Appendix I

Memorandum

CO 208

Subject	Date
LEGAL OPINION: Continued Viability of the Doctrine of Imputed Political Opinion	JAN 19 1993

To

Jan Ting
Acting Director
Office of International Affairs

Gregg Beyer
Director
Asylum Branch

Regional and District Counsel

From

Office of the
General Counsel

Question Presented:

Does persecution "on account of" one of the protected characteristics set forth in section 101(a)(42) of the Immigration and Nationality Act include persecution inflicted because the persecutor erroneously imputes a protected characteristic to the victim?

Summary Conclusion:

Persecution inflicted because the persecutor erroneously imputes to the victim one of the protected characteristics set forth in section 101(a)(42) can constitute persecution "on account of" that characteristic for the purpose of asylum or refugee analysis. This view is consistent with both the plain language of the statute and its settled administrative interpretation. Nor is it inconsistent with the reasoning of the Supreme Court in INS v. Elias-Zacarias, ___ U.S. ___, 112 S. Ct. 812 (1992).

Analysis:

I. Imputed Political Opinion After Elias-Zacarias.

It has been recognized by the Attorney General, by the Board of Immigration Appeals, and by courts of appeals that a political opinion "imputed" to the victim by the persecutor may in some circumstances provide a basis for refugee status. In Dasir v. Ilchert, 840 F.2d 723 (9th Cir. 1988), for example, the Ninth Circuit considered an asylum claim by a Haitian fisherman who, in order to secure the right to fish in certain waters, was expected to pay bribes to the Haitian security forces known as the Ton

Tons Macoute. Desir, the fisherman, introduced evidence that the Haitian government operated as a "kleptocracy" whose systematic thievery was enforced by Macoute terrorizing and extortion. Desir demonstrated that, because of his refusal to accede to Haitian governmental security forces' extortion, he "was perceived as disloyal and subversive and the machinery of the state . . . was violently engaged against him." 840 F.2d at 729. The Ninth Circuit held that the ensuing beatings constituted persecution on account of imputed political opinion and that Desir thus qualified for asylum under section 101(a)(42) of the Act. Id. at 728-29. See also Maldonado-Cruz v. INS, 883 F.2d 788 (9th Cir. 1989); Lazo-Majano v. INS, 813 F.2d 1432, 1435 (9th Cir. 1987); Hernandez-Ortiz v. INS, 777 F.2d 509, 517 (9th Cir. 1985); Sovich v. Esperdy, 319 F.2d 21 (2d Cir. 1963); Yiu Sing Chun v. Sava, 708 F.2d 869 (2d Cir. 1983); Matter of Izatula, Int. Dec. #3127 (BIA, Feb. 6, 1990); Matter of A-G-, 19 I&N Dec. 502, 506 (BIA 1987); 8 CFR 208.13(b)(2)(i)-(ii); 55 FR 2803 (1990) (interim rule on refugee status of persons fleeing coercive family planning policies); ___ FR ___ (1993) (final rule on coercive family planning policies).

Recognition of imputed political opinion as a ground for refugee status has sometimes been coupled with a very broad definition of what might constitute a qualifying "political" motive on the part of the persecutor, or of what might constitute a qualifying expression of political opinion on the part of the victim. For example, courts sometimes held that a decision to remain politically neutral rather than to comply with conscription laws is in general a political opinion within the meaning of the Act. See, e.g., Canas-Segovia v. INS, 902 F.2d 717, 728 (9th Cir. 1990) (Canas I); Bolanos-Hernandez v. INS, 749 F.2d 1316, 1324-25 (9th Cir. 1984).

In Elias-Zacarias, supra, the Supreme Court addressed the question whether a guerrilla organization's attempt to coerce a person into performing military service necessarily constitutes persecution on account of political opinion. The Court answered this question in the negative, because an asylum claimant must present some evidence, direct or circumstantial, that the alleged persecutors desire to punish him or her "on account of" their belief that the claimant holds a certain political opinion. The Board of Immigration Appeals had found no such evidence, and a Board determination that asylum eligibility has not been established "must be upheld if 'supported by reasonable, substantial, and probative evidence on the record considered as a whole.'" 112 S. Ct. at 818. The Court emphasized that the Board's conclusion could be disturbed on judicial review only had Elias presented evidence so compelling that no reasonable factfinder could fail to find the requisite fear of persecution. Id. at 817.

The Elias-Zacarias Court explicitly recognized that it was not dealing with a case of "imputed" political opinion --- in which the persecutor is attempting to punish a person or a class of persons for what the persecutor perceives to be political opposition, but in which this perception may not be correct --- and therefore left the question open. 112 S. Ct. at 816 ("Nor is there any indication (assuming, arguendo, it would suffice) that the guerrillas erroneously believed that Elias-Zacarias' refusal was politically based.") (emphasis in original). Thus Elias-Zacarias did not have a great deal to say about imputation. Rather, the decision observed that neutrality does not ordinarily constitute a political opinion under section 101(a)(42), and held that a generalized "political" motive on the part of the person inflicting punishment --- such as the desire to raise an army in order to accomplish certain political objectives --- does not establish that such punishment was inflicted "on account of" the victim's political opinion. Rather, the "on account of" test is met only when the persecutor is specifically motivated by his apprehension of the victim's political opinion. Id.

Some observers have tended to confuse the broad view rejected by the Elias-Zacarias Court of what constitutes a "political" motive on the part of the persecutor with the far narrower and far more traditional view that a persecutor who is motivated (in whole or in part) by his perception that his victim is a political enemy, but who happens to be incorrect, is nevertheless persecuting his victim "on account of" political opinion.

The Attorney General has recognized on several occasions that eligibility for asylum may be established by proof of a well-founded fear that an applicant will be regarded as a political enemy of the state, or of some other person or entity with the power to persecute, and persecuted on this account. Two instances of such recognition, having to do with coercive family planning policies and with countries that persecute people who attempt to leave, are discussed in sections II and III of this opinion respectively. A more general instance is the provision of 8 C.F.R. 208.13(b)(2)(i) that an applicant may establish a well-founded fear of persecution on one of the five statutory grounds by establishing that "there is a pattern or practice . . . of persecution of groups of persons similarly situated" to the applicant; that such pattern or practice is "on account of" one of the five statutory grounds; and that his own "inclusion in or identification with such group" makes it reasonable for him to fear persecution. This provision does not explicitly address the situation in which the applicant in fact does not have the political opinion or other protected characteristic that the persecutor believes him or her to have. The rule does seem to entail grants of asylum in this situation, however, because it requires applicants to prove only that they have the trait or traits which the persecutor has used as the

criterion for victim selection, and not that they actually have the particular political opinion or other protected characteristic the persecutor is trying to get at by persecuting persons with the selected trait. Even if such grants could be regarded as windfalls for the successful applicants, the regulation would be defensible as an administrative mechanism genuinely calculated to protect all of those for whom the statute prescribes protection, albeit at the cost of also protecting some other people. This justification is not necessary, however, for such applicants are genuinely at risk of persecution, and the persecution in question would be inflicted "on account of" the persecutor's desire to punish and/or deter certain political opinions or other protected characteristics.

The opposite result --- requiring a victim or prospective victim to prove not only "inclusion or identification with" a group possessing a protected characteristic, such that it is reasonable for him to fear persecution aimed at this group, but also that he or she actually does possess the characteristic --- would not only contravene the regulation but also lead to results that seem clearly inconsistent with the language and evident purpose of the asylum and refugee statutes. It should be emphasized that a denial of refugee status to persons who fear persecution on account of imputed political opinion would also entail denial of such status to persons who fear persecution on account of imputation of one of the other four grounds. This is so because the "on account of" language which precedes "political opinion" also precedes the other four grounds. 8 U.S.C. § 1101(a)(42)(a); see Canas-Segovia v. INS, 970 F.2d 599, 601 (9th Cir. 1992) (Canas II). Thus, for instance, a Mr. Rosenberg whom the Nazi government of Germany had sentenced to the gas chamber because it erroneously believed him to be a Jew, but who had somehow made it to the United States to apply for asylum, would not qualify for asylum. No matter how clear it might be that the government was going to kill him upon his return, and that the killing would be specifically motivated by a desire to do unpleasant things to Jews, such persecution would not be "on account of . . . religion" unless the government happened to be correct about Rosenberg's religion. This result is hardly compelled by the language of the statute; the most straightforward meaning of the words "persecution . . . on account of . . . religion" would appear to encompass a program specifically intended to stamp out Judaism even though implementation of the program should lead to some persecution of non-Jews. Nor does it seem appropriate to ascribe to Congress an unarticulated intention to generate such harsh results.

Nevertheless, as the Court underscored in Elias-Zacarias, prosecution and punishment under a law of general applicability will not ordinarily constitute persecution "on account of" one of the five statutory grounds. The "imputed political opinion" exception to this rule arises only when there is evidence that

the law and/or its enforcement are motivated in whole or in part by a desire to punish or deter one of the five characteristics protected by the asylum and refugee laws.

Such evidence may be either direct or circumstantial. Direct evidence would consist of statements by the persecutor to the effect that violators of the law are to be regarded and punished not just as ordinary lawbreakers but as political enemies. (See, for example, section II of this opinion, discussing the characterization by organs of the Chinese government of violators of the family planning laws as saboteurs, anarchists, and "class enemies.") Circumstantial evidence has most commonly consisted of punishment so severe as to seem obviously directed at real or perceived enemies rather than at ordinary lawbreakers. See Canas I, 902 F.2d at 728; Matter of Izatula, Int. Dec. #3127 (BIA, Feb. 6, 1990); Matter of A-G-, 19 I&N Dec. 502, 506 (BIA 1987). Applying the doctrine of imputed political opinion in either of these two situations is not inconsistent with the holding in Elias-Zacarias; in both cases, unlike the case before the Court in Elias-Zacarias, the persecution is motivated not just by a general desire to achieve certain political goals, but by a conscious and specific (albeit perhaps erroneous) belief that the victim's behavior reflects a political opinion.

A third situation in which punishment for violation of a law of general applicability has sometimes been regarded as persecution of political opponents is where compliance with the law would infringe what is generally regarded as a fundamental right. See J. Hathaway, The Law of Refugee Status 43, 173 (1991); cf. Matter of Izatula, supra (punishment for an attempt to overthrow a lawfully constituted government may be persecution, even though imposed under a law of general applicability, where democratic change is prohibited and a coup or revolution is therefore the only means of effecting political change). In such a situation, unwillingness to sacrifice this right in order to comply with the law might fairly be understood or regarded by the authority enforcing the law as necessarily entailing political opposition. Finally, it has been recognized that prosecution for refusal to obey a law or command which would require the applicant to persecute others, or "to engage in inhuman conduct," is persecution on account of political opinion even though the law or command is of general applicability. See Matter of A-G-, supra, at 506-07; Matter of Salim, 18 I&N Dec. 311 (BIA 1982); United Nations High Commissioner on Refugees, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to Status of Refugees 39-41 (Geneva, 1979).

It is arguable that the last two situations ("fundamental rights" and "inhuman acts") extend the doctrine of imputed political opinion beyond the limits of its logic, and that in any

event the application of the doctrine in these situations would be inconsistent with the rationale of Elias-Zacarias. In both cases the authorities have some obvious motives for enforcing the law that need not be related to the actual or imputed opinions of the violators. Nevertheless, both are distinct from the conscription laws addressed in Elias-Zacarias; military conscription, far from being regarded as the infringement of a fundamental right, is generally regarded as a prerogative of all sovereign nations, and this prerogative is still exercised by many civilized nations. Although the Elias-Zacarias Court did not rest its holding on this narrow ground, it should not be assumed that the Court would not distinguish a future case involving punishment for the exercise of a fundamental right or for the refusal to engage in persecution or inhuman acts. One possible distinction is that such laws are far more likely than other laws to become political loyalty tests. See, e.g., Sovich, supra, 319 F.2d at 21 (Exit controls are the product of modern dictatorships, and "[d]evotees of such regimes do not risk life and limb to violate statutes prohibiting departure. It would be naive to suppose, therefore, that punishment for illegal departure, under these circumstances, is not politically motivated, or does not constitute punishment 'because of . . . political opinion.'")

It should be noted that not all punishment, even for political opinion or one of the other four protected characteristics, necessarily constitutes persecution. A brief period of detention, or a fine that is not so high as to be calculated to inflict economic ruin, will not generally amount to persecution even though it is imposed on account of race, religion, nationality, membership in a particular social group, or political opinion. See, e.g., Sovich, supra, 319 F.2d at 29. When the punishment is sufficiently severe as to constitute persecution, however, a persecuter should be regarded as acting "on account of" one of the five statutory characteristics when he is motivated at least in part by a desire to eliminate or punish persons having this characteristic. Applicants who can establish a well-founded fear that they will be persecuted for having such a belief or other characteristic are eligible for asylum, even though the persecutor may be incorrect in attributing the belief or characteristic to them.

II. Coercive Family Planning Policies

Whether a persecutor may impute a protected characteristic to a person who does not in fact have it, like other questions of fact, typically depends on the circumstances of each individual case. There are, however, several frequently recurring situations in which the question of persecution on account of imputed political opinion is presented. The Attorney General has provided by regulation for one such situation. An applicant who

establishes a well-founded fear that he or she will be forced to undergo abortion or sterilization pursuant to the implementation of a coercive family planning policy, or will be persecuted for failure to do so, shall be regarded as having established a well-founded fear of persecution on account of political opinion. The applicant is not required to make a separate showing that the persecutor will impute a political opinion to him or her. 55 FR 2803 (1990)(interim rule); ___ FR ___ (1993)(final rule). The coercive family planning regulation arose out of experience with the coercive family planning policy imposed by the People's Republic of China.

On August 5, 1988, the Attorney General issued a memorandum to the Commissioner of the Immigration and Naturalization Service (INS) directing that INS asylum adjudicators give "careful consideration" to applications from nationals of the PRC who express a fear of persecution upon return to the PRC because they refuse to abort a pregnancy or resist sterilization after the birth of a second or subsequent child in violation of Chinese Communist Party directives on population. The Attorney General found that "there is evidence to support the assertion that such an act is viewed by PRC officials as 'political dissent.'"

On November 30, 1989, the President directed that the Attorney General give enhanced consideration under the immigration laws to persons from any country who express a fear of persecution upon return to their country related to that country's policy of forced abortion or coerced sterilization. Memorandum of Disapproval for the Emergency Chinese Immigration Relief Act of 1989, 25 Weekly Compilation of Presidential Documents at 1853-54 (1989).

On January 29, 1990, the Attorney General incorporated this directive into regulatory form by publishing an interim rule with request for comments at 55 FR 2803. The interim rule provided that an asylum officer or immigration judge shall find an applicant (and the applicant's spouse, if also an applicant) to be a refugee on the basis of past persecution on account of political opinion if the applicant establishes that he or she has been forced to abort a pregnancy or undergo involuntary sterilization pursuant to the implementation of a country's family planning policy. The same protection was extended to those who establish a well-founded fear of being forced to undergo an abortion or involuntary sterilization.

The President incorporated and reinforced the provisions of the interim rule in Executive Order No. 12711, § 4, which was published on April 13, 1990 at 55 FR 13897 (hereinafter "the Executive Order"). Section 4 of the Executive Order directed the Secretary of State and the Attorney General to provide for "enhanced consideration under the immigration laws" for persons expressing fear of persecution related to forced abortion or

coerced sterilization policies and further directed that such enhanced consideration be provided "as implemented by the Attorney General's regulation effective January 29, 1990." In accordance with this directive, and based on the premise that the doctrine of imputed political opinion remains viable after Elias-Zacarias, the Attorney General signed a final regulation on January 15, 1993, under which an alien fleeing coerced population control policies that involve or result in forced abortions or involuntary sterilizations may be considered to have established a clear probability (for withholding of deportation) or well-founded fear (for asylum) of persecution on account of political opinion.

To accord political refugee status to victims of coercive family planning policies --- or of various other sorts of repression that might serve some purpose other than to punish dissent --- is consistent with Elias-Zacarias so long as there is evidence that the authorities who impose such policies regard obedience to them as a test of loyalty to the government, and that punishment is therefore motivated at least in part by a desire to punish and/or to deter such disloyalty. As noted by the Attorney General in 1988, there is substantial evidence that violation of the PRC coercive family planning policy is regarded as an ideological crime, and that the harsh punitive and/or deterrent measures taken to enforce the policies are motivated at least in part by the desire to punish or deter political dissent.

First, the PRC family planning policy is one of those rare cases in which the persecutors have publicly declared that they regard their victims not just as lawbreakers but as political enemies. It is clear from a number of such declarations that compliance with the policy is regarded as an important test of loyalty and that those who wilfully fail to comply with the policy are "guilty of an ideological offense . . . ." Banister, China's Changing Population 200 (1987); see Directive of Attorney General Edwin Meese to Commissioner Alan Nelson, August 5, 1988, § 1. Government officials have been unusually explicit in their determination to treat opposition to the program as a form of political sabotage. "Planned parenthood work, like other work, also suffered from interference and sabotage by Lin Piao and the 'gang of four.' Lin Piao, the 'gang of four,' and their followers incited anarchism in marriage and childbirth." Foreign Broadcast Information Service Daily Report --- People's Republic of China, Vol. I, 239 (July 13, 1978): E10. Opposition to coercive family planning is thus often treated as a crime against the state. "We must expose and deal resolute blows at class enemies who sabotage planned parenthood." Id. at 135 (Aug. 7, 1978): G4. See also Bannister, supra, at 196-201.

Second, there is strong evidence that punishment for violation of the coercive family planning policy in the PRC is disproportionately severe. Reliable published reports covering

the period from 1978 through 1992 relate that punishment for those who resist the PRC family planning program may take several forms: fines that amount to as much as three times an average annual salary; abductions of pregnant women to clinics where abortions are performed against their will; compelling both men and women to undergo sterilization operations which are often debilitating in ways unrelated to reproductive functions; revocation or denial of business licenses, crop permits, and other means of livelihood; and the destruction or appropriation of property, sometimes including the family home.

Third, in order to be effective, a regime of coercive family planning must be carried out by means of comprehensive and unrelenting control over the most intimate aspects of family life. In the PRC, for example, local family planning authorities record individual women's menstrual cycles and couples' methods of birth control, and unauthorized pregnancies are dealt with by "work units" which also exercise almost unlimited control over the economic and personal lives of unit members. Both the right to bodily integrity and the right to procreate are universally recognized as fundamental human rights. See, e.g., Universal Declaration of Human Rights arts. 12, 16(3); Skinner v. Oklahoma, 316 U.S. 535 (1942). As discussed above, it is arguable that punishment for resistance to a law whose whole purpose and effect is to infringe such fundamental rights cannot fairly be characterized as mere prosecution.

Finally, in many cases the PRC program may require its victims to engage in "inhuman conduct." See Matter of A-G-, supra, at 506-07; United Nations High Commissioner on Refugees, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to Status of Refugees 39-41 (Geneva, 1979). A pregnant woman who wishes to carry her child to term but who is compelled (either by physical force or by threats of severe punishment) to terminate her pregnancy becomes not only a victim but also an unwilling participant in an almost uniquely violent and intrusive violation of bodily integrity and family privacy. Indeed, coerced pregnancy termination under the PRC program has been reported to occur even during the process of birth. Because the killing of a child still partly in the womb is regarded as an abortion rather than as an infanticide, and because the obligation to prevent unauthorized births is imposed not only on parents and local officials but also on physicians, it has been reported that doctors routinely kill newborns by crushing the skull with forceps or by injecting formaldehyde into the soft spot on the head. M. Chang, "Women," in Human Rights in the People's Republic of China (Yuan Li Wu ed. 1988). See also Birth Control Regulations of Canton Municipality's Tianhe District, Dongpu Precinct, reprinted in China Spring Digest, September/October 1987, 60-61 ("G. If any unauthorized baby dies

within three months of birth, the penalty assessed will only be 300 yuan.")

III. Punishment for Attempting to Leave the Country

Another instance in which the Attorney General has recognized that a government may use a law of general applicability as a means of punishing or controlling its enemies has to do with laws punishing unauthorized departure from the country. 8 CFR 208.13(b)(2)(ii) provides that asylum officers and immigration judges shall give "due consideration" to evidence that a nation persecutes persons who violate departure control laws or who seek asylum in another country. See also Sovitch, supra. Although an exit control law of general applicability may be imposed for reasons unrelated to the actual or perceived political opinions of the persons being controlled, some governments do seem to regard violators of such laws as subversives. This attitude may be evidenced either by explicit statements or by disproportionately severe punishment.

For example, Article 14 of the Law of the People's Republic of China on the Control of the Entry and Exit of Citizens provides that a person who violates PRC exit control laws is either to receive a warning or to be placed in administrative detention for up to ten days. If, however, "the circumstances of the case are serious enough to constitute a crime, criminal responsibility shall be investigated in accordance with the Law." Id. The penalties can increase to one year for more serious exit control violations or to five years for smuggling. See Articles 176, 177. Nevertheless, there exists a range of statutes carrying far more severe penalties for vaguely defined offenses against the state. Article 4 of the Criminal Law and the Criminal Procedure Law of the People's Republic of China specifically outlaws "counterrevolution" committed outside of PRC territory. Article 4 of the exit and entry laws prohibits Chinese citizens upon leaving the country from committing "any act harmful to the security, honor, or interests of their country." Article 94 of the criminal code imposes a harsh penalty upon those engaged in conduct viewed as counterrevolutionary:

> Whoever defects to the enemy and turns traitor is to be sentenced to not less than three and not more than ten years of fixed-term imprisonment; when the circumstances are serious or it is a case of leading a group to defect to the enemy and turn traitor, the sentence is to be not less than ten years of fixed-term imprisonment or life imprisonment.

While under the standard of Matter of Nagy, 11 I&N Dec. 888 (BIA 1966), imprisonment for violating exit control laws does not necessarily constitute disproportionate punishment, ten years of fixed-term imprisonment or life imprisonment presumably would. According to the Department of State, China accepts the return of citizens who have left without authorization, "in most cases apparently without punishment." Country Reports on Human Rights Practices for 1991 at 825. Yet such persecution need not take place "in most cases" in order for a person to hold a well-founded fear that it will take place in his. See INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987). The State Department materials appear to leave open the possibility that punishment is administered in some cases, and a fear of persecution may be well founded upon even a relatively small chance that the feared event could take place. Id. Nevertheless, in the absence of evidence that punishment for violations of the exit control laws in the PRC or any other nation exceed the relatively brief terms of confinement discussed in Nagy, an applicant should not be regarded as having established a well-founded fear of persecution on the sole ground that he or she may be punished for violating a departure control law.

IV. "Conscription Plus"

Prior to Elias-Zacarias, most imputed political opinion claims arose in the context of resistance to military conscription. Because Elias-Zacarias has narrowed the scope within which courts may find that an alleged persecutor's motive was "political," and because penalties for draft evasion do not generally depend on whether one is a supporter or opponent of the government, it is unlikely that many such claims will be successful. However, in one post-Elias-Zacarias case the Ninth Circuit has upheld a conscription-related asylum claim based on imputed political opinion.

Canas II, supra, was a case in which the Supreme Court had granted certiorari and then remanded for reconsideration in light of Elias-Zacarias. The original imputed political opinion holding in Canas I had rested, at least in part, on the evidence presented by the petitioner of disproportionately severe punishment of draft evaders in El Salvador. The most dramatic evidence was an eyewitness account of a deserter having had his arms cut off after having been accused of being an antigovernment guerrilla.

The Canas I opinion had also noted, however, that the petitioners' refusal to do military service "necessarily place[d] them in a position of political neutrality," and that such neutrality can amount to a political opinion. 902 F.2d at 728. If the disproportionate-punishment and neutrality-as-opinion statements are read as necessary elements in a single holding,

rather than as two alternative bases for finding imputed political opinion, then the original Canas holding was arguably inconsistent with the Supreme Court's observation in Elias-Zacarias to the effect that political neutrality is not "ordinarily" an affirmative expression of political opinion, since "we do not agree with the dissent that only a 'narrow, grudging construction of the concept of political opinion,' . . . would distinguish it from such quite different concepts as indifference, indecisiveness and risk-averseness." 112 S. Ct. at 816. However, the petitioner in Canas was not arguing that merely refusing to join a side would be viewed as an expression of political opinion, but only that his own status as a conscientious objector would be so viewed. The panel agreed with this contention, and found that this was "one of those rare cases" in which punishment for refusal to join the military would amount to political persecution. 902 F.2d at 728.

On remand, the panel reversed its earlier determination that the petitioner had demonstrated likelihood of persecution for his religious beliefs (see the discussion in Part I of this opinion) but remanded the case to the BIA with instructions to grant his "petition based on a showing of imputed political opinion," holding that Elias-Zacarias did not change its determination of his eligibility for this relief.

Canas may be best explained as a case in which the Service let the asylum applicant make the whole record before the immigration judge and the BIA, essentially relying on the applicant's status as a draft resister to ensure a holding adverse to him. On the record before the Ninth Circuit, however, the decision on the imputed political opinion issue was consistent with Elias-Zacarias and with the prior administrative interpretation. Evidence of disproportionately severe punishment, together with the applicant's membership in a subclass of violators whom the authorities might plausibly wish to single out for persecution, may establish eligibility for asylum even when the punishment feared by the applicant is for violation of a law of general applicability.

for Grover Joseph Rees III
General Counsel

Appendix I, continued

Memorandum

CO 208

Subject	Date
LEGAL OPINION: Continued Viability of the Doctrine of Imputed Political Opinion -- Addendum	MAR - 4 1993

To

John Cummings
Acting Director
Office of International Affairs

Gregg Beyer
Director
Asylum Branch

Regional and District Counsel

From

Office of the
General Counsel

On January 19, 1993, this office issued a legal opinion on whether persecution "on account of" one of the protected characteristics set forth in section 101(a)(42) of the Immigration and Nationality Act includes persecution inflicted because the persecutor erroneously imputes a protected characteristic to the victim. The opinion concluded that persecution on account of an imputed characteristic is included within the definition of the Act.

Among several instances of recognition by the Attorney General that imputed political opinion can give rise to the protections of the Act, the legal opinion cited a final rule signed by the Attorney General on January 15, 1993. That rule provides that an applicant who establishes a well-founded fear that he or she will be forced to undergo abortion or sterilization pursuant to the implementation of a coercive family planning policy, or will be persecuted for failure to do so, shall be regarded as having established a well-founded fear of persecution on account of political opinion.

That rule has not yet been published in the Federal Register, pending a general review by the Office of Management and Budget of all regulations signed before January 20, 1993, but not published on or before January 22, 1993. The final rule is substantially identical to the January 29, 1990 interim rule discussed on page 7 of the legal opinion. See also Executive Order No. 12711 section 4, 55 FR 13897 (1990), directing the Attorney General and the Secretary of State to provide for

"enhanced consideration under the immigration laws" for persons expressing fear of persecution related to forced abortion or coerced sterilization policies, and that such enhanced consideration be provided "as implemented by the Attorney General's regulation effective January 29, 1990." The provisions of the interim rule, as incorporated by the Executive Order, remain binding on the Service. It should also be noted that the coercive family planning regulation was only one of a number of sources cited in support of the proposition that the protection of the Act extends to persecution on account of imputed characteristics. Even in the absence of the regulation, the authorities would be overwhelmingly in favor of this proposition.

One purpose of the legal opinion was to examine the effect, if any, of the Supreme Court's decision in INS v. Elias-Zacarias, ___ U.S. ___, 112 S. Ct. 812 (1992), on the scope of protection afforded to persons who fear persecution on account of characteristics imputed to them by their persecutors. Since the publication of the opinion, we have learned that the Board of Immigration Appeals has recently issued a decision based in large part upon Elias-Zacarias. Matter of R-, Interim Decision #3195 (December 15, 1992). In Matter of R-, a member of the Sikh religion from the state of Punjab in India claimed to have suffered past persecution and to fear future persecution on account of imputed political opinion. The applicant testified that Sikh militants beat and threatened to kill him after he refused their demands to join their endeavors and to offer material support. In addition, based upon his contact with this group, local police beat him because they suspected him of being "involved with those engaged in a violent struggle against the government." Id., slip opinion at 6 n.3.

The Board concluded that the applicant had failed to establish that either the militant Sikhs or the police had harmed him on account of any real or imputed political opinion. Following Elias-Zacarias, the Board concluded that, to the contrary, the record indicated that the militant group harmed him simply because of his refusal to assist them, not to overcome any political opposition they rightly or wrongly perceived. Likewise, the police punished him not because they perceived him to possess any particular political opinion, but because they sought information about "a violent struggle against the government" in which they believed him to be involved.

Neither part of the Board's decision appears to be inconsistent with the conclusions of this office's legal opinion about the doctrine of imputed political opinion. The Board explicitly noted that this doctrine formed part of the basis for the applicant's claim, and the Board opinion seems clearly to imply that its result would have been different if the record had shown that either the police or the revolutionary group had been

Appendix I, continued

motivated by a desire to punish the applicant for his "actual or imputed" political opinion. Id. at 5; see id. at 6.

Grover Joseph Rees III
General Counsel

Appendix II

VISA PREFERENCE NUMBERS FOR MAY 1993

	All Chargeability Areas Except Those Listed	CHINA-mainland born	DOMINICAN REPUBLIC	INDIA	MEXICO	PHILIPPINES
FAMILY PREFERENCES						
1st	C	C	C	C	15APR92	03JUL85
2A Exempt from per-country limit	08FEB91	08FEB91	08FEB91	03FEB91	08FEB91	08FEB91
2A Subject to per-country limit	01MAR91	01MAR91	01MAR91	01MAR91	U	01MAR91
2B	08MAR91	08MAR91	08MAR91	08MAR91	08MAR91	08MAR91
3rd	08OCT89	08OCT89	01OCT88	08OCT89	08OCT89	01SEP86
4th	01JUL91	01JUL91	01JUL91	01JUL91	08DEC84	28DEC82
	08FEB84	08FEB84	08FEB84	26NOV82	08MAY81	12MAY77
EMPLOYMENT PREFERENCES						
1st	C	C	C	C	C	C
2nd	C	01OCT91	C	C	C	C
3rd	C	01AUG91	C	15MAR92	C	01DEC91
Other Workers	22NOV87	22NOV87	22NOV87	22NOV87	22NOV87	22NOV87
4th	C	C	C	C	C	29AUG92
Certain Religious Workers	C	C	C	C	C	29AUG92
5th	C	C	C	C	C	C
Targetted Employment Areas	C	C	C	C	C	C