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PROVING THE EXISTENCE OF PERSECUTION IN ASYLUM AND WITHHOLDING CLAIMS

JONI L. ANDRIOFF*

I. INTRODUCTION

The purpose of the Refugee Act of 1980¹ was to establish a comprehensive refugee resettlement and assistance policy. The statute was to reflect "one of the oldest themes in America's history—welcoming homeless refugees to our shores."² Through the Act, Congress intended to "[give] statutory meaning to our national commitment to human rights and humanitarian concerns."³ More than six years after passage, however, the humanitarian goals of the Act remain what one commentator has called an "unfulfilled promise."⁴

The Refugee Act of 1980 amended the Immigration and Nationality Act⁵ by establishing a mechanism for granting political asylum to those aliens who met the definition of "refugee." Congress defined the term "refugee" as a person with a well-founded fear of persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion.⁶ In addition to amending the asylum provisions of the Act, Congress revised the provisions that allowed for the withholding of deportation of aliens who could show that they feared persecution in their native countries. Congress, however, in both the asylum and withholding of deportation sections of the Act, failed to define "persecution" or to explain what circumstances constituted persecution under the Act.

As a result of Congress' failure to define persecution, the Immigration and Naturalization Service [INS] and the courts have developed on a case by case basis the evidentiary criteria for proving persecution in asy-

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1. Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C. (1982)).

2. S. REP. NO. 256, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 141.

3. *Id.*

4. A. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfilled Promise*, 17 U. MICH. J.L. REF. 243, 243 (1984).

5. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (codified in 8 U.S.C. §§ 1101-57 (1952)) [hereinafter cited as I.N.A. or "the Act"].

6. Political asylum is available to persons outside the United States and to aliens already in the United States. The United Nations Protocol and the Refugee Act of 1980 apply the definition of "refugee" to both groups. In referring to "refugees", this Note means those aliens trying to obtain asylum from within the United States.

lum and withholding of deportation claims. The circuit courts have split on the types of proof required to meet the clear probability of persecution standard for withholding claims and the well-founded fear standard for asylum claims. The result has been a set of criteria so strict that some courts and commentators have wondered whether an alien fleeing oppression can possibly meet it.⁷ In addition, some critics charge that the strict interpretation of the standards and the lack of Congressional guidance as to what constitutes persecution has allowed United States foreign policy goals to overshadow the humanitarian goals of the Act.⁸

This note discusses the courts' efforts to interpret the Act so as to effectuate its humanitarian goals. First, it explains the procedures available to an alien seeking to remain in the United States pursuant to the asylum or withholding of deportation provisions of the Act. Next, the substantive meaning of the well-founded fear and clear probability of persecution standards are discussed. The note then examines the types of evidence recently considered by the courts in evaluating an alien's asylum and withholding claims. It concludes that the well-founded fear standard is less stringent than the clear probability standard, and that courts are justified in relaxing the strict evidentiary criteria for showing the existence of persecution.

II. PROCEDURES AVAILABLE TO ALIENS WHO SEEK TO REMAIN IN THE UNITED STATES FOR FEAR OF PERSECUTION UPON RETURN TO THEIR NATIVE COUNTRIES

The I.N.A. provides two methods by which an alien may remain in the United States for fear of persecution in his native country.⁹ First, the alien can apply for a grant of asylum pursuant to section 208¹⁰ of the I.N.A. The alien's second alternative is to apply for withholding of deportation pursuant to section 243(h) of the Act.¹¹ These methods are closely related, but they differ procedurally and provide different forms

7. Wildes, *The Dilemma of the Refugee: His Standard for Relief*, 4 CARDOZO L. REV. 353-79 (1983); Note, *Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286 (1983); Note, *Political Asylum and Withholding of Deportation: Defining the Appropriate Standard of Proof Under the Refugee Act of 1980*, 21 SAN DIEGO L. REV. 171 (1983); Note, *The Right of Asylum Under United States Immigration Law*, 33 U. FLA. L. REV. 539 (1981).

8. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243 (1984) [hereinafter referred to as *Helton article*]; Note, *Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286 (1983).

9. An alien may apply for asylum or request a withholding of deportation even if he has entered the United States illegally. However, if the illegal entry involved fraud or deception, the alien's application for asylum may be denied. See *In re Salim*, Interim Dec. No. 2922 (BIA Sept. 29, 1982).

10. Section 208 of the I.N.A. appears at 8 U.S.C. § 1158 (Supp. 1985).

11. Section 243(h) of the I.N.A. appears at 8 U.S.C. § 1253(h) (Supp. 1985).

of relief. One important difference between the two methods is that asylum relief may be granted at the discretion of an INS district director or immigration judge while withholding of deportation is mandatory with respect to qualified applicants.¹²

A. Political Asylum under Section 208

The Refugee Act of 1980 added section 208¹³ to the I.N.A.¹⁴ This section directed the Attorney General to establish procedures by which an alien physically present in the United States can apply for asylum. The section states that “the alien may be granted asylum in the discretion of the Attorney General if [he] determines that such alien is a refugee within the meaning of Section 101(a)(42)(A).”¹⁵ In that section, Congress defined “refugee”¹⁶ as:

[A]ny 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.¹⁷

Once the alien is adjudged to be a refugee, however, his application for asylum may still be denied at the discretion of the Attorney General as exercised by the INS district director with jurisdiction over the alien’s port of entry or place of residence. However, if the alien applying for

12. Even if withholding of deportation is granted under § 243(h), the alien may still be deported to a third country. Section 208 asylum relief is “complete” relief from deportation and therefore a more substantial benefit. Also, a grant of withholding leads to no further benefits while a grant of asylum leads to eligibility for permanent residency status.

13. 8 U.S.C. § 1158 (Supp. 1985).

14. Prior to the passage of the Refugee Act of 1980, political asylum was governed by § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1952) (amended 1980), which made asylum available to a certain number of persons fleeing from Communist or Communist-dominated countries or from the general area of the Middle East because of persecution or the fear of persecution on account of race, religion, or political opinion. Before passage of the Refugee Act of 1980, the I.N.A. did not provide for asylum for aliens already in the United States. The 1980 Act also eliminated the statutory bias in favor of aliens from particular countries or types of regimes.

Although if substantially amended the I.N.A. by eliminating the requirement that the petitioner must be from a certain type of country or political regime, the 1980 Act has not brought major changes in practice in U.S. asylum policy. During the four fiscal years after passage of the 1980 Act, virtually no refugees have been admitted to the U.S. from “non-communist dominated” countries. As of July, 1982, out of a total of 463, 665 refugees admitted since the Act was enacted, 383 came from non-communist countries. ADVANCED IMMIGRATION WORKSHOP 1984, LITIGATION AND ADMINISTRATION PRACTICE SERIES, COURSE HANDBOOK SERIES, No. 246.

15. See *supra* note 13.

16. Congress derived this definition of refugee from the UNITED NATIONS PROTOCOL RELATING TO THE STATUS OF REFUGEES, January 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 268 [hereinafter cited as PROTOCOL], adopting articles 2 through 34. See *infra* note 39 and accompanying text.

17. 8 U.S.C. § 1101(a)(42)(A) (Supp. 1985).

asylum has been served with a notice of referral to exclusion proceedings or with an order to show cause for deportation proceedings,¹⁸ then exclusive jurisdiction over his asylum application lies with the immigration judge, not the district director.¹⁹ If the district director denies an application for asylum, the applicant may renew his request for asylum before the immigration judge in any subsequent exclusion or deportation proceedings.²⁰ Asylum requests made after the institution of deportation proceedings are automatically considered requests for withholding of deportation under section 243(h) of the Act.²¹ If an immigration judge is to hear the asylum claim, the application is filed with the judge's clerk and a hearing on the merits is scheduled.²²

Prior to the adjudication of the asylum claim, an advisory opinion is requested from the State Department's Bureau of Human Rights and Humanitarian Affairs²³ as to whether the applicant's fear of persecution is well-founded. The advisory opinion, if not classified as confidential, is then made part of the hearing record.²⁴ At the hearing, the applicant has the burden of proving that he is unable or unwilling to return to the country of his nationality "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a

18. The fact that an illegal alien must alert the INS to his presence in applying for asylum discourages many aliens from applying. This is especially true for aliens from Central America. INS statistics show that aliens from Guatemala and El Salvador, regardless of the merits of their cases, have an extremely poor chance of successfully applying for asylum. In fiscal year 1984, for example, the INS processed 13,373 applications for political asylum by Salvadorans. It denied 13,045 applications and granted 328. Of those denied, about 4,000 were returned to El Salvador. Most of the remainder appealed for a new hearing. *New York Times*, February 3, 1985, at 30, col. 1. Moreover, according to an internal INS report, different levels of proof are required of different asylum applicants according to the foreign policy interests of the United States with respect to the country involved. An El Salvadoran national must have a "classic textbook case" to obtain a favorable State Department advisory opinion. I.N.S. ASYLUM ADJUDICATIONS: AN EVOLVING CONCEPT AND RESPONSIBILITY FOR THE I.N.S. 57 (1982), as quoted in the Helton article at 254.

The encroachment of foreign policy concerns on asylum decisions has given rise to the Sanctuary Movement, a collection of church and lay groups that assist political refugees who enter the United States. The movement "developed out of moral necessity—the obligation of persons of faith to stand with the persecuted." CHICAGO RELIGIOUS TASK FORCE ON CENTRAL AMERICA, SANCTUARY AND THE LAW: A GUIDE FOR CONGREGATIONS 1 (1984). Members of the sanctuary movement argue that "religious workers assisting refugees are acting within their constitutional rights by responding to the biblical requirement to aid and assist refugees fleeing terror. The Bill of Rights protects the free exercise of religion." *Id.* The adherents of the movement believe that it is immoral for the U.S. government to further its foreign policy by returning aliens to dangerous conditions in their home countries. The movement contends that the moral issue becomes acute when the political strife endangering these aliens is furthered or instigated by the United States. CHICAGO RELIGIOUS TASK FORCE, SANCTUARY: A JUSTICE MINISTRY 18 (1982).

19. 8 C.F.R. § 208.1(b) (1985).

20. 8 C.F.R. § 208.9 (1985).

21. 8 C.F.R. § 208.3(b) (1985).

22. 8 C.F.R. § 208.6 (1985).

23. 8 C.F.R. § 208.7 (1985). See *infra* text accompanying note 34 and at notes 82 and 100.

24. 8 C.F.R. §§ 208.8(d), 208.10(b) (1985).

particular social group, or political opinion.”²⁵

The Act provides no substantive guidance to the district director in making asylum decisions.²⁶ INS regulations, however, require the district director to deny asylum requests in some specific instances.²⁷ The regulations do not specify how an immigration judge is to make asylum decisions.

The INS regulations do not provide for an administrative appeal when the district director denies an application for asylum. In addition, the regulations do not provide for review by the federal district courts for denials by district directors.²⁸ The regulations are also silent with respect to whether an immigration judge's decision to deny asylum may be appealed.²⁹ However, denials of asylum may be appealed to the Bureau of Immigration Affairs (BIA).

If the asylum request is granted, the alien may remain in the United States for one year. At the end of one year, asylum claims originally granted by a district director are reassessed. Asylum status may be ter-

25. 8 C.F.R. § 208.5 (1985).

26. The United Nations High Commissioner for Refugees compiled the HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979) [hereinafter referred to as HANDBOOK] as a guide to the Protocol's requirements. The BIA and some courts have used the HANDBOOK as an important means of interpreting the PROTOCOL. *Stevic v. Sava*, 678 F.2d 401, 406 n.8 (2d Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 2489 (1984), citing *Matter of Rodriguez-Palma*, Interim Dec. No. 2815 (BIA, Aug. 26, 1980).

27. 8 C.F.R. § 208.8(f) (1985) states:

(f) Denial — (1) *General*. The district director shall deny a request for asylum or extension of asylum status if it is determined that the alien:

- (i) Is not a refugee within the meaning of section 101(a)(42) of the Act;
- (ii) Has been firmly resettled in a foreign country;
- (iii) That the alien ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular group, or political opinion;
- (iv) The alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
- (v) There are serious reasons for considering that the alien has committed a serious non-political crime outside the United States prior to the arrival of the alien in the United States; or
- (vi) There are reasonable grounds for regarding the alien as a danger to the security of the United States.

28. If the denial of asylum is appealed to a federal district court, the court generally will dismiss the appeal for failure to exhaust the administrative remedy available before the immigration judge in subsequent deportation or exclusion proceedings. *But cf. Nasan v. INS*, 449 F. Supp. 244 (N.D. Ill. 1978). If the alien fails to request asylum before the close of exclusion or deportation proceedings, he may request that the proceedings be reopened by explaining why he failed to raise the asylum claim during the exclusion or deportation proceeding. 8 C.F.R. § 208.11 (1985). If the alien does not explain this failure, the asylum claim will be considered “frivolous,” and the motion to reopen will be denied.

29. *But see, e.g., Carvajal-Munoz v. INS*, 743 F.2d 562, 566 (7th Cir. 1984), in which the Seventh Circuit held that it could directly review the denial of an asylum claim by an immigration judge. *See also Chavarria v. U.S. Dep't of Justice*, 722 F.2d 666 (11th Cir. 1984), in which the court assumed that it could directly review the immigration judge's denial of an asylum claim.

minated 1) if circumstances have changed in the asylee's country of nationality so as to eliminate the need for asylum, 2) if the asylee poses a danger to the security of the United States or is convicted of a serious crime, or 3) if the alien was not eligible for asylum in the first instance.³⁰

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

Section 243(h) of the Act provides that:

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.³¹

Unlike an application for political asylum, withholding of deportation under section 243(h) is mandatory once a likelihood of persecution is proved.

The determination of whether to withhold deportation is made in a hearing.³² Traditionally, the INS has interpreted section 243(h) to place the burden on the applicant to establish a clear probability that he would be subjected to persecution if returned to his native country.³³ A State Department advisory opinion is not required.³⁴ The withholding of deportation is merely a stay of deportation with respect to the alien's native country. He may, however, be deported to a third country even if he successfully makes out a section 243(h) claim.

An alien whose application for asylum is denied by the district director is not precluded from requesting a withholding of deportation at a subsequent deportation hearing. As explained above, INS regulations provide that asylum applications filed with the immigration court after the deportation proceeding have begun are to be considered as requests for withholding under section 243(h).³⁵ Therefore, if an application for asylum is filed after deportation proceedings have commenced, there is no need to file a separate application for a withholding of deportation.³⁶

30. 8 C.F.R. § 208.15(a)(1-3) (1985).

31. 8 U.S.C. § 1253(h) (Supp. 1985).

32. 8 C.F.R. § 242.17(c) (1985).

33. *Id.*

34. The alien's deportation proceeding is not stayed while the court awaits an advisory letter in a contemporaneous asylum claim.

35. 8 C.F.R. § 208.3(b) (1985).

36. Conversely, a request for withholding under § 243(h) is not automatically considered as an application for asylum under § 208. An alien may be barred from applying for asylum while still being permitted to request withholding under § 243(h). This situation can occur when an alien requests that a deportation proceeding be reopened on the basis of a request for asylum. 8 C.F.R. § 208.11 (1985). At that time, the request will be denied unless the alien reasonably explains why he failed to request asylum prior to the completion of the deportation hearing. *Id.* Moreover, an alien

The two are automatically considered together.

The immigration judge has exclusive jurisdiction over requests for withholding of deportation under section 243(h). Denials of requests for withholding may be appealed to the BIA and then to the federal circuit courts of appeal.³⁷ The immigration judge has discretion to reopen a deportation or exclusion proceeding in which he has made a decision if he is satisfied that evidence to be offered is material and was not available at the hearing.

C. *The Different Standards of Proof under Sections 208 and 243(h)*

Before the enactment of the Refugee Act of 1980, the I.N.A. did not provide for asylum for aliens already in the United States. However, an alien could apply for withholding of deportation under section 243(h). The courts required applicants to show a clear probability of persecution in order to be eligible for a grant of withholding under section 243(h).³⁸ In order to meet the clear probability standard, an alien had to establish by objective evidence that he would be singled out for persecution if deported to his native country. This requirement was difficult to meet for aliens who typically fled their native countries without proper documentation of persecution.

In 1968, the United States acceded to the *United Nations Protocol Relating to the Status of Refugees*.³⁹ The *Protocol*, which contained guidelines for the granting of political asylum, included a definition of

may be granted a request for withholding of deportation after being denied asylum. Asylum can be denied if the alien comes within one of the undesirable groups described in I.N.A. § 243(h)(2) and 8 C.F.R. § 208.8(f)(iii-vi) (1985) or if the alien has been firmly resettled in another country. See 8 C.F.R. § 207.1(b)(1) (1985); 8 U.S.C. § 1157(c)(1) (Supp. 1985); 8 C.F.R. § 208.8(f)(1)(i) (1985); 8 C.F.R. § 208.14 (1985). Also, even though the district director or immigration judge determined that the alien would be subject to persecution if returned to his home country, discretionary asylum may be denied while mandatory withholding of deportation to the home country may be granted. See *In re Salim*, Interim Dec. No. 2922 (BIA Sept. 29, 1982) (asylum application denied because of fraudulent means of entering the country; withholding of deportation to home country granted. Alien was deported to a third country).

37. 8 C.F.R. § 242.21 (1985).

38. *Cheng Kai Fu v. I.N.S.*, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968); *Lena v. INS*, 379 F.2d 536 (7th Cir. 1967).

39. Congress amended the I.N.A. in 1980 to conform with the PROTOCOL, *supra* note 16. The PROTOCOL contained recommendations with respect to granting political asylum to those it defined as "refugees." The Protocol adopted the definition of "refugee" used in the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter referred to as Convention]. According to the PROTOCOL, "refugees" are people who have left their country "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." The PROTOCOL also included Article 33 of the Convention which states that no party to the PROTOCOL may return a refugee to "territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

“refugee” as one with a well-founded fear of persecution.⁴⁰ The *Protocol*’s well-founded fear standard for those seeking political asylum was less stringent than the administrative clear probability standard used for the proof of withholding claims under the I.N.A. For example, the well-founded fear standard allowed for the consideration of subjective factors, such as the alien’s opinions and statements, as well as objective factors in assessing the likelihood that an alien would face persecution if deported.⁴¹

The Refugee Act of 1980 adopted the *Protocol*’s new definition of “refugee” for asylum purposes. It established a procedure for granting asylum to aliens already in the United States, and it included the *Protocol*’s requirement for the mandatory withholding of deportation for qualified applicants. These new provisions and the humanitarian rhetoric of the *Protocol* caused the circuit courts to disagree⁴² as to the proper stan-

40. See *supra* notes 16 and 39.

41. In 1979, the United Nations published a handbook to assist governments in interpreting the PROTOCOL. The handbook explains that the assessment of the well-founded fear standard involves subjective as well as objective factors. The subjective factors include evidence such as “the alien’s statements, his personality, and his opinions and feelings to determine whether the alien’s fear is reasonable under the circumstances” existing in his home country. In addition, a valid claim to refugee status can be proved on “cumulative grounds” when no one single factor would justify such a finding.

In addition to subjective factors, the handbook requires the consideration of such objective factors as an evaluation of the petitioner’s credibility with respect to his own experiences, the experiences of his family and friends, or other members of the same social group, the laws of the country of origin and evidence of general conditions in the petitioner’s native country. HANDBOOK, *supra* note 26, at §§ 37 *et seq.* (1979), as discussed in Note, *Political Asylum and Withholding of Deportation: Defining the Appropriate Standard of Proof Under the Refugee Act of 1980*, 21 SAN DIEGO L. REV. 171, 189 (1983).

42. Prior to the Supreme Court’s decision in *INS v. Stevic*, 104 S. Ct. 2489 (1984), the disagreement among the circuits arose primarily as a result of the courts’ attempts to conform to the 1968 accession to the PROTOCOL. According to the Second Circuit in *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982), *rev’d on other grounds*, 104 S. Ct. 2489 (1984), the PROTOCOL, its language, history and subsequent usage as derived from the HANDBOOK indicated a standard “somewhat more generous” than the BIA’s administrative practice of requiring an applicant for withholding to show a clear probability of persecution. *Id.* at 406. The court stated that the clear probability test was “initially articulated by the B.I.A. as its preferred way of implementing what had been the wholly discretionary authority of Section 243(h).” *Id.* It reasoned that since the absolute obligation of Article 33 had been adopted in § 243(h) as requiring mandatory withholding, “standards developed in an era of discretionary authority require some adjustment.” *Id.* Stating that “the strongly humanitarian rhetoric accompanying the legislation is helpful to interpretation,” the court concluded that an alien could meet his burden of proof under § 243(h) by showing a well-founded fear of persecution. *Id.* at 408.

While some circuit courts were persuaded by *Stevic*, others assumed that the criteria for eligibility for a grant of asylum under § 208(a) were identical to those for a prohibition of deportation under § 243(h). See, e.g., *Zavala-Bonilla v. INS*, 730 F.2d 562, 563 n.1 (9th Cir. 1984) (declining to choose standard but treating § 243(h) claim as the alien’s only available asylum claim); *Reyes v. I.N.S.*, 693 F.2d 597, 599-600 (6th Cir. 1982), *vacated*, 747 F.2d 1045 (6th Cir. 1984) (a showing short of a clear probability is sufficient for both asylum and withholding); *Rejaie v. INS*, 691 F.2d 139, 146 (3d Cir. 1982) (requiring evidence of a clear probability of persecution in order to demonstrate that a fear of persecution is well-founded); *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977)

dard to be applied to withholding and asylum claims under the I.N.A. The Second,⁴³ Sixth,⁴⁴ and Ninth⁴⁵ Circuits applied the well-founded fear standard to asylum claims under both section 208 and section 243(h) requests for withholding. The courts reasoned that the pre-accession clear probability standard was too strict to comport with the humanitarian goals of the Act. The Third Circuit⁴⁶ contended that the well-founded fear standard was identical to the stricter pre-accession clear probability standard.

In *INS v. Stevic*,⁴⁷ the Supreme Court attempted to settle the disagreement among the circuits. The Court held that in order to prevail on an application for asylum, the alien must show a well-founded fear of persecution.⁴⁸ By contrast, in order to obtain a mandatory withholding of deportation, the alien must show a clear probability.⁴⁹ The Court ensured, however, further disagreement among the circuits by failing to define or explain the clear probability standard. The Court merely required that "an application [for withholding] be supported by evidence establishing that it is more likely than not that the alien would be subject to persecution on one of the specified grounds."⁵⁰ It also failed to explain what acts constitute persecution. Similarly, the Court held that the well-founded fear standard is to be applied to asylum claims, but it declined to define that standard. It stated simply that the well-founded fear standard is "more generous" than the clear probability standard.⁵¹

D. Proving a Clear Probability of Persecution

Since *Stevic*, the courts have struggled to define the well-founded fear standard with respect to asylum claims and the clear probability standard for withholding of deportation claims. Because the *Stevic* Court refused to define "persecution" for either withholding or asylum claims, the circuits split again as to the interpretation of the two standards and

(using the clear probability test for a request for withholding, but predicting that the two standards "will in practice converge"). Commentators shared the view that the 1980 codification of the PROTOCOL represented a liberalization of the alien's burden of proof. See *supra* notes 7 and 8.

43. See, e.g., *Stevic v. Sava*, 678 F.2d 401, 408 (2d Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 2489 (1984).

44. See, e.g., *Reyes v. INS*, 693 F.2d 597, 599-600 (6th Cir. 1982), *vacated*, 747 F.2d 1045 (6th Cir. 1984).

45. See, e.g., *McMullen v. INS*, 658 F.2d 1312, 1316 (9th Cir. 1981).

46. *Rejaie v. INS*, 691 F.2d 139, 146 (3d Cir. 1982).

47. 104 S. Ct. 2489 (1984).

48. *Id.* at 2501.

49. *Id.*

50. *Id.*

51. *Id.* at 2498.

the type of evidence required to meet them. The Third Circuit⁵² and the INS⁵³ cling to their pre-*Stevic* determination that a clear probability of persecution is required for both withholding and asylum claims. They interpret the two standards as requiring the alien to show, by objective evidence, a realistic likelihood that he would be persecuted if deported to his native country.⁵⁴ The Sixth,⁵⁵ Seventh,⁵⁶ and Ninth⁵⁷ Circuits hold that the clear probability standard requires the alien to show a likelihood that the applicant would be persecuted if returned to his home country. These circuits, however, require a lesser showing for the well-founded fear standard.⁵⁸

The Sixth, Seventh, and Ninth Circuits' departure from the INS's view reflects the courts' growing discomfort with the strict evidentiary requirements developed by the INS with respect to asylum and withholding claims. Traditionally, the courts deferred to the INS's expertise in immigration matters.⁵⁹ The result has been a set of evidentiary requirements so onerous that the courts and commentators wonder if they can ever be met. They argue that such restrictions are inconsistent with the humanitarian goals of the Act.⁶⁰ In interpreting the statute for themselves, the courts return to their proper role of reviewing the decisions of the BIA without "a special judicial mood of extraordinary caution in immigration matters."⁶¹

52. *Sotto v. INS*, 748 F.2d 832, 836 (3d Cir. 1984).

53. The BIA asserts its position that the two standards are identical even in circuits that have held otherwise. In *Matter of Acosta*, Interim Dec. No. 2986, (BIA March 1, 1985), the BIA stated: [W]e see no valid reason for departing from the construction of the well-founded fear standard that prevailed in this country prior to the Refugee Act of 1980. Accordingly, we continue to construe "a well-founded fear of persecution" to mean that an individual's fear of persecution must have its basis in external, or objective, facts that show there is a realistic likelihood he will be persecuted upon his return to a particular country.

This holding prompted the Ninth Circuit in *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1454 (9th Cir. 1985) to observe that the "[BIA] appears to feel that it is exempt from the holding of *Marbury v. Madison* [citation omitted], and not constrained by the circuit court opinion." *Matter of Acosta*, Interim Dec. No. 2986 at 21.

54. *Rejaie v. INS*, 691 F.2d 139, 146-47 (3d Cir. 1982) ("[W]e must conclude that petitioner did not demonstrate by objective evidence a realistic likelihood that he would be persecuted in his native land."); *Acosta*, Interim Dec. No. 2986 at 21 ("[W]e continue to construe a 'well-founded fear of persecution' to mean that an individual's fear of persecution must have its basis in external, or objective, facts that show there is a realistic likelihood that he will be persecuted . . .").

55. *Youkhanna v. INS*, 749 F.2d 360 (6th Cir. 1984).

56. *Caravajal-Munoz v. INS*, 743 F.2d 573 (7th Cir. 1984).

57. *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1985).

58. *Id.* at 1283; *Youkhanna v. INS*, 749 F.2d 360 at 362; *Caravajal-Munoz v. INS*, 743 F.2d at 574.

59. *Ananeh-Firempong v. INS*, 766 F.2d 621, 623 (1st Cir. 1985); *see also Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1454 (9th Cir. 1985) (the court admonishes the BIA for failing to follow Ninth Circuit opinions).

60. *See supra* notes 7-8 and accompanying text.

61. *Ananeh-Firempong*, 766 F.2d at 624.

The legislative history and purpose fo the Act belie the INS's view that the well-founded fear and clear probability standards are identical and require the alien to show a realistic likelihood that he would be persecuted upon return to his native country. While the legislative history of the Act indicates that Congress did not contemplate any great changes in immigration policy with the enactment of the Refugee Act of 1980,⁶² several changes are obvious on the face of the amended Act. These changes indicate that some administrative adjustments were necessary in order to effectuate the Act. The Sixth, Seventh, and Ninth Circuits are justified in holding that the clear probability standard is stricter than the well-founded fear standard for the following reasons.

First, section 208 requires a "well-founded fear of persecution" while section 243 requires a showing that the claimant's "life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion." As the *Stevic* Court suggested, section 208's requirement of "persecution" is a "seemingly broader concept than threats to 'life or freedom.'" ⁶³ For example, persecution may include the infliction of suffering or harm upon those who differ in a way considered offensive.⁶⁴ Thus, section 208's "persecution" language goes beyond the threat of death and imprisonment or detention suggested by section 243. This reasoning led the Ninth Circuit to conclude that the two standards are different since the "statutory term 'persecution' encompasses more than the non-statutory term 'persecu-

62. At the time the United States acceded to the PROTOCOL, Congress did not amend the I.N.A. because the President and State Department assured Congress that it did not need to be amended in order to comply with the PROTOCOL. *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 2489 (1984) *citing* S. EXEC. DOC. K, 90th Cong., 2d Sess. 3, 7, 8 (1968); S. EXEC. REP. NO. 14, 90th Cong., 2d Sess. 6-10 (1968). However, in the late Seventies, the influx of the Cuban refugees and Vietnamese "boat people" indicated that U.S. asylum policy was inadequate to accommodate large numbers of refugees. Congress then amended the I.N.A. to include asylum procedures for aliens already in the U.S.

The legislative history of the 1980 Act acknowledges that the amendments to the Act conformed it to the PROTOCOL by including a new definition of "refugee" and by making the withholding of deportation mandatory for qualified applicants. S. REP. NO. 608, 96th Cong., 1st Sess. 9 (1979), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 141. However, according to the Senate Report, the amendments relating to the withholding of deportation were not seen as major changes. S. REP. NO. 256, 96th Cong., 1st Sess. 9, 17 (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 141, 149. Similarly, while the House Report recognized that § 243(h) was amended to conform the withholding provision to the Article 33 of the PROTOCOL, it stated that the section was changed only for "the sake of clarity." H.R. REP. NO. 608, 96th Cong., 1st Sess. 18, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 1980. After 1968, taking its cue from Congress, the INS continued to require objective evidence of individualized persecution in order to meet the clear probability standard. The impetus to relax the criteria for § 243(h) claims after the U.S.'s accession to the PROTOCOL in 1968 came from the circuit courts.

63. *INS v. Stevic*, 104 S. Ct. 2489, 2500 n.22 (1984).

64. *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1452 (9th Cir. 1985) *citing* *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969).

tion' used in the judicially established 'clear probability of persecution test.' ”⁶⁵

Second, section 243 clearly requires the claimant to show that his life or freedom *would be* threatened if he were returned to his native country. This requires the alien to make an objective showing that persecution will occur. By contrast, section 208's language suggests a more subjective showing. It requires the alien to show that he *fears* persecution and that his fear is well-founded. This difference in the language of the two sections indicates that the well-founded fear standard is more subjective and therefore less stringent than the clear probability standard.

Third, section 208 replaced a provision⁶⁶ allowing conditional entry for a specified number of aliens from Communist and Middle Eastern countries applying from outside of the United States. The old provision granted asylum to applicants who had a "fear of persecution on account of race, religion, or political opinion."⁶⁷ The BIA decisions interpreting this provision⁶⁸ held that "fear of persecution" was a less stringent standard than the administrative clear probability of persecution requirement applied to section 243 claims. The pre-1980 "fear of persecution" standard required only that the claimant show a "good reason" for his fear.

By analogy, this "good reason" to fear persecution interpretation should be applied to the new asylum provision's well-founded fear of persecution language. The language of the old and new provisions is similar and both provisions refer to grants of asylum. The fact that the new provision erased the Act's geographic and numerical discrimination has no bearing on the quality of fear required to prove an asylum claim. Thus, the courts' interpretation of the new provision's "fear" standard should be guided by the prior interpretation of the old provision.

The "good reason" interpretation of the well-founded fear standard is supported by the *Handbook on Procedures and Criteria for Determining Refugee Status*.⁶⁹ The *Handbook* was compiled by the United Nations High Commissioner for Refugees to aid governments in interpreting the 1968 Protocol. The *Handbook's* explanations are based on the knowledge accumulated by the High Commissioner's Office over a period of 25 years. This knowledge includes "the practice of States in regard to the determination of refugee status, exchanges of views between

65. *Cardoza-Fonseca*, 767 F.2d at 1452.

66. *See supra* note 14 and accompanying text.

67. *See supra* note 14 and accompanying text.

68. *Stevic v. Sava*, 678 F.2d 401, 405 (2d Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 2489 (1984), *citing* *Matter of Tan*, 12 I. & N. Dec. 564 (1967); *Matter of Ugricic*, 14 I. & N. Dec. 384, 385-86 (1972).

69. *See supra* note 26 and accompanying text.

the Office and the competent authorities of Contracting States, and the literature devoted the subject over the last quarter century.”⁷⁰ Several courts and the BIA have recognized the *Handbook* as an important guide in interpreting the *Protocol* which formed the basis of the Refugee Act of 1980.⁷¹ According to the *Handbook*, the courts should consider subjective factors in determining whether the applicant fears persecution. The *Handbook* states that “an applicant for refugee status must normally show good reason why he individually fears persecution” in order to prove that his fear is well-founded.⁷² These explanations indicate that the *Protocol*’s well-founded fear standard for determining refugee status is less strict than the administrative clear probability standard.

Finally, the Act’s new asylum provision, section 208, gives the Attorney General discretion with respect to requests for asylum. In addition, the Act amended section 243⁷³ to require *mandatory* withholding when an applicant successfully made out his claim. The fact that the withholding of deportation is mandatory once the claim is proved supports the contention that Congress intended a stricter standard for mandatory withholding than for discretionary asylum. The clear probability standard is stricter because, once proved, the Attorney General is compelled to withhold deportation. By contrast, once an alien shows that he has a well-founded fear of persecution, the district director may still deny the claim.

The INS’s response⁷⁴ to this argument is that Congress intended a strict standard for asylum claims because a grant of asylum entitles the claimant to the greater benefit of remaining in the United States while the successful claimant under section 243 may be deported to a third country. However, this INS assertion does not defeat the courts’ contention that the well-founded fear standard is less stringent. Under the Act, the Attorney General still has discretion to deny asylum claims even for claimants who show a well-founded fear of persecution. Further, even after a district director grants a request for asylum, the claim may be reevaluated after one year and the grant of asylum withdrawn if the district director determines that the alien’s fear is no longer well-founded.⁷⁵

For the foregoing reasons, the Sixth, Seventh, and Ninth Circuits’ holding that the well-founded fear standard is less stringent than the

70. HANDBOOK, *supra* note 26 at 1.

71. See *supra* note 26 and accompanying text.

72. HANDBOOK, *supra* note 26 at 13.

73. 8 U.S.C. § 1153(h), Pub. L. No. 82-414, 66 Stat. 163 (1952).

74. *Matter of Acosta*, Interim Dec. No. 2986 at 28.

75. See *supra* note 30 and accompanying text.

clear probability standard is justified. It is useful to examine how the courts interpret the statutory bases of persecution in light of the two standards.

III. THE STATUTORY BASES OF PERSECUTION

A. Political Activities

Generally, the BIA⁷⁶ and the courts⁷⁷ require an applicant to show that he would be singled out for persecution if returned to his native country. In establishing an individualized fear, the courts have found persuasive evidence that the alien became known personally to his persecutors because of his political activities. Although sections 208 and 243(h) state that an alien shall not be deported if he fears persecution or threats to his life or freedom for holding a particular political opinion, the courts require more than a bare claim that the alien subscribes to such an opinion.⁷⁸ The petitioner must show that he expressed this opinion. Typically, such an expression required overt participation in political activity. Proof of a remote association,⁷⁹ mere membership in a dissent group,⁸⁰ or sporadic political activity⁸¹ were insufficient to estab-

76. See *supra* note 53 and accompanying text.

77. See, e.g., *Dally v. INS*, 744 F.2d 1191, 1195-96 (6th Cir. 1984); *Chavez v. INS*, 723 F.2d 1431, 1434 (9th Cir. 1984); *Chavarria v. U.S. Dep't of Justice*, 722 F.2d 666, 670 (11th Cir. 1984); *Sanchez v. INS*, 707 F.2d 1523, 1527 (D.C. Cir. 1983); *Fleurinor v. INS*, 585 F.2d 129, 133 (5th Cir. 1978); *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977).

78. In *Lugovic v. INS*, the court rejected the petitioner's "blanket assertion" that he would be persecuted if deported because he supported freedom for an Albanian region within Yugoslavia. In finding that the petitioner failed to meet the appropriate standard, the court noted that the petitioner had never belonged to any political organization, never came individually to the attention of the Yugoslavian government, and was not hampered by the Yugoslavian government when he left for the United States. According to the court, *Lugovic* failed to show why he would be any more susceptible to persecution than any of the other 1.4 million inhabitants of the region. 727 F.2d 1109 (6th Cir. 1984) (unpublished), quoted in *Shamon v. INS*, 735 F.2d 1015, 1016-17 (6th Cir. 1984).

79. In *Chavez v. INS*, 723 F.2d 1431 (9th Cir. 1984), the court denied the petitioner's motion to reopen his deportation proceedings because he had failed to make a prima facie showing that he was eligible for withholding under § 243(h). The court stated that the petitioner's "assertions of potential persecution based on his remote membership in a union are not convincing, nor has he presented any specific evidence of such persecution." *Id.* at 1434.

80. In *Marroquin-Manriquez v. INS*, 699 F.2d 129 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 3553 (1984), the petitioner claimed that he was a member of the Student Revolutionary Commission (CER) which protested conditions at the University of Nuevo Leon in Monterrey, Mexico, and that he later became a Marxist. He testified that he had learned of the murder of a fellow member of the CER and that a subsequent newspaper article linked petitioner to the killing. The court affirmed the BIA's order of deportation despite evidence that members of the CER were often "framed" for crimes they did not commit and that the Mexican government discriminated against Marxists. *Id.* at 131-32. The court was persuaded by evidence that some members of the CER had been released from custody.

81. In *Carvajal-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984), the court held that the petitioner failed to meet both the clear probability and the well-founded fear standards. In *Carvajal-Munoz*, the petitioner claimed that he was arrested for participating in demonstrations in Argentina. He testified that the Buenos Aires police had told him that he could not participate in demonstrations

lish persecution within the meaning of the Act.⁸² According to the courts, these passive forms of political activity failed to distinguish the petitioner from others who shared his political views. In short, the petitioner had to show that he was singled out because of his political activity, not simply because of his political opinion.

The specificity required for a showing of persecution on the basis of political opinion has worked a hardship on persons fleeing countries where political oppression has been characterized as widespread and non-specific.⁸³ The courts typically held that failing or refusing to join a political faction was not "individualized" enough to constitute a political opinion under the Act.⁸⁴ Thus, threats or violence resulting from a neu-

because he was Chilean. *Id.* at 577-78. The court stated that, if substantiated, the claim would establish persecution on the basis of nationality. *Id.* at 578. Because the objective evidence did not establish whether his Argentine friends were arrested in the demonstration, however, the petitioner failed to prove that he had been singled out for persecution. The petitioner also claimed that he had distributed pamphlets criticizing the military. The court rejected the petitioner's claim that he had been persecuted for that activity because he did not submit evidence that the police were aware of it. *Id.* at 578-79.

82. In *Zavala-Bonilla v. INS*, 730 F.2d 562 (9th Cir. 1984), the court held that there was insufficient evidence on the record to support the BIA's finding that the petitioner failed to prove a § 243(h) claim. Holding that the well-founded fear standard applied to a claim for withholding, the court held that *Zavala-Bonilla* proved that she would be persecuted because she had been an executive in her union, had helped to organize a general strike, and had been harassed by police on a picket line in her home country of El Salvador. According to the court, these facts belied the BIA's finding that the persecution within the meaning of § 243(h) had not been proved.

The court was further impressed by a State Department advisory letter recommending that *Zavala's* application for asylum be granted. The court noted that the advisory opinion, routinely denied to El Salvadorans, was "especially significant given this country's economic and political ties to El Salvador." *Id.* at 567 n.6.

Similarly, in *Augustin v. Sava*, 735 F.2d 32 (2d Cir. 1984), the petitioner alleged that he and his cousin had formed a local opposition group which challenged the Tonton Macoutes, the paramilitary forces supporting Jean Claude Duvalier, then President of Haiti, and had participated in secret martial arts classes. The petitioner left Haiti when his cousin was arrested. *Id.* at 34. The court reversed on procedural grounds the district court's denial of his petition for a writ of habeas corpus seeking review of an order of exclusion and deportation and remanded for a new hearing on the petitioner's credible asylum claim. *Id.* at 38.

Finally, in *McMullen v. I.N.S.*, 658 F.2d 1312 (9th Cir. 1981), a pre-*Stevic* case, the Ninth Circuit used the well-founded fear standard to establish a § 243(h) claim. The petitioner in *McMullen* was an active member of the Provisional Irish Republican Army (PIRA), a radical splinter of the Irish Republican Army. He had deserted the British Army and joined the PIRA in order to forestall an attack against Catholic demonstrators. When the PIRA became "extremist and terroristic," he resigned. The police arrested the petitioner for his prior involvement with the PIRA. He was imprisoned for three years in a segregated wing in order to protect him from PIRA member-prisoners. After his release, the petitioner cooperated with Scotland Yard. After coming to America, he cooperated with the U.S. Bureau of Alcohol, Firearms and Tobacco. When the INS sought to deport him, the petitioner supported his claim that the PIRA would persecute him upon his return with extensive documentation. The BIA, however, rejected his claim for withholding. In reversing the BIA, the court stated that "[i]f [petitioner], a well known former PIRA member with an extensively documented claim of probable persecution, failed to present sufficient proof, then it appears close to impossible for *anyone* in [his] position to make out a § 243(h) claim." *Id.* at 1319 (emphasis added).

83. See *supra* notes 7 and 8.

84. *Dally v. INS*, 744 F.2d 1191, 1196 (6th Cir. 1984); *Chavez v. INS*, 723 F.2d 1431, 1434 (9th

tral stance were considered to be merely a consequence of living in a country experiencing political upheaval. The petitioner had to show some "special circumstance" for which he was singled out for persecution.⁸⁵

For example, in *Zepeda-Melendez v. INS*,⁸⁶ the Ninth Circuit specifically rejected the petitioner's contention that his neutral stance entitled him to withholding of deportation. In *Zepeda-Melendez*, the petitioner alleged that his family's strategically located house was occupied by government soldiers during the day and by an anti-government faction at night. According to the petitioner, neither group knew of the other's use of the house. When the anti-government faction forced Zepeda-Melendez to agree to store arms in the house, he fled before any arms were brought for storage. In denying his application for withholding of deportation, the court held that "applications for relief based on generalized allegations of persecution resulting from the political climate of a nation"⁸⁷ were not sufficiently specific to constitute persecution under section 243(h). According to the court, the danger arising from his family's ownership of a strategically located house did not qualify as persecution based on race, religion, nationality, membership in a social group, or political opinion within the meaning of section 243(h).⁸⁸ The court further stated that "[t]o the extent that Zepeda also faces danger because of his noncommitment to either side, his danger is the same as faced by other Salvadorians. It is not specific enough to mandate withholding of deportation."⁸⁹

Zepeda-Melendez reflects the court's concern that defining neutrality as a political opinion would expand the number of aliens eligible for withholding and asylum by including persons who were not overtly participating in political activity. The court's unspoken fear was that resi-

Cir. 1984); *Martinez-Romero v. INS*, 692 F.2d 595, 595-96 (9th Cir. 1982); *Rejaie v. INS*, 691 F.2d 139, 145 (3d Cir. 1982); *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977).

85. *Saballo-Cortez v. INS*, 761 F.2d 1259, 1264 n.3 (9th Cir. 1984) (court unpersuaded by Nicaraguan petitioner's fear of persecution because he "belong[ed] to the social class of young men who refuse to give service, military or otherwise," to the Sandinistas); *Lugovic v. INS*, 727 F.2d 1109 (6th Cir. 1984) (unpublished) quoted in *Shamon v. INS*, 735 F.2d 1015 (6th Cir. 1984) (no proof that he was actually a member of a dissident political group); *Chavez v. INS*, 723 F.2d 1431, 1433 (9th Cir. 1984) (status as a "young urban male neither in the military nor with the guerrillas" lacked sufficient specificity to trigger relief); *Shamon v. INS*, 735 F.2d 1015, 1017 (6th Cir. 1984) (refusal to join Baath political party insufficient to establish realistic likelihood of persecution); cf. *Sarkis v. Sava*, 599 F. Supp. 724, 726 (E.D.N.Y. 1984) (court states that refusal to join Baath party constitutes a political opinion, but petitioner's claim of harassment at school is insufficient to prove he was singled out for persecution because of his political opinion).

86. 741 F.2d 285 (9th Cir. 1984).

87. *Id.* at 289-90.

88. *Id.* at 290.

89. *Id.*

dents of countries suffering widespread, politically-motivated violence would have incentive to enter the United States illegally in the hopes of successfully making out a claim under sections 208 or 243(h). The court's dilemma was conforming the strict requirement for an individualized fear of persecution based on overt political activity with the humanitarian goals of the Act.

This dilemma was addressed in *Bolanos-Hernandez v. INS*⁹⁰ in which the petitioner fled El Salvador to the United States after being told by the anti-government factions that he would be killed if he did not join their forces. In granting Bolanos' withholding claim, the Ninth Circuit declared that neutrality constitutes a political opinion under the Act.⁹¹ It stated:

When 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 of 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. Moreover, construing “political opinion” in so short-sighted and grudging a manner could result in limiting the benefits under the ameliorative provisions of our immigration laws to those who join one political extreme or another; moderates who choose to sit out a battle would not qualify.⁹²

The court distinguished *Zepeda-Melendez* in which it had rejected neutrality as a political opinion by noting that Bolanos-Hernandez, unlike Zepeda, had been individually threatened with death because of his neutrality.⁹³ The court further qualified its decision by requiring that the

90. 767 F.2d 1277 (9th Cir. 1985). The effect of *Bolanos-Hernandez* upon the use of uncorroborated testimony and generalized accounts of persecution is discussed *infra* at text accompanying notes 148-50 and 163-69, respectively.

91. *Id.* at 1286.

92. *Id.* (footnote omitted). However, in *Chavez v. INS*, 723 F.2d 1431 (9th Cir. 1984), the Ninth Circuit specifically rejected the petitioner's contention that his neutral stance entitled him to a withholding of deportation. The petitioner argued that, if returned to his native country, he would be persecuted as a result of his desire to remain neutral. In *Chavez*, a citizen of El Salvador, Lopez, was harrassed at his home by guerrillas. He requested asylum partly on the grounds that his ownership of a gun made him a target for guerillas who might want the weapon, and that his status as a young urban male unallied with either faction left him vulnerable to persecution by both sides. The court held that danger arising from mere gun ownership did not qualify as persecution under § 243(h). Further, Lopez's status as a young urban male was not specific enough for political asylum. According to the court, widespread violence affecting all Salvadorians was not persecution within the meaning of § 243(h).

93. The court also distinguished *Chavez*. It explained that the issue before it in *Chavez*, the petitioner's appeal of the denial of his motion to reopen, required it to apply the abuse of discretion standard in evaluating the BIA's decision. In *Bolados-Hernandez*, the court applied the less strict substantial evidence test in reversing the BIA's denial of the petitioner's § 243(h) claim. *Bolanos-Hernandez*, 767 F.2d at 1285, n.15 (9th Cir. 1985).

choice to remain neutral be a conscious one.⁹⁴ It did not address situations in which the petitioner's decision to remain neutral was the result of mere passivity.

The Ninth Circuit's determination that neutrality constitutes a political opinion under the Act indicates its recognition of the difficulties of proving individualized persecution in countries where political oppression is non-specific. Even after *Bolanos-Hernandez*, an individualized threat is required to establish persecution. However, by tying neutrality to an individualized threat, the court pronounced neutrality to be a sufficiently specific political opinion to bring it within the Act's definition.

C. Persecution Due to Membership in a Religious, Ethnic, or Social Group

Sections 208 and 243(h) state that an alien can avoid deportation to his native country by showing persecution based on his race, religion, membership in a social group, or political opinion.⁹⁵ Despite this express statutory language, the courts have been reluctant to define harassment based on membership in a religious,⁹⁶ ethnic,⁹⁷ or social group⁹⁸ as persecution under the Act. Typically, the courts conclude that any harassment directed toward such a petitioner was simply a consequence of widespread violence or political upheaval within the country. Thus, ac-

94. *Id.* at 1286.

95. 8 U.S.C. § 1253(h) (Supp. 1985).

96. *Dally v. INS*, 744 F.2d 1191, 1196 (6th Cir. 1984) (court rejected petitioners Ghazwan and Nashwan Dally's claims that they would face persecution because of their Catholic religion and Chaldean ethnic origin; the court also rejected petitioner Satto's claim that he faced job discrimination because of his religion and ethnic origin); *Minwalla v. INS*, 706 F.2d 831, 835 (8th Cir. 1983) (allegations that Pakistan established a non-secular state, that members of the Zoroastrian religion had been persecuted in the past, that petitioner would be required to carry a national identity card and that he would be denied job opportunities insufficient to support claim); *Sarkis v. Nelson*, 585 F. Supp. 235, 238 (E.D.N.Y. 1984), *aff'd on remand*, 599 F. Supp. 724 (E.D.N.Y. 1984) (BIA determined that petitioners failed to show that their refusal to join Baath party was based on their "religious" beliefs. Court remanded for a determination of whether the beatings petitioners sustained for refusing to join the party constituted a statement of political opinion. On remand, court held that petitioners had presented no evidence that they had been singled out for persecution because of religious or political beliefs.); *Shamon v. INS*, 735 F.2d 1015, 1016-17 (6th Cir. 1984) (despite being burned and beaten at school for refusing to join the Moslem Baath party, the court held that petitioner, an Assyrian Christian, failed to establish that he would be singled out for persecution).

97. *See, e.g., Dally v. INS*, 744 F.2d 1191 (6th Cir. 1984); *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982), *rev'd*, *INS v. Stevic*, 104 S. Ct. 2489 (1984).

98. *See, e.g., Martinez-Romero v. INS*, Interim Dec. 2872 (1981), *aff'd* 692 F.2d 595, 595-96 (9th Cir. 1982) (status as a student insufficient to show a clear probability of persecution even though petitioner's claim was supported by documents showing that students were frequently persecuted by the government); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1264 n.3 (9th Cir. 1985) (status as a "young urban male" unaligned with a political faction insufficient); *Zepeda-Melendez v. INS*, 741 F.2d 285, 289 (9th Cir. 1984) (status as "a male of military age who has sworn allegiance to neither faction" insufficient); *accord, Chavez v. INS*, 723 F.2d 1431 (1984).

ording to the courts, such harassment is not sufficiently individualized to constitute persecution within the meaning of the Act.⁹⁹

The requirement that one must be singled out for persecution because of group membership¹⁰⁰ is anomalous. The courts have held that if a petitioner, like other members of his group, is beaten,¹⁰¹ expelled from school,¹⁰² fired from a job,¹⁰³ or arrested¹⁰⁴ because of his group membership, then he has not been treated differently or singled out from other members of his group. Thus, he has not been persecuted as contemplated by the Act. The requirement that one must be singled out for persecution because of group membership is so difficult to meet that at least one court, confronted with the particularly harsh treatment of a petitioner because of his religion, suggested that the petitioner's claim of religious persecution be reconsidered as a political opinion so that the petitioner might more easily prove that he had been singled out.¹⁰⁵

This problem is especially troublesome with respect to aliens persecuted on the basis of their social group. Neither the Act nor the *Handbook* defines "social group."¹⁰⁶ In *Matter of Acosta*,¹⁰⁷ however, the BIA defined persecution because of social group as "persecution directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic."¹⁰⁸ According to the BIA,

the shared characteristic might be an innate one such as sex, color or kinship ties, or in some circumstances, it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristics that will qualify under this construction remains to be determined on a case-by-case basis.¹⁰⁹

The BIA also suggested that "social status" might overlap with "religion," "race," and "nationality."¹¹⁰

99. See *supra* text accompanying notes 83-89.

100. In *Hermiz v. INS*, No. 83-3763 (6th Cir. Nov. 5, 1984), the court dismissed the petitioner's appeal from a denial of his request for asylum or withholding of deportation. The petitioner had been granted asylum for one year based on the State Department's advisory opinion which stated that Assyrian Chaldeans and Catholics were, as a group, subject to religious persecution. However, after the State Department informed the INS that it "no longer believed that Iraqi Christians as a class were subject to persecution," the INS notified the petitioner that it was rescinding his asylum status.

101. *Shamon v. INS*, 735 F.2d 1015, 1016 (6th Cir. 1984).

102. *Reyes v. INS*, 693 F.2d 597, 599 (6th Cir. 1982), *vacated*, 747 F.2d 1045 (6th Cir. 1984).

103. *Dally v. INS*, 744 F.2d 1191, 1194 (6th Cir. 1984).

104. *Carvajal-Munoz v. INS*, 743 F.2d 562, 571 (7th Cir. 1984).

105. *Sarkis v. Nelson*, 585 F. Supp. 235, 238 (E.D.N.Y. 1984), *aff'd on rehearing*, 599 F. Supp. 724 (E.D.N.Y. 1984).

106. See *supra* note 85 and accompanying text.

107. *Matter of Acosta*, Interim Dec. 2986 (BIA March 1, 1985).

108. *Id.* at 31.

109. *Id.*

110. *Id.* at 30.

In *Acosta*, the BIA determined that the petitioner did not prove his asylum and withholding claims since he did not belong to a social group defined by an immutable characteristic. The petitioner was an executive officer of a taxi cooperative subjected to violence because it refused to yield to a anti-government group's demand to strike. According to the BIA, though it was "unfortunate" to have to do so, the petitioner could easily change his occupation as a means of avoiding persecution.¹¹¹

Although only one circuit court has applied the *Acosta* test thus far,¹¹² the courts must be vigilant not to define "social group" so broadly as to open the borders to whole populations. On the other hand, it is incumbent upon the courts to monitor the types of characteristics defined by the BIA as "immutable." The BIA must not be permitted to put petitioners to the choice of either being persecuted or giving up social characteristics fundamental to their identities. For example, the BIA should grant asylum rather than force students to abandon their studies or farmers to move off the land in order to avoid persecution. Although these characteristics are not "immutable" *per se*, they bear on fundamental human liberties that the Act seeks to preserve. It would defeat the purpose of the Act to force such changes as a substitute for granting asylum or withholding. The next step in such a progression would be to inform petitioners that they could avoid persecution simply by changing their political views.

Evidentiary Requirements

In addition to expanding the bases of persecution enumerated in the Act, the courts have redefined the evidentiary requirements for proving section 208 and 243 claims. Before 1980, a showing of persecution required the petitioner to present objective evidence of an individualized threat. The requirement of objective evidence was established in *Kashani v. INS*.¹¹³ In *Kashani*, the petitioner argued that he could show his well-founded fear of persecution by proving his subjective state of mind. In rejecting this argument, the court required objective evidence of a well-founded fear.¹¹⁴ The courts and the INS, following *Kashani*, have carried the requirement of objective evidence to its extreme by refusing to accept the petitioner's "self-serving" documents¹¹⁵ and testimony¹¹⁶ as

111. *Id.* at 32.

112. *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985).

113. 547 F.2d 376 (7th Cir. 1977).

114. *Id.* at 379.

115. *See, e.g.*, *Dally v. INS*, 744 F.2d 1191 (6th Cir. 1984); *Saballo-Cortez v. INS*, 761 F.2d 1259 (9th Cir. 1985); *Marroquin-Manriquez v. INS*, 699 F.2d 129 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 3553 (1984).

proof of persecution.

This interpretation has worked an extreme hardship on aliens fleeing their native countries. In recognition of the obstacles confronting aliens attempting to prove their claims, some courts¹¹⁷ have reevaluated their positions as to what constitutes "objective" evidence. In deferring to the INS the courts had abandoned their traditional role of interpreting credible testimony and documentary evidence, a role to which they are now returning.

The circuits currently are split as to the standard of review appropriate to BIA decisions. The Third Circuit¹¹⁸ applies an abuse of discretion test to both asylum and withholding decisions. The Second,¹¹⁹ Seventh,¹²⁰ and Ninth¹²¹ Circuits hold that the initial determination of refugee status in asylum cases should be reviewed under the substantial evidence test while the actual grant or denial of asylum is properly reviewed under the abuse of discretion test. These courts review withholding claims under the substantial evidence test.

A. Testimony

Generally, the courts rejected the petitioner's uncorroborated testimony in determining the existence of persecution. The test has not been whether the testimony was credible, but whether it was supported by some "objective" evidence. If the petitioner's own testimony was uncorroborated by objective evidence, it was rejected regardless of the court's view of its credibility.¹²² The courts' inquiry, however, is shifting from the form of the evidence to whether the evidence, whatever its form, is credible.¹²³

The shift in inquiry from the form of the evidence to its credibility presents new problems for the courts. The courts must rely on the administrative record and the findings of the immigration judge in reviewing his denial of section 208 and 243(h) claims. A difficulty thus arises when the immigration judge does not specifically rule on the credibility of the evidence. The reviewing court is then forced to infer the credibility of the evidence from the record as a whole. The question then be-

116. See *infra* text accompanying notes 122-150.

117. See *infra* notes 130-132 and accompanying text.

118. *Marroquin-Manriquez*, 699 F.2d at 133 n.5.

119. *Yiu Sing Chun v. Sava*, 708 F.2d 869, 876 (2d Cir. 1983).

120. *Carvajal-Munoz v. INS*, 743 F.2d 562, 567 (7th Cir. 1984).

121. *Bolanos-Hernandez*, 767 F.2d at 1285 n.15.

122. See *supra* text accompanying notes 133-139.

123. See *supra* text accompanying notes 148-150.

comes how far the court is willing to go in drawing inferences of this sort from the record.

For example, in *Zavala-Bonilla v. INS*,¹²⁴ the immigration judge denied the petitioner's request to withhold deportation because "discrepancies" in her story destroyed her credibility.¹²⁵ On appeal, the court re-analyzed the facts on the record and determined that the discrepancies were the result of poor translation and misunderstandings resolved by other facts on the record. The court reversed the immigration judge, holding that the petitioner's evidence was credible.¹²⁶

However, in *Saballo-Cortez v. INS*,¹²⁷ the court interpreted the immigration judge's finding of inconsistencies in the petitioner's testimony as a finding on his credibility. The court stated that "[i]n reviewing the record, we must defer to the immigration judge's express *and implied* findings that the alien's testimony is not credible if the record supports such finding."¹²⁸ A dissenting opinion expressed concern that the majority's interpretation of the record was too narrow. The dissenting judge stated that "[t]he immigration judge never relied on or even specifically made an adverse credibility determination based on the inconsistencies or anything else. The majority here, however, casts the immigration judge's decision as a credibility determination."¹²⁹

The Sixth Circuit still follows the general rule that testimony must be corroborated by objective evidence. Recent cases in that circuit, however, indicate the court's growing discomfort with rejecting otherwise legitimate claims because the petitioner's credible testimony is uncorroborated. Before *Stevic*, the Sixth Circuit required "something less"¹³⁰ than a clear probability of persecution in granting a request to withhold deportation. In *Reyes v. INS*,¹³¹ for example, the petitioner offered her own testimony that she and her family had been persecuted in the Phillippines. In granting a withholding of deportation under the more generous well-founded fear standard, the court recognized that one must have more than one's own testimony to support a claim under section 243(h). The court, however, stated that while "we do not wish to force the INS to accept potentially self-serving statements as true in

124. 730 F.2d 562 (9th Cir. 1984). The effect of *Zavala-Bonilla* upon the use of generalized accounts of persecution is discussed *infra* at text accompanying notes 161-62.

125. *Id.* at 566.

126. *Id.*

127. 762 F.2d 1254 (9th Cir. 1985).

128. *Id.* at 1266 (emphasis added).

129. *Id.* at 1269 n.4 (Pregerson, C.J., dissenting).

130. *Reyes v. INS*, 693 F.2d 597, 600 (6th Cir. 1984), *vacated* 747 F.2d 1045 (6th Cir. 1984).

131. 693 F.2d 597 (6th Cir. 1982), *vacated*, 747 F.2d 1045 (6th Cir. 1984).

granting asylum under section 243(h), . . . it is difficult to see what more . . . we would require, short of proof of actual persecution after the fact.”¹³² The court found substantial evidence of a well-founded fear based primarily on the petitioner’s testimony which was supported by documents showing general conditions in her country.

After *Stevic* announced the stricter clear probability standard, however, the Sixth Circuit adopted a stricter standard with respect to uncorroborated testimony. In *Dally v. INS*,¹³³ the court denied withholding of deportation in each of three consolidated cases.¹³⁴ It stated that an alien seeking the withholding of deportation must advance some credible evidence that authenticates his subjective allegations of persecution. The petitioners in all three cases testified that they were Catholics and of Chaldean ethnic origin.¹³⁵ They also testified that either they or members of their families were beaten or harassed for refusing to join the Moslem Baath party which controlled the Iraqi government. In one case, the petitioner alleged that he was seized by members of the Baath Party, interrogated and “pushed around” for his refusal to join the Baaths.¹³⁶ He also stated that his sister was seized and interrogated by the Iraqi secret police on several occasions for her failure to join the Baath party, and that his daughter was harassed into joining the youth division of the party because of threats to jail her father. He further testified that he was fired from his job of seventeen years, had difficulty running his liquor business, and was forced to bribe an Iraqi officer to secure his passport to the United States.¹³⁷ In denying the requests for withholding of deportation, the court stated that, “despite the compelling nature of the allegations, there was little in the record to authenticate the

132. *Id.* at 600.

133. 744 F.2d 1191 (6th Cir. 1984).

134. The first petitioners, the Dally brothers, filed a claim for political asylum stating that they feared persecution if returned to Iraq due to their Catholic religion and Chaldean ethnic origin. To support their claim, the petitioners offered their own testimony and a newspaper article detailing harassment of U.S. immigrants of Iraqi origin critical of the Iraqi government. They also alleged that a cousin had been harassed by governmental authorities for refusing to join the Baath Party. The court rejected their claim, stating that the petitioners did not state that they were members of an organization considered hostile to the Iraqi government; nor did they introduce evidence which described conduct on their behalf which exhibited hostility toward the Iraqi government. *Id.* at 1196. The court stated that the petitioners had not established by sufficient evidence a clear possibility of persecution. *Id.*

The second case involved petitioners who also claimed relief under section 243(h) because of their Catholic religion and Chaldean ethnic origin. In addition, one of the petitioners claimed that he had been “severely beaten by state police officials.” The court stated that “[a]lthough we acknowledge the seriousness of this allegation, the immigration laws as they exist today do not permit us to grant relief based on a petitioner’s self-serving statements.” *Id.*

135. *Id.* at 1193-95.

136. *Id.* at 1197.

137. *Id.*

thrust of the claims."¹³⁸ The court specifically stated, however, that it did not question the credibility of the testimony.¹³⁹

Similarly, in *Nasser v. INS*,¹⁴⁰ the petitioner testified that he was arrested and jailed several times for his refusal to join the Baath Party. He also testified that he was beaten by Baath officials and that his father had died as a result of a beating by Baath agents. He stated that if returned to Iraq, he too would be executed. Other than these "subjective" claims, however, no other evidence was introduced which corroborated Nasser's allegations.¹⁴¹ The court stated that, although it was "very troubled"¹⁴² by Nasser's claim that his father had been beaten to death, "the immigration laws as they presently exist preclude us from granting relief based on a petitioner's self-serving statements."¹⁴³ In a dissenting opinion, however, one judge stated that "[a]lthough I recognize that [the petitioner's] testimony may be 'self-serving' (as is any effort to save one's life), I cannot . . . ignore or discount it as the INS has done. I would remand for taking of further evidence"¹⁴⁴

The Seventh Circuit, by contrast, cautiously departed from the general rule it established in *Kashani*. In *Carvajal-Munoz v. INS*,¹⁴⁵ the court reviewing the immigration judge's denial of the petitioner's asylum claim, explained that an applicant's uncorroborated testimony will be insufficient to meet the well-founded fear test "unless it is credible, persuasive, and points to specific facts that give rise to an inference that the applicant . . . will be singled out for persecution."¹⁴⁶ Further, the court stated that uncorroborated testimony is acceptable only when objective, corroborative evidence does not exist. The court emphasized that in order to meet the evidentiary burden for an asylum claim under section 208(a) the petitioner must present very specific and detailed facts showing an individualized fear.¹⁴⁷ In *Carvajal-Munoz*, the court closely scrutinized the petitioner's testimony for any internal inconsistencies and for deviations from the facts on the written asylum application.

While the Seventh Circuit allowed a very narrow use of uncorroborated testimony in asylum claims, the Ninth Circuit was more emphatic in its departure from the general rule that uncorroborated testimony can-

138. *Id.*

139. *Id.*

140. 744 F.2d 542 (6th Cir. 1984).

141. *Id.* at 545.

142. *Id.*

143. *Id.*

144. *Id.* (Edwards, C.J. dissenting).

145. 743 F.2d 562 (7th Cir. 1984).

146. *Id.* at 573.

147. *Id.* at 574.

not be used to show a fear of persecution. In *Bolanos-Hernandez v. INS*,¹⁴⁸ the court held that the petitioner's bald statement that he was threatened with death by anti-government factions was sufficient to meet the stricter clear probability standard. The court stated that:

We recognize that omitting a corroboration requirement may invite those whose lives or freedom are not threatened to manufacture evidence of specific danger. But the imposition of such a requirement would result in the deportation of many people whose lives genuinely are in jeopardy. Authentic refugees rarely are able to offer direct corroboration of specific threats. . . . Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution. . . . If the alien's own testimony about a threat, when unrefuted and credible, were insufficient to establish the fact that the threat was made, it would be "close to impossible for any political refugee to make out a section 243(h) claim."¹⁴⁹

Thus, the *Bolanos-Hernandez* court expanded the range of persons eligible for withholding under section 243(h) by accepting uncorroborated testimony as proof of a clear probability of persecution.¹⁵⁰

B. General Accounts of Conditions Within the Country of Origin

Because an individualized threat is required to establish a fear of persecution, the courts refused to grant section 208 and 243(h) claims on the basis of evidence that shows general conditions or widespread violence in the petitioner's native country.¹⁵¹ For example, it may be held that reports by international human rights organizations,¹⁵² newspaper accounts,¹⁵³ or letters or expert testimony generally describing a pattern of persecution in the petitioner's home country without specifically mentioning the petitioner by name, are immaterial or not probative. Such evidence could be rejected even if it established that persons of the petitioner's religion, ethnic or social group were being persecuted on the basis of their group membership.¹⁵⁴

148. 767 F.2d 1277 (9th Cir. 1985). The effect of *Bolanos-Hernandez* upon neutrality as political opinion and the use of generalized accounts of persecution is discussed *supra* at text accompanying notes 90-94 and *infra* at text accompanying notes 163-69, respectively.

149. *Id.* at 1285 (citations omitted).

150. In addition to his own testimony, a petitioner may use the testimony of others to support his claim. Like the petitioner's own testimony, the testimony of another must support the petitioner's claim of an individualized fear of persecution. *See, e.g.,* Marroquin-Manriquez v. INS, 699 F.2d 129, 131-32 (3rd Cir. 1983).

151. *See supra* text accompanying notes 83-89 and 99.

152. Reports of the political and human rights conditions in various countries may be obtained from 1) Amnesty International, 2) Lawyers Committee for International Human Rights, 3) National Immigration Project, Inc., 4) American Association for the International Commission of Jurists, 5) National Center for Immigrants' Rights, Inc.

153. *See supra* note 134.

154. *See supra* text accompanying notes 95-112.

Some courts,¹⁵⁵ however, consider such documentary evidence as a factor in determining whether the petitioner has established persecution on the basis of a political opinion. Courts are persuaded by such evidence when it describes the persecution of persons who share characteristics with the petitioner and when the persecution claim is supported by other evidence. In *McMullen v. INS*,¹⁵⁶ for example, McMullen contended that he would face persecution by the Provisional Irish Republican Army (PIRA) if he were returned to Ireland because he had defected from and informed on that organization. The Ninth Circuit held that McMullen established a clear probability of persecution, in part by presenting evidence of the PIRA's retaliatory activities in Ireland. Noting the extensive and detailed nature of the evidence, the court stated that the names, dates, and places indicated a pattern in the PIRA's activity. According to the court, "evidence of a pattern of uncontrolled PIRA persecution of defectors is relevant in determining whether McMullen is likely to face persecution upon deportation."¹⁵⁷

Similarly, in *Samimi v. INS*,¹⁵⁸ the court took judicial notice of the Iranian government's treatment of "dissidents" in Iran in holding that the petitioner established a clear probability of persecution. The court distinguished *Samimi* from *Shoae v. INS*,¹⁵⁹ an earlier case involving a similar fact pattern in which the court held against the petitioner. In explaining the difference between *Samimi* and *Shoae*, the court stated that "[t]here is no mention in *Shoae* of the large-scale execution of dissidents. Nor is there any evidence that the Shoae panel took judicial notice of those conditions in Iran. We believe these factors tip the balance in favor of . . . Samimi's claim."¹⁶⁰

Additionally, in *Zavala-Bonilla v. INS*,¹⁶¹ the Ninth Circuit rejected the BIA's finding that general accounts of oppressive conditions should be discounted as non-specific to the petitioner's case. *Zavala-Bonilla* was a official in a labor union in El Salvador. She presented documentary evidence of the persecution of labor leaders and accounts of events in which she participated as a union member. The court held that the general accounts concerning the oppression of labor leaders as relevant to

155. See, e.g., *Coriolan v. INS*, 559 F.2d 993, 1003 (5th Cir. 1977); *Zamora v. INS*, 534 F.2d 1055, 1061-63 (2d Cir. 1976).

156. 658 F.2d 1312 (9th Cir. 1981). See *supra* note 82.

157. *Id.* at 1318.

158. 714 F.2d 992 (9th Cir. 1983).

159. 704 F.2d 1079 (9th Cir. 1983).

160. *Samimi*, 714 F.2d at 995 n.2.

161. 730 F.2d 562 (9th Cir. 1984). The effect of *Zavala-Bonilla* upon the shift in focus from the form of evidence to its credibility is discussed *supra* at text accompanying notes 124-26.

the extent that it supported specific information relating to the individual's well-founded fear of persecution.¹⁶² However, the court considered these accounts in combination with other documents and letters attesting to Zavala-Bonilla's union activities.

The court expanded the use of generalized accounts in *Bolanos-Hernandez v. INS*.¹⁶³ Bolanos-Hernandez, a citizen of El Salvador, alleged that the anti-government faction told him to join their forces or they would kill him. He believed this threat because five of his friends and possibly his brother had been similarly threatened and killed. The immigration judge rejected the faction's threat as being "merely representative of the general conditions in El Salvador."¹⁶⁴ The BIA sustained the immigration judge's findings, stating that Bolanos-Hernandez failed to show that his reason for fearing persecution could be distinguished from that of other Salvadorans. The Ninth Circuit disagreed. It stated that it was "mystified by the Board's ability to turn logic on its head"¹⁶⁵ by characterizing the specific threat made to Bolanos as "general".¹⁶⁶ The court explained, however, that the mere fact that a threat is made may not be sufficient to establish a clear probability of persecution. Citing *Stevic*, the court stated that whether it is "more likely than not that the alien would be subject to persecution may depend on whether the threat is a serious one."¹⁶⁷ The court went on to explain that evidence of general conditions in the country is relevant in determining whether the threat is serious. According to the court:

The newspaper articles introduced by Bolanos note the violent retribution that may follow the expression of political views in El Salvador and the executions conducted in retaliation for refusals to join political guerrilla groups. This general documentary evidence supports Bolanos' contention that he would suffer political persecution if he returned to El Salvador. . . . Given the general climate of uncontrolled violence in El Salvador, it would be unreasonable to conclude that the threat to Bolanos' life or freedom was not a serious one. Because he refused to join their cause and infiltrate the government on their behalf, the guerrillas are likely to consider him a political opponent, just as they would if he had spoken out publicly in opposition to their cause or tactics.¹⁶⁸

Thus, the court in *Bolanos-Hernandez* held that evidence of general con-

162. *Id.* at 564.

163. 767 F.2d 1277 (9th Cir. 1985). The effect of *Bolanos-Hernandez* upon neutrality as political opinion and the use of uncorroborated testimony is discussed *supra* at text accompanying notes 90-94 and 148-50, respectively.

164. *Id.* at 1280.

165. *Id.* at 1284.

166. *Id.* at 1285.

167. *Id.* (citations omitted).

168. *Id.* at 1285-86 (citations omitted).

ditions within a country is relevant in determining whether individualized threats of persecution are serious.¹⁶⁹ If the generalized information supports the petitioner's belief that the threat is a serious one, the existence of persecution is established.

By both defining neutrality as a political opinion¹⁷⁰ and accepting documentary evidence of general conditions in El Salvador, the Ninth Circuit significantly expands the range of persons eligible for asylum and withholding of deportation. This combination makes it possible for persons claiming persecution because of their social status as a student or "young urban male"¹⁷¹ to base their claims ostensibly on their political opinion and support it with documentary evidence of general conditions in the country.

While the Ninth Circuit thus came close to defining persecution on the basis of "social group", the First Circuit addressed the issue directly in *Ananeh-Firempong v. INS*.¹⁷² Using the BIA's definition of "social group" expressed in *Acosta*, the First Circuit determined that the petitioner was a "social refugee" because she presented documentary evidence that the Ghanaian government, a dictatorship, persecuted 1) supporters of the previous government, 2) members of the Ashanti tribe, and 3) professionals, business people, and other educated persons. The petitioner's family fell into all three categories.¹⁷³

The court stated that the general accounts "were at least trustworthy enough to be admissible and reasonably credible as evidence in an administrative hearing."¹⁷⁴ It further stated that "unless an alien were allowed to rely upon such sources, it is difficult to see how he or she could make out a case of political or *social* repression in a distant land."¹⁷⁵ According to the court,

[t]o offer refuge to those faced with genuine threats of persecution but to forbid them to offer journalistic accounts, expert opinions, and third party reports in their efforts to prove it would simply "sound the word of promise to the ear but break it to the hope."¹⁷⁶

The *Ananeh-Firempong* court implicitly suggests a solution to the anomaly of requiring proof of an individualized threat of persecution because of group membership. It states that general accounts describing persecu-

169. *Id.*

170. *See supra* notes 90-94 and accompanying text.

171. *See supra* notes 85 and 106-112 and accompanying text.

172. 766 F.2d 621 (1st Cir. 1985).

173. *Id.* at 623.

174. *Id.* at 628.

175. *Id.* (emphasis added).

176. *Id.*

tion of persons with the petitioner's characteristics are acceptable in proving a specific threat to the petitioner.¹⁷⁷ Presumably, the more closely the general account fits the petitioner's circumstances, the more amenable the court will be to characterizing the threat as specific.

CONCLUSION

The purpose of the Refugee Act of 1980 was to provide assistance to refugees fleeing their native countries due to persecution on the basis of race, religion, nationality, social group, or political opinion. Congress, however, failed to provide guidance as to how the INS and the courts should interpret the words "persecution" or "refugee." As a result, the INS was allowed to develop evidentiary standards so strict that the humanitarian goals of the Act were imperiled.

Although courts have traditionally deferred to the INS in matters of immigration policy, they are now giving effect to the policies of the Act through interpreting the Act and reviewing BIA decisions. The circuit courts, though split on the appropriate standard of review and on the correct evidentiary standard with respect to asylum and withholding claims, are beginning to expand their definitions of "persecution." In addition, these courts are returning to their proper role in weighing credible testimony and documentary evidence. As this trend continues, the courts will effectuate the humanitarian goals of the Act.

177. *Id.* at 626-27.

