (2)."). Under the REAL ID  
12 Act of 2005, effective May 11, 2005, however, we have  
13 jurisdiction to review any "constitutional claims or questions of  
14 law" raised in a petition for review, notwithstanding "any other  
15 provision of this chapter . . . which limits or eliminates  
16 judicial review." REAL ID Act of 2005, Pub. L. No. 109-13, Div.  
17 B, Title I, § 106(a)(1)(A)(iii), 119 Stat 231, 310 (codified at 8  
18 U.S.C. § 1252(a)(2)(D)). The REAL ID Act applies to this case.  
19 See id. § 106(b) (Section 106(a) "shall apply to cases in which  
20 the final administrative order of removal, deportation, or  
21 exclusion was issued before, on, or after the date of the  
22 enactment of this division."). As the government concedes, the  
23 proper interpretation of the one-year-deadline provision of 8  
24 U.S.C. § 1158(a)(2) is a question of law over which we have  
25 jurisdiction under the REAL ID Act. See Xiao Ji Chen v. U.S.  
26 Dep't of Justice, --- F.3d ----, 2006 WL 27427, at \*5, 2006 U.S.

1 App. LEXIS 261, at \*17 (2d Cir. Jan. 6, 2006) ("[F]or the  
2 purposes of the REAL ID Act, 'a "question of law" is a question  
3 regarding the construction of a statute." (quoting H.R. Rep. No.  
4 109-72, at 175 (2005))).

5 B. Standard of Review

6 Ordinarily, we review the BIA's interpretations of the  
7 INA with the deference described in Chevron U.S.A. Inc. v.  
8 Natural Resources Defense Council, Inc., 467 U.S. 837, 844  
9 (1984), see also INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999)  
10 ("It is clear that principles of Chevron deference are applicable  
11 to th[e INA] statutory scheme."), and similarly afford  
12 "substantial deference" to the agency's interpretation of its own  
13 regulations, Ramsameachire v. Ashcroft, 357 F.3d 169, 178 (2d  
14 Cir. 2004) (internal quotation marks and citation omitted).  
15 When, however, as is the case before us, the BIA summarily  
16 affirms a decision of an immigration judge, we do not extend such  
17 deference to the IJ's statutory interpretations. See Shi Liang  
18 Lin v. U.S. Dep't of Justice, 416 F.3d 184, 190-91 (2d Cir.  
19 2005).

20 We have not as yet had occasion to decide whether the  
21 summarily-affirmed interpretations of IJs are reviewed de novo,  
22 or with the lesser form of deference established under Skidmore  
23 v. Swift & Co., 323 U.S. 134 (1944). See Shi Liang Lin, 416 F.3d  
24 at 191; Ashton v. Gonzales, 431 F.3d 95, 97 (2d Cir. 2005).

1 Here, we need not so carefully gauge the proper level of  
2 deference, if any, to be given to the IJ's decision because we  
3 agree with the IJ's conclusion that Porras's asylum application  
4 was untimely, albeit on grounds other than those relied upon by  
5 the IJ.

6 C. "Last Arrival in the United States"

7 As we have noted, section 208(a)(2)(B) of the INA  
8 requires asylum applications to be filed "within 1 year after the  
9 date of the alien's arrival in the United States," and 8 C.F.R.  
10 § 208.4(a)(2)(ii) provides that "[t]he 1-year period shall be  
11 calculated from the date of the alien's last arrival in the  
12 United States or April 1, 1997, whichever is later." Porras's  
13 asylum application was undisputedly filed within one year of his  
14 return from his parole to Costa Rica on January 27, 2000, so the  
15 timeliness issue turns on whether that date should be considered  
16 Porras's "last arrival in the United States" for purposes of  
17 section 208(a)(2)(B).

18 Porras contends that the IJ's decision contradicts the  
19 plain language of the applicable regulation, 8 C.F.R.  
20 § 208.4(a)(2)(ii), to which we must give effect when, as here, it  
21 is not "arbitrary, capricious, or manifestly contrary to the  
22 statute." Ahmetovic v. INS, 62 F.3d 48, 51 (2d Cir. 1995)  
23 (quoting Chevron, 467 U.S. at 844). As we have discussed, the IJ  
24 stated, notwithstanding the regulation's provision that "[t]he  
25 1-year period shall be calculated from the date of the alien's

1 last arrival in the United States," 8 C.F.R. § 208.4(a)(2)(ii),  
2 that Porras's "eligibility for Asylum should be determined not  
3 from the date of his last arrival to the United States on January  
4 27, 2000." Oral Decision at 6 (emphasis added). In light of the  
5 fact that the IJ, even in the course of denying Porras's  
6 application as untimely, apparently assumed that January 27,  
7 2000, was the date of Porras's "last arrival" in the United  
8 States, Porras's plain-language argument seems plausible.

9           Upon analysis, however, we conclude that the term "last  
10 arrival in the United States" should not be read to include an  
11 alien's return to the United States after a brief trip abroad  
12 pursuant to a parole explicitly permitted by United States  
13 immigration authorities. Although the use of the word "last"  
14 seems to imply that there can be more than one "arrival," it is  
15 anything but self-evident that the phrase "arrival in the United  
16 States" refers to any and all border crossings into the country.  
17 Indeed, while counsel has not referred us to a case interpreting  
18 the term in the context of the regulation at issue here, and we  
19 have discovered no such authority ourselves, in other contexts  
20 "last arrival [in] the United States" has been taken to exclude  
21 returns from temporary departures from the country. See 8 C.F.R.  
22 § 245.2(a)(4)(iii) (under the Act of November 2, 1966 providing  
23 for the adjustment of status of certain Cuban nationals, "[i]f an  
24 applicant . . . departs from the United States temporarily with  
25 no intention of abandoning his or her residence, and is

1 readmitted or paroled upon return, the temporary absence shall be  
2 disregarded for purposes of the applicant's 'last arrival' into  
3 the United States."); Matter of Baez-Ayala, 13 I. & N. Dec. 79,  
4 82-83, Interim Decision No. 1925, (BIA 1968) ("[A] subsequent  
5 arrival after a temporary absence from the United States with no  
6 intention to abandon residence in the United States does not  
7 constitute the 'last arrival' within the contemplation of section  
8 1 of the Act [of November 2, 1966]."); cf. Lagandaon v. Ashcroft,  
9 383 F.3d 983, 986 n.1 (9th Cir. 2004) ("The Notice to Appear  
10 gives the date of Lagandaon's last arrival in the United States  
11 as July 31, 1988. The parties agree, however, and the Board of  
12 Immigration Appeals found, that Lagandaon was absent from the  
13 United States in 1988 for only twenty days. An absence of that  
14 length does not interrupt a period of presence for purposes of  
15 cancellation of removal eligibility.").<sup>3</sup> Conversely, we are  
16 aware of no authority supporting the notion that a return from a  
17 short absence abroad constitutes an "arrival" in the United  
18 States for these or similar purposes. Thus, read in the context  
19 of other immigration statutes and decisions, the IJ's conclusion  
20 when applying the statute was reasonable, despite the fact that  
21 he seemed to disregard the words of the applicable regulation.

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<sup>3</sup> In each of the cases cited here, the exclusion of returns from temporary departures from the definition of "last arrival [in] the United States" resulted in a benefit to the alien. In this case, however, our construction of "last arrival" works a detriment to Porras. This difference does not detract in any way from the conclusion that "last arrival" has not been interpreted to mean a return from a temporary departure.

1           Moreover, the IJ's conclusion best accords with the  
2 purpose of the statute as a whole. The one-year deadline was  
3 added to the INA as part of the Illegal Immigration Reform and  
4 Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No.  
5 104-208, 110 Stat. 3009, which, among other things, restricted  
6 the circumstances in which asylum could be granted. As is  
7 manifest in the IIRIRA and its legislative history, Congress was  
8 concerned that "[t]he asylum system has been abused by those who  
9 seek to use it as a means of 'backdoor' immigration." H.R. Rep.  
10 No. 104-469(I), at 107 (1996); see also S. Rep. No. 104-249, at 3  
11 (1996) (stating that a purpose of the bill was to address "the  
12 abuse of humanitarian provisions such as asylum"). Congress  
13 intended the one-year deadline to prevent persons who had resided  
14 in the United States for an extended period of time from applying  
15 for asylum as an afterthought, after overstaying their visas or  
16 failing to obtain citizenship through another means. See H.R.  
17 Rep. No. 104-469(I), at 116 (expressing concerns about asylum  
18 applications from "visa overstayers," many of whom, in the House  
19 Committee's view, filed for asylum "as a means of remaining in  
20 the United States indefinitely"); id. at 139 (noting with  
21 disapproval that, prior to the Act, aliens were "able to file an  
22 asylum application regardless of how long they have resided in  
23 the United States") (emphasis added). Permitting applicants to  
24 reset the asylum clock by taking a short excursion abroad would  
25 undermine the one-year deadline's clear purpose of focusing the



1 asylum process on those who have recently fled persecution in  
2 their home countries.

3 II. Exceptions to the One-Year Deadline

4 Porras contends that even if he did miss the one-year  
5 deadline to apply for asylum, he is eligible for a "changed  
6 circumstances" exception to the deadline because his January 2000  
7 arrest in Costa Rica constituted persecution and increased his  
8 fear of future persecution, thus "materially affect[ing his]  
9 eligibility for asylum." 8 U.S.C. § 1158(a)(2)(D); see also 8  
10 C.F.R. § 208.4(a)(4). Although he does not press the argument on  
11 appeal, Porras might also have asserted that he was eligible for  
12 an "extraordinary circumstances" exception because he  
13 "maintained . . . lawful . . . nonimmigrant status . . . until a  
14 reasonable period before the filing of [his] asylum application."  
15 Id. § 208.4(a)(5)(iv).

16 We have no authority to review the IJ's decision as to  
17 "changed" or "extraordinary" circumstances unless it implicates  
18 "constitutional claims or questions of law" over which the REAL  
19 ID Act grants this Court jurisdiction. See 8 U.S.C. § 1158(a)(3)  
20 (no court has jurisdiction to review the timeliness requirements  
21 of § 1158(a)(2)); 8 U.S.C. § 1252(a)(2)(D) (providing judicial  
22 review for "constitutional claims or questions of law"). In Xiao  
23 Ji Chen, supra, we addressed the same issue and concluded that we  
24 are "without jurisdiction to review petitioner's claims to the  
25 extent that she asserts that the IJ abused his discretion when  
26 making factual determinations that she had failed to demonstrate

1 either 'changed' or 'extraordinary' circumstances." --- F.3d at  
2 ----, 2006 WL 27427, at \*6, 2006 U.S. App. LEXIS 261, at \*20.  
3 Here, the IJ looked to "the facts and the circumstances as  
4 presented in this case" and concluded that Porras did not qualify  
5 for an exception. Oral Decision at 7. We therefore conclude  
6 that we cannot disturb the IJ's conclusion that Porras was not  
7 entitled to file past the one-year deadline because of changed or  
8 extraordinary circumstances. Cf. Ramadan v. Gonzales, 427 F.3d  
9 1218, 1221-22 (9th Cir. 2005) (noting that "the existence of  
10 'changed circumstances' that materially affect eligibility for  
11 asylum is a predominately factual determination, which will  
12 invariably turn on the facts of a given case").

### 13 III. Withholding of Removal and CAT

14 The one-year deadline of 8 U.S.C. § 1158(a)(2)(B) does  
15 not apply to applications for withholding of removal or CAT  
16 relief. See 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 208.16(a);  
17 Xiao Ji Chen, --- F.3d at ----, 2006 WL 27427, at \*7, 2006 U.S.  
18 App. LEXIS 261, at \*23; Yahong Zheng v. Gonzales, 409 F.3d 804,  
19 808 (7th Cir. 2005). We therefore review these claims on the  
20 merits.

21 In order to establish eligibility for withholding of  
22 removal, a petitioner must "establish[] that it is more likely  
23 than not that his 'life or freedom would be threatened in [the]  
24 country because of [his] race, religion, nationality, membership  
25 in a particular social group, or political opinion,'" Ramsameachire,  
26 357 F.3d at 178 (quoting 8 U.S.C. § 1231(b)(3)(A))

1 (alterations in Ramsameachire)). To qualify for CAT relief, a  
2 petitioner must demonstrate that "it is more likely than not that  
3 he or she would be tortured if removed to the proposed country of  
4 removal." 8 C.F.R. § 208.16(c)(2). Applicable regulations  
5 define torture as

6 any act by which severe pain or suffering,  
7 whether physical or mental, is intentionally  
8 inflicted on a person for such purposes as  
9 obtaining from him or her or a third person  
10 information or a confession, punishing him or  
11 her for an act he or she or a third person  
12 has committed or is suspected of having  
13 committed, or intimidating or coercing him or  
14 her or a third person, or for any reason  
15 based on discrimination of any kind, when  
16 such pain or suffering is inflicted by or at  
17 the instigation of or with the consent or  
18 acquiescence of a public official or other  
19 person acting in an official capacity.

20 8 C.F.R. § 1208.18(a)(1).

21 We review the IJ's findings of fact with regard to  
22 Porras's withholding of removal and CAT claims for "substantial  
23 evidence," Islami, 412 F.3d at 396, a standard of review that "is  
24 slightly stricter than the clear-error standard that the circuit  
25 courts typically apply in reviewing a district court's factual  
26 findings," but that does not permit us to "reverse the BIA simply  
27 because we disagree with its evaluation of the facts," Jin Shui  
28 Qiu v. Ashcroft, 329 F.3d 140, 149 (2d Cir. 2003) (internal  
29 quotation marks and citations omitted). "We review de novo  
30 questions of law regarding what evidence will suffice to carry  
31 any asylum applicant's burden of proof." Islami, 412 F.3d at 396  
32 (internal quotation marks and citations omitted).

1           As noted, Porras's petition is based on two incidents  
2 in which police in Costa Rica mistreated him on account of his  
3 sexual orientation. With respect to the first, when he was raped  
4 by a police officer, the IJ found that while "[t]here is no  
5 question that the sexual assault of [Porras] constitutes a  
6 despicable and abhorrent act, . . . [Porras's] experience as  
7 described and the circumstances of his abuse present a picture of  
8 an isolated act of random violence perpetrated by a corrupt  
9 police official." Oral Decision at 10. The IJ's finding that  
10 the 1984 rape was "an isolated act" is a factual one that is  
11 reviewed for, and supported by, substantial evidence. In  
12 particular, the undisputed fact that Porras remained in Costa  
13 Rica for seven years after the incident without suffering further  
14 attacks of any kind substantially supports the IJ's finding that,  
15 however despicable, the assault on Porras was an isolated event.

16           Having found that the rape was an isolated attack by a  
17 corrupt official, the IJ reasonably concluded that it did not  
18 justify withholding of removal, because it was not "more likely  
19 than not that were he . . . to be deported[, Porras's] life or  
20 freedom would be threatened." Islami, 412 F.3d at 395; cf.  
21 Melgar de Torres v. Reno, 191 F.3d 307, 313 (2d Cir. 1999)  
22 (noting that petitioner's "rape by Salvadoran soldiers . . . does  
23 not provide a basis for a well-founded fear of persecution" when  
24 there was "no evidence to suggest that the rape was anything but  
25 an act of random violence"). The IJ also properly concluded that  
26 Porras's 1984 rape and subsequent experiences in Costa Rica did

1 not establish that it was "more likely than not that [Porras]  
2 would be tortured if removed to the proposed country of removal."  
3 8 C.F.R. § 208.16(c)(2).

4 Substantial evidence also supports the IJ's finding  
5 that Porras's detention in January 2000 was "brief," and that  
6 Porras was released "without harm." Oral Decision at 11. Having  
7 found these facts, the IJ correctly concluded that they did not  
8 establish that Porras's life or freedom would be threatened  
9 should he return to Costa Rica. Cf. Ai Feng Yuan v. U.S. Dep't  
10 of Justice, 416 F.3d 192, 198 (2d Cir. 2005) (declining to grant  
11 petition for review of IJ's determination that petitioner had  
12 been persecuted where petitioner "was detained only briefly, and  
13 was not mistreated while in custody"); Eusebio v. Ashcroft, 361  
14 F.3d 1088, 1091 (8th Cir. 2004) ("It is a well-established  
15 principle that minor beatings and brief detention . . . do not  
16 amount to political persecution."). The January 2000 incident  
17 therefore does not establish Porras's eligibility for withholding  
18 of removal. Because no "severe pain or suffering" was inflicted  
19 on Porras, he fails to qualify for CAT relief as a result of the  
20 2000 incident. 8 C.F.R. § 1208.18(a)(1).

21 In a recent decision, we warned that "[t]aking isolated  
22 incidents out of context may be misleading" when determining  
23 whether asylum applicants are entitled to relief. "The  
24 cumulative effect of the applicant's experience must be taken  
25 into account." Poradisova v. Gonzales, 420 F.3d 70, 80 (2d Cir.  
26 2005) (internal quotation marks omitted). But in this case there

1 is ample basis for the IJ's conclusion that the two incidents  
2 described by Porras -- disparate in time, place, nature and  
3 severity as they are -- do not, taken together, satisfy the high  
4 standards of proof necessary for withholding of removal or relief  
5 under the CAT.

6 **Conclusion**

7 For the foregoing reasons, Porras's petition for review  
8 is denied. His motion for a stay of deportation pending our  
9 review of his petition is denied as moot.