

# POLITICAL ASYLUM AND WITHHOLDING OF DEPORTATION: DEFINING THE APPROPRIATE STANDARD OF PROOF UNDER THE REFUGEE ACT OF 1980

*The Refugee Act of 1980 established a "well-founded fear of persecution" standard for determining when an alien is eligible for political asylum in the United States. The correct interpretation of the new standard has recently been the subject of dispute between the Immigration and Naturalization Service and the United States courts of appeals. This Comment analyzes the different interpretations of the "well-founded fear" standard. It also suggests an interpretation based on the legislative history of the 1980 Act and the recommendations of the United Nations.*

## INTRODUCTION

One of the oldest themes in America's history is that of welcoming homeless refugees to its shores.<sup>1</sup> Refugees from many countries have come to America seeking refuge from persecution in their native land.<sup>2</sup> Since 1980, persons already physically present in the United States are also able to request asylum and withholding of deportation to their homeland due to a fear of persecution.<sup>3</sup> The increase in

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1. S. REP. NO. 256, 96th Cong., 1st Sess. 1, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 141, 141 [hereinafter cited as S. REP.].

2. *Id.* at 3. See also 8 U.S.C. § 1157 (1982) (authorizing an annual quota of refugees who may be admitted to the United States). The quota was set at 50,000 for fiscal years 1980, 1981, and 1982. In 1983, the quota was raised by President Reagan to 90,000 refugees, with special concern for refugees from Viet Nam, Latin America, and the Caribbean. Determination of President No. 83-2, 47 Fed. Reg. 46483 (1982), reprinted in 8 U.S.C.A. § 1157 app. at 60 (West Supp. 1983). In 1981 and 1982 the Immigration and Naturalization Service (INS) received asylum applications from nationals of 53 countries with large numbers being made by persons from Afghanistan, Ethiopia, Haiti, Iran, Nicaragua, Poland, and El Salvador, as well as others from Greece, Italy, Kenya, Mexico, and Sweden. Meissner, *Proposed Revisions in Asylum Procedures and Law*, 29 INS REPORTER 1 (1981).

3. 8 U.S.C. § 1158 (1982) (authorizes the establishment of procedures for granting asylum to persons physically present in the United States or at a land border or port of entry); 8 U.S.C. § 1253(h) (1982) (provides for withholding of deportation of aliens who would otherwise be deportable under 8 U.S.C. § 1251 (1982), but because the Attorney General has determined they would be persecuted in their homeland, they are granted a stay from deportation; the Attorney General has discretion to determine the length of the stay).

the number of persons seeking asylum in the United States has created a backlog of cases numbering in the thousands.<sup>4</sup> Many of these people are confined to detention camps or have sought temporary sanctuary in churches or in the homes of private citizens.<sup>5</sup> The problem of how to respond to the numerous requests for asylum made each year to the United States government has become critical over the past three years.<sup>6</sup>

Three years ago, Congress enacted the Refugee Act of 1980<sup>7</sup> to establish a more uniform procedure for the admission and resettlement of refugees in America.<sup>8</sup> The Refugee Act represents a comprehensive revision of former immigration laws relating to asylum.<sup>9</sup>

However, a dispute has arisen between the Immigration and Naturalization Service (INS) and the Third Circuit Court of Appeals on the one hand, and the Second Circuit Court of Appeals on the other regarding the interpretation of the new laws as intended by Congress.<sup>10</sup> The present conflict involves the requirements for determining when an alien is eligible for treatment as a political refugee. Specifically, a controversy exists regarding the appropriate standard of proof the alien must meet in order to prove eligibility for asylum.<sup>11</sup> The dispute involves not only what elements an alien must prove, but also the character and sufficiency of evidence needed to satisfy the

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4. Pick, *People Who Live On Hope — And Little Else*, STUDENT LAW., May 1983, at 14. In May, 1983, there were 143,000 asylum bids pending before the INS. *Id.*

5. Brom, *Church Sanctuary for Salvadorans*, CAL. LAW., July 1983, at 42, 43. Many of the aliens currently being held in detention camps are Salvadorans. Two Salvadorans were granted asylum in 1981 while 10,473 were apprehended and returned to El Salvador. In 1982, 74 Salvadorans were granted asylum and only 5,131 were deported. As of April, 1983, at least 931 Salvadorans were in detention awaiting hearing. As a result, hundreds of churches have begun offering sanctuary to Salvadorans who have escaped persecution and are awaiting a response from the INS as to the status of their asylum applications. *Id.*

6. The INS received approximately 3,700 applications for asylum in 1978 and another 5,800 in 1979. Between March of 1980 and July of 1981 over 53,000 applications for asylum were filed by persons physically present in the United States. Meissner, *supra* note 2, at 1.

7. Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C. (1982)). The Act was signed by President Carter on March 17, 1980. *Id.*

8. S. REP., *supra* note 1, at 1-2.

9. *Id.* at 1. Prior to the Act, Congress had taken a piecemeal approach toward asylum legislation, passing new laws in reaction to individual refugee crises as they occurred. With the influx of large numbers of refugees in the United States in the past decade (most notably from Indochina, Cuba, Haiti, Central America, and the Middle East), such an approach was no longer effective in determining who should be granted political asylum. *Id.* at 3.

10. See, e.g., *Marroquin-Manriquez v. INS*, 699 F.2d 129 (3d Cir. 1983), *petition for cert. filed*, 51 U.S.L.W. 3759 (U.S. April 7, 1983) (No. 82-1649); *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3633 (U.S. Feb. 28, 1983) (No. 82-973); *Rejaie v. INS*, 691 F.2d 139 (3d Cir. 1982).

11. *Stevic v. Sava*, 678 F.2d 401, 404 (2d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3633 (U.S. Feb. 28, 1983) (No. 82-973); *Rejaie v. INS*, 691 F.2d 139, 140 (3d Cir. 1982).

alien's burden of persuading the fact-finder.

The INS and the courts have each formulated their own interpretation of the new statute.<sup>12</sup> The INS maintains that an alien must prove a "clear probability" of persecution in his native land.<sup>13</sup> Three federal circuit courts of appeals have held that the statute mandates a lesser, "well-founded fear" of persecution standard.<sup>14</sup> This discrepancy has resulted in substantial differences in application of the law to individual cases where persons' lives and futures are at stake.<sup>15</sup>

The United States Supreme Court has recently granted certiorari in a case involving the issue of whether the Refugee Act of 1980 reduced the standard of proof a non-citizen must meet in order to be granted asylum in the United States.<sup>16</sup> Since asylum has traditionally been very difficult to obtain,<sup>17</sup> resolution of this conflict is of great importance to the thousands of persons who seek refuge in

12. See *infra* notes 96-117 and accompanying text.

13. For a discussion of the INS's position, see *Rejaie v. INS*, 691 F.2d 139 (3d Cir. 1982).

14. The Second and Sixth Circuits have indicated that the "well-founded fear" standard adopted by the Refugee Act of 1980 is a less harsh standard for proving asylum and withholding of deportation than the "clear probability" standard. See *infra* notes 96-99, 137-39 and accompanying text. The Ninth Circuit has arguably adopted the reasoning of the Second and Sixth Circuits. *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981). See also *Almirol v. INS*, 550 F. Supp. 253 (N.D. Cal. 1982) (in which the district court applied the lesser "well-founded fear" of persecution standard to an alien's request for a waiver of the two-year foreign residence requirement under § 212(e) of the Immigration and Nationality Act (INA) (codified at 8 U.S.C. § 1182(e) (1982))).

15. See *infra* notes 137-48 and accompanying text. Other factors affect the alien's burden of proving eligibility for asylum, most notably the political relationship between the United States and the alien's native country. This is partly because INS regulations require the State Department to give a recommendation in each case as to the alien's eligibility for asylum. 8 C.F.R. § 208.7 (1983). The recommendations tend to favor refugees from countries whose governments are not on favorable terms with the United States, such as refugees from Afghanistan or Iran as opposed to refugees from El Salvador or the Philippines. Pick, *supra* note 4, at 35. Also, "media-related" cases receive extra attention. To be persecuted, one must be "targeted." A famous person, such as tennis star Martina Navratilova or former Russian dancers Alexander Goudonov and Mikhail Baryshnikov, are known to the government, which improves their chances of being granted asylum. *Id.*

16. *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3633 (U.S. Feb. 28, 1983) (No. 82-973). The Court heard oral argument in *Stevic* on December 6, 1983. As of the date of this publication, no decision has been announced.

17. In the past, only a few applicants have been granted asylum. This is primarily because asylum has always been considered a privilege rather than a right, and is discretionary with the Attorney General. See 8 U.S.C. § 1157(c) (1982). See also *In re Tan*, 12 I. & N. Dec. 564, 568 (1967) (stating that the statute gives the Attorney General discretion to withhold deportation). This result was changed by making withholding of deportation mandatory when an alien meets the requirements of the new definition of "refugee." Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107 (1980) (amending § 243(h) of the INA) (codified at 8 U.S.C. § 1253(h) (1982)).

America each year.<sup>18</sup> It will also indicate the direction of America's future refugee policy.

This Comment analyzes the standard of proof imposed upon the alien attempting to obtain asylum in the United States under the Refugee Act of 1980. It evaluates the positions taken by the INS and the United States courts of appeals, most notably in the recent decisions of *Stevic v. Sava*<sup>19</sup> and *Marroquin-Manriquez v. INS*<sup>20</sup> and suggests possible solutions to the existing controversy.

#### HISTORICAL BACKGROUND<sup>21</sup>

##### *United States Statutes Relating to Refugees Abroad*

Until the twentieth century, the United States had no laws dealing specifically with those persons seeking to enter the United States as refugees from other lands.<sup>22</sup> After World War II, Congress enacted various provisions which provided for the admission of select groups of refugees. The first of these acts was the Displaced Persons Act of 1948.<sup>23</sup> This Act granted sanctuary for thousands of displaced persons who had fled Nazi or Soviet persecution as a result of events which occurred during World War II.<sup>24</sup> However, the 1948 Act was only a temporary response to an emergency crisis. Congress had not yet established a permanent refugee policy.<sup>25</sup>

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18. See Petition of Respondent INS for Rehearing and Suggestion for Rehearing En Banc, at 16, *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982), cert. granted, 51 U.S.L.W. 3633 (U.S. Feb. 28, 1983) (No. 82-973) [hereinafter cited as Petition for Rehearing] (on file with the San Diego Law Review). The INS suggests that if a new, more liberal standard of proof is upheld by the courts, every asylum petition denied since passage of The Refugee Act would be subject to reopening, creating a devastating effect upon the processing of asylum applications.

19. 678 F.2d 401 (2d Cir. 1982), cert. granted, 51 U.S.L.W. 3633 (U.S. Feb. 28, 1983) (No. 82-973).

20. 699 F.2d 129 (3d Cir. 1983), petition for cert. filed, 51 U.S.L.W. 3759 (U.S. April 7, 1983) (No. 82-1649). Petitioner has requested that his case be heard in conjunction with *Stevic v. Sava* because it raises the same issue as *Stevic*, but presents a more substantial record of facts.

21. For an exhaustive history of United States immigration law relating to refugees, see Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

22. 1 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE §§ 1.1-1.2 (1979). The first hundred years of our national existence was a period of unimpeded immigration welcoming all aliens without restrictions. *Id.*

23. Pub. L. No. 80-774, 62 Stat. 1009 (1948) (repealed in 1951).

24. *Id.*

25. See Anker & Posner, *supra* note 21, at 12-13. A similar provision, the Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400, provided emergency relief to refugees who were victims of natural calamities or who were fleeing Communist-dominated parts of Europe and the Middle East. The Refugee Relief Act was extended in 1957, Pub. L. No. 85-316, 71 Stat. 639, and later codified by the 1965 Amendments to the Immigration and Nationality Act. Pub. L. No. 89-236, 79 Stat. 911 (1965), (current version of the INA at 8 U.S.C. §§ 1101-1557 (1982)). See *infra* notes 30-32 and accompanying text.

In 1952, the Immigration and Nationality Act (INA)<sup>26</sup> was enacted to establish quotas and priorities for qualifying immigrants who wished to become permanent residents of the United States.<sup>27</sup> The INA included a defector provision allowing immigration of a restricted number of former Communists fleeing persecution abroad.<sup>28</sup> The emphasis of this measure was less on broad humanitarian goals than on giving encouragement and support to anti-Communists.<sup>29</sup>

The 1965 Amendments to the INA created the first permanent basis for the admission of refugees.<sup>30</sup> Section 203(a)(7) was added to the INA.<sup>31</sup> This section established a quota for admitting aliens fleeing Middle Eastern or Communist-dominated countries because of persecution or fear of persecution based on race, religion, or political opinion.<sup>32</sup> Until enactment of the Refugee Act of 1980, only persons from the countries specified in section 203(a)(7) were allowed to apply for asylum in the United States as refugees.<sup>33</sup>

26. Pub. L. No. 82-414, 66 Stat. 163 (1952) (currently codified at 8 U.S.C. §§ 1101-1557 (1982)).

27. See Anker & Posner, *supra* note 21, at 14, 18.

28. Pub. L. No. 82-414, § 212(a)(28)(I), 66 Stat. 163, 186 (1952) (currently codified at 8 U.S.C. § 1182(a)(28)(I) (1982)). The Act also included a parole provision which gave the Attorney General the authorization to temporarily parole aliens into the United States in emergencies or in the public interest. *Id.* at § 212(d)(5) (currently codified at 8 U.S.C. § 1182(d)(5) (1982)). An alien paroled into the United States need not prove eligibility as a refugee. Parole has traditionally been used as the primary basis for the admission of large numbers of refugees into the United States. See *generally* Note, *Refugees Under United States Immigration Laws*, 24 CLEV. ST. L. REV. 528 (1975) (discussing both parole and conditional entry of refugees).

The Refugee Act of 1980 limits the use of parole authority. The new Act provides: "The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee . . ." Refugee Act of 1980, Pub. L. No. 96-212, § 202(f)(B), 94 Stat. 102, 108 (amending § 212(d)(5) of the INA) (codified at 8 U.S.C. § 1182 (d)(5)(B) (1982)). However, a separate provision authorizes the President, after consultation with Congress and when justified by "special humanitarian concern" to parole a fixed number of refugees into the United States each year. *Id.* at § 201(b), 94 Stat. 102, 103 (1980) (adding § 207(a) to the INA) (codified at 8 U.S.C. § 1157(b) (1982)).

29. Anker & Posner, *supra* note 21, at 14.

30. The Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (repealed in part 1980) (current version of the INA at 8 U.S.C. §§ 1101-1557 (1982)).

31. *Id.* at § 203(a)(7), 79 Stat. 911, 912-15 (1965) (repealed 1980).

32. *Id.*

33. *Id.* One of the purposes of the Refugee Act of 1980 was to eliminate geographical and ideological restrictions on the admission of refugees. S. REP., *supra* note 1, at 4; H. R. REP. NO. 608, 96th Cong., 1st Sess. 19, reprinted in 1980 U.S. CODE CONG. &

## *Withholding of Deportation and the Rights of Asylum Applicants in the United States*

Asylees are persons physically present in the United States who have fled persecution in their native country.<sup>34</sup> Before 1980, the United States had never offered the right to apply for asylum to aliens illegally within the country.<sup>35</sup> However, section 243(h) of the INA<sup>36</sup> authorized the Attorney General<sup>37</sup> to withhold deportation of an alien already in the United States if it was determined that the alien would be subject to persecution in his native land if deported.<sup>38</sup> Section 243(h)'s withholding of deportation constituted the exclusive remedy for such an alien seeking refuge due to a fear of persecution in his homeland.<sup>39</sup> While the section does not actually confer asylum on an alien, it has often been referred to by courts as an asylum provision because it allows the alien to stay in the United States

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AD. NEWS, at 144, 160 [hereinafter cited as H. R. REP.].

34. See generally 8 C.F.R. § 208 (1983) (procedures relating to asylum applications by asylees). Asylees, persons requesting asylum after entering the country, are distinguished from refugees, persons outside the United States seeking political asylum in America. However, because the United Nations Protocol and the Refugee Act of 1980 apply the definition of a "refugee" to both groups of people, the distinction is unimportant for purposes of determining eligibility for asylum in light of the 1980 Act. Therefore, in this Comment, all persons requesting asylum are referred to as refugees. See 8 U.S.C. §§ 1157, 1158 (1982).

35. See *Yan Wo Cheng v. Rinaldi*, 389 F. Supp. 583 (D.N.J. 1975) (stating the general rule that aliens unlawfully present in the United States have no right to asylum). See also Note, *The Right of Asylum Under United States Law*, 80 COLUM. L. REV. 1125 (1980) (arguing that the United States government and the courts have failed to recognize the existence of a right of asylum in qualified applicants). Recently, a federal district court decision guaranteed illegal aliens the right to be apprised by the INS of asylum procedures and of the right to counsel. *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982).

36. Immigration and Nationality Act, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 212 (1952) amended by the Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 918 (current version at 8 U.S.C. § 1253(h) (1982)). Section 243(h) read:

The Attorney General is authorized to withhold deportation of any alien . . . within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason. The Refugee Act of 1980 removed the discretionary words "in his opinion" from section 243(h), replaced persecution with "life or freedom would be threatened," and added "nationality" and "membership of a particular social group" to "race, religion, or political opinion." Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107 (amending § 243(h) of the INA) (codified at 8 U.S.C. § 1253(h) (1982)).

37. The Attorney General has delegated his exclusive authority over immigration procedures to the INS, which is part of the U.S. Department of Justice. 8 C.F.R. § 100.2 (1983).

38. Immigration and Nationality Act, Pub. L. 82-414, § 243(h), 66 Stat. 163, 214 (1952) (current version at 8 U.S.C. § 1253(h) (1982)).

39. The Refugee Act of 1980 established separate proceedings permitting all aliens within the United States to apply for asylum. Pub. L. No. 96-212, § 208, 94 Stat. 102, 105 (codified at 8 U.S.C. § 1158(a) (1982)).

rather than be deported to face persecution in his homeland.<sup>40</sup>

### *The United Nations Protocol*

In 1968, the United States became a party to the United Nations Protocol Relating to the Status of Refugees<sup>41</sup> (Protocol). The Protocol defines a "refugee" as a person who:

owing to a *well-founded fear of being persecuted*, for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside 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.<sup>42</sup>

A separate provision of the Protocol prohibits a signatory state's "refouler" (return) of a refugee to a territory where the refugee's life or freedom would be threatened because of race, religion, nationality, membership in a particular social group, or political opinion.<sup>43</sup>

The language of the Protocol is in several ways more liberal than the existing United States laws relating to refugees.<sup>44</sup> First, the Protocol's definition of refugee includes refugees from *any* country in the world.<sup>45</sup> Second, the Protocol eliminates the requirement that a refugee have "fled" from the country of his nationality or habitual residence.<sup>46</sup> Consequently, an alien is entitled to apply for asylum as

40. See, e.g., *Rejaie v. INS*, 691 F.2d 139, 140 (3d Cir. 1982) (the court of appeals refers to the alien's request for withholding of deportation under § 243(h) of the INA as a petition for political asylum). *But cf. In re Lam*, I.D. No. 2857 (BIA 1981) (making an important distinction between withholding of deportation and asylum in that asylum will not be granted to an alien who has been firmly resettled in a third place, whereas the concept of firm resettlement is not relevant to § 243(h) applications).

41. *Opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter cited as Protocol]. The Protocol incorporates Articles 2 to 34, inclusive, of the Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 150. The major difference between the Protocol and the Convention is that the Protocol extended protection to persons who became refugees due to world events after 1951. The United States was not a signatory to the 1951 Convention.

42. Protocol, *supra* note 41, art. 1, § 1, at 6261 (emphasis added).

43. *Id.* at 6276. Under certain circumstances, however, a refugee may be deported to another country, since withholding of deportation is country-specific. Thus, if there is any other place to which an alien may safely be deported, such deportation will be effected. See *In re Lam*, I.D. No. 2857 (BIA 1981) (the Board withheld deportation of the alien to the People's Republic of China, but found him deportable to Hong Kong because he had lived there for several years without any fear of persecution).

44. See Note, *The Right of Asylum Under United States Immigration Law*, 33 U. FLA. L. REV. 539, 544 (1981).

45. C. GORDON & H. ROSENFELD, *supra* note 22, at § 2.24Ab.

46. *Id.*

a refugee whether his original purpose was to flee persecution or whether events later made it impossible for the alien to return to his former country. Third, the term "persecution" was defined as a "threat to one's life or freedom,"<sup>47</sup> whereas United States law defined it as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive."<sup>48</sup>

By ratifying the Protocol, the United States became obligated to implement the provisions of the treaty.<sup>49</sup> Nevertheless, Congress made no effort to modify United States immigration laws to conform to the Protocol. When the Senate gave its advise and consent for the United States to become a party to the Protocol, it did so with the understanding that accession did not require any changes in the existing immigration statutes.<sup>50</sup> The INA appeared sufficiently compatible with the Protocol and flexible enough to accommodate any minor administrative alterations that would be necessary.<sup>51</sup> The INS confirmed the Senate's position in a 1973 decision of the Board of Immigration Appeals (Board).<sup>52</sup> The Board stated that accession to the Protocol would not require radical changes in existing laws.<sup>53</sup> The Protocol would merely lend the weight of the nation's moral support to the document and would influence other nations with less liberal refugee legislation to adhere to the Protocol as well.<sup>54</sup>

In 1970, an embarrassing incident known as the Kudirka Affair dramatized the need to reform asylum procedures.<sup>55</sup> Kudirka was a

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47. Protocol, *supra* note 41, art. 31, at 6275.

48. *Moghianian v. United States Dep't of Justice*, 577 F.2d 141, 142 (9th Cir. 1978) (quoting *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969)).

49. S. REP., *supra* note 1, at 4.

50. S. EXEC. DOC. K, 90th Cong., 2d Sess. 3, 7, 8 (1968); S. EXEC. REP. NO. 14, 90th Cong., 2d Sess. 6-10 (1968). See also *Ming v. Marks*, 367 F. Supp. 673, 677-79 (S.D.N.Y. 1973), *aff'd per curiam*, 505 F.2d 1170 (2d Cir. 1974) (citing the 1968 legislative history to support the belief that the Convention would not alter or enlarge the effect of existing immigration laws because United States immigration laws already embodied the principles of the Convention).

51. S. EXEC. DOC. K, 90th Cong., 2d Sess. 3, 7, 8 (1968); S. EXEC. REP. NO. 14, 90th Cong., 2d Sess. 6-10 (1968).

52. *In re Dunar*, 14 I. & N. Dec. 310, 314 (1973). The Board is an appellate panel with jurisdiction to hear appeals from decisions of INS special inquiry officers and immigration judges. 8 C.F.R. § 3.1 (1983). An alien may currently appeal a decision of the Board to the United States courts of appeals. The pending Simpson-Mazzoli Bill proposes a United States Immigration Board empowered to hear all appeals in lieu of the present Board. S. 529, 98th Cong., 1st Sess. § 124(a)(2), 129 CONG. REC. S6975 (daily ed. May 18, 1983).

53. *In re Dunar*, 14 I. & N. Dec. 310, 313-14 (1973). In effect, the Board said the treaty was not self-executing, and was not meant to supersede prior United States law. *Id.* See *Pierre v. United States*, 547 F.2d 1281, 1288 (5th Cir. 1977) (the courts also refused to acknowledge that the Protocol modified United States asylum law).

54. *In re Dunar*, 14 I. & N. Dec. 310, 314 (1973).

55. See O'Brian, *The Kudirka Affair: Bringing Sanity to the Laws of Asylum*, HUM. RTS., Winter 1980, at 38-43, 56.



Lithuanian sailor who jumped from his Soviet fishing boat to an American Coast Guard ship while both vessels were in the territorial waters of the United States. He requested immediate asylum in the United States. His request was refused without an investigation of the situation, and Kudirka was returned to his ship by Russian sailors who beat him into submission.<sup>56</sup>

The publicity from the incident caused the State Department to declare that the United Nations Protocol required all requests for asylum to be seriously considered whether made abroad or in the United States.<sup>57</sup> However, asylum was made available to persons in the United States only at the discretion of the State Department and not because of any congressional directive.<sup>58</sup> In 1974, the INS promulgated new regulations allowing aliens physically present in the country to apply directly to the INS for asylum.<sup>59</sup> These regulations, however, were insufficient to meet the growing demand for refugee resettlement in the United States by large numbers of refugees fleeing Indochina, Cuba, Haiti, and other nations with oppressive governments.<sup>60</sup> A refugee policy was needed that would "treat all refugees fairly and assist all refugees equally."<sup>61</sup>

### *The 1980 Refugee Act*

The Refugee Act of 1980 established, for the first time, a comprehensive United States refugee admission and resettlement policy in response to the rapid increase in the number of refugees worldwide.<sup>62</sup> The new Act required the Attorney General to establish a uniform procedure for determining the eligibility of an asylum applicant.<sup>63</sup> Refugees from any country would now be eligible to apply for asylum.<sup>64</sup> Additionally, a separate provision allowed aliens already

56. *Id.*

57. General Policy Statement, 66 DEP'T STATE BULL. 124 (1972); *see also* 37 Fed. Reg. 3447 (1972) (in which the INS adopted the policy set out by the State Department); *but see* Kan Kam Lin v. Rinaldi, 361 F. Supp. 177 (D.N.J. 1973), *aff'd*, 493 F.2d 1229 (3d Cir. 1974), *cert. denied*, 419 U.S. 874 (1975) (only aliens lawfully in the United States are protected by the provisions of the Protocol).

58. General Policy Statement, 66 DEP'T STATE BULL. 124 (1972).

59. 39 Fed. Reg. 41,832 (1974) (repealed in 1981 because it was superseded by the Refugee Act of 1980).

60. S. REP., *supra* note 1, at 4.

61. *Id.* at 2 (remarks of Senator Kennedy).

62. *Id.* at 1. *See supra* note 9.

63. Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 103 (adding § 208(a) to the INA) (currently codified at 8 U.S.C. § 1158(a) (1982)).

64. *Id.* (adding § 207(a)(1) to the INA) (currently codified at 8 U.S.C. § 1157(a) (1982)).

present in the United States to apply for asylum.<sup>65</sup> Even asylum requests made during deportation and exclusion proceedings were to be seriously considered.<sup>66</sup>

Another main purpose of the Refugee Act of 1980 was to conform United States law with its treaty obligations under the Protocol, despite earlier assurances that statutory changes were not necessary to comply with the Protocol.<sup>67</sup> To accomplish this objective, Congress adopted the internationally accepted definition of "refugee" contained in the Protocol.<sup>68</sup> The addition of the refugee definition was a significant reform in the United States immigration law. Under this definition, an alien must be either unable or unwilling to return to his country because of a "well-founded fear" of persecution.<sup>69</sup> The Refugee Act authorizes the Attorney General to grant asylum to any alien who meets the new definition of "refugee."<sup>70</sup>

Because the INS and the courts have espoused different interpretations of the new "well-founded fear" standard set forth in the "refugee" definition, the purpose of the Refugee Act has arguably been thwarted.<sup>71</sup> To conform United States law to the Protocol and to establish uniform asylum procedures, a single standard for determining eligibility for asylum must be adopted.

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65. *Id.* (adding § 208(a) to the INA) (currently codified at 8 U.S.C. § 1158(a) (1982)).

66. 8 C.F.R. § 208.10 (1983). Under former law, only deportable aliens were entitled to section 243(h) relief and the protection of the Protocol.

67. S. REP., *supra* note 1, at 4. *See also* *Stevic v. Sava*, 678 F.2d 401, 407 (2d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3633 (U.S. Feb. 28, 1983) (No. 82-973) (concludes that the 1980 revisions accomplish what had not been done when the United States acceded to the Protocol in 1968).

68. Pub. L. No. 96-212, § 201(a)(42), 94 Stat. 102 (1980) (adding § 101(a)(42) to the INA) (currently codified at 8 U.S.C. § 1101(a)(42) (1982)). The section states: The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

This definition replaces the restrictive eligibility requirements of § 203(a)(7) of the INA.

69. *Id.*

70. *Id.* at § 201(b) (adding § 208(a) to the INA) (codified at 8 U.S.C. § 1158(a), (b) (1982)). Upon proving eligibility, the alien is granted conditional asylum for one year, at which time permanent residence status is conferred if the alien's situation is unchanged and the annual quota of 5,000 persons allows adjustment of status. *See* 8 C.F.R. § 208.8 (1983); 8 U.S.C. § 1159(b) (1982). Asylum itself is within the discretion of the Attorney General, although it is questionable whether the Protocol allows this discretion. *See* UNITED NATIONS HIGH COMMISSIONER OF REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979); *see also* Note, *supra* note 35, at 1138.

71. *See* Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit, at 11-13, *Marroquin-Manriquez v. INS*, 699 F.2d 129 (3d Cir. 1983), *petition for cert. filed*, 51 U.S.L.W. 3759 (U.S. April 7, 1983) (No. 82-1649) [hereinafter cited as *Petition for Writ*] (on file with the San Diego Law Review).

## THE TRADITIONAL STANDARDS OF PROOF

*Section 243(h)'s "Clear Probability of Persecution" Standard*

The INA and corresponding INS regulations specifically place the burden of proving a claim for asylum on the asylum applicant.<sup>72</sup> Before the Refugee Act of 1980, section 243(h) required an applicant to show that he "would be" subject to persecution because of race, religion, or political opinion.<sup>73</sup> The Board and most of the federal courts interpreted "would be" to require a showing of a "clear probability" of persecution directed at the individual applicant.<sup>74</sup> This stringent standard has been defined as a slightly higher standard than a fear of being shot.<sup>75</sup> It developed from the concept that an alien did not have a right to asylum under section 243(h); therefore, the Attorney General could exercise discretion and restrict relief to those who would "clearly" be subject to persecution.<sup>76</sup>

While a majority of courts have followed the standard set by the Board, a few courts have developed a different standard for asylum applications. At least one federal court has applied a lesser "preponderance of the evidence" standard to section 243(h) claims,<sup>77</sup> and several courts have occasionally required close to absolute proof of the alien's pending persecution.<sup>78</sup> One United States court of appeals

72. 8 C.F.R. §§ 208.5, 242.17(c) (1983); *see also* *Martineau v. INS*, 556 F.2d 306, 307 (5th Cir. 1977) (stating that the rule is well established that an alien has the burden of proving that deportation will lead to persecution).

73. Immigration and Nationality Act, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 212 (1952) (current version at 8 U.S.C. § 1253(h) (1982)).

74. *See* *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977); *Rosa v. INS*, 440 F.2d 100, 102 (1st Cir. 1971); *Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); *In re Ramirez-Romero*, I.D. No. 2884 (BIA 1981); *In re Dunar*, 14 I. & N. Dec. 310 (1973). *See also In re Joseph*, 13 I. & N. Dec. 70, 72 (1968) (in which the Board noted that it would restrict section 243(h) relief to cases in which there was a "clear probability" of future persecution. The Board was exercising interpretative discretion; it did not claim that Congress had such a standard in mind when it drafted the statutory language "would be subject to persecution").

75. Miller, *How to Immigrate: Better Find a Relative Who's Already Here*, L.A. Daily J., July 8, 1983, at 4, col. 3.

76. *In re Joseph*, 13 I. & N. Dec. 70, 72 (1968); *see also Lena v. INS*, 379 F.2d 536, 538 (7th Cir. 1967) (although the Attorney General restricts favorable exercise of discretion to cases of a clear probability of persecution, he has not exercised his discretion in an arbitrary manner); *Yan Wo Cheng v. Rinaldi*, 389 F. Supp. 583, 585 (D.N.J. 1975) (aliens in the United States unlawfully have no right to asylum).

77. *See Henry v. INS*, 552 F.2d 130 (5th Cir. 1977); *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975); *Daniel v. INS*, 528 F.2d 1278 (5th Cir. 1976).

78. *See Marroquin-Manriquez v. INS*, 699 F.2d 129 (3d Cir. 1983), *petition for cert. filed*, 51 U.S.L.W. 3759 (U.S. April 7, 1983) (No. 82-1649) (despite six volumes of documentary evidence, expert testimony, and testimony of the alien's family, asylum and section 243(h) relief were denied); *Fleurinor v. INS*, 585 F.2d 129, 134 (5th Cir. 1978)

has actually employed three different standards.<sup>79</sup> Regardless of the standard employed, or the terminology used by the court, the result is usually the same — the alien is unable to meet the burden of proving eligibility for asylum.<sup>80</sup>

In practice, the “clear probability” standard means that an alien must produce a certain type of evidence, and produce a sufficient amount of it, to convince the Board of the credibility of the asylum application.<sup>81</sup> Specifically, the Board requires the alien to present objective evidence<sup>82</sup> that he would be singled out for persecution<sup>83</sup> by the government or in some cases by a powerful political group in the alien’s native country.<sup>84</sup> Unlike most judicial proceedings, in asylum proceedings the alien’s own unsubstantiated testimony and that of friends is generally not sufficient.<sup>85</sup> Additionally, newspaper articles

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(despite proof of past persecution, the court stated that further proof of future persecution was needed); *Kasravi v. INS*, 400 F.2d 675 (9th Cir. 1968) (despite unimpeached documentary and expert testimony, section 243(h) relief was denied).

79. See the following decisions of the Fifth Circuit: *Fleurinor v. INS*, 585 F.2d 129 (5th Cir. 1978) (applying a standard which requires almost absolute proof of persecution); *Martineau v. INS*, 556 F.2d 306 (5th Cir. 1977) (applying the “clear probability” test); *Daniel v. INS*, 528 F.2d 1278 (5th Cir. 1976) (adopting the “preponderance of evidence” test).

80. See generally *Petition for Writ*, *supra* note 71, at 11-16 (“clear probability” test as applied by the Third Circuit in *Marroquin* is a burden nearly impossible to meet and deprives many deserving refugees of relief).

81. This interpretation of the “clear probability” standard is followed by the INS in asylum cases. See *infra* notes 90-91, and accompanying text. However, the statute does not restrict or specify the considerations that may be relied upon by the Attorney General in determining that an alien would be subject to persecution. See 8 U.S.C. § 1253(h) (1982).

82. See *Moghianian v. United States Dep't of Justice*, 577 F.2d 141, 142 (9th Cir. 1978) (undocumented claim that an alien, a member of a religious minority in Iran, would be persecuted is insufficient); *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977) (objective evidence that an alien will be persecuted is necessary); *Khalil v. District Director of the INS*, 457 F.2d 1276, 1278 (9th Cir. 1972) (statements without factual support cannot sustain the alien’s burden of proof); *Rosa v. INS*, 440 F.2d 100, 102 (1st Cir. 1971) (the clear probability standard requires more than unsubstantiated assertions); *Gena v. INS*, 424 F.2d 227, 232 (5th Cir. 1970) (an alien’s failure to obtain affidavits or other evidence precludes the alien’s claim); *In re Dunar*, 14 I. & N. Dec. 310, 319 (1973) (some sort of a showing must be made and this can ordinarily be done only by objective evidence).

83. See *Shoae v. INS*, 704 F.2d 1079, 1084 (9th Cir. 1983) (proof that the alien’s family was closely connected with the Shah’s regime in Iran and that the alien’s father and brother had been persecuted was insufficient); *Fleurinor v. INS*, 585 F.2d 129, 133-34 (5th Cir. 1978) (an Amnesty International Report does not add to the claim that an alien will be subject to persecution upon return to his native country of Haiti); *Zamora v. INS*, 534 F.2d 1055, 1063 (2d Cir. 1976) (concluding that although the alien’s father had been an officer in the army of the president overthrown by Duvalier in Haiti and the alien’s step-mother was the sister of the former president, the evidence was insufficient to prove that the alien was subject to personal threats of persecution).

84. *Rosa v. INS*, 440 F.2d 100, 102 (1st Cir. 1971). The Board generally requires that the government be the persecuting agent; however, in several cases the Board has considered claims of persecution by “a strong minority [with] de facto political power.” *Id.*

85. *In re Martinez-Romero*, I.D. No. 2872 (BIA 1981); *In re Chumpitazi*, 16 I. &

and other evidence of general conditions in the country indicating widespread persecution are not considered probative, even if such evidence relates to the applicant's particular religious, social, or political group.<sup>86</sup> Even evidence of past persecution is not in itself sufficient unless the alien can show the government's motive for persecuting him still exists.<sup>87</sup> The result of the Board's harsh "clear probability" standard and strict evidentiary requirements is that few aliens are granted relief from deportation, regardless of the likelihood of their persecution.

### *Section 203(a)(7)'s "Good Reason to Fear Persecution" Standard*

In contrast, section 203(a)(7) of the INA, added in 1965, made asylum available to an alien who could demonstrate that he was unable or unwilling to return to his native country due to "persecution or fear of persecution."<sup>88</sup> This language was almost identical to the definition of "refugee" adopted a few years later by the Protocol. To prove asylum under section 203(a)(7), the Board required an applicant to demonstrate a "good reason" to fear persecution.<sup>89</sup> The

N. Dec. 629 (1978). In most civil and criminal proceedings, the credibility of a person's testimony is a question for the judge or jury to decide. *Ballou v. United States*, 370 F.2d 659, 664 (6th Cir. 1966), *cert. denied*, 388 U.S. 911 (1967) (the manner and demeanor of the witnesses were relevant factors to be considered by the jury in determining the weight to be accorded to the testimony given). *See United States v. Copeland*, 263 F. Supp. 976, 979 (S.D.N.Y. 1967) (in determining credibility, the trier of fact should consider the witness's appearance, manner, demeanor, frankness, and capacity to relate accurately, as well as the contents of the testimony).

86. *In re Diaz*, 10 I. & N. Dec. 199, 200 (1963); *Ishak v. INS*, 432 F. Supp. 624 (N.D. Ill. 1977); *cf. Coriolan v. INS*, 559 F.2d 993, 1004 (5th Cir. 1977) (the INS could not properly decide an alien's fate without taking note of conditions in the alien's country); *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 475 (S.D. Fla. 1980) (in reviewing the claims of Haitians, the court stated that no asylum claim can be examined without an understanding of the conditions in the applicant's homeland).

87. *See Fleurinor v. INS*, 585 F.2d 129, 134 (5th Cir. 1978) (requiring that the claimant present evidence that the Haitian government remembers him despite having been beaten, robbed, and jailed eight years earlier).

88. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 203(a)(7), 79 Stat. 911, 912-15 (amending the INA) (repealed 1980). Section 203(a)(7) read:

Conditional entries shall next be made available by the Attorney General . . . to aliens who satisfy an . . . officer (A) that (i) because of persecution or *fear 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) 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 . . .

(Emphasis added).

89. *See In re Ugricic*, 14 I. & N. Dec. 384 (1972); *In re Adamska*, 12 I. & N.

Board admitted on several occasions that the "good reason" test was less stringent than the "clear probability" test of section 243(h), although both sections were intended to aid aliens fleeing persecution in their homeland.<sup>90</sup> Several aliens made attempts to convince the Board that United States ratification of the Protocol in 1968 mandated the eligibility requirements of section 243(h) to conform to the more lenient "good reason to fear" standard of section 203(a)(7) because it more closely followed the Protocol's definition of a "refugee."<sup>91</sup> Yet the Board specifically rejected the contention that the same standard of proof was required for both sections of the Act, despite the legislative history of the 1965 amendments to the INA which approved a single standard of proof for both sections.<sup>92</sup>

#### THE EFFECT OF THE 1980 REFUGEE ACT ON THE ASYLUM STANDARD OF PROOF

##### *Stevic v. Sava*

With passage of the 1980 Act, Congress expressed its intent to align United States asylum law with the Protocol,<sup>93</sup> and admitted that more than "minor administrative alterations" were necessary. The "well-founded fear" requirement of the Protocol's definition of "refugee" was adopted as the uniform standard of proof for all applicants under the new Act.<sup>94</sup> Both asylum and withholding of deportation provisions, now based directly on the language of the Protocol, were intended to be construed consistent with the meaning of the Protocol.<sup>95</sup>

*Stevic v. Sava*<sup>96</sup> was the first case to directly address the effect of

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Dec. 201 (1967).

90. *In re Tan*, 12 I. & N. Dec. 564, 569-70 (1967); *In re Janus & Janek*, 12 I. & N. Dec. 866, 876 (1968).

91. *In re Tan*, 12 I. & N. Dec. 564, 568-70 (1967); *In re Janus & Janek*, 12 I. & N. Dec. 866, 876 (1968).

92. 111 CONG. REC. H21,804 (1965) (remarks of Rep. Poff comparing the burden of proof of § 203(a)(7) to that of amended § 243(h): "[A]n alien who seeks to enter this country as a refugee must prove that he is a victim of persecution on account of one of three things, race, religion, or political opinion. My amendment simply requires that the alien who is about to be deported from this country must bear the same burden of proof if he is to be spared the penalty of deportation and retained in this country.")

93. S. REP., *supra* note 1, at 4.

94. *Id.* at 9, 16. See *Stevic v. Sava*, 678 F.2d 401, 408 (2d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3633 (U.S. Feb. 28, 1983) (No. 82-973).

95. See H. R. REP., *supra* note 33, at 20. In *In re Lam*, I.D. No. 2857 (BIA 1981), the Board held that "where a finding has been made that an alien's life or freedom would be threatened in a given country, and that his deportation to that country should thus be withheld, then it should also be found that the alien has a well-founded fear of persecution in that country for asylum purposes." *Id.* at 5. However, the Board distinguished a grant of asylum from a stay of deportation under section 243(h) because asylum additionally requires that the alien has not "firmly resettled" himself in another country. *Id.* at 5.

96. 678 F.2d 401 (2d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3633 (U.S. Feb. 28,

the Refugee Act's "well-founded fear" test on the alien's burden of proof. The Board had denied Stevic the opportunity to reopen his deportation proceedings to apply for withholding (pursuant to section 243(h)), because he failed to demonstrate "a clear probability" of persecution. The Second Circuit held that the Protocol's more liberal "well-founded fear" standard made the Board's "clear probability" standard no longer applicable.<sup>97</sup> After an exhaustive analysis of the Act's legislative history, the court concluded that "asylum may be granted and, under section 243(h), deportation must be withheld, upon a showing far short of a 'clear probability' that an individual will be singled out for persecution."<sup>98</sup> The court remanded the case for a full hearing under the more lenient standard of proof established by the Protocol, and codified in the 1980 Refugee Act. Although the *Stevic* court discussed the elements an alien must prove to be granted asylum—that the alien have a fear of persecution, and that the fear be well-founded—it purposely did not focus on the character of evidence that would be needed to satisfy the elements of the new standard.<sup>99</sup>

### *The Conflict Between the Circuits Over the Appropriate Standard*

Five months later, the Third Circuit, faced with the same issue, concluded that *Stevic* was wrongly decided. In *Rejaie v. INS*,<sup>100</sup> the court agreed with the government's position in *Stevic* that the terms "clear probability" and "well-founded fear" were identical.<sup>101</sup> Under either test, according to the *Rejaie* court, the alien must present "some objective evidence establishing a realistic likelihood that he

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1983) (No. 82-973). Other cases have examined the "clear probability" test in light of the language of the Protocol. See *supra* notes 90-91 and accompanying text. See also *INS v. Stanisic*, 395 U.S. 62, 79 n.22 (1969) (the Supreme Court noted that it was premature at that time to consider whether, and under what circumstances, a deportation order would contravene the Protocol). Although the test has been questioned before, *Stevic* was the first case to address the issue of the alien's burden of proof since the provisions of the Protocol were codified into United States law.

97. 678 F.2d at 408. The *Stevic* court rejected the Board's conclusion in *In re Dunar*, 14 I. & N. Dec. 310, 319-21 (1973), that the "clear probability" test was the same as the "well-founded fear" test. 678 F.2d at 406. The *Stevic* court found that the "well-founded fear" test more closely resembled the "good reason to fear" test of former section 203(a)(7). Since the Refugee Act eliminated the distinction between aliens seeking to enter as refugees under the old section 203(a)(7) and deportable aliens already in the country seeking political asylum under section 243(h), a uniform standard of proof should be applied in both situations. 678 F.2d. at 408.

98. 678 F.2d at 409.

99. *Id.*

100. 691 F.2d 139 (3d Cir. 1982).

101. *Id.* at 146.

would be persecuted in his native land.”<sup>102</sup>

The *Rejaie* court relied on pre-1980 case law to determine that the two standards were equivalent because both required more than a subjective or conjectural fear of persecution.<sup>103</sup> The court also quoted the legislative history of the Refugee Act to show that the modification of section 243(h) was merely a procedural change, not a substantive one.<sup>104</sup> The Third Circuit concluded that the Refugee Act did *not* modify the legal test applicable to section 243(h) because the INS had already been applying the legal test mandated by the Protocol.<sup>105</sup> Furthermore, the INS insisted that the Board and the courts have consistently applied the objective “clear probability” test even though the test has been described by a variety of terminology, including “probability of persecution,” “likelihood of persecution,” “reason to fear persecution,” and “well-founded fear of persecution.”<sup>106</sup>

One of the criticisms the *Rejaie* court had of the *Stevic* decision was that the Second Circuit had attributed a stringency to the “clear probability” test which was not consistent with prior cases. *Stevic*, however, did not reject the requirement that the alien produce *some* evidence of a threat of persecution. Rather, it distinguished the Board’s strict objective test used (with regard to deportable aliens) in section 243(h) cases from the more lenient “good reason to fear” test applied by the Board when considering admission of refugees under section 203(a)(7),<sup>107</sup> a distinction which the Board itself had recognized prior to the 1980 Act.<sup>108</sup> While the Second Circuit in

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102. *Id.* at 144.

103. *See* *Kashani v. INS*, 547 F.2d 376 (7th Cir. 1977); *see also In re Dunar*, 14 I. & N. Dec. 310, 319 (1973), in which the Board stated:

Some sort of showing must be made and this can ordinarily be done only by objective evidence. The claimant’s own testimony as to the facts will sometimes be all that is available; but the crucial question is whether the testimony, if accepted as true, makes out a realistic likelihood that he will be persecuted. The burden of coming forward with the requisite evidence is obviously the claimant’s. And, if all he can show is that there is a merely conjectural possibility of persecution, his fear can hardly be characterized as ‘well-founded.’

104. 691 F.2d at 144, 146. *See also* S. REP., *supra* note 1, at 9; H.R. REP., *supra* note 33, at 18, (states that the new asylum provisions clarify the procedure for determining claims filed by aliens physically present in the United States. The subjective standard did not change. However, until 1980 Congress had never indicated what the appropriate standard is under the Protocol. The INS developed the “clear probability” standard and the federal courts of appeals deferred to the agency’s expertise and discretion).

105. 691 F.2d at 146-47.

106. Petition for Writ, *supra* note 71, at 16.

107. 678 F.2d at 405-06.

108. *See In re Joseph*, 13 I. & N. Dec. 70, 72 (1968); *In re Tan*, 12 I. & N. Dec. 564, 568-69 (1967). INS Operating Instruction 208.4, issued November 11, 1981, copies the “good reason” language:

The burden is on the asylum applicant to establish that he/she is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of the country of such person’s nationality . . . because of perse-



*Stevic* emphasized the elements an alien must prove to obtain asylum, the Third Circuit focused on the type of evidence required. According to the *Rejaie* court, only objective evidence of persecution, as opposed to undocumented fears, would satisfy the alien's burden of proving eligibility for asylum.<sup>109</sup>

A classic example of the application of the stringent "clear probability" test is illustrated by the Third Circuit's decision in *Marroquin-Manriquez v. INS*.<sup>110</sup> In *Marroquin*, the court denied the alien's request for asylum and application for withholding of deportation because he had not presented evidence showing a "clear probability" of persecution if he were returned to Mexico, his native country. The Third Circuit also affirmed its recent decision in *Rejaie*, that the "clear probability" of persecution standard is identical to the new "well-founded fear" standard, and therefore the Board did not err in its use of the "clear probability" standard.<sup>111</sup>

Marroquin, a Marxist student revolutionary, had been involved in peaceful campus demonstrations until a local newspaper falsely accused him of assassinating a fellow student activist. Upon an attorney's recommendation, Marroquin fled the country, eventually entering the United States illegally, where he worked under an assumed name. While in the United States he learned that Mexican authorities continued to arrest and torture student activists, and that he had been accused of participating in an armed guerrilla assault and robbery.<sup>112</sup>

At his deportation hearing, Marroquin testified that a Mexican attorney told him he would never receive a fair trial in Mexico and that he should stay out of the country. His fear of persecution was corroborated by his wife's testimony, six volumes of documentary evidence, and the testimony of three expert witnesses.<sup>113</sup> Despite Marroquin's overwhelming amount of convincing evidence,<sup>114</sup> the court

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cution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. This means that the applicant must have actually been persecuted, or can show good reason why he/she fears persecution.

(Emphasis added).

109. 691 F.2d at 145-46.

110. 699 F.2d 129 (3d Cir. 1983), *petition for cert. filed*, 51 U.S.L.W. 3759 (U.S. April 7, 1983) (No. 82-1649).

111. *Id.* at 133.

112. *Id.* at 130-31.

113. *Id.* at 131-32.

114. Very few aliens have documentary evidence or expert testimony to corroborate their testimony. Marroquin produced substantially more evidence than most aliens. See *In re A—*, reported at 60 INTERPRETER RELEASES 25, 27 (1983).

affirmed the Board's ruling that "the record as a whole did not sustain the claim that Marroquin himself would be persecuted upon his return to Mexico."<sup>115</sup> It noted that the Board had denied relief because it found no "compelling reason to believe that Marroquin would not receive a fair trial in Mexico" and because one expert witness was unable to state "conclusively" that Marroquin would be persecuted if deported.<sup>116</sup> Such an application of the "clear probability" test reveals it to be far more stringent than the "well-founded fear" test adopted by the 1980 Act. Instead of focusing on the alien's *fear* of persecution, the "clear probability" test requires almost absolute proof of future persecution — a burden practically impossible to meet before persecution has actually occurred.<sup>117</sup>

### *Defining the Well-Founded Fear of Persecution Test*

Not only does the "clear probability" test approach a degree of certainty which makes it nearly impossible to satisfy, but it totally ignores the subjective component of the analysis emphasized by the United Nations Committee which drafted the Protocol. According to the United Nations Committee, the expression "well-founded fear" of being persecuted means either that a person has actually been a victim of persecution or "*can show good reason why he fears persecution.*"<sup>118</sup>

In 1979, the United Nations published its interpretation of the Protocol in its *Handbook on Procedures and Criteria for Determining Refugee Status*.<sup>119</sup> The *Handbook*, an accumulation of twenty-five years of experience and research, was published as a guideline for Contracting States to aid in administering the Protocol. Since the United States is a contracting party to the Protocol, and has expressed its intent to follow its provisions, the *Handbook* should be used in conjunction with the 1980 Act to formulate specific procedures regarding the admission of refugees. The *Handbook* states

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115. 699 F.2d at 132.

116. *Id.* at 133-34. *See also* Petition for Writ, *supra* note 71, at 16 (quoting from *Reyes v. INS*, 693 F.2d 597, 600 (6th Cir. 1982): "In light of the powerful showing that was made below, it is 'difficult to see what more than what was offered here [could be] require[d] short of proof of actual persecution after the fact.'").

117. Petition for Writ, *supra* note 71, at 16. *See also* *Reyes v. INS*, 693 F.2d 597, 600 (6th Cir. 1982).

118. United Nations Economic and Social Council, Report of the Ad Hoc Committee on Statelessness and Related Problems 11, U.N. Doc. E/1618; E/AC 32/5 (1950) (emphasis added).

119. Published by the OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (1979) [hereinafter cited as HANDBOOK]. Because the HANDBOOK was not published until shortly before final passage of the Refugee Act, no mention of the HANDBOOK is made in the legislative history. However, the Board has treated the HANDBOOK as a significant source of guidance as to the meaning of the Protocol. *In re Rodriguez-Palma*, 17 I. & N. Dec. 465 (1980).

that a "well-founded fear of being persecuted" involves subjective as well as objective elements.<sup>120</sup>

These elements may be proved by various types of evidence. The subjective element requires the court to evaluate the alien's statements,<sup>121</sup> his personality,<sup>122</sup> and his opinions and feelings<sup>123</sup> to determine whether the alien's fear is reasonable under the circumstances. Occasionally, an alien may have been subject to various circumstances, none in themselves amounting to persecution, but which have a cumulative effect on the applicant's mind which creates a well-founded fear of persecution.<sup>124</sup> A valid claim to refugee status may be justified on the "cumulative grounds" theory even though no specific evidence shows that the applicant "would be" subject to persecution if deported.<sup>125</sup>

The objective element necessitates an evaluation of the applicant's credibility.<sup>126</sup> Such an evaluation can be accomplished by producing evidence to prove that the alien's fear is well-founded. Relevant evidence includes statements of the applicant's own personal experiences, as well as the experiences of friends, relatives, and "other members of the same racial or social group."<sup>127</sup> The laws of the country of origin are also probative, "particularly the manner in which they are applied."<sup>128</sup> Finally, evidence of general conditions in the alien's native country are important. Although such evidence alone will not support a grant of asylum, a knowledge of these conditions is necessary to assess the alien's credibility.<sup>129</sup>

The sufficiency of evidence under the "well-founded fear" standard is also less demanding than under the "clear probability" stan-

120. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS § 38 (1979). Both the government and the courts agreed that the correct standard requires a rational fear and not merely a subjective evaluation. See *Petition for Rehearing*, *supra* note 18, at 8, 12, in which the INS uses the language of section 37 of the HANDBOOK to equate a "well-founded fear" with a "clear probability" of persecution.

121. HANDBOOK, *supra* note 119, at § 37.

122. *Id.* at § 40.

123. *Id.* at § 52.

124. *Id.* at § 53.

125. *Id.*

126. *Id.* at § 42.

127. *Id.* at § 43. The "clear probability" standard does not consider experiences of third persons to be probative of the individual's likelihood of persecution. *Shoae v. INS*, 704 F.2d 1079 (9th Cir. 1983).

128. HANDBOOK, *supra* note 119, at § 43.

129. *Id.* at §§ 37, 42, 98. Examples of conditions include a state of war or civil war in the country, as well as activities by political terrorists or secret police which make the country unsafe for the asylum applicant. *Id.*

dard. Under the “well-founded fear” test the lack of outside evidence need not defeat an asylum claim. In most cases a person fleeing from persecution will have arrived with only the barest necessities and very frequently without documents to prove his statements.<sup>130</sup> In such cases, if the applicant’s account appears credible, he should be given the benefit of the doubt unless there are good reasons to the contrary, or the alien’s statements are inconsistent with generally known facts.<sup>131</sup> False statements are not necessarily a reason for refusal of refugee status.<sup>132</sup> “A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive [of] any authority [and] may therefore be afraid to speak freely and give a full and accurate account” of past persecution.<sup>133</sup> “It may be necessary for the examiner to clarify any apparent inconsistencies and to resolve any contradictions” through personal interviews with the applicant.<sup>134</sup>

Although the burden of proof rests on the alien, the examiner has the burden of eliciting and clarifying information relating to the alien’s situation as well as the burden of researching the case.<sup>135</sup> When all available evidence has been obtained and checked, the examiner must decide the case solely on the criteria set forth above, unclouded by personal or political considerations.<sup>136</sup> If the court finds that the alien has good reason to fear persecution, asylum should be granted.

### *The Need for Uniform Application of the “Well-Founded Fear” Standard*

Although the *Handbook* defines the “well-founded fear” test in detail, the INS and the federal courts of appeals have not applied the test uniformly. On the contrary, the reaction of the courts to *Stevic* has been mixed. Confusion over the proper standard of proof and its evidentiary requirements is apparent in recent decisions.

At least one other court of appeals has followed *Stevic* and held that “the ‘clear probability’ test is inconsistent with the tenor and spirit, if not the language” of the 1980 Act.<sup>137</sup>

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130. *Id.* at § 196.

131. *Id.* at § 204.

132. *Id.* at § 199.

133. *Id.* at § 198.

134. *Id.* at § 199. The examiner may be a special examiner from the INS, or an immigration judge if an asylum request is made during deportation proceedings. 8 C.F.R. §§ 208.3, 208.6 (1983).

135. HANDBOOK, *supra* note 119, at § 196.

136. *Id.* at §§ 204, 205.

137. *Reyes v. INS*, 693 F.2d 597, 599 (6th Cir. 1982). The Ninth Circuit also arguably adopted the reasoning of the *Stevic* court in *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981), decided several months before *Stevic*. See also *Almirol v. INS*, 550 F. Supp. 253 (N.D. Cal. 1982), (the district court rejected the “clear probability” standard

The Sixth Circuit, in *Reyes v. INS*, agreed that a more lenient standard of proof is now required, but failed to indicate the quantum of proof now sufficient to satisfy the "well-founded fear" test.<sup>138</sup> The court, however, impliedly rejected the traditional rule that unsubstantiated testimony is insufficient to support a claim under section 243(h).<sup>139</sup>

The reaction of the Board reflects the confusion among the federal courts of appeals. At least two decisions of the Board have adhered to the strict "clear probability" standard requiring evidence that the aliens *would* face persecution if deported.<sup>140</sup> In both cases, asylum was denied. Another case quoted the Refugee Act's definition of "refugee" but followed the holding of the Third Circuit in *Rejaie*, holding that the new definition was identical to the old "clear probability" standard.<sup>141</sup>

In three other cases, the Board was undecided on the appropriate standard for asylum eligibility.<sup>142</sup> Acknowledging that the Second Circuit had rejected the "clear probability" standard in *Stevic*, the Board nevertheless found that the aliens' claims were meritless under either the "clear probability," "well-founded fear," "good reason," or "realistic likelihood" standards of proof.

However, two recent decisions by immigration judges have followed the *Handbook's* recommendation in evaluating the aliens' requests for asylum. In a radical departure from traditional evidentiary requirements, an immigration judge granted both asylum and withholding of deportation solely on the strength of the applicant's own testimony.<sup>143</sup> The judge quoted the *Handbook* to support the contention that while objective evidence is preferable, the final deter-

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in favor of the "well-founded fear" standard as contained in the INA's definition of "refugee").

138. *Reyes v. INS*, 693 F.2d 597, 600 (6th Cir. 1982).

139. *Id.* The alien in *Reyes*, a native of the Philippines, offered only two documents, letters which described the physical persecution of others and advised her not to return, to support her fear of persecution. *Id.* at 599. The court apparently viewed the alien's testimony as credible because it could not see "what more than was offered here . . . short of proof of actual persecution" would be necessary. *Id.* at 600. Instead of remanding the case for reconsideration under the less stringent standard, the court reversed the judgment and granted the alien's request for asylum.

140. *In re Exilus*, I.D. No. 2914 (BIA 1982); *In re Portales*, I.D. No. 2905 (BIA 1982).

141. *In re Sibrun*, I.D. No. 2932 (BIA 1983).

142. *Shoae v. INS*, 704 F.2d 1079 (9th Cir. 1983); *In re Matelot*, I.D. No. 2927 (BIA 1982); *In re Phelisna*, I.D. No. 2913 (BIA 1982), *rev'd*, 551 F. Supp. 960 (E.D.N.Y. 1982).

143. *In re A—*, reported at 60 INTERPRETER RELEASES 25, 26-29 (1983).

mination must be based on the credibility of the alien's testimony; and if credible, whether the testimony constitutes a basis for finding that the alien has a "well-founded fear" of persecution.<sup>144</sup> The judge concluded that the alien's past associations with the Somoza Regime in Nicaragua, considered with the general political climate in that country today, satisfied the "cumulative grounds" theory on which a claim of fear of persecution may be based.<sup>145</sup>

In another decision,<sup>146</sup> the immigration judge granted asylum and withholding of deportation on the basis of personal observations of the applicant, evaluation of her testimony and that of her witnesses, and newspaper articles, letters, and affidavits submitted by the alien. Despite an opinion from the State Department<sup>147</sup> recommending denial of the alien's claim, the judge was satisfied that the alien had testified truthfully and had a reasonable, well-founded fear of persecution.<sup>148</sup>

These decisions, while recognizing the effect of the 1980 Act, indicate the need for a uniform standard of proof for aliens seeking political asylum in the United States. The "well-founded fear" of persecution standard should be adopted as set forth in the statutory definition of "refugee"<sup>149</sup> and defined by the United Nations in its *Handbook*.<sup>150</sup> Under this standard, the alien must prove that he has a "fear of persecution" and that his fear is "well-founded."<sup>151</sup> Both objective and subjective evidence may be used to prove the elements of the "well-founded fear" standard.<sup>152</sup> Additionally, the sufficiency of the evidence is to be determined on a case-by-case basis, depending on the credibility of the alien's story.<sup>153</sup> Once an alien establishes a prima facie case under the "well-founded fear" standard, asylum should be granted.

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144. *Id.*

145. See HANDBOOK, *supra* note 119, at § 53.

146. *In re —*, reported at 60 INTERPRETER RELEASES 106 (1983).

147. The Bureau of Human Rights and Humanitarian Affairs (BHRHA), at the State Department, is required to issue recommendations on whether an applicant's claim should be granted or denied. 8 C.F.R. § 208.7 (1983). These opinions are based on the BHRHA's knowledge of the alien's native country. The BHRHA's opinions are routinely followed by the INS officers when processing asylum applications. Immigration judges, on the other hand, are more reluctant to blindly follow the recommendations, preferring to make independent evaluations of the aliens' applications. See *supra* note 15.

148. *In re —*, reported at 60 INTERPRETER RELEASES 106 (1983).

149. See 8 U.S.C. § 1101(a)(42) (1982).

150. HANDBOOK, *supra* note 119; see *supra* note 120 and accompanying text.

151. See 8 U.S.C. § 1101(a)(42) (1982).

152. HANDBOOK, *supra* note 119, at §§ 38-43.

153. *Id.* at § 44.

## CONCLUSION

By enacting the Refugee Act of 1980, Congress intended to conform existing law to the Protocol and to establish a more uniform procedure for the admission of refugees.<sup>154</sup> Since Congress adopted the Protocol's definition of "refugee," it is arguably obligated to follow the guidelines set forth in the *Handbook* for implementing the "well-founded fear" standard. These guidelines differ in many ways from the guidelines and procedures followed by the INS.<sup>155</sup> Therefore, the currently used standard(s) of proof must be conformed to the standard mandated by the Protocol and the *Handbook*. Several possible solutions exist.

First, Congress could amend the Refugee Act of 1980 to include a statutory standard of proof for granting asylum. Based on the *Handbook's* interpretation of the Protocol, the appropriate test would be a "good reason to fear persecution."<sup>156</sup> Once the test is explicitly adopted by Congress, regulatory guidelines which parallel the recommendations of the *Handbook* should be promulgated. Such legislation would ensure nationwide uniformity in applying the standard. Furthermore, it would clarify Congress' intent to modify former laws relating to asylum.

A second and more feasible solution would be for the INS to promulgate new regulations which follow the *Handbook's* definition of a "well-founded fear" of persecution. Arguably, Congress has already provided a standard of proof for asylum by codifying the Protocol's definition of a "refugee," which requires an alien to show a "well-founded fear" of persecution.<sup>157</sup> Although new regulations were enacted after the passage of the Refugee Act of 1980, much of the language relating to the alien's burden of proof has remained unchanged or ambiguous.<sup>158</sup> Since the INS is required to issue regulations which conform to the laws enacted by Congress,<sup>159</sup> new regulations should be promulgated which implement the new "refugee"

154. See *supra* notes 62-70 and accompanying text.

155. See *supra* text accompanying notes 119-34.

156. HANDBOOK, *supra* note 119, at § 45.

157. Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102, 102 (adding § 101(a)(42) to the INA) (codified at 8 U.S.C. § 1101(a)(42) (1982)).

158. See 8 C.F.R. § 208 (1983) (quoting the language of the "refugee" definition without explanation of what the provision requires); 8 C.F.R. § 242.17 (1983) (requiring the alien to show that he *would be* subject to persecution).

159. 8 U.S.C. § 1103(a) (1982) (requires the Attorney General to establish such regulations as he deems necessary for carrying out the provisions of the INA); see 8 C.F.R. § 100.6 (1983) (INS adoption of the congressional mandate).

definition. These regulations should follow the requirements of the *Handbook*, equating a "well-founded fear" of persecution with a "good reason to fear" persecution. By defining the specific requirements of the test as set forth above, the current practice of applying various standards will be eliminated.

Finally, the Supreme Court may provide a resolution to the controversy over the issue of the appropriate standard of proof. Whether the Court will provide an immediate solution to the problem, however, depends on the extent of the Court's findings. One possibility is that the Court will agree with the Third Circuit decision in *Marroquin-Manriquez* and uphold the "clear" probability" standard. This result would be contrary to the intent of Congress because it would ignore the legislature's adoption of the new "well-founded fear" test as defined by the Protocol. Another possibility would be for the Court to affirm the Second Circuit's holding in *Stevic*, which mandates a more lenient standard as a result of the Refugee Act of 1980. While this possibility would be consistent with the new definition of "refugee," it fails to provide the necessary guidelines for implementation of the new "well-founded fear" standard. The most effective solution would be for the Court to concur with *Stevic* and to set forth the requirements of the standard pursuant to the recommendations of the *Handbook*. Such a decision would require the INS and the federal courts to follow the same standard for determining asylum eligibility, and provide a means of achieving the objectives set forth by Congress in the Refugee Act of 1980.

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