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CLAIMS OF POLITICAL ASYLUM BASED ON NON-PHYSICAL FORMS OF HARM SUCH AS ECONOMIC SANCTIONS AND DEPRIVATIONS

Dessi Mathew

I. Introduction

Immigration matters have evoked an unprecedented level of interest in recent years. One of the reasons for this phenomenon has been the growing influx of asylum seekers. Some argue that the mass exodus of people and influx of immigrants into the U.S. is caused by major world political events, such as Fidel Castro's rise to power, the fall of Saigon in Vietnam, the ouster of Aristede in Haiti and the events of Tiananmen Square, creating waves of immigrants from Cuba, Vietnam, Haiti and China that caused the immigration debate to intensify.[1] Over the last 30 years, an unprecedented number of people have sought asylum in the U.S. "As the number of asylum seekers has surged, a public backlash against them has intensified and the war on terror has also generated suspicion of asylum seekers."[2]

However, current asylum laws and eligibility requirements limit asylum claims to people being persecuted solely on account of their race, religion, nationality, membership in a particular social group or political opinion.[3] The asylum procedures do not recognize claims by people fleeing ethnic conflict, battered women or victims of cultural practices such as female genital mutilation. Additionally, courts are reluctant to recognize economic sanctions as persecution.[4]

Some scholars and political groups are advocating for the broadening of the criteria which merit asylum. They argue asy-

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[1] Katherine Tonnas, *Out of a Far Country: The Sojourns of Cubans, Vietnamese, Haitians, and Chinese to America*, 20 S.U. L. Rev. 295, 297 (1993).

[2] Matthew E. Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 Harv. Int'l L.J. 413, 413-14 (2006).

[3] Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(42)(A) (2006).

[4] Debora E. Anker, Law of Asylum in the United States 233 (3d ed. 1999).

lum law should protect not only victims of persecution, but other victims of violence or human rights abuse. They claim that limiting asylum to the politically persecuted "draws a morally arbitrary distinction among people who are similarly situated with respect to their need for protection."[5] The persecution criteria, specifically, has been subject to a lot of criticism from activists. They argue that those forced to flee their homelands because of lack of protection from generalized violence, environmental catastrophe or severe economic hardship have an equally strong moral claim to asylum as those persecuted by the state on account of their race, religion, nationality, membership in a particular social group or political opinion.[6] Thus, it is clear that asylum remains a volatile political issue. In light of this debate, this comment will focus on political asylum claims based on economic persecution.

In a recent decision, the United States Court of Appeals for the Second Circuit indicated that it was not able to ascertain the standard applied by the Board of Immigration Appeals (BIA), the agency which provides appellate review of decisions by an Immigration Judge, for assessing when economic harm amounts to persecution in the context of establishing a claim for political asylum.[7] The Immigration and Nationality Act (INA), which is the basic body of U.S. immigration law, does not address what level of treatment constitutes "persecution" in the context of economic mistreatment claims. Thus, when the appellate courts decide such cases, they usually defer to the BIA's construction of the term. However, the BIA has not adopted a consistent construction of the term "economic persecution."[8] Over the past 30 years, various standards have been applied. This inconsistency is troubling as asylum seekers' lives ride on the resolution of these matters. The scope of what constitutes economic persecution is an important question in asylum claims, and thus will be the focus of this comment.

This comment will first provide a historical overview of asylum law in the United States, and an outline of the elements of an asylum claim. It will then analyze the scope of non-physical

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[5] *See* Price, *supra* note 2, at 415.
[6] *Id*. at 417.
[7] Mirzoyan v. Gonzales, 457 F.3d 217, 222 (2d Cir. 2006).
[8] *Id*.

forms of harm which amount to economic persecution for the purposes of establishing a political asylum claim in the United States as outlined in seminal cases. Several standards will be discussed and analyzed: (1) the denial of livelihood test, also known as the *Dunat* test; (2) the deliberate imposition of substantial economic disadvantage standard applied by the Ninth Circuit in *Kovac v. INS*,[9] and by other circuit courts including the Fourth Circuit, the Sixth Circuit, the Seventh Circuit, and the Tenth Circuit; (3) the deliberate deprivation of basic necessities test as per *Matter of Acosta*;[10] and (4) the standard in discrimination claims. The comment will analyze the applications of these standards by the various courts, and the implications for asylum seekers. In conclusion, it will provide support for the argument that courts should apply a broader, less restrictive standard. This comment will urge for widening the substantive grounds for asylum claims by linking the eligibility requirements to international human rights law, so that persecution would be interpreted to include sustained or systematic violations of human rights both in the political and economic spheres.

II. Historical Overview and U.S. Legislation

The United States has long been recognized as a country welcoming asylum seekers who are fleeing political oppression, religious persecution or oppression by the State based on race or ethnicity. In fact, the United States is a party to a number of multilateral agreements reaffirming the commitment of signatories to the protection and maintenance of human rights, including the United Nations Charter adopted in 1945, the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948, and the Conference on Security and Cooperation in Europe.[11] The United Nations Charter commits members to encouraging respect for human rights and obligates members to cooperate with the United Nations for the promotion of universal respect for, and observance of, human rights.[12] These international treaties "restate the moral

[9] Kovac v. INS, 407 F.2d 102 (9th Cir. 1969).
[10] In re Acosta, 19 I. & N. Dec. 211, 222 (BIA 1985).
[11] Andrew Clapham, Human Rights: A Very Short Introduction 33 (2007).
[12] *Id.*

as well as the legal obligation of the civilized nations of the world to recognize the right of every human being to live, work, and practice one's beliefs, free from oppressive governmental interference, and to refrain from such oppressive conduct."[13]

"Until the 1920s, the United States' doors were open to almost all aliens, irrespective of whether they were escaping religious or political persecution" or economic poverty.[14] After World War I, various restrictions began to emerge. This trend continued after World War II. When Congress enacted the Displaced Persons Act of 1948, the Cold War had just begun. This Act proposed to provide relief for those fleeing Fascist or Soviet persecution. "Subsequent amendments of the Act in 1950 exposed Congress' intent to use refugee law as a vehicle for the fostering of U.S. Cold War policies."[15]

In 1952 Congress passed the Immigration and Nationality Act (INA), also known as the McCarran-Walter Act, providing the basic framework for U.S. immigration policy; however, the INA of 1952 did not expressly contain provisions to handle the resettlement of refugees or displaced persons.[16] In order to fulfill its international obligations, the United States adopted ad hoc legislation for the immigration of refugees.[17] A year later Congress adopted the Refugee Relief Act, which furthered the U.S. existing policy by providing relief for refugees living within the People's Republic of China and the Soviet Union or its satellites.[18] "Passage of this Act heralded a major change in U.S. refugee policy." It was "the first time that U.S. law recognized the existence of refugees."[19] The Act, however, created stringent requirements. Refugees had to find U.S. citizen sponsors to serve as guarantors that the refugees would be able to find housing and employment, and would thus not become a public

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[13] H.R. REP. NO. 95-1452, at 6 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4700, 4703.

[14] *See* Tonnas, *supra* note 1, at 296.

[15] *Id.* at 302.

[16] *Id.*

[17] U.S. Citizenship and Immigration Services, History of the United States Asylum Officer Corps, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=62c26138f898d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=828807b03d92b010VgnVCM10000045f3d6a1RCRD#I (last visited Feb. 24, 2009) [hereinafter History].

[18] Tonnas, *supra* note 1, at 302.

[19] *Id.*

charge. "The federal government did not provide for any resettlement effort," leaving this task to private individuals and organizations.[20]

Beginning in 1956, the United States began large-scale use of the Attorney General's parole authority under Section 212(d)(5) of the INA to bring refugees to the United States. In order to allow the refugees paroled in the United States to receive permanent residency, Congress passed separate special legislation, such as the Hungarian Refugee Act of 1958, the Cuban Refugee Act of 1966, and the Indochinese Refugee Act of 1977.[21] The Immigration and Nationality Act was revised in 1965 through the Immigration Act of 1965. The 1965 amendments to the INA established a permanent refugee admissions process. The admission requirements continued to be delineated along ideological lines. Refugees were admitted into the United States if they fled from either communist countries or from a country within the Middle East.[22] Conditional refugee entrants were numerically limited under a preference system to 17,400 refugees annually.[23]

In November of 1968 the United States acceded to the 1967 United Nations Protocol Relating to the Status of Refugees, which incorporates the 1951 United Nations Convention relating to the Status of Refugees, also known as the Refugee Convention. Article 33 of the Refugee Convention prohibits a state party from expelling or returning a refugee to a country where his or her life or freedom would be threatened on account of a protected characteristic. Protected characteristics include race, religion, and political opinions. A "refugee" is defined in Art. 1A(2) as any person who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, unwilling to avail himself of the protection of that country.[24]

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[20] *Id*. at 303.

[21] *See generally*, History, *supra* note 17.

[22] *Id.*

[23] *Id.*

[24] United Nations Convention Relating to the Status of Refugees, July, 28, 1951, 189 U.N.T.S. 150.

In 1980 a special Refugee Act was passed by Congress, which established statutory recognition of political asylum in American immigration law.

The Refugee Act of 1980 was to fulfill U.S. obligations under the United Nations Protocol Relating to the Status of Refugees.[25] The Act created a refugee admissions system for people outside of the U.S. and a separate procedure for resolving claims of people already in the U.S. The United States Asylum Officer Corps stated:

> The Congressional intent of the 1980 Refugee Act was to establish a politically and geographically neutral adjudication standard for both asylum status and refugee status, a standard to be applied equally to all applicants regardless of their country of origin, and to abandon the ideologically-motivated system in place before 1980.[26]

Under the Refugee Act of 1980, applicants who meet the statutory definition of refugee became eligible for a discretionary grant of political asylum by the Attorney General.[27] The Refugee Act codified the principles outlined in the 1951 U.N. Convention Relating to the Status of Refugees and the U.N. Protocol Relating to the Status of Refugees.[28] The U.N. Protocol reaffirmed the principle of non-return, the right of a person not to be returned to a country where there is a reasonable expectation the person would suffer persecution. The U.N. Protocol set forth the guidelines for refugee and asylum law. The Protocol also provided a concrete definition of the term refugee for countries to follow.[29] The Congressional hearings and reports on the Refugee Act of 1980 clearly indicate Congress' intent to have U.S. law conform with the Protocol in regards to the refugee definition.[30] In contrast to the Protocol's definition of a refugee, the U.S. definition has a more expansive meaning, and it in-

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[25] James M. Moschella, *Osorio v. Immigration and Naturalization Service: The Second Circuit and Well-Founded Fear of Persecution Account of Political Opinion*, 21 BROOK. J. INT'L L. 471, 476 (1995).

[26] History, *supra* note 17.

[27] Moschella, *supra* note 25, at 471.

[28] *Id.* at 476-77.

[29] *Id.* at 473-74.

[30] *Id.* at 477.

cludes someone who has been persecuted in the past, as well as someone who has a well-founded fear of future persecution.[31]

The Refugee Act of 1980 forms the basis for American political asylum law. It attempted to meet the humanitarian ideas advanced by international refugee standards, and to establish uniform criteria for determining refugee eligibility.[32] Under the Refugee act, aliens can pursue asylum or withhold deportation when they have been caught illegally entering the United States or residing in the United States illegally, if they meet certain criteria. The Act developed a new quota of 50,000 refugees per year.[33]

In passing the Refugee Act, Congress declared that it is the historic policy of the United States "to respond to the urgent needs of persons subject to persecution" and to provide assistance to refugees.[34] The Act was also intended to establish a systematic, equitable procedural process for asylum claims which conformed to the spirit and ideas of the U.N. Protocol. The President became an important force in U.S. refugee policy through the use of the parole provisions.

> In response to the Cuban Revolution of 1959 for example, President Kennedy paroled 60,000 Cubans into the U.S. [Similarly], after the fall of Saigon, President Carter . . . paroled an estimated 400,000 Indochinese into the [U.S.] in ten separate parole programs from 1975-1979.[35]

During the course of formulating immigration legislation, "Congress . . . gradually delegated to the Executive branch much of its authority in [the] area" of immigration law.[36] Prior to 1980, the primary goal of U.S. refugee policy was to extend relief to those fleeing repressive regimes which the United States opposed. The U.S. policy tended to react to specific political situations and to reflect ideological and geographical biases.[37] The

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[31] History, *supra* note 17.

[32] Moschella, *supra* note 25, at 475.

[33] *Id.*

[34] *Id.* at 476.

[35] *See* Tonnas, *supra* note 1, at 305.

[36] *Id.*

[37] *Id.* at 306.

Act of 1980 was intended "to remove the ideological bias from the process regulating refugee admission."[38]

Ten years later, Congress passed the Immigration Act of 1990. This latest legislation amended the Immigration and Nationality Act significantly. Section 207 of the INA governs regulations relating to refugees, and Section 208 of the INA deals with asylum, and is also contained in 8 U.S.C. § 1158. Under current regulations, "[a]liens apprehended by the INS . . . [who] are in deportation or exclusion proceedings may apply for political asylum [in front of] an immigration judge only."[39] The immigration judge holds a hearing at which the applicant may be represented by counsel. Decisions of the judges are appealable to the BIA, with further appeals available through the federal judicial system. Aliens whose applications are denied are either deported or may be given time to depart voluntarily. In addition to applying for relief under political asylum, an alien in deportation or exclusion proceedings may apply for withholding of deportation to a particular country. Every applicant for asylum in such proceedings is automatically considered to be an applicant for withholding of deportation.

"The standard for withholding of deportation is more stringent than the standard for asylum."[40] An applicant who is granted asylum can apply for legal permanent residence status and eventually for U.S. citizenship. "If the alien's life or freedom would be threatened, withholding of deportation is mandatory. Granting of political asylum is discretionary."[41]

In 1996 President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act. In one of the many provisions, the Act expanded the definition of political opinion to include resistance to a coercive population control program. This provision allows a person who has been forced to abort a pregnancy, to undergo involuntary sterilization, or who has been persecuted for refusal to undergo such a procedure, to be eligible for political asylum on account of political opinion.[42]

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[38] *Id.* at 308.

[39] *Id.* at 310.

[40] *Id.*

[41] Tonnas, *supra* note 1, at 310.

[42] History, *supra* note 17.

III. Elements of Political Asylum

U.S. law provides three major forms of relief for persons fleeing persecution or related serious harm in their country of origin who are physically present or arriving in the United States: asylum, withholding of removal, and protection under the Torture Convention. Refugee status under U.S. law is only available to persons applying from outside of the United States. Asylum status, in contrast, is available to persons seeking protection in the United States or at its borders. There are no numerical or categorical limitations to asylum status.[43]

1. *Refugee*

To be eligible for asylum in the U.S. under 8 U.S.C.S. § 1158(b)(1)(A), an applicant must be a refugee under the INA. The INA defines a refugee in 8 U.S.C. § 1101(a)(42)(A) as

> any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or a well founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[44]

The statute is based on the language of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. The phrase "well-founded fear of being persecuted" is a key phrase of the definition. It replaces the earlier method of defining refugees by categories to defining refugees by the general concept of fear for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Therefore, the determination of refugee status requires an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin under the 1951 Refugee Convention. The definition incorporates a subjective and an objective element in determining whether well-founded fear exists. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. This definition rules out persons as victims of famine or natural disaster, unless they also

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[43] Anker, *supra* note 4, at 5.
[44] *See* 8 U.S.C. § 1101(a)(42)(A).

have a well-founded fear of persecution for one of the reasons stated.[45] The objective component requires credible and specific evidence to support a reasonable fear of persecution. One way an applicant can demonstrate the objective grounds to justify his fear would be to show specific human rights violations by his government targeting individuals with similar characteristics.[46]

The 1951 Convention makes a clear distinction between economic migrants and refugees. As per the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention, a migrant is

> a person who, for reasons other than those contained in the definition, voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee.[47]

It is important however to note that the Handbook recognizes that the distinction between an economic migrant and a refugee is sometimes blurred in the same way as the distinction between economic and political measures in an applicant's country of origin is not always clear. Thus, an applicant whose economic circumstances were a contributory factor to his decision to leave his country should not be denied asylum if he left his home country for both political and economic reasons and otherwise meets the requirements.[48] The Handbook explains that all circumstances need to be taken into account and notes, "behind economic measures affecting a person's livelihood there may be racial, religious or political aims or intentions directed against a particular group."[49] The Handbook also states that

> where economic measures destroy the economic existence of a particular section of the population (e.g. withdrawal of trading rights

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[45] Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992) (hereinafter "UNHCR Handbook"), para. 39.

[46] David Weissbrodt & Connie de la Vega, International Human Rights Law: An Introduction 75 (2007).

[47] UNHCR Handbook, *supra* note 45, para. 62.

[48] *S*ee generally Anker, *supra* note 4.

[49] UNHCR Handbook, *supra* note 45, para. 63.

> from, or discriminatory or excessive taxation of, a specific ethnic or religious group), the victims may, according to the circumstances, become refugees on leaving the country.[50]

On the other hand, the Handbook acknowledges that objections to general economic measures by a State are not by themselves good reasons for claiming refugee status.[51]

There are three ways to establish refugee status.[52] First, the applicant may demonstrate that he or she has suffered past persecution, in which case a presumption arises that he or she has a well-founded fear of future persecution. Second, the applicant may establish a well-founded fear of future persecution independent of any past persecution.[53] To qualify for withholding of removal, an applicant must meet the higher burden of showing that his or her life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.[54] Third, in certain cases, an applicant may have suffered such severe past persecution as to constitute a compelling reason for being unwilling or unable to return to his or her country.[55]

2. *Past Persecution on Account of Race, Religion or Political Viewpoint*

Under the first prong, a refugee must show that he has suffered past persecution (actual harm in his home country) by the government or state actor on account of his race, religion, nationality, membership in a particular social group or political opinion, or has a reasonable fear of future persecution upon returning to his home country. A showing of past persecution creates a legal presumption that the applicant has a well-founded fear of persecution and therefore should be granted asylum.[56] Evidence of past persecution alone can establish eligibility for asylum.[57] Unless the INS could rebut this presumption, the

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[50] *Id.*
[51] *Id.*
[52] Mirzoyan v. Gonzales, 457 F.3d 217, 220 (2d Cir. 2006).
[53] Id.
[54] *See* 8 U.S.C.S. § 1231(b)(3)(A).
[55] *See* 8 C.F.R. § 208.13(b)(1)(ii)(A).
[56] *See* 8 C.F.R. § 208.13(b)(1).
[57] Meza-Manay v. INS, 139 F.3d 759, 763 (9th Cir. 1998).

alien is eligible for asylum.[58] To rebut a presumption that an alien, who had shown past persecution, has a well founded fear of future persecution, the INS is required to show by preponderance of the evidence that conditions in the country of origin of the alien had changed to such an extent that the alien no longer has a well-founded fear of persecution upon return to that country.

3. *Persecution as an Element*

The term persecution is not defined by treaty, statute or regulation. There is no universally accepted definition of persecution, only guidelines from various sources including the UNHCR Handbook, precedent decisions and international human rights law.[59] The Handbook states:

> From Article 33 of the 1951 Convention, it can be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership in a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution.[60]

The Handbook asserts that other prejudicial actions or threats could amount to persecution depending on the circumstances of each case, including the subjective element of fear. The evaluation requires a judgment of the opinions and feelings of the person concerned. Due to the variations in the psychological makeup of individuals and in the circumstances of each case, interpretations of what amounts to persecution will vary. In addition, the UNHCR Handbook acknowledges that an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), but in some cases combined with other factors such as general atmosphere of insecurity in the country of origin, would amount to persecution. In such situations, the Handbook advises that "the various elements involved, may, if taken together, produce an effect on the mind of the applicant that can

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[58] 8 C.F.R. § 208.13(b)(1)(i).

[59] ANKER, *supra* note 4, at 19.

[60] Handbook, *supra* note 45.

reasonably justify a claim of well-founded fear of persecution on 'cumulative grounds.'"[61]

4. *Fear of Future Persecution*

Alternatively, if the applicant was not subject to past persecution, he may proffer evidence that he possesses a genuine fear of enduring future persecution if returned to his country of origin and that a reasonable person would fear persecution if returned to his country.[62] The standard used is a "more likely than not" standard when applied to claims based on persecution upon the alien's return to his country of origin.[63]

5. *Actual Harm*

The law requires that there be actual harm or a reasonable fear of future harm, amounting to persecutory harm, in order for an applicant to qualify as a refugee under Section 1101(a)(42) of the Immigration and Nationality Act. United States courts and administrative authorities have acknowledged that persecution is a flexible concept, one that requires a finding of serious harm, that is not limited to severe physical harm.[64]

Actions that might constitute persecution within the meaning of the asylum statute include detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings or torture, or threats of such action.[65] The Handbook notes that persecution is related to action by the authorities of a country, yet it could emanate from sections of the population that do not respect the standards established by the laws of the country concerned.

A case in point may be religious intolerance, amounting to persecution, in an otherwise secular country, where sizable fractions of the population do not respect the religious beliefs of their neighbors. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the

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[61] UNHCR HANDBOOK, *supra* note 45, para. 53.
[62] *See* 8 C.F.R. § 208.13(b)(2) (2007).
[63] *Mirzoyan*, 457 F.3d at 220.
[64] ANKER, *supra* note 4, at 278.
[65] *See* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006).

authorities, or if the authorities refuse, or prove unable, to offer effective protection.[66]

6. *Evidentiary Burdens of Proof and Statutory Standard*

It is the alien who bears the burden of proving that he has endured persecution or would be subject to persecution in the future. It is the general rule in both administrative and immigration law that the party charged with the burden of proof must establish the truth of his or her allegations by a preponderance of the evidence standard.[67] This is the burden of persuasion generally applied to aliens when seeking political asylum or withholding of deportation.[68] In order to qualify for relief either under Section 208(a) or Section 243(h), an alien must be able to provide objective support for his claim.[69] This objective support is required whether the standard is a well-founded fear of persecution or a clear probability of persecution. Also, support must be proffered to show the reasonableness of the alien's fear. Additionally, the showing of fear will be judged in light of the current foreign policy consideration of the U.S.[70]

7. *Harm Does Not Need to Be Physical*

The harm or suffering required to establish persecution in support of an asylum claim does not need to be physical harm. The harm may take other forms, such as the deliberate imposition of severe economic disadvantage, the deprivation of food, housing, employment, or other essentials of life.[71] Prior to 1965, the courts construed the political asylum statute, in the context of economic sanctions, to mean a denial of employment opportunities equal to denial of all means of earning a living. This was a particularly difficult burden for an alien to prove.[72]

Section 243(h) of the Immigration and Nationality Act was amended in 1965. The physical harm or persecution requirement was deleted. This amendment followed criticism that the

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[66] UNHCR HANDBOOK, *supra* note 45.
[67] In re Acosta, 19 I. & N. Dec. 211 (BIA 1985).
[68] *Id.*
[69] *Id.*
[70] *See* Tonnas, *supra* note 1, at 311.
[71] Kovac v. INS, 407 F.2d 102 (9th Cir. 1969).
[72] *Mirzoyan*, 457 F.3d at 222.

physical persecution requirement is too narrow.[73] The amendment shifted the emphasis from the consequences of oppressive conduct to the motivation behind it. However, Congress was clear that only persecution on account of race, religion, nationality or political opinion was to be a reason for granting an applicant political asylum.[74] The legislative history of the 1965 amendment shows that Congress intended "to effect a significant, broadening change in section 243(h) which would lighten the burden imposed on applicants for asylum by removing the requirement that they show threatened bodily harm." This intent of Congress seems especially relevant in cases of alleged economic persecution. The 1965 amendment however did not elaborate on what form of suffering besides physical persecution would meet the standard.

IV. The Asylum Process

A foreign national who seeks asylum in the United States may do so either affirmatively or defensively. An affirmative applicant may be either an individual who maintains a valid non-immigrant status (e.g. tourist status, or student status) or a person who either overstayed his visa or entered the United States without inspection.[75] A defensive applicant is one who applies for asylum after having been apprehended by the Department of Homeland Security and placed in removal proceedings in immigration court, a part of the Department of Justice.[76] A defensive applicant does not have an opportunity to present his or her claim to an asylum officer, and has to file the asylum application only in immigration court. He or she is usually detained in a detention facility after apprehension.[77] A small number of applicants are released on bond before their immigration court hearing, but most remain detained through their hearing and any subsequent appeal. A successful applicant is granted asylum and is not ordered to be removed.[78]

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[73] *Kovac,* 407 F.2d at 106.

[74] *Id.*

[75] Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Shrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan L. Rev. 295, 308-10 (2007).

[76] *Id.* at 309.

[77] *Id.*

[78] *Id.*

The Department of Homeland Security is the executive agency primarily responsible for overseeing immigration processes, including affirmative asylum applications. The United States Citizenship and Immigration Services houses the asylum corps, an agency comprised of asylum officers who evaluate asylum applications and interview applicants.[79] The interview process by an asylum officer is non-adversarial. There is no separate representative for the government. Decisions by asylum officers are reviewed by a supervisory asylum officer. The asylum officer can grant asylum, refer the case to immigration court, or deny the asylum if the applicant has valid immigration status, the applicant can remain in the U.S. When an asylum officer refers a case to immigration court, the asylum officer serves the asylum applicant with a Notice to Appear in court. The notice is the equivalent of a summons in a civil case, and the asylum applicant becomes a respondent. Immigration court hearings are adversarial proceedings.[80] A Department of Homeland Security attorney is assigned to cross-examine the asylum applicant and usually argues before the immigration judge that asylum is not warranted. Asylum decisions, whether by asylum or immigration judges, involve both a judgment about the applicant's credibility, and a determination of the applicant's eligibility.[81]

An applicant who is denied asylum by an immigration judge may appeal to the BIA, which is also a component of the Department of Justice. The BIA consists of eleven to fifteen members appointed by the Attorney General of the United States.[82] An asylum applicant may seek review of an adverse BIA decision in a U.S. Court of Appeals. The circuit courts may remand a case in which the BIA rendered a decision contrary to the law or abused its discretion, but the courts grant a great deal of deference to the BIA.[83]

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[79] *Id.*
[80] *Id.*
[81] Ramji-Nogales, Schoenholtz & Shrag, *supra* note 75, at 308-310.
[82] *Id.*
[83] *Id.*

V. Economic Persecution Claims

Although the term persecution has not been defined by statute,[84] case law has described persecution as the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive in a manner condemned by civilized governments. Civilized governments generally prohibit persecution based on race, religion, nationality, and political opinion. This formulation was established in *Matter of Laipenieks*, and is also firmly based on the 1978 House Report.[85] The Fifth Circuit Court of Appeals in *Mikhael v. INS* stated that:

> [T]he harm or suffering need not be physical, and may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.[86]

However, administrative agencies and federal court decisions "reflect an underlying reluctance to recognize economic sanctions and deprivations as persecution" unless the harm is severe or substantial.[87] Minor economic disadvantages or what the Eight Circuit Court of Appeals termed "mere economic detriment" in *Minwalla v. INS*, are insufficient to establish persecution. The applicant's claim in *Minwalla* was based on a denial of the opportunity to hold a government job. The court in *Minwalla* found that the applicant had only alleged "mere economic detriment" which did not constitute persecution.[88] Further, the BIA has consistently held that relegation of a person to a low economic or even subsistence level does not meet the statutory requirement unless the government is depriving the person of all realistic opportunity to earn a living.[89]

Congress has long recognized the importance of economic rights as core human rights protected by international law. The House Report of August 8, 1978 notes that prior regulations under the Displaced Persons Act described victims of persecu-

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[84] H.R. Rep. No. 95-1452, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4700, 4704.

[85] In re T-Z, 24 I. & N. Dec. 163, 170 (BIA 2007).

[86] Mikhael v. INS, 115 F.3d 299, 303 (5th Cir. 1997).

[87] Anker, *supra* note 4, at 238.

[88] Minwalla v. INS, 706 F.2d 831, 835 (8th Cir. 1983).

[89] Anker, *supra* note 4, at 236.

tion as persons or groups of persons who have been deprived of "liberty, property or equal protection of the laws, or have been denied the full rights of citizenship on account of race, religion or political belief." The House Reports further note that the Nuremberg Tribunals of 1945, which prosecuted 17 Nazi war criminals for war crimes and crimes against humanity, discussed the concept of economic persecution in great detail. The Nuremberg Tribunals recognized the economic aspect of persecution, citing the wholesale seizure of the Nazi government of Jewish assets and financial holdings, the imposition of extraordinarily burdensome fines and the creation of Jewish Ghettos as persecution.[90]

There is consensus among jurists that a person who has left his country for both political and economic reasons should not be barred from asylum where he has moved due to a combination of factors, including economic decisions. Often a government's rationale for imposing harsh economic measures may be political or a measure to target a specific group such as was often the case with political dissenters in former communist countries. Economic measures could be directed at a ruling party's political opponents or ethnic groups.[91] This was the case in pre-Aristide Haiti where the government maintained its power through extortionist behavior.[92]

VI. Standards of Economic Harm Applied by U.S. Courts

The BIA and federal courts have recognized that economic sanctions can rise to the level of persecution. Both agree that substantial economic deprivations by a government actor affecting a person's basic ability to make a living constitutes persecution. However, less severe forms of employment disadvantage such as the unavailability of government jobs or being forced to choose another, presumably comparable, occupation in order to avoid economic sanctions, do not rise to the level of persecution.[93] The BIA has also held that persecution could consist of

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[90] H.R. Rep. No. 95-1452, at 6 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4700, 4705.

[91] Anker, *supra* note 4, at 234.

[92] *Id.* at 235.

[93] Anker, *supra* note 4, at 239.

economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom.[94]

1. *Evolution of Standards*

A. *The* Dunat *Test: Total Deprivation of Earning a Livelihood*

Until 1965, withholding of deportation under former section 243(h) of the Act, 8 U.S.C. § 1253(h) (1964) required a showing that the alien would be subject to physical persecution. The Third Circuit Court of Appeals, for example, in *Blazina v. Bouchard*, held that before the Attorney General may grant relief under section 243(h), the alien must show that he would be subject not only to persecution, but to physical persecution. Physical persecution meant confinement, torture, or death inflicted on account of one's race, religion or political opinion. After Section 243(h) was amended in 1965, the physical requirement was deleted from the section and the language was modified to read "persecution on account of race, religion, or political opinion."[95] This amendment was the result of repeated criticism that the restriction to claims based on physical persecution deprives many persecuted applicants living in police states from relief because their harm is not physical in nature but amounts to a deprivation from the opportunity to provide for their families. The legislative history of the 1965 amendment provides further proof that Congress considered the physical persecution element to be entirely too narrow.[96]

In adjudicating claims based on economic harm, the courts in the 1960s applied the so called *Dunat* standard. The court in *Dunat* held that even if the alien has not experienced physical persecution, he would still be entitled to relief if he could show that he would be deprived of all means of earning a livelihood, which would amount to persecution. BIA decisions from the 1960s invoked the *Dunat* standard. This is a particularly difficult burden for an alien to meet and resulted in the denial of relief in cases where the economic persecution was essentially substantial harassment.[97]

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[94] *Acosta*, 19 I. & N. Dec. at 222.
[95] *Kovac*, 407 F.2d at 106.
[96] *Id.*
[97] *Id.* at 106-07.

In *Dunat*, the Third Circuit Court of Appeals interpreted the INA's then existing requirement of physical persecution to include "the denial of an opportunity to earn a living.[98] The applicant in *Dunat* was a national of Yugoslavia and a seaman. He had jumped ship in Norfolk, Virginia in 1956 and applied for a stay of deportation. He introduced evidence and urged that he would be physically persecuted if deported to Yugoslavia since its Communist government would deny him an opportunity to earn a livelihood because of his practice of the Roman Catholic faith.[99] His stay was denied. The Attorney General determined that the denial of employment is not within the import of the term physical persecution.

Dunat commenced an action in the district court arguing that the Attorney General's action was arbitrary and capricious, and thus an abuse of discretion. The district court entered summary judgment in favor of the Attorney General. *Dunat* appealed to the Third Circuit Court of Appeals. The Third Circuit reversed the lower court's judgment. The court held that economic proscription so severe as to deprive a person of all means of earning a livelihood may amount to physical persecution. The court stated that "the denial of an opportunity to earn a livelihood in a country such as the one involved here is the equivalent of a sentence to death by means of slow starvation and nonetheless final because it is gradual."[100] However, mere discrimination in employment (even if it is racially or politically motivated) was not enough. While reaching this conclusion, the court essentially established a very high standard for political asylum claims based on economic harm. This standard is not consistent with the principles of the Refugee Convention. This standard was adopted and applied by the court in *Kovac v. Immigration and Naturalization Service* decided in 1969 by the United States Court of Appeals for the Ninth Circuit.

The *Dunat* standard essentially means that as long as some employment opportunity would still remain available for the applicant, he is not eligible for political asylum, even though he may have suffered years of racially or politically motivated employment discrimination or deprivations by the government in

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[98] *See* Dunat v. Hurney, 297 F.2d 744 (3d Cir. 1962).
[99] *Id.* at 745.
[100] *Id.* at 746.

his native country. Under this interpretation, economic sanctions which were often imposed by communist authorities in the Soviet Union and Eastern Europe at the time as a means of punishing political dissidents would not have qualified as persecution for a successful asylum claim since its victims would not be deprived of all means of earning a livelihood.

B. *The* Kovac *Test, Probability of Deliberate Imposition of Substantial Economic Disadvantage*

So, the question remained, if an alien was subjected to substantial economic disadvantage because of his race, religion or political opinion, is that sufficient proof of harm for relief? Following the statutory change in the law in 1965, courts adopted the Ninth Circuit's more generous standard adopted in *Kovac v. INS* known as the deliberate imposition of substantial economic disadvantage. The Ninth Circuit Court of Appeals held that the Board's "total deprivation of earning a living" standard was erroneous, and that the proper test should focus on whether substantial economic disadvantage was imposed on the alien.

In *Kovac*, the petitioner was a national of Yugoslavia who had been harassed by the secret police in Yugoslavia and who, because of his refusal to cooperate, had lost several jobs as a chef.[101] Kovac took employment in the merchant marine in order to provide for his family as pressure from the secret police made it impossible for him to find other employment. He entered the United States in 1967 as a non-immigrant crewman on board of a Yugoslavian vessel. He remained in the United States after his ship departed. Kovac applied for temporary stay of deportation under Section 243(h) of the Immigration and Nationality Act,[102] which authorizes the Attorney General to withhold deportation to any country in which the alien would be subject to persecution on account of race, religion, or political opinion. The applicant was denied relief.

On appeal, the BIA affirmed the denial, applying the severe economic sanctions test. The court used a standard which evaluates economic persecution to the point of deprivation of all means of earning a livelihood, the standard spelled out in the

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[101] *Id.*
[102] 8 U.S.C. § 1253(h) (1965).

Dunat case. The BIA had applied an erroneous standard, and that such a standard is an erroneous interpretation of Section 243(h). The Ninth Circuit in *Kovac* stated that "a probability of deliberate imposition of substantial economic disadvantage upon an alien for reasons of race, religion, or political opinion is sufficient."[103] This test, less stringent on the applicant, was subsequently adopted by other courts, and re-indorsed in the 1980 Refugee Act.[104] According to this standard, sufficient breaches include being compelled to take menial employment incompatible with a person's education and experience, and being forced to work under extremely dangerous conditions.

For example, in *Berdo v. INS*, the Sixth Circuit Court of Appeals found that the applicant presented sufficient evidence that he had been subjected to deliberate imposition of substantial economic disadvantage. He was first demoted to a menial job, then threatened with denial of available education and training to secure highly skilled jobs, and then relegated to living conditions deemed unfit for human habitation. All actions by the government were taken in order to compel the applicant to join the communist party.[105] However, some courts continued to rely on the old standard, with emphasis on denial of livelihood. In *In re D-L-&A-M-*, the BIA in 1991 denied the applicant asylum because his loss of a job in Cuba did not deprive him of a livelihood.[106]

In *Borca v. INS*, the Seventh Circuit stated that the applicant had to show she faced the probability of deliberate imposition of substantial economic disadvantage on account of her political opinion (the lower threshold) and not that her persecution was so severe as to deprive her of all means of earning a living (a much higher standard). The petitioner in *Borca*, a Romanian citizen, entered the United States with a visitor's visa, but overstayed her status. The INS (now USCIS) initiated deportation proceedings against her. Prior to the expiration of her visa, Borca had filed an administrative application for asylum and withholding of deportation in which she claimed that

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[103] *Kovac*, 407 F.2d at 107.

[104] ANKER, *supra* note 4, at 237.

[105] Berdo v. INS, 432 F.2d 824, 827, 847 (6th Cir. 1970).

[106] In re D-L-&A-M-, 20 I. & N. Dec. 409, 414 (BIA 1991).

she would likely be persecuted for her political opinion if she returned to Romania.[107]

At her hearing, Borca, who was a hospital employee in the city of Timisoara, testified that she was interrogated by the Romanian secret police in connection with her efforts to expose hospital officials' purging of records and information about individuals injured or killed during the overthrow of the Ceausescu regime. Borca began to receive threatening calls at the hospital; the anonymous callers demanded that she destroy photo copies of the files in her possession. A month or two later, Borca was subjected to another interrogation and her dwelling was searched by the secret police. A year later, she helped organize a demonstration against the health minister and the Romanian government. Borca prepared posters for the demonstration. She also gave a speech in which she addressed the issue of the missing hospital records. When she returned to work, she was informed by the hospital director that her employment was being terminated due to her political activities. In addition, Borca was told that she was barred from assuming any other form of government employment. The secret police continued to investigate her. Borca went into hiding and then left Romania for the United States.[108]

She appealed the decision of the BIA denying her application for asylum and withholding of deportation. The court concluded that the BIA acted unreasonably by requiring the asylum applicant to meet a higher standard, and that the Board failed to heed Congress' intent as expressed in an amendment adopted to lessen the burden on asylum applicants.

C. *Discrimination as Persecution*

Discriminatory treatment in the exercise of rights such as education and housing may constitute persecution where the harms are severe, pervasive, and cumulative in number or intensity over time. Isolated and sporadic occurrences do not satisfy the severe and pervasive standard. In addition, the applicant must establish a failure of protection by his government.[109] The government must either be actively promoting the

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[107] Borca v. INS, 77 F.3d 210 (7th Cir. 1996).
[108] *Id.*
[109] ANKER, *supra* note 4, at 243.

discrimination or becoming complicit with it. In several cases involving Chinese nationals, the BIA has ruled that a denial of educational opportunities, in addition to other factors, rises to the level of persecution. *In re Chen*, which concerned an applicant who had suffered humiliations and banning from school as a result of his father's position as a minister during the Chinese Cultural Revolution, the BIA found that the persecution requirement was met.

The INS's instructional materials describe numerous forms of discriminatory harm as rising to the level of persecution including arbitrary interference with a person's privacy, family, home or correspondence; deprivation of all means of earning a living, relegation to substandard dwellings; exclusion from institutions of higher learning; passport denial; constant surveillance; and pressure to become an informer. Discriminatory harms are often evaluated cumulatively or in combination with physical or other forms of abuse, so that the persecution is judged in the totality of the mistreatment.[110] In a decision predating the 1980 Refugee Act, the BIA found that deprivation of professional opportunities could constitute persecution, where it is part of a systematic and extensive campaign of discrimination against a religious minority.[111]

D. Matter of Acosta - *Deprivation of Basic Necessities Test*

The formulation in the 1978 House Report also alludes to a deprivation by a government actor of basic necessities of life. The Report states that:

> [T]he harm or suffering need not only be physical, but may take other forms such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.[112]

The second prong, focusing on the deprivation of basic necessities was applied by the BIA in 1985 in *Matter of Acosta*.[113]

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[110] *Id.* at 244.

[111] *Id.* at 245.

[112] H.R. REP. NO. 95-1452, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4700, 4704.

[113] *Acosta*, 19 I. & N. Dec. at 222.

Some suggest that the substantial economic disadvantage test is somewhat broader than the Acosta formulation.

Both the *Acosta* formulation and the House Report use the term "severe" in describing the threshold level of harm required for a successful claim of persecution. The House Report's reference to the term "deliberate imposition of severe economic disadvantage" tracks the *Kovac* test for economic persecution, but the court in *Kovac* substitutes the term "severe" for "substantial."[114] The House Report also recognizes that "the deprivation of liberty, food, housing, employment or other essentials of life" may amount to persecution. So, the two tests, the *Kovac* test and the *Acosta* test should be applied as both reflecting the House Report principles.

VII. Conclusion

Although it is difficult to reconcile the results in many of the BIA and federal court decisions, the factor of a government's discriminatory intent is a distinguishing one. Courts seem to waiver between the two parts of the *Kovac* standard: "deliberate imposition" (intent) and "substantial economic disadvantage" (severity of the harm).[115] In some cases, economic harms that qualify for relief are part of a pattern of discrimination. Yet, case law is clear that persecution for asylum requires a showing of more than mere economic discrimination.

Courts inconsistently apply these various standards, which is troubling because denial of the relief sought leads to deportation. Deportation is a drastic sanction capable of destroying lives and disrupting families. Some courts erroneously continue to rely on the old *Dunat* standard with emphasis on "denial of the opportunity to make a living," without acknowledging the change adopted since the *Kovac* decision and the 1980 Refugee Act. This misstatement of the law is largely a failure to articulate the conceptual shift. Congressional intent is clear that an applicant does not need to demonstrate a total deprivation of livelihood or a total denial of all economic opportunity in order to be granted asylum relief.

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[114] In re T-Z, 24 I. & N. Dec. 163 (BIA 2007).

[115] Anker, *supra* note 4, at 242.

Judges should refer to the 1978 House Report formulation for guidance in each determination. The House Report expresses the intent of Congress to use a threshold test of severe harm or deprivation. The House Report's use of the term "severe disadvantage" as the benchmark for the level of economic harm is consistent with the Refugee Convention principle that persecution is an extreme concept and does not cover every minor government infringement. The *Kovac* standard, closely parallels this intent of Congress, and has been adopted by a number of federal courts including the Second Circuit, the Fourth Circuit, Sixth Circuit, the Seventh Circuit and the Tenth Circuit. By focusing on the "deliberate imposition of substantial economic disadvantage," the *Kovac* standard suggests a standard that is more flexible, yet legally sound. It encompasses breaches that do not amount to deprivation of all means of earning a living. The *Kovac* test covers claims based on extraordinary severe fines or wholesale seizures of assets.

It is clear from case law that where economic sanctions have a political, racial or disfranchising impact on its victims, they should be able to qualify for relief, as that seems to be at the core of the principles of the Refugee Convention and the Universal Declaration of Human Rights. The eligibility requirements should be linked to international human rights law. Considering that economic and related social rights, such as the right to work and earn a living mentioned in Article 23 of the Universal Declaration, are among the main human rights protected by international law. When a State seriously infringes on the individual's exercise of these rights, persecution should be established, especially when economic harms are a pattern of discrimination. Courts should apply a liberal interpretation that affords aliens the most protection since the language of the relevant asylum statute does not provide a fixed definition of the key term persecution. This would be consistent with the intent of Congress as expressed in the 1978 House Report to permit maximum flexibility with respect to each individual determination.