THE WELL-FOUNDED FEAR STANDARD IN REFUGEE ASYLUM: WILL IT STILL PROVIDE HOPE FOR THE OPPRESSED?

TABLE OF CONTENTS

I. INTRODUCTION

Many attorneys, to the extent they consider it at all, believe immigration law is dull.[1] Immigration law consists of a patchwork of statutes and regulations.[2] Even citations to the Immigration and Nationality Act[3] refer to its placement in "scattered sections of 8 U.S.C."[4] Immigration business is viewed as mundane, routine, and best left to the Immigration and Naturalization Service (INS) rather than the already overburdened court system.[5]

---

1. Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. REV. 413, 414 (1993).

2. *Id.* at 414-15.

3. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952). Recently, the Immigration and Nationality Act underwent changes in several respects including revisions to the asylum process and by "providing a mechanism for the determination and review of certain applicants who demonstrate a credible fear of persecution if returned to their own country." Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,312, 10,312 (1997); *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). The well-founded fear language in § 1101(a)(42)(A), which is the central focus of this Note, remained unchanged. *See* 8 U.S.C.A. § 1101(a)(42)(A) (West Supp. 1997).

4. Johnson, *supra* note 1, at 417 n.11.

5. *Id.* at 414.

Consider, conversely, the position of a person seeking asylum in the United States. Imagine being Sofia Campos-Guardado, a native of El Salvador, applying for asylum.[6] In 1984, Ms. Campos-Guardado was visiting her uncle in El Salvador who was chairman of a local agricultural cooperative.[7] During her visit, a woman and two men armed with guns arrived at her uncle's home.[8] They forced Ms. Campos-Guardado, her uncle, and her cousins to the waste pit on the farm, gagged them, and tied them up.[9] While the women watched, the attackers hacked up the men with machetes and eventually shot them to death.[10] The male intruders then raped the women, including Ms. Campos-Guardado.[11] After cutting them free, the attackers told them to flee or they would kill them.[12] The women ran and were eventually taken to the hospital.[13] Ms. Campos-Guardado who suffered a nervous breakdown, was hospitalized for fifteen days.[14]

When she later visited her parents, her mother introduced her to a cousin whom she recognized as one of her attackers.[15] On several occasions, he threatened to kill her and her family if she ever identified him.[16] As a result of these threats, Ms. Campos-Guardado fled to the United States.[17] She applied for asylum, but it was denied.[18]

The United States has historically considered itself a haven for refugees fleeing persecution or other forms of suffering.[19] "In 1783, George Washington proclaimed America a land whose 'bosom is open to receive the persecuted and oppressed of all nations.' A century later, Emma Lazarus put words in the Statue of Liberty's mouth, enabling her to welcome, indiscriminately, the 'huddled masses yearning to breathe free.'"[20] There are limits, however, to the United States' willingness to welcome newcomers.[21] Domestic policies and agendas are important in deciding how many immigrants may enter the United States and from what countries.[22] For example, Americans

---

6. *See* Campos-Guardado v. INS, 809 F.2d 285, 287 (5th Cir. 1987).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 291 (affirming the Board of Immigration Appeals decision that Ms. Campos-Guardado did not satisfy the "on account of" language of the statute); *see infra* notes 191-198 and accompanying text.
19. GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT xiii (1986).
20. *Id.*
21. *Id.* at xiii-xiv.
22. *Id.* at xvi. Between 1983 and 1991, asylum was granted at a rate exceeding 50% for people fleeing countries "hostile" to the United States, such as China and the Soviet Union. Sarah Ignatius, *Restricting the Rights of Asylum Seekers: The New Legislative and*

are more willing to welcome immigrants during labor shortages than during times of high unemployment and recession.[23]

Currently, the number of immigrants is growing, but they are "among the most disenfranchised members of our society, with language, cultural, and racial barriers prohibiting them from becoming full participating members of their communities."[24] Immigrants are treated as scapegoats, blamed by politicians and the media for the nation's economic problems.[25] They are also subject to new regulations by the INS restricting further entry.[26]

People seeking asylum are within this class of immigrants. As of December 1994, the INS carried a backlog of 425,000 asylum seekers, with some 13,000 new applications filed monthly.[27] As a result, the INS began changing its procedures so as to enable it to dispose of claims more quickly.[28] Doris Meissner, Commissioner of the INS, explained that change was needed due to the tremendous backlog and a concern for abuse within the system.[29] She stated that, under American law, applicants may be granted asylum only if they "demonstrate a well-founded fear of persecution in their homeland."[30] The purpose of the reform is to "re-establish a balance . . . between compassion and control: to grant asylum to persons who need protection and speed the process to remove nonmeritorious applicants from the country."[31]

This Note examines the "well-founded fear of persecution" standard as the means of obtaining asylum in the United States. The well-founded fear standard is the key to attaining a proper balance between compassion for those in need of refuge and protection of United States' economic interests. The well-founded fear standard for obtaining asylum in the United States originated in the Refugee Act of 1980.[32] This Note traces the origin of the well-founded fear standard and discusses its fit within the Act. Although the well-founded fear standard provides the best opportunity for refugees to obtain asylum, it is fraught with problems. The standard's vagueness is a source of conflict between the INS and courts. This Note examines the development of the well-founded fear standard from its inception through its defining period as a great hope for refugees, to near irrelevance with a

---

Administrative Proposals, 7 HARV. HUM. RTS. J. 225, 228-29 (1994). The acceptance rate was less than 3%, however, from countries supported by the United States, including Haiti, El Salvador, and Guatemala. *Id.* All three of these countries engaged in human rights abuses and violence toward their citizens during this time period. *Id.* at 229.

23. LOESCHER & SCANLAN, *supra* note 19, at xvi.

24. George E. Bushnell, Jr., *Coming to America*, A.B.A. J., Nov. 1994, at 8.

25. *Id.*

26. *Id.*

27. Steven Greenhouse, *U.S. Moves to Halt Abuses in Political Asylum Program*, N.Y. TIMES, Dec. 3, 1994, at 8.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

changing standard. Finally, this Note considers the standard's place in future asylum adjudication.

II. REFUGEE ACT OF 1980

The period of time between World War II and 1980 was a very open period for refugees entering the United States, especially for those fleeing communist countries.[33] United States foreign policy dominated the immigration process during this period, and facilitated the entry of favored refugees.[34] The Refugee Act of 1980 amended the Immigration and Nationality Act to include a definition of "refugee."[35] The 1980 Act brought the United States into compliance with the previously signed United Nations Protocol Relating to the Status of Refugees.[36]

A. *Purposes of the Act*

Until Congress passed the Refugee Act, the United States was out of compliance with the Protocol in two respects.[37] One deviation was the definition of refugee[38] and the other was the nonrefoulement policy—the prohibition on returning refugees to a country in which their lives or freedom would be threatened.[39] The Refugee Act addressed these concerns and thus brought the United States into compliance.[40]

A second purpose of the Refugee Act was to overcome the bias based on geography or ideology in order to permit refugees to seek asylum regardless of their political affiliation.[41] The Act removed the restriction that limited refugees to those coming from communist countries or the Middle East.[42] It allowed asylum on an individual basis for the first time; in order to seek refuge a person would not have to be a member of a special designated group.[43] Although the purposes of the Act are expressed as humanitarian, political considerations remain paramount.[44] The political considerations are evident when applicants from countries supported by the United States attempted to seek asylum and were denied refuge.[45]

---

33. Maureen O'Connor-Hurley, *The Asylum Process: Past, Present, and Future*, 26 NEW ENG. L. REV. 995, 1006 (1992).

34. *Id.* at 1005-06.

35. *See* 8 U.S.C. § 1101(a)(42)(A) (1994).

36. O'Connor-Hurley, *supra* note 33, at 1013; Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967; for the United States Nov. 1, 1968)).

37. O'Connor-Hurley, *supra* note 33, at 1008.

38. *Id.*

39. *Id.* at 1009.

40. *Id.* at 1008.

41. Kerry Knobelsdorff, INS v. Canas-Segovia*: Keeping Politics In and Refugees Out*, 8 CONN. J. INT'L L. 657, 663 (1993).

42. *Id.*

43. *Id.* at 663-64.

44. *Id.* at 664.

45. *Id.*

B. *Effects of the Act*

The Refugee Act of 1980 defined refugees as people who are unable or unwilling to return to their country of origin because of a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion."[46] Prior to the Refugee Act, the United States had no definition of refugee in its law.[47] This new definition is consistent with the United Nations Protocol.[48]

A second feature of the Refugee Act was to prohibit the deportation of an alien if the alien's life or freedom would be endangered in the alien's country of origin.[49] If a likelihood of persecution is proved, withholding deportation is mandatory.[50]

The Refugee Act created a means for applying for asylum under section 208 of the Act.[51] This section allows the Attorney General to provide asylum on a discretionary basis if the applicant is determined to be a refugee within section 1101(a)(42)(A).[52] The definition of refugee contains the well-founded fear standard.[53] Even if an applicant meets the definition of refugee, however, whether to grant asylum is in the discretion of the Attorney General.[54]

III. THE WELL-FOUNDED FEAR OF PERSECUTION STANDARD

A. *Overview of Asylum*

Even though the well-founded fear standard provides hope to applicants applying for asylum, there are two recurrent problems.[55] The first is the vagueness of the standard and the lack of guidance in interpreting the meaning.[56] The second, and related problem, is the conflict between the INS and the circuit courts.[57]

Despite the humanitarian possibilities for asylum, the vagueness of the well-founded fear standard presents serious problems.[58] In passing the Refugee Act, Congress failed to define persecution and refugee in a way to assist the INS and the courts in determining asylum.[59] The INS developed very

---

46. 8 U.S.C. § 1101(a)(42)(A) (1994).
47. O'Connor-Hurley, *supra* note 33, at 1008 n.107.
48. *Id.*
49. 8 U.S.C. § 1253(h).
50. *Id.*; *see also* Joni Andrioff, Note and Comment, *Proving the Existence of Persecution in Asylum and Withholding Claims*, 62 CHI.-KENT L. REV. 107, 112 (1985).
51. Immigration and Nationality Act § 208, 8 U.S.C. § 1158 (1994).
52. *Id.*
53. *See* 8 U.S.C. § 1101(a)(42)(A).
54. *See id.* § 1158(b)(1).
55. *See* O'Connor-Hurley, *supra* note 33, at 1020-22.
56. Anthony Asuncion, Note, INS v. Cardoza-Fonseca: *Establishment of a More Liberal Asylum Standard*, 37 AM. U. L. REV. 915, 945 (1988).
57. O'Connor-Hurley, *supra* note 33, at 1022.
58. Asuncion, *supra* note 56, at 945.
59. Andrioff, *supra* note 50, at 135.

restrictive standards, making it nearly impossible for applicants to obtain asylum.[60] The reluctance on the part of the Supreme Court to delineate the standard continues to cause disagreement and inconsistent results among the courts and the Board of Immigration Appeals (BIA).[61] The lack of clarity is particularly grave because a wrong decision carries with it the potential for persecution and death.[62]

Related to the vagueness of the well-founded fear standard is conflict between the INS and the courts. The Refugee Act was intended to eliminate ideological bias in the asylum process, but that purpose has not been achieved by the INS.[63] Critics claim the United States' asylum policy remains biased and overly strict.[64] "The government narrowly interpreted the refugee definition to exclude thousands of potential refugees."[65]

Ideology plays a significant role in the decisions made by the INS.[66] The requirement that the INS obtain an opinion from the State Department Bureau of Human Rights and Humanitarian Affairs (BHRHA) assures foreign policy influence in the decision.[67] Applicants coming from countries favored by the United States will have difficulty attaining asylum, despite the fact that many of those countries have poor human rights records.[68] The recommendations of the BHRHA strongly influence the asylum workers, who may have little or no outside information about the country from which the applicant is fleeing.[69]

Another concern about the asylum officers was the fact that most of these individuals rose through the ranks from working as enforcement personnel with the INS.[70] Critics question whether they are capable of separating their previous enforcement duties from the service aspect of adjudicating asylum applications.[71] These biases, coupled with inadequate training and understaffing, raise serious questions about the quality of the decisions.[72]

---

60. *Id.*

61. Asuncion, *supra* note 56, at 945-46.

62. *Id.* at 946.

63. O'Connor-Hurley, *supra* note 33, at 1036.

64. Matthew Joseph, Note, Immigration and Naturalization Service v. Elias-Zacarias: *Partially Closing the Door on Political Asylum*, 52 MD. L. REV. 478, 484 (1993).

65. *Id.* The Ninth Circuit broadly construed the definition of "refugee" to facilitate the granting of asylum to more applicants, while the INS restricted the definition. *Id.* at 489.

66. O'Connor-Hurley, *supra* note 33, at 1032.

67. *Id.*

68. *Id.* at 1032-33.

69. *Id.* at 1033.

70. *Id.*

71. *Id.*; *see also* Johnson, *supra* note 1, at 417. In criticizing the Supreme Court for its deference to the INS, one commentator claims "the INS is anti-immigrant and focuses almost exclusively on its enforcement rather than its service functions, and that the INS has been found by lower courts to engage in abusive and unlawful conduct toward immigrants, particularly persons seeking asylum in the United States." *Id.*

72. O'Connor-Hurley, *supra* note 33, at 1033.

In reviewing appeals from the BIA, the circuit courts often disagree with the BIA's findings.[73] The Ninth Circuit was especially progressive in its rulings in favor of refugees during the 1980s.[74] The Ninth Circuit reviewed a large number of claims from Salvadoran refugees.[75] The conflict between the Ninth Circuit and the BIA stemmed from the INS's implementation of United States foreign policy through the BHRHA.[76] The United States supported the government of El Salvador, which had numerous documented human rights violations.[77] The Salvadoran government was "fighting a Communist guerrilla faction."[78] Thus, the United States either refused to recognize well-documented human rights abuses or claimed the Salvadoran record was improving.[79] Asylum claims from Salvadoran applicants were summarily rejected by the INS.[80] The Ninth Circuit overturned several BIA decisions that strictly construed the BIA's restrictive definitions.[81] The well-founded fear standard was born out of the hope of refugees and the unsettled environment of vagueness and conflict.

B. *Origins of the Well-Founded Fear of Persecution Standard*

In 1968, the United States became a party to the United Nations Protocol Relating to the Status of Refugees.[82] According to this agreement, no changes were made to existing laws.[83] The President and the Senate apparently believed any changes in the law as a result of the treaty could be accommodated by administrative changes in the INS.[84]

The government was unaware of the effect of the definition of refugee and was unprepared for an unfortunate incident in which a Lithuanian sailor sought asylum.[85] The incident disturbed members of Congress, who asked

---

73. Joseph, *supra* note 64, at 486.

74. O'Connor-Hurley, *supra* note 33, at 1022.

75. *Id.* at 1022 n.236. The Ninth Circuit reviews the largest number of asylum decisions. *Id.* Many applicants live in California. *Id.* "Three hundred-fifty to four hundred thousand undocumented Central Americans are believed to be living in California and many of them seek asylum." *Id.* They comprised almost two-thirds of the claims in the Ninth Circuit during the 1980s. *Id.*

76. *Id.* at 1022.

77. *Id.*

78. *Id.*

79. *Id.* at 1023.

80. *Id.*

81. *Id.*

82. Davalene Cooper, Note, *Promised Land or Land of Broken Promises? Political Asylum in the United States*, 76 KY. L.J. 923, 928 (1988). The Protocol contained the definition of refugee and established the well-founded fear standard. *Id.*; *see supra* note 36 and accompanying text.

83. Cooper, *supra* note 82, at 928.

84. *Id.*

85. *Id.* Simar Kudirka jumped from a Soviet trawler and was rescued by the United States Coast Guard or Navy. *Id.* He requested asylum, but the INS had no procedures for handling asylum requests. *Id.* at 928-29. As a result, the United States sent him back to the Soviet Union. *Id.* at 929. The Soviet government then sent him to Siberia. *Id.*

the INS to implement an asylum procedure.[86] The INS attempted to do so without success.[87] This inability to promulgate regulations for asylum encouraged Congress to pass the Refugee Act.[88]

The Refugee Act of 1980 incorporated the Protocol's definition of refugee for asylum purposes.[89] The primary element in determining eligibility is whether an alien "is unable or unwilling to return to [the alien's country] . . . because of persecution or a well-founded fear of persecution."[90] The Refugee Act also provided for withholding deportation if the "alien's life or freedom would be threatened" in the event the applicant was forced to leave.[91] The Refugee Act allowed admission of refugees "when justified by humanitarian concerns or is otherwise in the national interest."[92] These changes were consistent with the language of the Protocol.[93]

Legislative history supports Congress' belief that the Refugee Act was essential for the United States to respond with flexibility toward refugees from around the world.[94] The Act failed, however, to define the standard of deciding eligibility for refugee asylum.[95] Thus, there has been a continuing controversy over the standard to apply for processing withholding of deportation and asylum.[96]

In the application for asylum following the Act, the INS treated asylum and withholding of deportation as if they required the same standard.[97] The circuit courts were divided over whether the well-founded fear standard of asylum was distinguishable from the clear probability standard of withholding of deportation.[98] The issue was brought to the attention of the Supreme Court in *INS v. Stevic*.[99]

Stevic, a Yugoslavian citizen, entered the United States on a visitor's visa and remained after its expiration.[100] He sought relief under section 243(h).[101] He claimed he was a member of an anti-Communist organization.[102] His father-in-law had been imprisoned in Yugoslavia for membership in that organization.[103] Stevic feared he would also be imprisoned if he returned to

---

86. *Id.*
87. *Id.*
88. *Id.*
89. Andrioff, *supra* note 50, at 114.
90. 8 U.S.C. § 1101(a)(42)(A) (1994).
91. *Id.* § 1253(h)(1).
92. *Id.* § 1157(a)(1).
93 Asuncion, *supra* note 56, at 926.
94. *Id.* at 927; *see also* H.R. REP. No. 96-608, 96th Cong., 1st Sess. 9 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 142.
95. Cooper, *supra* note 82, at 930.
96. *Id.*
97. *Id.*
98. Asuncion, *supra* note 56, at 927.
99. INS v. Stevic, 467 U.S. 407 (1984).
100. *Id.* at 409.
101. *Id.* at 410. Section 243(h) authorizes the Attorney General to withhold deportation of any alien who would be subject to persecution.
102. *Id.*
103. *Id.*

Yugoslavia.[104] His application was denied by an immigration judge.[105] The decision was affirmed by the BIA,[106] but was reversed by the Second Circuit.[107]

The Second Circuit maintained that the appropriate standard was well-founded fear of persecution rather than the clear probability of persecution standard.[108] The well-founded fear standard was viewed as more generous than the clear probability standard.[109] The INS believed the two standards were not significantly different and that Congress had intended to maintain the status quo in enacting the Refugee Act.[110] Thus, the clear probability standard still applies to withholding of deportation claims.[111]

The Supreme Court determined that an alien must prove a clear probability of persecution in order to obtain withholding of deportation under section 243(h).[112] The Court also acknowledged that asylum was a discretionary form of relief under section 208 and was subject only to the well-founded fear of persecution standard.[113] Therefore, the clear probability and the well-founded fear of persecution were distinct standards for refugees seeking relief.[114]

The Court agreed with the Second Circuit's conclusion that "the well-founded fear standard is more generous than the clear probability of persecution standard."[115] The Court chose not to interpret the meaning of the phrase well-founded fear, which is associated with the discretionary grant of asylum.[116] The definition of the well-founded fear standard was left to future cases.

C. *Defining the Well-Founded Fear Standard*

1. *Circuit Courts Take the Lead*

The decision in *INS v. Stevic*[117] left the lower courts without guidance in applying the standards in asylum cases.[118] The United States Courts of Appeals for the Sixth, Seventh, and Ninth Circuits applied the well-founded

---

104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 412; *see* Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982), *rev'd*, INS v. Stevic, 467 U.S. 407 (1984).
108. INS v. Stevic, 467 U.S. at 412.
109. *Id.* at 412-13 (citing Stevic v. Sava, 678 F.2d at 405-06).
110. *Id.* at 413.
111. *Id.*
112. *Id.* at 413.
113. *Id.* at 423.
114. *Id.* at 430.
115. *Id.* at 425.
116. *Id.* at 430.
117. INS v. Stevic, 467 U.S. 407 (1984).
118. Asuncion, *supra* note 56, at 930.

fear standard.[119] The Fifth Circuit also adopted the well-founded fear standard, but used the reasonable person standard to assess the application.[120] Disregarding the *Stevic* holding, the Third Circuit and the INS claimed that the clear probability standard was appropriate for both withholding of deportation and asylum claims.[121] This confusion and inconsistency among the circuit courts prompted the Supreme Court to accept *INS v. Cardoza-Fonseca* on certiorari to clarify the standard.[122]

The Seventh and Ninth Circuits provided contradictory leadership in determining the burden of proof necessary to satisfy the well-founded fear standard.[123] Those courts require objective and subjective components.[124] The Seventh Circuit explained that the clear probability standard required objective facts, but the well-founded fear standard could be met by uncorroborated testimony if the facts were specific.[125] The Ninth Circuit stated in *Del Valle v. INS*[126] that the well-founded fear standard has a subjective component that requires an assessment of an applicant's mental

---

119. *Id.* at 933 n.124 (citing cases from the respective circuits demonstrating the use of the well-founded fear standard). The Ninth Circuit in *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1455 (9th Cir. 1985), held that the BIA erred in using the "clear probability" standard and remanded for application of the well-founded fear standard. The Seventh Circuit in *Carvajal-Munoz v. INS*, 743 F.2d 562, 575 (7th Cir. 1984), differentiated between withholding of deportation and asylum, finding asylum to be a more lenient standard. The Sixth Circuit in *Youkhanna v. INS*, 749 F.2d 360, 362 (6th Cir. 1984), explained that the clear probability standard applies to withholding of deportation, and well-founded fear is the standard for asylum.

120. Asuncion, *supra* note 56, at 933 n.124; *see* Guevara-Flores v. INS, 786 F.2d 1242, 1249 (5th Cir. 1986) (determining that an applicant proves a "well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country").

121. Andrioff, *supra* note 50, at 116. The Third Circuit and the INS construed the standards as requiring a realistic likelihood of persecution if the applicant were deported. *Id.* In *Sotto v. INS*, 748 F.2d 832, 836 (3d Cir. 1984), the Third Circuit used the probability of persecution standard for both withholding of deportation and asylum claims. Asuncion, *supra* note 56, at 932. The Third Circuit maintained that the Supreme Court's failure in *Stevic* to define the standard required it to rely on its own precedent in *Rejaie v. INS*, 691 F.2d 139 (3d Cir. 1982). In that case, the Third Circuit determined the standards to be the same. *Id.* at 146. Because applicants frequently claimed both withholding of persecution and asylum, the court believed a single standard was logical and administratively convenient. Asuncion, *supra* note 56, at 933.

122. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

123. Joseph, *supra* note 64, at 487.

124. *Id.*

125. Carvajal-Munoz v. INS, 743 F.2d 562, 577 (7th Cir. 1984) ("[W]hen objective, corroborative evidence does not exist, petitioner's testimony must describe credibly and persuasively *specific, detailed* facts that demonstrate actual persecution on one of the specified grounds or give rise to an inference that some other good reason exists for petitioner to fear persecution on one of those grounds.").

126. Del Valle v. INS, 776 F.2d 1407 (9th Cir. 1985).

state.[127] According to the Ninth Circuit, the subjective component applies after the objective evidence has been received.[128]

Evidence documenting past persecution or threat of future persecution is usually sufficient to satisfy the objective component of the standard.[129] Evidence may include consistent statements by the applicant from the initial application to the hearing, corroboration by witness testimony, and documentation by letters or newspapers from the applicant's home country.[130] Frequently, however, refugees fleeing their country "are in no position to gather documentary evidence establishing specific or individual persecution or a threat of such persecution."[131] In *Bolanos-Hernandez v. INS*,[132] the Ninth Circuit noted that a requirement of corroboration "would result in the deportation of many people whose lives genuinely are in jeopardy. Authentic refugees rarely are able to offer direct corroboration of specific threats. . . . Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution."[133]

The lack of corroborating documentation makes the credibility, persuasiveness, and specificity of the applicant's testimony exceedingly important.[134] In *Carvajal-Munoz v. INS*,[135] the Seventh Circuit stated that uncorroborated testimony may be allowed only when no corroborative documentation exists.[136] In *Bolanos-Hernandez*, the Ninth Circuit was more accepting of uncorroborated testimony, even when it faced the dilemma of withholding deportation.[137]

The specificity required to prove persecution on the basis of political opinion is difficult for people fleeing countries with widespread violence and

---

127. *Id.* at 1411 (citing Cardoza-Fonseca v. INS, 767 F.2d 1448, 1452 (9th Cir. 1985)).

128. Del Valle v. INS, 776 F.2d at 1411 (citing Cardoza-Fonseca v. INS, 767 F.2d at 1453); *see also* Rodriguez-Rivera v. INS, 848 F.2d 998, 1001 (9th Cir. 1988) (noting that the well-founded fear standard contains both subjective and objective components); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1283 n.11 (9th Cir. 1985) (stating that an assessment of whether an applicant holds a "well-founded fear includes consideration of the applicant's state of mind").

129. Cardoza-Fonseca v. INS, 767 F.2d at 1453.

130. Del Valle v. INS, 776 F.2d at 1412 n.3.

131. Cardoza-Fonseca v. INS, 767 F.2d 1448, 1453 (9th Cir. 1985); *see* Carvajal-Munoz v. INS, 743 F.2d 562 (7th Cir. 1984). The court in *Carvajal-Munoz* recognized an applicant may not have documentary evidence. *Id.* at 574. Carvajal-Munoz was an Argentinean citizen, born in Chile, who sought asylum because the police arrested him numerous times in Buenos Aires while he attended street gatherings. *Id.* at 577. He maintained this persecution resulted from his birth in Chile, his political protests, and his renunciation of his Argentinean citizenship. *Id.* Because his testimony was inconsistent, and the facts lacked specificity, the court found he did not meet the well-founded fear standard. *Id.* at 579. The court denied him asylum. *Id.* at 580.

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

133. *Id.* at 1285.

134. *See* Carvajal-Munoz v. INS, 743 F.2d at 579 (denying asylum because of lack of credibility, corroboration, and specificity).

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

136. *Id.* at 574; Andrioff, *supra* note 50, at 130.

137. Bolanos-Hernandez v. INS, 767 F.2d at 1285.

political oppression.[138] Courts usually require some showing of an applicant being "singled out" for persecution.[139] In *Zepeda-Melendez v. INS*,[140] the Ninth Circuit disregarded the applicant's claim that his politically neutral position made him eligible for withholding of deportation.[141]

The following year, the Ninth Circuit in *Bolanos-Hernandez*, declared neutrality to be a political opinion.[142] In this case, Bolanos-Hernandez dissociated with a right-wing group of whom he had been a member.[143] He also refused to join the left-wing guerrillas who threatened his life for his refusal.[144] The court distinguished *Bolanos-Hernandez* from *Zepeda-Melendez* by stating that Bolanos-Hernandez had been singled out, threatened with death, and his position of neutrality was deliberate.[145] A rule requiring an applicant to express a political opinion consistent with one of the warring factions opposes the goals of the Refugee Act.[146] Such a position would only reward political extremists—not moderates in a conflict.[147]

The requirement that an individual be singled out because of group membership is especially unclear.[148] One court suggested an applicant could change a religious persecution case to persecution based on a political opinion because it would be easier to prove.[149] Persecution due to social grouping is troubling because it is not defined in the Act, nor in the *Handbook on Procedures and Criteria for Determining Refugee Status*.[150] The BIA defined persecution due to social grouping as "persecution directed toward an individual who is a member of a group of persons all of whom share a

---

138. Andrioff, *supra* note 50, at 121.

139. *Id.* at 122.

140. Zepeda-Melendez v. INS, 741 F.2d 285 (9th Cir. 1984).

141. *Id.* at 290. Zepeda-Melendez claimed government forces used his family's home during the day and the anti-government forces used it at night. *Id.* Neither knew about the other's use of the house. *Id.* When the anti-government forces decided to store weapons in the house, Zepeda-Melendez fled. *Id.* The Ninth Circuit decided the generalized persecution of the nation and Zepeda-Melendez's persecution did not qualify him for relief under section 243(h). *Id.* at 290; *cf.* Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286-88 (9th Cir. 1985) (stating that neutrality constitutes a political opinion).

142. Bolanos-Hernandez v. INS, 767 F.2d at 1287.

143. *Id.*

144. *Id.*

145. *Id.* at 1284; Andrioff, *supra* note 50, at 123.

146. Cardoza-Fonseca v. INS, 767 F.2d 1448, 1452 (9th Cir. 1985); Andrioff, *supra* note 50, at 123.

147. Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286 (9th Cir. 1985).

148. Andrioff, *supra* note 50, at 124-25.

149. *Id.* at 125; *see* Sarkis v. Nelson, 585 F. Supp. 235, 238 (E.D.N.Y. 1984), *modified sub nom.*, Sarkis v. Sava, 599 F. Supp. 724, 727 (E.D.N.Y. 1984).

150. Andrioff, *supra* note 50, at 125. The HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979) was compiled by the United Nations High Commissioner for Refugees as a guide to the requirement of the United Nations Protocol Relating to the Status of Refugees. *Id.* at 111 n.26.

common, immutable characteristic."[151] The BIA stated a case-by-case delineation would be necessary.[152]

The well-founded fear standard, which is based on the refugee definition in the Refugee Act, contains numerous elements to be clarified. Among these are when to use the well-founded fear standard instead of the clear probability standard, which standards require objective and subjective components, and what evidence will satisfy the burden of proof. These questions were addressed by the Supreme Court in *INS v. Cardoza-Fonseca*.[153]

2. INS v. Cardoza-Fonseca

Luz Marina Cardoza-Fonseca was a thirty-eight year old Nicaraguan woman who entered the United States as a visitor with her brother.[154] She overstayed her visitor's visa and faced deportation hearings when she requested withholding of deportation and asylum as a refugee.[155] In Nicaragua, her brother had been tortured and imprisoned because of his political activities.[156] Both she and her brother testified they believed the Sandinistas knew they fled Nicaragua together.[157] Although Ms. Cardoza-Fonseca was never politically active, she believed she would be interrogated, and her own political opposition would be brought to the attention of the government.[158] She feared she would be tortured if she returned.[159]

The immigration judge applied the same standard—clear probability of persecution—to both the withholding of deportation and the asylum claims.[160] He did not find her eligible for either claim.[161] The Ninth Circuit reversed and remanded her claims to the BIA for evaluation under the proper standards.[162] The Supreme Court then agreed to grant certiorari to resolve the conflict.[163]

The Supreme Court agreed with the Ninth Circuit that the well-founded fear of persecution standard applied to eligibility for asylum.[164] In characterizing the well-founded fear standard, the Court stated that the reference to fear in section 208(a) implied the decision will depend at least partly on the subjective mental state of the applicant.[165]

---

151. Matter of Acosta, 19 I. & N. Dec. 211, 233 (1985).
152. *Id.*
153. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).
154. *Id.* at 424.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 424-25.
159. *Id.* at 425.
160. *Id.*
161. *Id.*
162. *Id.* at 425-26.
163. *Id.* at 426.
164. *Id.* at 428.
165. *Id.* at 430-31. The Court declared that the "well-founded" portion of the standard does not detract from the subjective aspects. *Id.* at 431. "One can certainly have a well-founded

The Court found the difference between the two standards clear on the face of the statute, as well as in the legislative history.[166] In further interpretation of the definition of refugee, the Court found guidance in the *Handbook on Procedures and Criteria for Determining Refugee Status*.[167]

The Court believed that a case-by-case analysis would be necessary to further develop the well-founded fear standard.[168] In his concurring opinion, Justice Blackmun complimented the circuit courts for their "well-reasoned opinions . . . that almost uniformly have rejected the INS's misreading of statutory language and . . . provide an admirable example of the 'case-by-case adjudication' needed for the development of the standard."[169]

In anticipation of concerns about broadening the number of potentially eligible refugees, the Court quoted a house report in which the Committee acknowledged that the definition might expand the number of refugees eligible for asylum.[170] The Court stated that it was possible that the expansion could bring in more refugees than the United States could absorb, but that eligibility would not assure resettlement in this country.[171] The Court noted that Congress could have selected another means of limiting the number of refugees, but chose to give discretionary authority to the Attorney General.[172]

The Court asserted its "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[173] It pointed out that deportation was especially serious when an applicant would be "subject to death or persecution if forced to return to his or her home country."[174] To mitigate some of the concern, the Refugee Act gave the INS

---

fear of an event happening when there is less than a fifty percent chance of the occurrence taking place." *Id.* The Court quoted A. Grahl-Madsen:

> Let us . . . presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp. . . . In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have "well-founded fear of being persecuted" upon his eventual return.

Id. at 431 (quoting 1 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 180 (1966)).

166. *Id.* at 432.

167. *Id.* at 439. The Court explained that the *Handbook* lacked the force of law and did not bind the INS regarding asylum procedures under section 208(a). *Id.* at 439 n.22. It noted, however, that the *Handbook* gave "significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *Id.*

168. *Id.* at 448.

169. *Id.* at 451 (Blackmun, J., concurring). Justice Blackmun further stated: "The efforts of these courts stand in stark contrast to . . . the years of seeming purposeful blindness by the INS, which only now begins its task of developing the standard entrusted to its care." *Id.* at 452.

170. *Id.* at 444 (quoting H.R. REP. NO. 96-608, at 10 (1979)).

171. *Id.*

172. *Id.* at 444-45.

173. *Id.* at 449.

174. *Id.*

the necessary flexibility to accommodate situations in which refugees fled political or other oppression.[175]

D. *Limiting the Reach of the Well-Founded Fear Standard*

1. *Concerns Among Immigration Practitioners*

While some commentators viewed the decision in *Cardoza-Fonseca* as "an important touchstone for future liberal interpretations," other commentators were concerned with how the generous standard might be limited.[176] The Court's emphasis on the discretionary aspect of asylum concerned practitioners.[177] Some practitioners expressed misgivings about the lack of a clear definition of persecution and well-founded fear, which might allow the BIA to manipulate the definitions.[178] Continued political bias in decisions also caused concern.[179] The Court's failure to rule on the "singling out" requirement placed a heavy burden on the applicant.[180] These concerns left the well-founded fear standard open to criticism.[181] In reaction to the more liberal standard of well-founded fear, the BIA "increased the evidentiary burden necessary to prove persecution 'on account of' one of

---

175. *Id.* The concurrence and dissent in *INS v. Cardoza-Fonseca* predicted a future backlash. *Id.* at 452-60. In his concurring opinion, Justice Scalia agreed with the plain meaning of the well-founded fear standard, but criticized the extensive use of legislative history to arrive at the decision. *Id.* at 452 (Scalia, J., concurring). He also expressed disagreement with the majority's lack of deference to the administrative agency, the INS. *Id.* at 453. Justice Scalia believed the majority misinterpreted the holding in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "that courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent." INS v. Cardoza-Fonseca, 480 U.S. 421, 454 (1987) (Scalia, J., concurring). He believed the majority implied that the Court could substitute its construction of a statute for that of an agency whenever it differed. *Id.*

Justice Powell, in his dissent, stated that the BIA's interpretation of well-founded fear was reasonable. *Id.* at 460 (Powell, J., dissenting). He believed the interpretation of the standard was best left to the BIA because it was most familiar with the issues and the evidence presented. *Id.* He considered the INS the expert agency and recommended deference to its position. *Id.* The conflict over deference signaled a change in the Court's interpretation of asylum law. *See* Joseph, *supra* note 64, at 493.

176. Arthur C. Helton, INS v. Cardoza-Fonseca: *The Decision and Its Implications*, 16 N.Y.U. REV. L. & SOC. CHANGE 35, 51-52 (1987).

177. *Id.* at 52. Helton noted that applicants may be denied asylum on a discretionary basis for traveling in a "precipitous or irregular fashion" while they waited for processing, or for obtaining false documents to enter the country. *Id.* at 53. He claimed that the courts often viewed desperation as fraud or misrepresentation. *Id.* He viewed this kind of discretion as inconsistent with the humanitarian goals of the Refugee Act. *Id.*

178. Asuncion, *supra* note 56, at 941.

179. *Id.*

180. *Id.* at 942-43.

181. *Id.* at 942.

the enumerated elements."[182] This focus led to a new issue in asylum proceedings,[183] as addressed in *INS v. Elias-Zacarias.*[184]

2. INS v. Elias-Zacarias

Elias-Zacarias was a native of Guatemala who was arrested for illegal entry into the United States.[185] Elias-Zacarias sought asylum and withholding of deportation, claiming two armed guerrillas came to his home to recruit him.[186] When he refused, they threatened to return Elias-Zacarias.[187] Elias-Zacarias declined joining the guerrillas because they opposed the government, and he feared government retaliation against himself and his family.[188] He left Guatemala two months later.[189] The issue in the case was whether acts of conscription by guerrillas established persecution such that Elias-Zacarias had a well-founded fear of persecution.[190]

The Court failed to address the standards of proof for asylum, including well-founded fear and withholding of deportation.[191] Rather, the Court emphasized the definition of refugee in asylum proceedings and made each element of the definition "a separate burden of proof."[192] In its focus on the refugee definition, the Court found Elias-Zacarias did not satisfy the definition because he was not persecuted "on account of political opinion."[193] This change from the well-founded fear standard to a focus on the definition of refugee concerned immigration advocates.[194]

As a result of the transition to "on account of" language, the Court refused to recognize political neutrality as a political opinion within the definition.[195] The majority noted that Elias-Zacarias' refusal to join the

---

182. Craig A. Fielden, Note, *Persecution on Account of Political Opinion: "Refugee" Status After* INS v. Elias-Zacarias, *112 S. Ct. 812 (1992)*, 67 WASH. L. REV. 959, 962 (1992). The enumerated elements in the definition of refugee include persecution for "reasons of race, religion, nationality, membership in a particular social group, or political opinion." *See supra* note 46 and accompanying text.

183. *Id.* at 968-69.

184. INS v. Elias-Zacarias, 502 U.S. 478 (1992).

185. *Id.* at 479.

186. *Id.*

187. *Id.*

188. *Id.* at 480.

189. *Id.*

190. *Id.*

191. Joseph, *supra* note 64, at 493.

192. Fielden, *supra* note 182, at 975. Fielden believes the Court's focus on each element "frustrates the humanitarian purpose of the Refugee Act" and seriously limits the number of applicants who will be able to satisfy the definition. *Id.* He argues that the Court's attempt to restrict the number of refugees violates Congressional intent to create a broad class of aliens eligible for asylum. *Id.*

193. INS v. Elias-Zacarias, 502 U.S. at 481.

194. Asuncion, *supra* note 56, at 941.

195. Joseph, *supra* note 64, at 494. The Court disagreed with the Ninth Circuit's position in *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1985), that political neutrality constitutes a political opinion. INS v. Elias-Zacarias, 502 U.S. at 494 n.118.

guerrillas may have been for a nonpolitical reason.[196] The political opinion must be that of the victims, and they must clearly demonstrate the opinion.[197] Additionally, some evidence of the persecutors' motives are also necessary.[198]

In response to the majority's opinion, Justice Stevens dissented finding that Elias-Zacarias had proven a well-founded fear of harm or death if he returned to Guatemala.[199] He disagreed with the finding that Elias-Zacarias's fear of persecution was not "on account of . . . political opinion" because a political opinion may be "expressed negatively as well as affirmatively."[200] He declared that "the narrow, grudging construction of the concept of 'political opinion' that the Court adopts today is inconsistent" with the position taken toward the Refugee Act by the Court in *Cardoza-Fonseca*.[201] Among the inconsistencies was the failure to construe any ambiguities regarding eligibility in favor of the applicant.[202] Finally, he noted the statute does not require a showing of motivation by the persecutors.[203]

The Supreme Court rejected the position held by the majority of the circuit courts "that refugee status is a factual determination subject to a substantial evidence standard of review."[204] It pronounced a much more deferential standard of review—that an applicant could get judicial reversal only if the applicant presented evidence "so compelling that no reasonable factfinder could fail to find the requisite fear of persecution."[205] Obviously, it will be far more difficult for the courts to reverse a BIA decision.[206] The deference to the INS suggested by the dissenting opinion in *Cardoza-Fonseca* has become law.[207]

In its immigration decisions during the 1991 term, the Supreme Court consistently deferred to the BIA.[208] The Court ignored the fact that "the INS consistently has been criticized for abuse, ineptitude, and overemphasis on enforcement with a concomitant lack of sensitivity to the delicate life and liberty interests at stake, particularly in deportation proceedings."[209] The BIA

---

196. INS v. Elias-Zacarias, 502 U.S. at 482.

197. *Id.*

198. *Id.* The burden on applicants fleeing their homes is significant enough without having to gather documentation about persecutors' motives. Fielden, *supra* note 182, at 977. Persecutors' motives may not even be rational. *Id.* "Furthermore, the applicant will not know what motives the Court will find relevant . . . ." *Id.*

199. *Id.* at 484 (Stevens, J., dissenting).

200. *Id.* at 486. Justice Stevens gave examples of "negative" political opinions such as refusal to vote on election day or refusal to take an oath of allegiance. *Id.* He further stated that "'[c]hoosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction.'" *Id.* (quoting Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286 (9th Cir. 1985)).

201. *Id.* at 487.

202. *Id.* at 490.

203. *Id.* at 489.

204. Joseph, *supra* note 64, at 497.

205. INS v. Elias-Zacarias, 502 U.S. 478, 484 (1992).

206. Joseph, *supra* note 64, at 497.

207. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 460 (1987) (Powell, J., dissenting).

208. Johnson, *supra* note 1, at 417.

209. *Id.* at 453.

has been criticized for implementing foreign policy decisions of the President in violation of the Refugee Act.[210] Although life and liberty issues are in question, the Court paid relatively little concern in deferring to the agency decision.[211]

The Court limited its attention to the language of the statute, excluding any other information, such as legislative history.[212] Immigration and asylum have extensive legislative history that adds to and clarifies the language of the statute.[213] Failure to acknowledge this history results in particularly harsh outcomes.[214] The plain meaning approach in *Elias-Zacarias* is totally inconsistent with the rich analysis of *Cardoza-Fonseca.*[215] The Court "failed to reconcile *Cardoza-Fonseca's* liberal interpretation of the well-founded fear of persecution standard with *Elias-Zacarias'* narrow 'on account of' construction."[216] Both deference and plain meaning limit further inquiry on the part of the courts and will reduce appeals.[217]

E. *Post*-Elias-Zacarias *Cases: Is the Well-Founded Fear Standard Still Viable?*

After the decision in *Elias-Zacarias*, immigration experts found the BIA denying asylum to applicants with more disturbing claims than that of Elias-Zacarias.[218] Appellate courts seemed to be deferring to the INS and affirming their decisions.[219] The commentators admitted most of the decisions in asylum cases were neither published nor disseminated, so it was difficult to know the impact of *Elias-Zacarias.*[220] Some cases were particularly disturbing, such as sitations in which applicants suffered persecution, yet were not found to be refugees because their abuse was not the result of a political opinion.[221]

---

210. *Id.* at 417.

211. *Id.* at 417-18. Johnson believed that the Court was treating a life and death matter with no more concern than some perfunctory regulatory issue. *Id.*

212. *Id.* at 418.

213. *Id.*

214. *Id.*

215. *Id.* at 468.

216. *Id.*

217. *Id.* at 472.

218. *See* Steve Albert, *Is Appeals Board Slamming Door on Refugees? After Asylum Case, Standards Tighten*, LEGAL TIMES, Sept. 27, 1993, at 2.

219. *Id.* Kevin Johnson, Professor of Law at the University of California at Davis and an immigration expert, noted that "[b]efore Zacarias, most courts looked at BIA decisions to make sure they were correct. That doesn't happen now." *Id.*

220. *Id.*

221. *Id.* One example of this trend concerns the BIA's denial of asylum to an Indian Sikh who was beaten by police and harassed by Sikh militants. *Id.* The BIA found the beatings were for the purpose of obtaining information, not because of his political opinion. *Id.*

In another situation, a Sikh named Jagraj Singh provided food and his jeep to Sikh militants out of fear of persecution. *Id.* The police arrested him, beat him, shot him, and threatened to kill him. *Id.* Following his release, he was beaten again. *Id.* The BIA denied his

During the first months following the *Elias-Zacarias* decision, the circuit courts appeared to have given up the struggle and merely affirmed the BIA findings.[222] The Ninth Circuit, however, returned in 1994 with "new avenues of relief for refugees" and renewed criticism of the INS.[223] Other circuits have reviewed appeals and returned to the well-founded fear standard.[224] Many of these decisions carefully note evidence that "compels a

---

asylum request because an applicant must show more than simply physical abuse or civil or human rights violations. *Id.* This decision was reversed by the district court. *Id.*

222. *Id.* at 16. Kevin Johnson remarked that most of the appeals end up in unpublished affirmations with minimal reasoning. *Id.*

223. Steve Albert, *The Ninth Circuit's Border War*, RECORDER, Mar. 17, 1994, at 1. The Ninth Circuit contains division within the court—with some judges advocating for refugees and others who are pro-INS. *Id.* The Ninth Circuit reversed the denial of asylum to an Ethiopian refugee in *Kahssai v. INS*, 16 F.3d 323 (9th Cir. 1994), and *Shirazi-Parsa v. INS*, 14 F.3d 1424 (9th Cir. 1994), in which an Iranian feared imprisonment, torture, and death because of religious and political beliefs. Albert, *supra* at 1. The Ninth Circuit found the BIA failed to consider all the cumulative incidents and noted it "compelled reversal." *Id.* These were the first published cases by the Ninth Circuit since *Elias-Zacarias*. *Id.*

224. The Second Circuit overturned BIA denials of asylum and a well-founded fear of persecution in several recent decisions. *See* Osorio v. INS, 18 F.3d 1017, 1031-32 (2d Cir. 1994) (finding that evidence compelled a conclusion of well-founded fear by a Guatemalan labor leader whose life was in danger when many of his colleagues had already been killed by the Guatemalan government and he had been subject to death threats for his union work); Sotelo-Aquije v. Slattery, 17 F.3d 33, 37 (2d Cir. 1994) (finding that the record and the BIA's findings compelled the conclusion that Soleto-Aquije had a well-founded fear of persecution on account of his political opinion and actions opposing the Shining Path); Carranza-Hernandez v. INS, 12 F.3d 4 (2d Cir. 1993) (reversing the BIA decision that Carranza was not eligible for asylum because he proved persecution fears based on union activities and organization of the Braceros march).

The Fifth Circuit also reversed a BIA denial of asylum in *Rivas-Martinez v. INS*, 997 F.2d 1143 (5th Cir. 1993). The Fifth Circuit criticized the logic of the BIA and pointed out that it had failed to competently determine whether the Petitioner met the elements. *Id.* at 1148. The court noted that it would be illogical to inform "armed guerrillas to their faces that she detests them or their actions or their ideologies." *Id.* at 1147.

The Sixth Circuit held that the applicants in *Perkovic v. INS*, 33 F.3d 615, 621 (6th Cir. 1994), qualified as refugees. It stated "the evidence of large-scale infringements on the human rights of ethnic Albanians and evidence Yugoslavia punishes its nationals when they engage in proscribed expressions of political opinion abroad" support a well-founded fear of persecution. *Id.* at 623.

The Tenth Circuit in *Llana-Castellon v. INS*, 16 F.3d 1093, 1098-99 (10th Cir. 1994), held that the BIA denied applicants their due process by reversing the immigration judge's finding of well-founded fear. The BIA claimed that because the Sandinistas lost the election in Nicaragua, there was no longer a well-founded fear. *Id.* at 1097-98. The applicants were not given notice in order to respond. *Id.* at 1098.

Compare these decisions to the First Circuit's decision in *Kubec v. INS*, 30 F.3d 126 (1st Cir. 1994) (affirming the BIA's decision that the petitioner failed to show "compelling" evidence such that "no reasonable factfinder could fail to find the requisite fear of persecution") and *Lopez-Zeron v. INS*, 8 F.3d 636 (8th Cir. 1993) (affirming the BIA's decision that petitioners failed to prove a well-founded fear of persecution).

conclusion of fear of persecution," from the language of *Elias-Zacarias.*[225] After some initial reluctance to confront the BIA after *Elias-Zacarias,* the circuit courts are beginning to view the decisions more critically.

IV. CONCLUSION

The well-founded fear standard for refugee asylum was incorporated in the Refugee Act to bring the United States into compliance with its international obligations. Following World War II, the United States, in its humanitarian and compassionate concern for oppressed peoples of the world, opened its doors to provide refuge. Over the years, as more people needing protection entered, refugees became less welcome. Many of the circuit courts provided a check on the administrative agency charged with this mission of asylum, but their efforts were chilled by the Supreme Court's decision in *Elias-Zacarias.*

Some of the most recent decisions suggest that the circuit courts may resume the role of watchdog over the BIA. This may indicate a transition back to the generous position in the Supreme Court's decision in *Cardoza-Fonseca.* The United States, however, needs to develop a consistent policy regarding refugee asylum. It must live up to its ideals of providing a haven for the oppressed, or decide the burden is too great and make clear that refugees are no longer welcome.

Mary McGee Light

225. *See* Osorio v. INS, 18 F.3d at 1032; Sotelo-Aquije v. Slattery, 17 F.3d at 38; Perkovic v. INS, 33 F.3d at 621.