§ 301.75–1 Definitions.

ACC coverage. The crop insurance coverage against Asiatic citrus canker (ACC) provided under the Florida Fruit Tree Pilot Crop Insurance Program authorized by the Federal Crop Insurance Corporation.

* * * * *

3. In Subpart—Citrus Canker, a new § 301.75–16 would be added to read as follows:

§ 301.75–16 Payments for the recovery of lost production income.

Subject to the availability of appropriated funds, the owner of a commercial citrus grove may be eligible to receive payments in accordance with the provisions of this section to recover income from production that was lost as the result of the removal of commercial citrus trees to control citrus canker.

(a) *Eligibility.* The owner of a commercial citrus grove may be eligible to receive payments to recover income from production that was lost as the result of the removal of commercial citrus trees to control citrus canker if the trees were removed pursuant to a public order between 1986 and 1990 or on or after September 28, 1995.

(b) *Calculation of payments.* (1) The owner of a commercial citrus grove who is eligible under paragraph (a) of this section to receive payments to recover lost production income will, upon approval of an application submitted in accordance with paragraph (c) of this section, receive a payment calculated using the following rates:

Citrus variety	Payment (per acre)
Grapefruit	$2,925
Orange, Valencia	5,729
Orange, navel	5,693
Tangelo	1,666
Lime	4,829
Other or mixed citrus	2,925

(2) *Payment adjustments.*

(i) In cases where the owner of a commercial citrus grove had obtained ACC coverage for trees in his or her grove and received crop insurance payments following the destruction of the insured trees, the payment provided for under paragraph (b)(1) of this section will be reduced by the total amount of the crop insurance payments received by the commercial citrus grove's owner for the insured trees.

(ii) In cases where ACC coverage was available for trees in a commercial citrus grove but the owner of the grove had not obtained ACC coverage for his or her insurable trees, the per-acre payment provided for under paragraph (b)(1) of this section will be reduced by 5 percent.

(c) *How to apply for lost production payments.* The form necessary to apply for lost production payments may be obtained from any local citrus canker eradication program office in Florida, or from the USDA Citrus Canker Project, 10300 SW 72nd Street, Suite 150, Miami, FL 33173. The completed application should be accompanied by a copy of the public order directing the destruction of the trees and its accompanying inventory that describes the acreage, number, and the variety of trees removed. Your completed application must be sent to the USDA Citrus Canker Eradication Project, Attn: Lost Production Payments Program, c/o Division of Plant Industry, 3027 Lake Alfred Road, Winter Haven, FL 33881. Claims for losses attributable to the destruction of trees on or before [the effective date of this rule] must be received within 60 days after [the effective date of this rule]. Claims for losses attributable to the destruction of trees after [the effective date of this rule] must be received within 60 days after the destruction of the trees.

Done in Washington, DC, this 1st day of December 2000.

Bobby R. Acord,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 00–31142 Filed 12–4–00; 11:17 am]

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DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 208

[INS No. 2092–00; AG Order No. 2339–2000]

RIN 1115–AF92

Asylum and Withholding Definitions

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend the Immigration and Naturalization Service (Service) regulations that govern establishing asylum and withholding eligibility. This rule provides guidance on the definitions of ''persecution'' and ''membership in a particular social group,'' as well as what it means for persecution to be ''on account of'' a protected characteristic in the definition of a refugee. It restates that gender can form the basis of a particular social group. It also establishes principles for interpretation and application of the various components of the statutory definition of ''refugee'' for asylum and withholding cases generally, and, in particular, will aid in the assessment of claims made by applicants who have suffered or fear domestic violence. The Service believes these issues require further examination after the Board of Immigration Appeals (Board) decision in *In re R–A–,* Interim Decision 3403 (BIA 1999). Further, the rule clarifies that the factors considered in cases in the Court of Appeals for the Ninth Circuit regarding membership in a particular social group are not determinative. Finally, the rule clarifies procedural handling of asylum and withholding claims in which past persecution has been established. This proposed rule has been prepared and is published in conjunction with the final rule on asylum procedures, which incorporates both the interim rule amending the Department of Justice (Department) regulations to implement the Illegal Immigration Reform and Immigrant Responsibility Act, 62 FR 10312 (1997), and the proposed past persecution rule, 63 FR 31945 (1998).

DATES: Written comments must be submitted on or before January 22, 2001.

ADDRESSES: Please submit written comments in triplicate to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW., Room 4034, Washington, DC 20536. To ensure proper handling, please reference INS No. 2092–00 on your correspondence. Comments are available for public inspection at the above address by calling (202) 514–3048 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: Dorothea Lay, 425 I Street, NW, Washington, D.C. 20536, telephone number (202) 514–2895.

SUPPLEMENTARY INFORMATION:

Background

The purpose of this rule is to provide guidance on certain issues that have arisen in the context of asylum and withholding adjudications. The 1951 Geneva Convention relating to the Status of Refugees (1951 Convention) contains the internationally accepted definition of a refugee. United States immigration law incorporates an almost identical definition of a refugee as a person outside his or her country of origin ''who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality,

membership in a particular social group, or political opinion.'' Section 101(a)(42) of the Immigration and Nationality Act (Act) (8 U.S.C. 1101(a)(42)). (The definition was amended by section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, Div. C, 110 Stat. 3009, to include a provision on coercive family planning practices.) In order to establish eligibility for a discretionary grant of asylum under section 208 of the Act, 8 U.S.C. 1158, an alien must meet the definition of ''refugee'' under section 101(a)(42) of the Act. To qualify for withholding of removal under section 241(b)(3) of the Act, an alien must meet a higher burden of proof: That it is more likely than not that the alien would be persecuted on account of one of the five grounds listed within the definition of ''refugee.'' 8 U.S.C. 1231.

A sizable body of interpretive case law has developed about the meaning of the refugee definition. Historically, much of this case law has addressed more traditional asylum and withholding claims based on an applicant's political opinion. In recent years, however, the United States increasingly has encountered asylum and withholding applications with more varied bases, related, for example, to an applicant's gender or sexual orientation. Many of these new types of claims are based on the ground of ''membership in a particular social group,'' which is the least well-defined of the five grounds within the refugee definition. As the Court of Appeals for the Seventh Circuit noted in *Lwin* v. *INS,* ''[t]he legislative history behind the term * * * is uninformative, and judicial and agency interpretations are vague and sometimes divergent. As a result, courts have applied the term reluctantly and inconsistently.'' 144 F.3d 505, 510 (7th Cir. 1998).

Some of these cases have raised difficult analytical questions about the interpretation of the refugee definition, questions that have not always been addressed consistently through the administrative adjudication and judicial review process. This rule sets out a number of generally applicable principles to promote uniform interpretation of the relevant statutory provisions. Though applicable to all asylum and withholding cases, these principles are also designed to provide guidance for the resolution of novel issues in some of the asylum and withholding claims that the Department has encountered in recent years.

One of these novel issues is the extent to which victims of domestic violence may be considered to have been persecuted under the asylum laws. The Board considered and rejected such a persecution claim in its decision in *In re R-A-.* This proposed rule removes certain barriers that the *In re R-A-* decision seems to pose to claims that domestic violence, against which a government is either unwilling or unable to provide protection, rises to the level of persecution of a person on account of membership in a particular social group. The proposed rule does not specify how a claim of persecution based on domestic violence should be fashioned—in particular, it does not set forth what the precise characteristics of the particular social group might be. The Department has taken this approach in part because it recognizes that the way in which a victim of domestic violence who believes she has been persecuted may characterize the particular social group of which she is a member likely will vary depending upon the social context in her country. The Department also recognizes that whether domestic violence can be so characterized in a given case will turn on difficult and subtle evaluations of particular facts. Given these realities, it seems ill-advised to try to establish a universal model for persecution claims based on domestic violence. The Department has instead decided to propose a rule that states generally applicable principles that will allow for case-by-case adjudication of claims based on domestic violence or other serious harm inflicted by individual non-state actors.

The Department solicits comments both on the questions that we have left open and on whether the Department should seek to provide more direct guidance to adjudicators and the public on their resolution. We expect the questions addressed during the comment period would include: How persecution claims based on domestic violence might be conceptualized and evaluated within the framework of asylum law; how asylum officers, immigration judges, and the Board should determine whether a particular victim of domestic violence (or other acts of persecution by an individual non-state actor) has suffered this treatment ''on account of'' membership in a particular social group (*e.g.,* gender or status of being in a domestic relationship); and whether, in view of the fact that claims based on harm inflicted by individual non-state actors are relatively new in the United States, such claims raise distinct issues concerning statutory eligibility or the exercise of discretion in granting asylum.

The Meaning of Persecution

A fundamental question in any asylum or withholding adjudication is whether the harm that an applicant has suffered or fears amounts to persecution. Neither the 1951 Convention nor the Refugee Act of 1980 defines ''persecution.'' Two years before enacting the Refugee Act, Congress specifically debated whether to include a definition of ''persecution'' in the Act in the related context of a bill that eventually added the deportation ground aimed at Nazi persecutors (now section 241(a)(4)(D) of the Act). Congress rejected adding a definition of ''persecution'' to the immigration laws, concluding that the meaning of the term was well-established by administrative and court decisions and meant ''the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (*e.g.,* race, religion, political opinion, etc.), in a manner condemned by civilized governments. The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.'' H.R. Rep. 95–1452 at 5 (1978).

The Board adopted this meaning as well. *Matter of Acosta,* 19 I. & N. Dec. 211, 220 (BIA 1985), *modified on other grounds, Matter of Mogharrabi,* 19 I. & N. Dec. 439 (BIA 1987). The courts, too, generally have accepted this definition, describing ''persecution'' as '' 'the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive.'' ' *Duarte de Guinac* v. *INS,* 179 F.3d 1156, 1161 (9th Cir. 1999) (quoting *Korablina* v. *INS,* 158 F.3d 1038, 1043 (9th Cir. 1998)); *accord Miranda* v. *INS,* 139 F.3d 624, 626 (8th Cir. 1998); *Fisher* v. *INS,* 79 F.3d 955, 961 (9th Cir. 1996) (en banc); *Abdel-Maieh* v. *INS,* 73 F.3d 579, 583 (5th Cir. 1996); *Schellong* v. *INS,* 805 F.2d 655, 661–62 (7th Cir. 1986). This definition recognizes that ''persecution is an extreme concept that does not include every sort of treatment our society regards as offensive.'' *Fatin* v. *INS,* 12 F.3d 1233, 1243 (3d Cir. 1993); *see also Bastanipour* v. *INS,* 980 F.2d 1129, 1133 (7th Cir. 1992) (distinguishing persecution ''as distinct from mere discrimination or harassment''). These cases sometimes defined ''persecution'' as including other, separate elements of the ''refugee'' definition, such as the requirement that the persecution be ''on account of'' a protected characteristic. This rule is intended to provide

guidance on the meaning of persecution, to clarify that persecution includes objective and subjective components, as well as an analysis of state action or state inability or unwillingness to protect.

It has sometimes been suggested that persecution entails a subjective intent on the part of the persecutor to ''inflict harm'' or ''punish'' the victim. In *Matter of Acosta*, the Board found that, to be persecution, the harm or suffering must be inflicted upon an individual in order to punish. Some circuits have followed this early approach to defining persecution. *See*, *e.g.*, *Osaghae* v. *INS*, 942 F.2d 1160, 1163 (7th Cir. 1991) (''`Persecution' means, in immigration law, punishment for political, religious, or other reasons that our country does not recognize as legitimate.''). Certainly, in more traditional claims involving political persecution, such a ''punitive'' or ''malignant'' intent to visit harm upon the victim is usually present. In recent years, however, applicants have successfully presented novel claims in which the claimed persecution is not necessarily inflicted with the subjective intent to cause harm. In 1996, for example, the Board decided that a young woman from Togo qualified for asylum based on her fear of being subjected to female genital mutilation (FGM). *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (*en banc*). This case squarely raised the question whether a subjective intent to harm the victim is a necessary component of an asylum or withholding claim, because, presumably, most practitioners of FGM believe that they are performing an important cultural rite that bonds the individual to society, not that they are punishing or harming the victim. In *Matter of Kasinga*, the Board held that a ''subjective `punitive' or `malignant' intent is not required for harm to constitute persecution.'' *Id.* at 365.

In its 1997 decision in *Pitcherskaia* v. *INS*, 118 F.3d 641 (9th Cir. 1997), the Ninth Circuit further advanced this concept. In that case, a lesbian woman claimed that she had been forced to undergo psychiatric treatments and threatened with institutionalization in the 1980s by officials of the Soviet Union in an effort to change her sexual orientation. The Board held that the psychiatric measures taken by the officials did not constitute persecution because they were intended to ''cure'' her, not to punish her. On review, the Ninth Circuit reversed this portion of the Board's decision, and remanded the case for further consideration of other aspects of the case.[1] The Ninth Circuit, citing *Matter of Kasinga*, decided by the Board after the Board's decision in *Pitcherskaia*, concluded that an intent to harm or punish is not required for persecution to exist, and that the ''definition of persecution is objective, in that it turns not on the subjective intent of the persecutor but rather on what a reasonable person would deem `offensive.' '' *Pitcherskaia*, 118 F.3d at 646.

This rule addresses the definition of persecution by clarifying that it includes both objective and subjective elements. First, the proposed rule defines persecution in § 208.15(a) as ''the infliction of objectively serious harm or suffering.'' This general definition does not diminish the level of harm that has been recognized by the Board and generally sustained by the Courts of Appeals as sufficiently serious to constitute persecution. The definition does not preclude reference to other sources for guidance on what type of harm can constitute persecution. *See*, *e.g.*, United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook), para. 51 (re-edited 1992) (''From Article 33 of the 1951 Convention it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution.''). This proposed language in § 208.15(a), consistent with the Ninth Circuit's approach in *Pitcherskaia*, imposes an objective standard on the concept of persecution by requiring that the harm must be recognizable as serious harm. Generally, persecution cannot be established simply upon a showing of discrimination, harassment, or the denial of equal protection of the laws. Guided by existing case law, the decision-maker will deduce from the nature of the claim whether or not the harm is serious enough to constitute persecution.

The proposed language also provides that harm is persecution only if it is ''experienced as serious harm by the applicant, regardless of whether the persecutor intends to cause harm.'' The Department believes that it is appropriate to codify an interpretation that is drawn from the conclusion reached by both the Board in *Kasinga* and the Ninth Circuit in *Pitcherskaia:* that the existence of persecution does not require a ''malignant'' or ''punitive'' intent on the part of the persecutor. At the same time, the Department believes that it is necessary to emphasize that the victim must experience the treatment as harm in order for persecution to exist. For example, there are many women from cultures that practice FGM who view the process positively and believe that they are acting in the victim's best interests, even as the victim experiences the action as harmful. For the purpose of asylum and withholding adjudications, a key question is whether the applicant at hand would experience or has experienced the procedure as serious harm, not whether the perpetrator means it as punitive. Generally, an applicant's own testimony would be the best evidence in determining whether that applicant subjectively experienced or would experience the treatment as harm.

State Action Requirement

Inherent in the meaning of persecution is the long-standing principle that the harm or suffering that an applicant experienced or fears must be inflicted by either the government of the country where the applicant fears persecution, or a person or group that government is unable or unwilling to control. *See*, *e.g.*, *Matter of Villalta*, 20 I. & N. Dec. 142, 147 (BIA 1990); *Matter of H–*, 21 I. & N. Dec. 337 (BIA 1996); *Matter of Kasinga*, *supra*; *Matter of Acosta*, *supra.* This is also consistent with the understanding of Congress two years before the Refugee Act was passed that ''persecution'' is ''the infliction of suffering or harm, under government sanction,'' H.R. Rep. 95–1452 at 5, and with the position of UNHCR and Convention-based interpretations of the meaning of persecution. *See* UNHCR Handbook, para. 65.[2]

U.S. court and administrative decisions have looked to a variety of factors in considering the requirement that an applicant must show that the harm or suffering is inflicted by the government or a person or group the government is ''unable or unwilling to control.'' Courts have concluded the government is ''unable or unwilling to

[1] *Pitcherskaia* was remanded to the immigration court, where the case is currently pending.

[2] ''Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.''

control'' the infliction of harm or suffering if the applicant has shown a pattern of government unresponsiveness. *See Mgoian* v. *INS*, 184 F.3d 1029, 1036–37 (9th Cir. 1999). Both courts and the Board have also looked to whether an applicant has shown government complicity in the face of persecution. *See Korablina*, 158 F.3d at 1045. Courts have often considered the applicant's attempts to obtain protection from government officials and the government response or lack thereof. *See Surita* v. *INS*, 95 F.3d 814, 819–20 (9th Cir. 1996) (finding persecution where the police refused to respond to the applicant's request for assistance or provide a reasonable explanation for their failure to respond); *Singh* v. *INS*, 134 F.3d 962, 968 (9th Cir. 1998) (holding that the applicant failed to establish persecution, in part because the police responded to her call even though police took no further action). In the recent case of *In re S–A–,* Interim Decision 3433 (BIA 2000), the Board considered the applicant's testimony and country conditions information in concluding that any attempts by the applicant to seek protection would be futile and potentially dangerous. Other Board decisions illustrate the relevance of government responses to persecution by non-state actors. *See*, *e.g.*, *Matter of V–T–S–*, 21 I. & N. Dec. 792 (holding that the record did not support claim that the government was unable or unwilling to protect when evidence indicated that the government mounted massive rescue efforts to find kidnapped family members); *In re O–Z– & I–Z–*, Interim Decision 3346 (BIA 1998) (finding that the government was unable or unwilling to control the respondent's attackers and protect him or his son from the anti-Semitic acts of violence when the respondent reported at least three incidents of harm to the Ukrainian government, which took no action beyond writing a report). The UNHCR Handbook emphasizes that the inability to seek government protection may arise from circumstances beyond the applicant's control, such as grave disruptions within the country, or may result from a denial of protection to the applicant. UNHCR Handbook, para. 98. When assessing whether a government has denied protection, one factor to consider is whether the applicant has been denied services (*e.g.*, refusal of a national passport) normally accorded to other nationals of that country. UNHCR Handbook, para. 99.

Section 208.15(a)(1) of this rule provides further guidance as to what is meant by the state action requirement and, specifically, the requirement that the government be ''unable or unwilling to control'' non-government persecutors. The proposed rule states that ''[i]n evaluating whether a government is unwilling or unable to control the infliction of harm or suffering, the immigration judge or asylum officer should consider whether the government takes reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to the state protection that exists.'' The rule goes on to provide a non-exclusive list of evidentiary considerations that may be considered as helpful in determining whether a government is ''unable or unwilling'' to control the non-state actor. This new language codifies existing administrative interpretations and provides further guidance on this relatively undeveloped area of the law. This proposed list of evidentiary considerations is not intended to change the law, but merely to illustrate what types of evidence may be relevant in evaluating whether a government is unable or unwilling to control the infliction of suffering or harm. Of course, no government is able to guarantee the safety of each of its citizens at all times. This is not the standard for determining that a government is ''unable or unwilling to control'' the infliction of harm or suffering. *See, e.g., Aguilar-Solis* v. *INS,* 168 F.3d 565, 573 (1st Cir. 1999) (''Although action by non-governmental entities can constitute persecution, the law requires at least some showing that the alleged persecutors are not subject to the government's control.'') (citations omitted). Rather, the decision-maker should consider the government's policies with respect to the harm or suffering at issue, and what steps, if any, the government has taken to prevent the infliction of such harm or suffering. In addition, the decision-maker should consider what kind of access the individual applicant has to whatever protection is available, and any steps the applicant has taken to seek such protection. Any attempts by an applicant to seek protection within the country of persecution are relevant but are not determinative of the state's inability or unwillingness to control the infliction of suffering or harm. An applicant's failure to attempt to gain access to protection is not in itself determinative of the state's inability or unwillingness to control nor does this failure bar an applicant from establishing by other evidence the state's inability or unwillingness to control the infliction of suffering or harm. The adequacy of access to protection may vary within a given society depending on the individual applicant's circumstances and general country conditions. For example, in some countries, there generally may be reasonable access to state protection, but an applicant's access to such protection may be limited if the persecutor is influential with government officials. As another example, in some countries a female victim of spousal abuse may be able to obtain state protection if she has the support of her family of origin in seeking it, but her access to such protection may be more limited without such support. In each case, all factors relevant to the availability of and access to state protection should be examined in determining whether the government of the country in question is unwilling or unable to protect the applicant from a non-state persecutor. It is the applicant's burden to come forward with the evidence that the harm or suffering is inflicted by the government, or an entity that the government is unable or unwilling to control.

The ''on account of'' Requirement in General

Even if it is determined that the harm an applicant has suffered or fears may constitute persecution, the applicant may qualify for asylum or withholding only if that persecution is inflicted ''on account of'' the applicant's race, religion, nationality, membership in a particular social group, or political opinion. The Supreme Court has held that, in order for persecution to be ''on account of'' one of these protected grounds, there must be evidence that the persecutor seeks to harm the victim on account of the victim's possession of the characteristic at issue. *INS* v. *Elias-Zacarias,* 502 U.S. 478, 482 (1992). As administrative decision-makers and the courts have applied this test to individual cases, the determination about when persecution is inflicted ''on account of'' a protected ground has raised difficult interpretive issues. This rule provides guidance on several of these issues.

Under long-standing principles of U.S. refugee law, it is not necessary for an applicant to show that his or her possession of a protected characteristic is the sole reason that the persecutor seeks to harm him or her. Both the Board and the federal courts have recognized that a persecutor may have mixed motivations, and have stated that the ''on account of'' requirement is satisfied if the persecutor acts ''at least in part'' because of a protected characteristic. *See, e.g., Matter of T–M–B–,* 21 I. & N. Dec. 775 (BIA 1997), *overruled on other grounds sub nom.*

Borja v. *INS,* 175 F.3d 732 (9th Cir. 1999) (*en banc*). Some court decisions provide conflicting interpretations of the extent to which the persecutor's motivation must relate to a protected characteristic. *Compare Singh* v. *Ilchert,* 63 F.3d 1501, 1509 (9th Cir. 1995) (''[T]he BIA failed to recognize that persecutory conduct may have more than one motive, and so long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied.''); *with Gebremichael* v. *INS,* 10 F.3d 28, 35 (1st Cir. 1993) (alien must show that one of the five characteristics is ''at the root of persecution, such that [the characteristic] itself generates a 'specific threat to the [applicant]'') (internal quotations and citation omitted). This rule proposes new language at § 208.15(b) that would require an applicant to show that the protected characteristic is central to the persecutor's motivation to act. Consistent with current law, this language allows for the possibility that a persecutor may have mixed motives. It does not require that the persecutor be motivated solely by the victim's possession of a protected characteristic. It does, however, require that the victim's protected characteristic be central to the persecutor's decision to act against the victim. For example, under this definition it clearly would not be sufficient if the protected characteristic was incidental or tangential to the persecutor's motivation.

A refugee is traditionally an individual as to whom the bonds of trust, loyalty, protection, and assistance existing between a citizen and his country have been broken and have been replaced by the relationship of an oppressor to a victim. Inherent in the concept of refugee status is the principle that an individual requires international protection because his country of origin or of habitual residence is not safe for him, or cannot protect him, because of persecution on account of one of the five grounds specified in the definition of ''refugee.'' *See, e.g., Matter of Acosta,* 19 I. & N. Dec. at 234–35; 1 A. Grahl-Madsen, *The Status of Refugees In International Law* 97, 100 (1966). The proposed language that the protected characteristic of the refugee be central to the persecutor's motivation is thus supported by the purposes of the 1951 Convention.

The proposed language also incorporates the doctrine of ''imputed political opinion'' into the regulation. Under this doctrine, an applicant may establish persecution on account of political opinion if he or she can show that the persecutor was or is inclined to persecute because the persecutor perceives the applicant to possess a particular political opinion, even if the applicant does not in fact possess such an opinion. *See, e.g., Sangha* v. *INS,* 103 F.3d 1482, 1489 (9th Cir. 1997). The proposed language provides that an applicant may satisfy the ''on account of'' requirement by showing that the persecutor acts against him or her ''on account of the applicant's race, religion, nationality, membership in a particular social group, or political opinion, or on account of what the persecutor perceives to be the applicant's race, religion, nationality, membership in a particular social group, or political opinion.'' Thus, this language codifies the existing doctrine of imputed political opinion, as well as the existing administrative interpretation that this doctrine also extends to the protected grounds other than political opinion.

In re R–A–

The proposed new language in § 208.15(b) is intended to address analytical issues that have arisen in the context of some claims based on domestic violence, and in particular in the Board's decision in *In re R–A–,* Interim Decision 3403 (BIA 1999). In that case, the Board denied asylum to a Guatemalan woman who had been the victim of severe domestic violence by her husband in Guatemala and who feared that she would be at risk of continuing violence if she returned there. Certain elements of the Board's analysis in this case affect the ''on account of'' inquiry in asylum and withholding cases in general, and the ''particular social group'' cases especially. This rule sets forth a modified statement of the principles governing the ''on account of'' inquiry.

The applicant in *In re R–A–* presented alternative claims of persecution on account of political opinion (the applicant's opposition to male domination) and on account of membership in a particular social group (defined as ''Guatemalan women who have been intimately involved with Guatemalan male companions, who believe that women are to live under male domination''). *Id.* at 10–14. The Board found that the applicant's husband did not seek to harm her either on account of her political opinion or on account of her membership in a particular social group. *Id.* at 14.

The Board's analysis of the political opinion claim is consistent with long-standing principles of asylum law and is not altered by this rule. The Board reasoned that the abuse in this case was not on account of the applicant's political opinion because there was no evidence that the applicant's husband was aware of the applicant's opposition to male dominance, or even that he cared what her opinions on this matter were. Rather, he continued to abuse her regardless of what she said or did. *Id.* at 13–14. This portion of the decision is consistent with the Supreme Court's reasoning in *Elias-Zacarias*, *supra*, and with the Board's own precedent that harm is not on account of political opinion when it is inflicted *regardless* of the victim's opinion rather than *because* of that opinion. *See Matter of Chang*, 20 I. & N. Dec. 38, 44–45 (BIA 1989), superceded on other grounds, *Matter of X–P–T–*, 21 I. & N. Dec. 634 (BIA 1996).

The Board's particular social group analysis in *In re R–A–,* however, requires some clarification. The Board found that the violence in this case was not ''on account of'' the applicant's membership in the particular social group asserted—essentially Guatemalan women intimately involved with abusive Guatemalan men.[3] *Id.* at 17. The Service argued, and the Board agreed, that there was no indication that the applicant's husband would harm any other member of the asserted particular social group. In other words, there was no evidence that he would seek to harm other women who live with other abusive partners. *Id.* This was an important factor in the Board's decision that the harm in that case was not on account of membership in a particular social group. The Board did consider other factors in reaching its conclusion that no nexus had been shown between the husband's violence and the claimed particular social group. However, the Board's reasoning on this point could be construed to foreclose the possibility of satisfying the ''on account of'' requirement when the persecutor does not seek to harm other members of the asserted particular social group.

As an evidentiary matter, it often would be reasonable to expect that a person who is motivated to harm a victim because of a characteristic the victim shares with others would be prone to harm or threaten others who share the targeted characteristic. Such a showing should not necessarily be required as a matter of law, however, in order for an applicant to satisfy the ''on account of'' requirement. In some cases, a persecutor may in fact target an individual victim because of a shared characteristic, even though the persecutor does not act against others

[3] To the extent that the asserted particular social group in *In re R–A–* could be interpreted to have been defined by the persecution feared, this rule clarifies below that a social group must exist independently of the feared persecution.

who possess the same characteristic. For example, in a society in which members of one race hold members of another race in slavery, that society may expect that a slave owner who beats his own slave would not beat the slave of his neighbor. It would nevertheless be reasonable to conclude that the beating is centrally motivated by the victim's race. Similarly, in some cases involving domestic violence, an applicant may be able to establish that the abuser is motivated to harm her because of her gender or because of her status in a domestic relationship. This may be a characteristic that she shares with other women in her society, some of whom are also at risk of harm from their partners on account of this shared characteristic. Thus, it may be possible in some cases for a victim of domestic violence to satisfy the ''on account of'' requirement, even though social limitations and other factors result in the abuser having the opportunity, and indeed the motivation, to harm only one of the women who share this characteristic, because only one of these women is in a domestic relationship with the abuser.

To allow for this possibility, this rule provides that, when evaluating whether an applicant has met his or her burden of proof to establish that the harm he or she suffered or fears is ''on account of'' a protected characteristic, ''[b]oth direct and circumstantial evidence may be relevant to the inquiry.'' The rule further provides that ''[e]vidence that the persecutor seeks to act against other individuals who share the applicant's protected characteristic is relevant and may be considered but shall not be required.''

In every asylum or withholding case, of course, it remains the applicant's burden to establish that the specific persecutor involved in her claim is motivated to act against her because of her possession or perceived possession of a protected characteristic. As this rule underscores, both direct and circumstantial evidence may be relevant to this determination. As in any asylum or withholding case, evidence about the persecutor's statements and actions will be considered. In addition, evidence about patterns of violence in the society against individuals similarly situated to the applicant may also be relevant to the ''on account of'' determination. For example, in the domestic violence context, an adjudicator would consider any evidence that the abuser uses violence to enforce power and control over the applicant because of the social status that a woman may acquire when she enters into a domestic relationship. This would include any direct evidence about the abuser's own actions, as well as any circumstantial evidence that such patterns of violence are (1) supported by the legal system or social norms in the country in question, and (2) reflect a prevalent belief within society, or within relevant segments of society, that cannot be deduced simply by evidence of random acts within that society. Such circumstantial evidence, in addition to direct evidence regarding the abuser's statements or actions, would be relevant to determining whether the abuser believes he has the authority to abuse and control the victim ''on account of'' her status in the relationship.

Further, a claim involving domestic violence in which the applicant has satisfied the ''on account of'' requirement remains subject to the full range of generally applicable requirements under the asylum and withholding laws. For example, as in any other case, the fear of future abuse cannot be speculative, it must be ''well-founded.'' A woman who is not in an abusive relationship, for example, would not have a ''well-founded'' fear of domestic violence even if there is a high incidence of domestic violence in her country of origin. The harm feared must be serious enough to constitute persecution; isolated incidents of discrimination or lesser forms of harm would not qualify as persecution. As in any asylum or withholding case in which the persecutor is not the state itself, the applicant would have to show that the state is unwilling or unable to protect her. Generally, an applicant's claim based on domestic violence will rest on personal experiences not addressed in general country conditions information. General country conditions information may, however, support such a claim. The applicant should come forward with testimony regarding her personal experience, and, if available, documentary evidence relating to her claim.

This rule will also affect the analysis of asylum or withholding claims made by alleged abusers. A perpetrator of domestic violence serious enough to be persecution, who has abused the victim because of the victim's membership in a particular social group, would be barred from seeking asylum under section 101(a)(42) of the Act. 8 U.S.C. 1101(a)(42). The Service will consider ways to identify these individuals. Of course, if removable, these individuals would normally be entitled to a full hearing prior to removal, during which all evidence relevant to eligibility could be presented and considered. This will allow the government to protect our asylees and residents against persecutors.

Membership in a Particular Social Group

Once an applicant has established that the harm he or she has suffered or fears is ''on account of'' the characteristic asserted, the applicant must establish that the characteristic qualifies as race, religion, nationality, membership in a particular social group, or political opinion. Membership in a particular social group is perhaps the most complex and difficult to understand of these five grounds. There is relatively little precedent about the meaning of ''a particular social group,'' and that which exists has at times been subject to conflicting interpretations. This rule sets out the requirements for determining what qualifies as ''a particular social group,'' clarifies the relevance of past experience, and provides a list of non-determinative factors to be considered.

The key Board decision on the meaning of ''a particular social group'' requires that members of the group share a ''common, immutable'' trait. *Matter of Acosta,* 19 I. & N. Dec. at 233. This rule codifies this basic approach at § 208.15(C)(1), by providing that ''[a] particular social group is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it.'' The crucial aspect of this definition is that, to be immutable, the common trait must be unchangeable or truly fundamental to an applicant's identity. Gender is clearly such an immutable trait, is listed as such in *Matter of Acosta,* and is incorporated in this rule. Further, there may be circumstances in which an applicant's marital status could be considered immutable. This would be the case, for example, if a woman could not reasonably be expected to divorce because of religious, cultural, or legal constraints. Any intimate relationship, including marriage, could also be immutable if the evidence indicates that the relationship is one that the victim could not reasonably be expected to leave. Thus, this rule further provides in § 208.15(C)(1) that ''[i]n determining whether an applicant cannot change, or should not be expected to change, the shared characteristic, all relevant evidence should be considered, including the applicant's individual circumstances and country conditions information about the applicant's society.''

This rule also includes the principle that the particular social group in which an applicant claims membership cannot be defined by the harm which the applicant claims as persecution. It is well-established in the case law that this type of circular reasoning does not suffice to articulate a particular social group. *See Gomez* v. *INS,* 947 F.2d 660, 664 (2d Cir. 1991) (rejecting the applicant's claim to membership in a particular social group of women who have been previously battered and raped by Salvadoran guerrillas). It is also supported by Convention-based understandings of the definition of membership in a particular social group. *See, e.g., Islam* v. *Secretary of State for the Home Department,* 2 App. Cas. 629 (H.L. 1999) (United Kingdom) (''It is common ground that there is a general principle that there can only be a 'particular social group' if the group exists independently of the persecution'') (Lord Steyn).

Proposed § 208.15(c)(2) provides that, ''[w]hen past experience defines a particular social group, the past experience must be an experience that, at the time it occurred, the member either could not have changed or was so fundamental to his or her identity or conscience that he or she should not have been required to change it.'' This is consistent with current case law that recognizes that past experiences can be the basis for membership in a particular social group. *See Matter of Fuentes,* 19 I. & N. Dec. 658, 662 (BIA 1988). The regulatory language preserves the key requirement from *Matter of Acosta, supra,* that the trait defining a particular social group must be a fundamental one, which an individual should not be required to change. In reality, of course, no past experience can be changed, as it has already occurred. But not all past experiences should qualify as traits which, if shared by others, can define a particular social group for asylum and withholding purposes. The experience of joining a violent gang in the past, for example, cannot be changed. At that point in the past, however, that experience could have been avoided or changed. In other words, the individual could have refrained from joining the group. Certainly, it is reasonable for any society to require its members to refrain from certain forms of illegal activity. Thus, for example, under this language, persons who share the past experience of having joined a gang would not constitute a particular social group on the basis of a past experience.

The requirement in § 208.15(C)(1) that the persecution exist independently of the harm is equally applicable to claims of membership in a particular social group based on past experience. At least in theory, a shared past experience that defines a social group could be harm suffered by the applicant and other group members in the past. In such a claim however, the past harm that defines the social group cannot be the same harm that the applicant claims as persecution. Rather, in order for persecution to be ''on account of'' membership in such a group, the past experience must exist independently of the persecution. In fact, the past experience must be the reason the persecutor inflicted or is inclined to inflict the persecution on the applicant.

Finally, the proposed language in § 208.15(C)(3) provides a non-exclusive list of additional factors that may be considered in determining whether a particular social group exists. These factors are drawn from existing administrative and judicial precedent on the meaning of the ''particular social group'' ground. These precedents have been subject to conflicting interpretations, however, and this provision resolves those ambiguities by providing that, while these factors may be relevant in some cases, they are not requirements for the existence of a particular social group.

The first three factors in this section are drawn from the Ninth Circuit's decision in *Sanchez-Trujillo* v. *INS,* 801 F.2d 1571 (9th Cir. 1986). In that case, the Ninth Circuit stated that ''the phrase 'particular social group' implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest,'' *id.* at 1576, and that ''[o]f central concern is the existence of a voluntary associational relationship among the purported members,'' *id.* These factors have often been interpreted as prerequisites for the existence of a particular social group in the Ninth Circuit. The Ninth Circuit clarified the significance of these factors in the recent case of *Hernandez-Montiel* v. *INS,* 225 F.3d 1084 (9th Cir. 2000). The court held that its decision in *Sanchez-Trujillo* should be interpreted as consistent with the Board's decision in *Matter of Acosta* and that the voluntary associational test is an alternative basis for establishing membership in a particular social group. *See* 225 F.3d at 1093 n.6. Other circuits have not applied this factor, and, instead have simply relied on the Board's determination that the group must share a ''common, immutable'' characteristic. *See, e.g., Fatin* v. *INS,* 12 F.3d 1233, 1239 (3d Cir. 1993) (quoting *Matter of Acosta,* 19 I. & N. Dec. at 233). In cases arising outside the Ninth Circuit, the Board has decided that a particular social group may exist without reference to these factors. *See, e.g., Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 820–21 (BIA 1990) (Cuban homosexuals are a particular social group); *Matter of Kasinga,* 21 I. & N. Dec. at 365 (young women who belong to a specific Togolese tribe and who oppose FGM are a particular social group). To ensure uniform and fair administrative adjudications of particular social group asylum claims, this rule clarifies that the Department views the *Sanchez-Trujillo* factors as considerations that may be relevant in some cases, but not as requirements for a particular social group.

Similarly, the next three factors in this proposed section are drawn from the Board's decision in *In re R-A-.* In that case, the Board found it highly significant for ''particular social group'' analysis that the applicant had not shown that the group she asserted ''is a group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population, within Guatemala,'' or that ''the victims of spouse abuse view themselves as members of this group.'' *Id.* at 15. The Board also focused on whether ''it is more likely that distinctions will be drawn within the society between those who share and those who do not share the characteristic'' at issue. *Id.* at 16. This, of course, could be an important inquiry in asylum and withholding cases. The Board did not characterize these elements as requirements, however. This rule incorporates them as factors, but confirms that they are considerations, which, while they may be relevant in some cases, are not determinative of the question of whether a particular social group exists.

In applying the factor at § 208.15(c)(3)(vi)—whether members of a given group are distinguished for different treatment—it would be relevant to consider any evidence about societal attitudes toward group members or about harm to group members, including whether the institutions of the society at hand offer fewer protections or benefits to members of the group than to other members of society. In *In re R-A-*, for example, evidence presented that would be relevant to this inquiry included the applicant's testimony that the police did not respond to her calls for help, and that, when she appeared before a judge, he told her that he would not interfere in domestic disputes. Further, the Board's conclusion that documentary country conditions evidence indicates that ''Guatemalan society still tends to view domestic violence as a family problem'' would also be relevant. This type of evidence

may be considered in determining whether, because the applicant possesses a particular characteristic, harm inflicted on the applicant may be tolerated by society while it would not be tolerated if inflicted on members of the society at large.

The Department has elected at this point to propose that the relationship of *In re R-A-* and domestic violence claims to the definition of ''refugee'' be addressed by articulating broadly applicable principles to guide adjudicators in applying the refugee definition and other statutory and regulatory provisions generally. The Department has tentatively concluded that this approach would be more useful than simply announcing a categorical rule that a victim of domestic violence is or can be a refugee on account of that experience or fear, or that persons presenting such claims may be found eligible for relief or granted relief as a matter of discretion in certain specified circumstances. The current proposal of the Department would encourage development of the law in the area of domestic violence as well as in other new claims that may arise. Asylum and withholding cases are typically highly fact specific. A case-by-case approach would reflect that reality, and would also leave the refinement of applicable principles open to further development. The Department is nonetheless seeking comments on the relative merits of this approach, and other possible approaches, to providing for consideration of domestic violence claims as a basis for asylum and withholding of removal.

This rule does not modify the definition of ''firm resettlement.'' The rule merely changes its placement to § 208.15(d) of the regulations.

Burden of Proof

Under U.S. law, a showing of past persecution qualifies an applicant for refugee status. Section 101(a)(42) of the Act, (8 U.S.C. 1101(a)(42)). A showing of past persecution is also strongly indicative of the possibility of future harm. Under the current regulations as modified by the final rule on asylum procedures published in conjunction with this rule, a presumption of well-founded fear applies to applicants who qualify as refugees based on past persecution. The presumption places the burden on the U.S. government to show by a preponderance of the evidence that a refugee no longer has a well-founded fear of future persecution. The Department believes that this allocation of the burden generally is appropriate in light of the applicant's refugee status.

The final rule on asylum procedures published in conjunction with this rule broadens the evidence with which the government can rebut the presumption of well-founded fear. The presumption can be rebutted by evidence of a fundamental change in circumstances, including country conditions information, or a showing of a reasonable internal relocation alternative. The Department recognizes that some cases involving past persecution by non-government persecutors may present questions about whether the presumption of a well-founded fear of future persecution is appropriate. For example, to some commenters, the presumption of internal relocation may seem less warranted in cases involving non-government actors, or especially in those cases involving individual non-government actors, for which there may be more reason to believe that the victim could relocate. Some commenters may believe that certain types of individual non-government actor cases warrant a presumption more than others and should therefore be treated differently.

The Violence Against Women Office of the Department of Justice has offered the following observations about domestic violence, based on its experience in the U.S. as well as with foreign governments and non-governmental organizations:

> It is our experience that domestic violence manifests similar characteristics across all racial, ethnic and socioeconomic groups, and that many cultures have a variety of ways in which they condone and perpetuate domestic violence. *See, e.g.,* Lori J. Heise, Violence Against Women: The Hidden Health Burden (World Bank Discussion Papers 1994); Ending Violence Against Women, 27 Population Reports 5 (Johns Hopkins School of Public Health, Dec. 1999) (summarizing surveys from many countries discussing domestic violence). *See generally* H.R. Rep. 103–395, at 25–28 (1993) (congressional findings of fact about domestic violence). First, in relationships involving domestic violence, past behavior is a strong predictor of future behavior by the abuser. *See, e.g.,* United States Department of Justice, Understanding Domestic Violence: A handbook for Victims and Professionals. Victims report patterns of abuse—rather than single, isolated incidents—that tend to include the repeated use of physical, sexual and emotional abuse, threats, intimidation, isolation and economic coercion. *See, e.g.,* Anne L. Ganley, ''Understanding Domestic Violence,'' in Improving The Health Care Response to Domestic Violence: A Resource Manual for Health Care Providers 15 (Debbie Lee *et al.* eds., 1996). Second, both domestically and internationally, domestic violence centers on power and control over the victim. *See, e.g.,* Violence against Women in the International Community, 7 Cardozo J. Int'l & Comp. L. 205–318 (multiple authors discussing violence against women internationally). *See generally* Violence Against Women: An International and Interdisciplinary Journal (multiple volumes). Consequently, when victims attempt to flee the abusive relationship, or otherwise assert their independence, abusers often pursue them and escalate the violence to regain or reassert control. *See, e.g.,* United States Department of Justice, Stalking and Domestic Violence: The Third Annual Report to Congress under the Violence Against Women Act (1998); *see also* Barbara J. Hart, ''The Legal Road to Freedom,'' in Battering and Family Therapy: A Feminist Perspective 13 (Marsali Hansen & Michele Harway eds., 1993) (citing a variety of studies on separation violence). The risk of lethality to the victim is typically greatest when she attempts to escape the abuse and, in contrast to other persecution cases where the persecutor's desire to harm the victim may wane if the victim leaves, the victim's attempt to leave typically increases the abuser's motivation to locate and harm her. *See, e.g.,* Kerry Healey *et al.*, Batterer Intervention: Program Approaches and Criminal Justice Strategies (United States Department of Justice, National Institute of Justice, Feb. 1998); 27 Population Reports 7 (discussing this issue in foreign countries); Evan Stark & Anne Flintcraft, ''Violence Among Intimates: An Epidemiological Review,'' in Handbook of Family Violence 293 (Vincent B. Van Hasselt *et al.* eds., 1988); Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issues of Separation, 90 Mich. L. Rev. 1, 64–65 (1991). Third, because of the abuser's intimate relationship with the victim, he is likely to possess important information about where the victim could go or to whom she would turn for assistance.

These observations seem to support retaining the presumption of well-founded fear of future persecution for those applicants who have established past persecution by an individual non-state actor in the domestic violence context. The Department recognizes however, that this rule does not address other types of individual, non-state actor cases that may arise in the future. Therefore, the Department solicits suggestions as to whether it should continue to maintain the presumption of well-founded fear of future persecution, including the presumption of internal relocation, in cases involving persecutors who are non-state actors. The Department welcomes the views of the public on the merits of the approach proposed in this rule and will carefully weigh all comments in articulating the final rule.

In all cases of past persecution the government may rebut the presumption of well-founded fear of future persecution. The Department recognizes that, especially if the general rule concerning burden of proof is retained for cases involving individual non-state actors, some of the new types of claims

based on persecution by individuals may present a question of production of evidence useful to rebuttal that may be uniquely in the hands of the applicant claiming persecution. Moreover, whether or not the burden of proof is retained in this context, the Department has concluded that it would be appropriate to codify long-standing principles of law relating to the applicant's burden of production in asylum and withholding cases. For example, in the domestic violence context, an applicant's claim will rest on direct evidence regarding her experiences with the persecutor that are not addressed in general country conditions information. Circumstantial evidence, such as general country conditions information also may support such a claim. Under current case law, evidence relating to the applicant's personal experiences or personal knowledge of the likelihood of future harm should be provided by the applicant if reasonably available, or an explanation should be given as to why such information was not presented. This is well-established in the case law. *See Matter of S–M–J–,* 21 I. & N. Dec. 722, 724 (BIA 1997)(*en banc*). Furthermore, ''where there are significant, meaningful evidentiary gaps, applications will ordinarily have to be denied for failure of proof.'' *Matter of Dass,* 20 I. & N. Dec. 120, 124 (BIA 1989) (citing 8 CFR 208.5, 242.17(c)(1988)).

Being accorded the presumption of well-founded fear does not relieve the applicant of the burden of producing testimony or documentation reasonably available, especially evidence within the knowledge of the applicant. Failure to do so can be considered in (1) making a factual determination that the presumption has been rebutted, (2) in credibility determinations, and (3) in the exercise of discretion in granting asylum. The inquiry of an immigration judge or asylum officer considering evidence relevant to a discretionary grant of asylum or a grant of withholding will normally include factors relating to future persecution even in cases where past persecution has been shown. For example, the adjudicator should make inquiries into factors such as whether there has been a fundamental change in circumstances, the ability of the applicant to relocate, the location and status of the persecutor if known, and any evidence of a pattern of pursuit by the persecutor. This is consistent with the adjudicator's ability to consider all facts he or she deems relevant to an asylum or withholding claim.

Finally, this proposed rule adds language to §§ 208.13(b)(1)(ii) and 208.16(b)(1)(ii) clarifying the procedural handling of asylum and withholding claims in cases where the government has the burden of rebutting a presumption of well-founded fear of persecution or likelihood of future threat to life or freedom. The final regulations on asylum procedures published in conjunction with this proposed rule provide that, when an applicant for asylum establishes that he or she suffered past persecution, the applicant will be presumed also to have a well-founded fear of persecution, unless a preponderance of the evidence establishes that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution, or the applicant could reasonably avoid future persecution by relocating to another part of the applicant's country or, if stateless, the applicant's country of last habitual residence. *See* 8 CFR 208.13(b)(1)(i). A similar presumption applies to applicants for withholding of removal. *See* 8 CFR 208.16(b)(1) (upon showing of past persecution, presumption arises that it is more likely than not that applicant will face future persecution, unless a preponderance of the evidence demonstrates fundamental change of circumstances or that it would be reasonable for the applicant to relocate within the country of persecution).

Confusion has arisen concerning the proper disposition of cases in which a finding of no past persecution is reversed on appeal. This rule will codify a principle that, when an immigration judge or the Board finds that the applicant has failed to establish past persecution, the question of fundamental changed circumstances and reasonable internal relocation shall be deemed reserved, and the Service shall not be required to present evidence on fundamental changed circumstances or reasonable internal relocation to preserve the issues. Accordingly, if the immigration judge's or Board's finding of no past persecution is set aside, the Service will remain free on remand to present evidence and argument on the question of changes in country conditions or internal relocation.

This rule is consistent with established rules governing judicial review of agency action and of civil procedure. When a federal court reviews final agency action such as a decision of the Board:

> [i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

Florida Power & Light Co. v. *Lorion,* 470 U.S. 729, 744 (1985). Similarly, in ordinary civil litigation, absent a contrary order in the particular case, if a party moves for, or a district court grants, summary judgment for a party on one of a number of potentially dispositive grounds, that ruling does not mean that the party is abandoning or the court is addressing *sub silentio* possible alternative grounds of decision. And, if that narrow grant of summary judgment is reversed on appeal, the court of appeals does not proceed to enter summary judgment for the opposing party on a ground that was not addressed by the district court's ruling. Rather, the case is remanded for further proceedings.

We have concluded that a similar approach should be made explicit in the context of immigration judge or Board decisions finding an absence of past persecution—the immigration judge's or Board's silence on the question of fundamental changed circumstances or reasonable internal relocation should not be considered an implicit resolution of the question, and the case should be remanded for the presentation of evidence and a decision by the Board or immigration judge in the first instance. The contrary practice is not only inconsistent with ordinary practice, but encourages the Board, immigration judges, and the Service to engage in potentially wasteful expenditures of resources litigating and deciding issues that may not ever need to be resolved in the proceeding if the initial finding of no past persecution is sustained.

This rule, once final, will apply to all cases currently pending before the asylum office, the immigration courts and the Board of Immigration Appeals.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant impact on a substantial number of small entities because this rule involves the process for adjudication of certain requests for asylum and withholding of removal. This process affects individuals and not small entities.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1-year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Act of 1996. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department of Justice to be a ''significant regulatory action'' under Executive Order 12866, Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget for review.

Executive Order 13132

This rule will not have substantial direct effects on the states, on the relationship between the national Government and the states, or on the distribution of power and responsibility among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988

This interim rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Pub. L. 104–13, all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting or recordkeeping requirements inherent in a final rule. This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, part 208 of chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

1. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1226, 1252, 1282; 8 CFR part 2.

2. Section 208.13 is amended by revising paragraphs (b)(1) and (b)(1)(ii)(B) to read as follows:

§ 208.13 Establishing asylum eligibility.

* * * * *

(b) * * *

(1) *Past persecution.* An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to or avail himself or herself of the protection of that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded. Although a presumption of future persecution is raised by a finding of past persecution, this does not relieve the applicant of the burden of producing testimonial evidence or, where reasonably available to the applicant, documentary evidence relating to future persecution, including to a fundamental change in circumstances or the reasonableness of internal relocation.

(i) * * *

(ii) * * *

(B) When the immigration judge or Board finds that the applicant has failed to establish past persecution, the questions of fundamental changed circumstances and reasonable internal relocation shall be deemed reserved and the Service shall not be required to present evidence to preserve the issues. If that finding is set aside, the Service and the applicant shall be permitted on remand to submit evidence and argument on the questions of fundamental changed circumstances and reasonable internal relocation before any ruling on these matters is issued.

* * * * *

3. Section 208.15 is revised to read as follows:

§ 208.15 Definitions.

(a) *Persecution.* Persecution is the infliction of objectively serious harm or suffering that is subjectively experienced as serious harm or suffering by the applicant, regardless of whether the persecutor intends to cause harm. Inherent in the meaning of the term persecution is that the serious harm or suffering that an applicant experienced or fears must be inflicted by the government of the country of persecution or by a person or group that government is unwilling or unable to control. In evaluating whether a government is unwilling or unable to control the infliction of harm or suffering, the immigration judge or asylum officer should consider whether the government takes reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to the state protection that exists. Evidence of the following are pertinent and may be considered: Government complicity with respect to the infliction of harm or suffering at issue; attempts by the applicant, if any, to obtain protection from government officials and the government's response to these attempts; official action that is perfunctory; a pattern of government unresponsiveness; general country conditions and the government's denial of services; the nature of the government's policies with respect to the harm or suffering at issue; and any steps the government has taken to prevent infliction of such harm or suffering.

(b) *On account of the applicant's protected characteristic.* An asylum applicant must establish that the persecutor acted, or that there is a reasonable possibility that the persecutor would act, against the applicant on account of the applicant's race, religion, nationality, membership in a particular social group, or political opinion, or on account of what the persecutor perceives to be the

applicant's race, religion, nationality, membership in a particular social group, or political opinion. In cases involving a persecutor with mixed motivations, the applicant must establish that the applicant's protected characteristic is central to the persecutor's motivation to act against the applicant. Both direct and circumstantial evidence may be relevant to the inquiry. Evidence that the persecutor seeks to act against other individuals who share the applicant's protected characteristic is relevant and may be considered but shall not be required.

(c) *Membership in a particular social group.*

(1) A particular social group is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it. The group must exist independently of the fact of persecution. In determining whether an applicant cannot change, or should not be expected to change, the shared characteristic, all relevant evidence should be considered, including the applicant's individual circumstances and information country conditions information about the applicant's society.

(2) When past experience defines a particular social group, the past experience must be an experience that, at the time it occurred, the member either could not have changed or was so fundamental to his or her identity or conscience that he or she should not have been required to change it.

(3) Factors that may be considered in addition to the required factors set forth in paragraph (b)(2)(i) of this section, but are not necessarily determinative, in deciding whether a particular social group exists include whether:

(i) The members of the group are closely affiliated with each other;

(ii) The members are driven by a common motive or interest;

(iii) A voluntary associational relationship exists among the members;

(iv) The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question;

(v) Members view themselves as members of the group; and

(vi) The society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society.

(d) *Firm resettlement.* An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes:

(1) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or

(2) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live, the type of housing made available to the refugee, whether permanent or temporary, the types and extent of employment available to the refugee, and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation including a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.

4. Section 208.16 is amended by revising paragraphs (b)(1) and (b)(1)(ii)(B) to read as follows:

§ 208.16 Withholding of removal under section 241(b)(3) of the Act and withholding of removal under the Convention Against Torture.

* * * * *

(b) * * *

(1) *Past threat to life or freedom.* (i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence that paragraph (b)(1)(i)(A) or (B) of this section applies. If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm. Although a presumption of future persecution is raised by a finding of past persecution, this does not relieve the applicant of the burden of producing testimonial evidence, or where reasonably available to the applicant, documentary evidence, relating to future persecution, including to a fundamental change in circumstances or the reasonableness of internal relocation.

(i) * * *

(ii) * * *

(B) When the immigration judge or Board finds that the applicant has failed to establish past persecution, the questions of fundamental change in circumstances and reasonable internal relocation shall be deemed reserved and the Service shall not be required to present evidence to preserve the issues. If that finding is set aside, the Service and the applicant shall be permitted on remand to submit evidence and argument on the questions of fundamental change in circumstances and reasonable internal relocation before any ruling on these matters is issued.

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Dated: November 22, 2000.

Janet Reno,

Attorney General.

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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. H–052G]

Occupational Exposure to Cotton Dust

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed rule; request for comments.

SUMMARY: OSHA is proposing to amend the Cotton Dust Standard to add batch kier washed cotton to the types of washed cotton granted partial exemption from the Cotton Dust Standard, because those methods greatly reduce the risk of byssinosis when that cotton is spun and woven. This amendment is based on the recommendation of the industry/government/union Task Force for Byssinosis Prevention and supported by published studies and government, union, and industry experts.

Because OSHA believes the amendment is not controversial, the Agency is issuing it as a direct final rule published in the Final Rules section of