Chapter 5 - Asylum and Refuge

Introduction

Standing at the mouth of New York harbor, Lady Liberty sends a beacon of hope to the oppressed of the world. And like moths drawn to the flame, the oppressed do come. That flame does not burn the moths and in deserving instances provides warmth and comfort.

Asylum and refugee law is an integral part of the Immigration and Nationality Act. The following chapter examines three methods of protection afforded by the INA. The first is refugee status. The second is application for asylum. The third is temporary protective status. A brief description of these classifications are as follows:

1. Refugees: Refugees, as the name implies are persons displaced through some action - generally political - which causes them to flee their home countries. A classic example in American history would be the Vietnamese refugees. Refugees acquire their status while outside the USA.

2. Asylees: Asylees are persons who apply for refuge after entering the United States. The enumerated classes of applicants for asylum are exactly the same as that of individuals applying for admission as Refugees.

3. Temporary protected status: From time to time, depending on conditions in a particular country, including natural disasters, the President of the United States has the authority to declare that the nationals of that country in the United States will enjoy a temporary protected status within the United States, whereby they will be allowed to live and work in the United States until situations in their home country permit them to return. At such time, temporary protected status will be revoked and such nationals will have to return to their home country if they are not in valid immigrant or non-immigrant status by that time.

"Asylum" is a very broad term used to describe what actually is an application to stay in the United States based on one or a combination of more than one of five different factors. For example a person may apply for asylum in the United States on the basis of five different grounds or a combination of those grounds. Those five grounds are: the race of the person, his or her religion, his or her national origin, his or her membership in a particular social group or that person's political opinion.

As you can see the "political asylum" is only one of the five basis for asylum. It is not the only reason to get asylum in the United States. For example someone that is of a different tribe or a different group may be persecuted simply because he or she belongs to that group. Likewise someone else may be persecuted only because of religion, yet another person may be persecuted only because of his or her political opinion. Still other people may be persecuted simply because they may be of a particular social group, for example, they perhaps might be gay or they might be perceived as criminals, or possess some other infirmity which is viewed with disfavor by the general population and thus results in persecution. For example, there is an emerging "social group" basis for gender-based violence. Now please note that I have used the word persecution and not prosecution.

Prosecution typically is not a basis for asylum unless the prosecution is triggered by one of these five categories. For example if prosecution is because a person broke the law in that country, then it is not persecution for the purposes of asylum as long as all people that break that law are treated in a similar fashion. So, when we are looking at asylum cases as lawyers we do have to

evaluate if the person's claim is truly unfair persecution and therefore is a basis for asylum or whether it is prosecution and therefore we don't have a strong case for asylum.

One year after the grant of asylum the asylum seeker is eligible to apply for a green card. The asylum seeker can apply for the green card and once again he or she will have to wait until a green card is available. In the section about immigrant visas we discuss family based immigration quotas. However, in asylum law there are no set or regular quotas defined in the law. Each year the President of the United States decides how many immigrant visas will be issued to asylum seekers. Therefore, in any given year only that many asylum seekers can obtain their immigration visas or green cards. Once again there is a backlog so the lines get longer and longer. However, while the adjustment application is pending, the asylum seeker can continue to apply for and receive employment authorization so that he or she can live legally in the United States and work with valid documents.

Points to Note

In the following section on the asylum law, pay careful attention to the following general recurring themes:

- Past persecution;
- Future persecution;
- Basis for persecution;
- Persecution of others;
- Standard of proof;
- Ability to relocate; and
- Changed country conditions

The Law

101(a)(42) The term "refugee" means

101(a)(42)(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or

101(a)(42)(B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such

failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

Extension of the refugee standard to asylum seekers:

The Board of Immigration Appeals (BIA) held, in *Matter of Acosta*, 19 I & N Dec. 211 (1985):

"The Statutory Standard for Asylum

> A grant of asylum is a matter of discretion. See section 208 of the Act; INS v. Stevic, supra, at 423 n.18. However, an alien is eligible for a favorable exercise of discretion only if he qualifies as a "refugee" under section 101(a)(42)(A) of the Act. Therefore, that section establishes the statutory standard of eligibility for asylum. The pertinent portion of section 101(a)(42) provides as follows:
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> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . . The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

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8 C.F.R 208.13: **Eligibility for Asylum**

208.13(b) Eligibility. The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

208.13(b)(1) Past persecution. An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

208.13(b)(1)(i) Discretionary referral or denial. Except as provided in paragraph

(b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

208.13(b)(1)(i)(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

208.13(b)(1)(i)(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

208.13(b)(1)(ii) Burden of proof. In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.

208.13(b)(1)(iii) Grant in the absence of well-founded fear of persecution. An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

208.13(b)(1)(iii)(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

208.13(b)(1)(iii)(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

208.13(b)(2) **Well-founded fear of persecution**.

208.13(b)(2)(i) An applicant has a well-founded fear of persecution if:

208.13(b)(2)(i)(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

208.13(b)(2)(i)(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

208.13(b)(2)(i)(c) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

208.13(b)(2)(ii) An applicant does not have a well-founded fear of persecution if the

applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

208.13(b)(2)(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

208.13(b)(2)(iii)(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

208.13(b)(2)(iii)(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

208.13(b)(3) **Reasonableness of internal relocation**. For purposes of determinations under paragraphs (b)(1)(i), (b)(1)(ii), and (b)(2) of this section, adjudicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. Those factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

208.13(b)(3)(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored.

208.13(b)(3)(ii) In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

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8 C.F.R. 208.16(b): **Eligibility for Withholding of Removal**

208.16(b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof. The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

208.16(b)(1) **Past threat to life or freedom.**

208.16(b)(1)(i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

208.16(b)(1)(i)(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or

208.16(b)(1)(i)(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

208.16(b)(1)(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

208.16(b)(1)(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.

208.16(b)(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is ***more likely than not*** that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

208.16(b)(2)(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

208.16(b)(2)(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

208.16(b)(3) **Reasonableness of internal relocation**. For purposes of determinations under

paragraphs (b)(1) and (b)(2) of this section, adjudicators should consider, among other things, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. These factors may or may not be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

208.16(b)(3)(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecutor is a government or is government-sponsored.

208.16(b)(3)(ii) In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that under all the circumstances it would be reasonable for the applicant to relocate.

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8 C.F.R. 208.16(c): **Withholding under the UN Convention Against Torture**

Note: eligibility for CAT relief is predicated on the torture of the applicant by the government of his or her home country. It is not required that an applicant show persecution on the basis of the five asylum grounds. For instance, an applicant may simply show that it is his home country government's policy to torture any returning deportee who has converted his religion, or who was convicted for drug-related crimes. The torture need not be inflicted directly by the government; it can be inflicted by third parties who operate with the government's acquiescence.

208.16(c) Eligibility for withholding of removal under the Convention Against Torture.

208.16(c)(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105-277, 112 Stat. 2681, 2681-821). The definition of torture contained in §208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

208.16(c)(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is ***more likely than not that he or she would be tortured if removed to the proposed country of removal***. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

208.16(c)(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

208.16(c)(3)(i) Evidence of past torture inflicted upon the applicant;

208.16(c)(3)(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

208.16(c)(3)(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

208.16(c)(3)(iv) Other relevant information regarding conditions in the country of removal.

208.16(c)(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under §208.17(a).

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8 C.F.R. 208.17: Deferred removal under the Convention Against Torture

208.17(a) Grant of deferral of removal. An alien who: has been ordered removed; has been found under §208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under §208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured.

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8 C.F.R. 208.21: Admission of the asylee's spouse and children.

208.21(a) Eligibility. In accordance with section 208(b)(3) of the Act, a spouse, as defined in section 101(a)(35) of the Act, 8 U.S.C. 1101(a)(35), or child, as defined in section 101(b)(1) of the Act, also may be granted asylum if accompanying, or following to join, the principal alien who was granted asylum, unless it is determined that the spouse or child is ineligible for asylum under section 208(b)(2)(A)(i), (ii), (iii), (iv) or (v) of the Act for applications filed on or after April 1, 1997, or under §208.13(c)(2)(i)(A), (c), (D), (E), or (F) for applications filed before April 1, 1997.

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8 C.F.R. 208.24: Termination of asylum or withholding of removal or deportation.

208.24(a) Termination of asylum by the Service. Except as provided in paragraph (e) of this section, an asylum officer may terminate a grant of asylum made under the jurisdiction of an asylum officer or a district director if following an interview, the asylum officer determines that:

208.24(a)(1) There is a showing of fraud in the alien's application such that he or she was not

eligible for asylum at the time it was granted;

208.24(a)(2) As to applications filed on or after April 1, 1997, one or more of the conditions described in section 208(c)(2) of the Act exist; or

208.24(a)(3) As to applications filed before April 1, 1997, the alien no longer has a well-founded fear of persecution upon return due to a change of country conditions in the alien's country of nationality or habitual residence or the alien has committed any act that would have been grounds for denial of asylum under §208.13(c)(2).

Standards:

Asylum: Even a minimal showing of persecution or a well founded fear of future persecution is sufficient;

Withholding: Clear probability of persecution - it is "more likely than not" (ie 50 % +) that the applicant will suffer future persecution; and

CAT relief: More likely than not that the applicant will be subject to torture by a state actor or a State-sanctioned actor or an actor who the State chooses not to control

Procedure:

ONE-YEAR BAR: The alien must file his or her application for asylum within 1 year of entering the USA. If the alien does not do so, the alien is precluded from applying from asylum absent extraordinary circumstances. So far, the Board of Immigration Appeals has interpreted such circumstances to exist only where the alien was under the age of 18 when he or she entered the USA. Time that passes before the alien attains the age of 18 does not count. However, the one-year clock begins running when the alien turns 18. In that case, the application must be filed before the alien turns 19. *Matter of Y-C-*, 23 I&N Dec. 286 (BIA 2002).

Other reasons that may excuse the failure to file within one year of entry may be changed country conditions in the alien's home country that now make it unsafe for the alien to return there - for example, a change in the government or power structure, a flare-up of ethnic violence, etc.

The alien files form I-589 with the Asylum Office that has jurisdiction over the alien's place of residence in the USA. The asylum office will set an interview at their offices. The alien must appear for the interview with a translator and explain their claim to the asylum officer. This is a non-adversarial setting, and asylum officers are generally well trained to be empathetic and ask questions in a non-confrontational manner. There are no attorney-type cross-examinations or impeachment tactics. However, the asylum officer can and will consider the alien's credibility and consistency. Note that the Asylum Office DOES NOT provide translators, so individuals who appear without a translator and cannot speak or respond well in English will suffer the consequences of not being able to convey their story to the asylum officer, thereby risking denial.

Once the asylum application has been pending for a minimum of 6 months, the applicant can apply for an employment authorization document ("EAD") to the USCIS, thus providing the alien the legal means to obtain a valid social security number, a driver's license and employment, and thereby support him or herself and their families. Remember that a valid EAD is sufficient to prove employment eligibility to an employer for form I-9 purposes.

If the applicant's asylum application is granted within 6 months of filing the application, the applicant can apply for employment authorization, and one year after approval, apply for a grant of permanent residency ("green card").

What happens to applicants whose applications are denied by the Asylum Office?

Such applicants whose cases are denied by the asylum office have their cases automatically referred to the Immigration Court, where they can refile their applications in "defensive" asylum proceedings. The Immigration Court will consider their applications *de novo* (anew). The EOIR (Immigration Court) provides court-appointed translators for aliens who are not competent to proceed in English.

Cases

The following case is an example of the evolution of asylum law. Asylum law is a fascinating and constantly evolving field. Be warned however - there is no place in asylum law for the faint hearted. For example, in Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014), decided February 7, 2014, the BIA modified the standards for membership in a "particular social group", holding that (syllabus):

> (1) In order to clarify that the "social visibility" element required to establish a cognizable "particular social group" does not mean literal or "ocular" visibility, that element is renamed as "social distinction." Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008); Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008); Matter of A-M-E- &J-G-U-, 24 I&N Dec. 69 (BIA 2007); and Matter of C-A-, 23 I&N Dec. 951 (BIA 2006), clarified.
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> (2) An applicant for asylum or withholding of removal seeking relief based on "membership in a particular social group" must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.
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> (3) Whether a social group is recognized for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor.

In a companion case issued the same day, the BIA followed its' analysis in M-E-V-G-, above, and ruled that the applicant did not qualify for membership in a particular social group, namely, "former members of the Mara 18 gang in El Salvador who have renounced their gang membership." [Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014)]

In the following case, I have edited out certain sections in order to be as brief as possible. However, I did leave in substantial material which is necessary for you to understand the background and the facts of the case.

The Kasinga case is a well written and clearly defined opinion which sets forth and describes in detail the criteria relied on by the Board of Immigration Appeals in determining that the applicant has a credible fear of persecution and should be granted asylum.

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Matter of Kasinga
21 I & N Dec. 357
File A73 476 695
Decided June 13, 1996

(1) The practice of female genital mutilation, which results in permanent disfiguration and poses a risk of serious, potentially life-threatening complications, can be the basis for a claim of persecution.

(2) Young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a "particular social group" within the definition of the term "refugee" under section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1994).

(3) The applicant has met her burden of proving through credible testimony and supporting documentary evidence (1) that a reasonable person in her circumstances would fear country-wide persecution in Togo on account of her membership in a recognized social group and (2) that a favorable exercise of discretion required for a grant of asylum is warranted.

ON BEHALF OF APPLICANT:
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ON BEHALF OF SERVICE:
David A. Martin
General Counsel

BY: Schmidt, Chairman; Dunne, Vice Chairman; Holmes, Hurwitz, Villageliu, Cole, Mathon, and Guendelsberger, Board Members. Concurring Opinions: Filppu, Board Member, joined by Heilman, Board Member; Rosenberg, Board Member. Dissenting Opinion: Vacca, Board Member.

Schmidt, Chairman:

This is a timely appeal by the applicant from a decision of an Immigration Judge dated August 25, 1995. The Immigration Judge found the applicant excludable as an intending immigrant, denied her applications for asylum and withholding of deportation, and ordered her excluded and deported from the United States. Upon reviewing the appellate record anew ("de novo review"), we will sustain the applicant's appeal, grant asylum, and order her admitted to the United States as an asylee.

A fundamental issue before us is whether the practice of female genital mutilation ("FGM") can be the basis for a grant of asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158 (1994). On appeal, the parties agree that FGM can be the basis for a grant of asylum. We find that FGM can be a basis for asylum.

Nevertheless, the parties disagree about 1) the parameters of FGM as a ground for asylum in future cases, and 2) whether the applicant is entitled to asylum on the basis of the record before us. In deciding this case, we decline to speculate on, or establish rules for, cases that are not before us.

We make seven major findings in the applicant's case. Those findings are summarized below.

First, the record before us reflects that the applicant is a credible witness. Second, FGM, as practiced by the Tchamba-Kunsuntu Tribe of Togo and documented in the record, constitutes persecution. Third, the applicant is a member of a social group consisting of young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice. Fourth, the applicant has a well-founded fear of persecution. Fifth, the persecution the applicant fears is "on account of" her social group. Sixth, the applicant's fear of persecution is country-wide. Seventh, and finally, the applicant is eligible for and should be granted asylum in the exercise of discretion. Each finding is explained below.

I. Credibility

A. The Applicant's Testimony

The applicant is a 19-year-old native and citizen of Togo. She attended 2 years of high school. She is a member of the Tchamba-Kunsuntu Tribe of northern Togo. She testified that young women of her tribe normally undergo FGM at age 15. However, she did not because she initially was protected from FGM by her influential, but now deceased, father.

The applicant stated that upon her father's death in 1993, under tribal custom her aunt, her father's sister, became the primary authority figure in the family. The applicant's mother was driven from the family home, left Togo, and went to live with her family in Benin. The applicant testified that she does not currently know her mother's exact whereabouts.

The applicant further testified that her aunt forced her into a polygamous marriage in October 1994, when she was 17. The husband selected by her aunt was 45 years old and had three other wives at the time of marriage. The applicant testified that, under tribal custom, her aunt and her husband planned to force her to submit to FGM before the marriage was consummated.

The applicant testified that she feared imminent mutilation. With the help of her older sister, she fled Togo for Ghana. However, she was afraid that her aunt and her husband would locate her there. Consequently, using money from her mother, the applicant embarked for Germany by airplane.

Upon arrival in Germany, the applicant testified that she was somewhat disoriented and spent several hours wandering around the airport looking for fellow Africans who might help her. Finally, she struck up a conversation, in English, with a German woman.

After hearing the applicant's story, the woman offered to give the applicant temporary shelter in her home until the applicant decided what to do next. For the next 2 months, the applicant slept in the woman's living room, while performing cooking and cleaning duties.

The applicant further stated that in December 1994, while on her way to a shopping center, she met a young Nigerian man. He was the first person from Africa she had spoken to since arriving in Germany. They struck up a conversation, during which the applicant told the man about her situation. He offered to sell the applicant his sister's British passport so that she could seek asylum in the United States, where she has an aunt, an uncle, and a cousin. The applicant followed the man's suggestion, purchasing the passport and the ticket with money given to her by her sister.

The applicant did not attempt a fraudulent entry into the United States. Rather, upon arrival at

Newark International Airport on December 17, 1994, she immediately requested asylum. She remained in detention by the Immigration and Naturalization Service ("INS") until April 1996.

The applicant testified that the Togolese police and the Government of Togo were aware of FGM and would take no steps to protect her from the practice. She further testified that her aunt had reported her to the Togolese police. Upon return, she would be taken back to her husband by the police and forced to undergo FGM. She testified at several points that there would be nobody to protect her from FGM in Togo.

In her testimony, the applicant referred to letters in the record from her mother (Exh. 3). Those letters confirmed that the Togolese police were looking for the applicant and that the applicant's father's family wanted her to undergo FGM.

The applicant testified that she could not find protection anywhere in Togo. She stated that Togo is a very small country and her husband and aunt, with the help of the police, could locate her anywhere she went. She also stated that her husband is well known in Togo and is a friend of the police. On cross- examination she stated that it would not be possible for her to live with another tribe in Togo.

The applicant also testified that the Togolese police could locate her in Ghana. She indicated that she did not seek asylum in Germany because she could not speak German and therefore could not continue her education there. She stated that she did not have relatives in Germany as she does in the United States.

B. Background Information

1. The Asylum Application

The applicant's written asylum application was filed on April 18, 1995, while she was in INS detention (Exh. 3). That application is consistent with the above testimony in all material respects.

A number of documents are attached to the applicant's asylum application. First, there are copies of two letters, dated December 27, 1994, and December 30, 1994, respectively, signed by the applicant's mother. The letters are in English. One letter confirms that the applicant's father's family wishes to have the applicant marry an older man and be subjected to FGM. That letter further confirms that the applicant's mother gave the applicant money to assist her escape. The other letter confirms that the Togolese police were looking for the applicant following her escape in October 1994.

The applicant testified that 1) her mother cannot write English; 2) the letters were prepared by the applicant's sister, at her mother's request; and 3) the letters are signed by the applicant's mother (Tr. at 62-63).

A translated copy of the applicant's marriage certificate also is appended to the asylum application. That document, dated October 7, 1994, is signed by the applicant's husband, but not by the applicant.

Finally, an untranslated document in French, perhaps from the police in Togo, is attached to the asylum application. The applicant did not rely on the untranslated document at the hearing. The INS trial attorney neither objected to the admission of the untranslated document nor cross-examined the applicant with respect to it. The Immigration Judge did not mention the

untranslated document.

2. Applicant's Other Exhibits

The applicant's prior counsel also offered a letter dated August 24, 1995, from Charles Piot, Assistant Professor of Cultural Anthropology at Duke University (Exh. 6). That letter 1) states that it was written at counsel's request, on the basis of information furnished by counsel; 2) briefly describes Professor Piot's qualifications as a cultural anthropologist who spent 3 years doing research in Northern Togo in the 1980s; and 3) offers the opinion that a woman of the Tchamba people probably would be expected by her husband to have undergone a clitoridectomy (a type of FGM) prior to marriage.

The Immigration Judge admitted the Piot letter into evidence (Tr. at 89). The Immigration Judge noted that the weight given the letter would be affected by the inability of the INS to cross-examine Professor Piot. However, the Immigration Judge also stated that he "would accept the applicant on her word, that the tribe requires the circumcision [FGM] prior to marriage." (Tr. at 89).

The applicant also submitted pictures of herself in tribal ceremonial dress at the time of her marriage. Those pictures were admitted into evidence (Exh. 5), and the applicant testified to their authenticity (Tr. at 70-71).

3. Group Exhibit 4

The applicant's prior counsel also filed a lengthy pre-hearing brief accompanied by extensive documentation. That documentation included information on the practice of FGM, its harmful effects on women, its lack of legitimate justification, and its condemnation by the international community. The documentation also confirmed the generally poor human rights situation in Togo, particularly for women. These background materials are designated "Group Exhibit" 4 in the record.

4. Description of FGM

According to the applicant's testimony, the FGM practiced by her tribe, the Tchamba-Kunsuntu, is of an extreme type involving cutting the genitalia with knives, extensive bleeding, and a 40-day recovery period (Tr. 30-31, 41). The background materials confirm that the FGM practiced in some African countries, such as Togo, is of an extreme nature causing permanent damage, and not just a minor form of genital ritual. See, e.g., Nahid Toubia, Female Genital Mutilation: A Call for Global Action 9, 24-25 (Gloria Jacobs ed., Women Ink. 1993).

The record material establishes that FGM in its extreme forms is a practice in which portions of the female genitalia are cut away. In some cases, the vagina is sutured partially closed. This practice clearly inflicts harm or suffering upon the girl or woman who undergoes it.

FGM is extremely painful and at least temporarily incapacitating. It permanently disfigures the female genitalia. FGM exposes the girl or woman to the risk of serious, potentially life-threatening complications. These include, among others, bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus. It can result in permanent loss of genital sensation and can adversely affect sexual and erotic functions. See generally Toubia, supra; INS Resource Information Center, Alert Series-Women-Female Genital Mutilation, Ref. No. AL/NGA/94.001 (July 1994) [hereinafter FGM Alert].

The FGM Alert, compiled and distributed by the INS Resource Information Center, notes that "few African countries have officially condemned female genital mutilation and still fewer have enacted legislation against the practice." FGM Alert, supra, at 6. Further, according to the FGM Alert, even in those few African countries where legislative efforts have been made, they are usually ineffective to protect women against FGM. The FGM Alert notes that "it remains practically true that [African] women have little legal recourse and may face threats to their freedom, threats or acts of physical violence, or social ostracization for refusing to undergo this harmful traditional practice or attempting to protect their female children." Id. at 6-7. Togo is not listed in the FGM Alert as among the African countries that have made even minimal efforts to protect women from FGM.

The record also contains a May 26, 1995, memorandum from Phyllis Coven, Office of International Affairs, INS, which is addressed to all INS Asylum Officers and sets forth guidelines for adjudicating women's asylum claims. Coven, U.S. Dep't of Justice, Considerations For Asylum Officers Adjudicating Claims From Women (1995). Those guidelines state that "rape ..., sexual abuse and domestic violence, infanticide and genital mutilation are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five grounds." Coven, supra, at 4.

5. State Department Reports on Conditions in Togo

The record also contains two reports compiled by the United States Department of State. The first of these, dated January 31, 1994, 1) confirms that FGM is practiced by some ethnic groups in Togo; 2) notes that while some reports indicate that the practice may be diminishing, an expert indicates that as many as 50% of Togolese females may have been mutilated; and 3) notes that various acts of violence against women occur in Togo with little police intervention. Committees on Foreign Affairs and Foreign Relations, 103d Cong., 2d Sess., Country Report on Human Rights Practices for 1993 (Joint Comm. Print 1994) [hereinafter 1993 Country Reports].

The second Department of State Report on Togo, prepared by the Bureau of Democracy, Human Rights and Labor, is dated April 1995. Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, Togo-Profile of Asylum Claims & Country Conditions (April 1995) [hereinafter Profile]. While not specifically addressing FGM, that report states that the President of Togo has a poor human rights record and confirms that the government's military and security forces have been involved in serious human rights abuses.

At the hearing, the Immigration Judge decided not to include in the record a third State Department Report, the February 1995 Country Reports on Human Rights Practices for 1994, because the information basically duplicated the two reports already submitted. See Committees on Foreign Relations and International Relations, 104th Cong., 1st Sess., Country Reports on Human Rights Practices for 1994 268 (Joint Comm. Print 1995). Neither counsel objected to the Immigration Judge's decision to exclude the February 1995 report.

C. INS Cross-Examination and Request for Remand

During the hearing before the Immigration Judge, the INS had an opportunity to cross-examine the applicant and to offer documentary evidence of its own having a bearing on the case. The INS submitted no documentary evidence.

As discussed below, the INS general attorney's cross-examination of the applicant revealed no meaningful inconsistencies in her testimony. The INS does not claim that the applicant is incredible, nor does the INS argue that the Immigration Judge's adverse credibility determination

was correct. Rather, the INS requests that the record be remanded for further examination of the applicant's credibility. The INS cites four specific matters in support of its request.

First, the INS asserts that the applicant testified in an inconsistent manner because she gave several different answers regarding who performs FGM in her tribe. At one point, the applicant stated that an older man of the tribe performed the procedure (Tr. at 24). At another point, she indicated that an old lady or an official circumcisor performed the operation (Tr. at 31-32).

These are not inconsistencies that undermine credibility. It is understandable that a teenage girl, who has been protected from FGM by her father, and who has never been subjected to the process, might have an imperfect understanding of who actually performs the procedure in her tribe. We also note that the applicant had been attending high school outside Togo, in Ghana, during the time immediately preceding her father's death. The INS does not challenge the applicant's membership in the Tchamba-Kunsuntu Tribe, nor does it contend that the tribe does not practice FGM. When viewed in the context of the entire record, the ambiguous answers as to who performs FGM in the tribe do not undermine the applicant's credibility. See Matter of B-, Interim Decision 3251 (BIA 1995).

We reject the INS's second suggestion that there is a material discrepancy in the applicant's testimony regarding her marital status. The record establishes that the applicant was married against her will to an older man of her tribe, and the marriage was never consummated. The marriage certificate was not signed by the applicant. She fled the country shortly after the marriage, before she had been delivered to her husband's house. Understandably, in the particular circumstances of this case, the teenage applicant may, in her own mind, be uncertain as to whether she is actually "married" to her husband in Togo. The statement in her asylum application that she "would be forced to marry an old man, and be [circumcised]" is basically consistent with her testimony and the corroborating evidence she presented.

We also reject the INS's third challenge to the applicant's credibility. During oral argument, the General Counsel referred to the need to explore the matter of the "untranslated document" attached to the asylum application (O.A. at 33). However, he acknowledged that the INS had an opportunity to explore this matter below and did not do so (O.A. at 34). The INS is not entitled to another opportunity to try this issue. See Matter of Guevara, 20 I&N Dec. 238, 249 (BIA 1991).

We acknowledge the INS's fourth point-that a number of the applicant's answers on both direct and cross-examination were "inaudible" in the transcript. Nevertheless, there is ample audible testimony from the applicant that supports her asylum application. It is very unlikely that any of the "inaudible" portions of the transcript contained highly relevant material impeaching the applicant's credibility. If that were the case, we certainly would expect the INS to have brought it to our attention through an affidavit or declaration from its general attorney who was present at the hearing below.

Finally, the INS has not suggested that it has any newly discovered, previously unavailable documentary evidence relating to conditions in Togo or the likelihood of country-wide persecution.

For the foregoing reasons, a remand is not necessary. This is particularly true in light of the length of time the applicant's asylum application has been pending.

D. The Applicant's Credibility

We have conducted an independent review of the applicant's credibility. We note that the

Immigration Judge's adverse credibility determination was based on a perceived lack of "rationality," "persuasiveness," and "consistency." The Immigration Judge did not rely on the applicant's demeanor. We, like the Immigration Judge, can determine from the record whether the applicant's testimony is "rational, plausible, and consistent."

We find that the applicant's testimony in support of her asylum application is plausible, detailed, and internally consistent. See Matter of B-, supra. It is consistent with her asylum application and with the substantial background information in the record. The latter includes information from the Department of State and the INS Resource Information Center.

The applicant is a 19-year-old woman, who was a 17-year-old high school student at the time the events in question occurred. The applicant's father had died, she was separated from her mother, and she was under the control of an unsympathetic aunt. Her arrival in the United States followed flight from her homeland and a lonely journey of thousands of miles that took her through a strange country. Her testimony followed more than 8 months of continuous INS detention, in several facilities, one of which was closed by a riot.

We specifically reject the Immigration Judge's findings that the applicant's failure to know the present whereabouts of her mother; her claim to have avoided FGM through her father's efforts; the incident involving the German woman; or the incident with the Nigerian man were irrational, unpersuasive, or inconsistent. Each of those matters was adequately and reasonably explained by the applicant during her testimony and each of them reasonably could have happened to a teenage girl in the applicant's situation. Her testimony on these points was not impeached by the INS through cross-examination.

For the foregoing reasons, on the basis of the record before us, we find the applicant to be a credible witness.

II. FGM as Persecution

For the purposes of this case, we adopt the description of FGM drawn from the record and summarized in Part I.B.4. of this opinion. We agree with the parties that this level of harm can constitute "persecution" within the meaning of section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A) (1994).

While a number of descriptions of persecution have been formulated in our past decisions, we have recognized that persecution can consist of the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim. See Matter of Acosta, 19 I&N Dec. 211, 222-23 (BIA 1985), modified on other grounds, Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). The "seeking to overcome" formulation has its antecedents in concepts of persecution that predate the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. See, e.g., Matter of Diaz, 10 I&N Dec. 199, 204 (BIA 1963).

As observed by the INS, many of our past cases involved actors who had a subjective intent to punish their victims. However, this subjective "punitive" or "malignant" intent is not required for harm to constitute persecution. See Matter of Kulle, 19 I&N Dec. 318 (BIA 1985); Matter of Acosta, supra.

Our characterization of FGM as persecution is consistent with our past definitions of that term. We therefore reach the conclusion that FGM can be persecution without passing on the INS's proposed "shocks the conscience" test. We also agree with the parties that this case is not

controlled by Matter of Chang, 20 I&N Dec. 38 (BIA 1989) (holding that China's population control policy is not persecution).

III. Social Group

To be a basis for a grant of asylum, persecution must relate to one of five categories described in section 101(a)(42)(A) of the Act. The parties agree that the relevant category in this case is "particular social group." Each party has advanced several formulations of the "particular social group" at issue in this case. However, each party urges the Board to adopt only that definition of social group necessary to decide this individual case.

In the context of this case, we find the particular social group to be the following: young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice. This is very similar to the formulations suggested by the parties.

The defined social group meets the test we set forth in Matter of Acosta, supra, at 233. See also Matter of H-, Interim Decision 3276 (BIA 1996) (finding that identifiable shared ties of kinship warrant characterization as a social group). It also is consistent with the law of the United States Court of Appeals for the Third Circuit, where this case arose. Fatin v. INS, 12 F.3d 1233, 1241 (3d Cir. 1993) (stating that Iranian women who refuse to conform to the Iranian Government's gender-specific laws and social norms may well satisfy the Acosta definition).

In accordance with Acosta, the particular social group is defined by common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities. The characteristics of being a "young woman" and a "member of the Tchamba-Kunsuntu Tribe" cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.

IV. Well-Founded Fear

The burden of proof is upon an applicant for asylum to establish that a "reasonable person" in her circumstances would fear persecution upon return to Togo. Matter of Mogharrabi, 19 I&N Dec. 439, 445 (BIA 1987). The applicant has met this burden through a combination of her credible testimony and the introduction of documentary evidence and background information that supports her claim. See Matter of B-, supra; Matter of Dass, 20 I&N Dec. 120 (BIA 1989).

V. "On Account Of"

To be eligible for asylum, the applicant must establish that her well- founded fear of persecution is "on account of" one of the five grounds specified in the Act, here, her membership in a "particular social group." See, e.g., Matter of H-, supra (holding that harm or abuse because of clan membership constitutes persecution on account of social group).

Both parties have advanced, and the background materials support, the proposition that there is no legitimate reason for FGM. Group Exhibit 4 contains materials showing that the practice has been condemned by such groups as the United Nations, the International Federation of Gynecology and Obstetrics, the Council on Scientific Affairs, the World Health Organization, the International Medical Association, and the American Medical Association.

Record materials state that FGM "has been used to control woman's sexuality," FGM Alert, supra, at 4. It also is characterized as a form of "sexual oppression" that is "based on the

manipulation of women's sexuality in order to assure male dominance and exploitation." Toubia, supra, at 42 (quoting Raqiya Haji Dualeh Abdalla, Somali Women's Democratic Organization). During oral argument before us, the INS General Counsel agreed with the latter characterization. (O.A. at 41). He also stated that the practice is a "severe bodily invasion" that should be regarded as meeting the asylum standard even if done with "subjectively benign intent" (O.A. at 42).

We agree with the parties that, as described and documented in this record, FGM is practiced, at least in some significant part, to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to FGM. We therefore find that the persecution the applicant fears in Togo is "on account of" her status as a member of the defined social group.

VI. Country-Wide Persecution

The INS suggests, in its brief and at oral argument, that a remand is necessary because the applicant has not established that she would be unable to avoid FGM by moving to some other part of Togo. As we found in Part I of our opinion, the applicant presented credible testimony that her husband is a well- known individual who is a friend of the police in Togo. She testified that her aunt and her husband were looking for her and that there could be no refuge for her because Togo is a small country and the police would not protect her (Tr. at 59, 61, 65, 73, 74, 78, 86, 87).

The applicant's testimony is consistent with the background information in the record. That information confirms that 1) FGM is widely practiced in Togo; 2) acts of violence and abuse against women in Togo are tolerated by the police; 3) the Government of Togo has a poor human rights record; and 4) most African women can expect little governmental protection from FGM. See 1993 Country Reports, supra; Profile, supra; FGM Alert, supra, at 6-7. We also take notice that Togo is a small country of approximately 22,000 square miles, slightly smaller than West Virginia.

Neither in its briefs nor at oral argument did the INS raise any claim of "new evidence" that might show changed country conditions. We assume that if the INS had any new documentation showing that the applicant could find safety from FGM elsewhere in Togo, it would have offered that evidence in support of its motion to remand.

For the foregoing reasons, we find that this record adequately supports the applicant's claim that she has a country-wide fear of persecution in Togo.

VII. Discretion

We have determined that the applicant is eligible for asylum because she has a well-founded fear of persecution on account of her membership in a particular social group in Togo. A grant of asylum to an eligible applicant is discretionary. The final issue is whether the applicant merits a favorable exercise of discretion. The danger of persecution will outweigh all but the most egregious adverse factors. Matter of Pula, 19 I&N Dec. 467, 474 (BIA 1987). The type of persecution feared by the applicant is very severe.

To the extent that the Immigration Judge suggested that the applicant had a legal obligation to seek refuge in Ghana or Germany, the record does not support such a conclusion. The applicant offered credible reasons for not seeking refuge in either of those countries in her particular circumstances.

The applicant purchased someone else's passport and used it to come to the United States. However, upon arrival, she did not attempt to use the false passport to enter. She told the Immigration inspector the truth. See Matter of Y-G-, 20 I&N Dec. 794 (BIA 1994).

We have weighed the favorable and adverse factors and are satisfied that discretion should be exercised in favor of the applicant. Therefore, we will grant asylum to the applicant.

VIII. Ancilliary Matters

In view of our disposition of the applicant's case, we will deny the INS's request to remand. We find it unnecessary to consider the new evidentiary materials submitted by the applicant on appeal. We also do not reach the applicant's alternate claim that she has a well-founded fear of persecution on the basis of a forced polygamous marriage. Moreover, it is unnecessary for us to adjudicate the applicant's application for withholding of deportation.

IX. Summary and Conclusion

The applicant has a well-founded fear of persecution in the form of FGM if returned to Togo. The persecution she fears is on account of her membership in a particular social group consisting of young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice. Her fear of persecution is country-wide. We exercise our discretion in her favor, and we grant her asylum.

Therefore, we sustain the applicant's appeal, grant her asylum, and order her admitted to the United States. The following orders are entered.

Order: The applicant's appeal is sustained. The applicant is granted asylum and admitted to the United States as an asylee.

Further Order: The INS's motion to remand is denied.
Concurring Opinion:

Lauri Steven Filppu, Board Member, joined by Michael J. Heilman, Board Member, joined.

I respectfully concur. I write separately in part to respond more completely to several arguments advanced by the Immigration and Naturalization Service.

(Following concurring and dissenting opinions omitted)

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“U” Visa Status

Under the law, aliens who are victims of certain crimes, can apply for “U” visa status. That status is granted by the USCIS upon application by the alien. That application must be certified by a prosecutor, or head of other governmental entity that the alien is indeed a victim of a crime within the USA and has been, or will likely be helpful to the prosecution or the investigation of the crime. Most crimes that qualify for U-status are crimes involve violence against the victim. Other crimes may not involve violence, but may have severe consequences for the victim. For the victim to qualify for U-visa status, the victim must have suffered “direct and proximate harm” as a result of the qualifying criminal activity. Note that there is no requirement

that a law enforcement agency certify the alien's status as a victim of crime. In that case, the alien will be precluded from applying for U-status.

The crimes that qualify for U-status include but are not limited to: abduction, abusive sexual contact, domestic violence, false imprisonment, extortion, blackmail, FGM, hostage, incest, kidnaping, manslaughter, murder, involuntary servitude, sexual exploitation, rape, prostitution, perjury, peonage, obstruction of justice, slave trade, torture, trafficking, unlawful criminal restraint, and witness tampering.

Upon grant of U-status, the alien can apply for a waiver of inadmissibility in case the alien entered the US without inspection or overstayed his or her valid entry. The alien can also apply for Employment Authorization on approval of U-visa status. After a period in U-status, the alien is eligible to apply for Adjustment of Status (ie, permanent resident status) in the USA. The alien's derivative beneficiaries are also benefitted by the waiver, work authorization, and permanent residency grants as accorded to the principal alien.

Executive Order 12711 - Policy Implementation With Respect to Nationals of the People's Republic of China

April 11, 1990

By the authority vested in me as President by the Constitution and laws of the United States of America, the Attorney General and the Secretary of State are hereby ordered to exercise their authority, including that under the Immigration and Nationality Act (8 U.S.C. 1101-1557), as follows:

Sec. 1. The Attorney General is directed to take any steps necessary to defer until January 1, 1994, the enforced departure of all nationals of the People's Republic of China (PRC) and their dependents who were in the United States on or after June 5, 1989, up to and including the date of this order (hereinafter "such PRC nationals").

Sec. 2. The Secretary of State and the Attorney General are directed to take all steps necessary with respect to such PRC nationals (a) to waive through January 1, 1994, the requirement of a valid passport and (b) to process and provide necessary documents, both within the United States and at U.S. consulates overseas, to facilitate travel across the borders of other nations and reentry into the United States in the same status such PRC nationals had upon departure.

Sec. 3. The Secretary of State and the Attorney General are directed to provide the following protections:

(a) irrevocable waiver of the 2-year home country residence requirement that may be exercised until January 1, 1994, for such PRC nationals;

(b) maintenance of lawful status for purposes of adjustment of status or change of nonimmigrant status for such PRC nationals who were in lawful status at any time on or after June 5, 1989, up to and including the date of this order;

(c) authorization for employment of such PRC nationals through January 1, 1994; and

(d) notice of expiration of nonimmigrant status (if applicable) rather than the institution of deportation proceedings, and explanation of options available for such PRC nationals eligible for deferral of enforced departure whose nonimmigrant status has expired.

Sec. 4. The Secretary of State and the Attorney General are directed to provide for enhanced consideration under the immigration laws for individuals from any country who express a fear of persecution upon return to their country related to that country's policy of forced abortion or coerced sterilization, as implemented by the Attorney General's regulation effective January 29, 1990.

Sec. 5. The Attorney General is directed to ensure that the Immigration and Naturalization Service finalizes and makes public its position on the issue of training for individuals in F-1 visa status and on the issue of reinstatement into lawful nonimmigrant status of such PRC nationals who have withdrawn their applications for asylum.

Sec. 6. The Departments of Justice and State are directed to consider other steps to assist such PRC nationals in their efforts to utilize the protections that I have extended pursuant to this order.

Sec. 7. This order shall be effective immediately.

George Bush
The White House,
April 11, 1990.

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Matter of Y-C-

23 I & N Dec. 286

Decided March 11, 2002

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

An unaccompanied minor who was in the custody of the Immigration and Naturalization Service pending removal proceedings during the 1-year period following his arrival in the United States established extraordinary circumstances that excused his failure to file an asylum application within 1 year after the date of his arrival.

Pro se

BEFORE: Board En Banc: SCHMIDT, HOLMES, HURWITZ, VILLAGELIU, GUENDELSBERGER, ROSENBERG, GRANT, MOSCATO, MILLER, BRENNAN, ESPENOZA, OSUNA, and OHLSON, Board Members.

Concurring Opinion: FILPPU, Board Member, joined by SCIALABBA, Acting Chairman; DUNNE, Vice Chairman; COLE, HESS, and PAULEY, Board Members.

GRANT, Board Member:

The respondent has appealed from the decision of an Immigration Judge dated May 15, 2000, denying his application for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158 (2000). 1

The respondent has raised additional issues on appeal. However, in light of our decision, we need not address them at this time.
The appeal will be sustained and the record will be remanded to the Immigration Judge for a decision on the merits of the respondent's application for asylum.

I. Factual and Procedural History

The respondent is a 19-year-old native and citizen of the People's Republic of China. He was an unaccompanied minor when he entered the United States without inspection on July 3, 1998. On the day of his arrival the Immigration and Naturalization Service served him with a Notice to Appear (Form I-862), which was filed with the Immigration Court on July 30, 1998. On July 13, 1999, the Service released the respondent from custody and paroled him to the custody of his uncle.

The respondent attempted to file an asylum application with the Immigration Judge 5 months later, in December 1999, but it was rejected. The [page 287] respondent eventually filed his application with the Immigration Judge in May 2000. The Immigration Judge denied his application, finding that the respondent had not filed within a year of his arrival, as required by section 208(a)(2)(B) of the Act, and that he had not shown either changed circumstances or extraordinary circumstances that would excuse the delay in filing under section 208(a)(2)(D).

II. Analysis

With certain exceptions, an alien who is physically present in the United States, irrespective of status, may apply for asylum. See section 208(a)(1) of the Act. The alien must show by clear and convincing evidence that an application for relief was filed within 1 year after the date of his or her arrival in the United States. See section 208(a)(2)(B) of the Act. However, failure to meet the 1-year deadline does not give rise to an absolute bar to filing an asylum application. Notwithstanding this time limit, an asylum application may be considered if the alien demonstrates, to the satisfaction of the Attorney General, either the existence of changed circumstances that materially affect the applicant's eligibility for asylum, or extraordinary circumstances relating to the delay in filing an application within the 1-year period. See section 208(a)(2)(D) of the Act.

It is undisputed that the respondent filed his written asylum application with the Immigration Judge more than 1 year after his arrival in this country. The respondent makes no claim of changed circumstances. Instead, he argues that extraordinary circumstances prevented him from meeting the filing deadline.

In the context of this case, the term "extraordinary circumstances" is defined as follows:

The term "extraordinary circumstances" in section 208(a)(2)(D) of the Act shall refer to events or factors directly related to the failure to meet the 1-year deadline. Such circumstances may excuse the failure to file within the 1-year period as long as the alien filed the application within a reasonable period given those circumstances. The burden of proof is on the applicant to establish to the satisfaction of the asylum officer, the immigration judge, or the Board of Immigration

Appeals that the circumstances were not intentionally created by the alien through his or her own action or inaction, that those circumstances were directly related to the alien's failure to file the application within the 1-year period, and that the delay was reasonable under the circumstances. Those circumstances may include but are not limited to:

. . .

(ii) Legal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival . . . .

8 C.F.R. § 208.4(a)(5) (2001).

In determining whether extraordinary circumstances exist to excuse an alien's failure to meet the deadline for filing an asylum application, we [page 288] conduct an individualized analysis of the facts of the particular case. We are not required to excuse the respondent's tardy filing merely because the regulation includes unaccompanied minor status as a possible extraordinary circumstance. Instead, the respondent must establish the existence or occurrence of the extraordinary circumstances, must show that those circumstances directly relate to his failure to file the application within the 1-year period, and must demonstrate that the delay in filing was reasonable under the circumstances.

The record indicates that the respondent was 15 years old when he arrived here as an unaccompanied minor and that he remained under this legal disability throughout the following 1-year period. See 8 C.F.R. § 208.4(a)(5)(ii). He was in Service custody until just over a year after his arrival, when he was released into his uncle's custody. Approximately 5 months later, the Immigration Judge refused to accept the respondent's proffered asylum application. The respondent eventually filed his application with the Immigration Judge in May 2000, less than a year after he was released from Service custody. At the time of that hearing, the respondent was still a minor.

Moreover, the Service placed the respondent in removal proceedings immediately after he arrived here. Once the respondent was in removal proceedings, the Immigration Judge had authority to set a deadline for filing the asylum application. See 8 C.F.R. § 3.31(c) (2001). The Immigration Judge also had authority to conduct the proceedings in such a manner as to avoid unwarranted delay.

On these facts, we find that the respondent has established extraordinary circumstances for the delay in filing his application for asylum. See section 208(a)(2)(D) of the Act. He did not, through his own action or inaction, intentionally create these circumstances, which were directly related to his failure to meet the filing deadline. See 8 C.F.R. § 208.4(a)(5). We find that the respondent filed his application within a reasonable period given these circumstances. Id. We therefore conclude that these extraordinary circumstances excuse his failure to file within a year of his arrival.

III. Conclusion

The respondent was an unaccompanied minor when he arrived in the United States. He remained under this legal disability during the 1-year period after his arrival while removal proceedings were pending and he was in the custody of the Service. The respondent established extraordinary circumstances that excused his failure to file his asylum application within 1 year of the date of his arrival. Accordingly, the respondent's appeal will be sustained, and the record will be remanded to give him an opportunity to pursue his application for asylum on the merits. [page

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Order:

The appeal is sustained.

Further Order: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Concurring Opinion:

Lauri Steven Filppu, Board Member, in which Lori L. Scialabba, Acting Chairman; Mary Maguire Dunne, Vice Chairman; Patricia A. Cole, Frederick D. Hess, and Roger A. Pauley, Board Members, joined

I respectfully concur. I agree with the majority that removal proceedings should be reopened because the respondent meets the "extraordinary circumstances" test for not having filed his asylum application within a year of his arrival. I do not agree, however, with that portion of the majority's opinion which indicates that an alien's discretion as to when to file is constrained by the authority of an Immigration Judge to set deadlines. Nothing in that authority prevents an alien from filing before any deadline set by an Immigration Judge. I am also not aware of any preclusion on filing an asylum application in removal proceedings even in the absence of a deadline set by an Immigration Judge.

In this case, I find that the "extraordinary circumstances" test of section 208(a)(2)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a)(2)(D) (2000), has been satisfied by the respondent's youth and the totality of the circumstances. The record indicates that the respondent was 15 years of age when he arrived in July of 1998. He was promptly detained and placed in removal proceedings. The Immigration Court in Chicago, Illinois, scheduled various dates for master calendar hearings from August of 1998 through February of 1999. The record, however, does not reflect that the respondent ever attended a hearing in Chicago.

The respondent bonded out of custody in July of 1999, a year after his arrival. Venue was changed to New York and his first master calendar hearing occurred on September 17, 1999, at which time he said he would apply for asylum. The written asylum application was submitted on December 21, 1999, only days after the respondent turned 17. It was approximately 5½ months late.

The regulations recognize that an "extraordinary circumstance" may arise by virtue of a person's status as an unaccompanied minor. 8 C.F.R. § 208.4(a)(5)(ii) (2001). In this case, the respondent was additionally confined by the Immigration and Naturalization Service during the entire 1-year period for filing an asylum application. It further appears that he was not brought before an Immigration Judge during that 1-year period. The [page 290] record is silent on the circumstances of his confinement and the reasons for the Service's failure to produce him for any of the hearing dates scheduled in Chicago.

I find that an "extraordinary circumstance" arises from the combination of the respondent's youth, his detention, and the unexplained failure of the Service to produce him for a hearing during the 1-year period for filing an asylum application. Further, I find that his submission within 6 months of release, while still a minor, was reasonable under all the circumstances.

Discussion

First, let's analyze temporary protected status. In the law cited above, the text of the temporary protected status according to Chinese students is listed in its entirety. This executive decision was issued by President George Bush. Subsequently, the Immigration and Naturalization Service under authority of Congress, permitted the adjustment of status for the thousands of Chinese nationals who were eligible for temporary protected status. Thereby, these Chinese nationals became permanent residents of the United States. These events occurred from 1989 through 1994.

The Kasinga case is illustrative of the travails that many asylum applicants face in their home countries, their travel to the United States, and subsequently their stay in the United States.

Unfortunately, prior abuse of the asylum system has made it more difficult for well deserving asylees to obtain that benefit. For example, in the past asylees were granted immediate work authorization upon filing an asylum application. Therefore, many thousands of asylum seekers entered the United States, claimed asylum at the port of entry, and were immediately paroled into the United States and granted work authorization. These asylum applicants frequently filed bogus, and at best "skimpy" asylum applications. They knew very well that the American asylum system would take years to churn their cases through to a final decision and in that time they would be living, working and assimilating into American society. This abuse of the system resulted in a severe backlash against asylum seekers. The first came in 1997, when newly updated guidelines for asylum removed the issuance of work authorization to asylum applicants for a period of at least 180 days following filing of the asylum application. As soon as that happened, there was a drastic drop in asylum applicants. Further, since 1997, an alien must file his or her asylum claim within one year of entry to the USA absent “extraordinary circumstances”. Thus, the one-year bar also becomes a substantial hurdle to overcome.

The second major "asylum reform", the results of which have yet to be seen, came with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Under the pertinent sections of IIRIRA, cited above, excludable aliens who are intercepted at a port of entry may raise a claim of asylum. However, that claim will be very speedily adjudicated perhaps even at the port of entry, and the asylee returned to his or her own home country immediately. Of course, such an expedited procedure has major problems. First and foremost of course is whether or not the excludable alien is properly informed of his or her asylum rights. Second, whether the alien can even comprehend his rights or express his credible fear in an understandable fashion due to a potential language problem. Third, whether the interviewing INS officer has the underlying knowledge of country conditions in order to make a well founded decision on the alien's credibility and request for asylum. Finally, another problem is presented by the lack of review afforded these asylum decisions.

In 2005, the REAL ID act also added its own set of hurdles to the asylum process and immigration relief in general by:

1. Restricting asylum: Denial of asylum to applicants who cannot prove the central motive of their persecutor, who are not able to produce corroborating evidence, who mistakenly provide inconsistent testimony (even on minor facts which may be irrelevant to their claim) or whose demeanor does not meet the expectations of an immigration judge.

2. Expanding grounds of inadmissibility and removal to non-citizens who are either members of or have supported a political organization even if such organization has not been designated as a “foreign terrorist organization”.

3. Eliminating temporary stays of removal by federal appeals courts and restricting *habeas* review (courts have subsequently held that they have retained habeas reviews and their stays of deportation pending appeal are still available to appellants.)

In a recent case the Supreme Court held that courts of appeals should continue to apply the traditional criteria for granting a stay in ruling on a motion for stay of removal pending the review and adjudication of a petition for review of a deportation order. The Supreme Court rejected the DHS' argument that the alien prove by "clear and convincing evidence" that the removal order "is prohibited as a matter of law". *Nken v. Holder*, 129 S.Ct. 1749 (2009).

Recent influx of undocumented aliens at the Southern Border (2013-2015)

Thousands of aliens, primarily from Central America, have come across US-Mexico border. Some are mere children, even infants. Some children come with family members, others some with no accompanying adult. Many of them claim the endemic violence in their native countries (Guatemala, Honduras, El Salvador, Nicaragua) is driving them to the relative safety of the USA. Per international treaty, the US government has to try and determine who may qualify for relief and who may not before removing that person from the US. These detained aliens may be placed in "expedited removal" proceedings. Some may be screened upon apprehension and removed almost immediately. Others who may have enunciated a claim of persecution may be detained for a more detailed "Credible Fear Interview" before a USCIS Asylum officer. Undocumented and unaccompanied minors are usually held at a juvenile shelter which provides health screenings and vaccinations. If an "Unaccompanied Minor" (UAC) child has a "sponsor" [Usually a family member or family friend] in the USA, who is willing to accept the child, the USICE will release the minor to that person after verifying (as best as possible) - their relationship and the sponsor's background. Generally, an adult alien who is released will still have to comply with whatever reporting requirements the USICE imposes, as well as may be required to including wearing a GPS tracking ankle bracelet to ensure their whereabouts are known to ICE. All aliens who are released will have to appear in the immigration court with jurisdiction over their place of residence in order for removal proceedings to go forward. At such proceedings, the alien may assert any appropriate claims for relief.

Emerging Issues:

- "Migrant Protection Protocols" - essentially, remain in place (in Mexico) while waiting for Asylum office interview
- Detention of asylum seekers and family separation
- "Safe third country" agreements
- No bond for those entering along the Southern border without documents
- Line of AG decisions curtailing previously available relief (example - Matter of A-B-)

Problems

1. As a good attorney, what would your initially want to know in order to determine whether a prospective client has a well founded case for asylum?

2. How would you follow up on the initial information you gathered?

3. Where would you start looking for evidence to document your client's claim for asylum?

4. Your client tells you that his wife and children still remain "back home" and that he fears for their lives. Is it possible to bring them to the United States either temporarily or permanently so they can be safe? If so, how?

5. How would you construe a particular social group? What facts would you want to find out? Would you want to define your group in the broadest manner or as narrowly as possible?

6. What are the standards for asylum? For Withholding? For relief under the United Nations Convention against Torture? Who bears the burden of proof? Under what circumstances is the burden shifted?

7. What kind of evidence or witnesses would you want to present in an asylum application?

8. You have a consultation with an alien who comes to you eleven months after having entered the USA and tells you why she fled her home country and fears returning. What would you tell that individual as far as filing an asylum claim? Is there a time constraint? What if the client does not retain you at the initial consultation? What obligations do you have as an attorney?