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# Practical Implications of *INS v. Cardoza-Fonseca*: Evidencing Eligibility for Asylum Under the "Well- Founded Fear of Persecution" Standard

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## COMMENTS

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The Immigration and Naturalization Service (INS) instituted deportation proceedings against Luz Marina Cardoza-Fonseca, a Nicaraguan national, after her non-immigration visa expired and she failed to voluntarily depart the United States.<sup>1</sup> At her deportation hearing Cardoza-Fonseca conceded that she was subject to deportation, but requested political asylum pursuant to section 208(a) of the Immigration and Nationality Act of 1952, as amended (INA),<sup>2</sup> or, in the alternative,<sup>3</sup> withholding of deportation under

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1. The outcome of the INS proceeding appears at Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Appendix C, at 25a, filed 54 U.S.L.W. 3413 (U.S. Nov. 5 1985) (No. 85-782) (decision of the United States Immigration Judge) [hereinafter INS proceeding].

2. INA § 208(a) (codified as amended at 8 U.S.C. § 1158(a) (1982)) provides:  
 The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A) of this title.  
 INA § 101(a)(42) (codified as amended at 8 U.S.C. § 1101(a)(42) (1982)) provides in pertinent part:

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

section 243(h) of the INA.<sup>4</sup> Cardoza-Fonseca claimed that if deported to Nicaragua, she would be persecuted by the Sandinistas for her political opinions and as retaliation against her politically-active anti-Sandinista brother, with whom she had fled Nicaragua.<sup>5</sup> The immigration judge equated the standard of proof under section 243(h) with that under section 208(a) and held that she failed to demonstrate a clear probability of persecution and therefore was not entitled to either form of relief.<sup>6</sup> The Board of Immigration Appeals (BIA) dismissed the appeal, affirming the conclusion that Cardoza-Fonseca had failed to establish eligibility for either form of relief, reasoning that its conclusion would be the same whether it applied "a standard of 'clear probability,' 'good reason,' or 'realistic likelihood.'"<sup>7</sup> The Court of Appeals for the Ninth Circuit reversed and remanded for reconsideration, instructing the BIA that the legal standards for eligibility under sections 208(a) and 243(h) are in fact different.<sup>8</sup> The INS appealed.

The United States Supreme Court granted certiorari to resolve the conflict among the circuit courts of appeal on the issue of whether an alien's burden of proof for asylum under section 208(a) is equivalent to his burden of proof for withholding deportation under section 243(h).<sup>9</sup> The Court *held*, affirmed: the decision below holding that Congressional intent demonstrated by the plain meaning of the statutory language, and structure of the forms of relief under the Refugee Act compel the conclusion that the "well-founded fear" standard which governs eligibility for asylum is not identical nor equivalent to the "clear probability" standard which governs eligibility for withholding of deportation. *Immigration and Naturalization Service v. Cardoza-Fonseca*, 767 F.2d 1448 (9th

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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 . . . .

3. INS Proceeding, *supra* note 1, at 18a, 25a.

4. INA § 243(h)(1) (codified as amended at 8 U.S.C. § 1253(h)(1) (1982)) provides, in pertinent part:

The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

5. INS Proceeding, *supra* note 1, at 20a, 22a, 27a.

6. *Id.* at 27a-28a.

7. *Id.* at 21a.

8. *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1450, 1455 (9th Cir. 1984).

9. *INS v. Cardoza-Fonseca*, 475 U.S. 1009 (1986).

Cir. 1984), *aff'd*, 107 S. Ct. 1207 (1987).

## I. INTRODUCTION

*Give me your tired, your poor,  
Your huddled masses yearning to breathe free,  
The wretched refuse of your teeming shore,  
Send these, the hopeless tempest tossed to me,  
I lift my lamp beside the golden door.*<sup>10</sup>

*No matter how much some may regard this country as an unlimited safe harbor for homeless refugees, Congress has recognized that certain limitations must exist, and that this country can only accommodate so many immigrants in a given time period.*<sup>11</sup>

The United States open-door policy toward refugees is limited by the conditions and standards imposed by domestic and international law. The Refugee Act of 1980 defined the standards and conditions governing applications for asylum and withholding of deportation. It also gave rise to a controversy surrounding the burden of proof to be met by an alien under each type of claim. While the decision in *Cardoza-Fonseca* resolved the conflict over the equivalency of the burdens, it accomplishes nothing more than to mandate the INS to remedy the misapplication of the two standards. The Court admits that it provides no guidance with the application of the well-founded fear test.<sup>12</sup>

This comment proposes an objective framework for the analysis of asylum applications by using the factors discussed in the BIA decision, *In re Acosta*.<sup>13</sup> With this framework in place, the authors will discuss and analyze the type of qualitative evidence that has afforded and should afford an alien a favorable grant of discretion for political asylum. Finally, the authors will comment on the inherent problems of the existing process and the efficacy of the proposed framework.

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10. Emma Lazarus, Inscription on Statue of Liberty.

11. *Carvajal-Munoz v. INS*, 743 F.2d 562, 580 (7th Cir. 1984).

12. See *infra* notes 159-61 and accompanying text.

13. I. & N. Dec. No. 2986 (BIA March 1, 1985).

## II. FRAMEWORK: ASYLUM AND WITHHOLDING DEPORTATION PROCEDURES

The Refugee Act of 1980 amended the Immigration and Nationality Act of 1952<sup>14</sup> (INA) by establishing a procedure for granting political asylum<sup>15</sup> and by redefining the existing procedure for granting a withholding of deportation;<sup>16</sup> thereby making these two procedures the principle forms of relief against deportation.<sup>17</sup> Prior to 1980, there was no procedure by which aliens already in the United States could apply for asylum.<sup>18</sup> Consequently, requests for asylum were treated on the same basis as requests for withholding of deportation.

### A. *Asylum Under Section 208(a)*

Section 208(a) of the INA, requires the Attorney General to establish and administer a procedure for aliens to apply for asylum. It authorizes the Attorney General, in his discretion, to grant asylum to aliens who qualify as refugees.<sup>19</sup> Asylum, therefore, is a discretionary remedy for deportation.<sup>20</sup> Eligibility is based on a determination by the Attorney General that the alien qualifies as a "refugee." A refugee is:

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

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14. Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1503 (1982)).

15. INA § 208(a) (codified as amended at 8 U.S.C. § 1158(a) (1982)).

16. INA § 243(h) (codified as amended at 8 U.S.C. § 1253(h) (1982)).

17. The other forms of relief available include suspension of deportation, INA § 244(a) (codified as amended at 8 U.S.C. § 1254(a) (1982)); adjustment of status, INA § 245 (codified as amended at 8 U.S.C. § 1255 (1982)); and voluntary departure, INA § 244(e) (codified as amended at 8 U.S.C. § 1254(e) (1982)).

18. In 1974 a regulation permitting aliens to apply for asylum was provided, 8 C.F.R. § 108 (1975), but was revoked following the creation of the procedure for granting asylum in 1980, pursuant to the Refugee Act of 1980 (codified as amended at 8 U.S.C. §§ 1101-1503 (1982 & Supp. 1984)).

19. See *supra* note 2.

20. INA § 208(a) (codified as amended at 8 U.S.C. § 1158(a) (1982)) (an "alien may be granted asylum in the *discretion* of the Attorney General"); 8 C.F.R. § 208.8(a) (1988) ("The district director may approve or deny the asylum application in the exercise of *discretion*") (emphasis supplied).

account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>21</sup>

This definition triggered the controversial "well-founded fear of persecution" standard.

An otherwise qualified applicant, however, is statutorily denied asylum if it is determined that the alien: (1) has been "firmly resettled" in a third country;<sup>22</sup> (2) has participated in the persecution of others;<sup>23</sup> (3) has been convicted of a "particularly serious crime" and "constitutes a danger" to the United States;<sup>24</sup> (4) is considered to have committed a "serious nonpolitical crime" abroad prior to entering the United States;<sup>25</sup> or (5) is regarded as a "danger to the security" of the United States.<sup>26</sup>

21. INA § 101(a)(42) (codified as amended at 8 U.S.C. § 1101(a)(42) (1982)).

This definition is consistent with the definition prescribed by the United Nations Protocol Relating to the Status of Refugees. Article 1(2) of the Protocol defines "refugee" as a person who comes within the definition of article 1 of the United Nations Convention on the Status of Refugees. Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. 6577, 606 U.N.T.S. 267.

Article 1(A)(2) of the Convention defines "refugee" as a person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside of the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

July 28, 1951, 189 U.N.T.S. No. 152.

22. 8 C.F.R. § 208.8(f)(ii) (1985) (there is no corresponding statutory bar to applications for withholding deportation). INS regulations consider an alien "firmly resettled" if the alien "was offered resident status, citizenship, or some other type of permanent resettlement by another nation and travelled to and entered that nation as a consequence of his flight from persecution . . ." 8 C.F.R. § 208.14 (1985). Dispositive in the determination are the types of housing and employment, and the rights to education, public relief, naturalization, and permission to own property, made available to the alien. *Id.* For example, where such rights are "substantially and consciously restricted" the alien is not firmly resettled. Portales, 18 I. & N. Dec. 239, 242 (BIA 1982).

23. See 8 C.F.R. § 208.8(f)(iii) (1985). In particular, § 208.8(f)(iii) denies relief to an alien who "ordered, incited, assisted, or otherwise participated in the persecution of any other person on account of race, religion, nationality, membership in a particular social group, or political opinion." See also 8 U.S.C. § 1253(h)(2)(A) (1982) (corresponding statutory bar to applications for withholding deportation).

24. 8 C.F.R. § 208.8(f)(iv) (1985). See also 8 U.S.C. § 1253(h)(2)(B) (1982) (corresponding statutory bar to applications for withholding deportation).

25. 8 C.F.R. § 208.8(f)(v) (1985). See also 8 U.S.C. § 1253(h)(2)(C) (1982) (corresponding statutory bar to applications for withholding deportation).

26. 8 C.F.R. § 208.8(f)(vi) (1985). See also 8 U.S.C. § 1253(h)(2)(D) (1982) (corresponding statutory bar to applications for withholding deportation).

B. *Withholding of Deportation Under Section 243(h)*

Section 243(h) of the INA, as amended by the Refugee Act of 1980, provides that the Attorney General must withhold the deportation of any alien whose "life or freedom would be threatened" if deported.<sup>27</sup> To qualify for relief the applicant must demonstrate that his "life or freedom would be threatened [if returned to such country] on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>28</sup> Withholding of deportation is a non-discretionary remedy for deportation to the country in which the threat exists. Because the remedy is in fact country-specific, the United States may not necessarily become the alien's country of refuge.<sup>29</sup>

The burden is on the alien to prove that there is a "clear probability of persecution" if deported.<sup>30</sup> In *INS v. Stevic*,<sup>31</sup> the Supreme Court interpreted the "clear probability of persecution" standard to mean the alien must demonstrate that "it is more likely than not that the alien would be subject to persecution" if returned to the country in question.<sup>32</sup>

Like political refugees, a qualified withholding of deportation applicant is statutorily precluded relief if the alien: (1) participated in the persecution of others;<sup>33</sup> (2) has been convicted of a "particularly serious crime" and "constitutes a danger" to the

27. INA § 243(h)(1) (codified as amended at 8 U.S.C. § 1253(h)(1) (1982)).

This standard is derived from the United Nations Convention on the Status of Refugees, article 33.1:

no Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his *life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.*

July 28, 1951, 189 U.N.T.S. 150, 176 (emphasis supplied).

28. *Id.*

29. There are a number of cases in which deportation to one country was withheld but the alien was deported to another country. *See, e.g.,* Salim, 18 I. & N. Dec. 311, 315 (BIA 1982) (withheld deportation to Afghanistan but deported to Pakistan); Portales, 18 I. & N. Dec. 239, 242 (BIA 1982) (withheld deportation to Cuba but deported to Peru); Lam, 18 I. & N. Dec. 15, 18 (BIA 1981) (withheld deportation to China but deported to Hong Kong).

30. *INS v. Stevic*, 467 U.S. 407, 429-30 (1984).

31. *Stevic*, 467 U.S. 407.

32. *Id.* at 429-30.

33. 8 U.S.C. § 1253(h)(2)(A) (1982). In particular, this section precludes relief if "the alien ordered, incited, assisted, or otherwise participated in the persecution of any other person on account of race, religion, nationality, membership in a particular social group, or political opinion."



United States;<sup>34</sup> (3) is considered to have committed a "serious nonpolitical crime" abroad prior to entering the United States;<sup>35</sup> or (4) is regarded as a "danger to the security" of the United States.<sup>36</sup>

For those aliens who obtain political asylum, there are distinct benefits not available to aliens eligible only for a withholding of deportation.<sup>37</sup> For example, a refugee may be eligible for employment authorization<sup>38</sup> and for adjustment of status to that of permanent resident after one year, provided that numerical limitations allow it.<sup>39</sup> Consequently, a refugee who obtains permanent residence may not be deported to any country,<sup>40</sup> while an alien whose deportation merely is withheld may be subsequently deported to a country where he or she would not be subject to persecution.<sup>41</sup>

In order to fully establish a framework in which to discuss the Supreme Court's decision in *Cardoza-Fonseca*, it is helpful to review the status of the law regarding the question of equivalency of the standards prior to the Court's decision in March 1987. Of particular importance is the Supreme Court's decision in *Stevic*, the position adopted by the Board of Immigration Appeals, and the conflicting application of those views by the Circuit Courts of Appeals.

In 1984, the Supreme Court considered the proper standard of proof to govern applications for withholding of deportation under section 243(h).<sup>42</sup> The Court rejected the contention that the "well-founded fear" standard of section 208(a) governed applications for withholding of deportation under section 243(h), finding no support for that conclusion "in either the language of section 243(h), the structure of the amended Act, or the legislative history."<sup>43</sup> The

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34. 8 U.S.C. § 1253(h)(2)(B) (1982).

35. 8 U.S.C. § 1253(h)(2)(C) (1982).

36. 8 U.S.C. § 1253(h)(2)(D) (1982).

37. Although not a benefit per se, a request for asylum made after the initiation of deportation proceedings is also considered a request for withholding deportation. See 8 C.F.R. § 208.3(b) (1988). The obverse is not available.

38. 8 C.F.R. § 208.4 (1988) provides that "[u]pon the filing of a non-frivolous I-589 [application for asylum], the district director may, in his discretion, grant a request by the applicant for employment authorization."

39. See 8 C.F.R. §§ 209.1-209.2 (1988).

40. See INA §§ 208, 209 (codified as amended at 8 U.S.C. §§ 1158, 1159 (1982)); 8 C.F.R. § 209.2 (1988).

41. See INA § 243(h) (codified as amended at 8 U.S.C. § 1253(h) (1982)).

42. *INS v. Stevic*, 467 U.S. 407 (1984).

43. *Id.* at 428.

Court held that an alien is entitled to withholding of deportation only upon a showing that "persecution is more likely than not."<sup>44</sup>

On the question of whether the same standard should govern applications for asylum, the Court specifically reserved its decision, stating, "We do not decide the meaning of the phrase 'well-founded fear of persecution' which is applicable by the terms of the Act and regulations to requests for discretionary asylum. That issue is not presented by this case."<sup>45</sup> However, for purposes of the case, the Court expressly assumed "that the well-founded fear standard is more generous than the clear-probability-of-persecution standard."<sup>46</sup> Although it did not decide the question, the Court recognized that there exists a difference between the standards and thereby foreshadowed its holding in *Cardoza-Fonseca*. Technically, by not specifically reversing the Second Circuit's conclusion that the standards were in fact different, the Supreme Court implicitly approved the conclusion and preserved it as good law in that Circuit.<sup>47</sup>

In 1985, the BIA addressed the question of the appropriate standard for asylum and gave meaning to the term "well-founded fear."<sup>48</sup> Notwithstanding the *Stevic* Court's express assumption that the standard of proof for asylum was "more generous" than the standard governing withholding of deportation, the BIA, in *Acosta*, found "no meaningful distinction between a standard requiring a showing that persecution is likely to occur [i.e., asylum] and a standard requiring a showing that persecution is more likely than not to occur [i.e., withholding of deportation]."<sup>49</sup> Accordingly, the BIA concluded that "the standards for asylum and withholding of deportation are not meaningfully different and, in practical application converge."<sup>50</sup>

Pre-*Stevic* decisions in many of the Courts of Appeals equated the standards for establishing eligibility for asylum and withholding of deportation.<sup>51</sup> In some instances, the courts applied the stricter clear probability standard of section 243(h) to all applica-

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44. *Id.*

45. *Id.* at 430.

46. *Id.* at 426.

47. See *Carcamo-Flores v. INS*, 805 F.2d 60, 63 (2nd Cir. 1986).

48. *Acosta*, 19 I. & N. Dec. No. 2986 (BIA Mar. 1, 1985).

49. *Id.* at 25.

50. *Id.*

51. See e.g., *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1282 n.10 (9th Cir. 1985) and cases cited therein.

tions, while in others, the courts applied the "more generous" well-founded fear. For the most part, however, the confusion was cleared by *Stevic*.

Post-*Stevic*, the Circuit Courts of Appeals, with the exception of the Third Circuit, unequivocally held that the standard of proof pursuant to section 208(a) for asylum is not equivalent to that for withholding of deportation pursuant to section 243(h).<sup>52</sup>

### III. INS v. CARDOZA-FONSECA

Luz Marina Cardoza-Fonseca entered the United States at Miami, Florida on June 25, 1979.<sup>53</sup> A 38-year-old single female native and citizen of Nicaragua, she arrived as a non-immigrant visitor authorized to stay until September 30, 1979.<sup>54</sup> She remained beyond the authorized period without permission from INS. Upon discovery of her unauthorized stay, she was confronted by the INS. Rather than commence deportation proceedings, she was permitted to voluntarily depart the United States by September 28, 1980.<sup>55</sup> Instead she choose to remain. Her refusal to cooperate and return to Nicaragua caused deportation proceedings to be instituted against her in March 1981.<sup>56</sup>

#### A. Deportation Hearing

A deportation hearing was conducted on December 14, 1981, before U.S. Immigration Judge Bernard J. Hornbach.<sup>57</sup> At this point, Cardoza-Fonseca conceded that she was subject to deportation as a non-immigrant who had remained longer than permitted.<sup>58</sup> She defended against her deportation by applying for political asylum under section 208(a) of the Refugee Act of 1980, for a

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52. *Carcamo-Flores v. INS*, 805 F.2d 60 (2nd Cir. 1986); *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986), cert. denied, 107 S.Ct. 1565 (1987); *Cardoza-Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985); *Youkhanna v. INS*, 749 F.2d 360, 362 (6th Cir. 1984); *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984).

53. *INS Proceeding*, *supra* note 1, at 25a.

54. *Id.*

55. *Id.*

56. *INS Proceeding*, *supra* note 1.

57. *Id.* at 24a, 28a.

58. *Id.* at 25a. Under § 241(a)(2) of the INA (codified as amended at 8 U.S.C. § 1251(a)(2) (1982)), any alien shall be deported if the alien:

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States.

withholding of deportation under section 243(h) of the INA, or, for voluntary departure under section 244(e)<sup>59</sup> of the INA.<sup>60</sup>

In support of her applications, Cardoza-Fonseca claimed that if forced to return to Nicaragua she would be imprisoned and tortured because of her political opinions and close relationship to her brother, Orlando Cardoza-Fonseca, with whom she fled Nicaragua.<sup>61</sup> At the deportation hearing, he was called to testify about his political experiences and confrontations with the ruling Sandinista regime.<sup>62</sup> He recounted his history of imprisonment and torture at the hands of Somozan officials.<sup>63</sup> In conclusion, he contended that if she was returned, his sister would be imprisoned and interrogated.<sup>64</sup>

Because Cardoza-Fonseca conceded her deportability, the only question left for the immigration judge involved Cardoza-Fonseca's eligibility for withholding of deportation and political asylum. The judge found that the legal standards for these type of applications were identical. Thus, Cardoza-Fonseca would need to prove that "under the circumstances" there was a "clear probability of persecution directed to her individually."<sup>65</sup> In the judge's assessment, there existed "no evidence of any substance in the record other than her brother's claim for asylum."<sup>66</sup> Cardoza-Fonseca had failed to demonstrate a clear probability that she would be persecuted in Nicaragua.<sup>67</sup> Accordingly, the judge denied the applications for asylum and withholding of deportation, but granted her permission to voluntarily depart.<sup>68</sup> Cardoza-Fonseca appealed to the Board of Immigration Appeals.

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59. INA § 244(e) (codified as amended at 8 U.S.C. § 1254(e) (1982)), provides in pertinent part:

The Attorney General may, in his discretion, permit any alien under deportation proceedings . . . to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

60. INS Proceeding, *supra* note 1, at 18a, 25a.

61. *Id.* at 20a, 22a, 27a.

62. *Id.* at 27a.

63. *Id.* at 19a-20a.

64. *Id.* at 20a.

65. *Id.* at 27a.

66. *Id.*

67. *Id.*

68. *Id.* at 27a-28a.

### B. Board of Immigration Appeals

On appeal, Cardoza-Fonseca urged the BIA to find that "the immigration judge had applied the wrong legal standard in arriving at his conclusion that she failed to sustain her burden of proving a likelihood of persecution in Nicaragua."<sup>69</sup> The BIA, however, affirmed the decision. The Board articulated the standard in terms of Cardoza-Fonseca's failure to demonstrate that she "would suffer persecution within the meaning of section 208(a) or 243(h)."<sup>70</sup>

In reviewing the record, the BIA noted that Cardoza-Fonseca admitted she had never been politically active or singled out for persecution by the government, and had not taken action against the past or present Nicaraguan governments nor assisted her brother in any of his political activities.<sup>71</sup> The BIA concluded that her fear of retaliation and reprisal based on her relationship with her brother was "mere speculation,"<sup>72</sup> especially since Cardoza-Fonseca had failed to support her assertions through objective evidence.<sup>73</sup>

Thus, the BIA found she "failed to show that she will be persecuted or that she has a well-founded fear of persecution" necessary to qualify for withholding of deportation or for asylum.<sup>74</sup> As to the propriety of the standard of proof, the BIA declared that its conclusion would be the same whether it applied "a standard of 'clear probability,' 'good reason,' or 'realistic likelihood.'" <sup>75</sup> The Board dismissed the appeal, affirming the denial of her application for asylum and withholding of deportation.<sup>76</sup> Cardoza-Fonseca appealed to the Court of Appeals for the Ninth Circuit.

### C. The Ninth Circuit Court of Appeals

In the Court of Appeals, Cardoza-Fonseca narrowed the issues

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69. *Id.* at 18a.

70. *Id.* at 21a.

71. *Id.* at 22a.

72. *Id.*

73. *Id.* at 21a. The only "objective" evidence in the record was an article from a Nicaraguan newspaper which recounted Orlando Cardoza-Fonseca's confrontations with government officials. *Id.* at 20a. The article was attached to his application for asylum. *Id.* The remainder of the evidence was testimony by Luz Maria Cardoza-Fonseca and her brother, and a letter from their sister in Nicaragua.

74. *Id.* at 21a-22a.

75. *Id.* at 21a.

76. *Id.* at 18a, 22a.

on appeal by contesting only the BIA's decision that she was not eligible for asylum.<sup>77</sup> She did not challenge the decision on her eligibility for withholding of deportation. In determining her eligibility for asylum under section 208(a), Cardoza-Fonseca argued that the BIA erred in applying the "clear probability" standard rather than the "well-founded fear" standard. The Court of Appeals agreed, holding that an alien seeking asylum is required to demonstrate a "well-founded fear" of persecution, a standard not equivalent to the "clear probability" of persecution standard applicable to withholding of deportation claims.<sup>78</sup>

The court reasoned that the plain language of sections 208(a) and 243(h), and the overall structure of the INA supported the conclusion that the two standards differed.<sup>79</sup> The court explained:

We note that a recognition of the difference between the standards comports with the structure of the Immigration Act . . . there is a valid reason for applying a stricter standard where an alien claims he or she is entitled to a mandatory prohibition against deportation than where that person is asking only that he or she be found eligible for consideration for a grant of asy-

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77. *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1450 (9th Cir. 1984). The Court of Appeals consolidated the Cardoza-Fonseca case with an appeal from the BIA's denial of relief to Francisca Rosa Arguello-Salguera. *Id.* at 1448. Arguello-Salguera was also a native and citizen of Nicaragua, who entered the United States illegally, without inspection, on March 15, 1980. *Id.* at 1450. Deportation proceedings were instituted against her, spanning two and one-half years and three deportation hearings. Like Cardoza-Fonseca, she too conceded deportability and applied for asylum and withholding of deportation. *Id.* At the final hearing the immigration judge concluded that Arguello-Salguera demonstrated both a clear probability and well-founded fear of persecution, and issued a prohibition against deportation and granted her asylum. *Id.*

INS appealed the decision to the BIA, which reversed, vacating the decision and ordering Arguello-Salguera deported. *Id.* The BIA equated the standards under the claims for asylum and withholding of deportation and concluded that she had failed to demonstrate "she would be singled [sic] out for persecution" if forced to return to Nicaragua. *Id.* at 1450, 1454. Arguello-Salguera appealed the denial of both claims to the Court of Appeals. *Id.* at 1450. She also appealed the summary denial of her motion to dismiss the INS appeal of the immigration judge's decision, and the BIA's denial of her request for voluntary departure. *Id.* at 1450-51 n.2. The court affirmed the denial of the motion to dismiss and did not consider the request for voluntary departure because of its decision reversing the asylum and withholding of deportation claims. *Id.*

The Ninth Circuit's remand instructed the BIA to consider the asylum claim under the "proper legal standard." *Id.* at 1455. In addition, the claim for prohibition against deportation was remanded for clarification because the court was unable to determine from the opinion the findings and reasons for denying relief. *Id.* In particular, the court stated that it could not conclude whether the BIA's decision was based on the credibility of Arguello-Salguera or the legal sufficiency of the evidence. *Id.*

78. *Id.* at 1451.

79. *Id.* at 1451-52.

lum, a grant that ultimately will be made or denied by the Attorney General in the exercise of his discretion.<sup>80</sup>

Further discussion of the differences between the meanings of the "clear probability" and "well-founded fear" standards led the court to reaffirm its reasoning, implicitly endorsed by the Supreme Court in *Stevic*.<sup>81</sup> The court reiterated that the inquiry under the "clear probability" standard should be "whether it is more likely than not that the alien would be subject to persecution."<sup>82</sup> By contrast, under the well-founded fear analysis the question becomes whether the alien has a "subjective fear," and whether that fear has "enough of a basis that it can be considered well-founded."<sup>83</sup> The court concluded:

The term "well-founded fear" refers to a subjective state of mind, while "clear probability" refers to an objective fact. The latter phrase requires an examination of the objective realities, while the former requires an analysis of the applicant's mental state (notwithstanding the fact that the fear must have some objective basis if we are ultimately to find it well-founded).<sup>84</sup>

Thus, the Court of Appeals held that the BIA had erroneously applied the "clear probability" standard rather than the "well-founded fear" standard when it determined that Cardoza-Fonseca failed to establish eligibility for asylum under section 208(a).<sup>85</sup> Accordingly, the Court of Appeals reversed and remanded.<sup>86</sup> The INS, however, filed a petition for writ of certiorari to review the judgment of the Court of Appeals with the United States Supreme Court.<sup>87</sup>

#### *D. United States Supreme Court*

The Supreme Court granted certiorari<sup>88</sup> to resolve the conflict in the circuits.<sup>89</sup> The issue before the Court as the Solicitor Gen-

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80. *Id.* (citation omitted).

81. *Id.* at 1451 (citing *INS v. Stevic*, 467 U.S. 407, 424 (1984)).

82. *Id.* at 1452 (citing *INS v. Stevic*, 467 U.S. 407, 424 (1984)).

83. *Id.* at 1452-53.

84. *Id.* at 1452.

85. *Id.* at 1453.

86. *Id.* at 1455.

87. See *INS Proceeding*, *supra* note 1. The INS did not seek review of the decision with respect to Arguello-Salguera. *Id.* at 5 n.1.

88. *INS v. Cardoza-Fonseca*, 475 U.S. 1009 (1986).

89. The conflict existed between the Third Circuit, which adopted the BIA's position in

eral framed it was purely one of law unencumbered by facts: "Whether an alien's burden of proving eligibility for asylum pursuant to Section 208(a) is equivalent to his burden of proving eligibility for withholding deportation pursuant to Section 243(h). . . ."90

The opinion of the Court,<sup>91</sup> authored by Justice Stevens, who also authored the Court's unanimous decision in *Stevic*, drew a concurrence by Justice Blackman,<sup>92</sup> a concurrence in judgment by Justice Scalia,<sup>93</sup> and a strong dissent by Justice Powell, in which Chief Justice Rehnquist and Justice White joined.<sup>94</sup> The Court agreed with the Ninth Circuit and held that the standards under sections 208(a) and 243(h) were not equivalent.<sup>95</sup> The Court expressly made its holding narrow, stating that "we merely hold that the Immigration Judge and the BIA were incorrect in holding that the two standards are identical."<sup>96</sup> Moreover, the Court disclaimed any "attempt to set forth a detailed description of how the well-founded fear test should be applied,"<sup>97</sup> leaving that task to the "process of case-by-case adjudication."<sup>98</sup>

The majority opinion had three principal parts: the Court's interpretation of congressional intent as expressed in the plain meaning of the statutory language and the legislative history; the Court's response to the government's arguments; and finally, the majority's response to the dissent.

Justice Stevens began the opinion with a brief discussion of the obverse issue, decided by the Court two years earlier in the case of *INS v. Stevic*.<sup>99</sup> In *Stevic*, the Court held that the standard of proof under section 243(h) is a "clear probability" of persecution, which requires a showing that "it is more likely than not that the alien would be subject to persecution."<sup>100</sup> Although the *Stevic*

Sotto v. INS, 748 F.2d 832 (3d Cir. 1984) and the Sixth, *Youkhanna v. INS*, 749 F.2d 360 (6th Cir. 1984), Seventh, *Carvajal-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984), and Ninth, *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1984), Circuits.

90. *INS Proceeding*, *supra* note 1.

91. The majority was comprised of Justices Stevens, Brennan, Marshall, Blackman, and O'Connor. *Cardoza-Fonseca v. INS* 107 S. Ct 1207, 1208 (1987).

92. *Id.* at 1222-23.

93. *Id.* at 1223-25.

94. *Id.* at 1225-32.

95. *Id.* at 1211.

96. *Id.* at 1222.

97. *Id.* (footnote omitted).

98. *Id.* at 1221.

99. 467 U.S. 407 (1984).

100. *Id.* at 424. For further discussion of *Stevic*, see Helton, *INS v. Stevic: Standards*



Court declined to interpret the "well-founded fear" standard, it did expressly assume for purposes of the case before it that the "well-founded fear" standard was "more generous" than the "clear probability" standard.<sup>101</sup> With *Stevic* as a backdrop, the Court turned to the task at hand, the meaning and scope of the "well-founded fear" standard.<sup>102</sup>

The Court began its formal discussion with an analysis of the critical language of the standards of proof pursuant to sections 208(a) and 243(h) of the INA.<sup>103</sup> Section 243(h) provides that the Attorney General shall grant withholding of an alien's deportation to any country where "such alien's life or freedom would be threatened."<sup>104</sup> Section 208(a) provides that the Attorney General has discretion to grant asylum if he "determines that such alien is a refugee."<sup>105</sup> The Refugee Act provides in pertinent part that the term "refugee" means any person who has "a well-founded fear of persecution."<sup>106</sup>

In its analysis, the Court employed basic principles of statutory construction to glean Congressional intent from the language of the Refugee Act. The Court reasoned that the "ordinary and obvious meaning of [a] phrase is not to be lightly discounted,"<sup>107</sup> especially with regard to the immigration statutes, with respect to which the Court expressly considered itself "bound to assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'"<sup>108</sup>

Initially, the Court concluded that the language difference between the terms "well-founded fear" and "would be threatened" plainly demonstrated that Congress intended the standards for

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*of Proof in Refugee Cases Involving Political Asylum and Withholding of Deportation*, 87 W. VA. L. REV. 787 (1985); Note, *Asylum and Withholding of Deportation Under the Refugee Act of 1980: INS v. Stevic*, 20 TEX. INT'L L.J. 367 (1985); Recent Development, *Immigration Law: Political Asylum for Deportable Aliens — Immigration and Naturalization Service v. Stevic*, 104 S. Ct. 2489 (1984), 26 HARV. INT'L L.J. 225 (1985).

101. *Stevic*, 467 U.S. at 424.

102. Note that by discussing *Stevic* before reaching the merits of the issue in this case Justice Stevens points to Supreme Court dicta which supports the conclusion that the standards are not equal.

103. 107 S. Ct. at 1212-13.

104. INA § 243 (codified as amended at 8 U.S.C. § 1253(h) (1982)).

105. 8 U.S.C. § 1158(a) (1982).

106. INA § 101(a)(42)(A) (codified as amended at 8 U.S.C. § 1101(a)(42)(A) (1982)).

107. *Cardoza-Fonseca*, 107 S. Ct. at 1213.

108. *Id.* (citations omitted).

asylum and withholding of deportation to be different.<sup>109</sup> The Court bolstered its conclusion with the fact that Congress in the Refugee Act of 1980, while "simultaneously" adding section 208(a) and amending section 243(h), incorporated a new standard in section 208(a) but left the old standard in section 243(h).<sup>110</sup> In aid of this interpretation of the legislative intent, the Court invoked the principle of statutory construction that "where Congress includes particular language in one section of the same Act, it generally is presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion."<sup>111</sup> Thus, the Court concluded that in light of the linguistic differences in the statutes and Congress' deliberate selection of different language in section 208(a) and section 243(h), it was clear that "Congress intended the two standards to differ."<sup>112</sup>

Secondly, but more importantly, the Court found that the meaning conveyed by the language of each section establishes that the standards are not equivalent.<sup>113</sup> The Court found that the "well-founded fear" standard has a subjective component not present in the "would be threatened" standard which has only an objective component.<sup>114</sup> Specifically, the Court found that the reference to "fear" in the asylum standard focuses on the alien's subjective state of mind.<sup>115</sup> In contrast, the withholding of deportation standard has no equivalent "subjective component," but rather "requires the alien to establish by objective evidence that it is more likely than not that he or she will be subject to persecution upon deportation."<sup>116</sup> The Court also found that the "well-founded" element of the standard "does not alter the obvious focus on the individual's subjective belief, nor does it transform the standard into a 'more likely than not' one."<sup>117</sup> Implicit in this finding

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109. *Id.* The Government appeared to concede that, as a matter of linguistics, sections 208(a) and 243(h) are not identical.

110. *Id.*

111. *Id.* (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) cited in *Russell v. United States*, 464 U.S. 16, 23 (1983)).

112. *Id.*

113. *Id.* at 1212-13. The Court's finding that the standards are not equivalent is important in light of the Government's argument that even if the standards are *different*, Congress intended for the well-founded fear standard to be interpreted as *equivalent* to the clear probability standard. Petitioner's Brief at 22-28, *Cardoza-Fonseca v. INS* 107 S.Ct 1207 (1987) (No. 85-782).

114. *Cardoza-Fonseca*, 107 S. Ct at 1212-13.

115. *Id.*

116. *Id.* at 1212 (footnote omitted) (citing *Stevic*, 467 U.S. at 422).

117. *Id.* at 1213. The Court illustrated that the "well-founded" element of the require-

was the Court's recognition that the "well-founded fear" standard has an objective component. However, the Court appeared to reason that the subjective component of the standard prevents the "well-founded fear" standard from demanding the mathematical certainty specifically required by the "clear probability" standard. The Court viewed the differences in emphasis and meaning as further supporting its conclusion that the standards are not equivalent.

The dissent, however, did not agree that the language of section 208(a) is as clear and unambiguous as the majority proposed.<sup>118</sup> The dissent reasoned that, inasmuch as the words "well-founded" "contemplate some objective basis without specifying a particular evidentiary threshold," the statute is patently ambiguous.<sup>119</sup> Moreover, since both the "well-founded fear" and "clear probability" standards require "some objective basis," it is unclear from the face of the statute whether Congress intended to distinguish the standards on this component.<sup>120</sup>

Justice Powell writing for the dissent, agreed with the majority that the language of section 208(a) differs from the language of section 243(h) because the reference to "fear" contemplates a subjective inquiry. However, he was not convinced that the partially objective inquiry mandated by the words "well-founded" "differs *in practice*" from the objective inquiry required by the "clear probability" standard.<sup>121</sup> In fact, he specifically objected to the majority's conclusion that "the objective inquiries under the two sections necessarily are different," arguing that the Court, in reaching this conclusion, gave "short shrift to the words 'well-founded,' that clearly require some objective basis for the alien's fear."<sup>122</sup>

The dissent concluded that the plain meaning of the statute did not resolve what it deemed to be the "critical question" of the case, whether the objective inquiries of the two standards "differ *in*

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ment of section 208(a) does not necessarily rise to the level of a clear probability, i.e., more likely than not, as required by *Stevic* for section 243(h).

118. *Id.* at 1227.

119. *Id.* at 1228.

120. *Id.* at 1227.

121. *Id.* Thus, the dissent suggested that the "critical question" was "whether the objective basis required for a fear of persecution to be 'well-founded' differs *in practice* from the objective basis required for there to be a 'clear probability' of persecution." (emphasis in original).

122. *Id.* at 1227.

*practice.*"<sup>123</sup> This question, the dissent suggested, is "best answered" by the BIA, the entity "familiar with the types of evidence and issues that arise in such cases,"<sup>124</sup> and the one "to whom Congress has committed the question."<sup>125</sup> Accordingly, the dissent endorsed the BIA's decision in *Acosta*,<sup>126</sup> answering the "critical question" in the negative,<sup>127</sup> as one entitled to substantial deference<sup>128</sup> and as a reasonable interpretation of the Refugee Act.<sup>129</sup>

Justice Stevens subsequently turned his attention to the legislative histories of section 208(a) and the Refugee Act. He explained that an examination of the legislative history was required, even though he previously had concluded that the "plain language of this statute appears to settle the question before us."<sup>130</sup> The examination, however, is limited to a determination of "whether there is 'clearly expressed legislative intention' contrary" to the plain language of the statute, "which would require [the Court] to question the strong presumption that chooses."<sup>131</sup> The Court considered three aspects of the legislative history that it found particularly compelling: (1) pre-1980 practice under section 203(a)(7) of the INA, which provided "conditional entry" for aliens outside the United States; (2) the impact of the United Nations Protocol Relating to the Status of Refugees on United States asylum law after the United States acceded in 1968; and (3) the Conference Committee Report regarding the adoption of the House bill over the Senate bill.<sup>132</sup>

Section 203(a)(7) of the INA of 1952, authorized the Attorney General to grant "conditional entry" to a limited number of aliens fleeing from Communist countries, Communist-dominated coun-

123. *Id.*

124. *Id.* at 1227-28.

125. *Id.* at 1228. Congress originally authorized the Attorney General to determine eligibility for asylum pursuant to section 208(a), the Attorney General in turn delegated the responsibility to the BIA.

126. No. 2986 (BIA Mar. 1 1985).

127. The BIA concluded that "the standards for asylum and withholding of deportation are not meaningfully different and, in practicality, converge." *Id.* at 25.

128. *Cardoza-Fonseca v. INS*, 107 S. Ct. 1207, 1228 (1987) ("This is just the type of expert judgment — formed by the entity to whom Congress has committed the question — to which we should defer.")

129. *Id.* at 1228. The dissent commented, "Based on the text of the Act alone, I can not conclude that this conclusion is unreasonable."

130. *Id.* at 1213 n.12.

131. *Id.* (citing *United States v. James*, 106 S. Ct. 3116 (1986), and quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

132. *Id.* at 1214.

tries or the Middle East "because of persecution or fear of persecution."<sup>133</sup> The Court found that the conditional entry standard applied pursuant to section 203(a)(7) "was unquestionably more lenient than the 'clear probability' standard applied in section 243(h) proceedings."<sup>134</sup> However, the conditional entry standard lacked the "well-founded" requirement present in section 208(a). The Court acknowledged this apparent flaw in its analysis, but argued that Congress added the "well-founded" language in order to bring the statute into conformity with the United Nations Protocol on Refugees.<sup>135</sup> Thus, the Court concluded that the practice under section 203(a)(7) demonstrated Congressional intent to preserve existing standards for granting asylum, i.e., that the "standard for admission under section 207 be no different than the one previously applied under section 203(a)(7)."<sup>136</sup>

In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees.<sup>137</sup> By acceding to the Protocol, the United States was bound to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees<sup>138</sup> regarding "refugees" as defined by Article 1.2 of the Protocol.<sup>139</sup> Congress adopted the Protocol's definition of "refugee" in the Refugee Act in order to "bring

133. INA § 203(a)(7) (codified as amended at 8 U.S.C. § 1153(a)(7) (1976)), Pub. L. No. 89-236, § 3, 79 Stat. 913, *repealed by* 94 Stat. 107. Section 203(a)(7) provided authority to grant "conditional entry" to aliens:

(A) that (i) because of persecution . . . on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made . . . .

Numerical ceilings were placed on admissions. See 8 C.F.R. § 235.9 (1983), *revised* 48 Fed. Reg. 8 (which limited the countries in which conditional entry visas could be processed to Austria, Belgium, France, Germany, Greece, Hong Kong, Italy, and Lebanon).

134. *Cardoza-Fonseca v. INS*, 107 S. Ct. 1207, 1214 (1987). The Court, in support of this conclusion, cites *Tan*, 12 I. & N. Dec. 564, 569-70 (1967) and *Adamska*, 12 I. & N. Dec. 201, 202 (1967).

135. *Id.* at 1214-15, n.16.

136. *Id.* at 1215, n.18.

137. Jan. 31, 1967, 19 U.S.T. 6223, TIAS No. 6577, 606 U.N.T.S. 267. Regarding the United States' accession in 1968 see H.R. Conf. Rep. No. 781 96 Cong., 1st Sess. 19 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 160.

138. July 28, 1951, 189 U.N.T.S. 150. Note that the United States is not a signatory to the Convention. *Stevic*, 467 U.S. at 416 n.9. Article of the Protocol states:

" . . . Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention . . . ."

139. The Protocol incorporates by reference the Convention's definition of refugee.

United States refugee law into conformance" with the United States international obligations under the Protocol.<sup>140</sup> The Court interpreted the legislative history as not only demonstrating that "Congress adopted the Protocol's standard in the statute, but . . . Congress' intent that the new statutory definition of 'refugee' be interpreted in conformance with the Protocol's definition."<sup>141</sup> Thus, the Court concluded that it is "appropriate" to interpret the meaning of "well-founded fear" "with relation to the Protocol."<sup>142</sup>

Accordingly, the Court reviewed various interpretive materials on the United Nations Protocol.<sup>143</sup> The most important of these was the *Handbook on Procedures and Criteria for Determining Refugee Status*.<sup>144</sup> The Court, after extensive review of the *Handbook* and other sources interpreting the Protocol, concludes that the "well-founded fear" standard is clearly different from the "clear probability" standard of section 243(h).<sup>145</sup>

The dissent found the interpretive materials "only marginally relevant."<sup>146</sup> The dissent's principal objection was that the *Handbook* has "no binding force, because 'the determination of refugee status under the . . . Protocol . . . is incumbent upon the Contracting State.'"<sup>147</sup>

The Court also referred to the changes made by the Conference Committee on the House and Senate bills as evidence of Congressional intent to differentiate the standards. The Court focused on the Committee's use of language in the House bill<sup>148</sup> as opposed to language in the Senate bill.<sup>149</sup> Both bills authorized the Attorney General, in his discretion, to grant asylum if the applicant is a "refugee" within the meaning of the Refugee Act. The Senate bill, however, differed from the House bill by imposing the additional requirement that asylum would be denied unless the alien's "deportation or return would be prohibited under section 243(h)."<sup>150</sup>

140. 107 S. Ct. at 1216.

141. *Id.*

142. *Id.*

143. *Id.* at 1216-18.

144. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Geneva 1979)[hereinafter *HANDBOOK*].

145. *Cardoza-Fonseca v. INS*, 107 S. Ct. 1207, 1217-18 (1987).

146. *Id.* at 1229.

147. *Id.* at 1230 (quoting *HANDBOOK*, at 1).

148. H.R. 2816, 96th Cong., 1st Sess. (1980).

149. S. 643, 96th Cong., 1st Sess. (1980).

150. *Cardoza-Fonseca*, 107 S. Ct. at 1218. The Senate bill provided:

The Attorney General shall establish a uniform procedure for an alien physically

The Court concluded that the language in the Senate bill demonstrated that "the Senate recognized that there is a difference between the 'well-founded fear' standard and the 'clear probability' standard."<sup>151</sup> In addition, the Court interpreted Congress' refusal to enact the Senate bill as clear evidence that Congress did not intend for asylum to be governed by the "clear probability" standard.<sup>152</sup> The dissent, however, sees "no reason to believe" that the enactment of the House bill, rather than the Senate bill, was persuasive evidence that Congress intended to preserve two different standards to govern applications for asylum and withholding of deportation.<sup>153</sup> Rather, the dissent accorded "no weight" to the Committee's selection of the language in the House bill, and argued that both bills actually were "intended to preserve the Attorney General's regulations treating the two standards as substantially identical."<sup>154</sup>

Note that the Court also considered the question of whether the BIA's construction of sections 208(a) and 243(h) should be accorded substantial deference. It concluded that the "question of whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide," and therefore the BIA's interpretation of the equality of the standards is not entitled to any deference.<sup>155</sup>

In *Cardoza-Fonseca*, the Court narrowly held that "[T]he Immigration Judge and the BIA were incorrect in holding that the [standard for withholding deportation and granting asylum] are identical."<sup>156</sup> In brief, the Court's decision rested on its finding that Congress deliberately used different language to establish diverse standards to govern eligibility for relief under sections 208(a) and 243(h). This was an attempt to comport with the United States international obligations under the U.N. Protocol Relating to the Status of Refugees. The Court also sought to legitimize its

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present in the United States, irrespective of his status, to apply for asylum, and the alien shall be granted asylum if he is a refugee within the meaning of section 101(a)(42)(A) and his deportation or return be prohibited under section 243(h) of this Act.

S. 256, 96th Cong., 1st Sess. 26 (1979).

151. *Cardoza-Fonseca*, 107 S. Ct. at 1218.

152. *Id.* at 1219.

153. *Id.* at 1230.

154. *Id.* at 1230 n.6.

155. *Id.* at 1220-22. *Contra* Justice Scalia's concurrence at 1224-25, and Justice Powell's dissent at 1227-28.

156. *Id.* at 1222.

findings that the legislative history of the Refugee Act of 1980 evidenced clear Congressional intent not to make aliens eligible for asylum under section 208(a) equally eligible for withholding of deportation under section 243(h).<sup>157</sup> Justice Blackmun, in concurring with the Court's opinion and judgment, commented that in his view the Court "directed the INS to the appropriate sources from which the agency should derive the meaning of the 'well-founded fear' standard."<sup>158</sup> It is from those sources and from the Court's opinion that this comment attempts to propose a meaningful evidentiary standard by which to govern applications for asylum filed pursuant to section 208(a).

#### IV. REACHING THE EVIDENTIARY BORDER: BURDENS OF PROOF, PERSUASION AND STATUTORY ELIGIBILITY

It should be noted at the outset that in an evaluation of combined section 208(a) and section 243(h) claims, the determination of a "well-founded fear" may not necessarily need to be made. A withholding of deportation claim under Section 243(h) triggers the more stringent clear probability standard.<sup>159</sup> If an alien demonstrates a clear probability of persecution, then a well-founded fear "will, *a fortiori*, also have been met."<sup>160</sup>

The Court in *Cardoza-Fonseca* unequivocally stated that it provided no guidance to the application of the well-founded fear standard.<sup>161</sup> Consequently, the political asylum test must develop

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157. *Id.* at 1212-13.

158. *Cardoza-Fonseca*, 107 S.Ct. at 1223 (Blackmun, J., concurring).

Justice Scalia does not share in Justice Blackmun's sentiments regarding the Court's examination of sources from which the meaning of the "well-founded fear" standard can be derived. Justice Scalia, in contrast, "fears" that the Court's extensive and "gratuitous" examination of the legislative history would be "interpreted as a betrayal of [the Court's] assurance that it does 'not attempt to set forth a detailed description of how the well-founded fear test should be applied.'" *Id.* at 1223-25 (Scalia, J., concurring in the judgment) (quoting 107 S. Ct at 1222).

159. *INS v. Stevic*, 467 U.S. 407, 413 (1984).

160. *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1283 (9th Cir. 1984). It is possible, however, that political asylum would still be denied since it is a discretionary form of relief. The alien merely has met his lesser burden of proof under a well-founded fear standard by establishing the greater burden of a clear probability of persecution under a withholding of deportation claim. It is then the decision, and discretion, of the immigration judge whether he will grant asylum. If asylum is denied, the alien may be deported to another country because relief under a withholding of deportation claim is only country-specific. *See supra* note 29.

161. "We do not attempt to set forth a detailed description of how the well-founded fear test should be applied." *Cardoza-Fonseca*, 107 S. Ct at 1222.



through the process of case-by-case adjudication.<sup>162</sup> Thus, an attempt to give some meaning to the standard under *Cardoza-Fonseca* appears to be a valueless effort. Nonetheless, the language in *Cardoza-Fonseca* actually provides significant guidance in formulating the analysis of an asylum claim.<sup>163</sup>

The Court's decision compares and emphasizes the inherent differences under sections 208(a) and 243(h) of the Act that run counter to the imposition of a more stringent standard than intended by Congress with asylum claims.<sup>164</sup> The limited scope of the opinion, however, does not affect the viability of the framework developed by the Board of Immigration Appeals (BIA) in its decision, *In re Acosta*.<sup>165</sup> Although the *Acosta* decision recognized the differences between the standards, the BIA concluded that in practice they converged.<sup>166</sup> The BIA erred only to the extent that it required a "more likely than not" showing by the alien. Its framework remains functional under the appropriate standard enunciated in *Cardoza-Fonseca*.

To demonstrate eligibility for political asylum or withholding of deportation, the BIA has constructed a two-tier framework. First, the alien must meet his or her burden of proof and persuasion.<sup>167</sup> Second, the alien must demonstrate that he falls within the

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162. *Id.*

163. Although the Court denied any attempt to set forth a standard for applying the well-founded fear test in political asylum claims, it rendered a caveat in the wake of several pages discussing the various sources that give meaning to this standard. *Cardoza-Fonseca*, 107 S. Ct at 1213-20. Only then did the Court realize that the narrow legal question before it — whether the standards under §208(a) and §243(h) are the same — does not involve the interpretation of the standards. *Id.* at 1221. The Court's exhaustive effort to ascertain the legislative history of the Act easily becomes a backhand attempt to provide an interpretation of the well-founded fear standard. *Id.* at 1224 (Scalia, J., concurring). Thus, Justice Blackmun, in a separate concurrence, felt compelled to emphasize that the Court "eschews any attempt to give substance to the term . . . and leaves that task to the 'process of case-by-case adjudication'. . . ." *Id.* at 1223. Yet, even he conceded that the Court's guidance "should be *significant* in the [INS] formulation of the 'well-founded fear' standard." *Id.* (emphasis supplied).

164. See *infra* text accompanying notes 198-204.

165. 19 I. & N. Dec. No. 2986 (BIA March 1, 1985).

166. For the most part, the courts have applied the "well-founded" portion of the test in a manner not consistent with true objective analysis. The absence of an analytical framework, coupled with the necessity of case-by-case adjudication, is comparable to a journey into previously uncharted territory. Objectivity in the decisional process is replaced with a balancing approach. The *Acosta* opinion, however, provides a methodology for arriving at a reliable conclusion without as much extraneous influence by such factors as political pressures, subjectivity, and intuition.

167. *Acosta*, No. 2986 at 6.

statutory standards of Section 208(a) and Section 243(h).<sup>168</sup>

### A. *Burden of Persuasion: The Prima Facie Case*

An alien, like any other claimant, bears the burden of proof for his claim.<sup>169</sup> This burden necessarily encompasses the burden of persuasion and the burden of production.<sup>170</sup> In the field of immigration law, the burden of persuasion requires the alien to convince the trier of fact of the truth<sup>171</sup> of his allegations by a preponderance of the evidence.<sup>172</sup> The burden of production simply refers to the burden of going forward with the evidence; in both asylum and withholding of deportation cases, this burden has been statutorily allocated to the alien.<sup>173</sup> Once the alien's prima facie case has been made, only statutory eligibility remains to be established.

In determining whether the alien has met his burden of persuasion, the immigration judge, as trier of fact, must assess the probative force of the evidence and the credibility of the witnesses.<sup>174</sup> In this respect, the evidence proffered by the alien can be persuasive and credible if it provides specific detail of the circumstances surrounding the alien's allegations. It also should be logically consistent with all other evidence presented, whether it is testimonial or physical in nature.<sup>175</sup> Ideally, this evidence should not be entirely subjective; that is, the evidence should not be from the alien's testimony alone. The immigration judge should be presented with some type of objective evidence to corroborate the alien's subjective proof.<sup>176</sup> Therefore, under the best of circum-

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168. *Id.*

169. *Id.* at 7. In immigration proceedings, there is an exception to this rule. The government, in a deportation case, must "establish the facts supporting deportability by clear, unequivocal, and convincing evidence." *Woodby v. INS*, 385 U.S. 276 (1966); *accord*, *INS v. Stevic*, 467 U.S. 407, 424 n.19 (1984).

170. F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 7.5 (3d ed. 1985).

171. The alien must demonstrate that his statements are credible. *Del Valle v. INS*, 776 F.2d 1407, 1412 n.3 (9th Cir. 1985). Moreover, vague testimony may adversely impact upon a credibility determination. See *Estrada v. INS*, 775 F.2d 1018, 1021 (9th Cir. 1985). Thus, specificity or clarity becomes extremely critical in the determination of eligibility. See *infra* note 175 and accompanying text.

172. *Acosta*, No. 2986 at 7. The "truth" being of course, a well-founded fear of persecution under a § 208(a) claim, and a clear probability of persecution under § 243(h).

173. 8 C.F.R. § 208.5 (1985); 8 C.F.R. § 242.17(c) (1985).

174. See, e.g., U.S. ELEVENTH CIRCUIT DISTRICT JUDGES ASSOCIATION, *PATTERN JURY INSTRUCTIONS (Criminal Cases)*, Nos. 4, 5 (1985).

175. *Acosta*, No. 2986 at 10.

176. *Id.*

stances, a prima facie showing requires evidence that is (1) specific, (2) logically consistent, (3) objective, and (4) corroborative.<sup>177</sup>

It is unlikely, however, that the typical asylum claim will arise under the best of circumstances for the alien. More often than not, an alien has been unable to gather documentary evidence.<sup>178</sup> Proof by documentary evidence will be the exception and not the rule.<sup>179</sup> Other than his own testimony, usually there will be no other evidence available which the alien can offer to the immigration judge. For this reason, statements in the asylum application become critical and the alien's testimony cannot be rejected merely because it is self-serving. To disregard it, the immigration judge must make a specific finding that the alien lacks credibility.<sup>180</sup> Otherwise, the testimony should be deemed "worthy of belief," and the truth of his version of the facts accepted.<sup>181</sup>

However, an immigration judge has two primary grounds for discrediting an alien's testimony in an asylum hearing: inconsistent statements and witness demeanor.<sup>182</sup> First, with regard to inconsistent statements, no clear-cut test can be found in the Refugee Act or the UN Convention on the Status of Refugees;<sup>183</sup> a judge gener-

177. These four requirements can be traced to the HANDBOOK, *supra* note 144. To establish the facts of a claim, the HANDBOOK notes: "Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account not forwarded by the applicant." HANDBOOK, *supra* note 144, at 47. Thus, logical consistency is established by negative implication. The HANDBOOK continues:

(a) The applicant should:

(i) Tell the truth and assist the examiner to the full in establishing the facts of his case.

(ii) Make an effort to support his statements by any available evidence . . . [element of corroboration]

(iii) Supply all pertinent information [implies element of objectivity] concerning himself and his past experience in as much detail [element of specificity] as is necessary to enable the examiner to establish the relevant facts. . . .

HANDBOOK, *supra* note 144, at 47, 49 (bracket material indicates authors' comments).

178. *Carvajal-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984); *Dawood-Haio v. INS*, 800 F.2d 90, 96 (6th Cir. 1986) ("we ought not to jump to the assumption that what [governments] have not documented they have not done.").

179. HANDBOOK, *supra* note 144, at 47.

180. *Sahasale*, 11 I. & N. Dec. 759, 762 (BIA 1966); *Dunar*, 14 I. & N. Dec. 310, 319 (BIA 1973).

181. *Acosta*, No. 2986 at 10. In the absence of an adverse credibility finding, on appeal, the alien's testimony is presumed credible. *Platero-Cortez v. INS*, 804 F.2d 1127, 1131 (9th Cir. 1986).

182. *Platero-Cortez*, 804 F.2d at 1130; *Martinez-Sanchez v. INS*, 794 F.2d 1396, 1400 (9th Cir. 1986).

183. Nor can a test for inconsistency be found expressly in the Federal Rules of Evi-

ally possesses a wide range of discretion in this area. Despite the judge's discretion and the absence of a standard, the inconsistencies should be minimally governed by the standard of materiality. If the inconsistencies are unrelated to or have little bearing on the merits of the case, then such triviality should not cause the entire testimony to be disregarded.<sup>184</sup> In the second phase of analysis, it would be the rare case when an alien is found not credible solely on the basis of her demeanor. Such a finding, to be affirmed on appeal, would require the development of an extensive record by the immigration judge.<sup>185</sup>

In the absence of an adverse credibility determination, the alien's testimony is accepted as true. But, the probative sufficiency of the testimony does not excuse the alien from establishing "specific, objective facts that support an inference of past persecution or risk of future persecution. That the objective facts are established through credible and persuasive testimony of the applicant does not make those facts less objective."<sup>186</sup> When this evidence is accepted by the immigration judge, and it establishes prima facie grounds for substantive relief, the alien has satisfied the first-tier requirement of proof. He must then demonstrate statutory eligibility for asylum.

### *B. Burden of Production: Eligibility for Asylum*

Eligibility for asylum requires an alien to prove that he is a "refugee," as that term is defined in the Act. To qualify for "refugee" status:

- (1) the alien must show a "fear" of "persecution;"
- (2) that fear must be "well-founded;"
- (3) the persecution must be "on account of race, religion, nationality, membership in a particular social group, or political opinion;" and
- (4) the alien is unable or unwilling to return to his country of nationality or to the country in which he last habitually resided because of persecution or a well-founded fear of persecution.<sup>187</sup>

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dence. See D. McCORMICK, EVIDENCE 75, § 34 (West 3d ed. 1984).

184. *Platero-Cortez*, 804 F.2d at 1131; *Damaize-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986).

185. *Martinez-Sanchez*, 794 F.2d at 1400.

186. *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453 (9th Cir. 1984).

187. *Sanchez and Escobar*, I. & N. Dec. No. 2996 (BIA Oct. 15, 1985). See also *Acosta*, I. & N. Dec. No. 2986 (BIA Mar. 1, 1985).

The phrase "persecution or well-founded fear of persecution" dominates eligibility under the Act. By combining elements that are both subjective and objective in nature, this standard equally protects the interest of the alien and the humanitarian interests served by the statute.

The subjective element, fear, involves a state of mind. It encompasses the "consciousness of approaching danger; [a] mental response to threat."<sup>188</sup> By its very nature, this element will take into account any possible threat of persecution, *as perceived by the alien*. At this point, because only bare assertions are evaluated, only an adverse credibility determination could overcome the alien's statement as to his fear.

The term "fear" is preceded by the words "well-founded." This qualification dictates that the subjective element of fear must be grounded in objective fact. Given the likelihood that every alien can demonstrate some sort of fear,<sup>189</sup> the focus is on the circumstances that trigger this fear. The requirement of objectivity thereby serves to preclude those claims which are a matter of personal conjecture, even when the objective facts are only available from the testimony of the alien.<sup>190</sup>

In analyzing a claim under the "well-founded fear" standard, the first hurdle to overcome concerns the order of analysis. Should the immigration judge evaluate the objective or the subjective evidence first? Is there even a consequential difference? Those courts considering the question of order have taken different approaches without setting forth the reasons for the particular method chosen. In *Cardoza-Fonseca*, the Ninth Circuit interpreted the standard to require an objective-subjective order. In discussing the amount of evidence necessary to establish that a fear is well-founded, the court noted that it was "only after objective evidence sufficient to suggest a risk of persecution has been introduced that the alien's subjective fears and desire to avoid the risk-laden situation in his or her native land become relevant."<sup>191</sup>

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188. BLACK'S LAW DICTIONARY 549 (5th ed. 1979).

189. It seems that in practice the fear possessed by an alien is never challenged. The authors found no case where the immigration judge determined that the alien did not possess the requisite fear. In fact, this element of proof is virtually presumed, as few cases even bother to discuss it. The HANDBOOK, *supra* note 144, suggests that an alien's fear can be presumed. See *infra* text accompanying notes 192-95.

190. See *supra* text accompanying notes 176-79.

191. 767 F.2d at 1453.

Conversely, in *In re Acosta*, the BIA began its analysis with the alien's subjective fear of persecution.<sup>192</sup> It then considered whether that fear had a solid basis in objective facts.<sup>193</sup> Although no express reason was stated for this approach, the opinion examined the use of the word "fear" in the Refugee Act of 1980 and in the *Handbook*. The BIA reasoned that the prominence of the word in both the Act and the *Handbook* required the alien to demonstrate first that his or her primary motive for requesting refuge was fear.<sup>194</sup> The BIA's conclusion suggests it presumed this primary motive requirement necessarily obligated it to begin the analysis with the subjective component of the standard. Perhaps the BIA was further influenced by the *Handbook's* methodology which also treats the interpretation of "well-founded fear" in this order.<sup>195</sup> The *Handbook* does not, however, mandate this particular order of analysis; nor does it express any reason for selecting it. Irrespective of how this interpretive problem is resolved, the selection of one method over the other will not affect the outcome of an alien's claim for asylum. As noted, an alien's fear is generally not questioned. "It may be assumed that unless he seeks adventure or just wishes to see the world, a person would not normally abandon his home and county without some compelling reason."<sup>196</sup> Thus, the element of fear, for all practical purposes, is not a critical component to the alien's case. A court's discussion of an alien's fear, whether before or after an examination of the objective facts, is no more than formalism.<sup>197</sup>

Before discussing the four requirements under the statute, it is worth emphasizing that an alien may prove the existence of the requirements by testimonial or corroborative objective evidence. However, when the alien provides credible testimony regarding persecution there is no absolute requirement that the alien provide corroboration.<sup>198</sup>

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192. *Acosta*, I. & N. Dec. No. 2986 (BIA Mar. 1, 1985) at 12.

193. *Id.* at 21.

194. *Id.* at 15. HANDBOOK, *supra* note 144, at 11 (defining refugees by the concept of "fear" as a relevant motive).

195. HANDBOOK, *supra* note 144, at 11-12.

196. *Id.* at 12.

197. The authors have placed the discussion of the "fear" element following that of the well-foundedness requirement for two reasons. First, and most obviously, this approach corresponds to the order of the terms in the Act and the Convention. Second, at least one circuit, the Ninth, has suggested this approach. See *supra* text accompanying note 189.

198. *Canjura-Flores v. INS*, 784 F.2d 885, 888 (9th Cir. 1985). See also *supra* text accompanying note 186.

## 1. The Objective Facts: Establishing Well-Foundedness

The term "well-founded" qualifies the subjective state of fear. It implies that the fear "must be supported by an objective situation."<sup>199</sup> Instead of thoughts or feelings, it is the reality outside the alien's mind that is the focus. Whether the evidence is testimonial or corroborative in nature, the facts must enable the court to conclude that the alien is likely to become a victim of persecution.

It is at this point that all similarity in method of proof disappears between a withholding of deportation and a political asylum application. In *Stevic*, Justice Stevens declared that, under a Section 243(h) withholding of deportation claim, an alien must demonstrate a clear probability of persecution.<sup>200</sup> This standard "requires that an application be supported by evidence establishing that it is more likely than not that the alien would be subject to persecution."<sup>201</sup> Almost three years later, in *Cardoza-Fonseca*, Justice Stevens found that a section 208(a) asylum application was governed by a standard of proof less stringent than clear probability.<sup>202</sup> Although, the well-founded fear test was declared more generous than the clear probability standard, the Court refrained from "set[ting] forth a detailed description of how [it] should be applied."<sup>203</sup>

Justice Stevens reasoned that the statutory language in the Act evidenced the Senate's cognizance of the difference between the two standards. The use of different language with the new political asylum standard "certainly indicate[d] that Congress intended the two standards to differ."<sup>204</sup> Further, it follows that the standards should differ for another reason. Establishing a clear probability of persecution creates an *entitlement* to mandatory suspension of deportation.<sup>205</sup> An alien who proves a well-founded fear of persecution has only demonstrated *eligibility* for a discretionary grant of asylum.<sup>206</sup>

Although asylum is a less favorable remedy because the alien's

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199. HANDBOOK, *supra* note 144, at 12.

200. *Stevic*, 467 U.S. at 407.

201. *Id.*

202. 107 S. Ct. at 1213.

203. *Id.* at 1222.

204. *Cardoza-Fonseca*, 107 S. Ct. at 1213. See *supra* text accompanying notes 147-52.

205. *Cardoza-Fonseca*, 107 S. Ct. at 1219. See *supra* text accompanying notes 19-20, 28-29.

206. *Cardoza-Fonseca*, 107 S. Ct. at 1219.

fate rests with the discretion of the Attorney General, an alien is benefitted with a lower standard of proof. The advantage of this lower threshold is that it can be hurdled although the evidence indicates a less than fifty percent chance of persecution.<sup>207</sup> The Court provided an example of this situation:

Let us . . . presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp. . . In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have a "well-founded fear of persecution" upon his eventual return.<sup>208</sup>

In *Carcamo-Flores v. INS*,<sup>209</sup> the Second Circuit provided further examples of the type of objective evidence necessary to support an alien's fear of persecution. It considered affidavits, journalistic accounts of other persecution, and testimony sufficient to corroborate an alien's claim.<sup>210</sup> The court further recognized that an alien's testimony alone could suffice, especially where it is difficult or impossible to obtain documentary evidence.<sup>211</sup> The court concluded that the proper test to apply had been articulated by the Fifth Circuit.

In *Guevara-Flores v. INS*, the Fifth Circuit found a "mere irrational apprehension [to be] insufficient to meet the alien's burden of proof."<sup>212</sup> The court formulated the test as follows:

An alien possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country.<sup>213</sup>

In the search for objective facts supporting an alien's claim, it follows that objectivity should be evaluated in light of a reasonable person standard.<sup>214</sup> A court, in its analysis of the well-foundedness

207. *Id.* at 1213. See also *Carcamo-Flores v. INS*, 805 F.2d 60, 64 (2d Cir. 1986).

208. *Cardoza-Fonseca*, 107 S. Ct. at 1213 (citation omitted). Because of the subjective nature of fear, the facts that establish the fear to be well-founded will vary with every claim. There is no litmus test that determines when the fear becomes well-founded. This determination is left to the process of case-by-case adjudication. *Id.* at 1222.

209. 805 F.2d 60.

210. *Id.* at 64.

211. *Id.*

212. 786 F.2d 1242, 1249 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1565 (1987).

213. *Id.*

214. This reasonable person standard is evidently borrowed from the law of torts. The doctrine, as applied in this field, includes the element of reasonable foreseeability. Foreseeability, in turn, has the attribute of reasonable anticipation of harm. It is this latter articula-



requirement, determines whether the evidence presented provides the alien with "good reason to fear . . . persecution."<sup>215</sup> In other words, "good reason" is synonymous with circumstances which establish that persecution of the alien can be anticipated upon return to his country. This formulation produces a "reasonable anticipation of persecution" standard.

Of course, consideration must be given to the context in which the alien finds himself. The reasonable person analysis "should be sensitive to the position into which the person is, hypothetically, being placed."<sup>216</sup> Thus, under the more generous well-founded fear standard, "a reasonable person could have a well-founded fear of persecution even where the objective reality is that the likelihood of persecution is under fifty percent."<sup>217</sup>

Undoubtedly prompted by the Supreme Court's decision in *Stevic*, the BIA in *Acosta* undertook an extensive analysis of the political asylum standard of proof. The BIA's examination of the standard led it to equate the well-foundedness requirement with a "realistic likelihood" of persecution.<sup>218</sup> Noting, however, that the terminology varied among the Circuit Courts of Appeals,<sup>219</sup> the BIA dismissed any differences in diction to the extent that these variations approached a "plausibility" of persecution.<sup>220</sup>

After discussing the kind of objective facts necessary to establish a realistic likelihood of persecution, the BIA derived a four-part test that considered<sup>221</sup> whether: (1) the alien possesses a characteristic a persecutor seeks to overcome by punishing individuals who possess it; (2) a persecutor is aware or could easily become aware the alien possesses this characteristic; (3) a persecutor has the capacity to punish the alien; and (4) a persecutor has the incli-

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tion which renders the reasonable person doctrine particularly applicable under the well-founded fear analysis.

215. *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984) (emphasis supplied).

216. *Carcamo-Flores*, 805 F.2d at 68.

217. *Id.* See *supra* text accompanying note 207-08.

218. *Acosta*, No. 2986 at 23.

219. *Id.*

220. *Id.*

221. In *Acosta*, because the BIA concluded that both the withholding of deportation and granting of asylum standards were the same, it found that an alien was *required* to demonstrate each factor. This proof would rise to a level of clear probability, thereby ignoring the more generous standard of an asylum claim. The authors opine, however, that merely allowing an alien to demonstrate a "realistic likelihood" that the events will occur — as opposed to absolute proof of their existence — comports with the more generous asylum standard.

nation to punish the alien.<sup>222</sup>

These four factors, while useful to an immigration judge and an appellate court, must be considered carefully. As components of a "reasonable anticipation," or more accurately "reasonable apprehension," analysis, the generosity of the well-founded fear standard must be preserved. Because the standard to apply is one of reasonableness, these four factors may be demonstrated with less than a fifty percent likelihood of occurrence. Consequently, the lack of evidence on one factor should not be determinative of an alien's claim for asylum.

(a) *The Alien Possesses a Characteristic a Persecutor Seeks to Overcome by Punishment*

At first blush, this factor seems to require more than a fifty percent likelihood of occurrence. After all, one either possesses a characteristic, or one does not. But, such a dichotomous approach misses the mark. Certainly, in all cases, the characteristic which a persecutor seeks to overcome will become evident once the acts of persecution are identified.<sup>223</sup> Whether an alien possesses that characteristic, however, may not be as apparent. In *Acosta*, for example, the alien, a taxidriver, claimed persecution as a person engaged in the transportation industry of El Salvador.<sup>224</sup> This characteristic was easily verifiable. On the other hand, had *Acosta* suggested persecution because of his political opinion, then the determination regarding this characteristic would require a more detailed inquiry.

Clearly, the characteristic proffered by an alien at this point will also impact on the analysis of persecution "on account of" the five categories in the statute.<sup>225</sup> At this level, the existence of the characteristic is only an evidentiary requirement. Its legal suffi-

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222. *Acosta*, No. 2986 at 25. *Acosta* held that the standards under sections 208(a) and 243(h) merge in practical application. *Id.* To the extent this holding conflicts with the Supreme Court decision in *Cardoza-Fonseca*, it is, of course, overruled. However, it is only the result reached in *Acosta* that is incorrect. The BIA analysis remains valid because it specifically recognized the standards to be different. It is only in application that they converge. *Id.* at 25. Accordingly, these factors survive *Cardoza-Fonseca*.

223. This assumes, of course, that persecutors are rational, that is, that they are not randomly selecting citizens of the country and engaging in some sort of self-serving punishment. Instead, there will likely be a discernible pattern of persecution that evidences some characteristic common to those persecuted. The shared trait must be more than merely being a citizen of the country and being subject to the general war-torn condition in the country. See *Aviles-Torres v. INS*, 790 F.2d 1433, 1435 (9th Cir. 1986).

224. *Acosta*, No. 2986 at 29.

225. See *infra* text accompanying notes 267-92.

ciency is tested at a later stage of analysis. For this reason, the alien's identification of a characteristic should be accepted unless it appears to be patently frivolous. Otherwise, the immigration judge or the court may prematurely and needlessly conduct an inquiry into the reasons for persecution when ultimately the fear may not prove to be well-founded.<sup>226</sup>

(b) *Persecutor is Aware or Could Easily Become Aware the Alien Possesses the Characteristic*<sup>227</sup>

In a companion case, *Ganjour v. INS*,<sup>228</sup> an Iranian nonimmigrant student, Feridon Fathi, applied for asylum and a withholding of deportation. The Fifth Circuit, in affirming the BIA's denial of relief under both claims, focused on Fathi's involvement in an anti-Khomeini group while in the United States. The court found his involvement in the group to be "informal and spasmodic."<sup>229</sup> Further, Fathi's involvement in the group and in demonstrations did not indicate that "he would likely be brought to the attention of the Khomeini government. . . . and [he] did nothing to specifically call attention to himself."<sup>230</sup> In effect, the court found that Fathi had not come to the attention of the government, nor was it likely that he would. Similarly, in examining Fathi's claim that his family was threatened by pro-Khomeini supporters in the United States, the court could find no involvement by Iranian officials.<sup>231</sup> Thus, *Ganjour* makes it clear that while possessing a punishable characteristic places the alien in the group of persons subject to persecution, it is the persecutor's awareness, or likelihood of awareness, that is the focus of the analysis. An alien's inability to provide evidence in this regard, however, should not invalidate the

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226. For example, an alien "may have concealed his political opinion and never have suffered any discrimination or persecution . . . . In such circumstances the test of well-founded fear would be based on an assessment of the consequences that an applicant having certain political dispositions would have to face if he returned." HANDBOOK, *supra* note 144 at 20. The determination must be made "by a careful consideration of the circumstances." See HANDBOOK, *supra* note 144 at 22. Thus, if the alien's possession of the characteristic is questioned at this point, the analysis would overlap with the remaining *Acosta* factors, see *infra* text accompanying notes 227-58, and may have been needlessly undertaken if the fear is determined not to be well-founded.

227. The alien need not actually possess the characteristic. It is sufficient that the persecutor believe that he does. Certainly, the persecution does not become any less likely if the alien is not whom the persecutor believes him to be. The persecution will occur nonetheless.

228. 796 F.2d 832 (5th Cir. 1986).

229. *Id.* at 836.

230. *Id.* (emphasis supplied).

231. *Id.* at 837.

claim where there is a *likelihood* that the persecutor can become aware of the alien.

One method by which persecutors become aware of dissidents is through an information system that reports to official authorities. In *Farzad v. INS*,<sup>232</sup> the Fifth Circuit considered the effect of such a "spy system." Farzad was another nonimmigrant student that argued that his participation in demonstrations and lectures against the Khomeini regime was reported to Iranian officials through a "spy system."<sup>233</sup> To support his claim, a police official from Farzad's university testified as to the hostility between pro-Khomeini and anti-Khomeini groups. The court found that Farzad's involvement "without more, [did] not establish that his identity as a dissident ha[d] become known to Iranian authorities."<sup>234</sup> The court, in its *per curiam* decision, also found that the district court certainly had the correct standard in mind, although parts of its opinion may suggest otherwise.<sup>235</sup> To the extent that *Farzad* requires proof that the alien *is* a target of the persecutor, it would eliminate the more generous burden under an asylum claim. The decision, however, is useful in that it discloses the existence of a mechanism — the spy system — by which the persecutor may become aware of the alien.

Of course, awareness by the government rising to a level of direct interest in an alien will, in and of itself, establish a well-founded fear. The court, in *Guevara-Flores v. INS*,<sup>236</sup> adopted this approach. Ana Guevara-Flores was apprehended by the Texan Border Patrol and later suspected by the FBI to be Commandante Norma, a Salvadorian guerilla leader.<sup>237</sup> Fingerprint cards of Commandante Norma, obtained from Salvadorian authorities, revealed that the woman's identity had been mistaken. Nonetheless, the Salvadorian government indicated that possession of such subversive literature was a crime for which she could be detained upon her return.<sup>238</sup> Consequently, the authorities requested, in the event of her deportation, that they be provided with the date and num-

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232. 802 F.2d 123 (5th Cir. 1986).

233. *Id.* at 125.

234. *Id.*

235. Farzad's claim that the BIA had confused the standards of proof specifically was rejected. The court discounted any such possible error by the BIA because Farzad had failed to meet the more generous reasonable person standard. *Id.*

236. 786 F.2d 1242 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1565 (1987).

237. *Id.* at 1244.

238. *Id.*

ber of her flight, as well as copies of the documents she carried.<sup>239</sup> The Fifth Circuit held that a reasonable person in her circumstances would fear persecution because Salvadorian authorities had "personally taken an interest in her case."<sup>240</sup>

In sum, the level of awareness by the persecuting authority, or its ability to become aware, are critical to an alien's case. Actual awareness seems to warrant the immediate conclusion that the alien has proven his case. Alternatively, the fact that the persecutor has no contemporaneous knowledge of the alien should not work against him. The focus of the inquiry is on the reasonable likelihood that the persecutor could easily become aware of the alien. In this respect, an alien's activities, both inside and outside his country, must be carefully evaluated.

(c) *The Persecutor Has the Capacity to Punish the Alien*

This factor will be easily proved by an alien. For the most part, either the official government, a defacto power, or a guerilla group, is conducting the persecutions. The persecution is "normally related to action by the authorities of a country,"<sup>241</sup> whether the authority is the official government or not. General evidence of the activity by such groups will be documented by newspaper or other media. The ability to punish, however, need not be direct. A persecutor's capacity to punish is not rendered any less effective merely because it elects agents to impose its measures of discrimination.

(d) *The Persecutor Has the Inclination to Punish the Alien*

Adopting a dictionary definition, an "inclination" to punish indicates the persecutor has "[a] disposition more favorable to one . . . person than to another."<sup>242</sup> An alien must therefore show a reasonable likelihood that he or she will be punished, as distinct from the random or general upheaval occurring in the country; that the alien's "situation upon . . . return . . . will be . . . different from the dangers faced by other citizens . . . ."<sup>243</sup>

The Fifth and Ninth Circuits interpret the well-foundedness

239. *Id.*

240. *Id.* at 1250. Because Guevara was attempting to reopen her case, the court expressed no opinion on the merits of her claim. *Id.* It merely held that she had met the prima facie showing that "she is likely to meet the statutory requirements on remand." *Id.* at 1250-51.

241. HANDBOOK, *supra* note 144 at 17.

242. THE WEBSTER REFERENCE DICTIONARY OF THE ENGLISH LANGUAGE 485 (1983).

243. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1581 (9th Cir. 1986).

standard to impose on the alien a burden to demonstrate an individualized claim. This requirement is analogous to proof of the persecutor's disposition toward punishing the alien over others. In *Bahramnia v. INS*,<sup>244</sup> the Fifth Circuit examined yet another Iranian student's request for political asylum. Bahramnia contended that his membership in a group committed to the ouster of the Khomeini government, and his participation in demonstrations and discussions gave rise to a well-founded fear of persecution.<sup>245</sup> The court found that Bahramnia had not demonstrated:

any nexus between his membership in this organization and other acts or persecution that would give rise to the reasonable foreseeability that *he will* be persecuted . . . . No evidence was submitted to suggest that supporters of the Iranian regime have taken action *against* him in the United States, or that any of his family members in Iran have been harmed in any way *on account of their association with him*.<sup>246</sup>

The court's opinion indicates that the inclination to punish can be manifested in two ways. Direct persecution of the alien in the past or a "good reason" to anticipate future persecution shows such an inclination.<sup>247</sup> Alternatively, persecution can occur to an alien's family members. Since his family has been punished "on account of their association" with the alien,<sup>248</sup> the alien's claim that he will be "singled-out for persecution" still remains individualized because the family's persecution is imputed to the alien. It is persecution of the family as a unit which necessarily implicates the alien.<sup>249</sup>

This "individualized claim" has been similarly embraced by the Ninth Circuit. In *Vides-Vides v. INS*,<sup>250</sup> the court reasoned that the objective component of the well-founded fear standard included evidence that "should be specific enough to indicate that the alien's predicament is appreciably different from the dangers faced by the alien's fellow citizens."<sup>251</sup> Two succeeding cases continue to affirm the court's position.

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244. 782 F.2d 1243 (5th Cir. 1986).

245. *Id.* at 1248.

246. *Id.* (emphasis supplied).

247. *Id.*

248. *Id.*

249. See *infra* note 282 and accompanying text (discussing family status as membership in a social group).

250. 783 F.2d 1463 (9th Cir. 1986).

251. *Id.* at 1469 (citation omitted).

In *Rebollo-Jovel v. INS*,<sup>252</sup> the court expressly stated that "[t]o qualify for political asylum, Rebollo-Jovel must demonstrate that potential persecution would be directed at him as an individual. . . . We have repeatedly 'rejected the contention that a citizen' of El Salvador can establish eligibility for asylum merely by pointing out that political violence is widespread there.'"<sup>253</sup> Similarly, in *Sanchez-Trujillo v. INS*,<sup>254</sup> the court echoed the immigration judge's conclusion that neither petitioner established facts to distinguish their claim from the dangers faced by other citizens of the country.<sup>255</sup>

An initial interpretation of this factor could lead one to conclude that imposing such a burden on the alien exacts a standard of proof equal to, if not greater than, the clear probability standard. It must be emphasized, however, that such is not the case. The apparent similarity and certain confusion occurs because of "a few inartfully chosen words."<sup>256</sup> The discussion in *Sanchez-Trujillo* reveals the *sine qua non*.

The use of one particular word is not dispositive of whether the proper standard was applied . . . . "There is clearly a substantial difference between a demand that the alien demonstrate that [h]e *would be* persecuted if deported, and a demand that the alien demonstrate that [h]e has a *well-founded fear that [h]e would be persecuted*."<sup>257</sup>

Thus, the alien need only demonstrate a reasonable likelihood that he or she will be persecuted upon return. In the absence of corroborative evidence, it can be established through the alien's specific, consistent, objective, and credible testimony.<sup>258</sup>

## 2. The "Fear" of "Persecution"

"Fear" is the motive for an alien's flight. The instinct for survival has delivered the alien to this country. "Persecution," on the

252. 794 F.2d 441 (9th Cir. 1986).

253. *Id.* at 448 (citations omitted) (quoting *Sarvia Quintanilla v. INS*, 767 F.2d 1387, 1394 (9th Cir. 1985)).

254. 801 F.2d 1571 (9th Cir. 1986).

255. "[N]one of the incidents related by either petitioner appears to be 'a result of any specific effort aimed at them in particular . . . .'" *Id.* at 1581.

256. *Id.* at 1579.

257. *Id.* at 1579. (quoting *Florez-De Solis v. INS*, 796 F.2d 330, 336 (9th Cir. 1986) (Wallace, J., concurring)).

258. *See supra* notes 175-77 and accompanying text.

other hand, is the catalyst. It is the instigator to the flight which leaves behind country, and often family. The evidence of fear is subjective; it is individual and testimonial in nature. Persecution, however, can be objectively evaluated.

Fear is a state of mind characterized by an anticipation or awareness of danger.<sup>259</sup> Its subjective character allows it to be "illusory, neurotic, or paranoid."<sup>260</sup> Thus, the only essential requirement is that the fear be genuine.<sup>261</sup> A mere declaration by an alien will suffice, since fear is incapable of rational measurement.<sup>262</sup>

Additionally, the basis of an alien's fear will vary. It may be individual, such as being branded a guerilla,<sup>263</sup> or being forced to join the military.<sup>264</sup> Or, the fear may stem from group characteristics, such as religion,<sup>265</sup> political opinion,<sup>266</sup> or membership in a social group.<sup>267</sup> Ultimately, the only requirement is the presence of fear in the alien's mind.

On the other hand, "persecution" is the reason for the fear. "[T]he term encompasses 'the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive'."<sup>268</sup> Implicitly, a "persecution" occurs as a pattern of repetition. Otherwise, an alien is encouraged to claim every single act of violence, no matter how minor or isolated, as an act of persecution. Of course, the particular facts of each case will be critical to this determination. If the credible evidence demonstrates that the alien was captured, tortured, and released by the persecutor, then this showing should be sufficient. An alien does not need to be a victim of persecution in order to establish its existence. Past persecution or the threat of future persecution — as

259. *Acosta*, No. 2986 at 14.

260. *Dunar, I. & N. Dec. No. 2192* (BIA April 17, 1973). Of course, a fear of this nature will not survive the well-foundedness requirement. *Id.*

261. *Vides-Vides v. INS*, 783 F.2d 1463, 1469 (9th Cir. 1986).

262. *See Guevara-Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986). "Mere assertions of possible fear" will always be insufficient. *Shogee v. INS*, 704 F.2d 1079, 1084 (9th Cir. 1983) (emphasis supplied).

263. *See Aviles-Torres v. INS*, 790 F.2d 1433, 1435 (9th Cir. 1986).

264. *Vides-Vides*, 783 F.2d at 1466.

265. *Dawood-Haio v. INS*, 800 F.2d 90, 96 (6th Cir. 1986).

266. *See Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1984). *See infra text* accompanying notes 285-92.

267. *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1573 (9th Cir. 1986). *See infra text* accompanying notes 269-86.

268. *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1452 (9th Cir. 1986) (citing *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969)).



distinguished from general upheaval or chance occurrence — will establish the existence of “persecution.” The inquiry then turns to whether the persecution was “on account of” the five statutory factors.

### 3. “On Account of”

As used in the Act, this language and that which follows it represent words of limitation. Thus, they necessarily place conditions on the alien’s claim. The “fear of persecution” can only emanate from the five statutory categories: race, religion, nationality, membership in a particular social group, and political opinion.

#### (a) *Membership in a Particular Social Group*<sup>269</sup>

In developing a workable definition for this category, the *Handbook* would seem to be a logical starting point. Unfortunately, its discussion of this factor is insubstantial and provides good advice. In general terms, membership in this group is by “persons of similar backgrounds, habits, or social status.”<sup>270</sup> “Mere membership in a particular social group will not normally be enough to substantiate a claim for refugee status” unless there exists “special circumstances.”<sup>271</sup> The *Handbook* however, does not identify the “special circumstances” upon which to base a claim for refugee status.

In *Sanchez-Trujillo v. INS*,<sup>272</sup> the Ninth Circuit attempted to trace the “outer limits” of this phrase. From this otherwise ambiguous category, the court developed a four-part test to be used in determining whether eligibility for group classification and membership exists. The court looked to whether:

- (1) The class of people identified by the applicant is cognizable

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269. A discussion of the three other categories, race, religion and nationality, has been omitted. Generally, persecution on account of these reasons will be so widespread as to be easily corroborated. Moreover, an alien should have no difficulty in proving that he possesses any one of these characteristics. See *Damaize-Job v. INS*, 787 F.2d 1332, 1336-37 (9th Cir. 1986) (Sandinistas persecution of readily identifiable Miskito Indians characterized as “genocide”). Where an alien’s statements regarding persecution do not rise to the level of being on account of race, religion, or nationality, specific threats to the alien may provide a fall back position. See *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) (specific threat not lessened by the fact that individual resides in country where many persons threatened).

270. HANDBOOK, *supra* note 144 at 77.

271. HANDBOOK, *supra* note 144 at 79.

272. 801 F.2d 1571 (9th Cir. 1986).

as a "particular social group" under the immigration statutes;<sup>273</sup> (2) The applicant has established that he qualifies as a member of the group;<sup>274</sup> (3) The purported social group was in fact targeted for persecution on account of the characteristics of the group members;<sup>275</sup> and (4) "Special circumstances" necessitate that mere membership in the social group constitutes per se eligibility for asylum or withhold of deportation.<sup>276</sup>

In determining the cognizability of a group, the Ninth Circuit noted that there must be close affiliation with other members of the group as well as common interests shared between them.<sup>277</sup> It is the "cohesive, homogeneous group" to which the term applies.<sup>278</sup> Sanchez-Trujillo had sought asylum on account of persecution because of his membership in the group of young, urban working class males. In framing his claim in this manner, the court found that the group was too broad and possessed too many diverse lifestyles, interests, and political leanings.<sup>279</sup> To the court, this group represented little more than another "[m]ajor segment[] of the population of an embattled nation."<sup>280</sup> General upheaval in the country again played a significant role.<sup>281</sup>

The few cases discussing the applicability of a "particular social group" claim have one unifying theme: the group characteristics should be immutable and beyond the control of its members.<sup>282</sup> The *Sanchez-Trujillo* court implied that the size of the

273. *Id.* at 1574.

274. *Id.* at 1574-75.

275. *Id.* at 1575.

276. *Id.*

277. *Id.* at 1576.

278. *Id.* at 1577.

279. *Id.* (citing decision of immigration judge).

280. *Id.*

281. *See, e.g.,* Aviles-Torres v. INS, 790 F.2d 1433, 1435 (9th Cir. 1986) (discussing war torn conditions in country). It is worth noting that although a group claim may not succeed, the alien is not foreclosed from having his individual circumstances evaluated. Sanchez-Trujillo v. INS 1577, 1578 (9th Cir. 1986). This option is available because many of the group characteristics may overlap with the other statutory grounds. *See* Sanchez and Escobar, I. & N. Dec. No. 2996 at 15 (BIA Oct. 15, 1985).

282. The BIA, in Acosta-Solorzano, Interim Decision No. (BIA Mar. 1, 1985), noted that:

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 activities 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.* at 10. The court found that the characteristic may be "so fundamental to individual

group may also be a factor, noting that a family would be a "prototypical example" because it was "a small readily identifiable group."<sup>283</sup>

Thus, the emphasis lies with the uniqueness of common characteristics which set the group apart from the general population. As the number of characteristics increases, it becomes simpler for anyone to claim association with the group, and consequently, the group becomes larger in size. Likewise, broad categories of interests would also permit more persons to establish affiliation. The successful applicant must identify a relatively small group of persons with distinct characteristics in order to avoid "falling within the parameters of [a] sweeping demographic division."<sup>284</sup> Otherwise, the alien will be unable to establish a prima facie case, particularly in light of the dearth of authority construing the meaning of this term.

The structuring of an asylum application on the basis of group status does not abrogate the necessity to demonstrate the existence of an "individualized" claim. In this context, the only difference is that the individualization extends to a particular social group instead of a particular person.<sup>285</sup> The basis of the alien's claim must be that the group persecuted has "specific indentifying characteristics and its treatment based on those characteristics is distinct from that of the general population."<sup>286</sup>

#### (b) *Political Opinion*

Naturally, persecution based on political belief takes place because of the instability and conflict in the alien's country. It ordinarily occurs because of the alien's loyalty to other governmental factions, or because of lack of loyalty to the government in power. In determining whether persecution has, or may occur on account of an alien's political opinion, the motivations of both the alien and the persecutor may be examined, as well as the relationship

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identity or conscience that it ought not be required to be changed." *Id.* at 24 (citations omitted).

283. 801 F.2d at 1576 (citing *Hernandez-Ortiz v. INS.*, 777 F.2d 509, 515 (9th Cir. 1985)). Threats against an alien or members of his family have traditionally supported the conclusion that the aliens' life or freedom is endangered. *See, e.g., Hernandez-Ortiz*, 777 F.2d at 516) (But expressly leaving open the issue of a family as "particular social group." *Id.* at 517 n.8); *Garcia-Ramos v. INS.*, 775 F.2d 1373, 1374 (9th Cir. 1985).

284. *Sanchez-Trujillo*, 801 F.2d at 1577.

285. *See id.*

286. *Sanchez and Escobar*, No. 2996, at 15.

between the two.<sup>287</sup>

Political affiliation may be active or passive. In *Bolanos-Hernandez v. INS*,<sup>288</sup> the court recognized that the decision to remain neutral can be a decision of political conscience.<sup>289</sup> Bolanos-Hernandez had sought political asylum after he received death threats from guerillas whom he had declined to join.<sup>290</sup> The court reasoned that:

[w]hen a person is aware of contending political forces and affirmatively chooses not to join any faction, that choice is a political one. A rule that one must identify with one or two dominant warring political factions in order to possess a political opinion, when many persons may, in fact, be opposed to the views and policies of both, would frustrate one of the basic objectives of the Refugee Act of 1980 — to provide protection to all victims of persecution regardless of ideology.<sup>291</sup>

A significant contribution by the court was its finding that the alien's reasons for choosing to join or not join a group are of no importance to the political opinion analysis. The individual's choice could not be a factor because to the persecutor, the alien's motivation is irrelevant.<sup>292</sup> To the court, a persecutor would not question the alien, and is merely concerned with the "act[s] that constitute an overt manifestation of a political opinion."<sup>293</sup> Political neutrality, however, must be distinguished from apathy. The alien must make an affirmative choice to remain neutral.<sup>294</sup> The alien's failure however, to take a political position will prevent him from prevailing on this claim.<sup>295</sup>

## V. CONCLUSION

The line between the clear probability and the well-founded

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287. *Hernandez-Ortiz*, 777 F.2d at 516.

288. 749 F.2d 1316 (9th Cir. 1984).

289. *Id.* at 1324-25.

290. *Id.* at 1318.

291. *Id.* at 1325.

292. *Id.* at 1287.

293. *Id.*

294. *See, e.g., Lopez v. INS*, 775 F.2d 1015, 1016 (9th Cir. 1985) and cases cited therein.

295. Where an alien demonstrates that he is a "refugee" under the first three factors, *see supra* text accompanying note 187, then the fourth factor — the alien's inability or unwillingness to return — may be presumed because the application for asylum is a clear manifestation of the alien's unwillingness to return.

fear standards has been, at best, blurry. While it is clear that the two standards differ, the INS and the courts have been less than certain with their application of the well-founded fear test. The BIA, responding to the Supreme Court decision in *Stevic*, found that in practice the two standards were indistinguishable. The BIA's decision in *Acosta* provided four factors to be evaluated in the determination of a "well-founded" fear. The courts, nonetheless, continue to struggle to such extent that even improper word choice by the BIA could effect a remand.

The well-founded fear standard of section 208(a) combines a subjective and objective element of proof. Although this standard must be applied on a case-by-case basis, the very existence of an objective burden of proof necessitates a framework of analysis that can guide the INS and the courts to a proper conclusion. This framework was provided by the BIA in *Acosta*. Without the use of an objective framework, the asylum analysis reduces itself to a balancing process. The only certainty to be expected from this approach is the arbitrariness that will result in applying the well-founded fear standard.<sup>296</sup> If the humanitarian concerns of the Refugee Act of 1980 are to be given effect, the state of flux regarding this standard must be settled.

The factors enumerated in *Acosta* provide the means by which the reasonable person standard can be applied, in like manner, to every alien. The decisions evaluating political asylum claims have considered: an alien's possession of a characteristic a persecutor seeks out; a persecutor's awareness or likelihood of becoming aware that the alien possesses this characteristic; a persecutor's capacity to punish the alien; and a persecutor's inclination to punish the alien. There is no valid reason for the sporadic use of these factors. Only their consistent application will remove speculative judgment regarding the existence and degree of an alien's persecution. Additionally, the uncertainty directly impacts the alien's presentation of his case. The alien already contends with the handicaps of a language barrier, nervousness, and being compelled to use an interpreter. He should not be additionally burdened with uncertainty in the manner by which his evidence is construed. A framework that evaluates objective facts allows the alien to gather and present his

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296. Note, *The "Political Propaganda" Label Under FARA: Abridgement of Free Speech or Legitimate Regulation?*, 41 U. MIAMI L. REV. 591, 613 (1987) (ad hoc character of balancing test gives little guidance for future conduct because no clear standards produced to follow).

evidence in a manner specifically tailored for the court's analysis. In short, an objective framework substantially removes guesswork from the perspective of both the court and the alien.

The United States has continually demonstrated its role as a safe harbor, sensitive to the plight of those who flee their country when human rights violations can no longer be tolerated. This open door policy carries with it the realization that certain standards must be met because refuge cannot be offered to all those who seek it. Thus, the Refugee Act of 1980 and the case law interpreting it attempt to define the width of the doorway to this country. The courts, however, by their inconsistent application of the well-founded fear standard have constructed a revolving door, leaving aliens uncertain about which way it swings. Only an objective framework of analysis can guarantee a "realistic likelihood" of evenhandedness in the application of the well-founded fear standard. Otherwise, the offer of refuge to aliens "simply sound[s] the word of promise to the ear but break[s] it to the hope."<sup>297</sup>

HUMBERTO H. OCARIZ  
JORGE L. LOPEZ

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297. *Ananeh-Firemping v. INS*, 766 F.2d 621, 628 (1st Cir. 1985).