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## Persecutor or Common Criminal? Assessing a Government's Inability or Unwillingness to Control Private Persecution

by Joseph Hassell

In all asylum and withholding of removal cases under the Immigration and Nationality Act, an applicant must establish that he or she has been persecuted, has a well-founded fear of persecution, or is more likely than not to be persecuted in the designated country of removal. Sections 101(a)(42)(A), 208(b)(1)(B)(i), 241(b)(3)(C) of the Act, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(B)(i), 1231(b)(3)(C). Persecution "always implies some connection to government action or inaction," generally in the form of direct government action or government supported action. *See, e.g., Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014) (internal quotation marks and citation omitted).

However, the Board of Immigration Appeals and the Federal circuit courts of appeals universally acknowledge that for purposes of asylum and withholding of removal under the Act "persecution" may involve a "government's inability or unwillingness to control *private* conduct."<sup>1</sup> *See id.* (emphasis added) (citation omitted); *see also Malu v. U.S. Att'y Gen.*, No. 13-10409, 2014 WL 4073115, at \*8 (11th Cir. Aug. 19, 2014); *Paloka v. Holder*, 762 F.3d 191, 195 (2d Cir. 2014); *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014); *Constanza-Martinez v. Holder*, 739 F.3d 1100, 1102 (8th Cir. 2014); *Doe v. Holder*, 736 F.3d 871, 877-78 (9th Cir. 2013); *Karki v. Holder*, 715 F.3d 792, 801 (10th Cir. 2013); *Garcia v. Att'y Gen. of U.S.*, 665 F.3d 496, 503 (3d Cir. 2011); *Kante v. Holder*, 634 F.3d 321, 325 (6th Cir. 2011); *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011); *Tesfamichael v. Gonzales*, 469 F.3d 109, 113 (5th Cir. 2006); *Matter of Pierre*, 15 I&N Dec. 461, 462 (BIA 1975) (formalizing the "unwilling or unable" to control standard for non-governmental persecution in the context of a claim made under former section 243(h) of the Act, 8 U.S.C. § 1253(h) (1970)).

This article will first present some background information on the “unable or unwilling” to control standard, including a brief exposition of the standard’s origins, the appropriate standard used to review a government’s unwillingness or inability to protect an alien, and the contours of an alien’s burden of proof on the issue. It will then discuss other common issues that arise in assessing a government’s ability and willingness to control private conduct. For instance, what effect, if any, does an alien’s failure to report private acts of persecution to the authorities have on the analysis? How can adjudicators assess the efficacy of laws or government policies proscribing the private persecution at issue? What is the distinction between a government’s *willingness* to control a private actor and its *ability* to do so, and how should adjudicators measure a government’s inability to protect an alien from private conduct?

## Background

### *Historical Perspective*

The Board first suggested that private acts that a government was unable or unwilling to control could constitute persecution in *Matter of Eusaph*, 10 I&N Dec. 453 (BIA 1964). See *Cece v. Holder*, 733 F.3d 662, 679 (7th Cir. 2013) (en banc) (Easterbrook, J., dissenting). In *Matter of Eusaph*, the alien claimed that he was eligible for temporary withholding of deportation under former section 243(h) of the Act because he asserted that he would be harmed by Hindus in India on account of his Muslim faith and Pakistani nationality. The Board denied the alien’s application for relief. Although the Board recognized that persecution could be perpetrated by private actors, it found that the record did not reflect that the Indian Government tolerated, sponsored, or condoned private violence against Pakistani Muslims, or “that the police powers of the government have degenerated to the point where it is *unable* to take proper measures to control individual cases of violence in this respect which arise.” *Matter of Eusaph*, 10 I&N Dec. at 454–55 (emphasis added). Based on this finding, the Board concluded that the alien did “not meet the burden resting upon him to establish persecution.” *Id.* at 454.

The Board continued to refine the “unable or unwilling” to control standard and finally formalized it in 1975. See *Matter of Pierre*, 15 I&N Dec. at 462 (collecting cases); see also *Matter of Tan*, 12 I&N Dec. 564, 568 (BIA 1967) (“Mob action may be a ground

for staying deportation under section 243(h) where it is established that a government *cannot control* the mob.” (emphasis added)). Synthesizing its prior reasoning on the subject, the Board in *Matter of Pierre* held that an alien could qualify for temporary withholding of deportation under former section 243(h) of the Act “even though the persecution was at the hands of individuals not connected with any government” as long as the alien showed “that the government concerned was either *unwilling or unable* to control the persecuting individual or group.” 15 I&N Dec. at 462 (emphasis added).

Following the enactment of The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, the Board concluded that its previous construction of the term “persecution” under former section 243(h) was fully applicable to the term as it appeared in section 101(a)(42)(A) of the Act. See *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *modified on other grounds*, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). Accordingly, asylum applicants under section 208 of the Act were also required to show that they were persecuted by the government or by forces the government was “unable or unwilling” to control. See *id.*; *Matter of McMullen*, 17 I&N Dec. 542, 545 (BIA 1980) (citing, inter alia, *Matter of Pierre*, 15 I&N Dec. 461, and *Matter of Tan*, 12 I&N Dec. 564, and noting that “[w]hile these cases were decided prior to the enactment of the Refugee Act of 1980, we believe they are applicable to an alien seeking 243(h) relief, or asylum, under the new Act”).

In December 2000, the former Immigration and Naturalization Service proposed a regulation to clarify the meaning of various terms in asylum law. Included in the regulation was “further guidance as to what was meant by . . . the requirement that the government be ‘unable or unwilling to control’ non-governmental persecutors.” See Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,590–91, 76,597 (proposed Dec. 7, 2000). The regulation provided a list of pertinent evidence for adjudicators to consider in determining whether a government was “unable or unwilling” to control a private actor. *Id.* at 76,591. That list, which was not intended to be exhaustive, included the following: evidence that the government condoned or was complicit in the private harm being inflicted; the alien’s attempts, if any, to obtain government protection and the government’s response to those attempts; government action that is perfunctory; repeated government unresponsiveness; general country conditions; the nature of the government’s laws or policies

with regard to the complained of harm; and the steps, if any, the government has taken to prevent the infliction of such harm. *Id.* at 76,587, 76,591. As of this writing, the proposed regulation has not been finalized.

Nevertheless, the Board continues to employ the “unable or unwilling” standard in determining an alien’s eligibility for asylum and withholding of removal under the Act. *Matter of A-R-C-G-*, 26 I&N Dec. 388, 395 (BIA 2014) (remanding so that an applicant for asylum could demonstrate that the Guatemalan Government was “unwilling or unable” to control her abusive husband); *Matter of W-G-R-*, 26 I&N Dec. 208, 224 n.8 (BIA 2014) (stating that “to be eligible for withholding of removal under the Act, the respondent would have to establish that the Salvadoran Government is unable or unwilling to control Mara 18 gang members”). As noted, all of the circuit courts have adopted and continue to employ the same standard, although their applications and interpretations of this standard are less than uniform.

#### *Standard of Review*

It is important for adjudicators to recognize that a government’s ability and willingness “to control private actors is a ‘question of fact that must be resolved based on the record in each case.’” *See, e.g., Gutierrez-Vidal v. Holder*, 709 F.3d 728, 732 (8th Cir. 2013) (quoting *Menjivar*, 416 F.3d at 921). The circuit courts review an Immigration Judge’s factual findings regarding a government’s ability and willingness to control private actors for substantial evidence, meaning that a circuit court will uphold those findings unless “any reasonable adjudicator would be compelled to conclude to the contrary.” Section 242(b)(4)(B) of the Act, 8 U.S.C. § 1252(b)(4)(B); *see also, e.g., Lima v. Holder*, 758 F.3d 72, 78 (1st Cir. 2014).

The Board, on the other hand, reviews an Immigration Judge’s findings regarding the “unable or unwilling” to control issue for clear error. 8 C.F.R. § 1003.1(d)(3)(i). “[A] finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)) (internal quotation marks omitted). The Board misapplies this deferential standard if it weighs the evidence regarding a government’s ability

or willingness to control private actors differently from the Immigration Judge, or if the Board finds facts relating to the issue that were not found by the Immigration Judge. *See id.*

For instance, in *Crespin-Valladares*, 632 F.3d 117, the United States Court of Appeals for the Fourth Circuit found that, rather than reviewing the Immigration Judge’s findings for clear error, the Board instead concluded, without further elaboration, that the State Department report in the record demonstrated “that the Salvadoran government has focused law enforcement efforts on suppressing gang violence” and thus the aliens had “not shown that the government would be unable or unwilling to protect them from MS-13.” *Id.* at 128 (quoting the Board’s unpublished decision) (internal quotation mark omitted). The Fourth Circuit noted that the Immigration Judge had “identified a litany of reasons as to why attempts by the Salvadoran government to control gang violence have proved futile.” *Id.* The court remanded the case, in part, because the Board had not reviewed the Immigration Judge’s findings regarding the “unable or unwilling” to control issue under the correct standard. *Id.* at 128–29; *see also Vitug v. Holder*, 723 F.3d 1056, 1064 (9th Cir. 2013) (holding that the Board misapplied the clear error standard when it disregarded the Immigration Judge’s finding that the Government of the Philippines was unable or unwilling to protect the alien from anti-gay violence and instead made its own findings of fact on the issue); *Boraj v. Holder*, 559 F. App’x 51, 53 (2d Cir. 2014) (remanding because the Board denied asylum and withholding of removal based on its own factual findings that the Albanian authorities were willing and able to protect the alien from gang members, even though the Immigration Judge had made no findings in this regard).

#### *Burden of Proof*

As noted, an applicant for asylum or withholding of removal under the Act bears the burden of establishing that he or she has been persecuted in the designated country of removal. 8 C.F.R. §§ 1208.13(b)(1), 1208.16(b).<sup>2</sup> An applicant may carry this burden by presenting direct or circumstantial evidence of past persecution. *See, e.g., Madrigal v. Holder*, 716 F.3d 499, 505 (9th Cir. 2013). Accordingly, an applicant for asylum and withholding of removal must show—through direct or circumstantial evidence—that the government of the country of removal was unable or unwilling to protect him or her from past



persecution inflicted by private actors. *See, e.g., Aldana-Ramos*, 757 F.3d at 17.<sup>3</sup>

In this regard, several circuits have held that it is the applicant's burden to prove that the government's failure to control a private persecutor (for example, by declining to arrest or prosecute such an individual) is indicative of the government's complicity in the private act or its complete helplessness to stop it. *See, e.g., Jonaitiene v. Holder*, 660 F.3d 267, 271 (7th Cir. 2011) (noting that there may be a reasonable basis for government inaction on a particular report of criminal activity); *Menjivar*, 416 F.3d at 921 (same); *Nahrvani v. Gonzales*, 399 F.3d 1148, 1154 (9th Cir. 2005) (holding that the alien had not demonstrated that the German Government was unable or unwilling to control the private actors where he contended that the police failed to investigate his reports but "admitted that he did not give the police the names of any suspects because he did not know any specific names" and his wife testified "that the police investigated the complaints, but were ultimately unable to solve the crimes").

Furthermore, the Eighth Circuit has made clear that generalized evidence of "ineffectiveness and corruption do not, alone, require a finding that the government is 'unable or unwilling'" to control a private persecutor where the evidence the government's actual response indicates the contrary to be the case. *Gutierrez-Vidal*, 709 F.3d at 733 (quoting *Khilan v. Holder*, 557 F.3d 583, 586 (8th Cir. 2009) (per curiam)) (internal quotation marks omitted); *see also Menjivar*, 416 F.3d at 922 ("We deem the news articles regarding gang activity too general to dictate a conclusion that [a gang member's] specific acts directed toward [the alien] were persecution by the government.").

The alien in *Khilan* was kidnapped by Muslim separatists in the Kashmir region of India. The police arrested several individuals suspected of the kidnapping. However, fearing retaliation, the alien refused to cooperate with the police's investigation. After a review of the evidence presented, the Immigration Judge and the Board found that the Indian Government opposes Kashmiri Muslim separatists and provides protection to people threatened by them. The Eighth Circuit agreed. The court acknowledged that the alien had presented significant evidence of separatist and religious violence in India, as well as widespread corruption and abuse of police power in that country. *Id.* at 585. However, the

court noted that this general evidence, without more, was insufficient to prove that the Indian Government was "unable or unwilling" to control the separatists where the evidence specific to the alien's case indicated that the police not only promptly intervened, but also mounted an effective response. *Id.* at 586; *see also Ortiz-Araniba v. Keisler*, 505 F.3d 39, 42 (1st Cir. 2007) ("In determining whether a government is willing and able to control persecutors, . . . a prompt response by local authorities to prior incidents is 'the most telling datum.'" (emphasis added) (citation omitted)). Specifically, the Indian police arrested a number of suspects in the alien's kidnapping and attempted to further their investigation. The court observed that the Indian Government could not "be faulted for [the alien's] own refusal to cooperate with the investigation." *Khilan*, 557 F.3d at 586.

In contrast, the Ninth Circuit has made clear that generalized evidence of *effectiveness* does not necessarily prevent aliens from meeting their burden of proof where there is specific evidence that the aliens have repeatedly sought government protection to no avail. *See Mashiri v. Ashcroft*, 383 F.3d 1112 (9th Cir. 2004). In *Mashiri*, a family of Afghan nationals had been subjected to multiple incidents of anti-foreigner violence in Germany, which they repeatedly reported to the local police. The local police declined to intervene on their behalf and at one point informed them that anti-foreigner violence "happened all the time and that foreigners 'better try to take care of [themselves].'" *Id.* at 1121. The Immigration Judge acknowledged the specific evidence of the German Government's refusal to protect the aliens but, relying on more general evidence in the State Department report, found that the aliens had "failed to meet [their] burden of proof because [they] could not prove 'harm or fear of harm from a group that the [German] government is unwilling or unable to control on a *country-wide* basis.'" *Id.* at 1122 (third alteration in original) (quoting the Immigration Judge's decision).

The Ninth Circuit remanded, concluding that the Immigration Judge's finding was based on legal error. The court noted that it had "never required an applicant proceeding on a past persecution theory to prove that her '*past* experience reflected conditions nationwide.'" *Id.* (citation omitted). In fact, the court held that an alien could meet his or her "burden with evidence that the government was unable or unwilling to control the persecution in the applicant's *home city or area*." *Id.*

*continued on page 15*

# CIRCUIT COURT DECISIONS FOR AUGUST 2014

by John Guendelsberger

The United States courts of appeals issued 150 decisions in August 2014 in cases appealed from the Board. The courts affirmed the Board in 119 cases and reversed or remanded in 31, for an overall reversal rate of 20.7%, compared to last month's 16.1%. There were no reversals from the Third, Fourth, and Fifth Circuits.

The chart below shows the results from each circuit for August 2014 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	2	1	1	50.0
Second	30	25	5	16.7
Third	9	9	0	0.0
Fourth	3	3	0	0.0
Fifth	15	15	0	0.0
Sixth	5	3	2	40.0
Seventh	4	3	1	25.0
Eighth	9	8	1	11.1
Ninth	53	35	18	34.0
Tenth	8	6	2	25.0
Eleventh	12	11	1	8.3
All	150	119	31	20.7

The 150 decisions included 80 direct appeals from denials of asylum, withholding or protection under the Convention Against Torture; 40 direct appeals from denials of other forms of relief from removal or from findings of removal; and 30 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	80	61	19	23.8
Other Relief	40	32	8	20.0
Motions	30	26	4	13.3

The 19 reversals or remands in asylum cases involved credibility (5 cases), particular social group (4 cases), nexus (4 cases), level of harm for past persecution (3 cases), the 1-year filing requirement, a frivolousness finding, and protection under the Convention Against Torture.

The eight reversals or remands in the "other relief" category addressed the categorical and modified categorical approaches (two cases), whether a conviction was for a felony or a misdemeanor, a crime involving moral turpitude, the good moral character requirement, competency, eligibility for a section 212(c) waiver, and temporary protective status. The four motions cases involved changed country conditions, ineffective assistance of counsel, an in absentia order of removal, and sua sponte reopening.

The chart below shows the combined numbers for January through August 2014 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	36	28	8	22.2
Ninth	679	530	149	21.9
First	37	31	6	16.2
Third	88	77	11	12.5
Second	264	232	32	12.1
Fourth	71	64	7	9.9
Fifth	131	124	7	5.3
Sixth	68	63	5	7.4
Eleventh	76	72	4	5.3
Tenth	40	37	3	7.5
Eighth	49	48	1	2.0
All	1539	1306	233	15.1

Last year's reversal rate at this point (January through August 2013) was 12.8%, with 1521 total decisions and 195 reversals.

The numbers by type of case on appeal for the first 8 months of 2014 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	825	680	145	17.6
Other Relief	336	276	60	17.9
Motions	378	350	28	7.4

*John Guendelsberger is a Member of the Board of Immigration Appeals.*

## RECENT COURT OPINIONS

### ***First Circuit:***

*Guerrero v. Holder*, No. 13-1131, 2014 WL 4413224 (1st Cir. Sept. 9, 2014): The First Circuit dismissed an appeal from the Board's decision vacating its prior order reopening proceedings and reinstating its prior removal order. In 2002, the Board affirmed an Immigration Judge's order of removal based on an aggravated felony conviction under section 237(a)(2)(A)(iii) of the Act, and conviction under law relating to a controlled substance under section 237(a)(2)(B)(i). The petitioner was removed from the United States to the Dominican Republic in September 2002. He returned in January 2006 without inspection, and in June 2007, filed an untimely motion to reopen, which the Board denied. However, the Board granted a subsequent motion to reopen sua sponte the following year and remanded the petitioner's case to the Immigration Judge, noting (mistakenly) that the petitioner had resided continuously in the United States for 22 years and might be eligible for a section 212(c) waiver. On remand, the Immigration Judge determined that the Immigration Court lacked jurisdiction under the departure bar contained in 8 C.F.R. § 1003.23(b)(1) due to the petitioner's removal from the United States. On appeal, after the fact of the petitioner's removal was brought to its attention, the Board vacated both its 2008 sua sponte order and the Immigration Judge's subsequent order of removal following remand. The Board then denied the petitioner's 2008 motion, dismissed his appeal from the Immigration Judge's 2010 removal order as moot and declared its 2002 deportation order to be in effect. On appeal, the circuit court determined that it lacked jurisdiction to review the Board's last decision. Noting that it has general jurisdiction to review denials of motions to reopen by the Board, the court noted an exception where the Board declines to reopen proceedings sua sponte. The court noted that "there are no guidelines or standards which dictate how and when the Board should invoke its sua sponte power," and that such a decision "is committed 'to the unbridled discretion'" of the Board. Given the court's lack of jurisdiction to review a particular form of relief, it concluded that it clearly also lacked jurisdiction to review the denial of a motion to reconsider its decision to deny such relief.

### ***Third Circuit:***

*Mahn v. Att'y Gen.*, No. 12-4377, 2014 WL 4627976 (3d Cir. Sept. 17, 2014): The Third Circuit granted a petition for review of the Board's determination that a conviction for reckless endangerment under section 2705

of Title 18 of the Pennsylvania Consolidated Statutes was for a crime involving moral turpitude. The court did not accord *Chevron* deference to the Board's decision because it was non-precedential and issued by a single Board member. Applying the categorical approach, the court found that the least culpable conduct criminalized under the applicable statute would not rise to the level of "conduct that is inherently base, vile, or depraved" so as to constitute morally turpitudinous behavior. Insofar as the Pennsylvania statute includes conduct that "may place another person in danger . . . of serious bodily injury," the court observed that driving through a red light on an empty street could be punishable under the statute where the driver has a reckless mens rea. The court distinguished the applicable statute from section 120.25 of the New York Penal Law, which the Third Circuit determined constituted a crime involving moral turpitude in *Knapik v. Ashcroft*, 384 F.3d 84, 90 (3d Cir. 2004). The court noted that it had accorded *Chevron* deference in *Knapik* to the Board's determination because the New York statute contained "aggravating factors," namely, the requirement that the defendant "*under circumstances evincing a depraved indifference to human life . . . recklessly engages in conduct which creates a grave risk of death to another person.*" The court additionally stated that unlike the New York statute, the Pennsylvania statute contained no such aggravating factors, but "only requires conduct that *may* put a person in danger." The court therefore vacated the Board's removal order and remanded.

### ***Sixth Circuit:***

*Stanovsek v. Holder*, No. 13-3279, 2014 WL 4723268 (6th Cir. Sept. 24, 2014): The Sixth Circuit vacated a decision of the Board affirming the petitioner's ineligibility for a waiver under section 212(h) of the Act. The petitioner was admitted to the United States on a nonimmigrant visa; he subsequently adjusted his status to that of a lawful permanent resident. The petitioner was later convicted of a theft offense constituting an aggravated felony under section 101(a)(43)(G) of the Act. Applying the Board's holding in *Matter of E.W. Rodriguez*, 25 I&N Dec. 784 (BIA 2012), the Immigration Judge found the petitioner ineligible for a waiver as an alien who has been convicted of an aggravated felony following admission to the United States as a lawful permanent resident. In *Matter of E.W. Rodriguez*, the Board had found that an alien's adjustment of status constituted an admission for purposes of section 212(h). In a split decision by a three-judge panel, the circuit court did not defer to the Board's interpretation of section 212(h). Instead, it concluded that the statutory

language unambiguously required an actual physical entry into the United States. The court opined that had Congress intended otherwise, it could have barred those convicted of an aggravated felony “since the date of obtaining” lawful permanent resident status. The court stated that its interpretation comported with those of the Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits. It further explained that it was not persuaded by the reasoning of the Eighth Circuit, which afforded *Chevron* deference to the Board’s holding in *Matter of E.W. Rodriguez*. The court therefore remanded the record. The decision contains a dissenting opinion.

*Ruiz-Del-Cid v. Holder*, No. 13-3663, 2014 WL 4251606 (6th Cir. Aug. 29, 2014): The Sixth Circuit granted a petition for review of the Board’s and Immigration Judge’s denial of cancellation of removal under section 240A(b) of the Act. The petitioner had filed an application for asylum in 1993, which included a false statement that he had been threatened by guerillas in his native Guatemala. At his asylum interview in 2007, the petitioner repeated the false statement to the asylum officer. The petitioner subsequently applied for cancellation of removal before an Immigration Judge. At his 2011 removal hearing, the petitioner admitted to his prior false statement on direct examination. As a result, the Immigration Judge found that the petitioner could not establish that he was a person of good moral character during the 10 year period preceding the adjudication of his application for cancellation of removal. The application was denied and the Board affirmed. The majority of the three-judge circuit panel disagreed. Citing the Board’s decisions in *Matter of Namio*, 14 I&N Dec. 412, 414 (BIA 1973), and *Matter of M-*, 9 I&N Dec. 118, 119 (BIA 1960), the court concluded that the petitioner’s admission fell under the “doctrine of retraction” exception. The court observed that the Board has considered the amount of time between the false statement and the retraction to be relevant in some decisions. However, the court held that the dispositive factors under the Board’s standard were whether the retraction was voluntary and occurred prior to the exposure, or threat of imminent exposure, of the falsehood. The court found the length of time between the statement and retraction to provide little useful information regarding such determination, “particularly in light of the longer timeframes attendant to immigration enforcement.” The court therefore disagreed with the Board’s ruling that the petitioner’s retraction was untimely because it came 4 years after his false statement. The court

concluded that such a retraction was in fact timely because it occurred at the first opportunity the petitioner had to testify after his false statement and the falsehood had not been exposed, nor was about to be. The court remanded the record for consideration of whether the petitioner satisfied the remaining requirements for cancellation eligibility. The decision contained a dissenting opinion.

### ***Seventh Circuit:***

*Jendy v. Holder*, No. 13-3174, 2014 WL 4495148 (7th Cir. Sept. 15, 2014): The Seventh Circuit granted the petition for review and vacated the Board’s decision applying the stop-time rule of section 240A(d)(1) of the Act. The petitioner had obtained his lawful permanent residence in the United States in 1989. He thus accrued 7 years of continuous lawful residence in 1996. However, the above-cited provision of IIRIRA, which became effective in 1997, stops the accrual of continuous residence upon the commission of certain criminal offenses. The petitioner committed such an offense in 1995, prior to the passage of IIRIRA and before he accrued 7 years of continuous lawful residence. Citing its two precedent decisions, *Matter of Robles-Urrea*, 24 I&N Dec. 24, 27 (BIA 2006), and *Matter of Perez*, 22 I&N Dec. 689, 692–93 (BIA 1999) (en banc), the Board held that the stop-time provision applied retroactively to the petitioner’s 1995 offense, cutting off his accrual of continuous residency and rendering him ineligible for cancellation of removal. Applying step one of the retroactivity analysis outlined under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the court noted that the transitional rules for IIRIRA stated that the paragraphs (1) and (2) of section 240A(d) (governing continuous residence and physical presence) apply “to Notices to Appear issued before, on, or after” the date of IIRIRA’s enactment. However, the court pointed out that in the instant case, the event in question was not the issuance of a Notice to Appear, but the commission of a crime, an event on which the transitional rules are silent. The court cited *Landgraf*’s requirement that courts avoid retroactive application of a statute “unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature.” The court found no such clarity in section 240A(d)(1). Turning to the second step of the *Landgraf* analysis, the court concluded that in the absence of clear language regarding retroactive application, applying the stop-time rule in the instant case would have an impermissible effect.



### ***Ninth Circuit:***

In *Torres-Valdivias v. Holder*, No. 11-70532, 2014 WL 4377469 (9th Cir. Sept. 5, 2014), the three-judge panel unanimously held that the heightened discretionary requirements adopted by the Attorney General in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002), were properly applied by the Board in the context of applications for adjustment of status under section 245 of the Act. In *Matter of Jean*, the A.G. established a presumption that discretion should not be favorably exercised on behalf of an applicant for asylum and adjustment of status under section 209 of the Act who had been convicted of “violent or dangerous crimes,” except in compelling circumstances, such as where removal would cause exceptional and extremely unusual hardship or where there are national security and foreign policy considerations in play. That heightened standard was subsequently extended to cases involving waivers under section 212(h) of the Act by regulation, *see* 8 C.F.R. § 1212.7(d), and the Board panel in *Torres-Valdivias* extended it to an adjustment of status application under section 245(i) of the Act. The Ninth Circuit indicated that it would not extend *Chevron* deference to the Board’s decision. The court reasoned that the Board was altering the standard set forth in *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970), in holding that *Matter of Jean* applied in the section 245(i) context. *Matter of Arai* also involved an application for adjustment of status under section 245 of the Act. The court noted that *Chevron* would not apply to an unpublished decision that is not directly controlled by a published decision interpreting the same statute. Noting that an agency “may not . . . depart from a prior policy *sub silentio*,” the court observed that the Board did not publish its decision or acknowledge *Matter of Arai* in its unpublished order. Nevertheless, the court concluded that “the BIA’s decisions in this case are sufficient to satisfy its obligation not to act in an arbitrary or capricious manner.” In this regard, the Ninth Circuit noted that the Board had “adopted and affirmed” the Immigration Judge’s decision which in turn had expressly found that *Matter of Jean* had altered the *Matter of Arai* approach in cases where a violent or dangerous crime was involved.

*Roman-Suaste v. Holder*, No. 12-73905, 2014 WL 4358458 (9th Cir. Sept. 4, 2014): The Ninth Circuit affirmed the Board’s decision finding that the petitioner’s conviction for possession of marijuana for sale, under section 11359 of the California Health and Safety Code, was an aggravated felony.

### ***Eleventh Circuit:***

*Rivas v. U.S. Att’y Gen.*, No. 13-13069, 2014 WL 4338624 (11th Cir. Sept. 3, 2014): The Eleventh Circuit denied the petition for review of the Board’s precedent decision in *Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013). The petitioner sought a retroactive waiver under section 212(h) of the Act after making three trips abroad while he was removable from the United States due to his two petit larceny convictions. The petitioner was readmitted to the United States after each trip without being detained or questioned by the Department of Homeland Security. In removal proceedings, the petitioner filed a nunc pro tunc 212(h) application in reliance on the Board’s precedent decision in *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980). However, the Board concluded that Congress, through amendments to the language of section 212(h) in 1990 and 1996, abrogated the holding in *Matter of Sanchez*, and no longer allowed for a “stand alone” waiver unaccompanied by an application for adjustment of status. The court held that the Board’s requirement that an applicant for 212(h) concurrently file an application for adjustment of status was rational and did not violate the petitioner’s right to equal protection of the laws.

## **BIA PRECEDENT DECISIONS**

**I**n *Matter of C-C-I*, 26 I&N Dec. 375 (BIA 2014), the Board held that removal proceedings may be reopened to consider termination of an alien’s deferral of removal pursuant to 8 C.F.R. § 1208.17(d) (1) if the Government presents previously unconsidered evidence, whether or not previously unavailable, that is relevant to the possibility that the alien will be tortured in the country to which removal was deferred. Additionally, the Board held that the doctrine of collateral estoppel does not bar an Immigration Judge from reevaluating the alien’s credibility in light of additional evidence presented at a de novo hearing conducted under 8 C.F.R. § 1208.17(d)(3).

The Department of Homeland Security (“DHS”) moved for a hearing under 8 C.F.R. § 1208.17(d) to terminate the respondent’s deferral of removal to Nigeria based on evidence that the claim underpinning the grant of deferral was fraudulent. At the de novo hearing, the Immigration Judge found that the respondent lacked credibility because of fundamental inconsistencies between his testimony at his original removal proceedings and at the termination hearing. The Immigration Judge also found that the respondent had presented insufficient



corroborating evidence to overcome his lack of credibility and terminated the grant of deferral. The Immigration Judge additionally found the respondent ineligible for a section 212(c) waiver of inadmissibility.

On appeal, the Board explained that pursuant to 8 C.F.R. § 1208.17(d), termination of deferral of removal involves a two-step process. First, the DHS's motion for a hearing to consider terminating the deferral grant must be supported by evidence that was not presented at the previous hearing and that is "relevant to the possibility" that the alien would be tortured. Second, if the motion is granted an Immigration Judge must conduct a de novo hearing to consider if deferral should be terminated. This second step requires an Immigration Judge to determine whether the alien can again establish that he is more likely than not to be tortured if returned to the country designated for deferral.

The evidence supporting DHS's motion included a report from the Nigerian Embassy's Consular Anti-Fraud Unit stating that the Nigerian Government no longer practiced violence against members of the respondent's tribe and that the documents the respondent submitted to establish his claim for deferral were fraudulent. The Board concluded that this evidence was sufficiently "relevant to the possibility" that the alien would be tortured to support reopening under 8 C.F.R. § 1208.17(d)(1). In addition, the Board found no clear error in the Immigration Judge's adverse credibility determination and concurred with the Immigration Judge's finding that the respondent had not satisfied his burden of proof with sufficient corroborating evidence. The Board concluded that the respondent had not proven that he was more likely than not to be tortured if returned to Nigeria. As a consequence, the Immigration Judge properly terminated the respondent's deferral of removal to that country.

Turning to the respondent's argument that the Immigration Judge was collaterally estopped from reevaluating his original testimony and comparing it with testimony offered at the termination hearing, the Board reasoned that such an approach would negate the purpose of 8 C.F.R. § 1208.17(d)(3). That regulation requires an Immigration Judge to make a de novo determination based on the record, the initial application, and any new evidence regarding the likelihood of torture. Additionally, the Board observed that deferral of removal is a temporary form of relief, so further review of an alien's claim is

inherently contemplated. Consequently, the Board rejected the respondent's collateral estoppel argument.

Finally, the Board disagreed with the Immigration Judge's determination that the respondent was ineligible for a section 212(c) waiver because his lawful permanent resident status terminated when he was ordered removed in 1999. The Board noted that, pursuant to the regulations, reopening is warranted if a respondent can show that they were eligible for section 212(c) relief *prior* to the entry of a removal order. Insofar as the respondent had established that he was eligible for a 212(c) waiver prior to 1999, the Board found that remand for further consideration of the respondent's application for section 212(c) relief was warranted. The Board found that intervening precedent, namely, *Judulang v. Holder*, 132 S. Ct. 476 (2011), and *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014), also warranted remand.

In *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), the Board held that depending on the facts and circumstances in an individual case, "married women in Guatemala who are unable to leave their relationship" can constitute a cognizable particular social group ("PSG") forming the basis of a claim for asylum or withholding of removal under the Act.

Analyzing the proposed PSG under the three-part framework outlined in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), and *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), the Board first determined that the putative group was composed of members who share the common immutable characteristic of gender. It further observed that marital status may also be an immutable characteristic where the individual is unable to leave the relationship. As guidance, the Board explained that such a determination is fact- and evidence-dependent, based on such factors as whether dissolution of a marriage contravenes religious or other deeply held moral beliefs or if dissolution is possible in light of religious, cultural, or legal constraints. And the determination has a subjective component involving the respondent's own experiences as well as an objective component, which can be established using evidence of background country conditions.

Next, the Board found that the putative PSG was defined with particularity, since the terms "married," "women," and "unable to leave the relationship" all have commonly accepted definitions within Guatemalan

society based on the facts in this case. Pointing out that a married woman's inability to leave her relationship may be informed by societal expectations about gender and subordination, and legal constraints regarding divorce and separation, the Board found significant the fact that the respondent here had sought protection from her husband's abuse but was rebuffed by the police's refusal to intervene in a marital relationship.

Turning to the third prong of the PSG definitional framework, the Board found that "married women in Guatemala who are unable to leave their relationship" is a socially distinct group within Guatemalan society. In reaching that conclusion, the Board explained that such an inquiry involved an examination of whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect abuse victims, whether the laws are effective, and other sociopolitical factors. The Board observed that the record evidence demonstrated that Guatemala has a culture of "machismo and family violence," and that enforcement of its domestic violence laws can be problematic because the enforcement authority often ignores requests for assistance.

Pointing out that domestic violence cases generally involve unique and discrete issues not present in other PSG determinations, particularly as to social distinction, the Board explained that the facts and evidence in each case, including documented country conditions, law enforcement statistics and expert witnesses, the respondent's past experiences, and other credible sources of information, will be determinative. The case was remanded.

In *Matter of E. E. Hernandez*, 26 I&N Dec. 397 (BIA 2014), the Board held that malicious vandalism in violation of section 594(a) of the California Penal Code with a gang enhancement under section 186.22(d) of the California Penal Code, requiring that the offense be committed for the benefit of a criminal street gang with the specific intent to promote criminal conduct by gang members, is a categorical crime involving moral turpitude.

The respondent had been convicted of causing over \$400 in damages by vandalism in violation of section 594(a) of the California Penal Code with a gang enhancement under section 186.22(d). The Immigration Judge found that the DHS did not satisfy its burden of proving that the respondent was removable as an alien convicted of a crime involving moral turpitude. As a

consequence, the Immigration Judge terminated the proceedings and the DHS appealed.

Reviewing the respondent's conviction, the Board pointed out that under California law, a gang enhancement under section 186.22(d) can be imposed only if each element of the enhancement is proven beyond a reasonable doubt or admitted by the defendant in a plea agreement. Thus, the Board reasoned that a California conviction involving the application of the gang enhancement is considered a conviction for the enhanced offense. Thus, the respondent's conviction of malicious vandalism with a gang enhancement was a conviction for the enhanced offense. Consequently, the Board concluded that the Immigration Judge erred by separately analyzing whether the respondent's malicious vandalism and gang enhancement offenses involved moral turpitude.

Conducting a categorical analysis of the elements of the offense, the Board noted that malicious vandalism under California law requires, among other things, a showing of malice or a "general readiness to do evil." Insofar as criminal gangs pose a danger to public safety and a burden to society, and a conviction involving the gang enhancement requires a specific intent to promote gang activity, the Board concluded that moral turpitude inheres in malicious damage to property for the benefit of a criminal gang with the intent to promote criminal conduct by the gang. In the absence of a showing that an individual would be convicted under sections 594(a) and 186.22(d) for conduct not involving moral turpitude, the Board determined that the respondent had been convicted of a crime involving moral turpitude and was removable under section 237(a)(2)(A)(i) of the Act. The Board concluded that the proceedings had been terminated in error, sustained the DHS's appeal, and remanded the record.

In *Matter of Paek*, 26 I&N Dec. 403 (BIA 2014), the Board held that an alien who is admitted at a port of entry as a conditional lawful permanent resident pursuant to section 216(a) of the Act is an alien "lawfully admitted for permanent residence" who is ineligible for a section 212(h) waiver of inadmissibility if he or she subsequently was convicted of an aggravated felony.

The respondent was admitted at a port of entry in 1991 as a conditional lawful permanent resident under section 216(a). The Immigration Judge concluded that following his admission, the respondent was convicted

of an offense constituting aggravated felony. After removal proceedings were initiated, the respondent applied for adjustment of status under section 245(a) of the Act based on his marriage to a United States citizen in conjunction with a section 212(h) waiver. The Immigration Judge concluded that the respondent was barred from applying for a section 212(h) waiver because he was an alien previously admitted as a lawful permanent resident who later was convicted of an aggravated felony.

On appeal, the Board pointed out that the United States Court of Appeals for the Third Circuit, in whose jurisdiction the case arose, held in *Hanif v. Att’y Gen. of U.S.*, 694 F.3d 479 (3d Cir. 2012), that the phrase “admitted to the United States as an alien lawfully admitted for permanent residence” in section 212(h) only contemplates aliens who were admitted at a port of entry in lawful permanent resident status. It therefore does not apply to an alien who entered without inspection and then adjusted to lawful permanent resident status. Nevertheless, the Board found that several provisions of section 216 of the Act clearly include aliens who are admitted on a conditional basis within the category of aliens who are “lawfully admitted for permanent residence” as contemplated in section 212(h) of the Act.

For example, section 216(a)(1) includes aliens admitted as lawful permanent residents whose status was obtained on a conditional basis. Section 216(a)(2)(A) provides notice requirements regarding the removal of the conditions imposed on an alien granted permanent resident status on a conditional basis under 216(a)(1). And section 216(c)(3)(B) states that the conditional basis of the alien’s status is removed on the second anniversary of the date that the “alien obtain[ed] the status of lawful admission for permanent residence.”

The Board further observed that section 216(e), which addresses eligibility for naturalization, also specifies that an alien admitted as a conditional permanent resident is “considered to have been admitted as an alien lawfully admitted for permanent residence.” Additionally, the terms “alien spouse” and “alien son or daughter” as defined in section 216(h)(1) and (2) include “an alien who obtains the status of an alien lawfully admitted for permanent residence (*whether on a conditional basis or otherwise*).” (Emphasis added.) Moreover, 8 C.F.R. § 216.1 specifies that conditional permanent residents are afforded “the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws,

such status not having changed.” Finally, the Board pointed out that the Third Circuit held in *Gallimore v. Att’y Gen. of U.S.*, 619 F.3d 216 (3d Cir. 2010), in the context of eligibility for a waiver under section 212(c) of the Act, that a “conditional permanent resident” obtains “lawful permanent resident” status at the time he or she is initially admitted.

Concluding that when the respondent was admitted at a port of entry in 1991 as a conditional permanent resident, he was admitted as an alien “lawfully admitted for permanent residence,” the Board determined that the Immigration Judge properly found the respondent to be statutorily barred from obtaining a section 212(h) waiver. The appeal was dismissed.

In *Matter of Dominguez-Rodriguez*, 26 I&N Dec. 408 (BIA 2014), the Board reaffirmed *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012), holding that for purposes of section 237(a)(2)(B)(i) of the Act, the phrase “a single offense involving possession for one’s own use of 30 grams or less of marijuana” requires a circumstance-specific inquiry into the character of the alien’s unlawful conduct on a single occasion, not a categorical inquiry into the elements of a single statutory crime as outlined in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).

The respondent, a lawful permanent resident, had been convicted of possessing more than 1 ounce of marijuana in violation of section 453.336 of the Nevada Revised Statutes. The DHS initiated removal proceedings charging him with removability under section 237(a)(2)(B)(i) of the Act, as an alien who has been convicted of a controlled substance offense other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable. Pursuant to *Moncrieffe v. Holder*, the Immigration Judge conducted a categorical analysis of section 453.336 and concluded that the minimum conduct punishable under that statute involved possession of 30 grams or less of marijuana for personal use. The Immigration Judge declined to consider the DHS’s evidence that the respondent’s conduct involved possession of more than 30 grams of marijuana, concluding that *Moncrieffe* forebade a “circumstance-specific” inquiry and required termination of proceedings unless the DHS could establish that the respondent was convicted of possessing more than 30 grams of marijuana by reference to documents included in the record of conviction under the modified categorical approach, such as the judgment, charging document, or plea agreement.



On appeal, the DHS argued that the Immigration Judge's decision contravened *Matter of Davey*, which mandates a circumstance-specific, rather than a categorical, inquiry into the "possession for personal use" exception. The Board agreed, concluding that *Moncrieffe* does not impact the validity of *Matter of Davey*. In the Board's view, the Supreme Court and other Federal courts have found the categorical approach to be inapplicable when the immigration provision at issue calls for a "circumstance-specific" approach. The Board identified as examples: the Court's decisions in *Nijhawan v. Holder*, 557 U.S. 29 (2009) (holding that the categorical approach does not apply to determining whether a fraud offense resulted in a loss to victims in excess of \$10,000 as prescribed in the aggravated felony definition under section 101(a)(43)(M)(i) of the Act); the Third Circuit's decision in *Rojas v. Att'y Gen. of U.S.*, 728 F.3d 203 (3d Cir. 2013) (en banc) (holding that the categorical approach is inapplicable in the determination of whether an offense relates to a controlled substance under section 237(a)(2)(B)(i) of the Act); the Eighth Circuit's holding in *Mellouli v. Holder*, 719 F.3d 995 (8th Cir. 2013) (distinguishing *Moncrieffe* and deferring to the Board's decision in *Matter of Davey*), *cert. granted on other grounds*, 134 S. Ct. 2873 (2014); the Second Circuit's decision in *Varughese v. Holder*, 629 F.3d 272 (2d Cir. 2010) (per curiam), *cert. denied*, 132 S. Ct. 496 (2011) (finding that a determination of whether the monetary threshold under section 101(a)(43)(D) aggravated felony called for a circumstance-specific inquiry); and the Fifth Circuit's decision in *Bianco v. Holder*, 624 F.3d 265 (5th Cir. 2010) (holding that the categorical approach does not apply to a determination of whether the victim of a crime of violence had a qualifying "domestic" relationship to the offender, to support a "crime of domestic violence" removal charge under section 237(a)(2)(E)(i) of the Act). Based on its reasoning in *Matter of Davey*, the Board reaffirmed that the language of the "possession for personal use" exception calls for a circumstance-specific inquiry.

The Board rejected amici's argument that *Moncrieffe* established a rebuttable presumption that criminal grounds of removal must be analyzed categorically, observing that application of the categorical approach necessarily depends on the legislative intent underlying the relevant statute. The Board noted that the *Moncrieffe* Court recognized that specific limiting language in the text of the Act suggests Congress' intent to have the facts relevant to that limitation found in

immigration proceedings. Accordingly, the Board reasoned that the "possession for personal use" exception directs adjudicators to specific facts about an alien's crime, thus contemplating a circumstance-specific inquiry.

The Board also rejected amici's contention that *Matter of Davey* permits "minitrials" of issues that may not have been conclusively resolved in criminal proceedings. The Board observed that a circumstance-specific inquiry to determine the applicability of the "possession for personal use" exception does not involve a redetermination of an alien's guilt or innocence. If the conviction itself conclusively establishes all relevant facts to prove the applicability of the exception, the Immigration Judge's inquiry ends and the removal charge is dismissed. But if applicability of the "possession for personal use" exception cannot be determined by reviewing the elements of the offense, then the Immigration Judge necessarily must conduct an inquiry into the facts surrounding the offense, akin to *Nijhawan's* inquiry required to determine the amount loss under section 101(a)(43)(M)(i). Additionally, the Board pointed out that the DHS is required to prove by clear and convincing evidence that a respondent possessed more than 30 grams of marijuana for a reason other than personal use. And, in accordance with principles of fundamental fairness that are intrinsic to removal proceedings, a respondent has the opportunity to dispute the DHS's assertion that the "possession for personal use" exception does not apply.

Concluding that the Immigration Judge erred in terminating the proceedings, the Board sustained the DHS's appeal and remanded the record for further proceedings.

In *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014), the Board held that where a State statute covers a controlled substance not included in the Federal controlled substance schedules, under the categorical approach there must be a realistic possibility that the State would prosecute conduct that falls outside the generic definition of the offense to defeat a charge of removability.

The respondent had been convicted of the "sale of certain illegal drugs" in violation of section 21a-277(a) of the Connecticut General Statutes and his sentence exceeded 1 year of confinement. The DHS charged him with removability under sections 237(a)(2)(A)(iii) and (B)(i) of the Act. At the time the respondent pled guilty

to the offense, Connecticut's drug schedules included two controlled substances that had been removed from the Federal schedules years earlier. The Immigration Judge rejected the respondent's argument that section 21a-277(a) did not necessarily proscribe conduct equivalent to an offense under the Controlled Substances Act ("CSA") as required under *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). Proceeding directly to a modified categorical analysis, the Immigration Judge concluded that the DHS had satisfied its burden of proving that the respondent's offense involved a "narcotic" substance and found him removable as charged.

On appeal, the Board addressed the application of *Moncrieffe* to the question of an alien's removability when he or she has been convicted of a State controlled substance offense which may have involved substances not listed on the Federal schedules. Observing that the Federal schedules under the CSA change frequently and that State schedules are often non-conforming, the Board found that the presence of two opiate derivatives in the Connecticut schedules that were not listed in the Federal schedules meant that Connecticut's controlled substance definition was broader than the Federal definition. However, the Board noted that in *Moncrieffe* and *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), the Court explained that the categorical approach requires that there exist a realistic probability that the State would prosecute conduct falling outside of the generic definition.

Turning to the respondent's case, the Board determined that the evidence established that his offense of possession of a controlled substance was equivalent to a felony under the CSA. Noting that the Immigration Judge had initially conducted a modified categorical inquiry and found the respondent removable because the plea colloquy reflected that he pled guilty to the "sale of narcotics," the Board pointed out that the determination was erroneous because even if section 21a-277(a) is divisible, both of the non-conforming substances listed on the Connecticut schedule were "narcotics." Since the Immigration Judge did not apply the realistic probability test under the categorical as required by *Moncrieffe*, the Board remanded the record.

In *Matter of Pina-Galindo*, the Board held that an alien is ineligible for section 240A(b) cancellation of removal if he or she has been convicted of two or more offenses with an aggregate term of imprisonment of 5

years or more as defined in section 212(a)(2)(B) of the Act.

The respondent sustained multiple convictions involving intoxication, including a DWI conviction for which a suspended sentence of 10 years' confinement was imposed. The Immigration Judge found him removable under section 212(a)(6)(A)(i) of the Act and denied his application for section 240A(b) cancellation because he fell within the scope of section 212(a)(2)(B) of the Act.

On appeal, the respondent argued that section 212(a)(2)(B) is limited to the offenses described in section 212(a)(2)(A)(i), which includes crimes involving moral turpitude and controlled substances offenses rather than intoxication offenses like his. He also asserted that the singular word "offense" in section 240A(b)(1)(C) (barring aliens convicted of offenses under sections 212(a)(2), 237(a)(2), or 237(a)(3) of the Act from cancellation of removal) does not implicate multiple offenses, such as the respondent's. Thus, the respondent argued that, even if he were removable under, section 212(a)(2)(B), that offense is not included under section 240A(b)(1)(C) of the Act. The Board observed that it has consistently held that, by its plain language, section 240A(b)(1)(C) incorporates all of section 212(a)(2) of the Act, including section 212(a)(2)(B) of the Act.

The Board observed that the United States Court of Appeals for the Fifth Circuit, the circuit in which the case arose, the Board observed that the Fifth Circuit had adopted a similar interpretation of section 240A(b)(1)(C) of the Act in an unpublished decision. Additionally, the Board noted that the singular term "offense" did not exclude section 212(a)(2)(B) from section 240A(b)(1)(C) because the U.S. Code provides that words in the singular form also apply to several people, parties, or things, unless otherwise indicated by the context. Finally, the Board found significant that as established in *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003), the operation of the petty offense exception and its interaction with sections 212(a)(2)(A)(i) and 240A(b)(1)(C) reflect that the phrase "convicted of an offense under section 212(a)(2)" does not preclude consideration and interplay of multiple offenses. Concluding that the respondent's arguments were unavailing, the Board dismissed his appeal.

## REGULATORY UPDATE

**79 Fed. Reg. 55,659 (September 17, 2014)**

### DEPARTMENT OF JUSTICE

8 CFR Part 1003

[EOIR Docket No. 181; AG Order No. 3450– 2014]

RIN 1125–AA78

#### **Separate Representation for Custody and Bond Proceedings**

**AGENCY:** Executive Office for Immigration Review, Department of Justice.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document proposes to amend the Executive Office for Immigration Review (EOIR) regulations relating to the representation of aliens in custody and bond proceedings. Specifically, this rulemaking proposes to allow a representative before EOIR to enter an appearance in custody and bond proceedings without such appearance constituting an entry of appearance for all of the alien's proceedings before the Immigration Court.

**DATES:** Written comments must be submitted on or before November 17, 2014. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until midnight Eastern Time at the end of that day.

**79 Fed. Reg. 55,662 (September 17, 2014)**

### DEPARTMENT OF JUSTICE

8 CFR Parts 1003, 1240, and 1241

[EOIR Docket No. 164P; AG Order No. 3463– 2014]

RIN 1125–AA62

#### **List of Pro Bono Legal Service Providers for Aliens in Immigration Proceedings**

**AGENCY:** Executive Office for Immigration Review, Department of Justice.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This rule proposes to amend 8 CFR parts 1003, 1240, and 1241 by changing the name of the “List of Free Legal Services Providers” to the “List of Pro Bono Legal Service Providers.” The rule also would enhance the eligibility requirements for organizations, private attorneys, and referral services to be included on the List of Pro Bono Legal Service Providers (List).

**DATES:** Electronic comments must be submitted and written comments must be postmarked on or before November 17, 2014. The electronic Federal Docket Management System at [www.regulations.gov](http://www.regulations.gov) will accept electronic comments submitted prior to midnight Eastern Time at the end of that day.

**79 Fed. Reg. 52,027 (September 2, 2014)**

### DEPARTMENT OF HOMELAND SECURITY

[CIS No. 2540–14; DHS Docket No. USCIS– 2014– 0003]

RIN 1615–ZB26

#### **Extension of the Designation of Sudan for Temporary Protected Status**

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** Through this Notice, the Department of Homeland Security (DHS) announces that the Secretary of Homeland Security (Secretary) is extending the designation of Sudan for Temporary Protected Status (TPS) for 18 months from November 3, 2014 through May 2, 2016.

The extension allows currently eligible TPS beneficiaries to retain TPS through May 2, 2016, so long as they otherwise continue to meet the eligibility requirements for TPS. The Secretary has determined that an extension is warranted because the conditions in Sudan that prompted the TPS designation continue to be met. Sudan continues to experience ongoing armed conflict and other extraordinary and temporary conditions within the country that prevent its nationals from returning to the state in safety.

Through this Notice, DHS also sets forth procedures necessary for nationals of Sudan (or aliens having no nationality who last habitually resided in Sudan) to



re-register for TPS and to apply for renewal of their Employment Authorization Documents (EADs) with U.S. Citizenship and Immigration Services (USCIS). Re-registration is limited to persons who have previously registered for TPS under the designation of Sudan and who were granted TPS. Certain nationals of Sudan (or aliens having no nationality who last habitually resided in Sudan) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions, if they meet: (1) at least one of the late initial filing criteria; and, (2) all TPS eligibility criteria (including continuous residence in the United States since January 9, 2013, and continuous physical presence in the United States since May 3, 2013).

Current TPS beneficiaries under the Sudan designation may re-register during the 60-day re-registration period from September 2, 2014 through November 3, 2014. USCIS will issue new EADs with a May 2, 2016, expiration date to eligible Sudan TPS beneficiaries who timely re-register and apply for EADs under this extension. Given the timeframes involved with processing TPS re-registration applications, DHS recognizes that not all re-registrants will receive new EADs before their current EADs expire on November 2, 2014. Accordingly, through this Notice, DHS automatically extends the validity of EADs issued under the TPS designation of Sudan for 6 months through May 2, 2015, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended and their impact on Employment Eligibility Verification (Form I-9) and E-Verify processes.

**DATES:** The 18-month extension of the TPS designation of Sudan is effective November 3, 2014, and will remain in effect through May 2, 2016. The 60-day re-registration period runs from September 2, 2014, through November 3, 2014.

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### Unable or Unwilling *continued*

(emphasis added). It is unclear whether this holding extends beyond the Ninth Circuit. Nevertheless, *Mashiri* illustrates an important point. In determining whether an alien has established that the government is unable or unwilling to control private conduct, adjudicators should not disregard a government's actual response to the alien's requests for protection or focus exclusively on

general evidence of government effectiveness in controlling private actors. See *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1056 (9th Cir. 2006) ("Evidence of background country conditions alone cannot establish that specific acts of persecution did or did not occur.").

But adjudicators should not discount general evidence or evidence of country conditions altogether in assessing whether an alien has met his or her burden on the "unable or unwilling" issue. General evidence of government corruption or ineffectiveness is especially relevant in cases where the government has failed to take action or has failed to take effective action in the alien's specific case, despite the alien's repeated efforts to obtain government protection. *Aldana-Ramos*, 757 F.3d at 17; *Aliyev v. Mukasey*, 549 F.3d 111 (2d Cir. 2008); see also *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 26 (BIA 1998) (upholding a grant of asylum where "the respondent reported at least three . . . incidents to the police, who took no action beyond writing a report"). For instance, in *Aliyev*, 549 F.3d 111, the alien, an ethnic Uyghur, was beaten by Kazakh nationalists. He reported the assault to the police, and the police referred him to the hospital for medical testing but "nothing further was done in terms of an investigation." *Id.* at 118. Days after the assault, the nationalists threatened to kill the alien. His home was later bombed. The alien reported the bombing to the police and a single sheriff reported to the scene "but nothing further was ever done." *Id.* at 119.

The Second Circuit noted that the alien had presented specific evidence "that despite repeated reports of violence to the police, no significant action was taken on his behalf." *Id.* However, the court did not base its conclusion wholly on the police's actual response to the alien's requests for protection. The court ultimately determined that the Kazakh police's perfunctory actions were indicative of its inability or unwillingness to protect the alien based on evidence that one of his attackers was the nephew of a high-ranking Kazakh Government official and country conditions reports documenting that the Kazakh police were generally "poorly paid and believed to be corrupt." *Id.*

Similarly, in *Aldana-Ramos*, 757 F.3d 9, the First Circuit remanded the case to the Board to determine whether the aliens (siblings) had presented sufficient evidence that the Guatemalan Government was unable or unwilling to control members of the "Z" gang, who

had killed their father and had repeatedly threatened and intimidated them. In that case, the aliens had testified that the Government had failed to act on their behalf. They also testified that the Guatemalan police were generally unwilling to investigate the “Z” gang. In the court’s view, this evidence of general ineffectiveness bolstered their testimony that a local judge had dismissed all charges against a member of the “Z” gang suspected of killing their father and released the gang member after the judge was bribed.

Aliens may also meet their burden of proof on the “unable or unwilling” to control issue using specific evidence of government inaction in their case where there is general evidence that the government is complicit in or tacitly approves of the private persecution. The First Circuit found that an alien presented this type of evidence in *Ivanov v. Holder*, 736 F.3d 5 (1st Cir. 2013). In *Ivanov*, skinheads beat and kidnapped the alien, a Pentecostal Christian, holding him captive for 3 days. His parents filed a police report after the alien’s kidnapping but nothing was done. Following the kidnapping and the alien’s eventual release, he was summoned to police headquarters, where a Federal law enforcement official demanded that he testify against his pastor. The alien refused. A few days later, skinheads attacked the alien in his apartment lobby and threw Molotov cocktails at his home. The alien reported the attack, but the police again took no action. The Immigration Judge and the Board found that the alien had not sufficiently established that the Russian Government was unable or unwilling to protect him. The First Circuit disagreed.

The court observed that there was “nothing in the record to suggest that [the alien’s] abusers were ever apprehended, punished, or even looked for, in spite of having severely beaten and detained him for three days.” *Id.* at 13. Notably, the court found that this specific evidence of Government inaction was consistent with more general reports that local authorities failed to adequately respond to attacks against religious minorities. The court also found the police’s inaction following the second skinhead attack, which occurred days after a Federal official pressured the alien to testify against his pastor, was also evidence that the Russian Government was less than willing or able to protect the alien. According to the court, this specific evidence of inaction was corroborated by reports that Russian officials generally treated leaders of minority religious sects as security threats and gave tacit

or active support to the view that Russian Orthodoxy was “the country’s so-called ‘true religion.’” *Id.* On this record, the court concluded that “[l]ocal authorities either failed to take action against, or perhaps even supported, [the alien’s] persecutors. Their failure to respond signals their unwillingness or inability to control [the alien’s] persecutors.” *Id.* at 14 (emphasis added).

Absent general evidence of complicity, corruption, or ineffectiveness, it may be more difficult for an alien to show that specific instances of government inaction are indicative of its inability or unwillingness to control private conduct. In fact, the Seventh Circuit has held that in such a case, it remains the alien’s burden to show that government inaction was a deviation from standard law enforcement procedure. See *Jonaitiene*, 660 F.3d at 271. In *Jonaitiene*, the aliens (two siblings) asserted that they had been persecuted in Lithuania by an individual named Reika, whom the siblings had reported to the authorities for producing fraudulent visas. In retaliation, Reika lit the aliens’ mother’s apartment door on fire. No one was harmed by the blaze. The local fire department investigated the fire, but the police did not. Prosecutors also declined to institute criminal proceedings against Reika for participating in the fraudulent visa scheme.

The Seventh Circuit found that the police’s failure to investigate the arson and the Government’s decision not to prosecute Reika did not satisfy the aliens’ burden to show that the Lithuanian Government was unable or unwilling to protect them from private conduct. According to the court, the record was “[m]issing . . . any indicator as to why” the government did not act “and whether [these decisions] constituted a deviation from standard operating procedures.” *Id.* The court noted, for instance, that the aliens had not shown “whether the investigation of fires is normally left to the fire department [in Lithuania], which did investigate the incident.” *Id.* The court was similarly left to guess “whether the Lithuanian government was presented with sufficient evidence to prosecute Reika but chose not to do so.” *Id.*; cf. *Doe*, 736 F.3d at 879.

In *Doe*, the Ninth Circuit found that the alien had satisfied his burden of proof despite the fact that the Russian police had rejected his second complaint pursuant to a Russian law enforcement regulation, the contents of which were never identified. The court found that the alien’s failure to identify the regulation’s

contents (and thus his failure to show that his complaint was not discharged pursuant to standard law enforcement procedures) was not fatal to his claim. Instead, the court noted that there was other circumstantial evidence of the Russian Government's tacit approval of the private persecution in the record. Significantly, "the Russian police rejected his first complaint out of hand, questioning why he did not simply defend himself, and subsequently dismissed his second complaint without doing anything more than interviewing him at the hospital where he was being treated for his injuries." *Id.* "The police did so even though [the alien] did identify his attackers both times, and there was substantial evidence that the assaults were motivated by anti-homosexual bias." *Id.*

## Additional Issues

### *Failure to Report*

An alien's "[f]ailure to inform law enforcement of threats or attacks [he or she] claims to have suffered is *material* to the rejection of claims of government participation or complicity in past persecution." *Mejilla-Romero v. Holder*, 600 F.3d 63, 73 (1st Cir. 2010) (emphasis added). Nevertheless, a failure to report persecution is *not* essential to showing that a government is unable or unwilling to control private conduct. See *Matter of S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000).

In *Matter of S-A-*, the Board found that an alien's failure to report her father's abuse to the Moroccan authorities was not fatal to her asylum claim because the alien had convincingly showed that going to the police would have been futile or would have subjected her to a risk of increased harm. The Board first noted that under Moroccan law and social norms "a father's power over his daughter is unfettered." *Id.* at 1330, 1335. Thus, reporting the abuse would have been futile because the police would have declined to intervene on her behalf and stop her father's abusive conduct.

In addition to being futile "in light of societal religious mores," the alien had also shown that turning to the police for protection was "potentially dangerous." *Id.* at 1332–33. Evidence in the State Department report "corroborate[d] . . . testimony concerning the futility and perils of seeking governmental protection," and the Board noted that few women reported abuse because "domestic violence is commonplace [in Morocco] and legal remedies

are generally unavailable to women" who, upon losing in court, "are returned to the abusive home." *Id.* at 1333. Accordingly, the Board held that "[a]lthough she did not request protection from the government, the evidence convinces us that even if the respondent had turned to the government for help, Moroccan authorities would have been unable or unwilling to control her father's conduct." *Id.* at 1335.

In line with *Matter of S-A-*, no circuit has imposed a so-called "reporting requirement." *Castro-Martinez v. Holder*, 674 F.3d 1073, 1080–81 & n.1 (9th Cir. 2011) ("To be clear '[t]he reporting of private persecution to the authorities is not . . . an essential requirement for establishing government unwillingness or inability to control attackers.'" (alteration in original) (citation omitted)). Instead, most circuits require an alien to show, beyond mere speculation, what a government *would have done* had the alien sought government protection (namely, that it would have been unable or unwilling to protect her). See, e.g., *Almutairi v. Holder*, 722 F.3d 996, 1003 (7th Cir. 2013) (concluding that the alien had not shown that the Kuwaiti Government was unable or unwilling to protect him from private threats because he never reported the threats to the authorities and the alien "could only speculate that the Kuwaiti government might not protect him if he did seek its help"); *Shaghil v. Holder*, 638 F.3d 828, 834 (8th Cir. 2011) (finding it significant that the alien never reported the persecution to the police because there was "no evidence the government was unable or unwilling to control [the alien's] assailants in this case, and generalized evidence of occasional police failures, without more, is insufficient to show" that reporting would have been futile); *Mejilla-Romero*, 600 F.3d at 73–74 (finding that the record did not support the alien's contention that his failure to report a gang attack was justified because the record showed that the Honduran Government was committed to combatting gang violence and the police had previously intervened on the alien's behalf); *Lopez v. U.S. Att'y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007) (holding that "[a]lthough the failure to report persecution to local government authorities generally is fatal to an asylum claim, . . . it would be excused where the [the alien] convincingly demonstrates that those authorities would have been unable or unwilling to protect her, and for that reason she could not rely on them" (citing *Matter of S-A-*, 22 I&N Dec. at 1335)); *Montes v. Holder*, 394 F. App'x 95, 99 (5th Cir. 2010); *Procel v. Att'y Gen. of U.S.*, 374 F. App'x 354, 356 (3d Cir. 2010); *El Ghorbi v. Mukasey*, 281



F. App'x 514, 517 (6th Cir. 2008); *Xi Yan Lin v. U.S. Att'y Gen.*, 272 F. App'x 51, 53 (2d Cir. 2008) (finding that the alien failed to show that the Chinese Government was "unable or unwilling to control" her husband's abuse where she made no effort to seek assistance and the record indicated that the Government had taken an "increased interest in preventing domestic violence").

The circuit with the most developed law on this issue is the Ninth Circuit. See generally *Vitug*, 723 F.3d at 1065; *Castro-Martinez*, 674 F.3d at 1080–81; *Afriyie v. Holder*, 613 F.3d 924, 927–28, 932 (9th Cir. 2010); *Rahimzadeh v. Holder*, 613 F.3d 916, 922 (9th Cir. 2010); *Ornelas-Chavez*, 458 F.3d at 1057; *Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005); *Deloso v. Ashcroft*, 393 F.3d 907, 858, 866 n.5 (9th Cir. 2005). The circuit's decision in *Castro-Martinez*, in particular, contains the most in-depth discussion of the issue to-date. Most notably, this decision discusses the types of evidence an alien may present to fill the evidentiary gap and show, beyond mere speculation, what the government *would have done* had the alien sought government protection.

The alien in *Castro-Martinez* feared returning to Mexico because he had been raped by a group of teenagers as a child. The teenagers threatened the alien and instructed him not to report the rape to the authorities. Based on these threats, the alien did not report the rape and fled the country. The Ninth Circuit reiterated that it did not require an alien to report private persecution in order to establish that a government was unable or unwilling to control such conduct. *Castro-Martinez*, 674 F.3d at 1080–81. The court stated, moreover, that it had never required "any victim, let alone a child, . . . to report a sexual assault to the authorities." *Id.* at 1081.

Nevertheless, the court found that the alien's failure to report the rape to the Mexican authorities was material insofar as it left a "gap in proof about how the government would [have] respond[ed]" had the alien reported the rape. *Id.* (quoting *Rahimzadeh*, 613 F.3d at 922) (internal quotation marks omitted). The court determined that an alien could fill this evidentiary gap in four different ways. First, the alien could "demonstrate the government's lack of ability or willingness to respond to violence by 'establishing that private persecution of a particular sort is widespread and well-known but not controlled by the government.'" *Id.* (quoting same). Second, the alien could "show[] that [he or] others have

made reports of similar incidents to no avail." *Id.* (quoting same) (internal quotation marks omitted); see also *Matter of O-Z- & I-Z-*, 22 I&N Dec. at 26. Third, the alien could meet his burden by "demonstrating that a country's laws or customs effectively deprive [him] of any meaningful recourse to governmental protection." *Castro-Martinez*, 674 F.3d at 1081 (quoting *Rahimzadeh*, 613 F.3d at 921) (internal quotation marks omitted); see also *Matter of S-A-*, 22 I&N Dec. at 1330, 1332–33, 1335. Finally, the alien could also fill the evidentiary gap by "convincingly establish[ing] that [going to the authorities] would have been futile or would have subjected [the individual] to further abuse." *Castro-Martinez*, 674 F.3d at 1081 (alterations in original) (quoting *Rahimzadeh*, 613 F.3d at 922) (internal quotation marks omitted).

The court found the alien's unsubstantiated assertions that reporting the rape would have been futile or would have subjected him to an increased risk of harm, "without more, [were] not sufficient to fill the gaps in the record regarding how the Mexican government would have responded had [the alien] reported his attacks." *Id.* In fact, the court found that nothing in the record indicated that the Mexican authorities would have ignored the rape of a child or that authorities would have failed to provide such a child with protection. Accordingly, the Ninth Circuit declined to grant the alien's petition for review and upheld the Board's denial of his application for asylum and withholding under the Act.

### *Effective Law or Paper Tiger?*

Like an alien's failure to report, the mere existence of a law or government policy in the country of removal prohibiting the private persecution at issue is material to, but *not* necessarily dispositive of, whether the government is able and willing to control such conduct. When there is evidence of a law or policy barring private persecution, an adjudicator should consider and address the efficacy of the law or policy. For example, what are the punishments imposed by the legal regime or policy? What defenses does the law provide to the alleged persecutor? What societal values does the legal regime or policy reflect? What is the leadership's attitude toward the law or policy? See generally *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011); *Fiadjoe v. Att'y Gen. of U.S.*, 411 F.3d 135, 160–61 (3d Cir. 2005).

While the alien in *Sarhan* was living in the United

States, her cousin spread false rumors throughout the alien's community in Jordan that the alien had committed adultery. The alien's brother caught wind of these rumors, believed them, and repeatedly threatened to kill the alien upon her return to Jordan in order to restore the family's honor. In other words, the alien's brother was threatening to commit a so-called "honor crime" or "honor killing." *Sarhan*, 658 F.3d at 651, 657. The Immigration Judge denied the alien's application for withholding of removal under the Act, finding that the Jordanian Government was able and willing to protect the alien from her brother because the record reflected that the Jordanian Government criminalizes "honor killings" in its penal code and that the perpetrators of these killings are invariably prosecuted and convicted. The Immigration Judge recognized that "honor killings" were punished less severely than other forms of premeditated murder. However, the Immigration Judge observed that the Jordanian Government was "*trying to reform* the penal code" and institute stricter punishments. *Id.* at 660. The Board affirmed the Immigration Judge's decision for similar reasons.

The Seventh Circuit rejected the Immigration Judge's and the Board's analyses. The court acknowledged that the perpetrators of "honor killings" were invariably convicted and punished for their crimes. In fact, the Jordanian Government had obtained 17 convictions for each of the 17 "honor killings" perpetrated in 2007. Nevertheless, the court concluded that "[p]rosecution at times is an empty gesture." *Id.* at 658. The court found it significant that although all other forms of premeditated murder were punished by death in Jordan, the average sentence for an "honor killing" was 6 months' imprisonment or less. The court found such sentences to be *de minimis*, "result[ing] in little more than a slap on the wrist." *Id.* In addition, the only form of protection the Jordanian Government offered to potential "honor killing" victims was voluntary, indefinite incarceration of the victim. And in some cases, the court observed, potential victims of "honor crimes" remained in voluntarily incarceration for up to 20 years.

In the Seventh Circuit's view, even though the Jordanian Penal Code prohibited "honor crimes," the record compelled the conclusion that the Jordanian Government was unable or unwilling to protect potential "honor killing" victims. The court noted that "[a] six-month sentence for [an 'honor killing,' a] kind of premeditated murder, when all other murders are punished much more

severely, sends a strong social message of toleration for the practice." *Id.* According to the court, "[t]he legal regime and the minimal punishments that result mean that the Jordanian government at best does almost nothing and at worst promotes the practice of honor killings." *Id.* at 659.

The court additionally found that the Jordanian Government's *attempts* to reform its Penal Code in order to punish "honor killings" more severely were insufficient evidence of "concrete government action." *Id.* at 660 ("Attempts to amend laws to help curb violence against women are welcome steps, but they are not evidence that the government of Jordan has the power or the desire to protect a" potential victim of an "honor crime"). In fact, the court found that the Jordanian Government's repeated failures to institute better protections for potential victims reflected "a widespread unwillingness to recognize the abuse involved or take action against the problem." *Id.* at 659. Finally, the court noted that voluntary, indefinite incarceration of potential victims was not a cognizable form of government protection; it was "direct persecution, in the form of deprivation of an innocent person's liberty, by the government." *Id.* at 660.

Statements made by a country's leadership disparaging a law or policy which prohibits private persecution (and/or statements approving of the banned practice) may also be relevant in assessing whether a government is willing and able to effectively enforce such a prohibition. *See Fiadjoe*, 411 F.3d at 160–61. The alien in *Fiadjoe* was a victim of *Trokosi*, a form of ritualistic slavery customary among some tribes in Ghana. The alien was enslaved by her father who repeatedly beat and sexually assaulted her. The Immigration Judge denied the alien's application for asylum and withholding of removal, in part, because the alien had not shown that the Ghanaian Government was unable or unwilling to control her father. The Immigration Judge based this conclusion on evidence that the Ghanaian Constitution prohibited slavery, that the Ghanaian Government had prohibited *Trokosi*, and that several thousand slaves were freed as a result. The Board affirmed but the Third Circuit disagreed with the Immigration Judge's conclusion.

The court noted that the practice of *Trokosi* continued in Ghana despite its prohibition. In fact, the Ghanaian Government had not prosecuted a single *Trokosi* practitioner since the practice was banned. The court additionally cited statements made by Ghana's president

and a presidential aide which approved of Trokosi and were critical of anti-Trokosi activism as further evidence that the Ghanaian Government had little desire to protect Trokosi victims. *Id.* at 161 (observing that Ghana’s “most powerful man” “Jerry Rawlings, the country’s charismatic if not exactly democratic, president . . . has spoken of Trokosi as an important part of Ghana’s cultural heritage”); *see also id.* at 161 n.5 (noting that the record contained a statement by “a presidential aide criticiz[ing] anti-Trokosi activists for being insensitive to indigenous cultural and ‘religious’ beliefs and practices”). The court found that the Ghanaian leadership’s critical attitude toward the Government’s prohibition of Trokosi was highly relevant to assessing the Ghanaian Government’s ability and willingness to protect Trokosi victims because such statements reflected “the deep hold that the Trokosi religion has upon substantial elements of the Ghanaian people.” *Id.* at 161.

Accordingly, *Sarhan* and *Fiadjoe* stand for the proposition that the mere existence of a legal regime or government policy to combat private persecution is not necessarily evidence of a government’s ability and willingness to control persecutors. To determine a government’s willingness and ability to provide adequate protection to an individual protected by a law or policy, adjudicators should also examine: the *efficacy* of such legal regimes or policies (that is, the defenses it provides to private persecutors, the manner in which the law or policy is enforced, and the punishments imposed); what those laws or policies say about a society’s view of the banned practice; and the government’s leadership’s attitudes toward the law or policy. *See Sarhan*, 658 F.3d at 657–60; *Fiadjoe*, 411 F.3d at 160–61; *cf. Bal v. Att’y Gen. of U.S.*, 406 F. App’x 640, 643 (3d Cir. 2011) (concluding that the record did not compel a finding that the Turkish Government would be unable or unwilling to protect the alien from future harm because the State Department report indicated that Turkish law prohibited “honor killings,” violators were subject to life imprisonment, and the alien did not identify any evidence indicating that the Turkish police would refuse to protect him).<sup>4</sup>

### *Willingness versus Ability*

Adjudicators should be mindful that the “unable or willing” standard is set forth in the disjunctive. As a result, there may be instances where a government is *willing* to control a private persecutor, but is *unable* to do

so. An obvious example of a government that is *unable* to control private conduct would be a failed state incapable of enforcing its own laws or of controlling its population. *See Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (finding that the former Somalian Government was unable to effectively protect the alien from female genital mutilation (“FGM”) because, “[a]lthough the former government adopted a policy favoring the eradication of [FGM] in 1988, the central authority in Somalia subsequently fell and the policy was never implemented”; thus “[t]here does not appear to be any effective protection at present from FGM for an unwilling woman or girl”). Another example might be a government that is battling separatists or insurgents who control large swathes of a country’s territory. *See, e.g., Khatkhat v. Holder*, 704 F.3d 197, 206 (1st Cir. 2013) (holding that although the Pakistani Government had taken military action against the Taliban in the alien’s home province, “such military action indicates that the Pakistani government is *willing* to take on the Taliban, [but] such action does not show that the Pakistani government is *able* to protect its citizens from Taliban attacks”); *Hor v. Gonzales*, 421 F.3d 497, 498–99, 502 (7th Cir. 2005) (finding “strong evidence” that the Algerian Government was unable to protect the alien from Islamist separatists because the Algerian military informed the alien (a veteran) that they could offer him nothing in the way of protection and an Algerian court advised the alien to stay safe by “maintain[ing] a low profile”).

Another, more challenging, example might involve a government that is struggling to combat criminal elements (e.g., drug cartels, gangs, and human traffickers) operating in its territory. *See Madrigal*, 716 F.3d at 506–07; *Garcia*, 665 F.3d at 499–501, 503; *Burbiene v. Holder*, 568 F.3d 251, 255–56 (1st Cir. 2009). These cases often prove more challenging because they require adjudicators to assess the “*efficacy*” of a government’s efforts to combat these criminal elements. *See Madrigal*, 716 F.3d at 506 (emphasis added).

The alien in *Madrigal* was a former Mexican army soldier who had been threatened, shot at, and kidnapped by members of the Los Zetas drug cartel. The Immigration Judge and the Board denied the alien’s application for asylum and withholding of removal under the Act, finding that the Mexican Federal Government’s substantial law enforcement and military efforts to combat drug cartels and eliminate cartel-related violence evidenced the



Mexican Government's willingness and ability to control members of Los Zetas. The Ninth Circuit disagreed, finding that the Board's analysis was based on legal error.

According to the court, the Board's analysis "focused only on the Mexican government's willingness to control Los Zetas, not its *ability* to do so. The [Board] cited various statistics on the efforts of the national Mexican government to combat drug violence, but it did not examine the efficacy of those efforts." *Madrigal*, 716 F.3d at 506. The court noted that "[s]ignificant evidence in the record call[ed] into doubt the Mexican government's ability to control Los Zetas." *Id.* For instance, the country conditions evidence indicated "that violent crime traceable to drug cartels remains high despite the Mexican government's efforts to quell it." *Id.* at 506–07. "Furthermore, notwithstanding the superior efforts of the Mexican government at the national level, corruption at the state and local levels 'continue[d] to be a problem.'" *Id.* at 507 (citation omitted). Finally, the court found that the Mexican government's arrests of "79,000 people [over 7 years] on drug trafficking related charges"—may be of limited practical significance to [the alien's] situation, because corruption is also rampant among prison guards, and prisoners can and do break out of prison with the guards' help." *Id.* Because the Board did not appear to consider the efficacy of the Mexican Government's efforts to control members of the Los Zetas cartel, the court remanded the case for further analysis.

Thus, *Madrigal* stands for the proposition that even a government's "superior efforts" to combat criminal elements may only reflect its *willingness* to control such individuals, not its actual *ability* to do so. *See id.* at 506–07; *see also Garcia*, 665 F.3d at 503 (concluding that "although the Guatemalan government displayed *great willingness* to protect [the alien] before and after her testimony in the . . . murder trial, this willingness sheds no light on Guatemala's *ability* to protect her. The fact that Guatemala saw fit to relocate [the alien] to Mexico is tantamount to an admission that it could not protect her [from the gang] in Guatemala" (first emphasis added)). Nevertheless, *Madrigal*, *Garcia*, and cases like them fail to answer a crucial question: How should adjudicators assess the *efficacy* of a government's efforts to protect an alien? Or, put another way, how exactly should adjudicators quantify a government's *inability* to control private conduct?

## Quantifying a Government's Inability

The Seventh Circuit has noted that a government need not provide "perfect law enforcement" to its citizens to be deemed willing and able to protect them from persecution. *See Urbina-Dore v. Holder*, 735 F.3d 952, 954 (7th Cir. 2013). Nevertheless, it is unclear just how far a government may stray from ideal law enforcement before it is deemed unable to control private persecution. *See id.* (citing *Cece*, 733 F.3d at 679–80 (Easterbrook, J., dissenting) (observing that the utility of the "unable or unwilling" to control standard "is limited when we do not know how much shortfall in law enforcement counts as 'inability' to protect citizens")); *see also Damayanti v. Gonzales*, 209 F. App'x 601, 603 (7th Cir. 2006) (observing that government "protection occasionally fails, but *perfection is not required*" (emphasis added)).

The Board first attempted to refine the meaning of a government's inability to control private conduct in *Matter of McMullen*, 17 I&N Dec. 542. The alien in *Matter of McMullen* claimed that he would be killed by a terrorist organization known as the Provisional Irish Republican Army if deported to Ireland. The Board denied the alien's asylum claim, finding that while the evidence reflected the Irish Government's "difficulty in controlling terrorism" it did not establish that "the government there, which is a stable one, would not be *able*, if necessary, to protect the [him]." *Id.* at 546 (emphasis added). Thus, according to the Board in *McMullen*, a stable government's mere "difficulty . . . controlling" private conduct is not indicative of that government's *inability* to do so. *Id.*

The Fifth, Seventh, and Eleventh Circuits use a similar standard to measure a government's inability to control private persecution. Each of these circuits has defined a government's inability to protect a victim from private persecution as a "complete helplessness to protect [such] victims." *Bueso-Avila v. Holder*, 663 F.3d 934, 936 n.2 (7th Cir. 2011) (quoting *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)) (internal quotation mark omitted); *Guillen-Hernandez v. Holder*, 592 F.3d 883, 886–87 (8th Cir. 2010) (quoting *Menjivar*, 416 F.3d at 921 (citing the "complete helplessness" standard enunciated in *Galina* and deferring to Board's interpretation of government inability in *Matter of McMullen*)); *Shehu v. Gonzales*, 443 F.3d 435, 437 (5th Cir. 2006) (quoting *Galina*, 213 F.3d at 958).

In *Guillen-Hernandez*, the aliens (siblings) feared that an individual named Romel, who had killed their father and brother, would harm them upon their removal to El Salvador. Following the murders, the police initiated an investigation, which resulted in Romel's arrest and trial for the murders. Romel failed to appear for the last hearing of his murder trial and was convicted in absentia. It was suspected that Romel went into hiding. A warrant was issued for Romel's arrest, but he was never apprehended. Seven years after the murders, the aliens immigrated to the United States. During that 7 year period, the aliens lived in El Salvador without incident. Based on this evidence, the Immigration Judge and the Board concluded that the aliens had not shown that the Salvadoran Government was unable or unwilling to protect them. The Eighth Circuit agreed.

First, the court found that the "extensive police investigation, trial, and conviction of Romel amply support[ed] the [Board's] finding that the Salvadoran government was *willing* to control Romel." *Guillen-Hernandez*, 592 F.3d at 887 (emphasis added). The court acknowledged that the police never apprehended Romel. However, this fact, alone, was not demonstrative of the Salvadoran Government's "complete *helplessness* to protect" the aliens. *Id.* (emphasis added). The court observed that "none of the [aliens] experienced any actual harm during the seven years between the murders and their arrival in the United States." *Id.* The court additionally concluded that "[w]hile Romel's disappearance could conceivably be evidence of El Salvador's unwillingness or ineffectiveness to control Romel, it is also substantial evidence that Romel fears punishment at the hands of a government *ready and willing to enforce its criminal laws*." *Id.* (emphasis added). Thus, the Eighth Circuit's decision in *Guillen-Hernandez* indicates that occasional instances of government ineffectiveness (namely, in failing to apprehend a convicted murderer) are not necessarily indicative of its inability to control such an individual or to protect potential victims if the record contains other evidence of government effectiveness.

The First Circuit has not formally adopted the "complete helplessness" standard. Instead, it looks to see whether the government's inability to control criminal conduct is distinguishable from any other government's struggles to control a criminal element. See *Khan v. Holder*, 727 F.3d 1, 8 (1st Cir. 2013) (citing *Burbiene*, 568 F.3d at 255). In *Burbiene*, the alien, a Lithuanian

who feared that she would be kidnapped by human traffickers, argued that the Lithuanian Government was unable to control human trafficking activity. The First Circuit upheld the Board's decision to deny the alien asylum, finding that "Lithuania is 'making every effort to combat' human trafficking, 'a difficult task not only for the government of Lithuania, but for any government in the world.'" *Id.* at 255 (citation omitted). Citing the State Department report, the court noted that the Lithuanian government had strengthened its laws to better combat human traffickers, investigated trafficking organizations, instituted criminal proceedings against traffickers, and provided assistance to trafficking victims.

The court acknowledged that the Lithuanian Government "has not been able to completely eradicate the problem of human trafficking within its borders, and that the problem persists despite . . . 'significant efforts' by the government." *Id.* However, the court found that such a record did not demonstrate "that Lithuania's inability to stop the problem is *distinguishable from any other government's struggles to combat a criminal element*. Lithuania has experienced both setbacks and successes in its fight against this crime. But these circumstances do not subject the victims of human trafficking to 'persecution' under the [Act]." *Id.* at 255–56 (emphasis added).<sup>5</sup>

## Conclusion

Many challenges arise in assessing whether a government is unable or unwilling to control private persecution. This article has focused on only a few of those challenges. Adjudicators should be mindful of the appropriate standard of review for assessing this issue and also keep in mind, in evaluating past persecution, that general country conditions regarding government effectiveness and ineffectiveness do not trump evidence relating to the government's actual response to an alien's requests for government intercession. An alien's failure to report private persecution, and evidence of a law or government policy barring the private persecution at issue, are material to but not dispositive of a government's willingness and ability to intervene. Further, a government's willingness to control private conduct is distinct from its ability to do so. The largest outstanding issue facing adjudicators is quantifying a government's inability to control private persecution. As asylum and withholding of removal claims under the Act based on

privately inflicted harm become increasingly common, the Board and the circuits will necessarily have to refine the standards for measuring just how far a government may depart from ideal law enforcement before it is deemed either complicit in private persecution or incapable of stopping it.

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1. Persecution may also be established by showing that the government is unwilling or unable to *protect* the applicant from private persecution. The circuits use the phrases “unable or unwilling to *control*” and “unable or unwilling” to *protect* interchangeably. See, e.g., *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005) (stating that an applicant can show the government is “unable or unwilling to *control*” private acts by establishing that “the government condoned [the private acts] or at least demonstrated a complete helplessness to *protect* the victims”) (emphases added)). This article will do the same.

2. In the event an applicant for asylum or withholding of removal under the Act establishes past persecution, the burden generally shifts to the Department of Homeland Security to rebut the presumption that the alien possesses a well-founded fear of persecution. See 8 C.F.R. §§ 1208.13(b)(1)(i)(A), (B), (ii), 1208.16(b)(1)(i)(A), (B), (ii). But see 8 C.F.R. §§ 1208.13(b)(1), 1208.16(b)(1)(iii). This article will only discuss the contours of an alien’s burden of proof in establishing past persecution.

3. Persecution must be inflicted “on account of” one of the five protected grounds listed under section 101(a)(42)(A) of the Act (providing that an alien qualifies as a refugee if he or she fears “persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”); see also section 241(b)(3)(A) of the Act (rendering an alien eligible for withholding of removal under the Act if the alien would suffer persecution on account of his or her race, religion, nationality, membership in a particular social group, or political opinion). However, it is important for adjudicators to understand that an alien *does not* have the burden to establish that a government’s refusal to protect him or her from private persecution was “on account of” one of the five protected grounds. See *Matter of R-A-*, 22 I&N Dec. 906, 923 (BIA 1999) (en banc) (“[We] understand the ‘on account of’ test to direct an inquiry into the motives of the entity actually inflicting the harm.”), *vacated* 22 I&N Dec. 906 (A.G. 2001), *remanded*, 23 I&N Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I&N Dec. 629 (A.G. 2008). An Immigration Judge’s confusion of the “unable or unwilling” to control and “on account of” issues was responsible, at least in part, for the Third Circuit’s decision to remand *Valdiviezo-Galdamez v. Att’y Gen. of U.S.* (*Valdiviezo-Galdamez I*), 502 F.3d 285, 289 (3d Cir. 2007) (finding that the Immigration Judge erred “by placing the burden on [the alien] to prove *both* that the police refused to protect him from the gang members and that this refusal was ‘on account of’ [a protected ground]”).

4. Besides affecting the assessment of a government’s ability and willingness to control private conduct, evidence of an effective law may also influence the assessment of the social distinction of a proposed particular social group (“PSG”). “Social distinction refers to recognition by society . . . . To be socially distinct, a group need not be seen by society; it must instead be *perceived* as a group by society.” *Matter of W-G-R-*, 26 I&N Dec. at 216. The Board has held that evidence of social distinction may “include whether the society in question recognizes the need to offer protection to [the group], including whether the country has criminal laws designed to protect [the group], whether those laws are *effectively enforced*, and other sociopolitical factors.” *Matter of A-R-C-G-*, 26 I&N Dec. at 394 (emphasis added); cf. *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013) (en banc)

(“It is difficult to imagine better evidence that a society recognizes a particular class of individuals as uniquely vulnerable, because of their group perception by gang members, than that a special witness protection law has been tailored to its characteristics.”). It is notable that the Board cited *effective* enforcement as a criterion for social distinction in *Matter of A-R-C-G-*. Obviously, an *effectively* enforced law would be highly relevant to assessing a government’s willingness and ability to protect an alien shielded by such a law. However, it remains to be seen whether the Board or the circuits would find that an *ineffectively* enforced law, tailored to protect a particular group, like the laws discussed in *Sarhan* and *Fiadjoe*, would be demonstrative of a group’s social distinction.

5. To the author’s knowledge the Ninth Circuit is the only circuit that has held that government inaction stemming from a lack of financial resources is indicative of a government’s inability to control private conduct. *Doe*, 736 F.3d at 878 (noting that “[i]t does not matter that financial considerations may account for such an inability to stop elements of ethnic persecution. What matters instead is that the government ‘is unwilling or *unable* to control those elements of its society’ committing the acts of persecution”) (quoting *Avetova-Eliseva v. INS*, 213 F.3d 1192, 1198 (9th Cir. 2000) (holding that “any lack of funding might be labeled as a governmental choice [made by the Russian Government] (contrast the current Russian military campaign in Chechnya)”) (internal quotation marks omitted). The Third Circuit has signaled its reluctance to “second-guess” the manner in which a country allocates its scarce resources, but it did not rule out the possibility that a “disproportionate allocation of scarce resources” may, in some cases, be indicative of a government’s inability or unwillingness to protect vulnerable individuals. See *Soobrian v. Att’y Gen. of U.S.*, 388 F. App’x 182, 191 (3d Cir. 2010).

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