DC BAR

D I S T R I C T O F C O L U M B I A B A R

International Law Section

1250 H Street NW
Sixth Floor
Washington, DC
20005-5937

202-626-3463
FAX 202-626-3453
www.dcbar.org/sections

Sections EventLine
202-626-3455

Section Web Site Address
international.dcbar.org/

Steering Committee
Douglas E. McLaren, Chair
Nancy L. Perkins, Vice Chair
David L. Cleveland
Linda R. Horton
Brian A. Pomper
Maurice Wolf
Jamil Zouaoui

Jeannine C. Sanford
Board of Governors Liaison

C ittees
A t
Immigration and Human Rights
International Dispute Resolution
International Technology and Electronic Commerce
International Trade
Investment and Finance
Public International and Criminal Law

John W. Nields, Jr.
D.C. Bar President

John A. Payton
D.C. Bar President-elect

John D. Graubert
Chair, Council on Sections

John P. Mahoney
Vice Chair, Council on Sections

Katherine A. Mazzaferri
D.C. Bar Executive Director

Cynthia D. Hill
D.C. Bar Assistant Executive Director, Programs

Charles E. Lorenzetti
D.C. Bar Assistant Executive Director, Administration and Finance

Carol Ann Cunningham
D.C. Bar Sections Manager

SUMMARY OF INTERNATIONAL LAW SECTION'S COMMENTS ON THE PROPOSED REGULATIONS ON "ASYLUM AND WITHHOLDING DEFINITIONS"

The Department of Justice is seeking comments on its proposed regulations on "Asylum and Withholding Definitions." (65 Federal Register 76,588-76,598, Dec. 7, 2000). The proposed regulations provide guidance on the definition of "persecution" and "membership in a particular social group," as well as what it means for persecution to be "on account of" a protected characteristic within the definition of a refugee. They restate that gender can form the basis of a particular social group. They also establish general principles for interpretation and application of the various components of the statutory definition of "refugee" and provide particular guidance for the assessment of claims made by applicants who have suffered or fear domestic violence.

The comments we propose to file are intended to bring the proposed regulations more into harmony with settled case law and well established principles of evidence. Specifically, the comments suggest that the Department of Justice: (1) modify the proposed "on account of" provision to conform with existing case law establishing that the persecutor must act "at least in part" because of a protected characteristic; (2) adhere to evidentiary principles and settled case law by deleting the requirement that applicants produce proof of future persecution even after they have established past persecution, the establishment of which raises a presumption of future persecution; (3) clarify that an opinion regarding the treatment or rights of members of a certain group constitutes a political opinion; (4) modify the definition of "persecution" to comport with settled case law; and (5) adapt the definition of "particular social group" to conform with existing case law and international interpretations of this phrase.

January 22, 2001

Director
Policy Directives and Instructions Branch
Immigration & Naturalization Service
425 I Street N.W., Room 4034
Washington, D.C. 20536

Re: INS No. 2092-00; AG Order No. 2339-2000

Dear Director:

The International Law Section of the D.C. Bar submits the following comments on the proposed regulations on "Asylum and Withholding Definition." See 65 Fed. Reg. 76,588-76,598 (Dec. 7, 2000).

We support the proposed regulations and applaud, in particular, the government's clarification that claims based on domestic violence can, in some circumstances, be recognized as valid claims to asylum. We commend the Immigration and Naturalization Service for bringing United States law more into harmony with international human rights law, which has recognized domestic violence as a serious violation of internationally recognized human rights, as well as with refugee decisions of other governments, such as Canada and the United Kingdom, that have similarly recognized domestic abuse as a potential ground for asylum.[1]

We believe, however, that the proposed regulations would make far-reaching changes in other areas of asylum law, unrelated to domestic violence issues, that depart from settled case law and well established principles of evidence. Where the sections of the proposed regulations vary from settled law, we urge that they be revised. Following each of our comments below, we propose alternative language that conforms more closely to existing case law and established evidentiary principles.

"On Account of" Requirement. The Board of Immigration Appeals ("BIA") has recognized that, in a case where a persecutor has mixed motives, the persecutor must act, "at least in part," because of a protected characteristic. See Matter of T-M-B-, 21 I. & N. Dec. 775 (B.I.A. 1997) ("[A]n applicant for asylum need not show conclusively why persecution occurred

---

[1] Although some have expressed concern that recognizing domestic violence as a potential ground for asylum might open the flood gates to gender-based claims, the Canadian experience suggests otherwise. As one study indicates, "[t]he numbers of positive claims decided in accordance with the Canadian [Gender] Guidelines since they were promulgated in March 1993 are: 78 in 1993, 204 in 1994, 212 in 1995, 150 in 1996, 104 in 1997, 95 in 1998 (through September)." Karen Musalo, *Matter of R-A-: An Analysis of the Decision and its Implications,* 76 Interpreter Releases 1177 (Aug. 9, 1999) (citing *Macklin, Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian and Australian Approaches to Gender-Related Asylum Claims,* GEO. IMMIGR. L.J. 34 (1998)).

in the past or is likely to occur in the future. However, the applicant must produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or imputed protected ground."), overruled on other grounds sub nom. Borja v. INS, 175 F.3d 732, 736 (9th Cir. 1999) (en banc). All but one federal court of appeal have used similarly broad language when addressing this issue. See Hernandez-Montiel v. INS, 225 F. 3d 1084, 1096 (9th Cir. 2000) ("'persecutory conduct may have more than one motive, and so long as one motive is one of the statutorily enumerated grounds, the requirements [for asylum] have been satisfied.'") (quoting Singh v. Ilchert, 63 F.3d 1501, 1509-10 (9th Cir. 1995)); Osorio v. INS, 18 F.3d 1017, 1028 (2d Cir. 1994) (granting asylum to applicant in mixed motive case where BIA had found harm to be motivated primarily by an economic motive–not one of the statutorily enumerated grounds–because "'persecution on account of the victim's political opinion' does not mean persecution solely on account of the victim's political opinion.").[2]

The proposed rule departs, however, from settled case law and requires the applicant to "establish that the applicant's protected characteristic is central to the persecutor's motivation to act against the applicant." Proposed 8 C.F.R. § 208.15(b). Because persecutors are often motivated to act by more than one reason, the requirement that an applicant show that a protected basis was "central" to the motivation of the persecutor will likely affect a significant number of cases, including, for instance, cases where the government tortures political opponents not only because of their political opposition, but also to gain information. However, as courts have recognized, "[p]ersecutors are hardly likely to provide their victims with affidavits attesting to

---

[2] The preamble to the proposed regulations cites Gebremichael v. INS, 10 F.3d 28, 35 (1st Cir. 1993), as an example of a narrower mixed motive standard than that articulated by the other federal courts of appeal. Preamble, 65 Fed. Reg. at 76,592. In Gebremichael, the court stated that "[a]n applicant qualifies as a 'refugee' under the INA if membership in a social group is 'at the root of persecution,' such that membership itself generates a 'specific threat to the [applicant].'" However, the phrase "at the root of persecution" comes from an earlier First Circuit case, Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985), where the court looked to the U.N. High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status for guidance on how to analyze the "on account of" requirement in social group cases. The Handbook section cited in that case reads: "A 'particular social group' normally comprises persons of similar background, habits or social status . . . Membership of [sic] such a particular social group ***may be at the root of persecution*** because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies." Id. (citing ¶¶ 77-78, at 19 (1979) (emphasis added)). The Handbook language is clearly more permissive than the statements of the court in Gebremichael cited in the preamble to the proposed rule would suggest. As the other federal court opinions on this issue make clear, a broader standard would satisfy the "on account of" requirement. Additionally, the broader standard is consistent with the principle that asylum decisions should be made bearing in mind "the fundamental humanitarian concerns of asylum law." Matter of S-P-, 21 I. & N. Dec. 486 (BIA 1996).

their acts of persecution." Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1985). Indeed, the BIA has recognized that requiring an applicant to prove a persecutor's precise motivation is not a reasonable burden. See Matter of Fuentes, 19 I & N Dec. 658, 662 (BIA 1988) ("an applicant does not bear the unreasonable burden of establishing the exact motivation of a 'persecutor' where different reasons for actions are possible"). Yet precision is exactly what the proposed rule would require of an applicant: to show that the protected characteristic was not only one of the persecutor's motivations, but was, in fact, the persecutor's central motivation. While victims of persecution may be able to show, through direct or circumstantial evidence, that a protected characteristic motivated the persecutor in some way, they are extremely unlikely to be able to prove what was *central* to the persecutor's motivation to act.

Accordingly, we urge that proposed 8 C.F.R. § 208.15(b) be changed to comport with existing case law to require that the persecutor must act, "at least in part, because of a protected characteristic." Alternatively, we recommend that the language be changed to require the applicant to show that the motivation for persecution is "reasonably related to one of the statutory grounds."

Past Persecution and Presumption of Well-Founded Fear. Although a presumption of future persecution is raised by a finding of past persecution, the proposed regulations would require an applicant to produce testimony or documentation reasonably available even after the applicant has established past persecution. "Although a presumption of future persecution is raised by a finding of past persecution, this does not relieve the applicant of the burden of producing testimonial evidence or, where reasonably available to the applicant, documentary evidence relating to future persecution, including a fundamental change in circumstances or the reasonableness of internal relocation." Proposed 8 C.F.R. § 208.13(b)(1). The proposed regulations would require the same evidentiary showing for purposes of justifying withholding of removal. Proposed 8 C.F.R. § 208.16(b)(1).

This proposed evidentiary standard is extremely confusing and contrary to both well-established rules of evidence as well as BIA and federal court case law addressing presumptions. Under general evidentiary principles, a presumption relieves a party from having to produce specific evidence to establish a particular point. When the evidence is established that triggers the presumption, the presumption then fills the further evidentiary gap. See 1 Weinstein's Federal Evidence § 301.02[1] at 301-7 (2d ed. 1997); 2 McCormick on Evidence §342 at 450 (John W. Strong ed., 4th ed. 1992). As a result, the presumption "shifts the burden of producing evidence" to the other party. Id. Both immigration and non-immigration case law adhere to this evidentiary principle. See Matter of Chen, 20 I. & N. Dec. 16, *18 (B.I.A. 1989) (once an applicant has shown past persecution, a rebuttable presumption of future persecution arises and the Service may rebut the presumption by showing a changed circumstance in the applicant's country); accord In Re H-, I. & N. Dec. 337, 346 (B.I.A. 1996) (it is the Service's burden to rebut the presumption once the applicant has established past persecution). See also Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1579 (Fed. Cir. 1984) ("[t]he effect of a presumption of fact ... is to place upon the opposing party the burden of establishing the nonexistence of that fact"); Keeler Brass Co. v. Continental Brass Co., 862 F.2d 1063, 1066 (4th Cir. 1988) (when a plaintiff

successfully creates a presumption, he not only satisfies his burden of going forward but also shifts that burden to the defendant).

The proposed evidentiary standard is, therefore, contrary to both well-established principles of evidence and settled case law. It would allow a presumption to arise and yet still require the applicant to produce proof to justify the presumption, as if the presumption did not exist. As a practical matter, the proposed standard would be almost incomprehensible to an adjudicator for the purposes of applying the burden of proof after a showing of past persecution.

Accordingly, we request that the following language in both 8 C.F.R. § 208.13(b)(1) and 8 C.F.R. § 208.16(b)(1) be deleted: "[the presumption] does not relieve the applicant of the burden of producing testimonial evidence, or where reasonably available to the applicant, documentary evidence relating to future persecution, including a fundamental change in circumstances or the reasonableness of internal relocation."

The proposed regulations also raise another troubling possibility. The preamble states that the presumption of future persecution currently operates for both governmental and non-governmental persecutors. The preamble asks if this presumption should continue with non-state actors. We are firmly in favor of continuing this presumption for non-governmental as well as governmental persecutors, and are surprised that questions have been raised about this well-established principle of current law. Eliminating the presumption for asylum applicants fearing non-governmental persecutors would create an unequal situation with a heightened burden of proof for these applicants without any basis for doing so. It also could easily confuse adjudicators, who would have to deal with two standards, depending on who the persecutor was. In addition, people may fear both governmental and non-governmental actors, creating an even more complex posture for presenting a case. Finally, the proposed dual standard could create definitional problems in cases where a person fears persecution from persons within a government, who are later removed or otherwise severed from the government, but continue to persecute the applicant. Similarly, it would be difficult to discern whether someone is a governmental persecutor where there is no functioning government, or where guerrillas or rebels control parts of a country and the pre-existing government controls the rest of it. Accordingly, we strongly recommend that the presumption remain in effect regardless of whether an applicant fears a governmental or non-governmental persecutor.

Political opinion. Although the proposed rule clarifies that social group claims based on domestic violence can, in some circumstances, be recognized as valid claims to asylum, it does not mention whether political opinion claims based on domestic violence may succeed. To avoid misinterpretations of the BIA's decision in Matter of R-A-, Int. Dec. 3404 (B.I.A. 1999), where the court dismissed such a claim, the proposed rule should make clear that an opinion regarding the treatment or rights of members of a certain group constitutes a political opinion.

This clarification is consistent with existing case law regarding political opinion, which has recognized opinions concerning the treatment or rights of others, such as feminism, to constitute "political" opinions. See Fatin v. INS, 12 F.3d 1233, 1242 (3d Cir. 1993) ("[W]e have little

doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes."). Cf. Osorio v. INS, 18 F.3d 1017, 1024, 1030-31 (2d Cir. 1994) (granting asylum based on political opinion to applicant who believed municipal workers should be given more rights, despite lack of evidence regarding which political party applicant belonged to, which political philosophy he espoused, or which political leaders he supported).

Definition of Persecution. The proposed rule defines persecution as: "the infliction of objectively serious harm or suffering that is subjectively experienced as serious harm or suffering by the applicant, regardless of whether the persecutor intends to cause harm." Proposed 8 C.F.R. § 208.15(a). That is not the standard that the BIA and the federal courts widely use now, and which the preamble specifically quotes: "the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive." Preamble, 65 Fed. Reg. at 76,589. While the proposed definition is useful in clarifying that the persecutor does not have to intend to cause the harm, it adds the word "serious" to the type of harm that an applicant must experience. Because the case law has not used the term "serious," adjudicators might interpret the proposed rule as heightening the level of harm necessary for persecution. Such an interpretation is inconsistent with the standard established in the case law.

The U.S. Supreme Court has described "persecution" as "a seemingly broader concept than threats to life or freedom." See INS v. Stevic, 467 U.S. 407 428 n. 22 (1983). Persecution has been defined as the infliction of suffering or harm upon persons who differ in a way regarded as offensive (e.g., based on race, religion, political opinion, etc.). Duarte de Guinac v. INS, 179 F.3d 1156, 1161 (9th Cir. 1999) (describing persecution as "'the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive.'") (quoting Korablina v. INS, 158 F.3d 1038, 1043 (9th Cir. 1998)); accord Asani v. INS, 154 F.3d 719, 723 (7th Cir. 1998); Baka v. INS, 963 F.2d 1376, 1379 (10th Cir. 1992). See also Matter of Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996) (en banc) ("persecution can consist of the infliction of harm or suffering . . . to overcome a characteristic of the victim"). Consistent with this reasoning, the Court of Appeals for the First Circuit has stated that the harm suffered must be more than "harassment or annoyance," although an applicant need not prove threats to life or freedom. See Aguilar-Solis v. INS, 168 F.3d 565, 570 (1st Cir. 1999).

While serious physical harm is almost always held to be persecution, even actions that do not result in actual physical harm may in certain circumstances constitute persecution. For example, repeated threats in the context of harassment or other harm short of actual beatings may reach the level of persecution in certain circumstances. See, e.g., Singh v. INS, 94 F.3d 1353 (9th Cir. 1996)(past persecution where applicant received persistent death threats and threats to his property and business); Del Carmen Molina v. INS, 170 F.3d 1247 (9th Cir. 1999) (past persecution where applicant received two threatening notes from the guerillas and some of her cousins had been killed because they served in the military).

The harm need not even be physical harm to the applicant for it to constitute persecution in some circumstances. For example, the violation of one's fundamental beliefs may, in certain circumstances, amount to persecution. Fatin v. INS, 12 F.3d 1233, 1242 (3d Cir. 1993)

("persecution . . . include[s] governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs"). Persecution may also include the infliction of mental suffering. Fisher v. INS, 79 F.3d 955, 962 (9th Cir. 1996) (en banc), citing Kovac v. INS, 407 F.2d 102, 106-07 (9th Cir. 1969)(Congressional deletion of "physical" persecution from the Act indicates persecution may include mental suffering.)

Physical harm to others, such as close family members, has also been found to be persecution of the applicant. See, e.g., Chouchkov v. INS, 220 F.3d 1077 (9th Cir. 2000) (past persecution where "father and mother-in-law were brutalized and [applicant] had every reason to fear for his own life"); see also 8 U.S.C. § 1101(a)(42)(definition of forced abortion or sterilization of one's spouse as persecution of the applicant).

The United Nations High Commissioner for Refugees (UNHCR) Handbook on Procedures and Criteria for Determining Refugee Status[3] discusses the broad range of harm that could amount to persecution in certain circumstances. While there is no universally accepted definition of persecution, a threat to life or freedom on account of one of the five grounds is always persecution. UNHCR Handbook ¶ 51. In addition, "other prejudicial actions or threats would amount to persecution" depending on the circumstances of each case. Id. ¶ 52. "Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary." Id. Finally, an applicant subjected to various forms of harm, not in themselves amounting to persecution, could establish a claim if the "various elements . . . taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on 'cumulative grounds.'" Id. ¶ 53.

Adding the word "serious" to the definition of persecution may well undermine the broad range of harm that is considered to constitute persecution under well established case law. Accordingly, we request that the language in proposed 8 C.F.R. § 208.15(a) be changed to comport with settled case law to read that "[p]ersecution is the infliction of suffering or harm upon persons who differ in a way regarded as offensive, regardless of whether the persecutor intends to cause harm."

Membership in a Particular Social Group. We applaud the recognition reflected in the proposed regulations of the language used by the BIA in Matter of Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985), as the correct definition of the term "particular social group." The proposed regulations define "a particular social group" as a group that "is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a

---

[3] The U.S. Supreme Court has recognized the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status as a useful source in interpreting the language of the United Nations Protocol on the Status of Refugees, to which Congress sought to conform. See INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987).

member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it." Proposed 8 C.F.R. § 208.15(c). This interpretation is consistent with U.S. case law and with international understanding of the particular social group language of the United Nations Convention Relating to the Status of Refugees. See, e.g., Fatin v. INS, 12 F3d 1233, 1242 (3d Cir. 1993); Canada (Attorney General) v. Ward (1993) 2 S.C.R. 689; Islam v. Secretary of State for the Home Department 2 App. Cas. 629 (H.L. 1999) (United Kingdom); Re GJ, Refugee Appeal No. 1312/93, Refugee Status Appeals Authority (Aug. 30, 1999) (New Zealand).

However, the rule as proposed additionally states that when past experience is the basis for the social group, "the past experience must be an experience that, at the time it occurred, the member either could not have changed or was so fundamental to his or her identity or conscience that he or she should not have been required to change it." Proposed 8 C.F.R. § 208.15(c)(2). This language on past experience is confusing. More significantly, it is inconsistent with U.S. case law and international interpretations of the particular social group definition. The key factor in determining whether a characteristic is one that defines a particular social group under the refugee definition is whether that characteristic is immutable–either beyond the power of the individual to change or so fundamental to the individual's identity of conscience that he or she should not be required to change it. A past experience, by virtue of its historical nature, is unchangeable. It is, without more, an immutable characteristic. The BIA made this clear in Matter of Acosta by offering a past shared experience as one example of an immutable characteristic: "we interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common immutable characteristic. The shared characteristic might be an innate one such as sex, color or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership." Matter of Acosta, 19 I. & N. Dec. at 233. Similarly, the Supreme Court of Canada adopted a standard providing three general categories of particular social groups: 1) groups defined by an innate or unchangeable characteristic; 2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the associations; and 3) groups associated by a former voluntary status, unalterable due to its historic permanence. Canada (Attorney General) v. Ward, (1993) 2 S.C.R. 689, 739.

Accordingly, we request that the language in proposed 8 C.F.R. § 208.15(c)(2) concerning "past experience" be deleted.

Factors for a Social Group. The proposed regulation lists six factors for determining whether a particular social group exists, noting that these factors "may be considered," but "are not necessarily determinative:"

(1) the members of the group are closely affiliated with each other;
(2) the members are driven by a common motive or interest;
(3) a voluntary associational relationship exists among them;
(4) the group is a societal faction or recognized segment of the population

in the country;
(5) members view themselves as members;
(6) society distinguishes members of the group for different treatment or status than others in the society.

Proposed 8 C.F.R. § 208.15(c)(3).

We are deeply concerned about the possible misapplication of these factors. As noted previously, we applaud the codification in the proposed regulations of the definition of "social group" used by the BIA in Matter of Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985). However, we are concerned that an adjudicator would use these additional six factors as a checklist. Without all six, an adjudicator might deny the existence of what fairly constitutes a recognizable social group. Because the proposed rule states that these factors "may be considered," it would give the adjudicator discretion to interpret the rule as requiring an applicant to show all six factors and to deny the claim if all six factors are not present. Thus, this proposal may well result in an erroneous understanding of the law, leading adjudicators to think that all six factors are required.

Accordingly, we recommend that all of these factors be deleted from the final rules. In the alternative, we urge that the word "necessarily" in 8 C.F.R. § 208.15(c)(3) be deleted from the phrase "not necessarily determinative."

Respectfully submitted,

International Law Section
District of Columbia Bar