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## Organized Atrocities: Asylum Claims Based Upon a "Pattern or Practice" of Persecution

*by Adam L. Fleming*

The "*evidence in [the applicant's] favor consists primarily of his blanket assertion that if deported he will be persecuted because of his advocacy of freedom for an Albanian region within Yugoslavia. . . . [He] has not shown why he would be any more susceptible to persecution than any of Kosovo's approximately 1.4 million ethnic Albanians . . . .*" *Shamon v. INS*, 735 F.2d 1015, 1017 (6th Cir. 1984) (quoting *Lugovic v. INS*, 727 F.2d 1109 (6th Cir. 1984) (unpublished table decision) (affirming a finding that an ethnic Albanian's fear of returning to Yugoslavia was not well founded)) (internal quotation marks omitted).

"*[President Slobodan Milosevic] . . . wields absolute control over the Serbian police, a heavily armed force of some 70,000-80,000 which is guilty of extensive, brutal, and systematic human rights abuses, including extrajudicial killing. It continued a pattern of gross human rights violations and systematic repression of ethnic Albanians in the Kosovo Region.*" Bureau of Democracy, Human Right, and Labor, U.S. Dep't of State, *Serbia/Montenegro Country Reports on Human Rights Practices for 1993* (Jan. 31, 1994).

### Introduction

It is axiomatic that an applicant for asylum cannot claim to have a well-founded fear of persecution based upon general circumstances that negatively impact an entire populace. The applicant must demonstrate that there is a reasonable possibility that he or she will be targeted for persecution because of some protected ground. But the concept of targeting loses meaning in the face of large-scale massacres. For example, in Srebrenica, the Serb military indiscriminately executed thousands of Muslim men and boys; the genocidal policies of the Khmer Rouge caused the death or suffering of innumerable Cambodians; the Third Reich's Final Solution called for the annihilation of every single Jewish person.

In these contexts it would be overly burdensome to ask an asylum-seeker to prove that he would be individually selected for persecution. As one court has observed, "[I]t would not have been necessary for each individual Jew to await a personal visit to his door by Nazi storm troopers in order to show a well-founded fear of persecution." *Kotasz v. INS*, 31 F.3d 847, 852 (9th Cir. 1994). To address this issue, the asylum regulations provide an alternative burden of proof for aliens who advance so-called "pattern-or-practice" claims. An applicant who makes such a claim is *not* required to provide "evidence that there is a reasonable possibility he or she would be singled out individually for persecution." 8 C.F.R. § 1208.13(b)(2)(iii) (2012).

A pattern-or-practice claim has two components. The alien must first establish that there is a pattern or practice in the relevant country "of persecution of a group of persons similarly situated to the applicant" on account of a protected ground. 8 C.F.R. § 1208.13(b)(2)(iii)(A). The alien must then "establish[] his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable." 8 C.F.R. § 1208.13(b)(2)(iii)(B). An analogous standard exists for withholding of removal pursuant to section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3). *See also* 8 C.F.R. § 1208.16(b)(2).

This article will summarize the standards that courts typically apply to determine whether a pattern or practice of persecution exists in a given country. The article will then explore two of the major issues that have developed around pattern-or-practice claims. First, it will address the often-expressed concern that finding a pattern or practice means opening the doors to a flood of asylum claims; second, it will analyze the relevance of evidence of routine persecution that falls short of the pattern-or-practice standard.

**What Constitutes a "Pattern or Practice" of Persecution?**

As several courts have noted, the regulations do not define the phrase "pattern or practice." *See, e.g.*, *Lie v. Ashcroft*, 396 F.3d 530, 537 (3d Cir. 2005); *Makonnen v. INS*, 44 F.3d 1378, 1383 (8th Cir. 1995). That task has been left instead to be developed through case law. Each of the U.S. courts of appeals has accepted some standard close to the following articulation: The persecution must be "systematic, pervasive, or organized" and the harm must be at the hands of the government or forces that it is unwilling or unable to control. *Lie*, 396 F.3d at 537 (quoting *Ngure v. Ashcroft*, 376 F.3d 975, 991 (8th Cir. 2004)) (internal quotation marks omitted); *see also, e.g.*, *Woldemeskel v. INS*, 257 F.3d 1185, 1191 (10th Cir. 2001). The courts have generally emphasized that the term "pattern or practice" should be narrowly defined and that relief is available only in extreme cases. *Diaz-Garcia v. Holder*, 609 F.3d 21, 29 (1st Cir. 2010); *see also Raghunathan v. Holder*, 604 F.3d 371, 377 (7th Cir. 2010) ("[T]he level of persecution must be extreme for an alien to prevail under this theory.").

The pattern-or-practice regulation does not alter every other standard governing asylum eligibility. For example, an applicant for asylum still must show that his or her fear is countrywide. *See* 8 C.F.R. § 1208.13(b)(2)(ii); *see also Tantono v. Att'y Gen. of U.S.*, 300 F. App'x 167, 169 n.3 (3d Cir. 2008) ("The government may also rebut a claim based on a pattern or practice of official persecution by showing that internal relocation would be reasonable.").

The Board of Immigration Appeals has adopted the "systematic or pervasive" standard. *Matter of A-M-*, 23 I&N Dec. 737, 741 (BIA 2005) (citing *Lie*, 396 F.3d at 537).[1] To the chagrin of at least one circuit, however, the Board has not expanded upon the particulars of the standard. *See Mufied v. Mukasey*, 508 F.3d 88, 89 (2d Cir. 2007) ("encourag[ing] the BIA to elaborate upon the 'systematic, pervasive, or organized' standard it has applied to analyzing [pattern-or-practice] claims"); *see also Jo v. Holder*, 330 F. App'x 287, 289-90 (2d Cir. 2009).

Another circuit court has taken its criticism one step further. *See Banks v. Gonzales*, 453 F.3d 449, 454-55 (7th Cir. 2006). Noting the recurring nature of pattern-or-practice claims, the Seventh Circuit has declared that 8 C.F.R. § "1208.13(b)(2)(iii) cries out for systemic decisions." *Id.* at 454 (arguing that frequently occurring pattern-or-pattern claims could "be handled by the sort of detailed regulations that the Social Security Administration uses").

In the absence of a regulatory overhaul, it may prove helpful for adjudicators to consider factors previously



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found to be significant in pattern-or-practice cases. For example, courts have found that the following situations support a pattern-or-practice argument: (1) mandatory registration and the closing of "all religious facilities not belonging to the four sanctioned religions," *Ghebrehiwot v. Att'y Gen. of U.S.*, 467 F.3d 344, 354 (3d Cir. 2006) (Pentecostals in Eritrea); (2) deliberate manipulation of political party structures and the systematic persecution of political leadership, *Tegegn v. Holder*, 702 F.3d 1142, 1147 (8th Cir. 2013) (opposition groups in Ethiopia); (3) the criminalization of a protected ground, *Bromfield v. Mukasey*, 543 F.3d 1071, 1077 (9th Cir. 2008) (gay men in Jamaica); (4) increased militarization with evidence of an intent to engage in "ethnic cleansing," *Knezevic v. Ashcroft*, 367 F.3d 1206 (9th Cir. 2004) (Serbs in a particular region of Bosnia-Herzegovina); (5) violence committed against every member of the proposed group, *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (a family in the Kurdish-Muslim intelligentsia in Armenia); and (6) apostasy laws that force religious adherents to "practice underground," *Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1354-56 (11th Cir. 2009) (Christian converts in Iran).

On the other hand, asylum applicants have failed to establish pattern-or-practice claims based upon: (1) "mere discrimination," *Hernandez v. Holder*, 493 F. App'x 133, 137-38 (1st Cir. 2012) (ethnic Mayans in Guatemala); (2) "hardship resulting from conditions of civil strife," *Balachandran v. Holder*, 566 F.3d 269, 273 (1st Cir. 2009) (ethnic Tamils in Sri Lanka); (3) a "recent rise in violent attacks" coupled with institutional discrimination, *Slapak v. Att'y Gen. of U.S.*, No. 12-2638, 2013 WL 55611 at *2 (3d Cir. Jan. 4, 2013) (unpublished) (ethnic Roma in the Czech Republic); (4) violence that was not targeted or widespread, *Khan v. Att'y Gen. of U.S.*, 453 F. App'x 220 (3d Cir. 2011) ("Americanized Muslims" in Pakistan); (5) "inconsistent and sporadic" repression, *Xue Quan Zheng v. Att'y Gen. of U.S.*, 405 F. App'x 642, 645 (3d Cir. 2010) (underground church members in China); and (6) abuse of civilians that lacked a "persecutory motive," *Malonga v. Holder*, 621 F.3d 757, 768 (8th Cir. 2010) (ethnic Lari in the Republic of Congo).

Pattern-or-practice claims often defy simple resolution. The circuit courts have attempted to draw clear lines where possible. *See, e.g.*, *Kandaswamy v. Holder*, 466 F. App'x 35, 39 (2d Cir. 2012) ("[T]he designation of temporary protected status is not required for finding a pattern or practice of persecution."); *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1201 (9th Cir. 2000) (stating that a pattern-or-practice finding does not require "a showing of universality—a showing that *every* individual in the vulnerable group must face such serious persecution"); *Makonnen*, 44 F.3d at 1383 (finding that it is unreasonable "to require a showing of persecution of all the members of the applicant's group"). Still, the existence of a pattern or practice of persecution remains a fact-based inquiry.

The denial of one applicant's claim does not necessarily foreclose future claims predicated upon the same country and group. *See Ingmantoro v. Mukasey*, 550 F.3d 646, 651 (7th Cir. 2008). Circumstances may change over time. More and better evidence may become available. Therefore, for now at least, adjudicators must continue to examine the evidence of each case on an individual basis, despite the recurring nature of pattern-or-practice claims.

**Opening the Floodgates?**

Perhaps not surprisingly, courts have been reluctant to find patterns or practices of persecution. Several circuits have expressed concern that "[o]nce a court grants asylum based on a pattern-or-practice claim, 'every member of the group is eligible for asylum.'" *Paramanathan v. U.S. Att'y Gen.*, 341 F. App'x 613, 618 n.3 (11th Cir. 2009) (quoting *Ahmed v. Gonzales*, 467 F.3d 669, 675 (7th Cir. 2006)); *see also Mitreva v. Gonzales*, 417 F.3d 761, 765 (7th Cir. 2005) ("[C]ourts have interpreted the regulation to apply only in rare circumstances, to prevent an avalanche of asylum-seekers."). As the Eleventh Circuit has observed, these cases place the courts "between Scylla and Charybdis. A denial of review will return the petitioner to the [repressive] regime . . . , but an erroneous grant of review could establish a precedent that rewards less than genuine fears of persecution . . . ." *Kazemzadeh*, 577 F.3d at 1345.

This is a valid concern generally, but fortunately, it is unfounded here. Strictly speaking, a pattern-or-practice finding *does not* make every member of the proposed group eligible for asylum. The fear that mere membership would qualify *all* members for asylum was actually addressed during the rulemaking process that took place during the late 1980s. This article will now briefly review that history, before highlighting a few sample cases in which mere membership (or alleged membership) was found to be insufficient to qualify an alien for asylum.



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*The Promulgation of the Rule*

In the 1980s, immigration courts sometimes excluded relevant evidence that did not go to the direct question whether the individual applicant would be singled out for persecution. *See* Joni L. Andrioff, Note and Comment, *Proving the Existence of Persecution in Asylum and Withholding Claims*, 62 Chi.-Kent L. Rev. 107, 131 (1985). Circuit courts likewise sometimes expected asylum applicants to produce hyper-specific evidence. *See, e.g.*, *Youkhanna v. INS*, 749 F.2d 360, 361 (6th Cir. 1984) (affirming denials of asylum and withholding where the aliens presented only "numerous general descriptions of the lamentable religious and political conflicts in [their home country]"); *Carvajal-Munoz v. INS*, 743 F.2d 562, 577 (7th Cir. 1984) (noting that the applicant's evidence did not "refer[] to [him] specifically").

Eventually, the Department of Justice acknowledged that certain applicants could carry their burden of proof with only more generalized evidence of widespread persecution. In 1987, the Immigration and Naturalization Service ("INS") proposed a rule that "recognize[d] that the flight or defection of a bona fide refugee from a country that engages in widespread persecution may leave him in a difficult position to corroborate his claim." Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 52 Fed. Reg. 32,552, 32,553 (Aug. 28, 1987) (proposed rule). Among other things, the proposed rule required an "Asylum Officer to give due consideration to evidence establishing that the government of the applicant's country of nationality or habitual residence persecutes groups of persons similarly situated to the applicant." *Id*. Less than a year later, however, the INS amended its rule to correct a perceived flaw.

Specifically, the INS was concerned that the language of the rule "could lead to the assumption that mere group membership alone—however nominal—would be sufficient to establish refugee status." Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 53 Fed. Reg. 11,300, 11,302 (Apr. 6, 1988) (revised proposed rule). The amended proposed rule required the applicant for asylum to "explain why he would be substantially identified with [the proposed] particular group such that there is a reasonable possibility of his suffering persecution should he return to his country." *Id*.; *see also* 8 C.F.R. § 1208.13(b)(2)(iii)(B). Two years later the final rule established that "[i]t is not necessary [for an asylum applicant] to prove he would be singled out if he can establish that there is a pattern or practice of persecuting the group of persons similarly situated, and that he can establish inclusion in/identification with such group." Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674, 30,678 (July 27, 1990) (final rule); *see also* 8 C.F.R. § 1208.13(b)(2)(iii).

*Mere or Alleged Membership in the Group*

The current regulations require an alien to establish his or her inclusion in *and* identification with the proposed group. 8 C.F.R. § 1208.13(b)(2)(iii)(B). An alien's claim based upon a pattern or practice of persecution necessarily fails if the alien cannot establish his or her inclusion in the proposed group. *See, e.g.*, *Rasananthan v. U.S. Att'y Gen.*, 337 F. App'x 811, 813 (11th Cir. 2009) (stating that a "specific adverse credibility finding as to [the applicant's inclusion in the proposed group] would preclude a pattern or practice claim"); *Woldemichael v. Ashcroft*, 448 F.3d 1000, 1004 (8th Cir. 2006) (finding that the respondent failed to prove "that she is similarly situated to those Jehovah's Witnesses who are targeted for harassment and discrimination" in Eritrea); *Hidayat v. Att'y Gen. of U.S.*, 139 F. App'x 433, 436 (3d Cir. 2005) (affirming an Immigration Judge's holding that even "assuming *arguendo*, a pattern or practice of persecution of Christians [in Indonesia, the applicant's] claim would still fail because he did not establish that he was a Christian").

But even an alien who establishes his or her inclusion in the proposed group is not automatically eligible for asylum. The alien must still demonstrate identification with the group such that his or her fear is reasonable. *See, e.g.*, *Debek v. Holder*, 380 F. App'x 492, 496-97 (6th Cir. 2010) (upholding the denial of asylum on grounds that the applicant failed to produce evidence of his identification with those opposed to Hezbollah); *Ablahad v. Gonzales*, 230 F. App'x 563, 566 (6th Cir. 2007) (affirming a denial of asylum where the Immigration Judge held that the applicant failed to establish his inclusion and identification with a moneyed family in Iraq); *Ivanov v. INS*, 9 F. App'x 532, 535-36 (7th Cir. 2001) (affirming a decision holding that the applicant had not sufficiently established his inclusion in and identification with Macedonian separatists in Bulgaria); *Matter of S-M-J-*, 21 I&N Dec. 722, 731 (BIA 1997) ("[A]ssuming arguendo

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# CIRCUIT COURT DECISIONS FOR FEBRUARY 2013

*by John Guendelsberger*

The United States courts of appeals issued 179 decisions in February 2013 in cases appealed from the Board. The courts affirmed the Board in 151 cases and reversed or remanded in 28, for an overall reversal rate of 15.6%, compared to last month's 11.5%. There were no reversals from the Second, Fifth, Sixth, Eighth and Tenth Circuits.

The chart below shows the results from each circuit for February 2013 based on electronic database reports of published and unpublished decisions.

| Circuit | Total | Affirmed | Reversed | % Reversed |
|---|---|---|---|---|
| | | | | |
| First | 3 | 2 | 1 | 33.3 |
| Second | 4 | 4 | 0 | 0.0 |
| Third | 16 | 14 | 2 | 12.5 |
| Fourth | 11 | 10 | 1 | 9.1 |
| Fifth | 9 | 9 | 0 | 0.0 |
| Sixth | 6 | 6 | 0 | 0.0 |
| Seventh | 9 | 7 | 2 | 22.2 |
| Eighth | 2 | 2 | 0 | 0.0 |
| Ninth | 105 | 88 | 17 | 16.2 |
| Tenth | 2 | 2 | 0 | 0.0 |
| Eleventh | 12 | 7 | 5 | 41.7 |
| | | | | |
| All | 179 | 151 | 28 | 15.6 |

The 179 decisions included 81 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 50 direct appeals from denials of other forms of relief from removal or from findings of removal; and 48 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

| | Total | Affirmed | Reversed | % Reversed |
|---|---|---|---|---|
| Asylum | 81 | 69 | 12 | 14.8 |
| Other Relief | 50 | 39 | 11 | 22.0 |
| Motions | 48 | 43 | 5 | 10.4 |

The 12 reversals or remands in asylum cases involved credibility (3 cases), past persecution (2 cases), internal relocation (2 cases), particular social group (2 cases), mixed motive, well-founded fear, and a remand to clarify the basis for denial.

The 11 reversals or remands in the "other relief" category addressed crimes involving moral turpitude (2 cases), section 212(h) waivers (2 cases), application of the modified categorical approach to aggravated felony grounds (2 cases), good moral character, ineffective assistance of counsel, Board fact-finding, continuous physical presence for cancellation of removal, and abandonment of an asylum claim.

The five motions cases involved ineffective assistance of counsel (two cases), changed country conditions, notice of hearing, and a remand to resolve an issue not addressed.

The chart below shows the combined numbers for January and February 2013 arranged by circuit from highest to lowest rate of reversal.

| Circuit | Total | Affirmed | Reversed | % Reversed |
|---|---|---|---|---|
| | | | | |
| Tenth | 6 | 4 | 2 | 33.3 |
| Eleventh | 18 | 12 | 6 | 33.3 |
| First | 8 | 6 | 2 | 25.0 |
| Seventh | 16 | 13 | 3 | 18.8 |
| Eighth | 6 | 5 | 1 | 16.7 |
| Ninth | 180 | 153 | 27 | 15.0 |
| Fifth | 20 | 18 | 2 | 10.0 |
| Third | 47 | 44 | 3 | 6.4 |
| Fourth | 20 | 19 | 1 | 5.0 |
| Sixth | 18 | 18 | 0 | 0.0 |
| Second | 5 | 5 | 0 | 0.0 |
| | | | | |
| All | 344 | 297 | 47 | 13.7 |

Last year's reversal rate at this point (January and February 2012) was 8.9%, with 418 total decisions and 37 reversals.

The numbers by type of case on appeal for the first 2 months of 2013 combined are indicated below.

| | Total | Affirmed | Reversed | % Reversed |
|---|---|---|---|---|
| Asylum | 158 | 133 | 25 | 15.8 |
| Other Relief | 97 | 82 | 15 | 15.5 |
| Motions | 89 | 82 | 7 | 7.9 |

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## RECENT COURT OPINIONS

***Seventh Circuit:***

*Marin-Rodriguez v. Holder*, No. 12-2253, 2013 WL 819383 (7th Cir. Mar. 6, 2013): The Seventh Circuit denied the petition for review of the Board's decision affirming an Immigration Judge's removal order. The court agreed with the Board that the petitioner was ineligible for cancellation of removal under section 240A(b)(1) of the Act, because his conviction for using a fraudulent social security card for employment purposes in the United States under 18 U.S.C. § 1546(a) involved moral turpitude. The petitioner illegally entered the United States in 1988 and worked from 1999 until 2005 by using a fraudulent social security card. He pled guilty to a violation of 18 U.S.C. § 1546(a), admitting that he "used a social security card, knowing that card was not assigned to him and had been unlawfully obtained, to secure and maintain employment." In removal proceedings, the petitioner argued that the crime did not involve moral turpitude. The Immigration Judge found that a violation of 18 U.S.C. § 1546(a) was not categorically a crime involving moral turpitude ("CIMT"). However, applying the modified categorical approach, the Immigration Judge determined that the record of conviction established that the petitioner was convicted of a CIMT. The circuit court agreed, noting that "[c]rimes entailing an intent to deceive or defraud are unquestionably morally turpitudinous." In the language of the guilty plea contained in the record, the petitioner admitted to behavior that was clearly deceptive in nature. Thus, although under Board precedent, mere possession of an altered immigration document would not constitute a CIMT in and of itself, the court found the case distinguishable from mere possession because it involved use of an altered document "in a way that involved deception or the intent to deceive."

***Eighth Circuit:***

*Gutierrez-Vidal v. Holder*, No. 12-2247, 2013 WL 869652 (8th Cir. Mar. 11, 2013): The Eighth Circuit denied the petition for review of the Board's decision, affirming an Immigration Judge's denial of asylum from Peru. The petitioner claimed that the Peruvian Government was unable or unwilling to protect him from the Shining Path. Members of that group attacked the petitioner twice in 1999 (although he managed to escape injury the first time) because of the petitioner's position of leadership in a community service organization that coordinated with the local authorities. In denying asylum, the Immigration Judge found that in spite of the severity of the injuries suffered in the second attack, the petitioner had not established past persecution because he had not shown that the Peruvian Government was unable or unwilling to provide protection. The record established that the police investigated both incidents, made arrests, and issued an order of protection for the petitioner. The petitioner challenged this finding, arguing that the Government's actions to protect him were "minimal and fruitless." The court observed that a government's difficulty in controlling behavior is not sufficient to establish that it is unwilling or unable to control a potential persecutor. Rather, the asylum applicant must demonstrate that the government either condoned the behavior or "at least demonstrated a complete helplessness to protect the victims." The court added that even evidence of ineffectiveness or corruption will not establish that a government is "unwilling or unable to control" a persecutor where other evidence of record indicates otherwise. The record indicated the Peruvian police officers' efforts and lacked substantial evidence that the Government either condoned the Shining Path's actions or was completely helpless to protect the petitioner. Accordingly, the court affirmed the findings that the petitioner did not establish either past persecution or a well-founded fear of future persecution.

*Quinteros v. Holder*, Nos. 11-1875, 11-3425, 2013 WL 764719 (8th Cir. Mar. 1, 2013): The Eighth Circuit denied a petition for review of the Board's decision affirming an Immigration Judge's denial of asylum from El Salvador. The petitioner asserted that he was targeted for persecution in his country based on his membership in a particular social group, comprised of "family members of local business owners." The petitioner stated that his father was a well-known business owner in his area. Members of the MS-13 gang attempted to recruit the petitioner, but he refused to join the gang and soon left the country. After his departure, his 14-year-old brother was killed, allegedly by MS-13 members. The police arrested suspects in the murder, but they were acquitted. In addition, gang members extorted money from the petitioner's father, torched two of his business' vehicles, and threatened his sister. In denying asylum, the Immigration Judge concluded that the petitioner (1) did not suffer past persecution; (2) had not established membership in a particular social group, noting that business ownership was not an immutable characteristic; and (3) did not establish that the Government of



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El Salvador was unable or unwilling to control the persecutors, based on the arrests and prosecution of his brother's suspected murderers. The Board affirmed and also denied the petitioner's motions to reopen and reconsider. The motion to reopen, which was predicated on a claim of ineffective assistance of prior counsel, was denied because of a lack of prejudice. The Board denied the motion to reconsider, which relied on the Fourth Circuit's decision in *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011), finding it both inapplicable in the Eighth Circuit and distinguishable on the facts. The circuit court agreed. The court found the proposed group to be "too amorphous" to constitute a particular social group under the Board's precedent decisions. The court also distinguished the facts of *Crespin-Valladares*, in which the petitioner and his uncle actively cooperated with prosecutors, and the uncle testified in court against the accused gang members, who were eventually convicted. The court noted that the threats in that case were specifically directed against those who had cooperated or testified, not indiscriminately against all family members. The court also noted that in this case, the individuals charged with the brother's murder were acquitted, and no evidence was presented of charges being made in the arson of the father's vehicles (nor was the crime shown to be gang related).

***Ninth Circuit:***

*Gonzalez-Cervantes v. Holder*, No. 10-72781, No. 10-73789, 2013 WL 934432 (9th Cir. Mar. 8, 2013): The Ninth Circuit upheld the Board's unpublished decision finding a misdemeanor conviction for sexual battery under section 243.4(e) of the California Penal Code to be categorically for a crime involving moral turpitude. The petitioner challenged the Board's conclusion that there was no realistic possibility that California would apply the sexual battery statute to conduct that did not involve moral turpitude. The court agreed with the Board that there must be a realistic (as opposed to a theoretical) possibility that a State court would apply its statute to conduct not falling within the generic definition of moral turpitude. The court noted that the petitioner bears the burden of showing an actual case in which the State court has done so. Examining the facts of the cases cited by the petitioner, the court found that he failed to meet his burden of proof, because the elements of malicious intent and actual infliction of harm were necessarily present in each case. Therefore each case involved moral turpitude. The court also determined that the sexual battery offense in question was akin to other crimes previously found to involve moral turpitude, including rape, incest, solicitation of prostitution, and knowing possession of child pornography.

*Amponsah v. Holder*, No. 11-71311, 2013 WL 1180298 (9th Cir. Mar. 22, 2013):The Ninth Circuit granted the petition for review of the Board's decision finding the petitioner ineligible to adjust her status as the adopted child of a U.S. citizen. The Board ruled that the petitioner did not satisfy the statutory definition of a "child" because she had not been adopted while under the age of 16. However, the State adoption decree had been amended nunc pro tunc to predate the petitioner's 16th birthday. The Board relied on its precedent decision in *Matter of Cariaga*, 15 I&N Dec. 716 (BIA 1976), which held that nunc pro tunc adoption decrees issued after the child reaches the age of 16 are not given retroactive effect under the Act, but the court determined that the decision was not entitled to *Chevron* deference. The court did find the wording of the statute to be ambiguous under the first step of its *Chevron* analysis. But under the second step of *Chevron*, the court did not find the Board's blanket rule rejecting *all* nunc pro tunc adoptions to be reasonable. The court held that unless Congress expresses a contrary intent, deference must be afforded to State law in interpreting the word "adopted," because that describes a legal status defined by State law. The court also found the Board's holding to be at odds with the Full Faith and Credit Act, which exemplifies the strong Federal policy of recognizing valid State judgments. According to the court, rather than categorically rejecting all nunc pro tunc adoptions, the Board "can address fraud by investigating individual cases, as it does when evaluating the possibility of marriage fraud." The court also relied on due process grounds in invalidating the Board's alternative finding of ineligibility based on the petitioner's participation in marriage fraud. The record was remanded to the Board for further proceedings.

***Eleventh Circuit:***

*Xiu Ying Wu v. U.S. Att'y Gen.*, No. 12-11502, 2013 WL 898148 (11th Cir. Mar. 12, 2013): The Eleventh Circuit granted a petition for review as it related to an adverse credibility finding in a case involving an asylum claim based on China's coercive population control policy. The Immigration Judge found the petitioner's description of her claimed forcible abortion to be implausible and inconsistent on four points with the State Department's

Country Profile. The case was governed by the REAL ID Act, and the court observed that its review of an Immigration Judge's credibility findings is "extremely deferential." The court added that credibility findings must be based on "substantial evidence." In examining the plausibility determination, the court found that the Immigration Judge's wording (that the story "just seems suspicious to me" or "just seems implausible to me") indicated that the judge's conclusions were based on personal perception, as opposed to evidence of record. Turning to the Immigration Judge's findings based on the Country Profile, the court distinguished the decision from the one it upheld in *Xia v. U.S. Attorney General*, 608 F.3d 1233 (11th Cir. 2010). In that case, the Immigration Judge relied on at least one inconsistency and one omission independent of the State Department's report in reaching an adverse credibility finding. However, in this case the court found (absent the disqualified implausibility finding) that the Immigration Judge only relied on the Country Profile. While the court acknowledged that heavy reliance on State Department country reports is warranted, it cautioned against overreliance on "a static country profile" as a substitute for a more individualized analysis. The court noted that the petitioner's facts were not necessarily disproven by the State Department's conclusions that documents from Fujian province are *frequently* (but not necessarily always) forged or by its statements that Embassy officials were *unaware* of the occurrence of forced abortions or the issuance of abortion certificates (which does not necessarily rule out their existence). The court additionally ruled that the Immigration Judge could properly afford less evidentiary weight to an unauthenticated document, but distinguished a finding related to evidentiary weight from a conclusion that the petitioner lacked credibility, which the court held required an individualized assessment based on "the totality of the circumstances." The court vacated the Board's decision and remanded the record for further proceedings, emphasizing that on remand, asylum may still be denied "due to a paucity of evidence." However, the court found that based on the present record, reliance on the Country Profile was insufficient to support an adverse credibility finding.

## BIA PRECEDENT DECISIONS

In *Matter of Ortega-Lopez*, 26 I&N Dec. 99 (BIA 2013), the Board determined that the offense of sponsoring or exhibiting an animal in an animal fighting venture in violation of 7 U.S.C. § 2156(a)(1) is categorically a crime involving moral turpitude. Parsing the statute, which proscribes the sponsorship or exhibition of an animal in an animal fighting venture (defined as an event between at least two animals for sport, wagering, or entertainment), the Board noted that the offense must be committed "knowingly" and therefore requires a culpable mental state. Further, it involves the reprehensible conduct of causing animals to suffer harm or pain by forcing them to fight, sometimes to the death. Reviewing animal fighting cases, the Board concluded that the crime is not victimless and instead is a form of animal cruelty involving inherently base and depraved conduct.

Observing that all 50 States and the District of Columbia have laws proscribing dogfighting and cockfighting, the Board concurred with the Immigration Judge as to society's view that animal fighting is morally reprehensible and thus turpitudinous. The Board therefore concluded that the respondent's conviction for unlawful animal fighting in violation of 7 U.S.C. § 2156(a)(1) was categorically for a crime involving moral turpitude.

## REGULATORY UPDATE

**78 Fed. Reg. 19,077 (Mar. 29, 2013)**
**DEPARTMENT OF JUSTICE**
**Executive Office for Immigration Review**

8 CFR Parts 1208 and 1240
[EOIR Docket No. 173; AG Order No. 3375–2013]

Forwarding of Asylum Applications to the Department of State

SUMMARY: This final rule adopts without substantive change the proposed rule with request for comments published in the Federal Register on October 31, 2011, and includes several nonsubstantive, technical corrections. The Department of Justice (Department) is amending its regulations to alter the process by which the Executive Office for Immigration Review (EOIR) forwards asylum applications for consideration by the Department of State (DOS), Bureau of Democracy, Human Rights, and Labor. Currently, EOIR forwards to DOS all asylum applications that are submitted initially in removal proceedings before an immigration judge. The final rule amends the regulations to provide for sending asylum applications to DOS on a discretionary basis. For

example, EOIR may forward an application in order to ascertain whether DOS has information relevant to the applicant's eligibility for asylum. This change increases the efficiency of DOS' review of asylum applications and is consistent with similar changes already made by U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS).

**DATES:** This rule is effective April 29, 2013.

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**Organized Atrocities: Asylum Claims** *continued*

that there is a pattern or practice of persecution of [Charles] Taylor supporters in Liberia, . . . [i]t is not clear whether either of [the applicant's] relatives is identifiable as a Taylor supporter, and, as discussed above, it is not clear whether the applicant's association with her father and brother-in-law is identifiable."). *But see also Noorani v. Holder*, No. 12-1465, 2013 WL 440741 at *5 (7th Cir. Feb. 6, 2013) (unpublished) (holding that an applicant need not demonstrate that he would "be discovered to be" a member of the group).

This reasoning can be taken too far. In the past, the circuit courts have criticized the Board for requiring corroboration of inherently personal characteristics. *See, e.g.*, *Fessehaye v. Gonzales*, 414 F.3d 746, 756-57 (7th Cir. 2005) (stating that where the applicant "credibly claims to have converted to her spouse's religion, we see no necessity, absent exceptional circumstances, for the Board to require further corroboration"). A case may also be remanded where the Board or immigration court "unduly limits the [applicant's] claim" by defining the proposed group too narrowly. *See Tegegn*, 702 F.3d at 1146. Still, it remains the alien's burden to establish his or her "inclusion in, and identification with," any proposed group. 8 C.F.R. § 1208.13(b)(2)(iii). This second step in the pattern-or-practice analysis was intentionally included in the regulations and should not be overlooked.

**The Disfavored "Disfavored Group" Analysis**

Given the constricted definition that courts have applied to the phrase "pattern or practice," it is to be expected that an asylum applicant's evidence may often fall short of the standard for systematic persecution. The circuit courts have yet to adopt a uniform approach for the treatment of evidence that relates to group-based, but not systematic, persecution.

The most clearly articulated (if least widely adopted) mechanism for handling this type of evidence has been the Ninth Circuit's "disfavored group" analysis. *See Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004). Under this approach, an applicant for asylum can use evidence of group-based oppression to demonstrate a higher likelihood that he would be singled out *individually* for persecution (apart from any pattern-or-practice claim).

The applicant must make two showings to prevail: (1) membership in a "disfavored group," and (2) "an individualized risk of being singled out for persecution." *Sael*, 386 F.3d at 925. A "disfavored group" is defined as "'a group of individuals in a certain country or part of a country, all of whom share a common, protected characteristic, many of whom are mistreated, and a substantial number of whom are persecuted' but who are 'not threatened by a pattern or practice of systematic persecution.'" *Tampubolon v. Holder*, 610 F.3d 1056, 1060 (9th Cir. 2010) (quoting *Wakkary v. Holder*, 558 F.3d 1049, 1063 (9th Cir. 2009)). The two prongs of this analysis "operate in tandem." *Sael*, 386 F.3d at 925. "Thus, the 'more serious and widespread the threat' to the group in general, 'the less individualized the threat of persecution needs to be.'" *Id.* (quoting *Mgoian*, 184 F.3d at 1035 n.4).

The Ninth Circuit's "disfavored group" analysis has not been warmly received. Most of the other circuits have rejected it, arguing that it improperly lowers the standard for asylum claims. *See Agustina v. Holder*, 491 F. App'x 217, 219 (2d Cir. 2012); *Siagian v. Holder*, 478 F. App'x 201, 203 (5th Cir. 2012); *Yanes-Estevez v. U.S. Att'y Gen.*, 389 F. App'x 974, 979 n.1 (11th Cir. 2010); *Ingmantoro v. Mukasey*, 550 F.3d 646, 651 n.7 (7th Cir. 2008); *Kho v. Keisler*, 505 F.3d 50, 55 (1st Cir. 2007); *Lie*, 396 F.3d at 538 n.4. The remaining circuits have expressed varying levels of ambivalence toward the analysis. *See Kasonso v. Holder*, 445 F. App'x 76, 80 (10th Cir. 2011); *Grichaev v. Holder*, 414 F. App'x 828, 830 (6th Cir. 2011); *Winata v. Mukasey*, 287 F. App'x 544, 547 (8th Cir. 2008) (Gruender, J., concurring); *Chen v. U.S. INS*, 195 F.3d 198, 203-04 (4th Cir. 1999).

In response to this criticism, however, the Ninth Circuit maintains that its analysis has been "misunderstood by both the agency and some other circuits." *Wakkary v. Holder*, 558 F.3d at 1062. According to the Ninth Circuit, "Disfavored group analysis does not prescribe a

lower-than-usual burden of proof for the asylum claims . . . . [T]he 'lesser' or 'comparatively low' burden [of the disfavored analysis] refers not to a lower *ultimate* standard, but to the lower proportion of specifically individualized evidence of risk, counterbalanced by a greater showing of group targeting, that an applicant must adduce to *meet* that ultimate standard under the regulations' 'individually singled out' rubric." *Id*. at 1064.

Putting aside the semantic debate, it appears less controversial to say that group-based evidence has *some* relevance to claims that are not based on a pattern or practice. For example, even while rejecting the Ninth Circuit's approach, the First Circuit acknowledged that "in evaluating each claim on its facts, it may be that evidence short of a pattern or practice will enhance an individualized showing of likelihood of a future threat to an applicant's life or freedom." *Kho*, 505 F.3d at 55. The reality is that there may be more accord among the circuit courts than they seem to indicate. *Compare, e.g.*, *Wakkary*, 558 F.3d at 1064, *with Chen*, 195 F.3d at 203-04 ("Individual targeting and systematic persecution do not necessarily constitute distinct theories. Rather, an applicant will typically demonstrate some combination of the two to establish a well-founded fear of persecution.").

The Board has likewise recognized that the well-founded fear standard "contemplates the introduction of evidence regarding similarly situated persons to support an individual claim of persecution." *Matter of S-M-J-*, 21 I&N Dec. at 726 n.1. Therefore, whether an adjudicator operates under the disfavored group analysis or not, evidence of group-based mistreatment may be relevant. If an alien established that people who share his or her protected characteristic are regularly attacked, it stands to reason that it is at least somewhat more likely that he or she will be attacked as well. The weight and significance given to this logical conclusion often depends on the facts of the case.

## Conclusion

The pattern-or-practice regulation was designed to let certain asylum applicants avoid an unreasonable burden of proof—but the rule was not crafted to be comprehensive. Its drafters anticipated that the parameters of the regulation would be ironed out through adjudication. The law continues to evolve and several issues remain to be addressed.[2] However, case by case, the courts can move toward a more fair system that will protect legitimate claims to asylum without sacrificing the legitimacy of the asylum system as a whole.

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1. This case dealt with an applicant whose asylum application was time barred and whose pattern-or-practice claim was therefore considered only under the regulations governing withholding of removal. *See Matter of A-M-*, 23 I&N Dec. at 739.

2. For example, there is a split among the circuit courts as to whether an alien bears the burden of coming forward with a pattern-or-practice claim. *Compare Aguilar-Mejia v. Holder*, 616 F.3d 699, 703-04 (7th Cir. 2010) ("[T]he asylum regulations . . . require the agency to make a finding on the pattern-or-practice theory whether or not the petitioner draws the rule to the agency's attention."), *with Vakeesan v. Holder*, 343 F. App'x 117, 127 (6th Cir. 2009) (stating that the regulations do "impose on the alien a burden of production and persuasion"), *and Alexandra v. Att'y Gen. of U.S.*, 278 F. App'x 112, 116 (3d Cir. 2008) (stating that it is the applicant's "obligation to demonstrate a 'pattern or practice'").