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The Meaning of “Well-Founded Fear of Persecution” in United States Asylum Law and in International Law

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Barry Sautman

Abstract

Part I of this Article reviews the position of these administrative agencies and of the courts that have agreed with them. Part II discusses the contrary position of the majority of the circuit courts. Part III examines the international law bases of the relevant statutory language. It will be demonstrated that legislative history, United States case law, and international policy and practice, indicate that the United States government’s stringent administrative interpretation of the phrase “well-founded fear of persecution” is erroneous.

THE MEANING OF "WELL-FOUNDED FEAR OF PERSECUTION" IN UNITED STATES ASYLUM LAW AND IN INTERNATIONAL LAW

Barry Sautman*

INTRODUCTION

In recent years millions of people have fled from countries ruled by regimes with little or no regard for fundamental human rights.¹ Among those who have entered the United States, many say that they have come only because they would be persecuted, for political or other reasons, in their native countries.

Large groups of Cubans, Soviet Jews, and Indochinese, all of whose resettlement in the United States has been formally favored and assisted by the federal government,² are officially

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1. There are at least fourteen million refugees worldwide. Comment, *Refugee in America: What Burden of Proof?*, 17 J. MAR. L. REV. 81, 82 n.4 (citing Gross, *Open Up America!*, 10 HUM. RTS. 26 (1982)); see also Fawcett, *U.S. Immigration and Refugee Reform: a Critical Evaluation*, 22 VA. J. INT'L L. 805, 806 (1982) (16 million refugees). At least half of these refugees are unprotected by international law. Nanda, *World Refugee Assistance: the Role of International Law and Institutions*, 9 HOFSTRA L. REV. 449 (1981). Sixteen countries each contain 100,000 or more refugees. REFUGEES: A JOINT PUBLICATION OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AND U.S. VOLUNTARY AGENCIES (Fall, 1982), cited in Note, *The Endless Debate: Refugee Law and Policy and the 1980 Refugee Act*, 32 CLEV. ST. L. REV. 117, 127 (1983) [hereinafter cited as *The Endless Debate*]. For data on the numbers of persons who have fled to Canada, Honduras, Somalia, Pakistan and Thailand, see Ghoshal & Crowley, *Refugees and Immigrants: a Human Rights Dilemma*, 5 HUM. RTS. Q. 327, 343-46 (1983) (also focusing on United States treatment of "politico-economic refugees," a situation exemplified by Haitians). It should be noted, however, that a significant percentage of the worldwide refugee population is in Africa, where the operative definition of "refugee" is more encompassing than the United Nations definition discussed in this article. See *infra* note 5 and accompanying text.

2. See Haines, *Refugees and the Refugee Program*, in REFUGEES IN THE UNITED STATES: A REFERENCE HANDBOOK 4-7 (D. W. Haines ed. 1985) (data on the number of persons from Cuba, Indochina and the Soviet Union who have entered the United States in the last quarter-century). For the numbers of persons, by country or region of origin, admitted under the Attorney General's "parole power," § 212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1152(d) (1976) (authority to parole aliens into the United States temporarily "for emergency reasons or reasons deemed strictly in the public interest"), see WORLD REFUGEE CRISIS: THE INTERNATIONAL COMMUNITY'S RESPONSE, REPORT TO THE (HOUSE OR SENATE) COMM. ON THE JUDICI-

regarded as having been the victims of persecution. Smaller numbers of Salvadorans, Haitians, Poles, Afghans, Ethiopians, Romanians and others have pressed the same issue, with official United States reaction ranging from grudging acceptance to open hostility.³ Emigrants from non-Communist countries have usually been held to a significantly higher standard of proof than those from Communist countries⁴ in showing that

ARY, 96TH CONG., 1ST SESS. 213 (1979). The parole provision has principally been invoked to deal with large-scale migrations from Communist countries. For example, 629,219 Cubans and 208,200 Indochinese entered the United States via parole before 1979. See CONG. RESEARCH SERV., LIBRARY OF CONG., 96TH CONG., 1ST SESS., REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES 9 (Comm. Print 1980) [hereinafter cited as CRS Report]. The parole power was used to admit an additional 114,000 persons in 1980, overwhelmingly Cubans from the Mariel "boat-lift." CARIBBEAN REFUGEE CRISIS: CUBANS AND HAITIANS, HEARINGS BEFORE THE (HOUSE OR SENATE) COMM. ON THE JUDICIARY, 96TH CONG., 2D SESS. 52 (1980). The United States accepted an estimated 1.7 million refugees between 1948 and 1979. Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980*, 56 NOTRE DAME LAW 618, 620 (1981). Between 1956 and 1979, admissions under § 212(d) averaged 44,670 per annum. CRS REPORT, *supra*, at 9. Thus, the majority of refugees prior to 1981 probably entered via parole. Those who were not paroled often entered under a variety of laws. See, e.g., The Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (repealed), and the Migration and Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121, both of which were designed to facilitate entry by large numbers of refugees from particular, and, almost invariably, "Communist," countries or regions. For surveys of such legislation, see Wildes, *The Dilemma of the Refugee: His Standard for Relief*, 4 CARDOZO L. REV. 353, 355-60 (1983); LeMaster & Zall, *Compassion Fatigue: the Expansion of Refugee Admissions to the United States*, 6 B.C. INT'L & COMP. L. REV. 447, 450-52 (1983); Anker & Posner, *The Forty Year Crisis: a Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 13-19 (1981).

3. See Haines, *supra* note 2, at 7 (data on Poles, Afghans, Ethiopians and Romanians). On Salvadorans, see Stanley, *Economic Migrants or Refugees from Violence? A Time Series Analysis of Salvadoran Migration to the United States* (unpublished manuscript, Dep't of Pol. Sci., Mass. Inst. of Tech., March 1985) (empirical study showing predominant motive of Salvadorans migrating to the United States is fear of political violence); Anker, *The Development of U.S. Refugee Legislation*, in IN DEFENSE OF THE ALIEN 6 (Proc. of the 1983 Annual National Legal Conf. on Immigration and Refugee Policy) 159, 165 (L. Tomasi ed. 1984); Peter & Novian, *The Numbers Game: the Politics of U.S. Refugee Policy Toward Central America*, 1 LA RAZA L.J. 168 (1984); Note, *The Endless Debate*, *supra* note 1, at 128-31. On Haitians, see J. MILLER, *THE PLIGHT OF THE HAITIAN REFUGEES* (1984); Stepick, *Haitian Boat People: a Study in the Conflicting Forces Shaping U.S. Immigration Policy*, in U.S. IMMIGRATION POLICY 162 (R. Hofstetter ed. 1984) (also published as 45 L. & CONTEMP. PROBS. No. 2, Spring 1982); Tompkin, *A Criminal at the Gate: a Case for the Haitian Refugee*, 7 BLACK L.J. 387 (1982); Note, *An Analysis of Haitian Requests for Political Asylum After Haitian Refugee Center v. Civiletti*, 33 HASTINGS L.J. 1501 (1982). On Ethiopians, see Aaron, *Humanitarian Intervention, Nationality and the Rights of Refugees*, 26 HARV. INT'L L.J. 585 (1985).

4. From 1965 to 1980, United States refugee laws gave an express preference to claims from Communist countries, and 95% of those awarded refugee status were

from such countries. Although a change of law in 1980, *see infra* note 11 and accompanying text, supposedly eliminated these "geographical" (i.e., political) barriers to refugee status, 95% or more of all United States grants of asylum since 1980 have continued to go to refugees from Communist countries. Note, *Political Legitimacy in the Law of Political Asylum*, 95 HARV. L. REV. 450, 459 (1985); *see also* Cox, *Well-Founded Fear of Persecution: the Sources and Application of a Criterion of Refugee Status*, 10 BROOKLYN J. INT'L L. 333, 371 n.376 (1984) ("[t]o a great extent, United States protection of refugees only extends to preferred 'categories' of persons, primarily those fleeing communist countries"); LeMaster & Zall, *supra* note 2, at 448 (present U.S. refugee law serves the interests of only "those few aliens who happen to be in countries favored by the Department of State for some short-term policy goal"); Note, *The Right of Asylum Under United States Law*, 80 COLUM. L. REV. 1125, 1132-33, 1144 n.125 (1980) (those from communist countries, e.g., Czechoslovakia, need show less proof of political motivation in departing than those from other countries); Note, *Section 243(h) of the Immigration and Nationality Act of 1952 as Amended by the Refugee Act of 1980: a Prognosis and a Proposal*, 13 CORNELL INT'L L.J. 291, 299 n.46 (1980) (burden more onerous for those from U.S. military ally or major trading partner); Note, *Behind the Paper Curtain: Asylum Policy Versus Asylum Practice*, 7 N.Y.U. REV. OF L. & SOC. CHANGE 107, 124-26 (1978) (Applicants from Communist countries admitted as political refugees; those from friendly countries regarded as "economic refugees"); Dernis, *Haitian Immigrants: Political Refugees or Economic Escapees?*, 31 U. MIAMI L. REV. 27, 28 (1976) (greater proof of political repression demanded on those fleeing from non-Communist countries). One indication of such reaction is found in the statistics on grants and denials of asylum claims. For example, in fiscal year 1984, district directors of the INS granted 16 Haitian applications for asylum and denied 313, granted 328 Salvadoran applications and denied 13,045, granted 186 Afghan applications and denied 269, granted 305 Ethiopian applications and denied 1,014, granted 721 Polish applications and denied 1,482, and granted 121 Romanian applications and denied 197. B. HING, HANDLING IMMIGRATION CASES 196-97 (1985) (Haitian and Romanian dispositions as of June 1984); UNITED STATES IMMIGRATION & NATURALIZATION SERV., ASYLUM CASES FILED WITH DISTRICT DIRECTORS PURSUANT TO SECTION 208 I & N ACT, OCTOBER 1, 1983—SEPTEMBER 30, 1984 at 1 (other dispositions); *see also* Helton, *Political Asylum Under the 1980 Refugee Act: an Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243 (1983) (Russian, Ethiopian, Afghan and Romanian approval rates of 87%, 64%, 53% and 44%, respectively, compared to Pakistani, Filipino, Salvadoran, Haitian and Guatemalan rates of 12%, 11%, 3%, 2% and 2% respectively). It should also be noted that extended voluntary departure status was granted, for substantial periods in the late 1970s and early 1980s, to Ethiopians, Iranians, Nicaraguans, Poles and Ugandans, allowing those held to be deportable to extend their departure date indefinitely. *See* Note, *The Endless Debate*, *supra* note 1, at 129 n.60. The early 1980s witnessed even more striking U.S. government action on claims of those from rightist-ruled and Communist countries. For example, Scanlan, *supra* note 2, at 628, reports on one State Department officer's involvement with Polish and Salvadoran asylum claims in 1980; all the former were granted, while all the latter were refused. *Id.*; *see* Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 451 (S.D. Fla. 1980), *aff'd* 676 F.2d 1023 (5th Cir. 1982); *see also* REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES MISSION TO MONITOR INS ASYLUM PROCESSING OF SALVADORAN ILLEGAL ENTRANTS—SEPTEMBER 13-18, 1981, *reprinted in* 128 CONG. REC. 826-31 (daily ed. Feb. 11, 1982), reporting that proceedings involving Salvadorans were carried out "in a pro forma and perfunctory manner designed to expedite the cases as quickly as possible" and that not a single Salvadoran had yet been granted asylum. *Id.* at 829. The disparate official attitude toward asylum seek-

they are refugees⁵ and not "economic migrants."⁶

In addition to the issue of whether different standards of proof have been used for purposes of political and national discrimination among those seeking refugee status, there is also concern that the standard that the Immigration and Naturalization Service [the "INS"] claims to apply to all potential refugees is both overly harsh⁷ and not in accord with the views

ers, depending on their country of origin, is best summed up by an official of the Office of the United States Coordinator for Refugee Affairs, who states that the United States rejected a "shared humanity" approach to refugee law in favor of an "ally responsiveness" approach, under which the United States would grant asylum only to those who come from fallen allied "democratic" regimes or "who served as support troops in conflicts to preserve Western values." UNITED STATES COMM. FOR REFUGEES, WORLD REFUGEE SURVEY 1983 47 (1983). Senator DeConcini has observed that "if you are a boat refugee from Cuba, INS automatically considers you a refugee. If you are a boat refugee from Baby Doc's Haiti, INS automatically considers you an illegal alien coming to the United States for economic purposes." UNITED STATES REFUGEE PROGRAMS, HEARINGS BEFORE SENATE COMM. ON THE JUDICIARY, 96TH CONG., 2D SESS. 14 (1980). International law requires that, in expelling aliens, a state may not discriminate against the citizens of a particular foreign state. See C. FENWICK, INTERNATIONAL LAW 319, 321 (4th ed. 1965).

5. The term "refugee" will be employed in this article to mean those who have emigrated or seek to emigrate because of political or related factors, i.e. "persecutees." This is the traditional definition of refugee, exemplified in the work of A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW, 87 J. DU DROIT INT'L (1966-72) and Weis, *The Concept of Refugee in International Law*, 87 J. DU DROIT INT'L 929 (1960). This restrictive use of the term excludes large numbers of people whose need for refuge may be as great as that of those who are persecuted, but it is, nonetheless, the usage employed by United States law and the international instruments on which that law is based. See Shacknove, *Who Is a Refugee?*, 95 ETHICS 274 (1985); Note, *Displaced Persons: "The New Refugees"*, 13 GA. J. INT'L & COMP. L. 755, 763-71 (1983); Parker, *Victims of Natural Disasters in United States Refugee Law and Policy*, 1982 MICH. Y.B. INT'L LEGAL STUD. 137-38 (1982).

6. The Immigration and Naturalization Service has, in an internal document, recognized that "in some cases, different levels of proof are required of different asylum applicants. In other words, certain nationalities appear to benefit from presumptive status, while others do not." IMMIGRATION & NATURALIZATION SERV., ASYLUM ADJUDICATIONS: AN EVOLVING CONCEPT AND RESPONSIBILITY FOR THE IMMIGRATION AND NATURALIZATION SERVICE 54 (June & Dec. 1982) (quoted in Helton, *supra* note 4, at 254). This internal report noted that Salvadorans were required to present a "classical textbook case" to win asylum, while Poles had been recommended for asylum by the State Department before their applications had even been read. *Id.*

7. See, e.g., Note, *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1285, 1355 (1983) (evidentiary requirements inherent in the INS standard of proof "erects a virtually insuperable barrier to attainment of refugee status"); Comment, *Political Asylum and Withholding of Deportation: Defining the Appropriate Standard of Proof Under the Refugee Act of 1980*, 21 SAN DIEGO L. REV. 171, 188 (1983); Brief for Respondent in *Immigration & Naturalization Serv. v. Stevic*, 467 U.S. 407 (1984), at 10 (INS standard requires that proof of persecution be to a "near certainty").

of various United States courts of appeals⁸ or with international law and practice.⁹ United States federal courts have recently made a number of decisions defining the appropriate standard of proof in refugee cases, and the United States Supreme Court has also recently spoken on this subject,

8. See *Cardoza-Fonseca v. I.N.S.*, 767 F.2d 1448, 1454 (9th Cir. 1985), *cert. granted*, 106 S. Ct. 1181, 896 L.Ed. 2d 298 (1986) (No. 85-782, to be argued during the October 1986 Term). In *Cardoza*, the Ninth Circuit found that the Board of Immigration Appeals, in applying a high standard of proof for would-be refugees, "appears to feel that it is exempt from the holding of *Marbury v. Madison*, 5 U.S. 137 (1803) and not constrained by circuit court opinions." *Id.* The Ninth Circuit remanded to the Board in *Cardoza-Fonseca* because the Board has a more stringent standard of proof in evaluating the alien's asylum petition than is permitted by the terms of the applicable statute. The question for review by the Supreme Court is thus one of "pure" law, unencumbered by facts, of which the Ninth Circuit opinion is almost entirely devoid. The opinions of the immigration Judge in *In the Matter of Luz Marina Cardoza-Fonseca*, File No. A24 420 980 (San Francisco, Dec. 14, 1981) and the Board of Immigration Appeals in *In re Luz Marina Cardoza-Fonseca* (filed Sep. 21, 1983) appear as Appendices B and C to the Solicitor General's *Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit* in *I.N.S. v. Cardoza-Fonseca*, No. 85-782 (filed Nov. 15, 1985) [hereinafter cited as *Petition*]. These administrative opinions and the *Brief in Opposition to Petition for Certiorari* (filed Jan. 15, 1986), submitted by Cardoza-Fonseca's counsel reveal that she is a Nicaraguan national who denies any political activism but claims that she has a well-founded fear of persecution based on her brother, Orlando's, problems with the Sandinista government. Orlando, who was also an asylum applicant at the time of Cardoza-Fonseca's hearing before an immigration judge, was originally a Sandinista opponent of the previous Somoza government in Nicaragua. He claims to have been denounced to the Somoza authorities in 1978 and imprisoned for 45 days, tortured and interrogated. *Petition, supra* at 2. He purportedly told his interrogators that he was no longer sympathetic to the Sandinistas, because that movement appeared to be leaning toward Communism. He apparently made these same criticisms publicly. *Id.* Orlando and his sister left Nicaragua together. A number of relatives remain in Nicaragua, and the immigration judge noted that their parents, sisters and Orlando's wife and children had either been arrested or interrogated. *Id.* Orlando returned to Nicaragua in 1980 for a 15-day clandestine visit with relatives, at which time inquiries were made concerning his whereabouts. Luz's sister indicated, in a letter submitted in evidence at Luz's hearing, that the Sandinistas are still looking for her brother. The immigration judge ruled that the evidence did not show that Luz Cardoza-Fonseca would be persecuted for political opinions or because she belongs to a particular social group. *Id.* at 3. The Board of Immigration Appeals affirmed, noting that Luz had denied even being singled out for persecution by the Sandinistas and that her sister, who remains in Nicaragua, had not been harmed by that country's government. The Board concluded that Cardoza-Fonseca's "fears of retaliation, based solely on her claimed close relationship to her brother and her flight from Nicaragua with him, amount to anything more than mere speculation." *Id.* at 22.

9. See generally *Cox, supra* note 4, at 376 (comparing United States practice to that of several other Western states and concluding that "[p]ractice in the United States is less in conformity with [international law] than that of any of the States reviewed here").

although the question of whether different standards apply, depending on the remedy being sought, was explicitly left unanswered in the Court's most recent pronouncement.

In *Immigration and Naturalization Service v. Stevic*,¹⁰ the Court considered the standard of proof necessary under section 243(h) of the Immigration and Nationality Act (the "Act"), as amended by the Refugee Act of 1980,¹¹ to force the INS to withhold deportation because an alien's life or freedom is threatened in his country of origin.¹² The Court held that, in order to have deportation withheld, an alien must show that there is a "clear probability" that such a threat exists,¹³ that is, "whether it is more likely than not that the alien would be subject to persecution."¹⁴

Section 243(h) is not, however, the only provision of the Act that affords protection to refugees. Under section 208(a)

10. 467 U.S. 407 (1984). For analyses of the Supreme Court's *Stevic* decision, see Weinman, *I.N.S. v. Stevic: a Critical Assessment*, 7 HUMAN RIGHTS Q. 391 (1985); Helton, *Immigration and Naturalization Service v. Stevic: Standards of Proof in Refugee Cases Involving Political Asylum and Withholding of Deportation*, 87 W. VA. L. REV. 787 (1985); Note, *Withholding of Deportation Under the Refugee Act of 1980: Immigration and Naturalization Service v. Stevic*, 20 TEX. INT'L L.J. 367 (1985); Note, *Immigration Law: Political Asylum for Deportable Aliens—Immigration and Naturalization Service v. Stevic*, 104 S. Ct. 2489 (1984), 26 HARV. INT'L L.J. 225 (1985); Note, *Immigration and Naturalization Service v. Stevic: The Alien Facing Potential Persecution and the Clear Probability Standard for Relief From Deportation Under Immigration and Naturalization Act Section 243(h)*, 10 N.C.J. INT'L L. & COM. REG. 275 (1985).

11. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.) (amending the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (codified in 8 U.S.C. §§ 1101-1157 (1952))). For analyses of the 1980 act, see Anker, *Refugees/Asylum*, in PRACTICING LAW INST., ADVANCED IMMIGRATION WORKSHOP 1983, at 85-91 (R. Fragomen ed. 1984); Note, *The Endless Debate*, *supra* note 1, at 117; Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 MICH. Y.B. INT'L LEGAL STUD. 197.

12. Section 243(h)(1), 8 U.S.C. § 1253(h)(1), first appeared in 1952 with the enactment of the Immigration and Nationality Act. The section derives from the Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987. See LeMaster & Zall, *supra* note 2, at 452 n.38. Section 243(h) now reads "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."

13. 467 U.S. at 2501. The clear-probability test was evidently first advanced by the Attorney General when, before passage of the 1980 Refugee Act, that section's inapplicability was discretionary. It was first mentioned in *Lena v. I.N.S.*, 379 F.2d 536, 538 (7th Cir. 1967). See Steinberg, *The Standard of Proof in Asylum Cases*, 5 IMMIGRATION J. 8, 27 n.8 (1982).

14. *Stevic*, 467 U.S. at 2498 & n.19 ("clear probability had been defined by case law as 'likelihood'").

of the Act, aliens with a "well-founded fear" of persecution in their home countries are eligible for a discretionary grant of asylum in the United States.¹⁵ In *Stevic*, the government argued that the existence of a well-founded fear of persecution must be judged by the "more likely than not" standard, and Petitioner *Stevic* maintained that fear of persecution should be considered well-founded if that fear is not "imaginary, i.e., if it is founded in reality at all."¹⁶ The Court held that a more moderate position is that so long as an objective situation is

15. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1982), defines refugee, in pertinent part, as "any person who is outside any country of such person's nationality . . . and who 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." Section 208(a), 8 U.S.C. § 1158(a), requires the Attorney General to establish a procedure for aliens to apply for asylum and states that "the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title." 8 C.F.R. § 208.5 (1985) also provides that an alien who demonstrates a well-founded fear of persecution is eligible for a discretionary grant of asylum under section 208(a). When an asylum request is made after the institution of deportation proceedings, the request is also considered to include an application for relief under section 243(h). See 8 C.F.R. § 208.3 (1985). The reverse is not true. See *Stevic*, 467 U.S. at 2498 n.19. Aside from the question of standard of proof, the main difference between withholding and asylum is that withholding is country-specific; that is, although an alien granted withholding may not be deported to a country where his life or freedom is threatened on one of the specified grounds, he may be deported to that country as soon as it is apparent that it is not longer clearly probable that his life or freedom will be threatened there. Moreover, the alien can be deported to any other country willing to accept him. See, e.g., *Matter of Salim*, 18 I. & N. Dec. 311, 315 (Bd. of Imm. App. 1982) (withholding of deportation to Afghanistan, deportation to Pakistan); *Matter of Portales*, 18 I. & N. Dec. 239, 242 (Bd. of Imm. App. 1982) (withholding of deportation to Cuba, deportation to Peru); *Matter of Lam*, 1 I. & N. Dec. 15 (Bd. of Imm. App. 1981) (withholding of deportation to China, deportation to Hong Kong). In contrast, one who is a refugee presumptively enjoys that status for a year, after which he is inspected by an immigration officer. If it is determined that he still meets the definition of refugee and is not subject to an unwaivable ground for exclusion, then the refugee's status will be adjusted to that of permanent resident, provided that the Presidentially-designated number of refugee admissions and the 5,000 per annum quota of a refugee adjustments of status specified in sections 207(a) and 209(b), 8 U.S.C. §§ 1157(a) and 1159(b), have not been fully subscribed. If the quota is full, the applicant is wait-listed. See 8 C.F.R. §§ 209.1, 209.2 (1985). Once adjustment of status is achieved, the former refugee can become a United States citizen in as little as four more years. See 8 U.S.C. § 1159(b). Nevertheless, asylum is a discretionary form of relief, see *Anker, Exercising Discretion in Asylum Cases*, 6:2 IMMIGRATION J. 11 (1983), while section 243(h) relief is, in effect, a "prohibition against deportation to the country where the threat exists." *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1287 (9th Cir. 1985).

16. *Stevic*, 467 U.S. at 2498.

established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility. . . . For the purposes of our analysis, we may assume . . . that the well-founded-fear standard is more generous than the clear-probability-of-persecution standard because we can identify no basis in the legislative history for applying that standard in a section 243(h) proceeding or any legislative intent to alter the pre-existing practice.¹⁷

The Court in *Stevic* expressly refused to decide the meaning of the phrase "well-founded fear of persecution," because *Stevic* had applied only for withholding of deportation, and not for asylum.¹⁸ To have defined the meaning of the phrase would, in effect, have been to establish a standard of proof for a showing that an alien is a refugee eligible to be considered by the INS for the granting of asylum.

The importance of having an appropriate standard of proof is plain: deportation is "a drastic measure and at times the equivalent of banishment or exile,"¹⁹ something that "visits a great hardship on the individual" and "is a penalty—at times a most serious one."²⁰ As Justice Stewart warned, "[i]n this area of the law . . . we do well to eschew technicalities and fictions and to deal instead with realities."²¹ Reality for those denied the chance to win asylum because an agency or court failed to properly define a key phrase in refugee law and required too onerous a standard of proof can be not merely deportation, but deportation to a fate that is, at best, uncertain and, at worst, murderous.²²

The Supreme Court will soon define "well-founded fear," resolving a split among the courts of appeals. The administrative view, that is, the position of the INS and of the Board of Immigration Appeals (the "Board"), which reviews the deci-

17. *Id.*

18. *Id.*

19. *Tan v. Phelan*, 333 U.S. 6, 10 (1948).

20. *Bridges v. Wixon*, 326 U.S. 135, 137 (1945).

21. *Costello v. I.N.S.*, 376 U.S. 120, 131 (1964).

22. See AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA POLITICAL ASYLUM PROJECT, *THE FATE OF SALVADORANS EXPELLED FROM THE UNITED STATES* (unpublished manuscript Sept. 5, 1984) (discussing evidence that Salvadoran deportees are subject to reprisals and concluding that compelling their return "subjects them to intolerable danger").

sions of immigration judges, is at odds with that of the majority of circuits that have taken a position on the standard of proof necessary to demonstrate a well-founded fear of persecution. Part I of this Article reviews the position of these administrative agencies and of the courts that have agreed with them. Part II discusses the contrary position of the majority of the circuit courts. Part III examines the international law bases of the relevant statutory language. It will be demonstrated that legislative history, United States case law, and international policy and practice, indicate that the United States government's stringent administrative interpretation of the phrase "well-founded fear of persecution" is erroneous.

I. THE "IDENTICAL STANDARDS" POSITION

A. *The Third Circuit*

The Third Circuit holds that the well-founded fear standard for determination of applications for asylum under section 208(a) is identical to the clear probability standard used for claims of entitlement to withholding or deportation under section 243(h). In *Rejaie v. Immigration and Naturalization Service*,²³ the Third Circuit relied on the pre-1980 Act decision of the Seventh Circuit in *Kashani v. I.N.S.*,²⁴ which stated that the well-founded fear standard and the clear probability standard tended to converge in practice.²⁵

The *Rejaie* court also referred to the Board's decision in *In re Dunar*,²⁶ which had reached similar conclusions about the identity of the two standards, based on the Board's interpretation of the Senate's purpose in approving United States adherence to the 1967 United Nations Protocol Relating to the Status of Refugees.²⁷ The *Rejaie* court examined the legislative

23. 691 F.2d 139 (3d Cir. 1982).

24. 547 F.2d 376 (7th Cir. 1977).

25. *Id.* at 379.

26. 14 I. & N. Dec. 310, 319 (Bd. of Imm. App. 1973). For discussion of *Dunar*, see Note, *Those Who Stand at the Door: Assessing Immigration Claims Based on Fear of Persecution*, 14 NEW ENG. L. REV. 395, 411 (1983).

27. United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (ratified by the United States Oct. 4, 1968, 114 Cong. Rec. 29,607 (1968)), *entered into force* Nov. 1, 1968. International agreements that are ratified by the United States become binding domestic law. U.S. CONST. art. VI, cl. 2.

The definition of refugee in the 1980 Act was essentially taken from the Proto-

history of the 1980 Act and concluded that, because the new definition of refugee in that act was adopted solely for the sake of clarity and conformity with the language of the protocol, the *Kashani* court's conclusion survived passage of the 1980 Act.²⁸ *Rejaie* explicitly rejected the Second Circuit's view in *Stevic v. Sava*²⁹ that the 1980 Act created a uniform standard of proof for section 208(a) and section 243(h) claims and that the standard of proof under either section should be based on a well-founded fear test that is less stringent than requiring a showing that there exists a clear probability of persecution.³⁰ The

col. See A. HELTON, MANUAL ON REPRESENTING ASYLUM APPLICANTS 1 (1984); Anker & Posner, *supra* note 2, at 11. For the 1980 Act's definition, see *supra* note 15. The Protocol, in turn, incorporates articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. The United States was not a signatory to the Convention. See *Stevic*, 467 U.S. at 2494 n.9. Parties to the Protocol must comply with the Convention's provisions. Article 1, sec. 2 of the Protocol defines refugee as one who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside 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, is unable or, owing to such fear, is unwilling to return to it.

Article 1 of the Convention contained the same definition, except that it contained temporal and geographic limitations that were dropped with the addition of the Protocol.

28. 691 F.2d at 144, 146.

29. 678 F.2d 401 (2d Cir. 1978), *rev'd on other grounds sub nom.* I.N.S. v. *Stevic*, 467 U.S. 407 (1984).

30. 691 F.2d at 146. In its *Stevic* opinion, the Supreme Court neither strictly rejected the possibility of a uniform standard for both types of claims nor rejected the equation of well-founded fear with something less strict than clear probability. The Court did deny that one could prove entitlement to withholding based on a standard less than clear probability. The Court could reach this conclusion because, like the Board in *In re Dunar*, 14 I. & N. Dec. 310 (Bd. of Imm. App. 1973), that is extensively quoted, the Court equated withholding of deportation with the United States' obligation under Article 33 of the Convention not to "expel or return ('refouler,' in French), a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." See *Stevic*, 467 U.S. at 2494-96. While Article 33 is founded on the definition of "refugee" contained in Article 1, which speaks in terms of a well-founded fear of persecution, the Court obviously allowed that one standard of proof could be applicable for establishing that one must not be expelled to a country where he will be persecuted ("non-refoulement"), while another standard applies in showing that one is a refugee entitled to be considered for the discretionary relief of asylum. This is possible because section 243(h) does not even mention the term "refugee" and thus is not necessarily reliant on the Article 1 definition, even though the Immigration and Nationality Act section is supposed to embody the Article 33 concept. Although the Supreme Court did not

Rejaie court thereby rejected the argument of an Iranian student that a motion to reopen his deportation case had erroneously been denied, finding that the alien had failed to "demonstrate by objective evidence a realistic likelihood that he would be persecuted in his native land" if he refused military service.³¹

In later decisions, the Third Circuit has continued to adhere to *Rejaie*. In *Marroquin-Manriquez v. I.N.S.*,³² the court found no error in the Board's application of a clear probability standard to the claim of a Mexican political activist that he was entitled to be considered for political asylum.³³ In *Sotto v. United States I.N.S.*,³⁴ the Third Circuit recognized that *Stevic* left open the issue of the proper standard of proof of eligibility for section 208(a) relief, but stated that it "read nothing in *Stevic* to undermine the *Rejaie* holding."³⁵ The *Sotto* court nevertheless remanded the case to the Board, because the Board and the immigration judge whose decision the Board had affirmed had apparently not considered an affidavit that strongly supported the claim of the petitioning Filipino opposition leader that he would be persecuted for his anti-Marcos activities.³⁶ Most recently, in *Sankar v. I.N.S.*,³⁷ the Third Circuit again stated that *Stevic* leaves undisturbed its prior decisions that one must meet a clear probability standard to be eligible for section 208(a) relief, holding that the denial of such relief to two Syrians for failure to meet this standard was not an abuse of discretion.³⁸

B. Board of Immigration Appeals

The Board of Immigration Appeals has also consistently held that the standards of proof for the two forms of relief are

decide that there are two different standards of proof for the two different benefits that may accrue to those who seek to avoid persecution in their countries of origin, its dictum concerning a "more generous" standard than clear probability for asylum cases indicates the Court's leanings.

31. 691 F.2d at 146-47.

32. 699 F.2d 129 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1553 (1984).

33. 699 F.2d at 133.

34. 748 F.2d 832 (3d Cir. 1984).

35. *Id.* at 836.

36. *Id.* at 837.

37. 757 F.2d 532 (3d Cir. 1985).

38. *Id.* at 533.

identical. The Board's position was originally set out in *Matter of Dunar*³⁹ and reaffirmed in *Matter of Sibrun*,⁴⁰ when the Board stated that the showing of a "well-founded fear of persecution" requires that the alien present some objective evidence which establishes a realistic likelihood of persecution in his homeland; an alien's own speculative and conclusory statements, unsupported by independent corroborative evidence, will not suffice Otherwise stated, the test is whether objective evidence of record is significantly probative of the likelihood of persecution to this alien, sufficient to establish a well-founded fear.⁴¹

The Board's most complete effort to date to elaborate its position on the identity of standards of proof under sections 208(a) and 243(h) has been in *Matter of Acosta-Solorzano*.⁴² In what has been termed "a comprehensive opinion that analyzed the legislative background and history, the UN documents and commentaries, the Supreme Court's dictum in the *Stevic* case, and the conflicting decisions of the appellate courts,"⁴³ the Board in *Acosta* considered an immigration judge's denial of a Salvadoran's application for asylum and for the withholding of deportation. The Board acknowledged that, in *Stevic*, the Supreme Court had "assumed for purposes of analysis that the well-founded fear standard for asylum is more generous than the clear-probability standard for withholding of deportation."⁴⁴ The Board did not, however, venture an opinion as to why the Court might have made that assumption. Rather, the Board noted that the Third Circuit's position as to the identity of the two standards⁴⁵ and the Seven Circuit's views, in *Carvajal-Munoz v. INS*,⁴⁶ were very similar, both requiring a showing of actual persecution of the alien or "some other 'good reason' to fear persecution."⁴⁷ The Board also claimed to find support for its position in the Sixth Circuit's decision in

39. 14 I. & N. Dec. 310, 319-20 (Bd. of Imm. App. 1973).

40. 18 I. & N. Dec. 354 (Bd. of Imm. App. 1983).

41. *Id.* at 358 (citations omitted).

42. Bd. of Imm. App. Int. Dec. No. 2986 (Mar. 1, 1985).

43. I. C. GORDON & H. ROSENFELD, *IMMIGRATION LAW & PROCEDURE* § 2.24A(f) at 2-188.22(11) (1985 Supp.).

44. Bd. of Imm. App. Int. Dec. No. 2986 at 5 (Mar. 1, 1985).

45. *See Rejaie*, 691 F.2d at 144.

46. 743 F.2d 562 (7th Cir. 1984).

47. *See id.* at 574-76.

Youkhanna v. I.N.S.,⁴⁸ and identified only the Ninth Circuit's decision in *Bolanos-Hernandez v. I.N.S.*,⁴⁹ as opposing the Board's view. After this assessment of the conflicting positions of the courts, which misleadingly present the Board's position as that of the majority, the Board elaborated a defense of its "identical-standards" view.

The *Acosta* Board held that an alien applying for section 208(a) and 243(h) relief must establish by a preponderance of the evidence that the facts support his claim. Whether there is such a preponderance is to be judged, according to the Board, by the credibility and probative force of the evidence.⁵⁰ *Acosta* testified that, as manager of a taxi cooperative, he had been threatened on several occasions by guerillas intent on disrupting the Salvadoran economy and that other officers of the cooperative had been killed. The immigration judge's ruling that substantial portions of *Acosta's* testimony should be discounted "solely because it was self-serving," was rejected by the Board in the absence of an adverse credibility finding. However, the Board questioned whether, even accepting the facts as stated, *Acosta* could meet the standards of eligibility for asylum or withholding of deportation.⁵¹

The Board articulated four separate standards that an alien must satisfy to qualify as a refugee and thereby establish his eligibility for a favorable exercise of discretion regarding his application for asylum.⁵² As to the first of these standards, that the alien have a fear of persecution, the Board observed that this concept appeared in former section 203(a)(7) of the Act, prior to the 1980 revision.⁵³ This former section was

48. 749 F.2d 360 (6th Cir. 1984).

49. 767 F.2d 1277 (9th Cir. 1985).

50. Bd. of Imm. App. Int. Dec. No. 2986 at 7 (Mar. 1, 1985).

51. *Id.* at 10.

52. *Id.* at 11-12. "(1) the alien must have a fear of 'persecution;' (2) the fear must be 'well-founded;' (3) the persecution feared must be 'on account of race, religion, nationality, membership in a particular social group, or political opinion;' and (4) the alien must be unable or unwilling to return to his country of nationality or to the country in which he last habitually resided because of persecution or his well-founded fear of persecution." *Id.*

53. The term "asylum" in United States statutes, if not the concept itself, is original to the 1980 Refugee Act. LeMaster & Zall, *supra* note 2, at 458 n.71. Between 1974 and 1980, 8 C.F.R. Pt. 108 (1975) permitted aliens to apply for asylum to District Directors of the I.N.S. Until 1979, the District Director's decision was not appealable to either the Board or the courts of appeals. In May, 1979, the Board was

known as the "seventh preference"⁵⁴ and afforded "conditional entrant" status to aliens who applied in select countries overseas and who satisf[ied] an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution on account of race, religion or political opinion the [aliens had] fled (I) from any Communist or Communist-dominated country or area, or (II) from any country in the Middle East, and (ii) [were] unable or unwilling to return to such country or area on account of race, religion or political opinion, and (iii) [were] not nationals of the countries or areas where their application for conditional entry had been made.⁵⁵

An application for conditional entrant status under section

given authority by regulation to hear appeals of denials of asylum applications that had been filed after the commencement or completion of a deportation proceeding. *Carvajal-Munoz v. I.N.S.*, 743 F.2d 562, 564 n.3 (7th Cir. 1984). This "informal procedure" was an administrative response to the forced repatriation in 1972 of a Lithuanian seaman. See I C. GORDON & H. ROSENFELD, *supra* note 43, at §§ 2.31, 2.24Af (1985). The *Stevic* Court, 467 U.S. at 2496 n.13, notes that after the promulgation of the 1979 regulation, requests for asylum made after the commencement of deportation hearings were considered as requests for withholding under section 243(h) and "it appears that requests for asylum were to be judged by the same likelihood of persecution standard applicable to § 243(h) claims when the requests for asylum was made to a District Director or American consul at the port of entry. Thus, the standard of proof for the regulatory version of asylum is of little importance, since applications made after deportation proceedings had commenced were simply considered requests for § 243(h) relief, while denials of those made before deportation proceedings were instituted were not reviewable, and hence, the standard employed was never subject to appellate scrutiny. The argument of the Solicitor General in the *Petition*, *supra* note 8, at 14, that Congress intended that the Refugee Act of 1980 continue the pre-1980 asylum practice of using the withholding standard of proof is thus of little force. There was simply no independent consideration of an application for asylum made after deportation proceedings commenced and the correctness of using a clear-probability standard for application made before deportation proceedings started were never passed upon by the Board or the courts. The conditional-entrant category, discussed below, provided for the annual admission of 17,400 refugees per year. This provision was section 208(a)'s predecessor and existed from 1965 to 1980. LeMaster & Zall, *supra* note 2, at 453.

54. *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 52-53 (1971) (describing "Seventh Preference").

55. 8 U.S.C. § 1153(a)(7)(A)(i) (1976), repealed by the Refugee Act of 1980, Pub. L. No. 96-212, § 203(c)(3), 94 Stat. 102, 107. The seventh preference came into being with the 1965 amendments to the Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (repealed 1980). The conditional-entrant concept is discussed in Comment, *Political Asylum*, *supra* note 7, at 183-84; Anker & Posner, *supra* note 2, at 17-18; Note, *Refugees Under United States Immigration Law*, 24 CLEVE. ST. L. REV. 528, 530-31 (1975).

203(a)(7) had been judged under a standard that was markedly different from that applied to an application for withholding of deportation under section 243(h).⁵⁶ Whether the applicant for withholding of deportation had to show that he "would be" persecuted,⁵⁷ that persecution was clearly probable,⁵⁸ probable⁵⁹ or merely likely,⁶⁰ the pre-1980 section 243(h) standard presented virtually insuperable evidentiary problems. In contrast, one who sought conditional entrant status before 1980 had only to show "good reason to fear persecution."⁶¹

56. Although "conditional entry was somewhat similar to asylum, there are several points of difference, among which is the geographical restriction that was contained in section 203(a)(7). Additionally, the conditional entrant was treated as stopped at the border and had to wait for two years before eligibility for permanent residence would mature. It should not be thought, however, that "conditional entrant" status was exclusively reserved for overseas applicants. Up to one half of the refugee quota that existed prior to the 1980 Act was available to aliens who could meet the standard for conditional entry and who had been physically present in the United States for two years after legal entry as a non-immigrant. Note, *The Right of Asylum Under United States Law*, 80 COLUM. L. REV 1125, 1129 & nn.26, 27 (1980). The stringency of the "clear-probability" standard in pre-1980 section 243(h) jurisprudence is exemplified by cases such as *Matter of Tan*, 12 I. & N. Dec. 564 (1967), in which an ethnic Chinese Indonesian national claimed that he would be subjected to the then-current racial mob violence if he returned to Indonesia. Tan testified that he had personally never been attacked, although the police had been forced to intervene to save Tan's father's shop from a mob. The Board held that Tan had failed to show that he would personally be singled out for persecution. *Id.* at 568; see also *Fleurinor v. I.N.S.*, 585 F.2d 129, 134 (5th Cir. 1978) (alien must produce evidence of particularized persecution); *Kashani v. I.N.S.*, 547 F.2d 376 (7th Cir. 1977) (alien had not proved that he would, in fact, be persecuted); *Cheng Kai Fu v. I.N.S.*, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968) (discretion should be exercised favorably only upon showing of clear probability that the particular alien will be persecuted); *Lena v. I.N.S.*, 379 F.2d 536, 538 (7th Cir. 1967) (discrimination against church, but not against particular church member, proven); *Matter of Joseph*, 13 I. & N. Dec. 70 (Bd. of Imm. App. 1968) (clear probability means that alien must show he would be singled out for persecution); *Matter of Sihasale*, 11 I. & N. Dec. 531, 532 (Bd. of Imm. App. 1966) (applicant must set forth conditions relating to her personally which support anticipation of persecution). In some instances where the applicant for withholding was able to show a personalized history of persecution, discretionary denials of such relief nonetheless occurred. See, e.g., *Paul v. I.N.S.*, 521 F.2d 194, 197 (5th Cir. 1975), in which the majority opinion held that a group of Haitians failed to show that their departure from Haiti was politically motivated, despite unchallenged and apparently credible evidence of attacks by the Haitian secret police on the applicants and their families. *Id.* at 201-04 (Godbold, J., dissenting).

57. See, e.g., *Hosseinmardi v. I.N.S.*, 405 F.2d 25, 28 (9th Cir. 1968).

58. See *Kashani v. I.N.S.*, 547 F.2d 376 (7th Cir. 1977).

59. See *Kovac v. I.N.S.*, 407 F.2d 102, 105 (9th Cir. 1969).

60. See *Matter of Dunar*, 14 I. & N. Dec. 310, 319 (Bd. of Imm. App. 1973).

61. See *In Re Ugircic*, 14 I. & N. Dec. 384, 385-86 (Dist. Dir. 1972) ("good reason"); see also *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1978), rev'd on other grounds, 467

The Board implied in *Acosta* that its pre-1980 system of two standards of proof had never been formally adopted.⁶² Both the courts and the Board had, however, recognized and upheld the distinction between the "fear" standard applied to conditional entrants and the more stringent and "objective" standard that had to be proven for withholding of deportation.⁶³ Significantly, in August, 1983, the INS reverted to applying the more lenient well-founded fear standard rather than clear probability standard for overseas refugee processing, as contrasted with domestic decisions on withholding and asylum.⁶⁴

The *Acosta* Board considered the centrality of the concept of "fear" in the definition of "refugee" advanced by the United Nations High Commissioner for Refugees [UNHCR] in its

U.S. 407 (1984) (discussion of standard of proof under sections 203(a)(7) and 243(h)); *Cheng Fu Sheng v. Barber*, 269 F.2d 497 (9th Cir. 1959) ("fear of persecution standard in Refugee Relief Act of 1953 stands in sharp contrast to stringent withholding provision"); *Matter of Janus and Janek*, 12 I. & N. Dec. 866 (Bd. of Imm. App. 1968) (conditional entry applicant in different legal posture from withholding applicant); *Matter of Tan*, 12 I. & N. Dec. 564, 569-70 (Bd. of Imm. App. 1967) (nothing supports holding deportee to standard applied to conditional entrant); *In re Adamska*, 12 I. & N. 201 (R.C. 1967) (conditional entry standard "substantially broader" than pre-1965 withholding).

62. Bd. of Imm. App. Int. Dec. 2986 at 14, citing *Matter of Guiragossian*, 17 I. & N. Dec. 161, 163 (Bd. of Imm. App. 1979).

63. See *supra* note 63; see also Note, *Developments in the Law*, *supra* note 7, at 1356 n.165 (Board had stated that the conditional-entry standard was more lenient than the "suspension-of-deportation" standard); Comment, *supra* note 7, at 183-84. "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.' Yet the Board specifically rejected the contention that the same standard of proof was required for both sections of the Act." *Id.* The cases and commentators thus refute the Board's statement in *Acosta* that "prior to 1980, asylum and withholding of deportation were closely related forms of relief, and asylum was available if an alien could show the same likelihood of persecution that was required for withholding of deportation." Int. Dec. No. 2986 at 26. There was no "asylum" before the 1980 Act and, as demonstrated above, the standards of proof as between conditional entrants and those seeking withholding differed radically. Moreover, the Board itself recognizes that the Conference Committee for the bill that became the 1980 Refugee Act rejected language in the Senate bill that expressly linked asylum and withholding, in favor of the House version, which did not. *Id.* at 26 n.13.

64. Helton, *supra* note 4, at 253. Thus, since 1983, an alien applying for asylum at a United States consulate overseas must meet a less demanding standard of proof than if the same alien first made his way to the United States and thereafter raised the asylum claim with the I.N.S.

Handbook.⁶⁵ Although admitting that the utility of the *Handbook* in providing "one internationally recognized interpretation of the Protocol,"⁶⁶ the Board implied⁶⁷ that the UNHCR's explanation of the definition in the *Handbook* may have been based on the United Nations agency's relatively recent expanded role as an interceder not only for refugees but also for displaced persons.⁶⁸ The UNHCR, however, appeared as *amicus curiae* in the *Stevic* case and there made it clear that that office's interpretations of the meaning of "well-founded fear of persecution" were to be seen in the context of the definition of "refugee" in the 1951 Convention and the 1967 Protocol.⁶⁹ The Board did accept the UNHCR *Handbook* contention that fear should be the refugee's primary motive for requesting refuge, and it explained that "persecution" should be thought of as excluding harm arising from civil strife or anarchy, because Congress had rejected a definition of refugee that would have included "displaced persons."⁷⁰

65. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK: PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (1979) [hereinafter cited as *Handbook*].

66. Elsewhere, however, the Board was given an important place to the *Handbook's* interpretation of the Protocol. See, e.g., *In Re Frentescu*, 18 I. & N. 244 (1982); *Matter of Rodriguez-Palma*, 17 I. & N. 465, 468 (1980). The courts have also relied on the *Handbook*. See, e.g., *Hernandez-Ortiz v. I.N.S.*, 777 F.2d 509, 514 n.3 (9th Cir. 1985); *Ananeh-Firempong v. I.N.S.*, 766 F.2d 621, 626-28 (1st Cir. 1985); *Carvajal-Munoz v. I.N.S.*, 743 F.2d 562, 574 (7th Cir. 1984); *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1978), *rev'd on other grounds*, 467 U.S. 407 (1984); *Hotel & Restaurant Employees Local 25 v. Smith*, 594 F. Supp. 502, 512 (D.D.C. 1984). Moreover, an Assistant Attorney General in the Office of Legal Counsel, Theodore Olsen, addressed on Aug. 23, 1981 memorandum on the Refugee Act to David Crosland, General Counsel to the I.N.S., in which Olsen stated that "We assume that Congress was aware of the criteria articulated in the *Handbook* when it passed the Act in 1980, and that it is appropriate to consider the guidelines in the *Handbook* as an aid to the construction of the Act." UNITED STATES REFUGEE PROGRAM OVERSIGHT, HEARINGS BEFORE THE SUBCOMMITTEE ON IMMIGRATION, REFUGEES AND INTERNATIONAL LAW, HOUSE COMMITTEE ON THE JUDICIARY, 97TH CONG. 1ST SESS. 26 (1981). Doris Meissner, Acting Commissioner of the I.N.S., accepted this view in a submission to Congress. See REFUGEE ADMISSION PROPOSAL, HEARING BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY, 97TH CONG., 1ST SESS. 15 (1981).

67. Bd. of Imm. App. Int. Dec. No. 2986 at 15-16 & n.8.

68. See *supra* note 5, citing articles discussing the difference between these two categories.

69. See Helton, *supra* note 10, at 808 n.132 (discussion of the UNHCR's position in *Stevic* as to the meaning of "well-founded fear").

70. Bd. of Imm. App. Int. Dec. No. 2986 at 16-18.

The Board admitted that Acosta had shown that he was motivated by fear of persecution in seeking refuge in the United States, but questioned whether that fear was well-founded. It approved of the argument, in that regard, by Grahl-Madsen:⁷¹ "If there is a real chance that he will suffer persecution, that is reason good enough, and his 'fear' is 'well-founded.'" The Board extracted from this and other quotes support for its position that "well-founded fear" necessarily involves "an objective, as opposed to a purely subjective, test for the determination of refugee status."⁷² The Board, however, jumped from this incontestable observation to the more questionable conclusion that it was thereby justified in continuing to equate well-founded fear with clear probability of persecution. This feat was accomplished principally through the use of a helpful dictionary definition of the general phrase "well-founded."⁷³

The *Acosta* Board denied any intention to distinguish between the concepts of "probability" and "possibility" in requiring proof of a well-founded fear. Instead, it enumerated four factors that the evidence that the alien presents must show: (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of a punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.⁷⁴

In respect of the first factor, the Board views the trigger for the persecution from the point of view of the persecuted; that is, if the alien were, for example, not the political opponent that he imagines himself to be, he would not be considered to have a well-founded fear. The Board termed the remaining factors "indispensable in showing that there is a real

71. A. GRAHL-MADSEN, *supra* note 5, at 181.

72. Bd. of Imm. App. Int. Dec. No. 2986 at 20 (citation and footnote omitted). The Board did not indicate, however, who, if anyone, might hold to the position that all that matters when refugee status is being assessed is the state of mind of the applicant. It is well recognized that the idea that well-founded fear may be judged *only* in the light of the alien's state of mind has been rejected by the courts. Helton, *supra* note 28, at 6 n.12 (collecting cases).

73. Bd. of Imm. App. Int. Dec. No. 2986, at 22.

74. *Id.*

chance an alien will become a victim of persecution.”⁷⁵ These factors require a demonstration that the alien “would” be persecuted, that the persecutor knows about the alien and is both able and desirous of punishing him; that is, the asylum applicant must present not only objective and subjective evidence about himself (e.g., “they threatened my life, and I am now afraid for it”), but also objective and subjective evidence about the persecutor (e.g., “he knows I oppose him, would like to kill me, and would know how to find me”).⁷⁶

The Board said that such phrases as “good reason” and “valid reason,” which some circuits use as tests of well-founded fear,⁷⁷ are not synonymous with plausibility. The courts, the Board concluded, had required the applicant for asylum to “show that his fears have a sound basis in personal experience or in other external facts or events.”⁷⁸ In fact, a huge gulf separates that sort of requirement from a requiring that an asylum applicant meet the four evidentiary tests delineated by the *Acosta* Board. The Board claimed, however, that even those courts that oppose using a clear probability standard of proof for asylum claims had “looked for facts demonstrating some combination of the four factors we have used to describe a likelihood of persecution.”⁷⁹

The Board also claimed that its concept of well-founded fear corresponds in part to that of the UNHCR *Handbook*.⁸⁰ That document notes that, because fear is subjective, determination of refugee status “primarily require[s] an evaluation of the applicant’s statements rather than a judgment on the situation prevailing in his country of origin,”⁸¹ with due regard for individual psychological differences and an assessment of credibility.⁸² Although the *Handbook* requires that “this frame of mind must be supported by an objective situation,”⁸³ the *Handbook* regards objective factors, such as “the personal and

75. *Id.* at 22-23.

76. See *Cardoza-Fonseca*, 762 F.2d at 1454 (Board’s erroneous requirements that alien prove he “would” be persecuted).

77. *Id.* at 23.

78. *Id.* at 23-24.

79. *Id.* at 24 (citations omitted).

80. *Id.*

81. *Handbook*, *supra* note 67, at para. 37.

82. *Id.* at paras. 40, 41.

83. *Id.* at para. 38.

family background of an applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences,"⁸⁴ as mainly useful in "indicat[ing that] the predominant motive for his application is fear,"⁸⁵ including a fear that may be exaggerated, provided that it is "justified."⁸⁶

The *Acosta* Board objected both to the *Handbook's* focus on establishing the credibility of the alien's claimed motive, demanding instead that the applicant show that persecutors would be likely to move against him if he were returned to his country of origin, and to the *Handbook's* implication that one who has not yet been personally persecuted may still have a well-founded fear of persecution. Because these two factors are the key concepts in the *Handbook's* interpretation of "well-

84. *Id.* at para. 41.

85. *Id.*

86. *Id.* An example of such an exaggerated yet "justified" fear, that could serve as a basis for refugee status, might occur where one who has been persecuted under one regime in his country of origin still fears persecution despite a change in regimes or a substantial liberalization under the pre-existing regime. The fear that he would again be persecuted may be exaggerated, given all of the evidence that one could gather about current conditions in the country, but the fear would at least be excusable, if not justifiable, if many former prosecutors were still at large in that society. Thus, the *Handbook* "assumes that a person has a well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention." *Id.* at para. 45. "Objective" evidence, such as that regarding conditions in the applicant's country, is "an important element in assessing the applicant's credibility," which is but one of the factors by which to judge his motive. Thus, the *Handbook* concludes that an alien's fear is well-founded

if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reason as stated in the definition, or would for the same reason be intolerable if he returned there.

Id. at para. 42. According to the *Handbook*, then, it is credibility that is really at stake in the marshalling of "objective" evidence. If the alien cannot show, for example, that he or his friends and relatives and other members of the same racial or social group have been persecuted or that the laws themselves or the manner in which the laws are applied would encourage such persecution, *id.* at para. 43, he has not established the credibility of his assertion that his primary motive in coming to the United States was fear of persecution. In other words, a failure to produce such evidence means that the alien did not come to the United States because he feared persecution or, if he did come for that motive, the fear was more than exaggerated; it was unreasonable. The alien need not, however, show actual personal persecution, because "the word 'fear' refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution." *Id.* at para. 45.

founded fear”⁸⁷ the Board and the *Handbook* interpretations are at odds.

The Board’s position that there is “no meaningful distinction between a standard requiring a showing that persecution is likely to occur and a standard requiring a showing that persecution is more likely than not to occur”⁸⁸ makes no sense in the context of the *Handbook* discussion, which revolves not around the predictability of persecution, but around the reasonableness of the alien’s belief that he risks persecution if returned. If that belief is reasonable, in the light of evidence concerning his past experiences, those of others in his circle or more general conditions in the country, then he is faced with a “reasonable possibility,” in the words of the Supreme Court’s *Stevic* dictum,⁸⁹ that persecution would ensue upon his return. According to the *Handbook*, then, the alien has to prove neither that it is likely nor that it is more likely than not that such persecution will occur. His burden of proof, according to the *Handbook*’s test, is significantly less.⁹⁰

II. THE LESS-THAN-A-CLEAR-PROBABILITY POSITION⁹¹

A. The Sixth Circuit

The Sixth Circuit’s position, until recently, appeared to

87. See *id.* at 11.

88. Bd. of Imm. App. Int. Dec. No. 2986, at 25.

89. *Stevic*, 467 U.S. at 2498.

90. The Board denied asylum to Acosta on grounds not directly related to the present discussion. It rejected his argument that he was threatened with persecution on the ground of membership in a social group (San Salvador taxi drivers), because his particular group membership did not represent an “immutable characteristic.” The Board rejected Acosta’s contention that he was persecuted on political grounds, because it viewed the threats against taxi drivers by guerrillas as simply part of a general campaign by the latter to further their goals. Bd. of Imm. App. Int. Dec. No. 2986, at 28-32. In discussing the second claim by Acosta, the Board implied that persecution on political grounds would only be recognized if the person who is persecuted had a political opinion to which the persecutor objects. *Id.* at 32-33. The Ninth Circuit cases, discussed below, insist that such persecution is properly viewed from the standpoint of the persecutor; that is, persecution may exist even if the person who is persecuted does not have the characteristic or view that the persecutor believes that he possesses.

91. The positions of several circuit courts have been hinted at, but are not yet clear. The Fourth Circuit, in *Benitez v. Immigration and Naturalization Service*, No. 86-3005, slip op. at — (4th Cir. June 26, 1986) “for the sake of completeness” applied “the more liberal standard found in *Cardoza-Fonseca*” while noting that the Supreme Court would decide the issue. In *Ananeh-Firempong v. I.N.S.*, 766 F.2d

correspond to that of the Board and the Third Circuit. In *Reyes v. I.N.S.*,⁹² the circuit's first post-*Stevic* order implicating the standard for asylum, a Sixth Circuit panel noted that the Supreme Court had adopted the clear-probability standard in section 243 cases, granted the government's motion to reconsider an earlier decision that it was error to hold an applicant for both 243(h) and 208(a) relief to a clear-probability standard of proof and affirmed the Board's denial of that relief.⁹³ In *Dally v. I.N.S.*,⁹⁴ and *Nasser v. I.N.S.*,⁹⁵ other Sixth Circuit panels required Chaldean Catholics from Iraq to prove that it was clearly probable that they would be persecuted in that country, although the claimants had applied both for asylum under section 208(a) and for withholding of deportation under section 243(h).⁹⁶

In *Youkhanna v. I.N.S.*,⁹⁷ however, Chief Judge Lively and Judges Kennedy and Milburn noted that *Stevic* had left open the question of whether a lesser standard of proof applies to asylum applicants, but did "assume . . . that the well-founded fear standard is more generous than the clear-probability-of-persecution standard."⁹⁸ The *Youkhanna* court stated that the well-founded fear standard "does require less than the 'clear probability' standard applied to the section 243 question," but denied the Chaldean Christians' petition for want of "specific

621 (1st Cir. 1985), the First Circuit took a position on a related issue that is at odds with the Board's view as expressed in *Acosta*, holding that an alien need not show that a specific threat was made to him, but rather that a threat to one's family, social group or other group identity could be the basis for proving a section 243(h) or 208(a) case. *Id.* at 627. The Eleventh Circuit, in *Garcia-Mir v. Smith*, 766 F.2d 1478, 1482 n.3 (11th Cir. 1985), noted without comment that the district court, in *Fernandez-Roque v. Smith*, 539 F. Supp. 925, 931-35 (N.D. Ga. 1982), had determined that there is no significant difference between withholding of deportation and the relief called for in the *Convention* and the *Protocol*. The Second Circuit has not commented on standards of proof in refugee cases since *Stevic*, 678 F.2d 401 (2d Cir. 1978), *rev'd on other grounds*, 467 U.S. 407 (1984), but, since it considered in that case that both withholding and asylum could be awarded on the basis of tests that were significantly less stringent than "clear probability," it is likely that the Second Circuit would side with the majority of circuits in rejecting the contention that the tests for the two types of relief are identical.

92. 747 F.2d 1045 (6th Cir. 1984).

93. *Id.* at 1046.

94. 744 F.2d 1191 (6th Cir. 1984).

95. 744 F.2d 542 (6th Cir. 1984).

96. *Dally*, 744 F.2d at 1194; *Nasser*, 744 F.2d at 543.

97. 749 F.2d 360 (6th Cir. 1984).

98. *Id.* at 362 (citing *Stevic*, 104 S. Ct. at 2488).

evidence.”⁹⁹

Finally, in *Dolores v. I.N.S.*,¹⁰⁰ another Sixth Circuit panel agreed with the *Youkhanna* distinction, stating that the “well-founded fear standard is more generous both because it can be satisfied by credible subjective evidence and because the fear may be based upon group characteristics such as the petitioner’s religion.” Yet the *Dolores* court affirmed the denial of the application for asylum by a Filipino who had become active in anti-Marcos activities in the United States, because the applicant had not shown that he would be “more likely than other private citizens to suffer persecution.”¹⁰¹ Nevertheless, it now seems that the Sixth Circuit does not agree that an applicant for section 208(a) relief must prove his eligibility by demonstrating a clear probability of persecution.

B. *The Seventh Circuit*

The Seventh Circuit, in *Carvajal-Munoz v. I.N.S.*,¹⁰² considered the case of a Chilean native who had moved to Argentina in 1967 and had taken the latter country’s citizenship, but subsequently renounced it. He claimed he would be persecuted if returned to Argentina, because he was a Chilean, because he had renounced his Argentina citizenship, and because of his political views. He recounted that he had been harassed and arrested numerous times for his political activities.¹⁰³ In considering Carvajal-Munoz’s section 243(h) claim, the court reaffirmed the view that it had expressed in *Kashani v. I.N.S.*,¹⁰⁴ that “the evidence must establish that *this particular* applicant will more likely than not be singled out for persecution.”¹⁰⁵

As regards the evidentiary burden in proving a section 208(a) case, however, the Seventh Circuit, although still requiring the marshalling of specific facts showing that the applicant has been persecuted or has “good reason to fear”¹⁰⁶ that he or she will be singled out for persecution, allowed that in

99. *Id.*

100. 772 F.2d 223 (6th Cir. 1985).

101. *Id.* at 226-27 (citation omitted).

102. 743 F.2d 562 (7th Cir. 1984).

103. *Id.* at 563.

104. 547 F.2d 376 (7th Cir. 1977).

105. *Carvajal-Munoz*, 743 F.2d at 573 (emphasis in original).

106. *Id.* at 573 (citation omitted).

some instances the applicant's testimony alone may meet that burden, if it is credible, persuasive and points to specific facts.¹⁰⁷ The court regarded this standard as conforming to the one employed under the former conditional-entrant provision, section 203(a)(7) ("good reason to fear persecution") and in keeping with the Supreme Court's language in *Stevic* ("reasonable possibility").¹⁰⁸ It added that "[a]lthough this evidentiary standard is very similar to that connected with the 'clear probability' standard, it is not identical."¹⁰⁹ Because the standards are different, the court recommended that immigration judges make asylum decisions on separate records before the deportation hearing, and not together with their decisions on withholding deportation.¹¹⁰

C. *The Ninth Circuit*

The Ninth Circuit's refugee law jurisprudence has expanded rapidly since it decided *Bolanos-Hernandez v. I.N.S.*¹¹¹ in December, 1984. That trail-breaking decision involved a Salvadoran who claimed to have been threatened with death by guerillas because he had refused to join them. The court agreed with the Supreme Court's assumption in *Stevic* that the well-founded fear standard is more generous than the clear-probability test, based on the difference in language between sections 208(a) and 243(h), and stated that an evaluation of well-founded fear should include both consideration of the applicant's state of mind and an evaluation of the conditions in the country of origin, its laws, and the experience of others.¹¹²

The *Bolanos-Hernandez* court set out four factors that must be present to win a prohibition on deportation under section 243(h):

107. *Id.* at 574.

108. *Id.* at 576.

109. *Id.* at 574-75.

110. *Id.* at 570. The Ninth Circuit has set out a different order for considering the two claims. It first tests for a valid section 243(h) claim; if such a claim is sustainable, then eligibility for section 208(a) relief follows *a fortiori*. See *Bolanos-Hernandez*, 767 F.2d at 1277.

111. 767 F.2d 1277 (9th Cir. 1985).

112. *Id.* at 1282-83 & n.11. The language difference is between "would be threatened" in section 243(h) and "well-founded fear" in section 208(a). The *Bolanos-Hernandez* court characterized the former as "objective" and the latter as "allow[ing] for a partially subjective showing." *Id.* at 1283.

1. A likelihood of persecution, i.e., a threat to life or freedom;
2. persecution by the government or by a group which the government is unable to control;
3. persecution resulting from the petitioner's political belief; and
4. that the petitioner is not a danger or security risk to the United States.¹¹³

The government contended that Bolanos had failed to prove the first and third factors because the evidence that he offered of a specific threat to his life was "merely 'representative of the general conditions in El Salvador,' "¹¹⁴ and " 'not supported by 'independent corroborative evidence.' "¹¹⁵ The court responded that, as to the specific threat issue, the Board had "turned logic on its head" and that "[i]t should be obvious that the significance of a specific threat to an individual's life or freedom is not lessened by the fact that the individual resides in a country where the lives and freedom of a large number of persons are threatened."¹¹⁶ Moreover, noting that "[a]uthentic refugees are rarely able to offer direct corroboration of specific threat,"¹¹⁷ because "[p]ersecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution,"¹¹⁸ the alien's own testimony about a threat, if unrefuted and credible,¹¹⁹ would have to suffice to prove the threat. Otherwise, "it would be close to impossible

113. *Id.* at 1284 (citing *Zepeda-Melendez v. I.N.S.*; 741 F.2d 285, 289 (9th Cir. 1984) and *McMullen v. I.N.S.*, 658 F.2d 1312, 1315 (9th Cir. 1981).

114. *Bolanos-Hernandez*, 767 F.2d at 1284.

115. *Id.*

116. *Id.* at 1284-85.

117. *Id.* at 1285.

118. *Id.*

119. It is the difference in assessment of credibility that largely determines the difference in outcome between *Bolanos-Hernandez* and *Saballo-Cortez v. I.N.S.*, 761 F.2d 1259 (9th Cir. 1984), a case decided two days after *Bolanos-Hernandez*, but amended some months afterward. A number of important contradictions in *Saballo-Cortez'* evidence, including the Nicaraguan applicant's unobstructed exit from his country, with a government-provided passport, and his continuous employment during the period of the Sandinista government, led both the administrative bodies and the Ninth Circuit to conclude that the alien had not come to the United States because he feared persecution in Nicaragua. *Bolanos-Hernandez*, 767 F.2d at 1264 & n.3. In cases since *Bolanos-Hernandez* in which the Ninth Circuit has affirmed denial of section 243(h) and section 208(a) relief, it has generally concluded that, regardless of the standard applied, the alien has failed to prove eligibility for either form of relief. See *Garcia-Ramos v. I.N.S.*, 775 F.2d 1370, 1373 n.5 (9th Cir. 1985); *Sangabi v.*

for [any political refugee] to make out a Sec. 243(h) case.”¹²⁰ The court added that documentary evidence could be used to establish the credibility of an applicant’s claim that the putative persecutors had the will or the ability to carry out their threats.¹²¹

Since deciding *Bolanos-Hernandez*, the Ninth Circuit has reached questions of refugee law that other circuits, with many fewer claims, have not. The Ninth Circuit has not, however, expressly delineated its view on the meaning of well-founded fear of persecution.¹²² It has continued to enunciate a moderate position. For example, the court has held that an alien’s “mere assertions of his fear without evidence that his fear has a basis in fact” will not suffice to show persecution.¹²³ It still propounds a basically objective approach that requires the alien to make a prediction about the likelihood that he will be persecuted. For example, the court stated in *Sarvia-Quintanilla v. United States I.N.S.*¹²⁴ that [p]roof of even a sincere and deeply-felt fear is not itself enough to establish an alien’s eligibility for political asylum. That fear must be ‘well-founded.’ There must always be some direct, credible evidence supporting the [section 208(a)] claim. In addition, the evidence should be sufficiently specific to indicate that the alien’s predicament is appreciably different from the dangers faced by all his country-

I.N.S., 763 F.2d 374, 375 (9th Cir. 1985); *Vides-Vides v. I.N.S.*, 783 F.2d 1463 (9th Cir. 1986).

120. *Bolanos-Hernandez*, 767 F.2d at 1285 (citing *McMullen v. I.N.S.*, 658 F.2d 1312, 1319 (9th Cir. 1981)). It has been noted that the *I.N.S.*, in its guidelines provided to adjudicators of overseas refugee claims, has taken essentially the same position as the Ninth Circuit regarding uncorroborated testimony. See Helton, *supra* note 10, at 807 n.130 *see also* *Zavalla-Bonilla v. I.N.S.*, 730 F.2d 562, 565 (9th Cir. 1984) (Salvadoran’s letter from friends considered by Board as “gratuitous speculations” concerning threat to applicant). The *Zavalla* court stated that “[i]t is difficult to imagine, given her circumstances, what other forms of testimony *Zavalla-Bonilla* could readily present.” *Id.* But *see* *Espinoza-Martinez v. I.N.S.*, 754 F.2d 1536, 1540 (9th Cir. 1985) (“undocumented claims of persecution may amount to nothing more than the alien’s statement of opinion”) (citing *Moghanian v. I.N.S.*, 577 F.2d 141, 142 (9th Cir. 1978) and *Pereira-Diaz v. I.N.S.*, 551 F.2d 1149, 1154 (9th Cir. 1977)).

121. *Bolanos-Hernandez*, 767 F.2d at 1285-86. The court also held that affirmative political neutrality could be a “political opinion” on which an assertion of persecution could be based. *Id.* at 1285-86; *see also* *Arugeta v. I.N.S.*, 759 F.2d 1395, 1397 (9th Cir. 1985).

122. *See* *Garcia-Ramos v. I.N.S.*, 775 F.2d 1370, 1373 n.5 (9th Cir. 1985).

123. *Sagermark v. I.N.S.*, 767 F.2d 645, 649 (9th Cir. 1985).

124. 767 F.2d 1387 (9th Cir. 1985).

men.¹²⁵

The Ninth Circuit will not remand cases in which the Board has recognized that the asylum claim might be judged by a standard less than "clear probability" and has made it clear that even under the lesser standard for defining well-founded fear, e.g., "good reason," it may find a claim wanting.¹²⁶ Moreover, the Ninth Circuit attributes the difference between the well-founded fear and the clear-probability standards principally to the mandatory nature of section 243(h), as contrasted with the discretionary nature of section 208(a).¹²⁷ An argument can be made that the prohibition of an alien's deportation is more beneficial to the alien than a determination that he is eligible for an exercise of discretion regarding his asylum claim. Nevertheless, in practice, some aliens who have won withholding have been deported to countries other than those in which they feared persecution, yet aliens who can show that they are eligible for asylum are not deported¹²⁸ and, unlike those who receive 243(h) relief, may soon become permanent residents.

The Ninth Circuit's view of the origin of the two separate standards is based on an inferred Congressional intent to have differences in the standard of proof linked to gradations in

125. *Id.* at 1394 (citations omitted); see also *Estrada v. I.N.S.*, 775 F.2d 1018, 1021 (9th Cir. 1985) (alien must introduce some specific evidence to show that persecution would be directed toward him as an individual).

126. See, e.g., *Maroufi v. I.N.S.*, 772 F.2d 597, 601 (9th Cir. 1985) (motion to reopen) (case remanded because Board may have considered merits of asylum claim and, although it employed the wrong standard, did not make clear that, in the exercise of its discretion, it would have denied the motion under any standard); *Logan v. I.N.S.*, 775 F.2d 1015, 1016 (9th Cir. 1985) (no remand, because Board made clear that under any standard asylum should be denied); *Chatila v. I.N.S.*, 770 F.2d 786, 790 (9th Cir. 1985) (same result as in *Logan*).

127. *Cardoza-Fonseca*, 767 F.2d at 1451-52.

128. In *Azzouka v. I.N.S.*, No. 85-1209, slip op. at 6593 (2d Cir. Nov. 12, 1985), the court reversed the granting of a petition for a writ of habeas corpus to a Palestinian who sought to enter the United States and was excluded, under section 235(c) of the Immigration and Nationality Act, 8 U.S.C. 1225(c) (1982), as a threat to the public interest or welfare, safety or security of the United States. After cooperating with the Federal Bureau of Investigation to discuss the Palestine Liberation Organization, for whom he had worked, Azzouka filed a claim for political asylum. The question in this case, however, was whether the alien was entitled to a hearing on his political asylum claim. Ordinarily, if there is no previous finding of excludability that would bar an alien from being heard on his asylum claim and if that claim is found to have merit, discretion is regularly exercised in the alien's favor.

types of relief available.¹²⁹ It is more likely that no clear intention was ever explicitly held by Congress, which did not give any clear indication of its thought on standards of proof.¹³⁰ Rather, the "clear probability" standard had its origin in the period before United States accession to the Protocol,¹³¹ during a period in which neither applicants for withholding¹³² nor applicants for conditional entry¹³³ were considered under provisions that included the "well-founded fear" phrase. The clear-probability standard is a creature of administrative interpretation that took on a life of its own because it fit in with the language of section 243(h), which was the provision most often interpreted by the courts and the Board before 1980. This standard was thus well established by the time that Congress took steps to conform United States law to the Protocol. The existence of a distinct well-founded fear standard that is less stringent than the clear-probability test results from that subsequent congressional effort at conformity.

The Ninth Circuit's view in *Bolanos* and its progeny has taken it ever closer to achieving a conformity of United States law with the meaning of the Protocol, as interpreted by the UNHCR *Handbook*. For example, in *Cardoza-Fonseca v. I.N.S.*,¹³⁴ the court stated that, after objective evidence has been introduced that is sufficient to suggest a risk of persecution, "the alien's subjective fears and desire to avoid the risk-laden situation in his or her native land become relevant."¹³⁵ The implication is clearly that the fear of persecution is credible whenever there is evidence of a risk-situation, without regard to any proof of the degree of likelihood that the risk will materialize, provided only that the risk is not so remote as to make the fear unreasonable.

This formulation of the relevant standards has finally al-

129. See *Bolanos-Hernandez*, 767 F.2d at 1283.

130. See *Carvajal-Munoz*, 743 F.2d at 574 n.15.

131. The three principal cases that launched the use of the "clear probability" phrase, *Lena v. I.N.S.*, 379 F.2d 536 (7th Cir. 1967), *Cheng Kai Fu v. I.N.S.*, 386 F.2d 750 (2d Cir. 1967), and *Matter of Tan*, 12 I & N Dec. 564 (1967), were all decided in 1967. The United States acceded to the *Protocol* in 1968. See Comment, *supra* note 1, at 95 n.89.

132. See *supra* note 12.

133. See *supra* note 57.

134. 767 F.2d at 1453.

135. *Id.*

lowed the Ninth Circuit to make distinctions in practice between withholding and asylum, based upon the different standards of proof required for each remedy. In *Garcia-Ramos v. Immigration and Naturalization Service*,¹³⁶ a Salvadoran asylum applicant had belonged to a guerrilla group and left the country with a passport that he obtained by bribery. The immigration judge found Garcia's testimony not credible, based on Garcia's having shown "disrespect for U.S. law" by fathering a child out of wedlock and because of discrepancies between the date of entry on the asylum application and in Garcia's testimony.¹³⁷ The Board held that he had not shown a likelihood of persecution, even assuming all of his testimony to be true.¹³⁸ The court of appeals agreed with the Board as to withholding of deportation, on the ground that Garcia had openly engaged in political activities, yet was never arrested or threatened, and that his family continued to live unharmed in El Salvador. The court concluded that Garcia had not shown that the government was aware of his activities,¹³⁹ in contrast to such cases as *Bolanos-Hernandez*¹⁴⁰ and *McMullen v. INS*,¹⁴¹ in which direct threats had been made by insurgents. The applicant in *Garcia*, the court held, had proved a possibility, but not a clear probability, of persecution.¹⁴²

In discussing Garcia's asylum claim, however, the court lowered the threshold below the standard of proof mentioned in the *Stevic* dictum: The word "fear" connotes subjective considerations . . . thus requiring the evaluation of an applicant's state of mind That the fear must be "well-founded" implicates a requirement of objective reasonableness. In other words, there must be *some basis in reality* or reasonable possibility that a petitioner would be persecuted.¹⁴³

In *Stevic*, the Supreme Court had suggested that it is an immoderate position to argue that an alien can establish a well-founded fear if that fear was merely not imaginary, as long as

136. 775 F.2d 1370 (9th Cir. 1985).

137. *Id.* at 1372.

138. *Id.* at 1373.

139. *Id.*

140. 767 F.2d 1277 (9th Cir. 1985).

141. 658 F.2d 1312 (9th Cir. 1981).

142. *Garcia-Ramos*, 775 F.2d at 1373.

143. *Id.* at 1374 (emphasis added), citing *Stevic*, 102 S. Ct. at 2498.

the fear has any foundation in reality.¹⁴⁴ The Court offered the phrase "reasonable possibility" as the "more moderate position."¹⁴⁵ The Ninth Circuit, however, equates "reasonable possibility" with "some basis in reality."¹⁴⁶ Although this view is perhaps slightly more generous than the Supreme Court's dictum, it closely corresponds to the UNHCR *Handbook's* approach of objectively looking at a state of mind and its basis.¹⁴⁷ In this view, if the alien presents objective evidence that supports the credibility of his claim to fear persecution, then his fear is not unreasonable, but is based on reality, and is thus a well-founded fear.

This approach is not original with either the Ninth Circuit or the UNHCR. A career INS attorney took essentially the same position even before the passage of the Refugee Act of 1980.¹⁴⁸ The objective evidence supporting a claim based on this theory is presented not to calculate the likelihood of persecution, but to document that the alien's claim to fear persecution is real and not based on an irrational or unreasonable view of his circumstances.

In *Garcia*, the applicant had participated in daylight, undisguised, in numerous urban guerilla activities.¹⁴⁹ The court concluded that his fear was reasonable, even though he could not show that either he or his family had been persecuted: a well-founded fear of persecution can be established by other evidence, such as Garcia's evidence of his membership in a persecuted political organization, his extensive activities while a member of that organization, and his reasons to believe that he might have been identified as a member.¹⁵⁰

144. *Stevic*, 102 S. Ct. at 2498.

145. *Id.*

146. *Garcia-Ramos*, 775 F.2d at 1374.

147. *Handbook*, *supra* note 67 at paras. 37, 38.

148. See Frank, *Effect of the 1967 United Nations Protocol on the Status of Refugees in the United States*, 11 INT'L LAW. 291, 300 (1977) (fear is not well-founded if "illusory, neurotic or paranoid").

149. *Garcia-Ramos*, 775 F.2d at 1372.

150. *Id.* at 1374. But see *Larimi v. I.N.S.*, 782 F.2d 1494, 1497 (9th Cir. 1986) (Iranian who became involved with anti-Khomeini organization in the United States, one of whose members was killed upon return to Iran, failed to show "objectively reasonable" threat to himself, because it is speculative to conclude that his "sympathy for and causal affiliation with" anti-Khomeini organization would result in persecution); see also *Bahremnic v. I.N.S.*, 782 F.2d 1243, 1248 (5th Cir. 1986) (Iranian joined pro-Shan organization in 1981 in United States; several of his cousins were

This case presents perhaps the first instance in which a low-level opposition political activist from a country where human rights violations are common has been held to have established a well-founded fear without showing a personalized threat to himself or his family.¹⁵¹ In addition, the court upheld Garcia's asylum claim in the face of the INS assertion that the applicant had come to the United States for economic reasons,

killed or jailed in Iran since then. The court held that the alien failed to show a well-founded fear of persecution, because it is not evident that mere membership in anti-Khomeini group results in persecution, and there was no showing that Iranian authorities were aware of the alien's activities).

151. There is at least one instance where the government has facilitated asylum for individuals on the basis of their group affiliation. The State Department provides favorable opinions concerning the political asylum claims of applicants who it believes show a "high likelihood of persecution." Cox, *supra* note 4, at 372. The State Department has adopted a policy of generally recommending that political asylum be granted to members of the Baha'i, Christian and Jewish religions from Iran. See *Iranian Asylum Denials to be Reconsidered*, 59 INTERPRETER RELEASES 2 (1982). This policy undoubtedly results from the changed circumstances in Iran following establishment of an Islamic Republic; Iranian religious applicants who sought asylum before the fall of the Shah were not always successful. See, e.g., *Moghanian v. I.N.S.* 577 F.2d 141 (9th Cir. 1978) (Jew); *Sadeghzadeh v. I.N.S.*, 393 F.2d 894 (7th Cir. 1968) (Catholic). The State Department's recommendation can play an important role in the asylum process, because, when an application is submitted to an immigration judge during deportation proceedings, the judge must procure an opinion from the State Department's Bureau of Human Rights and Humanitarian Affairs. The deportation hearing is adjourned for this purpose, and the opinion generally becomes part of the record. 8 C.F.R. § 208.10(b). The I.N.S. "often gives great weight to the [Bureau's] opinion and will normally follow it The importance of the [Bureau's] opinion cannot be underestimated." Steel on Immigration, § 8.9, at 275 (1985). The government has admitted that Salvadorans rarely receive a favorable opinion, see *Zavala-Bonilla v. I.N.S.*, 730 F.2d 562, at 563 (9th Cir. 1984), and any opinion that concludes that the alien is likely to be persecuted by a government friendly to the United States is to be regarded as "particularly persuasive." *Id.* at 567 n.6. Nevertheless, only about one-fifth of Salvadoran asylum applicants who have received favorable State Department opinions have been granted asylum. See Cox, *supra* note 4, at 371 n.276. The case of Iranian religious minorities differs from *Garcia-Ramos* in that the former involves an "unfriendly" state, while the latter involves a national of a United States ally, but otherwise the State Department's policy is in accord with the court's view in *Garcia-Ramos*; neither view requires proof that the individual's affiliation is known to potential persecutors, but only a showing that it is not unreasonable to suspect that it is known. Moreover, both *Garcia-Ramos* and the State Department's Iranian religious minorities policy seem to put into practice a policy of using an evidentiary presumption where an alien's claimed persecution is related to his membership in a group. See Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUMAN RIGHTS L. REV. 39, 60 (1983). While Helton relates this evidentiary presumption to the "suspect classes" of race, religion and nationality, *id.*, there is no reason, given modern-day propensities to mass political murder and other persecution, to conclude that such presumptions are not equally useful with regard to proscribed political organizations.

stating that it is not "inconsistent with a claimed fear of persecution that a refugee, after he flees his homeland, goes to the country where he believes his opportunities will be best. Nor need fear of persecution be an alien's only motive for fleeing."¹⁵² The notion that an alien may establish an entitlement to be considered for asylum if he had a mixed motive for fleeing is also an innovation in U.S. refugee law that accords with the *Handbook*.¹⁵³

A similar interpretation can be discerned in *Del Valle v. Immigration & Naturalization Service*,¹⁵⁴ another Salvadoran case. A few days after Del Valle refused to become an informer for the right-wing "Squadron of Death," his cousin, who was a close friend and next-door neighbor, was kidnapped and killed.¹⁵⁵ When Del Valle continued to refuse to join the death squad, he was followed home by four men who stopped him and fired their weapons into the air. Some two hours later, the door to his apartment was broken down by fifteen heavily-armed men in military dress who accused him of membership in a guerrilla organization. He was bound, assaulted and taken to his captors' headquarters, where he was interrogated, blindfolded and beaten. He spent the next night in a police station, but was later released with the help of a friend. Del Valle left El Salvador promptly, but his nephew was "made to disappear" not long after Del Valle departed. The mother of Del Valle's murdered cousin and various letters from El Salvador corroborated his testimony.¹⁵⁶

The immigration judge in *Del Valle* denied both 208(a) and 243(h) relief, and the Board affirmed that denial, despite a positive credibility finding by the Board.¹⁵⁷ The Board concluded that, because they released him, the Salvadoran security forces must have satisfied themselves that he was not a guerrilla sympathizer and, therefore, that he would not be subject to perse-

152. *Garcia-Ramos*, 775 F.2d at 1374-75.

153. See *Handbook*, *supra* note 67, paras. 63-64. "The distinction between an economic migrant and a refugee is, however, sometimes blurred, in the same way that the distinction between economic and political measures in an applicant's country of origin is not always clear. . . . [W]hat appears at first sight to be primarily an economic motive for departure may in reality also involve a political element." *Id.*

154. 776 F.2d 1407 (9th Cir. 1985).

155. *Id.* at 1409.

156. *Id.* at 1409-10.

157. *Id.* at 1410.

cution upon return.¹⁵⁸ The Board also stated that Del Valle had failed to relate the killings of his relatives to his own situation.¹⁵⁹

The court disagreed, determining that there was no evidence to support the Board's conclusion that Del Valle was free of suspicion in the eyes of the Salvadoran security forces.¹⁶⁰ Although it pointed to specific facts in the record that would lead one to conclude that there were other reasons for Del Valle's release, the court added [w]e cannot permit the [Board] to infer that an applicant is unlikely to be persecuted solely on the basis that the applicant was released by his persecutors. This would lead to the absurd result of denying asylum to those who have actually experienced persecution and were fortunate enough to survive arrest or detention.¹⁶¹

This conclusion accords with the *Handbook's* assumption that a person has a well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention.¹⁶² The court also rejected the idea that because Del Valle had no knowledge of his murdered relatives having been part of the opposition, their deaths were unrelated to the likelihood of his being persecuted.¹⁶³

The Ninth Circuit reasoned that Del Valle's relatives having been "particularly affected by the conditions in the country," supported Del Valle's own claim for asylum.¹⁶⁴ Although it may be true that persecution of one's relatives and friends increases the likelihood of one's own persecution, the *Handbook* would not require this conclusion. Rather, the persecution of those dear to the applicant would serve to "show that his fear that sooner or later he also will become a victim of

158. *Id.*

159. *Id.* at 1412.

160. *Id.*

161. *Id.* at 1413.

162. *Handbook*, *supra* note 67, para. 45.

163. *Del Valle*, 776 F.2d at 1413.

164. *Id.* The court cited *Chavez v. I.N.S.*, 723 F.2d 1431, 1434 (9th Cir. 1984), and *Sanchez v. I.N.S.*, 707 F.2d 1523, 1527-28 (D.C. Cir. 1983), cases in which the courts had inferred that persecution of the applicant was unlikely because the applicant's relatives had not been persecuted. The *Del Valle* court evidently thought that the obverse should be true.

persecution is well-founded."¹⁶⁵ In other words, that relatives or friends are persecuted makes an applicant's fear that he risks being persecuted if returned to his country of origin a reasonable fear.¹⁶⁶

The court in *Del Valle* also held that a well-founded fear could be supported by evidence of a conscious choice to remain neutral in the Salvadoran civil war, because such a stance constituted a political opinion for which one might be persecuted.¹⁶⁷ The court reversed as to both section 243(h) relief and eligibility for consideration for section 208(a) relief.¹⁶⁸

In *Hernandez-Ortiz v. Immigration and Naturalization Service*,¹⁶⁹ the applicant had been ordered deported in November, 1982, and had then appealed. The INS mistakenly deported her anyway, but she was returned to the United States after a three-week hiatus in El Salvador. Although she was being returned to the United States under this country's official auspices, she had to pay a Salvadoran official two hundred dollars to be permitted to exit.¹⁷⁰ Hernandez maintained in her subsequent asylum petition that this incident had brought her to the attention of the Salvadoran government which, she said, regarded her as a traitor.¹⁷¹

To support this assertion, Hernandez testified that her brother, a teacher, and her sister-in-law had been murdered in

165. *Handbook*, *supra* note 67, para. 43.

166. In contrast, the Sixth Circuit does not appear to have adopted any of the *Handbook's* assessment of the value, as evidence of a well-founded fear in a petitioner, of persecution of his family or friends. For example, in *Moosa v. I.N.S.*, 760 F.2d 715, 716 (6th Cir. 1985), the applicant testified that he feared for his freedom in his native Iraq because he is a Shi'ite and had refused to join the ruling Ba'ath party. His uncle and three brothers had been imprisoned by the Ba'ath, and five of his friends had been executed. The court, however, focused on the fact that Moosa was studying in the United States for a doctorate in nuclear physics under an Iraqi government fellowship and had not been persecuted during a ten-day visit in Iraq. The case was heard on appeal of the denial of a motion to re-open, *id.* at 720, as it may be that the Sixth Circuit would have employed a broader interpretation of the evidence required to substantiate a section 208(a) claim had the matter been considered in a different procedural posture.

167. *Del Valle*, 776 F.2d at 1413. The *Del Valle* court thus settled a question left open in *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1285 (9th Cir. 1985), i.e., whether one could claim that one risks suffering political persecution based on a conscious choice of neutrality, without more.

168. *Del Valle*, 776 F.2d at 1414.

169. 777 F.2d 509 (9th Cir. 1985).

170. *Id.* at 512.

171. *Id.*

El Salvador in November, 1980, that her grandparents had been threatened and their store robbed by soldiers in November, 1982, that her brother-in-law's wife had been kidnapped and assaulted by the Salvadoran National Guard in June, 1983, and that the Guard had threatened to kill the couple.¹⁷²

In July, 1983, Hernandez moved to reopen her deportation proceedings and requested both asylum and withholding of deportation. The Board denied her motion, concluding that her fears reflected nothing more than the "political upheaval and random violence" in El Salvador.¹⁷³ The Ninth Circuit, in considering the Board's findings with regard to the substantive aspect of the application for withholding of deportation, discussed whether an applicant who had not alleged that she participated in opposition activities might still be considered to be threatened because of her political opinion. The court concluded that persecution could occur if "there is a difference between the persecutor's views or status and that of the victim; it is oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate." Therefore, "in determining whether threats or violence constitute political persecution, it is permissible to examine the motivation of the persecutor; we may look to the political views and actions of the entity or individual responsible for the threats or violence, as well as to the victim's and we may examine the relationship between the two."¹⁷⁴

Noting that governments do not usually employ military force against non-criminals for other than political reasons, and that such force was employed against many members of Hernandez's family, the court concluded that it was proper to infer that the threats were related and that they were politically motivated.¹⁷⁵ Additionally, because a government does not usually persecute those who are perceived to share its ideology, it could also be inferred that the threat to Hernandez was on account of her political opinion.¹⁷⁶

172. *Id.*

173. *Id.* at 513.

174. *Id.* at 516.

175. *Id.*

176. *Id.* at 517. The *Handbook*, *supra* note 67, para. 80, states that an applicant need not actually hold political opinions that are opposed to those of authorities, but will be a refugee nevertheless if he is persecuted because he is thought by the perse-

Because Hernandez was seeking to reopen her case after an adverse decision, the court considered the discretion available to the Board under sections 243(h) and 208(a) relief in such a context and because 243(h) is mandatory if the alien is eligible, the court held that the Board has the choice of concluding that the alien is eligible and prohibiting deportation or of determining that the alien is not eligible and denying reopening.¹⁷⁷ Whether the merits are reached or not, however, the Board is obligated to accept as true the alien's factual averments presented in the affidavits supporting the motion to reopen. Since Hernandez's affidavits supported a *prima facie* case of eligibility, the court held that it was an abuse of discretion to deny her 243(h) relief without a hearing.¹⁷⁸

Hernandez, the court held, also necessarily established that she is a refugee, and the Board thus had the discretion to award her asylum.¹⁷⁹ The court did not fully set the limits of that discretion, but held that it could be unfavorably exercised "only on the basis of genuine compelling factors—factors important enough to warrant returning a bona fide refugee to a country where he may face a threat of imminent danger to his life or liberty."¹⁸⁰ Moreover, the Board "must clearly articulate the factors it has considered and the basis for its discretionary determination" and such factors must be only those permitted under the Board's discretion.¹⁸¹ The court held that the Board had not and could not specify any permissible factor that would serve to deny asylum to Hernandez.¹⁸²

Since *Bolanos-Hernandez*, the Ninth Circuit has developed precedents which, taken together, come closer to meeting the prescriptions of the UNHCR *Handbook* than the case law of any other United States court. Under these precedents, an alien

cutors to hold such opinions, or he may hold such opinions but never have expressed them. In the latter case, "it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reasons of political opinion." *Id.* at para. 43.

177. *Hernandez-Ortiz*, 777 F.2d at 517-18.

178. *Id.* at 518.

179. *Id.* at 519.

180. *Id.*

181. *Id.*

182. *Id.*

may be considered to be a refugee if he can show that his fear of persecution is based in reality. He can do so by showing either that threats have been made or that actions have been taken against him or against his family, friends or "social group."¹⁸³ The mere fact that a persecution ceased at some point, e.g., by the alien's release from detention, need not obviate the reasonableness of the persecution's being resumed at some future date. The applicant can still establish that his fear is well-founded even though the threats or actions against him or those with whom he is associated were not necessarily on account of actually held political views, if the fear of such threats or actions results from the persecutor's belief that the applicant or his associates have a characteristic or view that the persecutor will not tolerate. Alternatively, the alien may show that he or those close to him actually hold views or have carried out actions in opposition to the putative persecutors and that there is some reason to fear that those views or actions have been or will be brought to the attention of those in a position to persecute the applicant.¹⁸⁴

Thus, the gravamen of the asylum applicant's complaint of persecution is becoming understood by the Ninth Circuit in terms quite akin to those expressed by the UNHCR, i.e., that he has a fear of being persecuted that is credible because of what has happened to him or to those to whom he is connected or what, it is not unreasonable to believe, might happen to an alien who has characteristics that persecutors might find objectionable.¹⁸⁵ This view militates against demanding of the alien a prediction of the likelihood of persecution beyond establishing that it is a reasonable possibility that would lead the trier of fact to conclude that the fear has some basis in reality. This does not mean that the Ninth Circuit's views conform fully to those of the *Handbook* or, more generally, to international law standards,¹⁸⁶ but that this court has made the greatest strides

183. See *supra* notes 113-31, 139-48, 155-70, 173-88.

184. *Id.*

185. *Id.*

186. See, e.g., *Diaz-Escobar v. I.N.S.*, 782 F.2d 1488 (9th Cir. 1986). There, in a case in which a former Guatemalan military reservist claimed that guerrillas may have been responsible for a letter left on his car and threatening his death if he did not leave the country, a Ninth Circuit panel stated that the showing needed for section 208(a) relief "may be slightly less than such a [clear] probability." *Id.* at 1492. Considering the source of the threat to the alien to be wholly speculative, the court de-

in that direction and that, given the volume of asylum cases that it addresses, may be expected to continue to urge United States law along the path that international agencies and other nations have already trod.

D. *The Fifth Circuit*

The Fifth Circuit has agreed with the determinations of the Sixth, Seventh and Ninth Circuits that a well-founded fear of persecution standard for asylum applicants differs from the clear probability of persecution standard that must be met by applicants for withholding of deportation. In *Guevara-Flores v. Immigration & Naturalization Service*,¹⁸⁷ the court reviewed a BIA denial of a Salvadoran's motion to reopen her asylum application. Ana Guevara was apprehended in an ordinary border round-up, but because she was carrying a letter of introduction to Puerto Rican church activists containing "'classic Marxist rhetoric,'" the INS contacted the FBI, who suspected that she might be Norma Guevara de Grande, a guerrilla leader known in El Salvador as Commandante Norma.

The FBI contacted Salvadoran authorities, who forwarded fingerprint information that indicated that Ana Guevara was not the commandante. The Salvadoran government nevertheless requested information on the date and number of Guevara-Flores' flight to El Salvador in the event of her deportation. It asked that such information be forwarded to the head of the National Guard, since possession of "'subversive

nied relief. A case such as *Diaz-Escobar* which involved a former volunteer in the military who had received a direct death threat would more likely be considered to present a fear based in reality by *Handbook* standards than one with facts such as those presented in *Quintanilla-Ticos v. I.N.S.*, No. 85-7221, slip op. (9th Cir., Feb. 27, 1986) (Salvadoran who played in military band told by unknown person that "all the uniformed ones must die.") It would be interesting to see how the Ninth Circuit would now treat claims similar to those made in pre-*Bolanos-Hernandez* cases, such as *Chavez v. I.N.S.*, 723 F.2d 1431, 1434 (9th Cir. 1984) (claim that applicant has a well-founded fear of persecution because he is a young urban male Salvadoran) and *Martinez-Romero v. I.N.S.*, 602 F.2d 595, 595-96 (9th Cir. 1982) (basically the same claim as in *Chavez*, except that the applicant was a student). The *Del Valle* court took steps toward recognizing that membership in what a persecutor might view as a targetable social group, e.g., a family unit, can create a well-founded fear. See also *Hernandez-Ortiz v. I.N.S.*, 777 F.2d 509, 515 n.6 (9th Cir. 1985), recognizing that membership in a "persecuted group" may be sufficient "to require a finding of eligibility for asylum or an order prohibiting deportation." *Id.*

187. *Guevara-Flores v. Immigration & Naturalization Service*, 786 F.2d 1242 (5th Cir. 1986).

literature' " was a crime for which Guevara could be detained in El Salvador.

Guevara-Flores applied for political asylum, but refused to fill out part of the Form I-589 without a guarantee that the application would not be discussed with the Salvadoran authorities. At her deportation hearing, Guevara-Flores applied for administrative subpoenas to obtain production of all communications about her between the United States and El Salvador authorities. Her motion and her application were denied by the IJ and the denials were affirmed by the BIA.

Guevara-Flores subsequently obtained several relevant documents from the FBI via a Freedom of Information Act request. The documents indicated that although it recognized that Guevara-Flores was not a guerrilla leader, the Salvadoran National Guard was still interested in the letter found on her and in the particulars of her return to El Salvador. Guevara-Flores moved to reopen in light of this new evidence, but the Board concluded that the documents did not establish a *prima facie* case of either the clear probability of persecution or of a well-founded fear.

In considering whether the BIA correctly denied the motion to reopen, the Fifth Circuit had to determine whether Guevara-Flores had made a *prima facie* showing of entitlement to relief and, where relevant, of the likelihood that discretion would be exercised in her favor. The court recognized that while asylum is discretionary relief, withholding is mandatory where entitlement has been demonstrated. Guevara-Flores conceded that she could not prove that she had been or would be persecuted under the terms of 8 C.F.R. 208.5.¹⁸⁸ The court thus had to construe the phrase "well-founded fear of persecution."

The Fifth Circuit agreed with the Ninth Circuit's holding in *Cardoza-Fonseca v. Immigration & Naturalization Service*,¹⁸⁹ that

188. That provision governs the alien's burden of proof in asylum proceedings. It states that "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 or, in the case of a person having no nationality, the country in which such person habitually resided, 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."

189. *Cardoza-Fonseca v. Immigration & Naturalization Service*, 767 F.2d 1448,

a well-founded fear refers to a subjective state of mind and with *Bolanos-Hernandez v. Immigration & Naturalization Service*¹⁹⁰ that an asylum applicant's fear "must have some basis in the reality of the circumstances; mere irrational apprehension is insufficient to meet the alien's burden of proof."¹⁹¹ The court stated that an alien has a well-founded fear "if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country."¹⁹² It explicitly rejected the position of the Third Circuit, expressed in *Sotto v. Immigration & Naturalization Service*,¹⁹³ that the standards for asylum and withholding of deportation are identical, considering the reasoning in that case and in its predecessor, *Rejaie*,¹⁹⁴ unpersuasive.

The court's position is principally based on the rules of statutory construction:

The linguistic difference between the words 'well-founded fear' and 'clear probability' may be as striking as that between a subjective and objective frame of reference. The difference in result which obtains when an alien meets the burden of proof imposed on an asylum claim and that which is imposed for withholding of deportation is equally as dramatic.¹⁹⁵

The court also explicitly disagreed with the BIA in *Matter of Acosta-Solarzano*¹⁹⁶ because its interpretation ignored the disjunctive configuration of the INS's own regulation, 8 C.F.R. 208.5. The Fifth Circuit opined that the two disjunctive phrases, "because of persecution" and "well-founded fear of persecution" could not be synonymous or coextensive, since "each is an alternative method by which the alien can meet the statutory standard."¹⁹⁷ Noting that a statute should be con-

1452 (9th Cir. 1985), *cert. granted*, 54 U.S.L.W. 1132 (U.S. February 25, 1986) (No. 85-782).

190. *Bolanos-Hernandez v. Immigration & Naturalization Service*, 767 F.2d 1277, 1283 (9th Cir. 1984).

191. *Guevara-Flores*, 786 F.2d at 1249.

192. *Id.*

193. *Sotto v. Immigration & Naturalization Service*, 748 F.2d 832, 836 (3d Cir. 1984).

194. *Rejaie v. Immigration & Naturalization Service*, 691 F.2d 139 (3d Cir. 1982).

195. *Guevara-Flores*, 786 F.2d at 1250.

196. *Matter of Acosta-Solarzano*, Int. Dec. No. 2986 (March 1, 1985).

197. *Guevara-Flores*, 786 F.2d at 1250 n.8.

strued to give meaning to each of its clauses, the court concluded that reading the two standards as coextensive would effectively make the phrase "well-founded fear of persecution" mere surplusage.¹⁹⁸

In Guevara-Flores' case, a well-founded fear was established because the Salvadoran authorities obviously implied that they would take action against Guevara-Flores' because of her possession of "subversive literature." Since the IJ could reasonably exercise his discretion to allow asylum, the court held that Guevara-Flores was entitled to reopen her case.¹⁹⁹

Guevara-Flores is especially noteworthy because of the way in which it defines well-founded fear. Although it makes no reference to the case, its delineation of the "objective" component of the well-founded fear standard (requiring "some basis in the reality of the circumstances; mere irritational apprehension is insufficient") accords with that of the Ninth Circuit in *Garcia-Ramos v. Immigration & Naturalization Service*²⁰⁰ in which the "objective reasonableness" of the fear was equated with "some basis in reality or reasonable possibility" of persecution. Both the Fifth and Ninth Circuits' explication of the "objective" component broadly comport with the guidelines of the UNHCR's *Handbook*.²⁰¹

III. INTERNATIONAL NORMS: THE NON-IDENTITY OF STANDARDS OF PROOF

A variety of factors confirm that the standard of proof for eligibility for consideration for asylum under section 208(a) is more generous than the requirement, to gain a withholding of deportation, that an alien show a clear probability of persecution. These factors include the position of the UNHCR *Handbook*, the interpretations given earlier asylum provisions in United States Law, the intent of the drafters of the 1951 Convention and recent international efforts to negotiate a convention on territorial asylum.

198. *Id.*

199. *Id.* at 1251.

200. *Garcia-Ramos v. Immigration & Naturalization Service*, 775 F.2d 1370, 1374 (9th Cir. 1985).

201. See, e.g., *Handbook*, paras. 37 & 38.

A. *The UNHCR Handbook*

The UNHCR's *Handbook* has been shown to have been generally endorsed by the Board and by several important federal courts.²⁰² It has been assumed by both the United States Attorney General and the INS that Congress was aware of the *Handbook*'s criteria at the time that it drafted the Refugee Act of 1980 and that it considered those terms an aid in construing the terms of the Act.²⁰³ One of those terms, of course, is the phrase "well-founded fear of persecution," contained in the Act's definition of "refugee."²⁰⁴

The *Handbook*'s position is that an applicant for asylum need not show that persecution is more likely than not if he is returned to his country of origin; rather, a well-founded fear can be demonstrated without reference to a calculus of the likelihood of persecution. A fear is well-founded if it is a credible fear, and it is credible if there is some basis in fact to conclude that the persecution that is feared might be realized.²⁰⁵ The Supreme Court's "reasonable possibility" dictum is a pithy summary of the *Handbook* analysis, and the rapidly developing Ninth Circuit case law adequately incorporates the concomitant evidentiary showing that the *Handbook* criteria entail. The United States courts that have taken the position that asylum may be proved by a less-than-clear-probability showing are in accord with the United Nations standard.²⁰⁶

B. *International Law and Former Section 203(a)(7)*

A second indication of the correctness of the position of

202. See *supra* note 68.

203. See *supra* note 68.

204. See *Handbook*, *supra* note 67 at para. 37; *supra* note 15.

205. The UNHCR's adherence to this view dates to well before the publication of the *Handbook*. See LEGAL DIV., OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR REFUGEES, ELIGIBILITY—A GUIDE FOR THE STAFF OF THE OFFICE OF THE UNITED NATIONS COMM'R FOR REFUGEES 69 (1962) (to evaluate the subjective element in well-founded fear, assess the degree of fear and its credibility; evaluate the objective element by examining applicant's personal experience or other concrete facts and determining if the evidence is credible, plausible and sufficient), *cited in* Anker & Posner, *supra* note 2, at 67.

206. The *amicus* brief of the UNHCR in *Stevic* stated that "Fear, rather than a certainty or 'clear probability' of persecution, is what makes a refugee unwilling to return to his country of origin, and 'good reason' for that fear, rather than proof of a particular degree of probability of being persecuted, may be all that a refugee can show in support of his claim." Quoted in Cox, *supra* note 4, at 374 n.330.

the majority of the circuits is that the INS has consistently argued, and the Supreme Court has held,²⁰⁷ that the United States' accession to the Protocol in 1967 did not effect a substantial change in existing United States law. The law extant during the consideration of the bills that became the 1980 Act included section 203(a)(7), the former conditional entrant provision.²⁰⁸ As has been shown,²⁰⁹ that provision, which existed from 1965 to 1980, used a "good reason" standard of proof that was significantly more lenient than the clear-probability standard for withholding of deportation that had emerged by 1967.²¹⁰

Although there were restrictive features in the former section 203(a)(7) that are not contained in the present section 208(a),²¹¹ these inhibitions, e.g., the geographical restriction, the annual limit on the number of applications, and the residency requirements for those who had already left their native countries, were eliminated by Congress in the 1980 legislation. The restrictions were not consistent with Congressional intent to promulgate a uniform procedure²¹² and to adopt "a universal approach to refugee admissions consistent with international standards and norms [and] 'special humanitarian concerns.'" ²¹³ Because, however, half of the annual quota of refugees under section 203(a)(7) could be filled by those who were already in the United States and were otherwise eligible, section 203(a)(7) was in some ways analogous to present section 208(a).

Section 203(a)(7) was, in fact, a provision that went beyond the non-repatriation requirement of Article 33 of the United Nations Convention of 1951,²¹⁴ in the sense that it granted to qualified individuals a "right of asylum" that was not then and may not yet be mandated by international law.²¹⁵

207. See *I.N.S. v. Stevic*, 467 U.S. 407 (1984).

208. See *supra* note 55 and accompanying text.

209. See *supra* notes 57-66 and accompanying text.

210. See *supra* text accompanying note 63.

211. See *supra* text accompanying note 57.

212. See Helton, *supra* note 4, at 250; Wildes, *supra* note 2, at 370; Comment, *supra* note 7, at 179.

213. Anker & Posner, *supra* note 2, at 11.

214. See *supra* notes 27-39 and accompanying text.

215. See Gilbert, *The Right of Asylum: a Change of Direction*, 32 INT'L & COMP. L.Q. 633 (1983) (traditional view that there is no right to asylum, but "[t]he recent change

The same can be said about the present section 208(a). The United States, presumably, could have continued to assert compliance with the Protocol by withholding deportation from those whom it believed would be persecuted. Instead, it continued to allow refugees to apply from abroad and, since August, 1983, has expressly used a less-than-clear-probability standard with regard to these applicants.²¹⁶ Yet Congress was not concerned merely with establishing a uniform procedure for those applying for refugee status from abroad. The very enactment of another provision designed to protect aliens already in the United States from persecution abroad, alongside the pre-existing section 243(h), shows that Congress intended to continue doing, but to do better, what it had done in a limited fashion through section 203(a)(7), that is, to protect refugees at home and abroad under a standard that is less stringent than the standard required for withholding of deportation.

Because the United States' accession to the Protocol was not designed to change significantly existing United States law, section 203(a)(7)'s "language virtually mirrored the Protocol definition,"²¹⁷ and because the 1980 Act incorporated that definition of refugee as a basis for a claim to asylum, there is no reason to conclude that Congress intended to end a system that had two separate tracks, one for aliens with respect to whom deportation would be withheld because they could establish a clear probability of persecution and a second for those, whether in the United States or abroad, who might not meet the former standard but who could nonetheless show that they had a well-founded fear of persecution.

As will be shown below in an examination of the *travaux préparatoires* of the United Nations Convention, the "good reason" standard of proof under section 203(a)(7) was identical to the concept of well-founded fear that the Convention's drafters had in mind. The effect of the existence of the former provision for refugees that used a less-than-clear-probability standard of proof, based on the Protocol, on Congress' manifest intent that accession to the Protocol not alter United States

in policy may mean that a qualified refugee has a right to enter a State in search of asylum and that the said State would be under a duty to grant asylum").

216. See *supra* note 57 and accompanying text.

217. *Stevic*, 467 U.S. at 2500 n.22.

legal standards, and on the enactment of the 1980 reforms to conform United States practice with the provisions of the Protocol, shows that there were two standards and two forms of relief before the 1980 Act and that there is still a two-track system today.

C. *The Intent of the Drafters of the Convention*

The *travaux préparatoires* underlying the 1951 Convention and the 1967 Protocol have been skillfully surveyed,²¹⁸ and pre-Convention refugee law, which was a counterpoint to what the drafters of the Convention wanted to accomplish, has been thoroughly examined.²¹⁹ Summarizing the results of these analyses, one can say that the Convention drafters certainly intended that their "well-founded fear" definition should not be limited only to applicants for refugee status who could demonstrate a clear probability of persecution.

1. Pre-Convention Policies

Hathaway delineates three trends in the definition of refugee prior to 1950. From 1920 to 1935, refugees were defined in juridical terms, as persons outside their state of origin who had been effectively deprived of the formal protection of their government and who could not, therefore, move about internationally.²²⁰ This trend was exemplified by those who left Russia immediately following the 1917 Revolution and by Armenians who were forced out of Turkey between 1915 and 1922.²²¹ International agreements were concluded in 1926, 1928 and 1933 that sought to protect such groups; these agreements contained a criterion of ethnic or territorial origin in addition to a stipulation that the applicant should not enjoy *de jure* international protection. The origin requirements were phrased to restrict the eligible group as much as possible to precisely those persons suffering from a denial of formal state protection.²²²

A "social perspective" trend as to the definition of refugee

218. Cox, *supra* note 4, at 336-52.

219. Hathaway, *The Evolution of Refugee Status in International Law: 1920-1950*, 33 INT'L & COMP. L.Q. 348 (1984).

220. *Id.* at 349.

221. *Id.* at 350-54.

222. *Id.* at 359-60.

prevailed from 1935 to 1938.²²³ International refugee efforts in this period were concerned with helping people who were casualties of broad-based social or political occurrences which had separated them from their home societies. Assistance in migration was afforded to refugees not, as during the juridical period, with a view to correcting an anomaly in the international legal system, but rather in order to ensure the refugees' safety or well-being.²²⁴

The definition of refugee during the "social-perspective" period differed from that during the previous juridical by including "categories of persons eligible for international assistance [that] encompassed groups adversely affected by a particular social or political event, not just those united by a common status vis-a-vis the international system."²²⁵ The social-perspective approach was the first instance in which the international community went to the aid of refugees who had reason to fear that they would be denied *de facto*, as opposed to *de jure*, protection of their government.²²⁶

The social-perspective approach culminated in 1938 in an international convention to aid German refugees.²²⁷ The conference at Geneva that framed the 1938 Convention rejected a narrowing of the definition of refugee to include only those who fled directly from Germany.²²⁸ Because a part of the definition adopted at Geneva referred to persons who considered themselves to be German but did not enjoy the Reich's protection, the Convention did not require that migration be premised on political, racial or religious grounds, although persons who left Germany "for reasons of purely personal convenience" were not to be considered refugees.²²⁹ Those who had been subjected to economic sanctions or proscriptions were refugees.²³⁰ Thus, by 1939, a refugee could be one vic-

223. *Id.* at 349.

224. *Id.* at 349-50.

225. *Id.* at 367.

226. *Id.* at 368. This was in the case of anti-Nazi Saarlanders who sought to emigrate when their territory was reunified with the German Reich as the result of a 1935 plebiscite. *Id.*

227. Convention Concerning the Status of Refugees Coming From Germany, Feb. 10, 1938, 4461 L.N.T.S. 61 (1938).

228. Hathaway, *supra* note 214, at 364.

229. *Id.* at 365.

230. *Id.*

timized by being denied either the state's de facto or de jure protection.²³¹

From 1938 to 1950, an individualist perspective prevailed, with the "essential characteristic of the refugee . . . the existence of fundamental incompatibility between the claimant and his government."²³² The Intergovernmental Committee on Refugees that was established in 1938 had defined refugees to include only those fleeing the Greater Reich because of political opinions, religious beliefs or racial origins.²³³ In 1943, the Committee's purview was extended to other refugees in Europe, and Spanish Republicans were the principal beneficiaries.²³⁴ In 1946, the Committee's competence was extended further, to include persons unwilling or unable to return to their home countries. This extension was made because the International Refugee Organization [IRO] had been established, and that body employed a "more subjectively individualistic" definition than that previously used by the Committee.²³⁵

The United Nations Relief and Rehabilitation Administration [UNRRA] existed from 1943 to 1946 alongside the Intergovernmental Committee, and, in July, 1946, at the urging of Eastern-bloc countries, UNRRA required that applicants for post-war refugee status establish "concrete evidence" of persecution, in contrast to pre-war and wartime refugees from discriminatory Nazi legislation.²³⁶ The Intergovernmental Committee and UNRRA were succeeded by the IRO. That organization's definition of refugee required that an applicant for refugee status express "valid objections" to returning to his country of origin, although an exception to this rule was made for the German and Austrian victims of Nazi persecution and for Spanish Republicans.²³⁷ Valid objections included "[p]ersecution or fear based on reasonable ground of persecution because of race, religion, nationality or political opin-

231. *Id.* at 370.

232. *Id.*

233. *Id.* at 370-71.

234. *Id.*

235. *Id.* at 372-73.

236. *Id.* at 372-73 & n.271.

237. *Id.* at 374 & n.272.

ion.”²³⁸

This basis for a valid objection is the direct predecessor of the definition contained in the 1951 Convention. The IRO Manual for Eligibility Officers [the “Manual”]²³⁹ employed terms very similar to those now used by the *Handbook*:

Fear of persecution is to be regarded as a valid objection whenever an applicant can make plausible that owing to his religious or political convictions or to his race, he is afraid of discrimination, or persecution on returning home. Reasonable grounds are to be understood as meaning that the applicant can give a plausible and coherent account of why he fears persecution. Since fear is a subjective feeling, the Eligibility Officer cannot refuse to consider the objection as valid when it is plausible.²⁴⁰

The *Manual* also stated that, if the applicant found it impossible to obtain documentary evidence of his persecution “and his story is otherwise credible, he should be given the benefit of the doubt . . . a sufficiently plausible story may be adequate.”²⁴¹ The IRO definition and standard of proof has been described by Hathaway as “very close to . . . a subjective refugee determination scheme.”²⁴² It was this scheme that was the culmination of the shift in international refugee law from a strictly objective juridical perspective that stressed *de jure* denial of a state’s protection, through the still largely objective social perspective that also allowed for consideration of *de facto* loss of protection, and ultimately to the basically subjective standards of the wartime organizations and the IRO. It was also this scheme that presaged both the Convention definition and the *Handbook*’s interpretations. As Cox remarks:

the Manual is devoid of reference to any sort of prediction

238. *Id.* at 375; Cox, *supra* note 4, at 339. Other valid objections included “those of a political nature judged by the Organisation to be ‘valid’ ” and “compelling family reasons arising out of previous persecution.” The “valid objections” could be raised, however, only by those who fit into certain enunciated categories, e.g., victims of fascism, displaced persons, etc., and there were a number of cessation provisions. See Hathaway, *supra* note 214, at 375-76.

239. INTERNATIONAL REFUGEE ORGANIZATION, MANUAL FOR ELIGIBILITY OFFICERS (MAY, 1950).

240. Cox, *supra* note 4, at 340 (quoting from the UNHCR’s *amicus* brief in *Stevic* at 20 n.48).

241. *Id.* at 340 n.39.

242. See Hathaway, *supra* note 214, at 378.

or specific forecast regarding the likelihood of persecution as an element of "reasonable grounds." Instead, the subjective feeling of fear, if found plausible by those making the status determination, must be accepted. It can be concluded that reasonable grounds must include any threat of persecution sufficient to make a person actually afraid. Reasonable grounds, then, cannot be limited to persecution which is more likely than not to occur or which is clearly probable. A person could reasonably flee and seek refuge based upon a threat of persecution which might, but would not necessarily materialize.²⁴³

2. The 1950-51 Ad Hoc Committee

The Convention definition of refugee derived from the work of the Ad Hoc Committee on Statelessness and Related Problems that began meeting in January, 1950, in response to a direction from the United Nations Economic and Social Council [ECOSOC], to provide for an instrument for the protection of refugees to be available when IRO terminated.²⁴⁴

Almost at the outset of the Committee meetings, the British representative, Sir Leslie Brass, remarked that "[t]he draft convention need not be as restrictive in its definition of refugees as the constitution of the International Refugee Organization, since it did not envisage financial assistance, as the latter had done. It could therefore afford to be more liberal in its definition of refugees."²⁴⁵ Hsiu Cha, the Chinese representative, thought that the definition of refugee in the IRO constitution was valuable as a guide but favored "a more comprehensive definition."²⁴⁶ Louis Henkin, the United States representative, stated that the United States thought the term "refugees" should be defined in "generous but precise terms."²⁴⁷ Although the United States wanted the definition to

243. See Cox, *supra* note 4, at 341.

244. *Id.* at 342. It should be noted that the Convention was drafted exclusively by representatives of "Western" states. The Communist states refused to participate because of the presence of a Kuomintang member as the representative of China. U.N. Doc. E/AC.32/SR.1 at 2-3 (1950); see also Ad Hoc Comm., Memorandum by the Secretary General, E/AC.32/2 (Jan. 3, 1950) (setting out two possible definitional approaches for the Ad Hoc Committee, that of "categories" and that of "all refugees of whatever origin").

245. E/AC.32/SR.2 at 7.

246. *Id.* at 8.

247. *Id.* at 9.

be one based on categories, it thought that existing conventions and the constitution of the IRO should be the basis for the definition.²⁴⁸ The French delegate thought that "what had so far been accomplished should be reconsidered in a more generous spirit," and that a "truly liberal convention" should be produced, with a definition "as all-embracing as possible."²⁴⁹

The United States, Britain and France all submitted draft definitions to the committee. Because the United States' proposal was not universalistic, but was phrased in terms of the subsequently rejected method of describing recognized categories, it is not relevant here. The first British proposal²⁵⁰ considered refugees to be "persons who for good reasons (such as, for example, serious apprehension based on reasonable grounds of political, racial or religious persecution in the event of their going to that State) . . . do not desire the protection of the State."²⁵¹ In a revised draft of the British proposal, the phrase "well-founded fear of persecution" appeared for the first time:

in this Convention, the expression "refugee" means, except where otherwise provided, a person who, having left the country of his ordinary residence on account of persecution or well-founded fear of persecution, either does not wish to return to that country for good and sufficient reason or is not allowed by the authorities of that country to return there and who is not a national of any other country.²⁵²

Sir Leslie stated that his country's draft definition's "main virtue . . . lay in the fact that it extended protection to as many persons as possible. The phrase 'good and sufficient reason' . . . had been used purposely in order to include a variety of motives other than fear of persecution which might have influ-

248. *Id.* at 9. The United States position regarding the definition of "refugee," expressed more fully by Mr. Henkin at E/AC.32/SR.3 at 13, ultimately did not prevail. The French and British delegations strongly opposed this approach. *See, e.g.,* E/AC.32/SR.4 at 7 (French view of "a general convention embracing all existing groups of refugees"); *see also* E/AC.32/SR.3 at 10 (United States view); E/AC.32/SR.5 at 3 (United States view).

249. E/AC.32/SR.3 at 7.

250. *See* E.AC.32/L.2 at 1 (1950).

251. *Id.*

252. E/AC.32/L.2/Rev. 1 at 1 (1950).

enced their decision.”²⁵³

The French draft definition²⁵⁴ was very like the British and contained the phrase “*crainte fondée de persécution*,” that is, a justifiable fear of persecution.²⁵⁵ It should also be noted that the French text of the IRO constitution’s definition, “*la persécution ou la crainte fondée de persécution*,” is very like the Convention definition, “[L]e *terms de refugies s’applique à toute personne . . . qui . . . craignant avec raison d’être persécutée*.”²⁵⁶ It is not surprising, then, that the French representative expressed his country’s support for the British draft, “subject to slight modifications.”²⁵⁷ Britain and France had a very broad view of who might be recognized as a refugee. For example, an observer at the Committee meetings, Mr. Stolz of the American Federation of Labor, noted that “people sometimes left their country for social or economic reasons,”²⁵⁸ and the French delegate replied that “[T]he nature of the persecution should be described in very broad terms. In actual practice . . . the people referred to by the [American Federation of Labor] representative would be recognized as refugees.”²⁵⁹

The actual wording of the definition of refugee in the 1951 Convention was left to a working group consisting of the United States, United Kingdom and French representatives, plus Jacob Robinson, representing Israel.²⁶⁰ If Mr. Robinson’s comments are applicable to the working group as a whole, the working group had in mind two examples, the same two groups that had principally concerned the wartime refugee relief organizations and the IRO and that were given coverage as categories in the Convention, namely, the victims of political and religious persecution in Germany and its satellites, on the one hand, and the Spanish Republicans, on the other hand.²⁶¹

That the concerns of these two groups were in the minds of the drafters is of some relevance in interpreting the Convention definition. Without any intention to denigrate the scale of

253. E/AC.32/SR.6 at 3.

254. See E/AC.32/L.3 (1950).

255. *Id.*

256. Cox, *supra* note 4, at 345 n.80.

257. E/AC.32/SR.6 at 3.

258. E/AC.32/SR.17 at 3.

259. *Id.* at 4.

260. E/AC.32/SR.6.

261. See E/AC.32/SR.18 at 4.

their suffering as a group, it must be said that many who fled the fascist dictatorships had not individually experienced persecution, in the sense of personalized threats being made against them, yet they were undoubtedly refugees. While before and during World War II, the likelihood of their persecution if returned, as they often were,²⁶² could be described as a certainty, after the war the Spanish government offered an amnesty to Republicans, and the Jews and other anti-Nazis were presumably free to return to their countries of origin.²⁶³ Yet these groups were quite rightly considered to be archetypal refugees, because there remained a reasonable possibility that persecution would resume, and because members of these groups could not be expected to feel at all comfortable in the environment where they or those very like them had experienced persecution.²⁶⁴ Moreover, both of these groups were composed of persons who very often had to flee with a minimum of documentation and who lost all contact with those in their native lands who might have been able to support their claim of persecution. In other words, the evidentiary demands that are placed on refugees today by the United States immigration authorities could not possibly have been in the minds of the drafters of the Convention definition of "refugee."

At the end of its first session, the Ad Hoc Committee produced a draft that included in the definition of refugee two specific categories, the victims of Nazism in the Greater Reich and those who were victims or who had a well-founded fear of becoming victims of the Spanish Falangists, as well as a more general category, encompassing those in Europe generally who had a well-founded fear of being persecuted because of events there between 1939 and 1951.²⁶⁵ In the draft of its ini-

262. See generally A. TARTAKOWER & K. GROSSMAN, *THE JEWISH REFUGEE* (1944); D. WYMAN, *THE ABANDONMENT OF THE JEWS: AMERICA AND THE HOLOCAUST 1941-1945* (1985).

263. See generally J. VERNANT, *THE REFUGEE IN THE POST-WAR WORLD* 58-66 (1953).

264. The United States expressly adopted the position that persons who were unwilling for psychological reasons to return to their home countries could be considered refugees. See 1950 UNITED NATIONS YEARBOOK 572.

265. Report of the Ad Hoc Committee, E/1618; E/AC.32/5 at 12 (Feb. 17, 1950).

tial report to the Economic and Social Council,²⁶⁶ the Committee remarked that well-founded fear depended only on the applicant's giving a "plausible account" of his fear.²⁶⁷ The final report of the Committee's first session stated that the expression "means that a person has either been actually a victim of persecution or can show good reason why he fears persecution."²⁶⁸ This interpretation is, of course, the derivation of the standard of proof that came to be applied under section 203(a)(7) of the Act.²⁶⁹

After a period of comments by governments on that report,²⁷⁰ there was a second Committee session and another report²⁷¹ that contained a definition not materially different from that found in the first report. A Conference of Plenipotentiaries was held in 1951 to complete the work on the Convention,²⁷² but the final definition again did not differ substantially from that produced by the first Committee session. Accordingly, the remarks made by representatives during that session and the official comments on the expression "well-founded fear" contained in the first session's draft and final reports are valid indicators of the drafters' intentions with regard to the meaning of the phrase. There can be little doubt that the meaning they gave to it was more liberal than the already quite "subjective" IRO definition²⁷³ and considerably more liberal than concept of "clear probability."²⁷⁴

266. E/AC.32/L.38 at 33 (Feb. 15, 1950). The actual report was dated two days later. See *supra* note 261.

267. E/AC.32/L.38 at 1.

268. E/AC.32/5 at 39.

269. See *supra* note 63.

270. See E/1703/Add. 5 (June 24, 1950).

271. See Report of the Ad Hoc Committee, Second Sess., E/1850; A/AC.32/8.

272. See generally A/CONF.2/SR.

273. The Committee's report of Feb. 17, 1950, E/AC.32/5, at 37, stated that "[T]he Committee gave careful consideration to the provisions of previous international agreements. It sought to retain as many of them as possible in order to assure that the new consolidated convention should afford at least as much protection to refugees as had been provided by previous agreements." *Id.*

274. Thus, Cox, *supra* note 4, at 351-52, lists the "assertions" about the definition that he derived from his study of its origins:

[F]irst, the core of the refugee definition is an individual's fear of persecution; second, the fear is well-founded if it is based on reasonable grounds; third, such grounds are established if a person can give a plausible account of why he fears persecution and this account is supported to the extent reasonably possible; fourth, an additional objective basis underlying the per-

The weight that one gives to the drafters' conception of the meaning of well-founded fear perhaps depends upon the degree to which one adheres to a jurisprudence of original intention. If such intention has any significance here, it is that the phrase was not intended to be coupled with a clear probability standard of proof.

D. *The Draft Convention on Territorial Asylum*

Another indication that a less-than-clear-probability standard is applicable to attempts to secure asylum is found in the official United States response to the attempt to define the term "refugee" during a Conference of Plenipotentiaries in Geneva in January-February, 1977, that was charged with drafting an international convention on territorial asylum.²⁷⁵ A group of experts who presented a draft definition to the Conference had not significantly changed the definition of refugee that was established by the 1951 Convention.²⁷⁶ There was much discussion and many proposed amendments relating to the definition in the Committee of the Whole that consid-

son's fear can be required only if the State assists the person in providing such basis; fifth, an individual must be accorded the benefit of the doubt; sixth, the well-founded fear criterion is to be applied in a non-discretionary manner; and seventh, the well-founded fear criterion is to be applied as liberally as possible. Incident to those requisites are the following negative propositions: first, any interpretation which is primarily objective and only secondarily subjective is inconsistent with Protocol mandates; and second, any State that demands objective proof but fails to assist the person in developing such proof is failing to implement the Protocol fully.

A number of authorities made comments during the period in which the Convention was first being put into practice that accord with this analysis. For example, the French lawyers Sarraute and Tager remarked that "inspired by the definition of refugee given by the constitution of the IRO . . . the new text adopted . . . a very comprehensive definition which had the great virtue of being based on a criterion that was not objective, but psychological." Sarraute & Tager, *Le Nouveau Statut International des Réfugiés: Convention de Genève du 28 juillet 1951*, 42 REV. CRITIQUE DU DROIT INT'L PRIVÉ 245, 258 (1953). Nehemiah Robinson stated that "well-founded" signified that "a person has either actually been a victim of persecution or can show good reason why he fears persecution. N. ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, SIGNIFICANCE AND CONTENTS 48 (1953).

275. For a contemporary discussion of the issue of territorial asylum, see Vierdag, "Asylum" and "Refugee" in *International Law*, 24 NETH. INT'L L. REV. 287 (1977). See also Chamberlain, *The Mass Migration of Refugees and International Law*, 7 FLETCHER FORUM 93 (1983).

276. See Note, *The Definition of Refugee in International Law: Proposals for the Future*, 5 B.C. THIRD WORLD L.J. 183, 192 (1985).

ered the definition. Subsequently, an oral amendment was offered by Argentina, Indonesia, Malaysia, Pakistan and the Philippines which read: "Each contracting State may grant the benefits of the Convention to a person seeking asylum if he, being faced with the definite possibility of persecution" ²⁷⁷

As Paul Weis, the British representative at the Conference, has remarked, ²⁷⁸ this amendment's phrase, "faced with a definite possibility," set up a definition that is "more restrictive, providing for an objective test only, and would depart from the present practice of many States." ²⁷⁹ The amendment was adopted by a vote of 38 for, 34 against, and 15 abstentions. ²⁸⁰ The French representative to the Conference reports that the socialist countries, together with certain Asian, African and Arab countries, voted for the amendment, while the Western countries and certain Latin American states voted against it. ²⁸¹

The United States was among the Western countries that voted against this amendment, ²⁸² demonstrating that official United States policy in the international arena in the relatively recent past is against establishing a standard of proof for applicants for asylum that requires them to prove something very like a clear probability of persecution.

E. *International Practice*

A number of authors have examined the law and practice of determining refugee status in other Western countries. ²⁸³ The most recent and thorough of these studies concludes that:

277. See Report of the United Nations Conference on Territorial Asylum, A/CONF.78/12/Ann. I at 22 (Apr. 21, 1977).

278. Weis, *The Draft United Nations Convention on Territorial Asylum*, 50 BRIT. Y.B. INT'L L. 151 (1979).

279. *Id.* at 162.

280. A/CONF.78/12/Ann. I at 24.

281. LeDuc, *L'Asile Territorial et Conférence des Nations Unies de Geneve, Janvier 1977*, 1977 ANNVAIRE FRANÇAISE 221, 246.

282. There is no indication in the Conference's summary record of how individual states voted on this amendment. See A/CONF.78/C.1/SR.16. A letter to the author from Charles H. Stange, State Department Chief IO/RI5 (UN Documents and Research and Information Systems), dated April 14, 1985, states that "[W]e were able to confirm that the United States *did* vote against the oral amendment (emphasis in original)."

283. See Cox, *supra* note 4, at 352-69; Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. MICH. J.L. REF. 183 (1984); Avery, *Refugee Status Decision Making: the Systems of Ten Countries*, 19 STAN J. INT'L L. 235 (1983).

[t]he clear probability test is unmatched in restrictiveness and in deviation from Protocol principles Where refugee status is determined with regard to the benefit of the doubt, the Protocol elements are generally given due weight. In Belgium, France, Canada and the United Kingdom (Home Office), the grant of refugee status is not made with reference to any prediction of persecution. Instead, applicants are given the benefit of the doubt. Fear of persecution is considered, as are an applicant's statements. These factors, together with such objective indicia as may be available, are accepted as 'good reasons' for a grant of refugee status. It is the practice of these States which represents the true letter and spirit of the Protocol. Other signatories to the Protocol should look to this practice for guidance in order to meet their obligations under the Protocol.²⁸⁴

CONCLUSION

A sharp conflict exists between the Immigration and Naturalization Service, the Board of Immigration Appeals and one circuit court, on the one hand, and several other circuit courts, on the other hand, over the correct interpretation of the phrase "well-founded fear of persecution" contained in the definition of "refugee" in the Immigration and Nationality Act. The present view of the United Nations, as embodied in the UNHCR *Handbook*, the existence of a quasi-asylum provision

284. Cox, *supra* note 4, at 378-79; see also G. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* (1983) for a contemporary examination of refugee law that comes to much the same conclusion. The principal reason for the striking difference between current United States refugee practices and the practices of other Western states may be that the latter have encouraged the UNHCR to play an important role in their assessments of refugee status. For example, the British Home Office uses the *Handbook* in making initial determinations. Canada's guidelines on refugee definitions are based on the *Handbook*. A UNHCR representative makes Belgian refugee determinations. Italy has a three-person joint eligibility committee that includes a UNHCR representative. West Germany does not require applicants to show that they would more likely than not be persecuted if returned to their countries of origin. Weinman, *supra* note 10 at 402-03, 407. That the interpretation of the Protocol by other North Atlantic states differs so radically from U.S. administrative practice should give pause to those who urge a restrictive standard. Where there is more than one interpretation of a treaty's requirements, the correct interpretation is the one that least unduly restricts the rights that the treaty is intended to protect. See *Kolorat v. Oregon*, 366 U.S. 187, 193 (1961). Moreover, treaties are to be interpreted in the light of the subsequent practice of their parties. See *RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 147 (1965).

prior to the 1980 Refugee Act that incorporated a generous standard, the discernible intentions of the drafters of the international agreement upon which the United States definition is based, the United States' recent objections to a harsh standard of proof for those seeking territorial asylum, and the law and practice of other nations all indicate that those courts that oppose the identification of a "well-founded fear" with a "clear probability of persecution" are correct. Among those courts, the Ninth Circuit is rapidly creating a case law that incorporates important elements of humanitarian international practice.

The split over the correct standard of proof and accompanying evidentiary burden will be resolved by a forthcoming decision of the Supreme Court.²⁸⁵ This decision will be fateful for thousands of current applicants for asylum and for many more who in the future will seek a haven from persecution in this country.

285. See *Cardoza-Fonseca v. I.N.S.*, 767 F.2d 1448 (9th Cir. 1985), *cert. granted*, 54 U.S.L.W. (Feb. 24, 1986). If the Supreme Court affirms the Ninth Circuit's decision in *Cardoza-Fonseca*, the outcome will be felt most strongly not in the courts of appeals, which presently dispose of some scores of asylum cases annually, but rather at the administrative level. Only about 2% of all denials of asylum are appealed beyond the administrative level. Anker, *INS Internal Report on Asylum Adjudications—A Cause for Cautious Optimism*, 7 IMMIGRATION J. 26, 27 (1984).