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FACT SHEET 60: AUSTRALIA'S REFUGEE AND HUMANITARIAN PROGRAMME

Australia's Immigration Programme has two components:
- Migration Programme for skilled and family migrants
- Humanitarian Programme for refugees and others in refugee-like situations.

Background information

One of the major challenges facing the world today is protecting refugees who have been forced to leave their homes by armed conflict and human rights abuses. The United Nations High Commissioner for Refugees (UNHCR) estimates that there were 45.2 million forcibly displaced people worldwide at the end of 2012, the highest number since 1994. Of these, 28.8 million were internally displaced persons, 15.4 million were refugees and 937,000 were asylum seekers.

See: www.unhcr.org

As a member of the international community, Australia shares responsibility for protecting these refugees and resolving refugee situations. This commitment is most strongly expressed through the Humanitarian Programme.

Humanitarian Programme

The Humanitarian Programme has two important functions:

- the onshore protection/asylum component fulfils Australia's international obligations by offering protection to people already in Australia who are found to be refugees according to the United Nations Convention relating to the Status of Refugees
- the offshore resettlement component expresses Australia's commitment to refugee protection by going beyond these obligations and offering resettlement to people overseas for whom this is the most appropriate option.

Onshore protection

The onshore component of the Humanitarian Programme aims to provide options for people who wish to apply for protection (or asylum) after arrival in Australia.

More information on the onshore component of the programme is available on the department's website.

See: Seeking protection in Australia (58KB PDF file)

Offshore resettlement

The offshore resettlement component comprises two categories of permanent visas. These are:
• **Refugee**—for people who are subject to persecution in their home country, who are typically outside their home country, and are in need of resettlement. The majority of applicants who are considered under this category are identified and referred by UNHCR to Australia for resettlement. The Refugee category includes the Refugee, In-country Special Humanitarian, Emergency Rescue and Woman at Risk visa subclasses.

• **Special Humanitarian Programme (SHP)**—for people outside their home country who are subject to substantial discrimination amounting to gross violation of human rights in their home country, and immediate family of persons who have been granted protection in Australia. Applications for entry under the SHP must be supported by a proposer who is an Australian citizen, permanent resident or eligible New Zealand citizen, or an organisation that is based in Australia.

**See:** Proposing an applicant

**Note:** People who arrived as an Illegal Maritime Arrival on or after 13 August 2012 are no longer eligible to propose their family under the Humanitarian Programme. People in these circumstances can apply under the family stream of the Migration Programme.

**Composition of the offshore resettlement programme**

The size and composition of Australia's resettlement programme are influenced by a number of factors. These include:

- UNHCR assessments of the resettlement needs of refugees overseas
- the views of individuals and organisations in Australia conveyed during community consultations with the Minister for Immigration and Border Protection
- Australia's capacity to assist.

**Outcomes of 2012–13 programme**

In 2012–13, the Humanitarian Programme was increased to 20,000 places from 13,750 places in 2011–12. A total of 20,019 visas were granted under the Humanitarian Programme, of which 12,515 visas were granted under the offshore component and 7,504 visas were granted under the onshore component. See the tables below for further details on the 2012–13 programme outcomes.

**Woman at Risk**

In 2012–13, 1,673 visas (13.9 per cent) of the Refugee category were granted to Woman at Risk visa applicants, exceeding the nominal annual target of 12 per cent.

**Applications**

In 2012–13, a total of 50,444 people lodged applications under the offshore programme component compared with 42,928 in 2011–12.
Humanitarian Programme figures

Humanitarian Programme grants by category 2008–09 to 2012–13

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Refugee</td>
<td>6499^2</td>
<td>6003</td>
<td>5998</td>
<td>6004</td>
<td>12 012</td>
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<tr>
<td>Special Humanitarian (offshore)</td>
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<td>2973</td>
<td>714</td>
<td>503</td>
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<tr>
<td>Onshore^1</td>
<td>2492</td>
<td>4534</td>
<td>4828</td>
<td>7041</td>
<td>7504</td>
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<tr>
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<td>5</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td><strong>Total</strong>^3</td>
<td>13 507</td>
<td>13 770</td>
<td>13 799</td>
<td>13 759</td>
<td>20 019</td>
</tr>
</tbody>
</table>

^1 Includes protection visas and onshore humanitarian visa grants that are countable under the Humanitarian Programme.

^2 This figure included a one-off allocation of 500 refugee places for Iraqis.

^3 Data in this table is reported as at the end of each programme year.

2012–13 offshore visa grants by top ten countries of birth

<table>
<thead>
<tr>
<th>Countries</th>
<th>Number of visas granted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iraq</td>
<td>4064</td>
</tr>
<tr>
<td>Afghanistan</td>
<td>2431</td>
</tr>
<tr>
<td>Myanmar/Burma</td>
<td>2352</td>
</tr>
<tr>
<td>Bhutan</td>
<td>1023</td>
</tr>
<tr>
<td>Congo (DRC)</td>
<td>489</td>
</tr>
<tr>
<td>Iran</td>
<td>471</td>
</tr>
<tr>
<td>Somalia</td>
<td>396</td>
</tr>
<tr>
<td>Sudan</td>
<td>319</td>
</tr>
<tr>
<td>Eritrea</td>
<td>185</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>182</td>
</tr>
<tr>
<td>Other</td>
<td>603</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>12 515</strong></td>
</tr>
</tbody>
</table>

More information on the 2012–13 Humanitarian Programme is on the department's website. See: Humanitarian Programme Statistics

More detailed statistics on the past Humanitarian Programmes are available in the department's annual reports. See: Departmental Annual Reports

Fact Sheet 60. Produced by the National Communications Branch, Department of Immigration and Border Protection, Canberra.

Last reviewed November 2013.
AUSTRALIAN HUMAN RIGHTS COMMISSION: ASYLUM SEEKERS AND REFUGEE GUIDE

Over the last decade the Commission has worked to promote and protect the rights of asylum seekers and refugees in Australia. The Commission aims to provide clear, factual information to highlight the human rights issues involved in the treatment of these groups of people.

On this page:
- Who are asylum seekers and refugees?
- What are Australia's human rights obligations in relation to asylum seekers and refugees?
- How many refugees does Australia grant permanent protection to each year?
- Why are asylum seekers and refugees in immigration detention?
- How are asylum seekers' claims decided?
- What is the 'enhanced screening process'?

Who are asylum seekers and refugees?

An asylum seeker is a person who has fled their own country and applied for protection as a refugee.

The United Nations Convention relating to the Status of Refugees, as amended by its 1967 Protocol (the Refugee Convention), defines who is a refugee and sets out the basic rights that countries should guarantee to refugees. According to the Convention, a refugee is a person who is outside their own country and is unable or unwilling to return due to a well-founded fear of being persecuted because of their:
- race
- religion
- nationality
- membership of a particular social group or
- political opinion.

Asylum seekers or refugees and migrants have very different experiences and reasons for moving to another country. Migrants choose to leave their home country, and can choose where to go and when they might return to their home country. Asylum seekers and refugees, on the other hand, flee their country for their own safety and cannot return unless the situation that forced them to leave improves.

What are Australia's human rights obligations in relation to asylum seekers and refugees?

Australia has international obligations to protect the human rights of all asylum seekers and refugees who arrive in Australia, regardless of how or where they arrive and whether they arrive with or without a visa.

While asylum seekers and refugees are in Australian territory (or otherwise engage Australia's jurisdiction), the Australian Government has obligations under various international treaties to
ensure that their human rights are respected and protected. These treaties include the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and the *Convention on the Rights of the Child* (CRC). These rights include the right not to be arbitrarily detained.

As a party to the Refugee Convention, Australia has agreed to ensure that asylum seekers who meet the definition of a refugee are not sent back to a country where their life or freedom would be threatened. This is known as the principle of *non-refoulement*.

Australia also has obligations not to return people who face a real risk of violation of certain human rights under the ICCPR, the CAT and the CRC, and not to send people to third countries where they would face a real risk of violation of their human rights under these instruments. These obligations also apply to people who have not been found to be refugees.

For an overview of the key human rights issues that arise from Australia’s approach to asylum seekers and refugees, see the Commission’s recent publication *Asylum seekers, refugees and human rights: snapshot report 2013*.

**How many refugees does Australia grant permanent protection to each year?**

Under the Humanitarian Program, Australia accepts a certain number of people every year who are refugees or have special humanitarian needs. The Humanitarian Program has two main components:

- *offshore resettlement* for people who are found to be refugees (and others whose need for protection has been acknowledged) in another country before they come to Australia, and
- *onshore protection* for people who come to Australia and make a successful claim for asylum after they arrive.

The Australian Government has indicated that in the 2013-14 financial year, it intends to provide 13,750 places in the Humanitarian Program.

**Why are asylum seekers and refugees in immigration detention?**

Asylum seekers may arrive in Australia without a valid visa or other documentation for a number of reasons. For example, a person who is fleeing persecution by the government of their country of origin might not be able to obtain a passport from officials in that country. Alternatively, a person fleeing persecution might travel without documentation to avoid being identified as they leave their country of origin in order to reduce the risk to themselves and their family.

Under the *Migration Act 1958* (Cth) (the Migration Act), asylum seekers who arrive in Australia without a valid visa must be held in immigration detention until they are granted a visa or removed from Australia.

There is no limit under Australian law to the length of time for which a person may be held in immigration detention. Some asylum seekers spend long periods of time in immigration
detention waiting for their refugee claim to be assessed; waiting for the completion of health, identity and security checks; or awaiting removal from Australia if they have been found not to be a refugee nor someone who is owed 'complementary protection'. Click here for more information about immigration detention and human rights.

While the legal framework for mandatory detention remains in place, over the past few years, increasing numbers of asylum seekers have been permitted to reside in the community while their claims for protection are assessed, after spending an initial period in closed detention. The Commission has welcomed the increased use of alternatives to closed immigration detention such as community detention and the grant of bridging visas, but remains concerned that thousands of asylum seekers and refugees are still held in closed immigration detention facilities.

How are asylum seekers’ claims decided?

Asylum seekers who arrive in Australia with a valid visa

Asylum seekers who arrive in Australia on a valid visa and then apply for protection (i.e. as part of the onshore protection program mentioned above) have their claims assessed through the refugee status determination and complementary protection system that applies under the Migration Act.

The Department of Immigration and Border Protection (Department) will make a primary assessment as to whether the person is a refugee according to the criteria set out in the Refugee Convention.

In some cases, a person may not be a refugee, but may nevertheless face significant human rights abuses, such as torture, if returned to his or her country of origin. If an asylum seeker is found not to be a refugee, the Department will assess whether he or she meets 'complementary protection' criteria – that is, whether he or she is owed protection under the ICCPR, CAT or CRC because if they were to be sent to another country there is a real risk they would suffer serious harm.

If a person is found to be a refugee or to be owed complementary protection, providing he or she satisfies health, identity and security requirements, he or she will be granted a protection visa. People who are refused protection by DIAC at the primary stage have access to independent merits review by the Refugee Review Tribunal (RRT), or in some circumstances the Administrative Appeals Tribunal (AAT). In some circumstances, they can seek judicial review of decisions made by the RRT or the AAT. In some exceptional circumstances they can seek Ministerial intervention to allow them to remain in Australia on other humanitarian or compassionate grounds.

Asylum seekers who arrive in Australia by boat without a valid visa

Since August 2012 there have been a number of changes in law and policy in relation to what happens to people who come to Australia seeking asylum without a valid visa. What policies
apply to these asylum seekers now depends on their mode of arrival, and on what date they arrived.

In August 2012, the Australian Government introduced a system of third country processing for asylum seekers who arrive in Australia at an ‘excised offshore place’ (such as Christmas Island) by boat. In May 2013 this system was extended to apply to asylum seekers who arrive by boat anywhere in Australia. Under this system, asylum seekers who have arrived by boat must be transferred to a third country as soon as is reasonably practicable unless the Minister for Immigration and Border Protection exercises his discretion to exempt them from transfer. If asylum seekers who arrive unauthorised by boat are allowed by the Minister to remain in Australia, their claims will be processed under Australian law.

If asylum seekers are transferred to a third country, their claims for protection will be processed under that country’s laws.

On 19 July 2013 and 3 August 2013 the Australian Government established resettlement arrangements with the Governments of PNG and Nauru respectively. The effect of these arrangements is that asylum seekers who are transferred from Australia to those countries will not only remain there while their claims are processed, but if found to be refugees, will be resettled in those countries, rather than in Australia.

For more information about the transfer of asylum seekers to third countries, click here.

**What is the 'enhanced screening process'?**

In October 2012 the Australian Government introduced an ‘enhanced screening process’ for people who come unauthorised by boat to Australia from Sri Lanka.

The Commission is concerned that this process may not contain sufficient safeguards to protect people from being removed to a country where they face a real risk of significant harm (refoulement).

Under the enhanced screening process an individual is interviewed by two officers from the Department. If the Department determines that an individual raises claims that may engage Australia’s non-refoulement obligations, they are ‘screened in’ to the third country processing regime.

If the Department determines that an individual does not raise claims that engage Australia’s non-refoulement obligations then they are ‘screened out’ of the protection assessment process and removed back to their country of origin.

For information about the enhanced screening process and the Commission’s concerns about the process, see the Commission’s fact sheet: Tell Me About: The ‘Enhanced Screening Process’.
The Australian Human Rights Commission: Transfer of Asylum Seekers to Third Countries.

In August 2012 the Australian Government introduced a third country processing regime for asylum seekers who come to Australia by boat, without a valid visa. There are many aspects of this regime which may lead to breaches of Australia’s human rights obligations.

The third country processing regime

Following the release of the report by the Expert Panel on Asylum Seekers on 13 August 2012, the Australian Government introduced a system of third country processing for asylum seekers. Under this system, asylum seekers who arrive by boat without a valid visa must be transferred to a third country as soon as is reasonably practicable, unless the Minister for Immigration exercises his/her discretion to exempt them from transfer.

In order to implement this system, the Federal Parliament passed amendments to the Migration Act 1958 (Cth) and legislative instruments designating Nauru and Papua New Guinea (PNG) as ‘regional processing countries’. Under the Migration Act certain documents must be tabled with the designations of ‘regional processing countries’, including a statement of reasons from the Minister as to why he/she thinks it is in the national interest to designate the country, and the advice the Australian Government received from the UN High Commissioner for Refugees about the designation. The designation documents for Nauru(pdf) were tabled on 10 September 2012, and the designation documents for PNG(pdf) were tabled on 9 October 2012.

The system of third country processing introduced in August 2012 initially only applied to those asylum seekers who arrived in Australia at an ‘excised offshore place’ (such as Christmas Island). However in May 2013 the system was extended to apply to all asylum seekers who arrive (without authorisation) by boat anywhere in Australia (that is, including the mainland). In September 2012 the Australian Government commenced transferring asylum seekers who had arrived in Australia by boat to Nauru. In November 2012 it commenced transferring asylum seekers to Manus Island in PNG.

On 19 July 2013 the Australian Government announced a Regional Resettlement Arrangement (RRA) with the Government of PNG, and on 6 August 2013 the Australian Government entered into a new Memorandum of Understanding (MOU) with PNG to support the RRA. Under the RRA and MOU, asylum seekers arriving unauthorised by boat to Australia after 19 July 2013 will be transferred to PNG for processing under PNG law, and if found to be refugees they will be resettled in PNG, rather than Australia. If found not to be refugees they will be returned to their country of origin or a country where they have a right of residence.

Similarly, on 3 August 2013 the Australian Government signed a new MOU with Nauru which provides that the Nauruan Government will enable individuals whom it has determined are in need of international protection to settle in Nauru, ‘subject to agreement between Participants on arrangements and numbers’.

As at 29 November 2013 there were 668 asylum seekers in the ‘regional processing centre’ on Nauru, and 1,140 asylum seekers in the centre on Manus Island.
United Nations High Commissioner for Refugees (UNHCR) conducts regular visits to the regional processing centres on Nauru and Manus Island. UNHCR publishes reports following these visits, the latest of which are available here.

The Commission's human rights concerns about sending asylum seekers to third countries

Seeking asylum in Australia is not illegal. In fact, it is a basic human right. All people are entitled to protection of their human rights, including the right to seek asylum, regardless of how or where they arrive in Australia.

In the Commission’s view, all people who arrive in Australia and make claims for asylum should have those claims assessed on the Australian mainland through the refugee status determination and complementary protection system that applies under the Migration Act. If they are found to be owed protection, they should be granted a Permanent Protection Visa and allowed to live in Australia.

The Commission holds serious concerns that the system of third country processing creates a significant risk that Australia may breach its human rights obligations. In particular, the Commission has concerns about:

- the differential treatment of asylum seekers based on their mode of arrival
- the potential for breaches of Australia’s non-refoulement obligations
- the potential that asylum seekers will be subjected to arbitrary detention
- conditions for asylum seekers on Nauru and Manus Island
- the detention of child asylum seekers
- the impact on families, including potential separation
- the situation of unaccompanied children
- the lack of robust independent monitoring mechanisms.

The Commission made a detailed submission to the Parliamentary Joint Committee on Human Rights about the human rights concerns relating to the third country processing regime. The Committee’s report is available here.

For further information, see:

Reports:
- Asylum seekers, refugees and human rights: snapshot report 2013

Papers:
- Human rights issues raised by the third country processing regime (March 2013)
HIGH COURT OF AUSTRALIA

31 August 2011

PLAINTIFF M70/2011 v MINISTER FOR IMMIGRATION AND CITIZENSHIP

PLAINTIFF M106 OF 2011 BY HIS LITIGATION GUARDIAN, PLAINTIFF M70/2011 v MINISTER FOR IMMIGRATION AND CITIZENSHIP

[2011] HCA 32

Today the High Court held invalid the Minister for Immigration and Citizenship's declaration of Malaysia as a country to which asylum seekers who entered Australia at Christmas Island can be taken for processing of their asylum claims. After an expedited hearing before the Full Bench, the Court by majority made permanent the injunctions that had been granted earlier and restrained the Minister from taking to Malaysia two asylum seekers who arrived at Christmas Island, as part of a larger group, less than four weeks ago.

The Court also decided that an unaccompanied asylum seeker who is under 18 years of age may not lawfully be taken from Australia without the Minister's written consent under the Immigration (Guardianship of Children) Act 1946 (Cth). The Court granted an injunction restraining the Minister from removing the second plaintiff, an Afghan citizen aged 16, from Australia without that consent.

The Court held that, under s 198A of the Migration Act 1958 (Cth), the Minister cannot validly declare a country (as a country to which asylum seekers can be taken for processing) unless that country is legally bound to meet three criteria. The country must be legally bound by international law or its own domestic law to: provide access for asylum seekers to effective procedures for assessing their need for protection; provide protection for asylum seekers pending determination of their refugee status; and provide protection for persons given refugee status pending their voluntary return to their country of origin or their resettlement in another country. In addition to these criteria, the Migration Act requires that the country meet certain human rights standards in providing that protection.

The Court also held that the Minister has no other power under the Migration Act to remove from Australia asylum seekers whose claims for protection have not been determined. They can only be taken to a country validly declared under s 198A to be a country that provides the access and the protections and meets the standards described above. The general powers of removal of "unlawful non-citizens" given by the Migration Act (particularly s 198) cannot be used when the Migration Act has made specific provision for the taking of asylum seekers who are offshore entry persons and whose claims have not been processed to another country, and has specified particular statutory criteria that the country of removal must meet.

On the facts which the parties had agreed, the Court held that Malaysia is not legally bound to provide the access and protections the Migration Act requires for a valid declaration. Malaysia is not a party to the Refugees Convention or its Protocol. The Arrangement which the Minister
signed with the Malaysian Minister for Home Affairs on 25 July 2011 said expressly that it was not legally binding. The parties agreed that Malaysia is not legally bound to, and does not, recognise the status of refugee in its domestic law. They agreed that Malaysia does not itself undertake any activities related to the reception, registration, documentation or status determination of asylum seekers and refugees. Rather, the parties agreed, Malaysia permits the United Nations High Commissioner for Refugees ("UNHCR") to undertake those activities in Malaysia and allows asylum seekers to remain in Malaysia while UNHCR does so.

The Court emphasised that, in deciding whether the Minister's declaration of Malaysia was valid, it expressed no view about whether Malaysia in fact meets relevant human rights standards in dealing with asylum seekers or refugees or whether asylum seekers in that country are treated fairly or appropriately. The Court's decision was based upon the criteria which the Minister must apply before he could make a declaration under s 198A.

- This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.
Mediterranean refugee crisis: EU reduced to impotent handwringing

Demands for EU response to recent tragedies growing but member countries’ policies differ wildly, while Brussels holds minimal authority

Ian Traynor Europe editor
Monday 20 April 2015 09:15 EDT

A wonder of modern engineering, Europe’s longest road and rail bridge connects Scandinavia to mainland European transport networks by linking the Swedish city of Malmö with the Danish capital, Copenhagen, across the Øresund Strait.

The five-mile bridge has brought Sweden and Denmark closer together. But when it comes to dealing with newcomers, the two neighbours could not be further apart.

While the Danes practise the most restrictive immigration policies in the EU, the Swedes have the most open, liberal asylum and refugee regime in the union. It is difficult for foreign-born spouses of Danes to get residence rights in Denmark. But Sweden last year fielded more than 80,000 asylum applications, more than twice as many as Britain in a country six times smaller than the UK in population terms.

When it comes to immigration, Swedish and Danish policies are chalk and cheese. It highlights how, in the middle of a Mediterranean migration crisis that is seeing hundreds of thousands surrender their life savings to trafficking networks and risk their lives to reach Europe’s shores, there is no such thing as an EU or European immigration policy.

As the tragedies in the waters between Libya and Italy multiply weekly, newspapers, pundits, MPs, NGOs and charities are clamouring to know what “Europe” is doing. The desperation and the suffering, so evident on television and online, are fuelling fresh Brussels-bashing as unelected, self-satisfied eurocrats are said to be feckless, impotent and cynical in their lack of response.

In fact, the institutions of Brussels have minimal authority over immigration in Europe. It is Britain not Brussels that decides how many uprooted Syrians it will take in. It is Berlin and the German regional authorities that rule on whether asylum be granted or deportations ordered. This is why the interior ministers from 28 governments meeting on Monday in Luxembourg could agree or disagree on what to do about Lampedusa and why the European commission or parliament could only issue rather sad and empty words. In a demonstration of handwringing impotence, the commission in Brussels hit a new low on Sunday when it said it was “chagrined” at the fishing trawler capsizing on Saturday night.
which may have left more than 900 dead.

“European” immigration policy is a mess, a patchwork of 28 hugely varying national systems constrained by national politics, shaped by culture and history. The big British and French ethnic minorities stem from the hangovers of empire. German multiculturalism derives from the foreign labour force, mainly Turkish, brought in to power the “economic miracle” of the 1960s. The newer EU countries of eastern Europe were, until a generation ago, closed societies behind the iron curtain with no experience of mass migration except the flight of their native populations from Russian occupation. They have continued to export their own people to western Europe since the first joined the EU in 2004.

Estonia had 155 asylum applications last year, according to EU figures. Germany had more than 200,000, almost a third of the asylum claims lodged in the EU (626,000 and nearly 200,000 up on the year before).

Between them, seven countries - or one-quarter of the EU - fielded more than three-quarters of asylum applications. Most fail. But although 425,000 claims were denied in 2013, less than 40% of those failures resulted in deportation.

There have been innumerable proposals over the past decade from Brussels for more common and coordinated policies, ranging from “blue card” schemes modelled on the US green card to making it easier for migrants to enter the EU legally.

But an EU-wide scheme is a no-go area for all national governments except those who might benefit from it, since it would entail a system of quotas and distributing refugees and asylum-seekers more equitably between EU countries.

Incumbent governments of the mainstream centre-left or -right are scared of this because immigration is one of the most toxic and incendiary topics in the national politics of so many countries.

The UK prime minister, David Cameron, is wary of Ukip on the issue and is fighting the rest of the EU over freedom of movement within Europe. The German chancellor, Angela Merkel, has an eye on the large recent anti-immigrant street protests against the “Islamification of the west” in her country.

When the former French president, Nicolas Sarkozy, sought to blunt the appeal of the anti-immigrant National Front of Marine Le Pen, he did so by sounding tough on immigration. The current socialist prime minister, Manuel Valls, tried the same trick when he was interior minister.

On Sunday, in Finland’s general election, the anti-immigrant populists called the (True) Finns party reached second place and a claim on coalition government. The Danish hard line over the past 15 years has been due to the influence on coalition politics of the nationalist, anti-immigrant Danish People’s party. Similar dynamics are at play in Austria, The Netherlands, Greece, Italy and Hungary.
In Brussels, too, the fear factor applies. When the Lampedusa tragedy left more than 300 dead off the Italian coast in October 2013, European immigration policy was put on to the agenda for an EU summit. Herman Van Rompuy, organising and chairing the summit, then had it removed until June last year. Why? Because national leaders were worried it would boost the fortunes of anti-immigrant parties in the European parliament elections in May last year.

Next Thursday in Milan, leaders of the European People’s party, the Christian democratic caucus that is the biggest in the European parliament, is to grapple with the issue.

Their - inconclusive - draft policy paper, obtained by the Guardian, talks of introducing quotas for distributing migrants across the 28 countries according to a country’s size and its wealth or depending on whether a certain “threshold” of refugee influx in a country has been exceeded.

“An intra-EU relocation scheme has to be elaborated,” the document says.

Next month, the European commission will unveil a European migration agenda blueprint tabling similar proposals.

Governments are likely to balk at such notions, as they always have. But the situation in the Mediterranean is spiralling out of control. A summer of “Europe’s shame” headlines looms. The politicians may be losing control as events dictate political outcomes.

More analysis

**Topics**

Migration
Italy
European Union
Europe
European commission
TIME: What you need to know about the EU’s Refugee Crisis

Thousands of asylum seekers have now died trying to reach Europe from Africa, putting the E.U.’s refugee policies under scrutiny

At least 700, but perhaps as many as 950, refugees are feared dead after a boat capsized off the coast of Libya on Sunday.

Who are the migrants attempting to cross the Mediterranean Sea?

Although it is still unclear exactly which countries the migrants feared dead in Sunday’s disaster hail from, refugees being transported across the Mediterranean Sea by smugglers come mostly from North African and West Asian countries like Yemen, Nigeria, Gambia, Syria and Libya, to name a few. Some come from even further afield, however. One of the 28 survivors of the vessel that capsized on Sunday — who reportedly told authorities that the boat was carrying 950 people — was from Bangladesh.

Where are they going and why?

Most people attempting the perilous crossing are fleeing poverty or violent conflict in their native countries and are attempting to reach Europe, where they seek asylum and better employment opportunities. Countries like Spain, Greece, Italy and the small island nation of Malta are common destinations. The vessel on Sunday capsized off the coast of Libya near the island of Lampedusa, Italy’s southernmost landmass, which is about 127 miles from Sicily and 109 miles from Malta.

How did the boat capsize?

Italian authorities received an emergency call on Saturday night about a boat bearing migrants 70 miles off the Libyan coast, the New York Times reported, and ordered the closest commercial vessel — Portuguese freighter King Jacob — to make contact and wait for rescue ships to arrive. The migrants on board rushed to one side of the boat on glimpsing the freighter in order to signal it, overturning it in the process. The Bangladeshi survivor told Italian authorities that the smugglers had locked about 300 others in the boat’s hold, but his account could not be confirmed.

Aren’t incidents like this becoming tragically common?

Yes. The influx of refugees into Europe, particularly Italy, has increased dramatically in recent months. Some 170,100 refugees arrived in Italy in 2014, according to the United Nations’ refugee agency UNHCR, and the International Organization for Migration estimates that 21,191 migrants reached the country this year as of April 17 — over 10,000 within the past week.
Fatalities during the perilous journey have risen dramatically during the same period, with an estimated 3,500 deaths in 2014. Sunday’s disaster, if the deaths are confirmed, will be the region’s worst ever and will take the total death toll this year above 1,500. About 1,100 of those will have died last week alone, with another 400 migrants believed to have drowned off the Libyan coast in a separate incident last Monday. Other horror stories from the past week include the rescue of burn victims from a rubber raft (smugglers reportedly didn’t allow them to get treatment after a gas cylinder exploded before their departure in Libya) and reports of Muslim refugees tossing Christian refugees overboard.

**What are European countries doing about the issue?**

Sunday’s incident has prompted a wave of criticism against the E.U., with experts as well as national leaders across the continent accusing the E.U. of mishandling the issue of refugees crossing the Mediterranean. “This disaster confirms how urgent it is to restore a robust rescue-at-sea operation and establish credible legal avenues to reach Europe,” Antonio Guterres, United Nations High Commissioner for Refugees, said in a statement. Heads of state stressed the need to tackle the root causes of human trafficking in countries like Libya, with Italian Prime Minister Matteo Renzi calling it a “plague on our continent” and French President Francois Hollande urging the E.U. to provide “more boats, more over-flights and a more intense battle against people trafficking.”

The Triton program, Europe’s effort to rescue and rehabilitate migrants, is being slammed as inadequate, ineffective and underfunded in comparison to its predecessor, Italy’s Mare Nostrumprogram. Mare Nostrum, which reportedly had a budget of nearly $10 million compared to Triton’s $3.2 million, was shut down late last year amid claims that it encouraged more refugees to seek passage to Europe.

The issue will be discussed in Luxembourg on Monday when the E.U. Foreign Affairs Council meets, according to High Representative for Foreign Affairs Federica Mogherini. “The world needs to react with the conviction with which it eliminated piracy off the coast of Somalia a few years ago,” said IOM Director General William Lacy Swing, advocating a reinstatement of a program on the scale of Mare Nostrum. “All of us, especially the E.U. and the world’s powers, can no longer sit on the sidelines watching while this tragedy unfolds in slow motion.”
What happens to the migrants after they arrive?

Every refugee is entitled to asylum in Europe under the Common European Asylum System, which sets out a framework for their protection and rehabilitation. However, several countries are unable to implement this framework effectively with the sudden and ever-increasing influx of illegal migrants. There have been allegations of mistreatment of asylum-seekers in the past, and measures to deal with the problem include a proposal to create offshore detention centers in so-called “third countries” like Morocco, Egypt and Tunisia. A large part of the effort is funded by the E.U.’s Asylum, Migration and Integration fund, which has set aside 3.137 billion euros for the period of 2014-2020.

Unfortunately, as this week’s events show, many perish before they can be even considered for asylum.
Unaccompanied Alien Children Encountered by Fiscal Year

Fiscal Years 2009-2014; Fiscal Year 2015 to date (October 1, 2014 - March 31, 2015)

<table>
<thead>
<tr>
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</tr>
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<tbody>
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<td>Mexico</td>
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<td>13,974</td>
<td>17,240</td>
<td>15,634</td>
<td>5,572</td>
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Family Unit Apprehensions Encountered by Fiscal Year*

Fiscal Year 2015 to date (October 1, 2014 - March 31, 2015)

<table>
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<th>Country</th>
<th>FY 2015</th>
</tr>
</thead>
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<td>Guatemala</td>
<td>4,537</td>
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<tr>
<td>Honduras</td>
<td>3,418</td>
</tr>
<tr>
<td>Mexico</td>
<td>2,193</td>
</tr>
</tbody>
</table>

*Note: (Family Unit represents the number of individuals (either a child under 18 years old, parent or legal guardian) apprehended with a family member by the U.S. Border Patrol.)

Tags: Statistics Unaccompanied Alien Children (UAC) U.S. Border Patrol
NOTE: I encourage you to go to the TRAC URL at the bottom of this page to view this data, as the tables on-line allow you to sort the information much more specifically.
Unaccompanied Alien Children: Potential Factors Contributing to Recent Immigration

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July 3, 2014
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Introduction

In the past several years, and in the past year in particular, the number of unaccompanied alien children (UAC) seeking to enter the United States along the U.S.-Mexico border has surged to unusually high levels. This surge is driven overwhelmingly by migration from El Salvador, Guatemala, and Honduras. Congress has expressed increasing concerns over this situation because of its implications for border security and U.S. immigration policy. Because the surge has occurred recently, and because few sources of data exist to accurately measure the characteristics and motives of these unaccompanied children, immigration observers have advanced a range of explanations for the surge.

The report is not intended to be an exhaustive review of all factors that potentially underlie the recent surge in unaccompanied children. Rather, it discusses major possible contributing factors that have been widely cited in published reports. It also emphasizes factors that may account for the recent surge in unaccompanied children, but not long-standing causes, such as wage and earnings differentials between other countries and the United States. The report distinguishes what are often referred to as “push” and “pull” factors associated with the recent surge. Push factors in this case refer to forces that originate in migrant origin countries which encourage children to emigrate to other countries. Pull factors refer to elements that originate in the United States and encourage children to migrate specifically to this country.

The analytic dichotomy between push and pull factors often blurs in actual circumstances. For example, family reunification may occur after a parent from an origin country secures employment in the United States. Yet, having an employed parent in the United States may easily make a child in an origin country more susceptible to extortion or kidnapping by criminal gangs, which in turn, may motivate the child to migrate to the United States. Hence, having an employed parent in the United States ostensibly acts as a “pull” factor while the threat of violence acts as a “push” factor, but in this example, the latter would not occur without the former.

Migration to another country stems not only from macro-level circumstances such as violence and economic hardship but also personal circumstances and characteristics, such as marital status and risk tolerance. Most children have multiple motives, and how those motives influence their decisions to migrate depend on a range of factors that cannot be measured easily.

This report begins by describing the recent surge in unaccompanied child apprehensions. It discusses several factors widely associated with out-migration from El Salvador, Guatemala, and Honduras, three countries accounting for much of the recent surge of unaccompanied child migrants. These factors include economic conditions and poverty, crime and violence, and conditions related to the migration transit zone between Central America and the United States. The report then discusses three broad factors that may be attracting migrants to the United States: economic and educational opportunity, family reunification, and U.S. immigration policies. It concludes with caveats on the attribution of causes to this situation.

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1 In this report, we refer to unaccompanied alien children as unaccompanied children.

2 The terms “push factor” and “pull factor” have long been used in demographic research to explain human migration.
Background

Unaccompanied alien children (UAC) are defined in statute as aliens under age 18, who lack lawful immigration status in the United States, and who are without a parent or legal guardian in the United States or lack a parent or legal guardian in the United States who is available to provide care and physical custody. They typically arrive at U.S. ports of entry or are apprehended along the southwestern border with Mexico. Less frequently they are apprehended in the interior and determined to be a juvenile and unaccompanied. Most of these children are aged 14 or older.

Figure 1. UAC Apprehensions by Country of Origin, FY2008-FY2014

Source: Prepared by Jamie L. Hutchinson, CRS Graphics Specialist. Data from Department of Homeland Security, United States Border Patrol, Juvenile and Adult Apprehensions—Fiscal Year 2013. (Data provided to CRS by request.)

Notes: FY2014 figures are October 1, 2013, to June 15, 2014, representing just over 2/3 of a fiscal year.

The number of unaccompanied children has increased in the past six years and has surged in this current year. In FY2008, the number apprehended by U.S. Customs and Border Protection (CBP)

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3 For information on unaccompanied alien children, see CRS Report R43599, Unaccompanied Alien Children: An Overview, by Lisa Segheiti, Alison Siskin, and Ruth Ellen Wasem.

4 Alien, a technical term appearing throughout the Immigration and Nationality Act (INA), refers to a foreign national who is not a citizen or national of the United States. This report uses "unaccompanied alien children" and "unaccompanied children" interchangeably.

5 6 U.S.C. §279(g)(2).

6 A juvenile is defined as an alien under the age of 18. 8 C.F.R. §263.3. In this report, the terms "juvenile," "child," and "minor" are used interchangeably.

7 A juvenile is classified as unaccompanied if neither a parent nor a legal guardian is with the juvenile alien at the time of apprehension, or within a geographical proximity to quickly provide care for the juvenile. 8 C.F.R. §236.3(b)(1).
toted 8,041. In the first 8½ months of FY2014, apprehensions climbed to 52,000 (Figure 1). Nationals of Guatemala, Honduras, El Salvador, and Mexico have accounted for almost all unaccompanied alien children apprehended at the Mexico-U.S. border during this period.

In the past three years, apprehensions of Mexican unaccompanied children, which rose substantially in FY2009, have since varied between 12,000 and 17,000. In contrast, apprehensions of unaccompanied children from Guatemala, Honduras, and El Salvador have increased considerably during this period. In FY2009, Mexicans accounted for 82% of the 19,668 unaccompanied child apprehensions, while the Central American countries accounted for 17%. By the first eight months of FY2014, the proportions had almost reversed, with Mexican apprehensions comprising only 23% of the 52,000 UAC apprehensions, and UAC from the three Central American countries comprising 75% of the total. The total increase in apprehensions in the past three years stems mainly from large increases in the number of unaccompanied children from the three Central American countries.

The similarity of the trends characterizing apprehensions of unaccompanied alien children from El Salvador, Guatemala, and Honduras, and their stark divergence from those characterizing unaccompanied Mexican children suggests that factors specific to Central America’s “northern triangle” underlies the sudden surge in total unaccompanied child apprehensions. What follows is a discussion of possible causes originating in the countries themselves (“push factors”) and other possible causes originating in the United States (“pull factors”).

## Conditions in Central America as Possible “Drivers” for Unaccompanied Child Migration

Central America is a region encompassing seven countries of the isthmus between Mexico and South America: Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama (Figure 2). The overwhelming majority of the unaccompanied child migrants apprehended in Mexico or at the U.S.-Mexico border have come from Guatemala, Honduras, and El Salvador, which are often referred to as the “northern triangle” countries of Central America. High violent crime rates, poor economic conditions fueled by relatively low economic growth rates, relatively high poverty rates, and the presence of transnational gangs appear to be some of the main distinguishing factors between these three northern triangle countries and other countries in the region.

Unaccompanied child migrants’ motives for emigrating appear to be multifaceted. In 2013, the U.N. High Commissioner for Refugees (UNHCR) conducted interviews with a representative group of about 400 unaccompanied minors from El Salvador, Guatemala, Honduras, and Mexico, all of whom had arrived in the United States since FY2012. Most of the unaccompanied minors

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8 If extrapolated at the same rate to the end of the fiscal year, the figure would reach roughly 73,000. News reports have cited an internal DHS memorandum estimating that FY2014 apprehensions could total 90,000. Alicia A. Caldwell, Associated Press, “Border Patrol resources stretched thin as children illegally enter U.S. alone,” *PBS NewsHour, The Rundown*, June 5, 2014.

9 This term is often used to refer to these three countries as a group.

10 For more information, see CRS Report R41731, *Central America Regional Security Initiative: Background and Policy Issues for Congress*, by Peter J. Meyer and Clare Ribando Seelke.

provided multiple reasons for leaving their countries. Many left to reunite with family or pursue opportunities in the United States. Of those interviewed, 21% mentioned joining a family member, 51% mentioned economic opportunity, and 19% mentioned education.\footnote{Ibid.}

Figure 2. Map of Central America and Neighboring Countries

*Source: Prepared by Amber Hope Wilson, CRS Graphics Specialist.*

Violence also played a large role in their decisions to emigrate. Nearly half of the children (48%) said they had experienced serious harm or had been threatened by organized criminal groups or state actors, and more than 20% had been subject to domestic abuse. As recently as 2006, only 13% of unaccompanied child migrants from Central America interviewed by UNHCR presented any indication they were fleeing societal violence or domestic abuse.

(\textit{...continued})

\textit{Children on the Run”). Children interviewed were part of the increase in unaccompanied children beginning in FY2012. Almost all were interviewed while in the custody of the Office of Refugee Resettlement, the agency within the U.S. Department of Health and Human Services to which they are referred after apprehension. Children were identified by a random selection process that accounted for age, nationality, sex, and date of U.S. arrival. For more on the study’s methodology, see pp. 18-22. Caution must be used in generalizing a single study to the entire population of unaccompanied children. 

\footnote{Ibid.}
Endemic poverty also appears to play a role in the emigration of unaccompanied minors, as 16% of those interviewed mentioned economic deprivation as a motive. There is some variation depending on country of origin, with Salvadorans being more likely to cite societal violence and Guatemalans being more likely to cite economic deprivation as motives for emigration (see Table 1). Other studies involving interviews with unaccompanied children yield similar results.

Table 1. Primary Reasons Unaccompanied Children Emigrate
(Percentage of minors interviewed by UNHCR in 2013 citing each factor)

<table>
<thead>
<tr>
<th>Country of Origin</th>
<th>Societal Violence</th>
<th>Domestic Abuse</th>
<th>Economic Deprivation or Social Exclusion</th>
<th>Family or Opportunities in the United States</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>El Salvador</td>
<td>66%</td>
<td>20%</td>
<td>7%</td>
<td>80%</td>
<td>35%</td>
</tr>
<tr>
<td>Guatemala</td>
<td>20%</td>
<td>23%</td>
<td>29%</td>
<td>84%</td>
<td>39%</td>
</tr>
<tr>
<td>Honduras</td>
<td>44%</td>
<td>24%</td>
<td>21%</td>
<td>82%</td>
<td>34%</td>
</tr>
<tr>
<td>Mexico</td>
<td>59%</td>
<td>17%</td>
<td>7%</td>
<td>80%</td>
<td>34%</td>
</tr>
<tr>
<td>Total</td>
<td>48%</td>
<td>21%</td>
<td>16%</td>
<td>81%</td>
<td>35%</td>
</tr>
</tbody>
</table>

Source: UNHCR, Children on the Run.
Notes: Sums exceed 100% since the majority of the children interviewed provided multiple reasons for emigrating. Column categories were grouped by source author, and more detailed reasons cannot be provided.

Economic Stagnation and Poverty

El Salvador, Guatemala, and Honduras are each considered lower middle income economies by the World Bank. Per capita gross domestic product (GDP) in 2014 is estimated to be $4,014 in El Salvador, $3,684 in Guatemala, and $2,368 in Honduras. The countries have maintained what are viewed by most economists as generally sound macroeconomic policies in recent years, and enjoyed stable economic growth until the onset of the global financial crisis and U.S. recession in 2009. At that time, the Salvadoran and Honduran economies contracted and the Guatemalan economy slowed significantly, demonstrating how all three countries are vulnerable to external shocks as a result of their open economies and close ties to the United States. Although all three economies have rebounded since 2010, growth rates have yet to fully recover (see Figure 3). El Salvador posted an economic growth rate of just 1.6% in 2013, the lowest of any country in Central America.

13 Ibid.
14 See, for example, Women's Refugee Commission, Forced from Home: The Lost Boys and Girls of Central America, October 2012; and Elizabeth G. Kennedy, "No Place for Children: Central America's Youth Exodus," InSight Crime, June 23, 2014.
15 International Monetary Fund (IMF), World Economic Outlook Database, April 2014, accessed June 2014.
16 An open economy is an economy with relatively few barriers to trade or investment (as opposed to a closed or protectionist economy). Open economies are more integrated into the international market than closed economies, and thus more vulnerable to external shocks.
17 Close ties means the countries are heavily reliant on exports to the United States, remittances from the United States, and investment from the United States.
Economic growth in the region has been inhibited by slow economic growth in major markets (Europe, China, the United States) as well as domestic factors, such as a coffee rust (roya fungus) outbreak, hurricanes and other natural disasters, and weak productivity.\textsuperscript{19} The coffee rust epidemic, which in 2013 affected 74% of the coffee crop in El Salvador, 70% of the coffee crop in Guatemala, and 25% of the coffee crop in Honduras, led to nearly 200,000 jobs being lost across the three countries.\textsuperscript{20} Employment and wages in the coffee sector have continued to fall over the past year, depriving many poor households of a significant source of income.\textsuperscript{21}

\textbf{Figure 3. Annual Percentage Change in Real Gross Domestic Product (GDP): 2007-2014}

\begin{center}
\includegraphics[width=\textwidth]{figure3.png}
\end{center}


\textbf{Note:} Growth rates for 2013 and 2014 are IMF estimates.

Central American countries are also vulnerable to other types of natural disasters. For example, a tropical storm that hit El Salvador in 2011 caused more than $800 million in damage to roads, infrastructure, and agriculture.\textsuperscript{21}

The northern triangle countries also struggle with low productivity rates, particularly when compared to competitors in East Asia. Tariff preferences provided through the Dominican

\textsuperscript{19} Economist Intelligence Unit, \textit{Country Reports on El Salvador, Guatemala, and Honduras}, June 2014.

\textsuperscript{20} The coffee rust epidemic is also a problem in the rest of Central America but Costa Rica, Panama, and to a certain extent, Nicaragua can handle such economic and natural disaster shocks more effectively because of their comparatively well developed economies, lower levels of poverty, and/or stronger social safety nets.


Republic-Central America-United States Free Trade Agreement (CAFTA-DR) appear to be important in keeping apparel producers in those countries competitive in the U.S. market. Economic growth and slightly higher levels of social investment have led to improved social conditions in the region over the past decade. Nevertheless, poverty remains widespread. According to the U.N. Economic Commission for Latin America and the Caribbean (ECLAC), about 45% of Salvadorans, 55% of Guatemalans, and 67% of Hondurans live in poverty. Guatemala and Honduras have the highest income disparities in Central America, exacerbated by the social exclusion of indigenous people and ethnic minorities. The top 10% of earners account for 47% of national income in Guatemala and 43% of national income in Honduras.

Crime and Violence

El Salvador, Guatemala, and Honduras have long struggled to address high levels of crime and violence, but the deterioration in security conditions has accelerated over the past decade. Counternarcotics efforts in Colombia and Mexico have put pressure on drug traffickers in those countries, leading some to battle over territory in Central America—a region with fewer resources and weaker institutions dedicated to addressing criminal activity. Increasing flows of illicit narcotics have coincided with rising levels of violence and have contributed to the corruption of government officials.

Gangs such as Mara Salvatrucha (MS-13) and the “18th Street” gang (M-18) also play a major role in crime and violence in the northern triangle region, but are not significantly present in other Central American countries. The 18th Street gang was formed by Mexican youth in the Rampart section of Los Angeles in the 1960s who were not accepted into existing Hispanic gangs. MS-13 was created during the 1980s by Salvadorans in Los Angeles who had fled the country’s civil conflict. Both gangs later expanded their operations to Central America. This process accelerated after the United States began deporting illegal immigrants, many with criminal convictions, back to the northern triangle region after the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. In general, Central American

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24 Poverty rates are 17.8% in Costa Rica, 25.3% in Panama, and 58.3% in Nicaragua. Figures for Belize are unavailable. U.N. Economic Commission for Latin America and the Caribbean (ECLAC), Social Panorama of Latin America 2013, p. 50.


26 For more information, see CRS Report R41731, Central America Regional Security Initiative: Background and Policy Issues for Congress, by Peter J. Meyer and Clara Ribando Steeke.


28 For background, see CRS Report RL34112, Gangs in Central America, by Clara Ribando Steeke.

29 For the history and evolution of these gangs, see Tom Diaz, No Boundaries: Transnational Latino Gangs and American Law Enforcement, Ann Arbor, M.I.: University of Michigan Press, 2009

30 IIRIRA expanded the categories of noncitizens subject to deportation and made it more difficult for foreign nationals to get relief from removal.
countries whose migrants did not emigrate to the Los Angeles area, such as Nicaragua or Panama, did not receive large numbers of gang-deportees in the 1990s.\footnote{31}

The MS-13 and 18th Street gangs engage in a variety of activities, such as kidnapping, extortion, and forced recruitment, which often have more of an impact on the day-to-day lives of Salvadorans, Guatemalans, and Hondurans than drug-trafficking.\footnote{32} On October 11, 2012, the Treasury Department designated the MS-13 as a significant transnational criminal organization whose assets would be targeted for economic sanctions pursuant to Executive Order (E.O.) 13581.\footnote{33} State Department officials have estimated that roughly 85,000 members of MS-13 and M-18 reside in the northern triangle countries, with the highest per capita concentration in El Salvador.\footnote{34}

### Table 2. Estimated Homicide Rates in Central America and Mexico: 2007-2012

(Homicides per 100,000 people)

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</tr>
</thead>
<tbody>
<tr>
<td>Belize</td>
<td>33.9</td>
<td>35.1</td>
<td>32.2</td>
<td>41.8</td>
<td>39.2</td>
<td>44.7</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>8.3</td>
<td>11.3</td>
<td>11.4</td>
<td>11.3</td>
<td>10.0</td>
<td>8.5</td>
</tr>
<tr>
<td>El Salvador</td>
<td>57.1</td>
<td>51.7</td>
<td>70.9</td>
<td>64.1</td>
<td>69.9</td>
<td>41.2</td>
</tr>
<tr>
<td>Guatemala</td>
<td>43.4</td>
<td>46.1</td>
<td>46.5</td>
<td>41.6</td>
<td>38.6</td>
<td>39.9</td>
</tr>
<tr>
<td>Honduras</td>
<td>50.6</td>
<td>60.8</td>
<td>70.7</td>
<td>81.8</td>
<td>91.4</td>
<td>90.4</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>12.8</td>
<td>13.0</td>
<td>14.0</td>
<td>13.5</td>
<td>12.5</td>
<td>11.3</td>
</tr>
<tr>
<td>Panama</td>
<td>12.7</td>
<td>18.4</td>
<td>22.6</td>
<td>20.6</td>
<td>20.3</td>
<td>17.2</td>
</tr>
<tr>
<td>Mexico</td>
<td>7.8</td>
<td>12.2</td>
<td>17.0</td>
<td>21.8</td>
<td>22.8</td>
<td>21.5</td>
</tr>
</tbody>
</table>


Note: 2012 is the most recent year for which comparable data are available at this time.

Over the past decade, homicide rates have increased significantly in Honduras and remained at elevated levels in El Salvador and Guatemala. According to the U.N. Office on Drugs and Crime, in 2012 (the most recent year for which comparable data are available), the homicide rate per 100,000 inhabitants stood at 90.4 in Honduras, 41.2 in El Salvador, and 39.9 in Guatemala (see Table 2).\footnote{35} Although local statistics suggest that homicide rates declined slightly in each of the


\footnote{32} Of the unaccompanied minors interviewed by UNHCR, 27% reported that they had been harmed or threatened by gangs. This includes nearly 62% of the Salvadorans. UNHCR, 2014, op. cit.


three countries in 2013, they remain among the highest in the world. Moreover, there are indications that the homicide rate has begun to climb once again in El Salvador as the gang truce that has been in effect since 2012 has unraveled.36 Other crimes, such as theft and extortion, also remain at elevated levels. In 2012, 29% of Salvadorans, 34% of Guatemalans, and 32% of Hondurans reported that someone in their household had been the victim of some form of crime within the previous 12 months.37

Many children also must contend with violence at home. Although domestic abuse—including physical, emotional, and sexual abuse—often goes unreported and undocumented, it is believed to be widespread in the region.38 According to scholars, Central American cultural norms legitimizethe use of violence in interpersonal relationships, including physical discipline of children and violence against women.39 Studies have found that children who are left behind as a result of one or both parents migrating abroad are more vulnerable to abuse. This is especially true of children whose mothers have migrated.40

**Unaccompanied Migrant Children: Why Not from the Rest of Central America?**

In FY2012, the number of unaccompanied children apprehended at the U.S. border originating from the northern triangle countries ranged from about 3,000 to 4,000 per country. That same year, there were only 4 unaccompanied children from Belize, 5 from Costa Rica, 43 from Nicaragua, and none from Panama.41

Many observers speculate that children are not migrating from Belize, Costa Rica, Nicaragua, and Panama because those countries have experienced greater economic growth and/or less crime and violence than the northern triangle countries. In 2013, the International Monetary Fund (IMF) estimated that economic growth rates in the northern triangle countries ranged from 1.6% to 3.5%. Most of the other countries’ rates were indeed higher: Belize grew by an estimated 1.6%, Costa Rica grew by an estimated 3.5%, Nicaragua grew by an estimated 4.2%, and Panama grew by an estimated 8%.42 Per capita gross domestic product (GDP) in three of these four countries is higher than in the northern triangle as well: Belize’s per capita GDP is $4,659, Costa Rica’s is $10,892, and Panama’s is $11,824. About 18% of Costa Rica’s population and 25% of Panama’s live in poverty, the lowest poverty rates in the isthmus.43 Although Nicaragua’s per capita GDP is lower than all the other Central American countries, at $1,929, and its poverty rate of 58% is closer to that of Guatemala (55%), it has social welfare programs that provide many services to mitigate its poverty to some degree. The Nicaraguan economy has also been expanding in recent years.

Most of these non-northern triangle countries can also be characterized as less violent than their neighbors. Costa Rica, Nicaragua, and Panama have the lowest levels of homicides in Central America (although Belize has the second-highest rate in the region) (see Table 2). None of the four countries has the same degree of problems with gangs tied to larger and more organized U.S. gangs that their neighbors have; their gangs are more local.44

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42 U.N. Economic Commission for Latin America and the Caribbean (ECLAC), *Social Panorama of Latin America 2013*, p. 50. (In this section, Belize is not listed if data for it were unavailable.)
Migration Transit Zone Conditions and Mexico’s Migration Policies

Conditions of migration facing unaccompanied children likely play a considerable role in determining whether they emigrate to the United States. While the persistence of economic stagnation, poverty, and criminal violence may explain why flows of unaccompanied minors have increased, the journey through Central America and Mexico to the United States has become more costly and dangerous. Unauthorized migrants from Central America, often lacking legal protection in Mexico because of their immigration status, have reportedly become increasingly vulnerable to human trafficking, kidnapping, and other abuses. Corrupt Mexican officials have been found to be complicit in activities such as robbery and abuse of authority. While Mexico has stepped up immigration enforcement in some areas (see below), enforcement along train routes frequented by Central American child migrants continues to be lacking.

As U.S. border security has tightened, more unauthorized Central American migrants have reportedly turned to smugglers (coyotes), who in turn must pay money to transnational criminal organizations (TCOs) such as Los Zetas, to lead them through Mexico and across the U.S.-Mexico border. The Administration has estimated that 75-80% of unaccompanied child migrants are now traveling with smugglers. Some smugglers have reportedly sold migrants into situations of forced labor or prostitution (forms of human trafficking) in order to recover their costs; other smugglers’ failure to pay Los Zetas has reportedly resulted in massacres of groups of migrants. Mass grave sites where migrants have been executed by TCOs have been recovered in recent years.

The Mexican government appears to be attempting to balance enforcement and humanitarian concerns in its migration policies. Implementation of its new laws and policies has been criticized both by those who favor more enforcement and those who favor more migrants’ rights. In addition to stepping up efforts against human trafficking and passing new laws to stiffen penalties for alien smuggling (2010) and human trafficking (2012), Mexico enacted a comprehensive migration reform law in 2011 and secondary legislation to implement that law in 2012. Previously, Mexico’s immigration law, the General Population Act (GPA) of 1974, limited legal immigration and restricted the rights of foreigners in Mexico, with unauthorized migrants subject to criminal penalties. In 2008, the Mexican Congress reformed the GPA to decriminalize simple

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47 Ibid.

48 Human smuggling typically involves the provision of a service, generally procurement or transport, to people who knowingly consent to that service in order to gain illegal entry into a foreign country. For more information, see CRS Report RL34317, *Trafficking in Persons: U.S. Policy and Issues for Congress*, by Alison Siskin and Lianna Rosen.


50 White House, Office of the Vice President, “Remarks to the Press with Q&A by Vice President Joe Biden in Guatemala,” press release, June 20, 2014.


52 WOLA, *Mexico’s Other Border Security*. 
migration offenses, making unauthorized migrants subject to fines and deportation, but no longer subject to imprisonment. In May 2011, it passed a broader reform of the GPA.53

Contrary to some media reports, Mexico’s 2011 law did not create a transit visa for migrants crossing through Mexico, as civil society groups had been advocating. As a result of the law, Mexico now requires visas for Central Americans entering its territory (aside from those on temporary work permits or those possessing a valid U.S. visa).

According to many migration experts, implementation of Mexico’s 2011 migration law has been uneven. While some purges of corrupt staff within the National Migration Institute (INM) in the Interior Ministry have occurred in the past year, implementation of the migration law has been hindered by the government’s failure to more fully overhaul INM.54 Some experts maintain that Mexico lacks the funding and institutions to address traditional migration flows, much less the increasing numbers of U.S.-bound unaccompanied children that its agents are detaining. Mexico has only two shelters for migrant children and no foster care system in which to place those who might be granted asylum.

Despite provisions to improve migrants’ rights included in the 2011 migration law, the Mexican government also continues to remove large numbers of Central American adult migrants, arrest smugglers of those migrants, and return unaccompanied child migrants to Central America.55 According to INM, Mexico detained 86,929 foreigners in 2013, 80,079 of whom were removed (79,416 people were removed in 2012). Of those who were removed, some 97.4% originated in the northern triangle countries of Central America. In the first four months of 2014, Mexico removed some 24,000 people from the northern triangle countries, 9% more than during that period in 2013.56 Child protection officers from INM accompanied 8,577 children to their countries of origin in 2013 and 6,330 from January through May 2014; 99% of those children originated in northern triangle countries.57

With U.S. support, the Mexican government in 2013 started implementing a southern border security plan that has involved the establishment of 12 naval bases on the country’s rivers and three security cordon that stretch more than 100 miles north of the Mexico-Guatemala and Mexico-Belize borders.58

53 Mexico’s 2011 migration reform was aimed at: (1) guaranteeing the rights and protection of all migrants in Mexico; (2) simplifying Mexican immigration law in order to facilitate legal immigration; (3) establishing the principles of family reunification and humanitarian protection as key elements of the country’s immigration policy; and (4) concentrating immigration enforcement authority within the National Migration Institute (INM) in the Interior Ministry in order to improve migration management and reduce abuses of migrants by police and other officials. For a general description of the law in English, see Gobierno Federal de México, “Mexico’s New Law on Migration,” September 2011, available at http://asmeex.uesd.edu/assets/028/12460.pdf.

54 Reforms that migration experts have recommended include raising hiring standards for immigration agents, regulating how migrants should be treated, and strengthening internal and external controls over migration agents. Sonja Wolf et al., Assessment of the National Migration Institute: Towards an Accountability System for Migrant Rights in Mexico, INSYDE, 2014.

55 From January through May 2014, the Mexican government arrested 431 people for breaking provisions in the migration law; most of those individuals were accused of smuggling-related crimes. Gobierno de Mexico, Sistema Institucional de Información Estadística (SIIE), “Incidencia Delictiva del Fuero Federal, 2014.”


58 The State Department has provided $6.6 million of mobile Non-Intrusive Inspection Equipment (NIIE) and approximately $3.5 million in mobile kiosks, operated by Mexico’s National Migration Institute, that capture the (continued...)
Factors in the United States Associated with Immigration of Unaccompanied Children

Forces that potentially attract unaccompanied children to the United States may be more subjective than forces that cause them to leave their home countries. Unlike the prevalence of actual violence or deprivation associated with daily economic hardship, for instance, the perception of economic opportunity or the chance to obtain legal authorization to live in the United States may often conflict with what is legally and actually possible. Several reports suggest that migrant smugglers prey on potential migrants’ desperation by misleading them with false information about such possibilities.59

Immigration observers have made numerous, sometimes conflicting assertions of the importance of one or another pull factor, relying on a range of empirical evidence. Despite considerable public attention, the precise combination of motives driving unaccompanied children to migrate to the United States remains unclear. The discussion below considers three widely cited motivations: economic and educational opportunity, family reunification, and recent U.S. immigration policies.

Economic and Educational Opportunity60

Unaccompanied children regularly cite economic opportunity in the United States as a reason for their emigration north.61 Since almost all are school-aged children, it remains unclear how this stated aspiration should be interpreted. Given endemic poverty in northern triangle countries, slow economic growth, and the large and long-standing income disparity between the triangle countries and the United States, it remains unclear the extent to which fluctuations in economic conditions in the United States actually affect children’s migration decisions.

In the United States, current employment levels for minority youth are low relative to all other labor market groups.62 In the immediate term, the potential for unaccompanied children to participate in the U.S. labor market is constrained in most cases by lack of English language skills, limited educational attainment, and, given their age, the extent to which U.S. laws permit their labor force participation.63 Assuming they found employment, such constraints would likely relegate them to low-skilled, low-wage sectors of the U.S. economy.

(...continued)

biometric and biographic data of individuals transiting southern Mexico. Total State Department support is likely to reach at least $66.6 million. The U.S. Department of Defense (DOD) has also provided training to troops patrolling the border, communications equipment, and support for the development of Mexico’s air mobility and surveillance capabilities. WOLA, op. cit. U.S. Department of State, Bureau of International Narcotics and Law Enforcement Affairs, “INL Assistance for Mexico’s Southern Border Strategy,” fact sheet, June 2014. For background, see CRS Report R43149, U.S.-Mexican Security Cooperation: The Mérida Initiative and Beyond, by Clare Ribando Seelke and Kristin Finklea.


60 Craig Elwell, Specialist in Macroeconomic Policy, Government and Finance Division, and Michael Garcia, Attorney in the American Law Division, both contributed to this section.

61 UNHCR, Children on the Run.


63 The Fair Labor Standards Act (FLSA) sets 14 years of age as the minimum age for employment, and limits the (continued...)

Congressional Research Service
Apart from what unaccompanied children cite as pull factors, U.S. labor market conditions likely affect their parents and relatives residing in the United States, which in turn, may play a critical role in the recent surge. Improving employment prospects, for instance, could more readily provide parents with the means to afford the expense of their children’s migration to this country and lead to greater desire for family reunification as discussed below.\(^{64}\)

At a national level, macroeconomic data on the U.S. economy indicate that despite overall improvement, considerable slack remains in labor markets, with labor force participation remaining weak and the unemployment rate and other measures of labor force utilization remaining well above most estimates of the long-run sustainable rate.\(^{65}\)

Labor market conditions for low-skilled workers are especially challenging. Bureau of Labor Statistics (BLS) employment data by educational attainment show that employment for workers with less than a high school diploma\(^{66}\) fell by about 5 million jobs between 2007 and 2014.\(^{67}\) Thus, despite some indications of economy-wide recovery and U.S. labor market improvement, the demand for low-skill workers has not recovered over the same period that has witnessed the surge of unaccompanied children.

Regarding unauthorized workers, while extensive academic scholarship has analyzed their role, impact, and prospects in the U.S. labor force, government reporting is hindered by data limitations. Government statistics, as a rule, do not capture legal status of the foreign-born workforce. Therefore, assessing how U.S. economic conditions serve as a magnet for typically low-skilled and often unauthorized workers cannot be measured directly and is usually estimated or inferred by assessing the employment outlook of industrial sectors most likely to employ low skilled and unauthorized workers.

Research from the Pew Hispanic Center, which produces authoritative statistics on the unauthorized population, suggests that unauthorized workers concentrate in four low-skilled industrial sectors: farming, building, grounds-keeping and maintenance; construction; and food preparation and serving.\(^{68}\) With the exception of farming, the BLS projects that these occupations are expected to grow close to or above the average rate of all occupations in the coming decade.\(^{69}\)


\(^{(68)}\) These four sectors accounted for an estimated 73% of all unauthorized worker employment. Pew Hispanic Center, A Portrait of Unauthorized Immigrants in the United States, by Jeffrey S. Passel, and D’Vera Cohn, April 14, 2009.

Hence, the economic prospects for low-skilled, low-wage, and typically unauthorized workers appears mixed. While employment in low-skilled sectors of the economy has suffered more and recovered less than that of other sectors in the past seven years since the economic downturn, the employment prospects for the economic sectors most likely to employ such workers appears on par with or above the national average. Nonetheless, perceptions of opportunities may have greater impact than fluctuations in U.S. economic and labor market conditions.

Unaccompanied children also cite educational opportunity in the United States as a reason for their emigration north. Unlawful aliens in the United States are able to receive free public education through high school. In 1982, the Supreme Court’s decision in Plyler v. Doe prohibited states from restricting access of children to public elementary and secondary education on the basis of immigration status.

The Court’s ruling did not concern access to higher education, however, and both the federal government and some states have adopted measures that limit unlawfully present aliens’ eligibility for admission to public institutions of higher education, in-state tuition, or financial aid.

**Family Reunification**

Family reunification is often cited as a primary reason for the recent large-scale migration of unaccompanied children to the United States. Surveyed unaccompanied children cite family reunification as one of the main reasons for migrating to the United States. The desire to reunite with family stems from family separation that occurs when one or both parents migrate to a destination country for more remunerative employment. Prior to the mid-1990s, migrants from Mexico and Central America who worked in the United States often returned regularly to be with their families in their origin countries. Increased border enforcement in the mid-1990s gradually made unauthorized entry into the United States more difficult and expensive, which had the unintended consequence of creating a “caging effect” by encouraging unauthorized aliens to settle permanently in the United States rather than working temporarily and regularly returning home.

Demographic and survey data provide evidence of sizable linkages between the three countries dominating the recent spike in unaccompanied child apprehensions and their foreign-born

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70 UNHCR, *Children on the Run*.
71 For more information, see CRS Report RL33863, *Unauthorized Alien Students: Issues and “DREAM Act” Legislation*, by Andorra Bruno; and “Noncitizens and Eligibility for HEA Federal Student Aid Programs” in CRS Report R43302, *Postsecondary Education Issues in the 113th Congress*, coordinated by David P. Smole.
73 UNHCR, *Children on the Run*.
populations living in the United States. In 2012, the foreign-born populations from El Salvador (1,254,501), Guatemala (880,869), and Honduras (535,725) ranked as the 6th, 10th, and 16th largest groups, respectively, of all foreign born groups. From the perspective of the source country, U.N. survey data indicate that sizable percentages of children residing in these three countries have at least one parent living in the United States.77 Were data available on other relatives living in the United States, such as siblings or extended relatives, these percentages would be higher.

The desire for family reunification is also driven by the perception that children who are not immediately returned to their home countries can reside with their family members for periods extending several years, as discussed below under “U.S. Immigration Policies.” Upon apprehension, unaccompanied children are immediately given a Notice to Appear (NTA) before an immigration judge who will adjudicate their case to remain in the United States.78 Receipt of an NTA indicates the start of immigration proceedings.

Yet, by law, persons apprehended by Customs and Border Patrol (CBP) and whom CBP determines to be unaccompanied children from countries other than Mexico and Canada, must be turned over to the care and custody of Health and Human Services (HHS), Office of Refugee Resettlement (ORR) while they await their removal hearing.79 Unaccompanied children are moved from the custody of the law enforcement agency that apprehended them to a human services agency experienced with child welfare and family reunification. ORR is required to place these children in the least restrictive setting possible that accounts for the child’s best interests.80 In an estimated 90% of these cases, children are placed with parents, siblings, and extended relatives who currently reside in the United States.81

The Immigration and Nationality Act (INA) contains provisions allowing foreign nationals to reside lawfully in the United States if they are sponsored by parents and siblings who are U.S. citizens or Lawful Permanent Residents.82 However, sizable proportions of these family members are estimated to be unauthorized aliens.83 According to DHS, the estimated unauthorized

76 Other Central American countries ranked considerably lower: Nicaraguans were 31st, Panamanians were 55th, Costa Rican were 67th, and Belizians were 86th. Mexicans represent the largest foreign-born population residing in the United States. For El Salvador, the population residing in the United States is one-fifth the size of population living in El Salvador (6.3 million). Source: 2012 American Community Survey (ACS) Public Use Micro Sample (PUMS).
77 The figure is 49% in El Salvador, 27% in Guatemala and 47% in Honduras. By comparison, the figure for Mexico is 22%. Source: UNHCR, Children on the Run.
78 For more information on the processing of unaccompanied alien children, see CRS Report R43559, Unaccompanied Alien Children: An Overview, by Lisa Seghetti, Alison Siskin, and Ruth Ellen Wasem.
79 The Homeland Security Act of 2002 (HSA; P.L. 107-296) divided responsibilities for the processing and treatment of UAC between the newly created Department of Homeland Security (DHS) and the Department of Health and Human Services’ (HHS) Office of Refugee Resettlement (ORR). The Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457, Section 235) differentiated treatment according to whether or not unaccompanied children originated from the contiguous countries of Mexico and Canada. Unaccompanied alien children from Mexico and Canada may also be turned over to HHS-ORR if they are determined to be victims or potential victims of trafficking, if they claim asylum, or if they do not consent to return voluntarily.
80 The TVPRA directed HHS to ensure that unaccompanied children “be promptly placed in the least restrictive setting that is in the best interest of the child.” §§235(a)-(235(d) of TVPRA; 8 U.S.C. §1232(b)(2). See also “What is the ‘best interest of the child’ standard, and how does it apply to immigration detention and removal decisions?” in CRS Report R43523, Unaccompanied Alien Children—Legal Issues: Answers to Frequently Asked Questions, by Kate M. Manuel and Michael John Garcia.
83 As a policy, ORR does not inquire as to the legal status of the family member with whom the unaccompanied child is (continued...)
populations in 2012 of Salvadorans, Guatemalans, and Hondurans living in the United States was 690,000, 560,000, and 360,000, respectively, representing 55%, 64%, and 67% of all foreign-born residents from those three countries living in the United States.\(^4\)

The length of time unaccompanied children can expect to wait until their removal hearing may play a role for incentivizing their migration to the United States. As of March 2014, the average wait time nationwide for all immigration proceedings was 19 months.\(^5\) However, the length of time until a final judgment occurs varies widely depending on appeals and individual circumstances.\(^6\) Surges in caseloads, such as that caused by the current influx of unaccompanied children, can also tax the limited resources of the immigration court system, further extending wait times for removal hearings, and possibly fostering a perception among foreign nationals that a unique opportunity exists to exploit this administrative backlog. Rumors of these backlogs and the potential for being reunited with family—even if temporarily—reportedly have reached emigrant-sending communities in Central America.\(^7\)

**U.S. Immigration Policies**

The possible relationship between U.S. immigration policies (actual policies as well as perceptions of policies) and the surge in arrivals of unaccompanied children has been the subject of heated discussion among immigration observers and policy makers. It is not known if, and how, specific immigration policies may have influenced decisions to try to enter the United States unlawfully. News reports, however, suggest that perceptions of unspecified U.S. policies toward alien minors may have played a role. According to a June 2014 *New York Times* article:

> [Children], parents, immigration officials, lawyers and activists interviewed say that there has been a subtle shift in the way the United States treats minors.

That perception has inspired parents who have not seen their children for years to hire so-called coyotes, guides often associated with organized crime, to bring them north. It has prompted other parents to make the trip with toddlers in tow, something rarely seen before in the region.\(^8\)

(...continued)


\(^5\) This figure is based upon analysis by the Transactional Records Access Clearinghouse (TRAC) of data obtained from the U.S. Department of Justice’s Executive Office for Immigration Review (EOIR) for all immigration cases, not just those involving unaccompanied children. See TRAC Immigration data, http://trac.syr.edu/phptools/immigration/court_backlog, accessed June 2014.

\(^6\) The 19 month figure is an average for all immigration courts, and comprises a range of periods, some of which extend far beyond 19 months.


Similarly, a June 2014 article by the Migration Policy Institute makes reference to “some evidence of a growing perception among Central Americans that the U.S. government’s treatment of minors, as well as minors traveling in family units, has softened in recent years.” As discussed below, there have been recent changes in the treatment of unaccompanied children who arrive in the United States, in accordance with the Trafficking Victims Protection Reauthorization Act of 2008.

Much of the debate about the possible role of U.S. immigration policy in the surge has focused on specific policies and proposals that some may believe can offer unaccompanied children the prospect of a period of stay in the United States or U.S. lawful permanent resident status. A March 2014 *Miami Herald* article, after noting that many arriving children are fleeing gang violence, stated:

But children are also being sent by families who believe they could qualify for immigration reform—if Congress ever acts on it—or for President Barack Obama’s 2012 Deferred Action for Childhood Arrivals program known as DACA. For its part, the Obama Administration maintains that the driving force behind the surge “is what’s happening in [the unaccompanied children’s] home countries.” The Administration has stated, however, that misinformation about U.S. policies has been a contributing factor. White House Domestic Policy Council Director Cecilia Muñoz, as reported by Bloomberg News in June 2014, blamed the increase in unaccompanied children attempting to cross the border in part on ‘misinformation’ about immigration law and administration actions regarding minors that “is being deliberately promulgated by criminal networks” involved in smuggling aliens into the U.S.” Other observers who reject the argument that Administration policies are responsible for the surge in unaccompanied child arrivals point to “Obama’s aggressive deportation policy since ... 2009.”

U.S. immigration policies and proposals – both legislative and administrative – that have been widely cited as possible factors in the surge or that are relevant to the treatment of unaccompanied children who arrive in the United States are discussed here.

**Humanitarian Forms of Immigration Relief**

As discussed above, child migrants report that they are fleeing violence, deprivation, abuse, or other hardships in their home countries as well as reuniting with family already in the United States. At issue is whether U.S. immigration policies that provide humanitarian relief to those who are fleeing such situations may serve as a magnet to foreign nationals. These humanitarian policies include asylum, relief for trafficking victims, and special immigrant status for juveniles.

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64 Another possible form of relief, Temporary Protective Status (TPS), is not discussed in this report because it currently does not apply to unaccompanied children arriving from the northern triangle. For information on TPS, see CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by Ruth Ellen Wasem and Karma Ester.
As these policies on humanitarian relief have been in place for many years, it is difficult to make a causal link between them and the recent surge in unaccompanied children from Central America. The only notable and recent revisions to the policies on humanitarian relief for unaccompanied children were included in the Trafficking Victims Protection Reauthorization Act (TVPRRA) of 2008, as discussed below.

Asylum

Many immigration observers expect that a large proportion of unaccompanied children seeking immigration relief in the United States will apply for asylum. The United States has long held to the principle that it will not return a foreign national to a country where his or her life or freedom would be threatened. This principle is embodied in several provisions of the INA, most notably in provisions defining refugees and asylees that the Refugee Act of 1980 added to the INA. 55

In 2008, the TVPRRA revised the procedures and policies for those unaccompanied children who file for asylum, most notably requiring that unaccompanied children from contiguous countries (i.e., Canada and Mexico) be screened for possible asylum claims. Subsequently, DHS opted to screen all unaccompanied children for possible asylum claims. 56 In addition, the TVPRRA gives U.S. Citizenship and Immigration Services (USCIS) asylum officers “initial jurisdiction over any asylum application filed by” an unaccompanied child. 57

To receive asylum, foreign nationals must demonstrate a well-founded fear that if returned home, they will be persecuted based upon one of five characteristics: race, religion, nationality, membership in a particular social group, or political opinion. Because “fear” is a subjective state of mind, assessing the merits of an asylum case rests in large part on the credibility of the claim and the likelihood that persecution would occur if the alien is returned home.

Asylum claims for the current surge of unaccompanied children may be complicated by uncertainty as to whether their circumstances meet the criteria established by the INA for asylum seekers. It remains to be seen to what extent to which this legal option would offer immigration relief to the many unaccompanied children who claim asylum on the basis of feared persecution due to

56 8 U.S.C. §1101 et seq. Within 48 hours DHS personnel must screen the unaccompanied child to determine that he or she has not been a victim of a severe form of trafficking in persons and that there is no credible evidence that the minor is at risk should the minor be returned to his country of nationality or of last habitual residence, that the unaccompanied child does not have a possible claim to asylum; and that the unaccompanied child is able to make an independent decision to voluntarily return to his country of nationality or of last habitual residence.
57 §§235(a) – 235(d) of TVPRRA; 8 U.S.C. §1222. Prior to the TVPRRA revisions, the unaccompanied children who sought asylum did so during a removal proceeding before an immigration judge in the Department of Justice’s (DOJ) Executive Office for Immigration Review (EOIR). USCIS guidelines require that the asylum officer conduct “child-appropriate interviews taking into account age, stage of language development, background, and level of sophistication.” The guidelines also note that the child’s age may affect the analysis of his or her asylum status (e.g., in considering whether the harm the child suffered amounts to persecution, in evaluating the child’s possibly limited knowledge of events, etc.). Where a child is unable to identify all relevant motives for the persecution, the guidelines state that “a nexus can still be found if the objective circumstances support the child’s claim that the persecutor targeted the child based on one of the protected grounds. If the Asylum Officer decides that an unaccompanied child in

removal proceedings is not eligible for a grant of asylum, case processing will depend on the status of the unaccompanied child’s case before EOIR. The Asylum Office coordinates with Immigration and Customs Enforcement (ICE) for the transfer of the files of the unaccompanied children not granted asylum back to ICE. Joseph E. Langlois, “Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS,” Interoffice Memorandum, USCIS Refugee, Asylum, and International Operations Directorate, August 14, 2007, p. 6-7; and Joseph E. Langlois, “Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children,” Interoffice Memorandum, March 29, 2009
gang-related violence.\textsuperscript{98} Data on the percentage of unaccompanied alien children who receive asylum is not available.\textsuperscript{99}

**Trafficking Victims**

Unaccompanied children who arrive at the U.S. border may have valid claims for immigration relief on the basis of being trafficking victims.\textsuperscript{100} Foreign nationals who are victims of severe forms of trafficking are eligible for T nonimmigrant status and ultimately lawful permanent residence if they meet certain conditions.\textsuperscript{101} U.S. statute defines severe forms of trafficking to mean: (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjecting to involuntary servitude, peonage, debt bondage, or slavery.\textsuperscript{102}

In addition to requiring that unaccompanied children from contiguous countries be screened for possible asylum claims, the TVPRA of 2008 requires that they be screened to determine that the unaccompanied child has not been a victim of a severe form of trafficking in persons.

In March 2009, DHS issued a policy that essentially made the trafficking screening provisions applicable to all unaccompanied children.\textsuperscript{103} Immigration judges generally issue a relatively small number of T “visas” (856 in FY2013), and the number of unaccompanied alien children among these is unknown.

**Special Immigrant Juveniles**

More than two decades ago, Congress created an avenue for unauthorized children who become dependents of the court to become lawful permanent residents (LPRs).\textsuperscript{104} Any child or youth who was born in a foreign country; who lives without legal authorization in the United States; who has experienced abuse, neglect, or abandonment; and who meets other specified eligibility criteria may be eligible for the LPR classification of special immigrant juvenile (SIJ).

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\textsuperscript{99} Discussion with Executive Office of Immigration Review (EOIR), Legislative and Public Affairs, June 4, 2014.

\textsuperscript{100} For more information on the difference between human trafficking, which involves forms of involuntary servitude, and human smuggling, which involves knowing consent, see CRS Report RL34317, *Trafficking in Persons: U.S. Policy and Issues for Congress*, by Alison Siskin and Liana Rosen.

\textsuperscript{101} To qualify for the “T” visa, the victim of trafficking must also be: physically present in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or a U.S. port of entry because of such trafficking, or to participate in investigative or judicial processes associated with such trafficking; have complied with any reasonable request for assistance to law enforcement in the investigation or prosecution of acts of trafficking unless unable to do so due to physical or psychological trauma, or be under the age of 18; and be likely to suffer extreme hardship involving unusual and severe harm upon removal. CRS Report RL34317, *Trafficking in Persons: U.S. Policy and Issues for Congress*, by Alison Siskin and Liana Rosen.

\textsuperscript{102} §103(8) of P.L. 106-386; 22 U.S.C. 7102.

\textsuperscript{103} U.S. Congress, Senate Committee on the Judiciary, “Trafficking Victims Protection Reauthorization Act: Renewing the Commitment to Victims of Human Trafficking,” testimony of DHS Acting Deputy Assistant Secretary Kelly Ryan, September 13, 2011.

\textsuperscript{104} The provision was initially aimed at children of unauthorized aliens who had been abused, neglected or abandoned.
Among other things, TVPRA of 2008 amended the SIJ eligibility provisions to 1) remove the requirement that a juvenile court deem a juvenile eligible for long-term foster care and 2) replace it with a requirement that the juvenile court find reunification with one or both parents not viable. According to USCIS legal guidance, an eligible SIJ would include the following:

[An unauthorized child] who has been declared dependent on a juvenile court; whom a juvenile court has legally committed to, or placed under the custody of, an agency or department of a State; or who has been placed under the custody of an individual or entity appointed by a State or juvenile court. Accordingly, petitions that include juvenile court orders legally committing a juvenile to or placing a juvenile under the custody of an individual or entity appointed by a juvenile court are now eligible.\(^{105}\)

SIJ status is one of the few forms of immigration relief in the INA that specifically takes into account the best interests of the child. By statute, ORR must consent to any court having jurisdiction to determine the custody status or placement of a juvenile alien in ORR custody for SIJ status.\(^{106}\) It is not known how many unaccompanied children have ultimately obtained SIJ status.\(^{107}\)

**Deferred Action for Childhood Arrivals (DACA) and Legalization Proposals**

Some observers have singled out the Obama Administration’s Deferred Action for Childhood Arrivals (DACA) initiative and legalization provisions in proposed comprehensive immigration reform (CIR) legislation as possible factors in the surge of unaccompanied child arrivals. The DACA initiative provides temporary protection from removal to certain individuals who were brought to the United States before age 16 and meet other criteria. Among the criteria is continuous residence in the United States since June 15, 2007.\(^{108}\) Although new arrivals would not be eligible for DACA, some argue that unaccompanied children and their families falsely believe that they would be covered.\(^{109}\)

CIR legislation introduced in Congress in recent years typically has included provisions to enable certain unauthorized aliens to become lawful permanent residents of the United States. In 2013, the Senate passed a CIR bill (the Border Security, Economic Opportunity, and Immigration Modernization Act; S. 744) that would establish a general legalization program for unauthorized aliens who have been continuously present in the United States since December 31, 2011, and meet other criteria; dependent spouses and children of principal applicants would have to have maintained continuous physical presence in the United States since December 31, 2012, and meet other requirements. S. 744 would provide a special pathway to LPR status for successful applicants under the general legalization program who entered the United States before age 16 and satisfy other requirements.\(^{110}\) Newly arriving unaccompanied children would not be eligible for the S. 744 legalization programs.

---


\(^{106}\) INA 101(b)(27)(I)(iii)(I).


Conclusion

This report has conceptualized possible factors contributing to the recent and sizable increase in unaccompanied children into “push” and “pull” forces. The former comprise conventional and long-standing forces such as endemic poverty and lack of economic opportunity, as well as recent causes, such as the rise of gangs and drug trafficking organizations that have destabilized El Salvador, Guatemala, and Honduras and severely limited these countries’ ability to protect their youth. The latter include more subjective factors, such as aspirations for employment and education, the desire to reunite with family members, and perceptions related to U.S. immigration policies.

With information relatively scarce, and circumstances changing rapidly, it becomes challenging to accurately measure or gauge which factors are the most important drivers of the current surge. For example, surveys by organizations with distinct goals may sometimes yield findings that place substantially more emphasis on one factor over another. Absent full scale representative information, it may be difficult to draw conclusions about the magnitude of any single factor or its relative strength over another. As noted above, the division between push and pull factors blurs as multiple factors affect individuals making personal decisions to migrate.

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IMMIGRATION AND THE DEPARTMENT OF HOMELAND SECURITY

Refugee Law
Prof. Abriel Summer 2014

Department of Homeland Security
• On November 25, 2002, President Bush signed the Homeland Security Act (HSA) of 2002, which – among other things:
  • creates a cabinet level Department of Homeland Security (DHS)
  • with nearly 170,000 employees.

Dept. of Homeland Security
• Restructuring started on March 1, 2003.
• Transition over one year.
• Reorganization plan may change.

Immigration after March 1, 2003

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<tr>
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<th>Department of Justice</th>
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Immigration under the Dept. of Homeland Security

Citizenship and Immigration Services
Department of Border and Transportation Security
  ➢ Immigration and Customs Enforcement (ICE)
  ➢ Customs and Border Protection (CBP)

CITIZENSHIP & IMMIGRATION SERVICES
• All immigration service and adjudication functions previously performed by INS, including adjudication of immigrant visa petitions, naturalization petitions, asylum and refugee applications, INS Service Center adjudications.
• Director reports to Deputy Sec., DHS
CIS

- Under the reorganization plan, CIS has a "Legal Advisor" who will represent it before EOIR for visa petition appeals.

Immigration & Customs Enforcement, DHS

Will include enforcement and investigations arms of
- The Customs Service
- INS
- Federal Protective Services
- Offices of District Counsel
- Focus on interior enforcement

Customs and Border Protection

- Will include:
  -- Agricultural quarantine inspections;
  -- INS inspections;
  -- Border Patrol, and
  -- Customs Service
- Focus on movement of goods & people
PROPOSED REFUGEE ADMISSIONS
FOR
FISCAL YEAR 2015

REPORT TO THE CONGRESS

SUBMITTED ON BEHALF OF
THE PRESIDENT OF THE UNITED STATES
TO THE
COMMITTEES ON THE JUDICIARY
UNITED STATES SENATE
AND
UNITED STATES HOUSE OF REPRESENTATIVES

IN FULFILLMENT OF THE REQUIREMENTS OF
SECTIONS 207(d)(1) and (e)
OF THE
IMMIGRATION AND NATIONALITY ACT

UNITED STATES DEPARTMENT OF STATE
UNITED STATES DEPARTMENT OF HOMELAND SECURITY
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES
FOREWORD

On World Refugee Day, June 20, both President Obama and Secretary Kerry re-affirmed our nation’s commitment to helping refugees and our leading role in providing safe haven. This stance reflects our proud heritage as a land welcoming to immigrants. It also reflects a harsh reality. There are currently more refugees, asylum-seekers, and internally displaced persons than at any time since World War II. While starting life anew in the United States may be daunting, it also offers unparalleled hope. It is a chance not only to escape from violence and persecution but to start again. The assistance the American people provide helps newcomers find their footing and feel a part of their new communities. Refugees add to America’s vitality and diversity by making substantial contributions to our economic and cultural life.

Resettlement in a third country is a solution for some of the world’s most vulnerable refugees, those who would face real danger if they tried to remain where they are or return to the countries they escaped. As a matter of principle, the USRAP offers resettlement to refugees regardless of their location, national origin, health status, occupational skills, or level of educational attainment.

U.S. Arrivals Remain Strong

Refugee arrivals in FY 2014 will again come close to reaching the President’s authorized ceiling of 70,000. Close interagency coordination on security checks helped to make this possible because it allowed us to scrutinize and process referrals more carefully and efficiently. We also helped the UN High Commissioner for Refugees (UNHCR) enhance its capacity to refer refugees for resettlement which in turn helped our program reach its ceiling. We had expected 15,000 refugees to arrive from Africa in 2014 but we are now on pace to exceed that. We will also welcome a large number of Iraqi refugees in 2014. Since 2007, we have resettled more than 105,000 Iraqis, despite the challenges of processing refugees in Iraq and some neighboring countries.

Congolese Resettlement

As the world’s leading resettlement country and chair of the Congolese Refugee Core Group, the United States will admit more than 3,000 Congolese refugees in FY 2014. In the coming years that number will rise steadily. We continue to work closely with UNHCR to help it resettle at least 50,000 Congolese worldwide over the next 4-5 years. Most of these refugees are in camps in Uganda, Tanzania, Rwanda, and Burundi, and come originally from the
Kivus or Katanga in the Democratic Republic of the Congo. Domestically, we are chairing a Congolese working group, made up of representatives from state governments, nongovernmental organizations, and international organizations who assist with resettlement. Our goal is to better equip Congolese refugees to be resettled in the U.S., to identify additional resources and to help U.S. communities prepare to accept larger numbers of Congolese.

**Syrian Refugees**

The refugee crisis caused by the conflict in Syria is the worst the world has witnessed in a generation with more than 2.9 million refugees in the region. More than 9 million people need assistance including 6.5 million displaced inside Syria. The U.S. government is deeply committed to assisting the Syrian people and has provided more than $2 billion in humanitarian assistance since the start of the crisis, more than any other donor. While the vast majority of Syrians would prefer to return home when the conflict ends, we recognize that some remain extremely vulnerable in their country of asylum and would benefit from resettlement. UNHCR has announced that it aims to refer 30,000 Syrian refugees to all resettlement countries by the end of calendar year 2014. Those numbers will likely rise in 2015 and 2016. The United States has received more than 2,500 referrals as of August 2014 and expects thousands more in the remainder of the year. We will begin to welcome those Syrians who are approved for U.S. resettlement to communities across the country in larger numbers in 2015.

**Unaccompanied Minors from Central America**

The number of unaccompanied children crossing the southwest border has risen exponentially. The Administration is taking a whole of government approach that addresses underlying causes of
migration relating to economic prosperity, governance, and security. One element in our comprehensive strategy to reduce unlawful and dangerous migration to the United States is the planned establishment of in-country refugee programs for minors in Honduras, El Salvador, and Guatemala. The program would be open to certain qualifying lawfully present relatives in the United States to file for unmarried children under 21 who are still residing in their home country and who are eligible to be admitted to the United States as refugees.

**Improvements to Global Resettlement**

Our efforts to convince more nations to resettle refugees continue to pay dividends. In recent years, countries without a history of resettling refugees have stepped forward and established programs. The list includes Switzerland, which has announced a regular resettlement program, and Japan, which has announced that its pilot program will become permanent next year. In 2013, a total of 27 countries resettled refugees identified and referred by UNHCR. At least 23 countries have agreed to accept Syrian refugees referred by UNHCR, including a number of countries without regular resettlement programs. They will admit Syrians through a humanitarian admissions program.

For several years the U.S. government has provided targeted financial support to UNHCR. One goal is to expand the resettlement capacity and infrastructure it can make available to all countries running resettlement programs. In the Great Lakes region of Africa in particular we have enabled UNHCR to hire more staff. They in turn have been able to refer more refugees to more countries. We have also funded two new interview facilities that all countries can use to screen refugees from the region. The U.S. chairs the Congolese Core Group, made up of countries that have agreed to resettle Congolese refugees and plays an active role in other core groups tasked with resettling additional high priority populations.

"The dreams refugees harbor have special meaning for Americans. Even before our land was a nation, America was a haven for those seeking freedom from persecution, hunger, oppression, and war. Today, refugees continue to look to America for relief and opportunity. These refugees, many of whom arrive having lost everything, become some of the most resilient, entrepreneurial, and devoted citizens we have.

When I visited the UN’s Za’atari refugee camp in Jordan last year, I saw firsthand the value and importance of our work. Hundreds of thousands of Syrians — many women and children — live there in suspended animation, waiting for the opportunity to rebuild their lives. I met with some of the camp’s many residents. Their needs were simple: food, shelter, stability. But most of all, they want to live their lives with the dignity and respect that all people deserve.

That’s why I’m proud that the United States is the largest donor to humanitarian relief worldwide. Our humanitarian assistance has saved lives and eased suffering for 4.7 million people inside Syria and more than 2.8 million refugees in neighboring countries. We have also recently announced nearly $300 million in additional humanitarian assistance to help the people affected by the conflict in South Sudan. Beyond just dollars and programs, our efforts are assisting millions who have fled conflict and persecution in the Central African Republic, Burma, Afghanistan, and many other places around the world."

Secretary John Kerry
June 20, 2014
World Refugee Day
Reuniting Families

In late 2012, the United States reinstated the Priority Three (P-3) family reunification program for spouses, unmarried children under 21, and parents of persons lawfully admitted to the United States as refugees or asylees. It had been suspended for four years after DNA testing uncovered widespread fraud. Since 2012, we have received more than 2,000 P-3 applications for refugees in 50 countries. We are processing them according to more stringent procedures, including DNA testing to verify parent-child relationships. In some countries relatives must register with UNHCR and/or the host government to obtain permission to exit for third country resettlement. Last year we encountered challenges in a number of processing locations where they did not meet this requirement. Accordingly, we have recently tightened the rules for individuals accepted for P-3 consideration, and in most locations will accept applications only for those who meet all relevant local registration requirements.

Combatting Fraud in the Refugee Admissions Program

In 2014, we took additional measures to protect the refugee admissions program against fraud. The Department of State has established new guidelines for its worldwide network of Resettlement Support Centers to improve the way we screen and train staff and interpreters, control access points, manage electronic data, and communicate with applicants. The U.S. government is also working with UNHCR to safeguard refugee referral data by improving registration procedures and enhancing electronic screening of registration data to detect identity fraud.

Ensuring a Suitable Welcome

In FY 2014, to maintain quality reception and placement services for arriving refugees the Department of State continued to guarantee resettlement agencies a minimum level of funding, even during lulls caused when numbers dip, or referrals are delayed so staff and services will be available when needed. The Department expects to continue this funding mechanism in FY 2015.

Benefits and services for refugees include the Reception and Placement grant provided by the State Department, time-limited assistance programs (up to eight months from arrival) and social service programs (up to five years) funded by the Office of Refugee Resettlement at the Department of Health and Human Services (HHS/ORR). These programs help refugees find employment and become economically self-sufficient. They also encourage social integration. The State Department and HHS/ORR continue to work closely with receiving communities to give stakeholders the tools and information they need so that new arrivals can best benefit from the programs and services that are available to
them. Over the past year we have consulted with groups in Arizona, Colorado, Illinois, Maine, New York, Texas, Utah, and Wisconsin. ORR established regional offices in order to increase engagement and consultation with resettlement stakeholders. The Administration will continue to explore ways of sustaining a strong federal-state-community partnership and ensuring that refugees can integrate successfully.

Planning for the Future

As we prepare to bring growing numbers of Congolese and Syrian refugees to the United States, we are simultaneously wrapping up longstanding resettlement programs for Burmese in Thailand and Bhutanese in Nepal. In 2014 we continued to process the cases of the more than 5,000 Burmese in Thailand who submitted expressions of interest in resettlement in 2013. The last several thousand eligible Burmese will arrive in the United States in 2015. In Nepal, we worked with UNHCR to issue a last call for expressions of interest among Priority Two (P-2) eligible Bhutanese. Approximately 3,000 individuals registered their interest by the June 30 deadline and we will move these cases to completion while reducing our operations in Nepal.

We continue to face challenges accessing refugee applicants in a variety of locations. In some countries, such as Syria, Yemen, and Eritrea, Department of Homeland Security (DHS) adjudicators have been unable to travel to interview applicants for several years. DHS-approved refugees in Syria continue to depart as their cases become fully cleared, and we have had applicants in Yemen, Iran, and Eritrea moved to a UNHCR Emergency Transit Center in Romania or Slovakia, but relatively small numbers benefit from this option due to capacity limitations. In Iraq, Lebanon, and Kenya, security concerns have hampered our ability to process applicants. In Chad, Ethiopia, and other countries, applicants are in extremely remote locations, and are hard and expensive to reach. We are constantly reviewing our operations to find efficient and creative ways to access larger numbers of vulnerable individuals in these locations for resettlement.

In these and other ways we will continue to adapt to meet changing needs and keep our refugee resettlement program strong. With the support of Congress and the American people, refugee resettlement will continue to be a proud American tradition for many years to come.
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**IV. DOMESTIC IMPACT OF REFUGEE ADMISSIONS** 59


Refugee Admissions Program for FY 2015

Proposed Ceilings

Table I

Refugee Admissions in FY 2013 and FY 2014, Proposed Refugee Admissions by Region for FY 2015

<table>
<thead>
<tr>
<th>Region</th>
<th>FY 2013 Actual Arrivals</th>
<th>FY 2014 Ceiling</th>
<th>FY 2014 Projected Arrivals</th>
<th>Proposed FY2015 Ceiling</th>
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</thead>
<tbody>
<tr>
<td>Africa</td>
<td>15,980</td>
<td>15,000</td>
<td>15,800</td>
<td>17,000</td>
</tr>
<tr>
<td>East Asia</td>
<td>16,537</td>
<td>14,000</td>
<td>14,500</td>
<td>13,000</td>
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<tr>
<td>Europe and Central Asia</td>
<td>580</td>
<td>1,000</td>
<td>900</td>
<td>1,000</td>
</tr>
<tr>
<td>Latin America/Caribbean</td>
<td>4,439</td>
<td>5,000</td>
<td>4,300</td>
<td>4,000</td>
</tr>
<tr>
<td>Near East/South Asia</td>
<td>32,389</td>
<td>33,000</td>
<td>34,000</td>
<td>33,000</td>
</tr>
<tr>
<td>Regional Subtotal</td>
<td>69,925</td>
<td>68,000</td>
<td>69,500</td>
<td>68,000</td>
</tr>
<tr>
<td>Unallocated Reserve</td>
<td></td>
<td>2,000</td>
<td></td>
<td>2,000</td>
</tr>
<tr>
<td>Total</td>
<td>69,925</td>
<td>70,000</td>
<td>69,500</td>
<td>70,000</td>
</tr>
</tbody>
</table>

Generally, to be considered a refugee, a person must be outside his or her country of nationality or, if stateless, outside his or her country of last habitual residence. Under the Immigration and Nationality Act (INA) § 101(a)(42)(B), however, the President may specify circumstances under which individuals who are within their countries of nationality or last habitual residence may be considered a refugee for purposes of admission to the United States. The FY 2015 proposal recommends continuing such in-country processing for specified persons in Iraq, Cuba, Eurasia and the Baltics, and commencing such in-country processing for specified persons in Honduras, El Salvador and Guatemala. Persons for whom resettlement is requested by a U.S. ambassador in any location in the world may also be considered, with the understanding that they will only be referred to the USRAP following Department of State consultation with USCIS at the Department of Homeland Security (DHS).

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2 These proposed figures assume enactment by Congress of the President’s Budget levels related to the U.S. Refugee Admissions Program elements.
Unallocated Reserve

This proposal includes 2,000 unallocated admissions numbers to be used if needed for additional refugee admissions from any region. The unallocated numbers would only be used following notification to Congress.

Admissions Procedures

Eligibility Criteria

The Department of State’s Bureau of Population, Refugees, and Migration (PRM) is responsible for coordinating and managing the USRAP. A critical part of this responsibility is determining which individuals or groups from among the millions of refugees worldwide will have access to U.S. resettlement consideration. PRM coordinates within the Department of State, as well as with DHS/USCIS and other agencies, in carrying out this responsibility.

Section 207(a)(3) of the INA states that the USRAP shall allocate admissions among refugees “of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation.” Which individuals are “of special humanitarian concern” to the United States for the purpose of refugee resettlement consideration is determined through the USRAP priority system. There are currently three priorities or categories of cases:

- Priority 1 – Individual cases referred to the program by virtue of their circumstances and apparent need for resettlement;
- Priority 2 – Groups of cases designated as having access to the program by virtue of their circumstances and apparent need for resettlement;
- Priority 3 – Individual cases from designated nationalities granted access for purposes of reunification with anchor family members already in the United States.

(Note: Refugees resettled in the United States may also seek the admission of spouses and unmarried children under 21 who are still abroad by filing a “Following to Join” petition, which obviates the need for a separate refugee claim adjudication. This option is described in more detail in the discussion of Following to Join cases below.)
Access to the program under one of the above-listed processing priorities does not mean an applicant meets the statutory definition of "refugee" or is admissible to the United States under the INA. Applicants who are eligible for access within the established priorities are presented to DHS/USCIS officers for interview. The ultimate determination as to whether an applicant can be admitted as a refugee is made by DHS/USCIS in accordance with criteria set forth in the INA and various security protocols.

Although the access categories to the USRAP are referred to as "processing priorities," it is important to note that entering the program under a certain priority does not establish precedence in the order in which cases will be processed. Once cases are established as eligible for access under one of the three processing priorities, they all undergo the same processing steps.

**Priority 1 – Individual Referrals**

Priority 1 (P-1) allows consideration of refugee claims from persons of any nationality, usually with compelling protection needs, for whom resettlement appears to be the appropriate durable solution. Priority 1 cases are identified and referred to the program by UNHCR, a U.S. Embassy, or a designated NGO. UNHCR, which has the international mandate worldwide to provide protection to refugees, has historically referred the vast majority of cases under this priority. Some NGOs providing humanitarian assistance in locations where there are large concentrations of refugees have also undergone training by PRM and DHS/USCIS and have been designated eligible to provide Priority 1 referrals.

**Process for Priority 1 Individual Referral Applications**

Priority 1 referrals from UNHCR and NGOs are generally submitted to the appropriate Regional Refugee Coordinator, who forwards the referrals to the appropriate Resettlement Support Center (RSC) for case processing and scheduling of the DHS/USCIS interview. PRM’s Office of Admissions reviews embassy referrals for completeness and may consult with DHS in considering these referrals.

A U.S. ambassador may make a Priority 1 referral for persons still in their country of origin if the ambassador determines that such cases are in need of exceptional treatment and the Departments of State (PRM) and Homeland Security (DHS/USCIS) concur. In some cases, a Department of State request to DHS/USCIS for parole may be a more appropriate option.

---

3 Referrals of North Koreans and Palestinians require State Department and DHS/USCIS concurrence before they may be granted access to the USRAP.
PRIORITY 2 – GROUP REFERRALS

Priority 2 (P-2) includes specific groups (within certain nationalities, clans or ethnic groups, sometimes in specified locations) identified by the Department of State in consultation with DHS/USCIS, NGOs, UNHCR, and other experts as being in need of resettlement. Some Priority 2 groups are processed in their country of origin. The process of identifying the group and its characteristics includes consideration of whether the group is of special humanitarian concern to the United States and whether members of the group will likely be able to qualify for admission as refugees under U.S. law. Groups may be designated as Priority 2 during the course of the year as circumstances dictate, and the need for resettlement arises. PRM plays the coordinating role for all group referrals to the USRAP.

There are two distinct models of Priority 2 access to the program: open access and predefined group access, normally upon the recommendation of UNHCR. Under both models, Priority 2 designations are made based on shared characteristics that define the group. In general, the possession of these characteristics is the reason the group has been persecuted in the past or faces persecution in the future.

The open-access model for Priority 2 group referrals allows individuals to seek access to the program on the basis of meeting designated criteria. To establish an open-access Priority 2 group, PRM, in consultation with DHS/USCIS, and (as appropriate) with UNHCR and others, defines the specific criteria for access. Once the designation is in place, applicants may approach the program at any of the processing locations specified as available for the group to begin the application process. Applicants must demonstrate that they meet specified criteria to establish eligibility for access.

The open-access model has functioned well in the in-country programs, including the long-standing programs in Eurasia and the Baltics, and in Cuba. It was also used successfully for Vietnamese for nearly thirty years (1980-2009), Bosnian refugees during the 1990s, and is now in use for Iranian religious minorities and Iraqis with links to the United States.

The RSCs responsible for handling open-access Priority 2 applications, working under the direction of PRM, make a preliminary determination as to whether the applicants qualify for access and should be presented to DHS/USCIS for interview. Applicants who clearly do not meet the access requirements are “screened out” prior to DHS/USCIS interview.
In contrast to an open-access group, a predefined group designation is normally based on a UNHCR recommendation that lays out eligibility criteria that should apply to individuals in a specific location. Once PRM, in consultation with DHS/USCIS has established the access eligibility criteria for the group, the referring entity (usually UNHCR) provides the bio data of eligible refugee applicants for processing. This type of group referral is advantageous in situations in which the intensive labor required to generate individual referrals would be impracticable, potentially harmful to applicants due to delays, or counterproductive. Often, predefined groups are composed of persons with similar persecution claims. The predefined group referral process saves steps and can conserve scarce resources, particularly for UNHCR. In recent years, predefined groups have included certain Burmese in Thailand, certain Bhutanese in Nepal, and certain Congolese in Rwanda. Predefined group referrals with clear, well-defined eligibility criteria and several methods for cross-checking group membership can serve as a fraud deterrent as well, preventing non-group members from gaining access to theUSRAP by falsely claiming group membership. It can also speed the resettlement process in cases where immediate protection concerns are present.

FY 2015 Priority 2 Designations

In-country processing programs

The following ongoing programs that process individuals still in their country of origin under Priority 2 group designations will continue in FY 2015:

Eurasia and the Baltics

This Priority 2 designation applies to Jews, Evangelical Christians, and Ukrainian Catholic and Orthodox religious adherents identified in the Lautenberg Amendment, Public Law No. 101-167, § 599D, 103 Stat. 1261 (1989) (codified at 8 U.S.C. § 1157) as amended (“Lautenberg Amendment”), with close family in the United States. With annual renewal of the Lautenberg Amendment, these individuals are considered under a reduced evidentiary standard for establishing a well-founded fear of persecution.

Cuba

Included in this Priority 2 program are human rights activists, members of persecuted religious minorities, former political prisoners, forced-labor conscripts, and persons deprived of their professional credentials or subjected to other disproportionately harsh or discriminatory treatment resulting from their perceived or actual political or religious beliefs.
Iraqis Associated with the United States
Under various Priority 2 designations, including those set forth in the Refugee Crisis in Iraq Act, employees of the U.S. Government, a U.S. government-funded contractor or grantee, U.S. media or U.S. NGOs working in Iraq, and certain family members of such employees, as well as beneficiaries of approved I-130 (immigrant visa) petitions, are eligible for refugee processing in Iraq.

The following planned program that would process individuals still in their country of origin under a Priority 2 group designation may be launched in FY 2015:

Minors in Honduras, El Salvador, and Guatemala

Under this planned new P-2 program, certain lawfully present qualifying relatives in the United States could request access to a refugee interview for an unmarried child under 21 in his/her country of origin.

Groups of Humanitarian Concern outside the Country of Origin

The following Priority 2 groups are already designated and, in most cases, undergoing processing with significant arrivals anticipated during FY 2014. (Additional Priority 2 groups may be designated over the course of the year.)

Ethnic Minorities and others from Burma in camps in Thailand
Under this existing Priority 2 designation, individuals who have fled Burma, are registered in nine refugee camps along the Thai/Burma border, are identified by UNHCR as in need of resettlement, and expressed interest prior to January 2014 (depending on the location), are eligible for processing.

Ethnic Minorities from Burma in Malaysia
Under this Priority 2 designation, ethnic minorities from Burma who are recognized by UNHCR as refugees in Malaysia and identified as being in need of resettlement are eligible for processing.

Bhutanese in Nepal
Under this existing Priority 2 designation, Bhutanese refugees registered by UNHCR in camps in Nepal, identified as in need of resettlement, and expressed interest prior to June 30, 2014, are eligible for processing.
Iranian Religious Minorities
Under this Priority 2 designation, Iranian members of certain religious minorities are eligible for processing and are considered under a reduced evidentiary standard for establishing a well-founded fear of persecution, pursuant to annual renewal of the Lautenberg Amendment as amended in 2004 by Sec. 213 of Title II, Division E, of the Consolidated Appropriations Act of 2004, P.L. 108-199, 118 Stat. 3 ("the Specter Amendment").

Iraqis Associated with the United States
Under various Priority 2 designations, including those set forth in the Refugee Crisis in Iraq Act, employees of the U.S. government, a U.S. government-funded contractor or grantee, U.S. media or U.S. NGOs working in Iraq, and certain family members of such employees, as well as beneficiaries of approved I-130 (immigrant visa) petitions, are eligible for refugee processing. This program is operating in Jordan and Egypt, in addition to the in-country program in Iraq.

Congolese in Rwanda
Under this existing Priority 2 designation, certain Congolese refugees in Rwanda who were verifiably registered in 1997 and identified as in need of resettlement are eligible for processing.

**PRIORITY 3 – FAMILY REUNIFICATION**

The Priority 3 (P-3) category affords USRAP access to members of designated nationalities who have immediate family members in the United States who initially entered as refugees or were granted asylum. At the beginning of each fiscal year, PRM, in consultation with DHS/USCIS, establishes the list of nationalities eligible for processing under this priority. The PRM Assistant Secretary may modify the list during the year, in consultation with DHS/USCIS, but additions or deletions are generally made to coincide with the fiscal year.

Inclusion on the P-3 list represents a finding by PRM that the nationality is of special humanitarian concern to the United States for the purpose of family-reunification refugee processing. Eligible nationalities are selected following careful review of several factors. UNHCR’s annual assessment of refugees in need of resettlement, provides insight into ongoing refugee situations, which could create the need for family-reunification processing. In addition, prospective or ongoing repatriation efforts and U.S. foreign policy interests must be weighed in determining which nationalities should be eligible.
The P-3 program has undergone significant changes in recent years. In order to qualify for access under the P-3 program, an applicant must be outside of his or her country of origin, be registered or have legal status in the country of asylum (with some exceptions), have had an Affidavit of Relationship (AOR) filed on his or her behalf by an eligible "anchor" relative in the United States during a period in which the nationality was included on the eligibility list, and have been cleared for onward processing by the DHS/USCIS Refugee Access Verification Unit (RAVU).

Since the P-3 program resumed in October 15, 2012, after a suspension period due to fraud concerns, the AOR has been an official Department of State form (DS-7656). The form contains new language about penalties for committing fraud, and alerts filers that DNA evidence of certain claimed biological parent-child relationships will be required in order to gain access to a USCIS interview for refugee admission to the United States through the P-3 program. As of June 30, we have received more than 2,000 AORs that are in various stages of processing. We anticipate that P-3 arrivals to the United States will begin in FY2015.

The following family members of the U.S.-based anchor are qualified for P-3 access: spouses, unmarried children under 21, and/or parents. Qualifying anchors are persons who were admitted to the United States as refugees or were granted asylum, including persons who are lawful permanent residents or U.S. citizens who initially were admitted to the United States as refugees or were granted asylum. The anchor relative must be at least 18 years of age at the time the AOR is filed and must file the AOR within 5 years of the date the anchor entered the U.S. as a refugee or was granted asylum.

In addition to the qualifying family members of a U.S.-based anchor listed above, the qualifying family member’s spouse and unmarried children under 21 may derive refugee status from the principal applicant for refugee status. On a case-by-case basis, an individual may be added to a qualifying family member’s P-3 case if that individual:

1) lived in the same household as the qualifying family member in the country of nationality or, if stateless, last habitual residence; AND
2) was part of the same economic unit as the qualifying family member in the country of nationality or, if stateless, last habitual residence; AND
3) demonstrates exceptional and compelling humanitarian circumstances that justify inclusion on the qualifying family member’s case.
These individuals “are not “spouses” or “children”, under INA 207(c)(2)(A)” and thus cannot derive their refugee status from the Principal Applicant. They must, therefore, independently establish that they qualify as a refugee.

**FY 2015 Priority 3 Nationalities**

P-3 processing is available to individuals of the following nationalities:

- Afghanistan
- Bhutan
- Burma
- Burundi
- Central African Republic
- Colombia
- Cuba
- Democratic People’s Republic of Korea (DPRK)
- Democratic Republic of Congo (DRC)
- El Salvador
- Eritrea
- Ethiopia
- Guatemala
- Haiti
- Honduras
- Iran
- Iraq
- Mali
- Somalia
- South Sudan
- Sri Lanka
- Sudan
- Syria
- Uzbekistan

**Following-to-Join Family Reunification Petitions**

Under 8 CFR Section 207.7, a principal refugee admitted to the United States may request following-to-join benefits for his or her spouse and/or unmarried children under the age of 21 who were not previously granted refugee status. Once in the United States, and within two years of admission, the refugee
The Eligibility Determination

In order to be approved as a refugee, an applicant must meet the refugee definition contained in § 101(a)(42) of the INA. That section provides that a refugee is a person who is outside his or her country of nationality or last habitual residence and is unable or unwilling to return to 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. As mentioned above, the President may specify special circumstances under which a person can meet the refugee definition when he or she is still within the country of origin. The definition excludes a person who has ordered, incited, assisted, or otherwise participated in persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Further, an applicant who has been “firmly resettled” in a third country may not be admitted as a refugee under INA Section 207. Applicants are also subject to various statutory grounds of inadmissibility, including criminal, security, and public health grounds, some of which may be waived or from which applicants may be exempted.

The grounds of inadmissibility that apply to refugee applicants include the broad terrorism-related inadmissibility grounds (TRIG) at Section 212(a)(3)(B) of the INA. Beginning in 2005, the Departments of Homeland Security, State, and Justice began to exercise a discretionary Secretarial authority to exempt certain categories of refugee applicants from TRIG inadmissibility based on a determination that they did not represent a threat to the United States and otherwise merited an exemption for humanitarian purposes. As of June 2014, more than 12,700 TRIG exemptions have been granted to refugee applicants.\(^5\)

A DHS/USCIS officer conducts a non-adversarial, face-to-face interview of each refugee applicant designed to elicit information about the applicant’s claim for refugee status and any grounds of ineligibility. The officer asks questions about the applicant’s experiences in the country of origin, including problems and fears about returning (or remaining), as well as questions concerning the applicant’s activities, background, and criminal history. The officer also considers evidence about conditions in the country of origin and assesses the applicant’s credibility and claim.

Background Checks

\(^5\) Over 6,600 of these exemptions pertained to Burmese applicants who had associations with groups that met the statutory definition of an undesignated “terrorist organization” in Section 212(a)(3)(B). Approximately 5,580 of the exemptions related to applicants who provided material support to a terrorist organization under duress—for example, Iraqi applicants who paid a ransom for a kidnapped family member.
Refugee applicants of all nationalities are required to undergo background security checks. Security checks include biographic name checks for all refugee applicants and biometric (fingerprint) checks for refugee applicants aged 14 to 79. PRM, through its overseas Resettlement Support Centers, initiates required biographic name checks, while USCIS is responsible for collecting biometric data for screening. Biographic and biometric information is vetted against a broad array of law enforcement, intelligence community, and other relevant databases to help confirm identity, to check for any criminal or other derogatory information (including watchlist information), and to identify information that could inform lines of questioning during the interview. Refugee applicants must clear all required security checks prior to final approval of their application.

In late 2010, the USRAP implemented an enhanced security check requirement for all refugee applicants. While implementing the enhanced check was critical to strengthening the integrity of the program, refugee admissions were disrupted in FY 2011 and FY 2012. Interagency coordination and processing procedures were improved, however, resulting in increased refugee admissions levels beginning in May 2012. Admissions levels continued at these higher levels in FY 2013 and reached 99.9% of the ceiling set by Presidential Determination.

**PROCESSING ACTIVITIES OF THE DEPARTMENT OF STATE**

**Overseas Processing Services**

In most processing locations, PRM engages an NGO, an international organization (IO), or U.S. embassy contractors to manage a Resettlement Support Center (RSC) that assists in the processing of refugees for admission to the United States. RSC staff pre-screen applicants to determine preliminarily if they qualify for one of the applicable processing priorities and to prepare cases for DHS/USCIS adjudication. The RSCs assist applicants in completing documentary requirements and schedule DHS/USCIS refugee eligibility interviews. If an applicant is conditionally approved for resettlement, RSC staff guide the refugee through post-adjudication steps, including obtaining medical screening exams and attending cultural orientation programs. The RSC obtains sponsorship assurances and, once all required steps are completed, refers the case to IOM for transportation to the United States.
In FY 2014, NGOs (Church World Service, Hebrew Immigrant Aid Society, and International Rescue Committee) worked under cooperative agreements with PRM as RSCs at locations in Austria (covering Austria only), Kenya (covering sub-Saharan Africa), and Thailand (covering East Asia). International organizations and NGOs (IOM and the International Catholic Migration Commission) support refugee processing activities based in Ecuador, Jordan, Russia, Nepal, and Turkey covering Latin America, the Middle East, South and Central Asia, and Europe. The U.S. Department of State supports refugee processing in Havana, Cuba.

**Cultural Orientation**

The Department of State strives to ensure that refugees who are accepted for admission to the United States are prepared for the profound life changes they will experience by providing cultural orientation programs prior to departure for the United States. It is critical that refugees arrive with a realistic idea of what their new lives will be like, what services will be available to them, and what their responsibilities will be.

Every refugee family receives *Welcome to the United States*, a resettlement guidebook developed with contributions from refugee resettlement workers, resettled refugees, and government officials. The 2012 edition is available in eight languages: Arabic, Burmese, Chin, English, Karen, Kinyarwanda, Nepali, and Somali. The previous (2007) edition is still available in 16 languages: Albanian, Amharic, Arabic, Bosnian/Croatian/Serbian, English, Farsi, French, Karen, Kirundi, Nepali, Russian, Somali, Spanish, Swahili, Tigrinya, and Vietnamese. Through this book, refugees have access to accurate information about the initial resettlement period before they arrive. The *Welcome to the United States* refugee orientation video was also revised in 2012 and is available in eight languages: Arabic, Burmese, Chin, English, Karen, Kinyarwanda, Nepali, and Somali. The 2004 version of the video is available in 13 languages: Arabic, English, Farsi, Hmong, Karen, Karenni, Kirundi, Nepali, Russian, Somali, Spanish, Swahili, and Tigrinya.

In addition, the Department of State funds one- to five-day pre-departure orientation classes for eligible refugees at sites throughout the world. In an effort to further bridge the information gap for certain groups, brief video presentations featuring the experience of recently resettled refugees of the same ethnic group are made available to refugee applicants overseas. Groups featured include refugees from Bhutan, Burma, Cuba, Darfur, and Iraq. *Faces of Resettlement*, a video produced in 2013, shows five individuals who entered the United States as refugees, from Bhutan, Burma, Burundi, Iraq, and Sudan. Each of them tells their
own story of the ways in which they are rebuilding their lives in their new communities. *Faces of Resettlement* also includes interviews with receiving community members.

**Transportation**

The Department of State funds the international transportation of refugees resettled in the United States through a program administered by IOM. The cost of transportation is provided to refugees in the form of a loan. Refugees are responsible for repaying these loans over time, beginning six months after their arrival, although it is possible to request a deferral based on inability to begin paying at six months.

**Reception and Placement (R&P)**

In FY 2014, PRM funded cooperative agreements with nine private resettlement agencies to provide initial resettlement services to refugees arriving in the United States. The R&P agencies are responsible for providing initial reception and core services (including housing, furnishings, clothing and food, as well as assistance with access to medical, employment, educational, and social services) to arriving refugees. These services are provided according to standards of care within a framework of outcomes and indicators developed jointly by the NGO community, state refugee coordinators, and U.S. government agencies. The nine organizations maintain a nationwide network of some 350 affiliated offices in 185 cities to provide services. Two of the organizations also maintain a network of 24 affiliated offices through which unaccompanied refugee minors are placed into foster care, a program administered and funded by HHS/ORR.

Using R&P funds from PRM supplemented by cash and in-kind contributions from private and other sources, the participating agencies provide the following services, consistent with the terms of the R&P cooperative agreement:

- Sponsorship;
- Pre-arrival resettlement planning, including placement;
- Reception on arrival;
- Basic needs support (including housing, furnishings, food, and clothing) for at least 30 days;
- Cultural orientation;
- Assistance with access to health, employment, education, and other services as needed; and
- Development and implementation of an initial resettlement plan for each refugee.
OFFICE OF REFUGEE RESETTLEMENT (ORR)

Through the Refugee Act, Congress directed HHS/ORR to provide refugees with resettlement assistance that includes employment training, English language training, cash assistance (in a manner that promotes early independence), and job placement – including providing women with equal opportunities to employment as men. ORR’s mission is to help refugees transition into the U.S. by providing benefits and assistance that assist them to achieve self-sufficiency and become integrated members of society as soon as possible. To this end, ORR funds and administers various programs, some of which are highlighted below.

State-Administered and Wilson-Fish Programs

Under ORR’s state-administered or Wilson-Fish (WF) programs, refugees not eligible for Temporary Assistance for Needy Families (TANF) or Supplemental Security Income (SSI) are eligible to receive up to eight months of Refugee Cash Assistance (RCA). Refugees not eligible for Medicaid are eligible to receive up to eight months of Refugee Medical Assistance (RMA) upon arrival. In state-administered programs that operate a publicly administered RCA program (33 States), RCA benefits are based on cash benefit levels established by state TANF programs. In States that operate their RCA program through a Public-Private Program (PPP) model (5 States) and WF States (12 States plus one county), the RCA benefit is based on the higher of the RCA rates outlined in the ORR regulations or the State TANF rates.

The WF program is an alternative to the traditional state-administered program, and is usually administered by local voluntary resettlement agencies. The WF program emphasizes early employment and economic self-sufficiency by integrating cash assistance, case management, and employment services, and by incorporating innovative strategies for the provision of cash assistance (e.g. financial bonuses for early employment). WF programs also serve as a replacement for the State when the State government withdraws from all or part of the ORR-funded refugee assistance program. There are currently 13 WF programs nationwide.

ORR also provides states/WF programs with Formula Refugee Social Services (RSS) and Targeted Assistance (TAG) funds. ORR distributes these funds based on arrival numbers and refugee concentration levels in counties with a high utilization of public assistance. Funding is time limited, and refugees can only access RSS and TAG services up to five years after arrival. These services include: employability services, employment assessment services, on-the-job
training, English language instruction, vocational training, case management, translation/interpreter services, social adjustment services, health-related services, home management, and if necessary for employment, day care and transportation.

Additionally, to assist specific groups of refugees, ORR administers the following specialized programs through states/WF programs, including Cuban-Haitian, Older Refugees, Preventive Health, Refugee School Impact, and Targeted Assistance.

**ORR Matching Grant Program**

The ORR Matching Grant program (MG) is provided through the nine national resettlement agencies that provide R & P services and their resettlement affiliates in 42 states. The objective of MG is to guide newly-arrived refugee households toward economic self-sufficiency through employment within four to six months of program eligibility (usually within the first month of arrival). In MG, self-sufficiency is defined as total household income from employment that enables a family unit to support itself without receipt of public cash assistance. ORR awards $2,200 on a per capita basis to each national resettlement agency, which then allocates funds to its local service providers based on projected enrollments. Agencies provide a 50% match to every federal dollar.

Through the ORR Matching Grant Program, local service providers ensure core maintenance services for a minimum of 120 days which include housing, transportation, food, and a cash allowance. Clients also receive intensive case management and employment services. Refugees who are unable to attain self-sufficiency by day 120 or 180, may access RCA for the remainder of the eight month eligibility period. In FY 13, over 29,000 individuals were enrolled in the program, 69% of whom achieved self-sufficiency. Approximately 33% of refugees participate in the ORR Matching Grant Program.

**ORR Refugee Health**

ORR recently created a Division of Refugee Health (DRH) to address the health and well-being of refugees. DRH is working on various initiatives including: collaborating with partners in the implementation of the Affordable Care Act (ACA), including the expansion of Medicaid and implementation of the state/federal Health Insurance Marketplaces; administering the Survivors of Torture program; providing technical assistance on medical screening guidelines,
mental health awareness and linkages, suicide prevention, emergency preparedness and other health and mental health initiatives (e.g. vision care, autism, etc.).

**ORR Unaccompanied Refugee Minor (URM) Program**

ORR provides funds to 15 states who administer over 20 URM programs. States contract with local licensed foster care agencies that provide specialized placements and services to URMs. URMs live in various placements including: traditional and therapeutic foster homes, group homes, semi-independent and independent living and residential treatment centers, and homes of relatives. URMs receive various services including: English language training, educational and vocational training, cultural preservation, social integration, family tracing, permanency planning, independent living, and health/mental health care. ORR regulations require states to provide services to URM in parity with the state’s Title IV-B foster care plan.

**Other ORR Discretionary Refugee Service Programs**

ORR also provides funding to non-profit agencies to focus on special initiatives or programs for refugees including: case management, ethnic community development, home-based child care business development, individual development accounts, microenterprise development, and agricultural projects.

**ORR Technical Assistance**

ORR provides technical assistance (TA) to resettlement stakeholders through various organizations that have expertise in certain fields. Currently ORR’s TA providers assist stakeholders in the areas of community engagement/integration, employment, health, survivors of torture, and TANFstate programs.
## Regional Programs

### Table II

**Proposed FY 2015 Regional Ceilings by Priority**

<table>
<thead>
<tr>
<th>Region</th>
<th>Priority 1 Individual Referrals</th>
<th>Priority 2 Groups</th>
<th>Priority 3 Family Reunification Refugees</th>
<th>Total Proposed</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Africa</strong></td>
<td>14,000</td>
<td>2,500</td>
<td>500</td>
<td>17,000</td>
</tr>
<tr>
<td><strong>East Asia</strong></td>
<td>1,800</td>
<td>11,000</td>
<td>200</td>
<td>13,000</td>
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<tr>
<td><strong>Europe/Central Asia</strong></td>
<td></td>
<td></td>
<td></td>
<td>1,000</td>
</tr>
<tr>
<td><strong>Latin America/Caribbean</strong></td>
<td></td>
<td></td>
<td></td>
<td>4,000</td>
</tr>
<tr>
<td><strong>Near East/South Asia</strong></td>
<td></td>
<td></td>
<td></td>
<td>33,000</td>
</tr>
</tbody>
</table>

**Unallocated Reserve**

**Total Proposed Ceiling:** 70,000
<table>
<thead>
<tr>
<th>Country of Origin</th>
<th>Arrival Number</th>
<th>% of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Afghanistan</td>
<td>661</td>
<td>0.95%</td>
</tr>
<tr>
<td>Angola</td>
<td>6</td>
<td>0.01%</td>
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<tr>
<td>Bangladesh</td>
<td>1</td>
<td>0.00%</td>
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<tr>
<td>Bhutan</td>
<td>9,134</td>
<td>13.06%</td>
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<td>Bulgaria</td>
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<tr>
<td>Burma</td>
<td>16,299</td>
<td>23.31%</td>
</tr>
<tr>
<td>Burundi</td>
<td>193</td>
<td>0.28%</td>
</tr>
<tr>
<td>Cambodia</td>
<td>30</td>
<td>0.04%</td>
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<tr>
<td>Canada</td>
<td>1</td>
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</tr>
<tr>
<td>Central African Republic</td>
<td>318</td>
<td>0.45%</td>
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<td>Chad</td>
<td>32</td>
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<tr>
<td>China</td>
<td>86</td>
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</tr>
<tr>
<td>Colombia</td>
<td>230</td>
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<tr>
<td>Congo</td>
<td>161</td>
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<tr>
<td>Cuba</td>
<td>4,205</td>
<td>6.01%</td>
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<tr>
<td>Dem. Rep. Congo</td>
<td>2,563</td>
<td>3.67%</td>
</tr>
<tr>
<td>Egypt</td>
<td>3</td>
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<tr>
<td>Eritrea</td>
<td>1,824</td>
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<tr>
<td>Ethiopia</td>
<td>765</td>
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</tr>
<tr>
<td>Former Soviet Union*</td>
<td>579</td>
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<tr>
<td>Gambia</td>
<td>11</td>
<td>0.02%</td>
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<tr>
<td>Guinea</td>
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</tr>
<tr>
<td>India</td>
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</tr>
<tr>
<td>Iran</td>
<td>2,578</td>
<td>3.69%</td>
</tr>
<tr>
<td>Iraq</td>
<td>19,488</td>
<td>27.87%</td>
</tr>
<tr>
<td>Ivory Coast</td>
<td>20</td>
<td>0.03%</td>
</tr>
<tr>
<td>Country</td>
<td>Count</td>
<td>Percentage</td>
</tr>
<tr>
<td>---------------------------</td>
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</tr>
<tr>
<td>Jordan</td>
<td>13</td>
<td>0.02%</td>
</tr>
<tr>
<td>Kenya</td>
<td>5</td>
<td>0.01%</td>
</tr>
<tr>
<td>Korea, North</td>
<td>17</td>
<td>0.02%</td>
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<tr>
<td>Kuwait</td>
<td>12</td>
<td>0.02%</td>
</tr>
<tr>
<td>Liberia</td>
<td>94</td>
<td>0.13%</td>
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<tr>
<td>Libya</td>
<td>1</td>
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</tr>
<tr>
<td>Mali</td>
<td>2</td>
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</tr>
<tr>
<td>Nepal</td>
<td>34</td>
<td>0.05%</td>
</tr>
<tr>
<td>Nigeria</td>
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<tr>
<td>Pakistan</td>
<td>158</td>
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<tr>
<td>Palestine</td>
<td>164</td>
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<tr>
<td>Republic of South Sudan</td>
<td>17</td>
<td>0.02%</td>
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<tr>
<td>Rwanda</td>
<td>139</td>
<td>0.20%</td>
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<tr>
<td>Senegal</td>
<td>2</td>
<td>0.00%</td>
</tr>
<tr>
<td>Sierra Leone</td>
<td>4</td>
<td>0.01%</td>
</tr>
<tr>
<td>Somalia</td>
<td>7,608</td>
<td>10.88%</td>
</tr>
<tr>
<td>Sri Lanka (Ceylon)</td>
<td>92</td>
<td>0.13%</td>
</tr>
<tr>
<td>Sudan</td>
<td>2,160</td>
<td>3.09%</td>
</tr>
<tr>
<td>Syria</td>
<td>36</td>
<td>0.05%</td>
</tr>
<tr>
<td>Thailand</td>
<td>4</td>
<td>0.01%</td>
</tr>
<tr>
<td>Tibet</td>
<td>15</td>
<td>0.02%</td>
</tr>
<tr>
<td>Togo</td>
<td>18</td>
<td>0.03%</td>
</tr>
<tr>
<td>Uganda</td>
<td>15</td>
<td>0.02%</td>
</tr>
<tr>
<td>Venezuela</td>
<td>3</td>
<td>0.00%</td>
</tr>
<tr>
<td>Vietnam</td>
<td>86</td>
<td>0.12%</td>
</tr>
<tr>
<td>Yemen</td>
<td>12</td>
<td>0.02%</td>
</tr>
<tr>
<td>Zimbabwe</td>
<td>12</td>
<td>0.02%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>69,926</td>
<td><strong>100.00%</strong></td>
</tr>
</tbody>
</table>

*Source: Department of State, Bureau of Population, Refugees, and Migration, Refugee Processing Center*
### Table VIII
UNHCR Resettlement Statistics by Resettlement Country CY 2013 Admissions

<table>
<thead>
<tr>
<th>Resettlement Country</th>
<th>Total</th>
<th>Percent of Total Resettled</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>47,875</td>
<td>67.04%</td>
</tr>
<tr>
<td>Australia</td>
<td>11,117</td>
<td>15.57%</td>
</tr>
<tr>
<td>Canada</td>
<td>5,140</td>
<td>7.20%</td>
</tr>
<tr>
<td>Sweden</td>
<td>1,832</td>
<td>2.57%</td>
</tr>
<tr>
<td>Germany</td>
<td>1,092</td>
<td>1.53%</td>
</tr>
<tr>
<td>Norway</td>
<td>941</td>
<td>1.32%</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>750</td>
<td>1.05%</td>
</tr>
<tr>
<td>New Zealand</td>
<td>682</td>
<td>0.96%</td>
</tr>
<tr>
<td>Finland</td>
<td>665</td>
<td>0.93%</td>
</tr>
<tr>
<td>Denmark</td>
<td>475</td>
<td>0.67%</td>
</tr>
<tr>
<td>Netherlands</td>
<td>362</td>
<td>0.51%</td>
</tr>
<tr>
<td>Belgium</td>
<td>100</td>
<td>0.14%</td>
</tr>
<tr>
<td>France</td>
<td>100</td>
<td>0.14%</td>
</tr>
<tr>
<td>Switzerland</td>
<td>78</td>
<td>0.11%</td>
</tr>
<tr>
<td>Ireland</td>
<td>62</td>
<td>0.09%</td>
</tr>
<tr>
<td>Brazil</td>
<td>56</td>
<td>0.08%</td>
</tr>
<tr>
<td>Rep. of Korea</td>
<td>31</td>
<td>0.04%</td>
</tr>
<tr>
<td>Japan</td>
<td>18</td>
<td>0.03%</td>
</tr>
<tr>
<td>Uruguay</td>
<td>14</td>
<td>0.02%</td>
</tr>
<tr>
<td>Argentina</td>
<td>7</td>
<td>0.00%</td>
</tr>
<tr>
<td>Portugal</td>
<td>6</td>
<td>0.00%</td>
</tr>
<tr>
<td>Austria</td>
<td>4</td>
<td>0.00%</td>
</tr>
<tr>
<td>Chile</td>
<td>3</td>
<td>0.00%</td>
</tr>
<tr>
<td>Czech. Rep.</td>
<td>1</td>
<td>0.00%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>71,411</td>
<td>100.00%</td>
</tr>
</tbody>
</table>
In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM)

Introduction

The Central American Minors (CAM) Refugee/Parole Program provides certain qualified minors in El Salvador, Guatemala and Honduras a safe, legal, and orderly alternative to the dangerous journey that some children are currently undertaking to the United States. The CAM program began accepting applications from qualifying parents in the U.S. for their children on December 1, 2014. The qualifying parent is the U.S.-based parent who may complete the application. Only certain parents, described below, are eligible to be qualifying parents and file for their children. Each qualified child must be unmarried, under the age of 21, and residing in El Salvador, Guatemala or Honduras. In certain cases, the parent of the qualifying child may also qualify for access if the parent is the spouse of the qualifying parent. See below for eligibility details.

Eligibility

Qualifying Child

The qualifying child in El Salvador, Guatemala or Honduras must be:

- The child of the qualifying parent per the Immigration and Nationality Act (biological, step, or legally adopted);
- Unmarried;
- Under the age of 21;
- A national of El Salvador, Guatemala, or Honduras; and
- Residing in his or her country of nationality.

Eligible Family Members

In some cases, other eligible family members may have access, including:

- Unmarried children of the qualifying child who are under the age of 21 can be included as derivatives.

Parent of Qualifying Child Who is not the Qualifying Parent

This program is primarily aimed at minors, but a parent of the qualifying child may be included if:

- He/she is part of the same household and economic unit as the qualifying child,
- He/she is legally married to the qualifying parent at the time the qualifying parent files the CAM-Affidavit of Relationship (AOR), and
- He/she continues to be legally married to the qualifying parent.

**Qualifying Parent**

The qualifying parent may be any individual who is at least 18 years old and lawfully present in the United States in one of the following categories:

- Permanent Resident Status, or
- Temporary Protected Status, or
- Parolee, or
- Deferred Action
- Deferred Enforced Departure, or
- Withholding of Removal

**Deferred Action**

Parolees and persons granted deferred action must have been issued parole or deferred action for a minimum of one year. For all other categories listed above, individuals who are lawfully present and in a valid status at the time of application (this means the date of CAM-Affidavit of Relationship filing) are eligible.

**Application Process**

There is no filing deadline for this program, but the qualifying parent must be in one of the current statuses listed above at the time of applying for this program, as well as at the time of admission or parole of the beneficiary of this program.

The qualifying parent in the U.S. files Form DS-7699 Affidavit of Relationship (AOR) for Minors Who Are Nationals of El Salvador, Guatemala, and Honduras (CAM-AOR). This form can only be accessed and completed with the assistance of a designated resettlement agency (RA). For additional information and a listing of resettlement agencies where the CAM-AOR may be filed please visit the Department of State, Refugee Processing Center’s website.

There is no fee to participate in this refugee/parole program and it is prohibited for anyone to charge a fee for completion of the form.

**DNA Testing**

DNA relationship testing must occur between the qualifying parent in the U.S. and his/her biological children. The parent in the U.S. will pay the initial costs of DNA testing and will be reimbursed for testing costs ONLY if ALL claimed and tested biological relationships are confirmed by DNA test results.

Refugee Status

Refugee status is a form of protection available to those who meet the definition of refugee and who are of special humanitarian concern to the United States. For a legal definition of refugee, see section 101(a)(42) of the Immigration and Nationality Act (INA). Both the qualifying child and the in-country parent of the qualifying child must establish an independent refugee claim to be granted refugee status. Eligibility for refugee status is determined on a case-by-case basis through an interview with a specially-trained USCIS officer.

Applicants who gain access to the program, but are found ineligible for refugee status will be considered on a case-by-case basis for parole into the United States. For more information about refugees, see the "Refugees" section of our website.

Parole

Parole allows individuals who may be otherwise inadmissible to come to the U.S. on a case-by-case basis for urgent humanitarian reasons or significant public benefit. A separate application for this process is not required.

An applicant found conditionally eligible for parole is subject to the following additional requirements:

- **Medical Clearance and Costs:** All applicants for parole will be required to obtain and pay for medical clearance.
- **Travel Arrangements and Costs:** An individual who is authorized parole must book his or her travel through an approved USCIS process and pay for the flight to the United States.

USCIS will be updating the CAM webpage to provide updated information on Parole as part of the CAM Program. Please check back periodically to view this updated information.

Asylum Procedure; summary of asylum v. withholding, expedited removal.
Refugee Law
Prof. Abriel

ASYLUM PROCEDURE
• Affirmative application before CIS OR
• Application for asylum as relief from removal before IJ – either initial application or review of application referred by CIS
• Once removal proceedings begin, IJ has sole jurisdiction
• Form I-589 and supporting documentation
• If granted, file I-730 for children/spouse.

Brief overview of removal process
• ICE/CBP issues Notice to Appear (charging document)
• If denied, bond redetermination proceedings
• Determination of removability (in master calendar hearing if uncontested; individual calendar hearing if contested).
• If removable, file applications for relief.
• Individual calendar hearing on applications for relief.
• Administrative appeal to BIA
• Petition for review in U.S. circuit court of appeals

Withholding compared to asylum
• Standard of proof - withholding has higher standard of proof than asylum.
• BUT withholding mandatory; asylum discretionary
• Withholding is country specific; asylum is not.
• Asylum leads to LPR status; withholding does not
• Both grant employment authorization
• Apply for both on Form I-589

Standards of proof
• Asylum = well-founded fear of persecution = reasonable fear standard = less than 50% likely
• Withholding = clear probability of persecution = more than 50% likely
• Burden is on applicant for both, except that if past persecution established, burden shifts to govt. to show future persecution not likely.
**Expedited removal**
INA § 235(b)(1)
- Applies only to: (a) aliens seeking admission and (b) persons in the U.S. who entered without admission or parole and cannot show they have been physically present for two years; AND
- Only to persons inadmissible on one of two grounds: (1) INA 212(a)(6)(C) [material misrepresentation or fraud] or 212(a)(7) [lack of entry documents].

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**If expedited removal:**
- Officer shall order alien removed from US without further hearing or review unless alien indicates intention to apply for asylum or fear of persecution.
- If alien indicates such an intent or fear, officer shall refer alien for credible fear interview with asylum officer.

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**Credible fear process**
- Interview with asylum officer
- If asylum officer finds credible fear, alien referred for full removal proceedings
- If asylum officer finds no credible fear, alien may seek review of decision from Immigration Judge.
- No administrative review, except for aliens who claim under oath to be LPRs or to have been admitted as refugee or granted asylum.
- Standard of proof for credible fear is significant possibility that alien could establish eligibility for asylum.
DEVELOPING DEFINITIONS OF PERSECUTION

From Matter of Acosta, 19 I & N Dec. 211 (BIA 1985)

As was the case prior to enactment of the Refugee Act, ‘persecution’ as used in section 101(a)(42)(A) clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome. The word does not embrace harm arising out of civil strife or anarchy. In fact, Congress specifically rejected a definition of a refugee that would have included ‘displaced persons,’ i.e., those who flee harm generated by military or civil disturbances. This construction is consistent with the international interpretation of ‘refugee’ under the Protocol, for that term does not include persons who are displaced by civil or military strife in their countries of origin. See Special Project, supra note 8, at 763–69, and authorities cited therein.

From Matter of Kasinga, 21 I & N Dec. 357 (BIA 1996)

While a number of descriptions of persecution have been formulated in our past decisions, we have recognized that persecution can consist of the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim. See Matter of Acosta, 19 I & N Dec. 211, 222-23 (BIA 1985), modified on other grounds, Matter of Mogharrabi, 19 I & N Dec. 439 (BIA 1987). The “seeking to overcome” formulation has its antecedents in concepts of persecution that predate the Refugee Act of 1980. Pub. L. No. 96-212, 94 Stat. 102. See, e.g., Matter of Diaz, 10 I & N Dec. 199, 204 (BIA 1963).

As observed by the INS, many of our past cases involved actors who had a subjective intent to punish their victims. However, this subjective “punitive” or “malignant” intent is not required for harm to constitute persecution. See Matter of Kulle, 19 I & N Dec. 318 (BIA 1985); Matter of Acosta, supra.

From the United Nations Handbook on Procedures and Criteria for Granting Refugee Status

51. There is no universally accepted definition of “persecution”, and various attempts to formulate such a definition have met with little success. 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.

52. Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding para. graphs. The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.
631 F.3d 194
(Cite as: 631 F.3d 194)

631 F. 3d 194
United States Court of Appeals,
Fifth Circuit.
Rudina DERMIRAJ; Rediol Demiraj, Petitioners,
v.
Eric H. HOLDER, Jr., U.S. Attorney General, Re-
spondent.

No. 08–60991.
Jan. 11, 2011.

Background: Aliens, natives and citizens of Albania, petitioned for review of the orders of the Board of Immigration Appeals (BIA), denying their applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT).

Holdings: The Court of Appeals, Haynes, Circuit Judge, held that:
(1) aliens did not have fear of persecution “on account of” their family membership, as required to support grant of asylum and withholding of removal, and
(2) aliens were not entitled to relief under the CAT.

Petition denied.

Dennis, Circuit Judge, filed dissenting opinion.

Before BARKSDALE, DENNIS and HAYNES, Circuit Judges.

HAYNES, Circuit Judge:

Rudina Demiraj and her son, Rediol Demiraj, petition for review of the decision of 196 the Board of Immigration Appeals (“BIA”) denying their applications for asylum, withholding of removal, and protection under the Convention Against Torture. The petitioners, who are Albanian nationals, are the wife and son of Edmond Demiraj, a material witness in the United States’ prosecution of Bill Bedini. While conceding removability, the petitioners contend that they reasonably fear reprisal from Bedini and his associates if they are returned to Albania.

While the petitioners have assembled competent record evidence of the risks they may face upon returning to Albania, we, like the Immigration Judge (“I”) and the BIA, nevertheless conclude that those concerns do not entitle them to the relief they seek under the Immigration and Nationality Act. We therefore DENY the petition for review.

I. Facts & Procedural History

Rudina Demiraj and her minor son, Rediol, entered the United States without inspection in October 2000. Mrs. Demiraj timely filed an application for asylum, withholding of removal, and protection under article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture”), Dec. 10, 1984, S. TREATY DOC. No. 100–20, 1465 U.N.T.S. 85, 113. Mrs. Demiraj named Rediol as a derivative beneficiary of her application. In her application, filed on September 28, 2001, and refilled as corrected on November 19, 2001, Mrs. Demiraj asserted that she was entitled to the relief requested because of her and her family’s political involvement in opposing Albania’s former communist regime and current socialist party and consequent fear of reprisal and torture in Albania. On December 27, 2001, the Immigration and Naturalization Service issued Mrs. Demiraj and her son a notice to appear, charging her with removability; after a hearing before an IJ in 2002, Mrs. Demiraj and her son were denied all relief and ordered removed. Mrs. Demiraj appealed to the BIA, claiming that the court’s interpreter was ineffective; the BIA dismissed the appeal in October 2003.

FN1 Mrs. Demiraj and her son originally were named in Mr. Demiraj’s application for the same relief, but she elected to separate her and her son’s applications and to refile them separately.

[1] In February 2004, the BIA allowed Mrs. Demiraj to reopen her case based on changed circumstances. After the IJ’s initial disposition of Mrs. Demiraj’s case, Mr. Demiraj was shot in Albania by Bill Bedini, an Albanian wanted in the United States for human smuggling. Mr. Demiraj had been identified by the United States as a material witness against Bedini, but Mr. Demiraj never actually testified against Bedini because Bedini fled to Albania. After Mr. Demiraj was deported to Albania, Bedini kidnapped, beat, and shot Mr. Demiraj because of his cooperation with the United States’ efforts to prosecute Bedini. After Mr. Demiraj recovered from the shooting, local police in Albania took his statement but intimated that they would not investigate the crime. Bedini threatened Mr. Demiraj again, and he
631 F.3d 194
(Cite as: 631 F.3d 194)

fled to the United States. Mr. Demiraj was granted withholding of removal in a separate proceeding. During the same time period, two of Mr. Demiraj's nieces were also kidnapped by Bedini and his associates and trafficked to Italy. After escaping, the nieces fled to the United States and were granted asylum.

FN2. The IJ ultimately accepted all of Mr. and Mrs. Demiraj's testimony with respect to the Bedini incidents as factually credible, and the BIA accepted that determination; we therefore recite it here as fact.

FN3. We note that withholding of removal, unlike asylum, does not confer any derivative benefits or protections on the alien's family. 

Arif v. Mukasey, 509 F.3d 677, 682 (3d Cir. 2007) (per curiam).

These new facts, along with evidence of the interfamilyal "blood feud" culture in Albania, were presented to the IJ following the BIA's order to reopen Mrs. Demiraj's proceedings. The IJ credited all of the testimony presented by Mrs. Demiraj but found nevertheless that she was not entitled to any of the relief she sought. The IJ therefore ordered Mrs. Demiraj and her son deported to Albania. The BIA dismissed the appeal in November 2006, adopting and affirming the decision of the IJ. Mrs. Demiraj petitioned this court for review, but before we issued a decision, the Attorney General moved for voluntary remand to the BIA for reconsideration in light of the Supreme Court's intervening decision in Gonzalez v. Thomas, 547 U.S. 183, 126 S.Ct. 1613, 164 L.Ed.2d 358 (2006). We granted that motion and remanded. Demiraj v. Gonzalez, No. 06-61125, 2007 WL 7315791, *1 (5th Cir. June 18, 2007).

On remand, the BIA applied Thomas but again dismissed the appeal in October 2008. Mrs. Demiraj filed a second petition for review with this court and moved to reconsider before the BIA, offering additional evidence that another of Mr. Demiraj's nieces had been granted asylum in the United States after Bedini kidnapped her and told her she would "pay" for the actions of her "sisters and her uncle." We stayed proceedings until the BIA denied the motion to reconsider in July 2009; Mrs. Demiraj also filed a third petition for review of the order denying reconsideration.

Mrs. Demiraj's petitions for review of the BIA's October 2008 decision on remand and of its July 2009 denial of reconsideration were timely filed. We have jurisdiction under 8 U.S.C. § 1252(a)(1) and (d).

II. Standard of Review

[2][3] The BIA's interpretation of statutory and regulatory provisions that determine whether a petitioner is statutorily eligible for relief from removal is an issue of law that we review de novo. See Ortiz v. Ashcroft, 303 F.3d 341, 348 (5th Cir. 2002) (reviewing statutory eligibility for asylum); Shaikh v. Holder, 588 F.3d 861, 866–64 (5th Cir. 2009) (reviewing statutory eligibility for withholding of removal); Koe v. Ashcroft, 293 F.3d 899, 906–07 (5th Cir. 2002) (reviewing eligibility for protection under the Convention Against Torture). In that de novo review, we "afford considerable deference to the BIA's interpretation of immigration statutes unless the record reveals compelling evidence that the BIA's interpretation is incorrect." Shaikh, 588 F.3d at 863 (quoting Mikhael v. INS, 115 F.3d 259, 362 (5th Cir. 1997)).

[4] We review the BIA's underlying findings of fact "for substantial evidence, which 'requires only that the BIA's decisions be supported by record evidence and be substantially reasonable.'" Shaikh, 588 F.3d at 863 (citing Mikhael, 115 F.3d at 362, and quoting Omagah v. Ashcroft, 288 F.3d 254, 258 (5th Cir. 2002)); see also 8 U.S.C. § 1252(b)(4)(B). Where, as here, the BIA's decision depended in large part on the factual findings of the IJ, we review the IJ's findings under this same standard to the extent that they influenced or were relied upon by the BIA. See Chun v. INS, 40 F.3d 76, 78 (5th Cir. 1994).

III. Discussion

[5] Mrs. Demiraj and her son asserted three grounds for relief from removal before the IJ and the BIA: (1) asylum, (2) withholding of removal based on a probability of persecution, and (3) protection under the Convention Against Torture. The IJ and the BIA ruled that the petitioners were ineligible for any of the three forms of relief. Asylum and withholding of removal based on a probability of persecution are closely related, and the BIA found the petitioners statutorily ineligible for relief under both for the same reason; we therefore address those claims together. FN4

FN4. The standards for relief are structured such that an applicant who cannot meet the persecution standard for asylum necessarily cannot meet the persecution standard for withholding of removal. See, e.g., In re, 293 F. 3d at 906.

A. Asylum & Withholding of Removal

The BIA found the petitioners ineligible for asylum or withholding of removal because, even crediting all of the petitioners' evidence, Mrs. Demiraj and her son could not demonstrate that any persecution they might suffer in Albania was "on account of" their membership in the Demiraj family within the meaning of the statute and regulation. An alien who is otherwise subject to removal is eligible for discretionary asylum if the alien demonstrates that she is a "refugee" as defined under the Immigration and Nationality Act ("INA"). 8 U.S.C. § 1158(b)(1)(A); see also 8 C.F.R. § 1208.13(b). The statute in turn defines "refugee" in relevant part as a person who is unable or unwilling to return to her home county "because of persecution or a well-founded fear of persecution on account of ... membership in a particular social group ...." 8 U.S.C. § 1101(a)(42)(A). Similarly, an alien may obtain withholding of removal if she proves that her "life or freedom would be threatened in the country to which removal is ordered because of the alien's ... membership in a particular social group ...." 8 U.S.C. § 1231(b)(3)(A). The petitioners argue that they would be persecuted in Albania by Bedini "on account of" their membership in a particular social group, namely, the Demiraj family. The BIA, in its order after voluntary remand, agreed with the petitioners that the "Demiraj family" could constitute a "particular social group" within the meaning of the asylum and withholding of removal statutes, and the government does not dispute that conclusion.

[FN6 The core of this case instead is the question of whether Mrs. Demiraj's evidence showed that she reasonably feared persecution or likely would be persecuted "on account of" her family membership. See Thiery v. Ashcroft, 380 F.3d 788, 792 (5th Cir.2004). The IJ and the BIA concluded that the evidence did not establish this requisite connection between her family membership and the identified persecution by Bedini and his associates. The only dispute between the parties is whether the facts as found by the IJ constitute, as a matter of law, proof of persecution "on account of" Mrs. Demiraj's membership in the Demiraj family or not.

FN5. Because Mrs. Demiraj's application for asylum was submitted before the effective date of the REAL ID Act of 2005, Pub.L. No. 109-3, div. B, 119 Stat. 302, she "had only to demonstrate that 'one of the persecutor's motives [fell] within a statutorily protected ground.'" Shaikh, 588 F.3d at 864 (alteration in original) (quoting Girmay v. INS, 283 F.3d 564, 667 (5th Cir.2002)). By contrast, in cases decided "under the REAL ID Act, an alien must 'establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.'" Shaikh, 588 F.3d at 864 (quoting 8 U.S.C. § 1158(b)(1)(A)); see also REAL ID Act § 101(a)(5), 119 Stat. at 303.

After considering the record and the case law, the BIA explained its conclusion thus:

*199 Nexus may be shown ... where there is a desire [by the alleged or feared persecutor] to punish membership in the particular social group, [and] also where there is a desire [by the persecutor] to overcome what is deemed to be an offensive characteristic identifying the particular social group. The respondents here [viz., Mrs. Demiraj and her son] must identify some evidence, direct or circumstantial, that the assailants are motivated, at least in part, by a desire to punish or to overcome the family relationship to [Mrs. Demiraj]'s husband.

Here, the individuals involved were seeking revenge against [Mr. Demiraj] for his testimony, and seek to harm [him] by attacking the respondents. We do not ordinarily find that acts motivated solely by criminal intent, personal vendettas, or personal desires for revenge establish the required nexus .... On this record, although the respondents are members of a particular social group, we do not find they fear persecution on account of this membership. Rather, the problems they may face are on account of revenge the assailants are attempting to extract against [Mr. Demiraj].


38

The parties disagree about the meaning of “on account of.” We need not resolve that dispute here because, even assuming that the petitioners’ definition—“because of”—is the correct one, they cannot prevail. The crucial finding here is that the record discloses no evidence that Mrs. Demiraj would be targeted for her membership in the Demiraj family as such. Rather, the evidence strongly suggests that Mrs. Demiraj, her son, and Mr. Demiraj’s nieces were targeted because they are people who are important to Mr. Demiraj—that is, because hurting them would hurt Mr. Demiraj. No one suggests that distant members of the Demiraj family have been systematically targeted as would be the case if, for example, a persecutor sought to terminate a line of dynastic succession. Nor does the record suggest that the fact of Mr. and Mrs. Demiraj’s marriage and formal inclusion in the Demiraj family matters to Bedini; that is, Mrs. Demiraj would not be any safer in Albania if she divorced Mr. Demiraj and renounced membership in the family, nor would she be any safer if she were Mr. Demiraj’s girlfriend of many years rather than his wife. The record here discloses a quintessentially personal motivation, not one based on a prohibited reason under the INA. FN6 Thus, the record in this case does not compel us to reject the BIA’s determination here. Mrs. Demiraj and her son *200 are not entitled to asylum or withholding of removal.

FN6. For this reason, our decision does not conflict with the Seventh Circuit’s decision in Torres v. Mukasey, 551 F.3d 616 (7th Cir.2008). Torres held that a petitioner had successfully demonstrated persecution on account of membership in his family where he had been singled out for extreme mistreatment while enlisted in the Honduran army simply because, “within Honduran military circles[,] the Flores Torres clan is known as a family of deserters.” Id. at 622. The Seventh Circuit characterized the persecution of the petitioners in that proceeding as retribution “for the perceived offenses of his four brothers,” id. at 623, but the facts of that case make quite clear that the petitioner’s persecutors in the Honduran military had generalized their resentment of the brothers for desertion into a vengeful hatred of an entire family as a group of deserters. See id. at 623–24. Here, by contrast, the JJ and BIA determined that Bedini was motivated by personal revenge; that is, that Mrs. Demiraj is at risk because Bedini seeks to hurt Mr. Demiraj by hurting her—not because he has a generalized desire to hurt the Demiraj family as such. That finding has support in the record, and we are therefore obliged to defer to it. See, e.g., Shaikh, 588 F.3d at 863.

B. Convention Against Torture

The United States’ implementation of the article 3 “non-refoulement” provision of the Convention Against Torture entitles an alien to withholding of removal if she can “establish that it is more likely than not that ... she would be tortured if removed to the proposed country of removal.” 8 C.F.R. § 1208.16(a)(2); see also Tamara-Gomez v. Gonzalez, 447 F.3d 343, 350 (5th Cir.2006) (“To obtain relief under the Convention Against Torture, the alien need not demonstrate all of the elements of a persecution claim; instead he must show a likelihood of torture upon return to his homeland.”). The regulation defines “torture” as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 1208.18(a)(1).

In this case, the JJ found Mrs. Demiraj’s proof of “consent or acquiescence [by] a public official” lacking. A state actor only “acquiesces” in torture if “the public official, prior to the activity constituting torture, ha[s] awareness of such activity and thereafter breach[es] his or her legal responsibility to intervene to prevent such activity.” 8 C.F.R. § 1208.18(a)(7); see also Hakin v. Holder, 628 F.3d 151, 154–57, 2010 WL 5064379, at *4–6 (5th Cir.2010) (holding that “‘acquiescence’ is satisfied by a government’s willful blindness of torturous activity”). We have thus held
that “relief under the Convention Against Torture requires a two part analysis—first, is it more likely than not that the alien will be tortured upon return to his homeland; and second, is there sufficient state action involved in that torture.” *Tamara-Gomez, 447 F.3d at 350–51* (footnote omitted).

[7] The BIA adopted the IJ’s opinion with respect to the Convention Against Torture and provided no independent analysis of that issue. The IJ concluded that Mrs. Demiraj had not demonstrated that she would more likely than not be tortured with the consent or acquiescence of the Albanian government. The IJ found that:

Although the police in Albania apparently, assuming that [Mrs. Demiraj]’s information is correct, are reluctant to get involved with [her] problems with Bajdlini and his associates, there is no evidence that the government of Albania has a policy of ignoring torture if they are specifically aware of [its] occurrence at the time it is occurring and also there is no evidence that [Mrs. Demiraj and her son] would be detained on behalf of the government and subjected to torture with the government’s acquiescence.

We decline to disturb this finding. We may only reject the finding of fact that Mrs. Demiraj was not likely to be tortured “if the evidence presented by [the petitioner] was such that a reasonable factfinder would have to conclude that’ the finding was incorrect. See *INS v. Elias-Zacarias*, 502 U.S. 478, 481, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992); see also *Chen v. Gonzales*, 470 F.3d 1131, 1134 (5th Cir.2006) (holding that the standard of review under § 1252(b)(4)(B) “essentially codifies the substantial evidence test established by *201* the Supreme Court in ... *Elias-Zacarias*”). Mrs. Demiraj only presented evidence that her husband had difficulty convincing the local police to investigate his shooting after the fact. The standard for acquiescence, as the IJ’s finding emphasizes, requires an official to be aware of ongoing torture and likely to refuse to act to intervene and prevent the torture as it is occurring.*322* No such evidence was presented here.

*FN7. Our recent decision in *Hakim* clarifying the definition of “willful blindness” similarly continues to require at least “awareness” on the part of the government. 628 F.3d at 155–57, 2010 WL 5064379, at *5–6* (citing and quoting *Zheng v. Ashcroft*, 332 F.3d 1186, 1194–96 (9th Cir.2003) (rejecting BIA’s former standard for acquiescence because “the BIA’s interpretation ... impermissibly requires more than awareness” (emphasis added))).

The 2003 State Department Country Report on Albania, which was in evidence before the IJ, estimated that “60 to 65 percent” of what it termed “blood feud” homicides “were brought to court and nearly all of them ended up at the appellate level.” The portion of that report that expressly assesses the country’s record on torture noted occasional incidents of torture committed by public officials and described most as having been investigated and prosecuted. The IJ therefore had sufficient record evidence to conclude that the state was not “more likely than not” to acquiesce in torture and therefore also to deny relief under that treaty.

**IV. Conclusion**

We find no error in the BIA’s conclusion that the petitioners are not entitled to asylum, withholding of removal under the INA, or protection under the Convention Against Torture. We therefore must DENY the petitions.

**DENNIS, Circuit Judge, dissenting:**

I respectfully dissent. To show persecution “on account of” a protected ground, 8 U.S.C. § 1101(a)(42)(A) “only requires the alien to prove some nexus between the persecution and [one of] the five protected grounds.” *Thuri v. Ashcroft*, 380 F.3d 788, 792 (5th Cir.2004) (quoting *Ontiveros-Turas v. Ashcroft*, 303 F.3d 341, 349 (5th Cir.2002)). The evidence presented by Mrs. Demiraj in this case clearly demonstrates a nexus between the persecution she fears and the protected ground of membership in a social group, i.e., her membership in the family of Mr. Demiraj.

*FN1. The REAL ID Act of 2005 changed the “on account of” language to the following: “To establish that the applicant is a refugee... the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.” 8 U.S.C. § 1158(b)(1)(B)(i)*
emphasis added). The BIA has held that this new standard applies not only to applications for asylum, but also to applications for withholding of removal. In re C-T-L-C., 251 & N. Dec. 341, 344-48 (B.I.A. 2010). However, the REAL ID Act applies "only prospectively to applications for asylum or withholding of removal made on or after the effective date of the Act, May 11, 2005." Aliqwekwe v. Holder, 345 Fed.Appx. 915, 920 n.4 (9th Cir. 2009) (unpublished) (citing REAL ID Act of 2005, Pub.L. No. 109-13, § 101(h), 119 Stat. 302, 303). Mrs. Demiraj's application for asylum or withholding of removal was filed before 2005. Therefore, as the majority states, the REAL ID Act does not apply in this case.

Bedini, an Albanian mobster, has shown himself to be a powerful person capable of brutal violence. Bedini previously threatened Mr. Demiraj for agreeing to aid the United States government in its investigation of his involvement in human smuggling, and, in March 2003, abducted Mr. Demiraj and his brother. Bedini and the other captors beat both men, and Bedini then shot Mr. Demiraj at close range. Although Mr. Demiraj survived, his physician 292 later told him that he was "lucky the bullet did not go through [his] kidney." Although Mr. Demiraj requested help from the police, they refused to take any action against Bedini. Mr. Demiraj then escaped to the United States in April 2003, and was granted withholding of removal.

Besides this attack, Bedini has targeted other Demiraj family members because they are members of Mr. Demiraj's family. In April 2003, several men, one of whom appears to have been Bedini, kidnapped two of the Demiraj's nieces in Albania and took them to Italy, where the captors attempted to force the nieces—ages 19 and 21—into prostitution. Upon being given clothes to wear for standing on the street, the girls began to cry and protest that they were not prostitutes. One captor, who may have been Bedini, became angry and beat the girls, saying that "this was payback to your [Uncle Edmund [Mr. Demiraj] for when I was in the United States." The captors then tied the nieces up for days with no food, water, or access to a toilet. Eventually, the nieces, who "both had pain all over, felt sick and nauseated," and had urinated on themselves, consented to work as prostitutes. They were told to clean themselves up and to put on makeup. They were taken outside to the streets, where "[the same man ... who shot [their] Uncle Edmund" gave them "some condoms and told [the nieces] how to use them for sex." Not long afterwards, the nieces, through sheer luck and a kind taxi driver, managed to escape from their captors and contact their family. Their family worried that if the nieces returned to Albania, Bedini would attack them again, and that the local police would refuse to intervene, as they had done after Mr. Demiraj was shot. The nieces then fled to the United States and were granted asylum.

Three years later, in 2006, Bedini and his associates abducted at gunpoint the nieces' younger sister, who was 19 years old at the time, and took her to Germany. Bedini beat her, saying that he had "warned [her] sisters not to escape from us because their [the Demiraj] family was going to pay for everything," and that "if you're going to pay for your sisters and your uncle. You better do the same as your sisters." Like her sisters, this niece was taken to the streets for prostitution, but managed to escape, and fled to the United States, where she was granted asylum. In addition, the brother who was abducted with Mr. Demiraj has now fled to Greece, and Mr. Demiraj's parents, who have been threatened by Bedini, have gone into hiding.

The majority characterizes all of this as involving merely personal revenge, but there is no evidence that Bedini has any grudge against Mrs. Demiraj, her son, or any other Demiraj family members as individuals—rather, his only interest in them is because of their membership in the family of Mr. Demiraj.

In Torres v. Mukasey, 551 F.3d 616 (7th Cir. 2008), whose facts are markedly similar to those of the instant case, the Seventh Circuit explained that "[a] successful asylee must show that he was persecuted because of his ... membership in a particular social group," and concluded that "the record shows that [the petitioner] clearly did establish ... a nexus" between his mistreatment and his family membership, where the petitioner presented evidence that he had been mistreated by the Honduran military because of his relationship to his brothers, who were considered military deserters. Id. at 629-30. The Seventh Circuit explained:

[The petitioner's] testimony is rife with examples
that provide his family's history as the nexus for his mistreatment. Throughout the hearing, [the petitioner] *203 noted the numerous occasions on which ... his primary persecutor[ ] referenced [the petitioner's] family while inflicting harm on [the petitioner]. In at least one instance when [the persecutor] placed an unloaded pistol to [the petitioner's] head and pulled the trigger, [the petitioner] testified that [the persecutor] said, "You are going to pay for your brothers' desertion. You are going to pay for his escape because you are the last one that ... we ... have." According to [the petitioner's] testimony, [the persecutor] told [the petitioner] that he placed [the petitioner] in the water barrel because "I had to pay for the escape of my brothers." [The petitioner] testified that when [the persecutor] forced [the petitioner] to run nude in front of his unit, [the persecutor] ordered, "Put this man to run until he falls dead .... Because you have to pay for what your brothers did for their escape because they violated. They defy the army." [The petitioner] also stated, "I was so afraid that I was going to stay in [the army] and I was afraid to die in there. Because ... [the persecutor] told me that I was never going to leave that place .... Because I was going to pay for my brothers' escape because I was the last one that remained."

Id. at 630 (internal citations omitted). In this case, we have essentially the same situation: Mrs. Demiraj faces a grave risk of attack from Bedini if she returns to Albania because of her membership in the family of Mr. Demiraj. She married Mr. Demiraj in 1992 and, several years later, he agreed to aid the United States government in a criminal prosecution against Bedini, thereby exposing his family to the depredations of Bedini. Mrs. Demiraj's family membership puts her at risk of attacks similar to what other family members have already experienced.

Accordingly, Mrs. Demiraj is entitled to protection under 8 U.S.C. § 1101(a)(42)(A), which grants asylum to persons who have a well-founded fear of persecution because of their membership in a particular social group:

To establish that he is a member of a "particular social group," [the petitioner] must show that he was a member of a group of persons that share a common characteristic that they either cannot change or should not be required to change because it is fundamental to their individual identities or consciences.

Ontanez-Tursios, 303 F.3d at 352. The majority and the BIA do not dispute that membership in a family meets these criteria. Family membership is a characteristic that a person either cannot change (if he or she is related by blood) or should not be required to change (if he or she is related by marriage). The purpose of asylum law is to honor a moral obligation to protect people who are threatened with persecution because of characteristics like these. The Seventh Circuit applied the law correctly in Torres, a case that I find indistinguishable from the current case. The majority has created a circuit split and put our court on the wrong side of it. I therefore dissent.

C.A.5,2011.
Demiraj v. Holder
631 F.3d 194

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447 Fed. Appx. 832
This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued on or
after Jan. 1, 2007. See also Ninth Circuit Rule 36-3.
(Find CTA9 Rule 36-3)

United States Court of Appeals,
Ninth Circuit,
Mirta Lidia CASTILLO, Petitioner,
v.
Eric H. HOLDER, Jr., Attorney General, Respondent.

No. 09-71121.
Submitted Aug. 11, 2011.

FN* The panel unanimously concludes this
case is suitable for decision without oral

Filed Aug. 17, 2011.

Background: Alien, a native and citizen of Guate-

mala, petitioned for review of an order of the Board of
Immigration Appeals (BIA), dismissing her appeal

from an immigration judge's decision denying her apply-

ations for asylum, withholding of removal, relief

under the Convention Against Torture ("CAT"), and

for special cancellation of removal under the Nicara-

guan and Central American Relief Act of 1997

(“NACARA”). Our jurisdiction is governed by 8

U.S.C. § 1252. We review for substantial evidence

the agency's factual determinations. Njuga v. Ashcroft,

374 F.3d 765, 769 (9th Cir.2004). We dismiss in part

and grant in part the petition for review, and we

remand.

[1] We lack jurisdiction to review the agency's
determination that Castillo is not eligible for

NACARA relief. See Langita v. Holder, 597 F.3d 970,

972 (9th Cir.2010) (per curiam).

[2] Substantial evidence does not support the
agency's determination that Castillo was not perse-

cuted on account of a protected ground because the

evidence compels the conclusion that Castillo was

assaulted, raped, and threatened by members of the

Guatemalan Civil Defense Patrol ("CDP") on account

of her exposure of CDP misconduct to the police and

a human rights organization. See Njuga, 374 F.3d at

770–71 (retaliation against a Kenyan petitioner who

opposed government corruption by helping domestic

servants escape was on account of political opinion);

Reyes-Guerrero v. INS, 192 F.3d 1241, 1245–46 (9th

Cir.1999) (death threats received after a Colombian
prosecutor investigated political corruption by an opposition political party constituted persecution on account of political opinion). Accordingly, we grant the petition as to Castillo's asylum and withholding of removal claims, and remand for further proceedings. See INS v. Ventura, 537 U.S. 12, 16-18, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002) (per curiam).

[3] In denying CAT relief, the agency failed to evaluate the rape of Castillo. See Kamaalhas v. INS, 251 F.3d 1279, 1282 (9th Cir. 2001) (torture includes severe mental or physical pain or suffering inflicted for the purpose of punishing that person for an act she or another person committed, or for the purpose of intimidation); id. (agency must consider “evidence relevant to the possibility of future torture”); see also Mohammed v. Gonzales, 409 F.3d 785, 802 (9th Cir. 2005) (evidence of past torture is relevant to determination of eligibility for CAT relief). Accordingly, we also grant the petition as to CAT relief and remand for further proceedings. See Ventura, 537 U.S. at 16-18, 123 S.Ct. 353.

The government shall bear the costs for this petition for review.

PETITION FOR REVIEW DISMISSED in part; GRANTED in part; REMANDED.

C.A.9, 2011.
Castillo v. Holder
Exceptions to protection for refugee status, asylum, and withholding
Summer 2015
Refugee Law

Exceptions to non-refoulement
Art. 33.2
- Reasonable grounds for regarding person as danger to country’s security;
- The individual, having been convicted by final judgment of a particularly serious crime, constitutes a danger to the community of the country.

Exceptions to refugee status under U.S. law
- Persecution of others on Convention ground.
- Failing under INA § 212 criminal and security inadmissibility grounds, but all grounds waivable EXCEPT:
  - 212(a)(3)(C) [controlled substance traffickers];
  - 212(a)(3)(A) [coming to U.S. to engage in espionage, sabotage, prohibited export of goods, technology, or sensitive information; engage in activity with purpose of overthrowing U.S. government by force, violence, or other unlawful means];
  - 212(a)(3)(B) [terrorist activities];
  - 212(a)(3)(C) [admission would have potentially serious adverse foreign policy consequences];
  - 212(a)(3)(E) [participation in Nazi persecution, genocide, or acts of torture or extrajudicial killing].

Exceptions to asylum under INA § 208(a)(2)
- Safe third country.
- Previous asylum application and denial (unless changed circumstances).
- Failure to file within one year of entry (or within reasonable time of expiration of valid status), unless changed circumstances in country, extraordinary circumstances for delay, or within reasonable time of expiration of valid status.

Exceptions to asylum under INA § 208(b)(2)(A)
- Persecution of others b/c of Convention ground.
- Having been convicted of particularly serious crime, constitutes a danger to U.S. community; aggravated felony under INA 101(a)(43) presumed particularly serious crime.
- Serious reasons to believe person has committed a serious nonpolitical crime outside U.S. prior to entry.
- Reasonable grounds for regarding person as danger to U.S. security.
- Firm resettlement in another country.
Terrorist exception to asylum –
INA § 208(b)(2)(A)(v)
- Applicant is described in INA § 212(a)(3)(B)(i)(I)
  [has engaged in terrorist activity], (ii) [reasons for believing person will
  engage in terrorist activity], (iii) [incited terrorist
  activity], (IV) [represents terrorist organizations], or
  (V) [member of terrorist organization, unless can show
  did not know and should not reasonably have
  known it was terrorist org.], or in INA §
  237(a)(4)(B) [terrorist activities].
- For (IV) only, not a bar if AG determines there
  are not reasonable grounds for regarding alien as a danger to security of U.S.

Material Support to Terrorism
Bar under U.S. Law
- Inadmissible if provided “material support” to
  terrorists under INA 212(a)(3)(B) (a form of
  engaging in terrorist activity).
- Result – refugees not allowed to enter U.S.
- CIS’ first method of addressing issue – waivers.
- Consolidated Appropriations Act of 2006 –
  material support bar inapplicable to certain
  individuals who provided assistance under
  duress.

Withholding ineligibility grounds
INA § 241(b)(3)(B)
- Persecution of others on Convention ground;
- Having been convicted of particularly serious
  crime, constitutes danger to U.S. community;
  aggravated felony with sentence of at least 5 yrs
  presumed;
- Serious reasons for believing committed serious
  nonpolitical crime outside U.S. before arrival;
- Reasonable grounds for believing alien is
  security risk

Examples of aggravated felonies
§ INA 101(a)(43) – 21 in all
- Murder, rape, sexual abuse of a minor
- Illicit trafficking in controlled substances
- Illicit trafficking in firearms or destructive devices
- Crime of violence under 18 U.S.C. § 16, with 1 yr.
  sentence
- Theft or burglary offense with sentence of at least 1 year.
- Commercial bribery, forgery, counterfeiting with 1 yr.
  sentence
- Obstruction of justice, perjury, with 1 year sentence.
- Fraud where loss to victim exceeds $10,000.
- Attempts, conspiracies to commit listed offenses.
- Includes U.S. federal, state, and local, and foreign
  offenses.

§ 413(f) of the Anti-terrorism and
Effective Death Penalty Act of 1996
- AG may withholding alien’s deportation,
  notwithstanding any other provisions of the law, if:
- Life or liberty would be threatened in country of
  return on account of one of five Convention
  grounds, and
- Grant of withholding necessary to ensure
  compliance with UN Protocol.
- BUT abrogated April 1, 1997; no longer in effect.

Cessation clauses under
UN Refugee Convention
- Voluntarily re-availed self of protection of country
  of nationality;
- Voluntarily re-acquired nationality;
- Acquired new nationality and enjoys protection
  of that country;
- Voluntarily re-established self in country he left;
- Can no longer refuse to avail self of protection of
  country of nationality because of changed
  circumstances.
Cessation of asylum status under U.S. law – INA § 208(c)(2)

- Falls under deportation ground;
- No longer meets conditions of asylum due to fundamental change in circumstances;
- Falls under one of exceptions to protection;
- May be removed to country where life or freedom would not be threatened on Convention ground; and eligible to receive asylum or equivalent temporary protection;
- Voluntarily availed self of protection of country of nationality;
- Acquired new nationality and enjoys its protection.
EXCERPTS FROM

UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees

E. GROUNDS FOR REJECTING INDIVIDUAL RESPONSIBILITY

Lack of mental element (mens rea)

64. As reflected in Article 30 of the ICC Statute, criminal responsibility can normally only arise where the individual concerned committed the material elements of the offence with knowledge and intent. Where there is no such mental element (mens rea) a fundamental aspect of the criminal offence is missing and therefore no individual criminal responsibility arises. A person has intent where, in relation to conduct, the person means to engage in the conduct or, in relation to consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. Knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. Thus, for example, an individual who intended to commit the act of murder cannot be liable for a crime against humanity if he or she was unaware of an ongoing widespread or systematic attack against the civilian population. Such knowledge is a requisite component of the mental element of a crime against humanity. In such a case, the applicability of Article 1F(b) may be more appropriate.

65. In certain circumstances the individual may actually lack the mental capacity to be held responsible for a crime, for example, on the grounds of insanity, mental handicap, involuntary intoxication or, in the case of children, immaturity.66

Defences to criminal liability

66. Regard should be had to general principles of criminal liability to determine whether a valid defence exists for the crime in question, as outlined in the examples below.

(i) Superior orders

67. A commonly-invoked defence is that of “superior orders” or coercion by higher governmental authorities, although it is an established principle of law that the defence of superior orders does not absolve individuals of blame. According to the Nuremberg Principles: “The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility under international law, provided a moral choice was in fact possible for him.”67

68. Article 7(4) of the ICTY Statute provides that “the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility”. Article 33 of the ICC Statute states that the defence of superior orders 66 See also paragraph 91 below on minors.

(ii) Duress/coercion
69. The defence of duress was often linked to that of superior orders during the post-Second World War trials. According to Article 31(d) of the ICC Statute, the defence of duress only applies if the incriminating act in question results from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. There are, therefore, stringent conditions to be met for the defence of duress to arise.

70. Where duress is pleaded by an individual who acted on the command of other persons in an organisation, consideration should be given as to whether the individual could reasonably have been expected simply to renounce his or her membership, and indeed whether he or she should have done so earlier if it was clear that the situation in question would arise. Each case should be considered on its own facts. The consequences of desertion plus the foreseeability of being put under pressure to commit certain acts are relevant factors.

(iii) Self-defence; defence of other persons or property

71. The use of reasonable and necessary force to defend oneself rules out criminal liability. Similarly, reasonable and proportionate action to defend another person or, in the case of war crimes, property which is essential for the survival of the person or another person or for accomplishing a military mission, against an imminent and unlawful use of force, may also provide a defence to criminal responsibility under certain circumstances (see, for example, Article 31(c) of the ICC Statute).

Expiation

72. The exclusion clauses themselves are silent on the role of expiation, whether by serving a penal sentence, the grant of a pardon or amnesty, the lapse of time, or other rehabilitative measures. Paragraph 157 of the Handbook states that: ... The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant’s criminal character still predominates.

73. Bearing in mind the object and purpose behind Article 1F, it is arguable that an individual who has served a sentence should, in general, no longer be subject to the exclusion clause as he or she is not a fugitive from justice. Each case will require individual consideration, however, bearing in mind issues such as the passage of time since the commission of the offence, the seriousness of the offence, the age at which the crime was committed, the conduct of the individual since then, and whether the individual has expressed regret or renounced criminal activities. In the case of truly heinous crimes, it may be considered that such persons are still undeserving of international refugee protection and the exclusion clauses should still apply. This is more likely to be the case for crimes under Article 1F(a) or (c), than those falling under Article 1F(b).
74. As for lapse of time, this in itself would not seem good grounds for setting aside the exclusion clauses, particularly in the case of crimes generally considered not subject to a statute of limitation. A case by case approach is necessary once again, however, taking into account the actual period of time that has elapsed, the seriousness of the offence and whether the individual has expressed regret or renounced criminal activities.

75. The effect of pardons and amnesties also raises difficult issues. Although there is a trend in some regions towards ending impunity for those who have committed serious violations of human rights, this has not become a widely accepted practice. In considering the impact on Article 1F, consideration should be given as to whether the pardon or amnesty in question is an expression of the democratic will of the relevant country and whether the individual has been held accountable in other ways (e.g. through a Truth and Reconciliation Commission). In some cases, a crime may be of such a heinous nature that the application of Article 1F is still considered justified despite the existence of a pardon or amnesty.

F. PROPORTIONALITY CONSIDERATIONS

76. The incorporation of a proportionality test when considering exclusion and its consequences provides a useful analytical tool to ensure that the exclusion clauses are applied in a manner consistent with the overriding humanitarian object and purpose of the 1951 Convention.69 State practice on this issue is not, however, uniform with courts in some States rejecting such an approach, generally in the knowledge that other human rights protection mechanisms will apply to the individual,70 while others take account of proportionality considerations.71

77. In UNHCR’s view, consideration of proportionality is an important safeguard in the application of Article 1F. The concept of proportionality, while not expressly mentioned in the 1951 Convention or the travaux préparatoires, has evolved in particular in relation to Article 1F(b), since it contains a balancing test in so far as the specific terms “serious” and “non-political” must be satisfied.72 More generally, it represents a fundamental principle of international human rights law73 and international humanitarian law.74 Indeed, the concept runs through many fields of international law.75 As with any considerations have also arisen in Swiss cases, for example in Decision 1993 No. 8, the Swiss Asylum Appeals Commission held:

To determine an act to be a particularly serious crime in the sense of Article 1F(b) of the Convention, it is necessary that, all things considered, the interest of the perpetrator in being protected against serious threats of persecution in his country of origin appear less by comparison with the reprehensible nature of the crime that he committed and with his guilt. (unofficial translation. Original text reads: Pour qualifier une action de crime particulièrement grave au sens de l’art. 1 F, let. b de la Convention, il faut que, tout bien pesé, l’intérêt de l’auteur à être protégé de graves menaces de persécutions dans son pays d’origine apparaîsse moindre en comparaison du caractère répréhensible du crime que celui-ci a commis ainsi que sa culpabilité.)

In the case of E.K., judgment of 2 November 2001, EMARK 2002/9, concerning two former members of the Kurdish separatist PKK from Turkey, the Swiss Asylum Appeals Commission took into account proportionality considerations, such as the length of time since the acts were committed, the young age at which they were committed, and the asylum-seekers’ subsequent withdrawal from the organisation.
The International Court of Justice (ICJ) in its judgment in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ Reports, 1986, p. 14, found that the right of self-defence, as an exception to the prohibition on the use of force in the UN Charter, must be exercised in a proportionate manner. The ICJ confirmed that this proportionality exception to a human rights guarantee, the exclusion clauses must therefore be applied in a manner proportionate to their objective, especially bearing in mind that a decision leading to exclusion does not equate with a full criminal trial and that human rights guarantees may not represent an accessible “safety valve” in some States.

78. In reaching a decision on exclusion, it is therefore necessary to weigh up the gravity of the offence for which the individual appears to be responsible against the possible consequences of the person being excluded, including notably the degree of persecution feared. If the applicant is likely to face severe persecution, the crime in question must be very serious in order to exclude the applicant. This being said, such a proportionality analysis would normally not be required in the case of crimes against peace, crimes against humanity, and acts contrary to the purposes and principles of the United Nations, as the acts covered are so heinous that they will tend always to outweigh the degree of persecution feared. By contrast, war crimes and serious non-political crimes cover a wider range of behaviour. For those activities which fall at the lower end of the scale, for example, isolated incidents of looting by soldiers, exclusion may be considered disproportionate if subsequent return is likely to lead, for example, to the individual’s torture in his or her country of origin. Where, however, persons have intentionally caused death or serious injury to civilians as a means of intimidating a government or a civilian population, they are unlikely to benefit from proportionality considerations.

...  

H. SPECIAL CASES

Minors

91. In principle, the exclusion clauses can apply to minors but only if they have reached the age of criminal responsibility. Great caution should always be exercised, however, when the application of the exclusion clauses is being considered in relation to a minor. Under Article 40 of the 1989 Convention on the Rights of the Child, States shall seek to establish a minimum age for criminal responsibility. Where this has been established in the host State, a child below the minimum age cannot be considered by the State concerned as having committed an excludable offence. For those over this age limit (or where no such limit exists), the maturity of the particular child should still be evaluated to determine whether he or she had the mental capacity to held responsible for the crime in question. The younger the child, the greater the presumption that such mental capacity did not exist at the relevant time.

92. Where mental capacity is established, particular attention must be given to whether other grounds exist for rejecting criminal liability, including consideration of the following factors: the age of the claimant at the time of becoming involved with the armed group; the reasons for joining (was it voluntary or coerced or in defence of oneself or others?); the consequences of refusal to join; the length of time as a member; the possibility of not participating in such acts or of escape; the forced use of drugs, alcohol or medication (involuntary intoxication); promotion
within the ranks of the group due to actions undertaken; the level of education and understanding of the events in question; and the trauma, abuse or ill-treatment suffered by the child as a result of his or her involvement. In the case of child soldiers, in particular, questions of duress, defence of self and others, and involuntary intoxication, often arise. Even if no defence is established, the vulnerability of the child, especially those subject to ill-treatment, should arguably be taken into account when considering the proportionality of exclusion for war crimes or serious non-political crimes.

93. At all times, regard should be had to the overwhelming obligation to act in the “best interests” of the child in accordance with the 1989 Convention on the Rights of the Child. Thus, specially trained staff should deal with cases where exclusion is being considered in respect of a child applicant. In the UNHCR context, all such cases should be referred to Headquarters before a final decision is made on exclusion. The “best interests” principle should also underlie any post-exclusion action. Articles 39 and 40 of the 1989 Convention are also relevant as they deal with the duty of States to assist in the rehabilitation of “victims” (which would tend to include child soldiers) and set down standards for the treatment of children thought to have infringed the criminal law.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

MATTER OF M-E-V-G-, RESPONDENT

Decided February 7, 2014

**1 *227* (1) In order to clarify that the “social visibility” element required to establish a cognizable “particular social group” does not mean literal or “ocular” visibility, that element is renamed as “social distinction.”

(2) An applicant for asylum or withholding of removal seeking relief based on “membership in a particular social group” must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.

(3) Whether a social group is recognized for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor.

....

This case is before us on remand from the United States Court of Appeals for the Third Circuit for further consideration of the respondent’s applications for asylum and withholding of removal. The court declined to *228* afford deference to our conclusion that a grant of asylum or withholding of removal under the “particular social group” ground of persecution requires the applicant to establish the elements of “particularity” and “social visibility.” Upon further consideration of the record and the arguments presented by the parties and amici curiae, we will clarify our interpretation of the phrase “particular social group.” We adhere to our prior interpretations of the phrase but emphasize that literal or “ocular” visibility is not required, and we rename the “social visibility” element as “social distinction.” The record will be remanded to the Immigration Judge for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

**2 .... The respondent claims that he suffered past persecution and has a well-founded fear of future persecution in his native Honduras because members of the Mara Salvatrucha gang beat him, kidnapped and assaulted him and his family while they were traveling in Guatemala, and threatened to kill him if he did not join the gang. In addition, the respondent testified that the gang members would shoot at him and throw rocks and spears at him about two to three times per week. The respondent asserts that he was
persecuted “on account of his membership in a particular social group, namely Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs.”

The Immigration Judge issued a decision on June 15, 2005, denying the respondent’s applications for asylum, withholding of removal, and protection under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [cite omitted] We summarily affirmed the Immigration Judge on February 27, 2006. On September 7, 2007, the Third Circuit granted the respondent’s petition for review and remanded the case for further consideration of his arguments regarding his membership in a particular social group. *229 Valdiviezo-Galdamez v. Att’y Gen. of U.S. (“Valdiviezo-Galdamez I”), 502 F.3d 285 (3d Cir. 2007).

On remand, we issued a decision on October 22, 2008, which again denied the respondent’s applications for asylum and withholding of removal. We held that the respondent did not establish past persecution “on account of a protected ground” and applied our intervening decisions in Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008), and Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008), in concluding that the respondent did not show that his proposed particular social group possessed the required elements of “particularity” and “social visibility.”

The case is now before us following a second remand from the Third Circuit. Valdiviezo-Galdamez v. Att’y Gen. of U.S. (“Valdiviezo-Galdamez II”), 663 F.3d 582 (3d Cir. 2011). The court found that our requirement that a particular social group must possess the elements of “particularity” and “social visibility” is inconsistent with prior Board decisions, that we have not announced a “principled reason” for our adoption of that inconsistent requirement, and that our interpretation is not entitled to deference under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Valdiviezo-Galdamez II, 663 F.3d at 608. Nevertheless, the court advised that “an agency can change or adopt its policies” and recognized that the Board may add new requirements to, or even change, its definition of a “particular social group.” Id. (quoting Johnson v. Ashcroft, 286 F.3d 696, 700 (3d Cir. 2002)) (internal quotation marks omitted).

II. ISSUE

**3 The question before us is whether the respondent qualifies as a “refugee” as a result of his past mistreatment, and his fear of future persecution, at the hands of gangs in Honduras. Specifically, we address whether the respondent has established an asylum claim based on his membership in a particular social group.

III. PARTICULAR SOCIAL GROUP

A. Origins

An applicant for asylum has the burden of establishing that he or she is a refugee within the meaning of section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2012). This requires the applicant to demonstrate that he or she suffered past persecution or has a well-founded fear of future

The phrase “membership in a particular social group,” which is not defined in the Act, the Convention, or the Protocol, is ambiguous and difficult to define. Matter of Acosta, 19 I&N Dec. 211, 232-33 (BIA 1985); see also, e.g., Valdiviezo-Galdamez II, 663 F.3d at 594 (“The concept is even more elusive because there is no clear evidence of legislative intent.”); Fatin v. INS, 12 F.3d 1233, 1238 (3d Cir. 1993) (“Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a ‘particular social group.’”)

Congress has assigned the Attorney General the primary responsibility of construing ambiguous provisions in the immigration laws, and this responsibility has been delegated to the Board. INS v. Aguirre-Aguirre, 526 U.S. 415, 424-25 (1999); see also section 103(a)(1) of the Act, 8 U.S.C. § 1103(a)(1) (2012) (providing that the “determination and ruling by the Attorney General with respect to all questions of law shall be controlling”). The Board’s reasonable construction of an ambiguous term in the Act, such as “‘membership in a particular social group,’” is entitled to deference. See Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. at 844.

**4 We first interpreted the phrase “membership in a particular social group” in Matter of Acosta. We found the doctrine of “ejusdem generis” helpful in defining the phrase, which we held should be interpreted on the same order as the other grounds of persecution in the Act. Matter of Acosta, 19 I&N Dec. at 233-34. See generally CSX Transp., Inc. v. Alabama Dep’t of Revenue, 131 S. Ct. 1101, 1113 (2011) (stating that the canon “ejusdem generis” literally means “of the same kind”). The phrase “persecution on account of membership in a particular social group” was interpreted to mean “persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable *231 characteristic.” Matter of Acosta, 19 I&N Dec. at 233. The common characteristic that defines the group must be one “that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.” Id.

B. Evolution of the Board’s Analysis of Social Group Claims

Matter of Acosta was decided based on whether a common immutable characteristic existed. Matter of Acosta, 19 I&N Dec. at 233. We rejected the applicant’s claim that a Salvadoran cooperative organization of taxi drivers was a particular social group, because members could change jobs and
working in their job of choice was not a "fundamental" characteristic. Id. at 234 ("[T]he internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice."). Because there was no common immutable characteristic in Matter of Acosta, we did not reach the question whether there should be additional requirements on group composition.

At the time we issued Matter of Acosta, only 5 years after enactment of the Refugee Act of 1980, relatively few particular social group claims had been presented to the Board. Given the ambiguity and the potential breadth of the phrase "particular social group," we favored a case-by-case determination of the particular kind of group characteristics that would qualify under the Act. Id. at 233. This flexible approach enabled courts to apply the particular social group definition within a wide array of fact-specific asylum claims.

**5 Now, close to three decades after Acosta, claims based on social group membership are numerous and varied. The generality permitted by the Acosta standard provided flexibility in the adjudication of asylum claims. However, it also led to confusion and a lack of consistency as adjudicators struggled with various possible social groups, some of which appeared to be created exclusively for asylum purposes. See, e.g., Sepulveda v. Gonzales, 464 F.3d 770, 772 (7th Cir. 2006) ("A social group has to have sufficient homogeneity to be a plausible target for persecution. But under Acosta this is not a demanding requirement . . . ."). In Matter of R-A-, 22 I&N Dec. 906, 919 (BIA 1999; A.G. 2001), we cautioned that "the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown."7

*232 Over the years there were calls for the Board to state with more clarity its framework for analyzing social group claims. E.g., Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013) (en banc); Rojas-Perez v. Holder, 699 F.3d 74, 81 (1st Cir. 2012); Sanchez-Trujillo v. INS, 801 F.2d 1571, 1575 n.6 (9th Cir. 1986) (noting that there is "a dearth of judicial authority construing the meaning of 'particular social group'D'). To provide clarification and address the evolving nature of the claims presented by asylum applicants, we refined the particular social group interpretation first discussed in Matter of Acosta to provide the additional analysis required once an applicant demonstrated membership based on a common immutable characteristic.

In a series of cases, we applied the concepts of "social visibility" and "particularity" as important considerations in the particular social group analysis, and we ultimately deemed them to be requirements. See Orellana-Monson v. Holder, 685 F.3d 511, 521 (5th Cir. 2012) ("[C]ase by case adjudication is permissible and . . . such adjudication does not necessarily follow a straight path. The BIA may make adjustments to its definition of 'particular social group' and often does so in response to the changing claims of applicants."). Although we expanded the particular social group analysis beyond the Acosta test, the common immutable characteristic requirement set forth there has been, and continues to be, an essential component of the analysis.

**6 In Matter of C-A-, we recognized "particularity" as a requirement in the particular social group analysis and held that the "social visibility" of the members of a claimed social group is "an important element in identifying the existence of a particular social group." Matter of C-A-, 23 I&N Dec. 951, 957,
959-61 (BIA 2006) (holding that “noncriminal informants working against the Cali drug cartel” in Colombia were not a particular social group), aff’d sub nom. Castillo-Arias v. U.S. Att’y Gen., 446 F.3d 1190 (11th Cir. 2006), cert. denied, 549 U.S. 1115 (2007). We subsequently determined that a “particular social group” cannot be defined exclusively by the claimed persecution, that it must be “recognizable” as a discrete group by others in the society, and that it must have well-defined boundaries. Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69, 74-76 (BIA 2007) (holding that “wealthy” Guatemalans were not shown to be a particular social group within the meaning of the “refugee” description), aff’d sub nom. Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007).

Finally, in 2008, we issued Matter of S-E-G- and Matter of E-A-G-, in which we held that—in addition to the common immutable characteristic requirement set forth in Acosta—the previously introduced concepts of “particularity” and “social visibility” were distinct requirements for the “membership in a particular social group” ground of persecution. In *233 Matter of S-E-G-, 24 I&N Dec. at 582, we stated that we were seeking to provide “greater specificity to the definition of a social group” outlined in Acosta by requiring an applicant to establish “particularity” and “social visibility,” consistent with our prior decisions. In Matter of E-A-G-, we noted that “we have issued a line of cases reaffirming the particular social group formula set forth in Matter of Acosta . . . and providing further clarification regarding its proper application.” Matter of E-A-G-, 24 I&N Dec. at 594 (reaffirming the requirements of Acosta and the additional requirements of “particularity” and “social visibility”).

Our articulation of these requirements has been met with approval in the clear majority of the Federal courts of appeals. See Umana-Ramos v. Holder, 724 F.3d 667, 671 (6th Cir. 2013); Henriquez-Rivas v. Holder, 707 F.3d at 1087-91 (clarifying the criteria while reserving assessment of their validity); Orellana-Monson v. Holder, 685 F.3d at 521; Gaitan v. Holder, 671 F.3d 678, 681 (8th Cir. 2012); Zelaya v. Holder, 668 F.3d 159, 165-66 & n.4 (4th Cir. 2012) (deferring to our particularity requirement); Rivera-Barrientos v. Holder, 666 F.3d 641, 649-53 (10th Cir. 2012); Scatambuli v. Holder, 558 F.3d 53, 59-61 (1st Cir. 2009); Ucelo-Gomez v. Mukasey, 509 F.3d at 74; Castillo-Arias v. U.S. Att’y Gen., 446 F.3d at 1196-99. However, it has not been universally accepted. See Valdiviez-Galdamez II, 663 F.3d at 603-09; Gatini v. Holder, 578 F.3d 611, 615-16 (7th Cir. 2009) (rejecting the social visibility requirement); see also Cece v. Holder, 733 F.3d 662, 668-69 & n.1 (7th Cir. 2013) (en banc).

*234 IV. ANALYSIS

We take this opportunity to clarify our interpretation of the phrase “membership in a particular social group.” In doing so, we adhere to the social group requirements announced in Matter of S-E-G- and Matter of E-A-G-, as further explained here and in Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014), a decision published as a companion to this case.9 We believe that these requirements provide guidance to courts and those seeking asylum based on “membership in a particular social group,” are necessary to address the evolving nature of claims asserted on this ground of persecution, and are essential to ensuring the consistent nationwide adjudication of asylum claims. See Matter of R-A-, 24 I&N Dec. 629, 631 (A.G. 2008) (“Providing a consistent, authoritative, nationwide interpretation of ambiguous
provisions of the immigration laws is one of the key duties of the Board."); see also FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515-16 (2009); 8 C.F.R. § 1003.1(d)(1) (2013). In this regard, we clarify that the "social visibility" test was never intended to, and does not require, literal or "ocular" visibility.

A. Protection Within the Refugee Context

The interpretation of the phrase "membership in a particular social group" does not occur in a contextual vacuum. See Medtronic, Inc. v. Lohr, 518 U.S. 470, 484-85 (1996) (stating that although analysis of a statute begins with its text, interpretation of the statutory language does not occur in a contextual vacuum). Consistent with the interpretive canon "ejusdems generis," the proper interpretation of the phrase can only be achieved when it is compared with the other enumerated grounds of persecution (race, religion, nationality, and political opinion), and when it is considered within the overall framework of refugee protection.10

The Act and the Protocol do not extend protection to all individuals who are victims of persecution. They identify "refugees" as only those who face persecution on account of "race, religion, nationality, membership in a *235 particular social group, or political opinion." Section 101(a)(42) of the Act; Protocol, supra, art. 1.

**8 The limited nature of the protection offered by refugee law is highlighted by the fact that it does not cover those fleeing from natural or economic disaster, civil strife, or war. See Matter of Sosa Ventura, 25 I&N Dec. 391, 394 (BIA 2010) (explaining that Congress created the alternative relief of Temporary Protected Status because individuals fleeing from life-threatening natural disasters or a generalized state of violence within a country are not entitled to asylum). Similarly, asylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions. See Konan v. Att’y Gen. of U.S., 432 F.3d 497, 506 (3d Cir. 2005); Abdille v. Ashcroft, 242 F.3d 477, 494 (3d Cir. 2001) ("[O]rdinary criminal activity does not rise to the level of persecution necessary to establish eligibility for asylum."); Singh v. INS, 134 F.3d 962, 967 (3d Cir. 1998) ("Mere generalized lawlessness and violence between diverse populations, of the sort which abounds in numerous countries and inflicts misery upon millions of innocent people daily around the world, generally is not sufficient to permit the Attorney General to grant asylum . . . .").

Unless an applicant has been targeted on a protected basis, he or she cannot establish a claim for asylum. See Al Fara v. Gonzales, 404 F.3d 733, 740 (3d Cir. 2005) ("[G]enerally harsh conditions shared by many other persons do not amount to persecution."). [H]arm resulting from country-wide civil strife is not persecution "on account of" an enumerated statutory factor," (quoting Fatin v. INS, 12 F.3d at 1240)); Matter of N-M-A-, 22 I&N Dec. 312, 323, 326 (BIA 1998) (finding that an applicant who faced "a variety of dangers arising from the internal strife in Afghanistan" did not qualify for asylum).

The "membership in a particular social group" ground of persecution was not initially included in the refugee definition proposed by the committee that drafted the U.N. Convention; it was added later without discussion. Matter of Acosta, 19 I&N Dec. at 232. The guidelines to the Protocol issued by the
United Nations High Commissioner for Refugees ("UNHCR") clearly state that the particular social group category was not meant to be "a 'catch all' that applies to all persons fearing persecution." UNHCR, Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, at 2, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), available at http://www.unhcr.org/3d58de2da.html ("UNHCR Guidelines").

Societies use a variety of means to distinguish individuals based on race, religion, nationality, and political opinion. The distinctions may be based on characteristics that are overt and visible to the naked eye or on those that are subtle and only discernible by people familiar with the particular culture. The characteristics are sometimes not literally visible. Some distinctions are based on beliefs and characteristics that are largely internal, such as religious or political beliefs. Individuals with certain religious or political beliefs may only be treated differently within society if their beliefs were made known or acted upon by the individual. The members of these factions generally understand their own affiliation with the grouping, and other people in the particular society understand that such a distinct group exists.

Therefore these enumerated grounds of persecution have more in common than simply describing persecution aimed at an immutable characteristic. They have an external perception component within a given society, which need not involve literal or "ocular" visibility. Considering the refugee context in which they arise, we find that the enumerated grounds all describe persecution aimed at an immutable characteristic that separates various factions within a particular society.

B. Particular Social Group

Given the suggestions that further explanation of our interpretation of the phrase "particular social group" is warranted, we now provide such clarification based on the analysis set forth above. See, e.g., Henriquez-Rivas v. Holder, 707 F.3d at 1087-89; Rajas-Perez v. Holder, 699 F.3d at 81; Valdiviezo-Galdamez II, 663 F.3d at 603-09.

The primary source of disagreement with, or confusion about, our prior interpretation of the term "particular social group" relates to the social visibility requirement. See Umaña-Ramos v. Holder, 724 F.3d at 672-73; Henriquez-Rivas v. Holder, 707 F.3d at 1087; Valdiviezo-Galdamez II, 663 F.3d at 603-09. Contrary to our intent, the term "social visibility" has led some to believe that literal, that is, “ocular” or “on-sight,” visibility is required to make a particular social group cognizable under the Act. See Valdiviezo-Galdamez II, 663 F.3d at 606-07. Because of that misconception, we now rename the "social visibility" requirement as "social distinction." This new name more accurately describes the function of the requirement.

Thus, we clarify that an applicant for asylum or withholding of removal seeking relief based on "membership in a particular social group" must establish that the group is composed of members who share a common immutable characteristic,
(2) defined with particularity, and
(3) socially distinct within the society in question.

1. Overview of Criteria

The criteria of particularity and social distinction are consistent with both the language of the Act and our earlier precedents. By defining these concepts in Matter of C-A- and the cases that followed it, we did not depart from or abrogate the definition of a particular social group that was set forth in Matter of Acosta; nor did we adopt a new approach to defining particular social groups under the Act. See Henriquez-Rivas v. Holder, 707 F.3d at 1084 (describing our refinement of the definition of a particular social group). Instead, we clarified the definition of the term to give it more """"concrete meaning through a process of case-by-case adjudication."" INS v. Aguirre-Aguirre, 526 U.S. at 425 (quoting INS v. Cardoza Fonseca, 480 U.S. at 448) (internal quotation marks omitted); see also Orellana-Monson v. Holder, 685 F.3d at 521 (""[T]he BIA's current particularity and social visibility test is not a radical departure from prior interpretation, but rather a subtle shift that evolved out of the BIA's prior decisions on similar cases and is a reasoned interpretation, which is therefore entitled to deference."); Mendez-Barrera v. Holder, 602 F.3d 21, 26 (1st Cir. 2010); Castillo-Arias v. U.S. Att'y Gen., 446 F.3d at 1197.

Our interpretation of the phrase "membership in a particular social group" incorporates the common immutable characteristic standard set forth in Matter of Acosta, 19 I&N Dec. at 233, because members of a particular social group would suffer significant harm if asked to give up their group affiliation, either because it would be virtually impossible to do so or because the basis of affiliation is fundamental to the members' identities or consciences. Our interpretation also encompasses the underlying rationale of both the "particularity" and "social distinction" tests.

The "particularity" requirement relates to the group's boundaries or, as earlier court decisions described it, the need to put "outer limits" on the definition of a "particular social group." See Castellano-Chacon v. INS, 341 F.3d 533, 549 (6th Cir. 2003); Sanchez-Trujillo v. INS, 801 F.2d at 1576. The particular social group analysis does not occur in isolation, but rather in the context of the society out of which the claim for asylum arises. Thus, the ""social distinction"" requirement considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it. A viable particular social group should be perceived within the given society as a sufficiently distinct group. The members of a particular social group will generally understand their own affiliation with the grouping, as will other people in the particular society.12

**11** Literal or "ocular" visibility is not, and never has been, a prerequisite for a viable particular social group. ...In fact, we have recognized particular social groups that are clearly not ocularly visible. See, e.g., Matter of Kasinga, 21 I&N Dec. 357, 365-66 (BIA 1996) (determining that young tribal women
who are opposed to female genital mutilation ("FGM") constitute a particular social group); *239 Matter of Toboso-Alfonso, 20 I&N Dec. 819, 822-23 (BIA 1990) (holding that homosexuals in Cuba were shown to be a particular social group); Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988) (holding that former national police members could be a particular social group in certain circumstances). Our precedents have collectively focused on the extent to which the group is understood to exist as a recognized component of the society in question. See Matter of E-A-G-, 24 I&N Dec. at 594 (describing social visibility as "the extent to which members of a society perceive those with the characteristic in question as members of a social group").

2. "Particularity"

While we addressed the immutability requirement in Acosta, the term "particularity" is included in the plain language of the Act and is consistent with the specificity by which race, religion, nationality, and political opinion are commonly defined. The Tenth Circuit recently noted that "the particularity requirement flows quite naturally from the language of the statute, which, of course, specifically refers to membership in a `particular social group.'" D'Rivera-Barrientos v. Holder, 666 F.3d at 649.

**12 A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group. Matter of A-M-E- & J-G-U-, 24 I&N Dec. at 76 (holding that wealthy Guatemalans lack the requisite particularity to be a particular social group). It is critical that the terms used to describe the group have commonly accepted definitions in the society of which the group is a part. Id. (observing that the concept of wealth is too subjective to provide an adequate benchmark for defining a particular social group).

The group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective. See Ochoa v. Gonzales, 406 F.3d 1166, 1170-71 (9th Cir. 2005) (stating that a particular social group must be narrowly defined and that major segments of the population will rarely, if ever, constitute a distinct social group). The particularity requirement clarifies the point, at least implicit in earlier case law, that not every "immutable characteristic" is sufficiently precise to define a particular social group. See, e.g., Escobar v. Gonzales, 417 F.3d 363, 368 (3d Cir. 2005) (finding the characteristics of poverty, homelessness, and youth to be "too vague and all encompassing" to set perimeters for a protected group within the scope of the Act).

3. "Social Distinction"

Our definition of "social visibility" has emphasized the importance of "perception" or "recognition" in the concept of "particular social group." See Matter of H-, 21 I&N Dec. 337, 342 (BIA 1996) (stating that in Somali society, clan membership is a "highly recognizable" characteristic that is "inextricably linked to family ties"). The term was never meant to be read literally. The renamed requirement "social distinction" clarifies that social visibility does not mean "ocular" visibility--either of the group as a whole or of individuals within the group--any more than a person holding a protected religious or political belief must be "ocularly" visible to others in society. See, e.g., Henriquez-Rivas v. Holder, 707 F.3d at 1087-89. Social distinction refers to social recognition, taking as its basis the plain language of

the Act—in this case, the word “social.” To be socially distinct, a group need not be seen by society; rather, it must be perceived as a group by society. Matter of C-A-, 23 I&N Dec. at 956-57 (citing UNHCR Guidelines, supra). Society can consider persons to comprise a group without being able to identify the group’s members on sight.

**13** The examples in Matter of Kasinga, Matter of Toboso-Alfonso, and Matter of Fuentes, illustrate this point. It may not be easy or possible to identify who is opposed to FGM, who is homosexual, or who is a former member of the national police. These immutable characteristics are certainly not ocularly visible. Nonetheless, a society could still perceive young women who oppose the practice of FGM, homosexuals, or former members of the national police to comprise a particular social group for a host of reasons, such as sociopolitical or cultural conditions in the country. For this reason, the fact that members of a particular social group may make efforts to hide their membership in the group to avoid persecution does not deprive the group of its protected status as a particular social group. See Rivera-Barrientos v. Holder, 666 F.3d at 652 (stating that the social distinction requirement “does not exclude groups whose members might have some measure of success in hiding their status in an attempt to escape persecution”).

The Third Circuit has indicated that it was “hard-pressed to discern any difference between the requirement of ‘particularity’ and the discredited requirement of ‘social visibility.’”* Valdiviezo-Galdamez II, 663 F.3d at 608. We respectfully disagree. As recognized by other courts, there is considerable overlap between the “social distinction” and “particularity” requirements, which has resulted in confusion. See, e.g., *241 Henriquez-Rivas v. Holder, 707 F.3d at 1090 (“Admittedly, both BIA and our own precedent have blended the ‘social visibility’ and ‘particularity’ analysis . . . .”).

“Particularity” remains essential in the interpretation of the phrase “‘particular social group,” especially in the analysis of broadly defined social groups.

The “social distinction” and “particularity” requirements each emphasize a different aspect of a particular social group. They overlap because the overall definition is applied in the fact-specific context of an applicant’s claim for relief. While “particularity” chiefly addresses the “outer limits” of a group’s boundaries and is definitional in nature, see Castellano-Chacon v. INS, 341 F.3d at 549, this question necessarily occurs in the context of the society in which the claim for asylum arises, see Matter of S-E-G-, 24 I&N Dec. at 584 (inquiring whether the group can be described in sufficiently distinct terms that it “would be recognized, in the society in question, as a discrete class of persons”). Societal considerations have a significant impact on whether a proposed group describes a collection of people with appropriately defined boundaries and is sufficiently “particular.” Similarly, societal considerations influence whether the people of a given society would perceive a proposed group as sufficiently separate or distinct to meet the “social distinction” test.

**14** For example, in an underdeveloped, oligarchical society, “landowners” may be a sufficiently discrete class to meet the criterion of particularity, and the society may view landowners as a discrete group, sufficient to meet the social distinction test. However, such a group would likely be far too amorphous to meet the particularity requirement in Canada, and Canadian society may not view landowners as sufficiently distinct from the rest of society to satisfy the social distinction test. In
analyzing whether either of these hypothetical claims would establish a particular social group under the Act, an Immigration Judge should make findings whether “landowners” share a common immutable characteristic, whether the group is discrete or amorphous, and whether the society in question considers “landowners” as a significantly distinct group within the society. Thus, the concepts may overlap in application, but each serves a separate purpose.

4. Society’s Perception

The Ninth Circuit has recently observed that neither it nor the Board “has clearly specified whose perspectives are most indicative of society’s perception of a particular social group.” Henriquez-Rivas v. Holder, 707 F.3d at 1089 (suggesting that “the perception of the persecutors may matter the most” in determining a society’s perception of a particular social group); see also Rivera-Barrientos v. Holder, 666 F.3d at 650-51 *242 (referencing the relevant society as both “citizens of the applicant’s country” and “the applicant’s community”). Interpreting “membership in a particular social group” consistently with the other statutory grounds within the context of refugee protection, we clarify that a group’s recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor.

Defining a social group based on the perception of the persecutor is problematic for two significant reasons. First, it is important to distinguish between the inquiry into whether a group is a “particular social group” and the question whether a person is persecuted “on account of” membership in a particular social group. In other words, we must separate the assessment whether the applicant has established the existence of one of the enumerated grounds (religion, political opinion, race, ethnicity, and particular social group) from the issue of nexus. The structure of the Act supports preserving this distinction, which should not be blurred by defining a social group based solely on the perception of the persecutor.

Second, defining a particular social group from the perspective of the persecutor is in conflict with our prior holding that “a social group cannot be defined exclusively by the fact that its members have been subjected to harm.” Matter of A-M-E- & J-G-U-, 24 I&N Dec. at 74. The perception of the applicant’s persecutors may be relevant, because it can be indicative of whether society views the group as distinct. However, the persecutors’ perception is not itself enough to make a group socially distinct, and persecutory conduct alone cannot define the group. Id.; see also, e.g., Henriquez-Rivas v. Holder, 707 F.3d at 1102 (Kozinski, C.J., dissenting) (“Defining a social group in terms of the perception of the persecutor risks finding that a group exists consisting of a persecutor’s enemies list.”); Mendez-Barrera v. Holder, 602 F.3d at 27 (“The relevant inquiry is whether the social group is visible in the society, not whether the alien herself is visible to the alleged persecutors.”).

**15 For example, a proposed social group composed of former employees of a country’s attorney general may not be valid for asylum purposes. Although such a shared past experience is immutable and the group is sufficiently discrete, the employees may not consider themselves a separate group within the society, and the society may not consider these employees to be meaningfully distinct within society in general. Nevertheless, such a social group determination must be made on a case-by-case basis,
because it is possible that under certain circumstances, the society would make such a distinction and consider the shared past experience to be a basis for distinction within that society.

The former employees of the attorney general may not be considered a group by themselves or by society unless and until the government begins *243 persecuting them. Upon their maltreatment, it is possible that these people would experience a sense of “group,” and society would discern that this group of individuals, who share a common immutable characteristic, is distinct in some significant way. See, e.g., Sepulveda v. Gonzales, 464 F.3d 770 (regarding a social group consisting of former employees of the Colombia Attorney General’s Office); see also Cece v. Holder, 733 F.3d at 671 (recognizing that “[a] social group ‘cannot be defined merely by the fact of persecution’ or ‘solely by the shared characteristic of facing dangers in retaliation for actions they took against alleged persecutors,’”D but that the shared trait of persecution does not disqualify an otherwise valid social group (quoting Jonatitene v. Holder, 660 F.3d 267, 271-72 (7th Cir. 2011))). The act of persecution by the government may be the catalyst that causes the society to distinguish the former employees in a meaningful way and consider them a distinct group, but the immutable characteristic of their shared past experience exists independent of the persecution.

The persecutor’s actions or perceptions may also be relevant in cases involving persecution on account of “imputed” grounds, such as where one is erroneously thought to hold particular political opinions or mistakenly believed to be a member of a particular social group. See, e.g., Matter of S-P-, 21 I&N Dec. 486, 489 (BIA 1996); Matter of A-G-, 19 I&N Dec. 502, 507 (BIA 1987). For example, an individual may present a valid asylum claim if he is incorrectly identified as a homosexual by a government that registers and maintains files on homosexuals--in a society that considers homosexuals a distinct group united by a common immutable characteristic. In such a case, the social group exists independent of the persecution, and the perception of the persecutor is relevant to the issue of nexus (whether the persecution was or would be on account of the applicant’s imputed homosexuality).

**16 Persecution limited to a remote region of a country may invite an inquiry into a more limited subset of the country’s society, such as in Matter of Kasinga, 21 I&N Dec. at 366, where we considered a particular social group within a tribe. Cf. Henriquez-Rivas v. Holder, 707 F.3d at 1089 (“Society in general may also not be aware of a particular religious sect in a remote region.”). However, the refugee analysis must still consider whether government protection is available, internal relocation is possible, and persecution extends countrywide. Section 101(a)(42) of the Act; Gambashidze v. Ashcroft, 381 F.3d 187, 192-94 (3d Cir. 2004); Abdille v. Ashcroft, 242 F.3d at 496; Matter of C-A-L-, 21 I&N Dec. 754, 757-58 (BIA 1997). Only when the inquiry involves the perception of the society in question will the “membership in a particular social group” ground of persecution be equivalent to the other enumerated grounds of persecution.

*244 C. Evidentiary Burdens

The respondent argues that a particular social group interpretation that requires more than the analysis set forth in Matter of Acosta imposes significant burdens on the applicant and introduces subjectivity to the analysis. Such concerns are based on an overbroad reading of the particular social group ground of

persecution. In all asylum and withholding of removal cases, including those involving the other grounds of persecution, an applicant is required to establish the existence of the underlying basis for the alleged persecution. Sections 208(b)(1)(B), 241(b)(3)(C) of the Act, 8 U.S.C. §§ 1158(b)(1)(B), 1231(b)(3)(C) (2012).

For example, when an applicant makes a claim of persecution based on political opinion or religion, he or she is required to provide evidence that the claimed political or religious group exists and is recognized as such in the relevant society. See Sandie v. Att’y Gen. of U.S., 562 F.3d 246, 253 (3d Cir. 2009) (denying relief where the applicant failed to establish the existence, nature, and activities of a secret society he claimed to fear); see also, e.g., Aden v. Holder, 589 F.3d 1040, 1043-46 (9th Cir. 2009) (denying relief where the applicant failed to adequately establish the existence of a minority clan in Somalia by providing evidence “such as scholarly sources, ethnological studies, or witnesses”); Osono v. Gonzales, 457 F.3d 849, 855 (8th Cir. 2006) (denying relief where the applicant failed to adequately establish the existence of a political party).

**17 Likewise, the applicant has the burden to establish a claim based on membership in a particular social group and will be required to present evidence that the proposed group exists in the society in question. The evidence available in any given case will certainly vary. However, a successful case will require evidence that members of the proposed particular social group share a common immutable characteristic, that the group is sufficiently particular, and that it is set apart within the society in some significant way. Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as “distinct” or “other” in a particular society. Thus, when the requirements for “membership in a particular social group” are consistent with the other grounds of persecution, the overall burdens are equivalent to those placed on applicants asserting claims based on the other grounds.

D. Consistency with Prior Board Precedent

In its decision, the Third Circuit declined to afford Chevron deference to our prior interpretation of the requirements for a particular social group *245 because it perceived them to be inconsistent with our past decisions, in particular Matter of Kasinga, Matter of Toboso-Alfonso, and Matter of Fuentes, Valdiviezio-Galdamez II, 663 F.3d at 604, 607. In clarifying that “ocular” visibility is not required, we consider our interpretation of the phrase “membership in a particular social group” to be consistent with our prior case law.

In Kasinga and Toboso-Alfonso, we found that each applicant established an immutable characteristic in keeping with the Acosta standard, and we held that they established viable particular social groups. Matter of Kasinga, 21 I&N Dec. at 365-66 (young women of the Tchamba-Kunsuntu Tribe who had not been subjected to FGM, as practiced by that tribe, and who opposed the practice); Matter of Toboso-Alfonso, 20 I&N Dec. at 822-23 (persons identified as homosexuals by the Cuban Government).

The Third Circuit recognized that the members of each of these groups “have characteristics which are
completely internal to the individual and cannot be observed or known by other members of the society in question (or even other members of the group) unless and until the individual member chooses to make that characteristic known.” Valdiviezo-Galdamez II, 663 F.3d at 604. However, the unobservable nature of the immutable characteristics involved in Kasinga and Toboso-Alfonso did not preclude the societies in question from considering certain women of the tribe or homosexuals, respectively, as distinct groups that were set apart within the society.

**18 In Matter of Toboso-Alfonso, the Government did not challenge the Immigration Judge’s finding that homosexuality was an immutable characteristic. The proposed group in that case, homosexuals in Cuba, was sufficiently particular because it was a discrete group with well-defined boundaries. The group was based on an immutable characteristic that provided an adequate benchmark for defining the members of the group, and it did not rely on a vague or subjective characteristic. The record established the existence of a Cuban governmental office that registered and maintained files on homosexuals. Matter of Toboso-Alfonso, 20 I&N Dec. at 820, 822. The applicant testified that residents threw eggs and tomatoes at him when he was being forced to leave the country because of his status as a homosexual, and he submitted evidence that suspected homosexuals were subjected to physical examinations, interrogations, and beatings. Id. at 820-21. On those facts, it was clear that people in Cuban society considered homosexuals to be a discrete and distinct group within the society and that a homosexual in Cuba would have generally understood his or her affiliation with the grouping. The group was therefore particular and socially distinct within the society in question.

*246 In Matter of Kasinga, 21 I&N Dec. at 365-66, we found that the social group met the immutable characteristic test set forth in Acosta. The proposed group of young women of a certain tribe who had not been subjected to FGM and opposed the practice was sufficiently particular because it presented a group that had clear and definable boundaries. The record contained objective evidence regarding the prevalence of FGM in the society in question and the expectation that women of the tribe would undergo FGM. Id. at 361, 367. Based on these facts, we found that people in the Tchamba-Kunsuntu Tribe would generally consider women who had not undergone FGM and opposed the practice to be a discrete and distinct group that was set apart in a significant way from the rest of the society. Such women would clearly understand their affiliation with this grouping. Thus, the proposed group was particular and was perceived as socially distinct within the society in question.

In Matter of Fuentes, the fundamental characteristic at issue was also not visible. However, we did not hold that “former member[s] of the national police of El Salvador” necessarily constituted a viable particular social group. Matter of Fuentes, 19 I&N Dec. at 662. Rather, we merely recognized that the applicant’s status as a former policeman was an immutable characteristic because it was beyond his capacity to change, and we noted that it is “possible that mistreatment occurring because of such a status in appropriate circumstances could be found to be persecution on account of political opinion or membership in a particular social group.” Id. (emphasis added). The applicant in Fuentes presented some evidence of social distinction, because the national police played a high-profile role in combating guerrilla violence, and a witness testified that “guerrillas had the names of the people who had been in the service” and targeted and killed former service members. Id. at 659, 661. However, because we held that the applicant did not show that the harm he feared bore a nexus to his status as a former member of
the national police, we did not fully assess the factors that underlie particularity and social distinction. *Id.* at 661-63.

**19 In Matter of C-A.,** we found that “noncriminal drug informants working against the Cali drug cartel” in Colombia were not a particular social group, and we emphasized that “[s]ocial groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups.” *Matter of C-A.*, 23 I&N Dec. at 957, 959-60 (finding that members of the applicant’s society would not “recognize a social group based on informants who act out of a sense of civic duty rather than for compensation”). However, we also included language highlighting the relative ocular invisibility of confidential informants. *Id.* at 959-60. To the extent that *Matter of C-A.* has been *247* interpreted as requiring literal or “ocular” visibility, we now clarify that it does not.

Since *Matter of Acosta,* we have also recognized “particular social groups” in cases involving immutable characteristics within discrete segments of the population. *Matter of V-T-S.*, 21 I&N Dec. 792, 798 (BIA 1997) (Filipinos of mixed Filipino-Chinese ancestry); *Matter of H.*, 21 I&N Dec. at 342-43 (members of the Marchan sub clan of Somalia who share ties of kinship and linguistic commonalities). The particular social groups in these cases satisfied the social distinction test because the record in each case contained objective evidence establishing the existence of the groups as distinct within the society in question. *Matter of V-T-S.*, 21 I&N Dec. at 798 (citing the State Department Profile on the Philippines as stating that approximately 1.5% of the Philippine population has an identifiable Chinese background); *Matter of H.*, 21 I&N Dec. at 342-43 (citing country reports discussing various clans).

E. International Interpretations

**20 Although the statutory terms “refugee” and “particular social group” occur against the backdrop of the Protocol and the Convention, *248* international interpretations of those terms are not controlling here. *INS v. Aguirre-Aguirre*, 526 U.S. at 427-28.

We recognize that our interpretation of the ambiguous phrase “particular social group” differs from the approach set forth in the UNHCR’s social group guidelines, which sought to reconcile two international interpretations that had developed over the years. UNHCR Guidelines, *supra,* at 2-3; *see also Valdiviezo-Galdamez II*, 663 F.3d at 615 n.4 (Hardiman, J., concurring). The UNHCR advocates an alternative approach, which permits an individual to establish a particular social group based on “protected characteristics” or “social perception” but does not require both. UNHCR Guidelines, *supra,* at 2-3. However, the European Union adopted a “particular social group” definition that departs from the UNHCR Guidelines by requiring a social group to have both an immutable/fundamental characteristic and social perception.15

While the views of the UNHCR are a useful interpretative aid, they are “not binding on the Attorney General, the BIA, or United States courts.” *INS v. Aguirre-Aguirre*, 526 U.S. at 427. Indeed, the UNHCR has disclaimed that its views have such force and has taken the position that the determination

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We believe that our interpretation in *Matter of S-E-G-* and *Matter of E-A-G-* , as clarified, more accurately captures the concepts underlying the United States' obligations under the Protocol and will ensure greater *249* consistency in the adjudication of asylum claims under the Act. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967; *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837. Unlike the UNHCR's alternative approach, we conclude that a particular social group must satisfy both the "protected characteristic" and "social perception" approaches, in addition to the particularity requirement, as described above.

V. APPLICATION TO THE RESPONDENT

In our prior decision in this case, we rejected the respondent's gang-related claim based on the reasoning set forth in *Matter of S-E-G-* and *Matter of E-A-G-* . In *Matter of S-E-G-* , 24 I&N Dec. at 582, we denied a gang-related asylum claim asserting a proposed social group of "Salvadoran youths who have resisted gang recruitment, or family members of such Salvadoran youth." The applicant's membership in a particular social group was not established because he did not show that the proposed group was sufficiently particular or socially distinct, that is, recognized in the society in question as a discrete class of persons. *Id.* at 584-87. His fear was based on his individual response to the gang's efforts to increase its ranks, not on persecution aimed at his membership in a group. See *INS v. Elias-Zacarias*, 502 U.S. at 483 (rejecting a guerrilla recruitment claim where the applicant failed to establish that the persecutor had a motive other than increasing the size of its forces). Similarly, the applicant in *Matter of E-A-G-* did not establish that the proposed group, "persons resistant to gang membership," was a particular social group. *Matter of E-A-G-* , 24 I&N Dec. at 594-95 ("The focus is not with statistical or actuarial groups, or with artificial group definitions. Rather, the focus is on the existence and visibility of the group in the society in question and on the importance of the pertinent group characteristic to the members of the group.").

**21** While there is no universal definition of a "gang," it is generally understood to be "a criminal enterprise having an organizational structure, acting as a continuing criminal conspiracy, which employs violence *250* and any other criminal activity to sustain the enterprise." UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* 1 n.3 (Mar. 31, 2010), available at http://www.unhcr.org/refworld/docid/4bb21fa02.html (quoting the Federal Bureau of Investigation's definition of a gang).

The UNHCR has recognized that "[g]ang-related violence may be widespread and affect large segments of society, in particular where the rule of law is weak. Ordinary people may be exposed to gang-violence simply because of being residents of areas controlled by gangs." *Id.* para. 10, at 4. Although the UNHCR indicates that certain marginalized social groups may be specifically targeted by gangs, it also noted that "a key function of gangs is criminal activity. Extortion, robbery, murder, prostitution, kidnapping,
smuggling and trafficking in people, drugs and arms are common practices employed by gangs to raise funds and to maintain control over their respective territories.” Id. para. 8, at 3.

In Matter of S-E-G-, 24 I&N Dec. at 588, we also noted that the evidence of record indicated that El Salvador suffered from widespread gang violence, stating that “victims of gang violence come from all segments of society, and it is difficult to conclude that any ‘group,’ as actually perceived by the criminal gangs, is much narrower than the general population of El Salvador.” Although this evidence of indiscriminate gang violence and civil strife was largely dispositive of the applicant’s ability to establish the proposed group’s existence in the society in question, it also undermined his attempt to establish a nexus between any past or feared harm and a protected ground under the Act.

Against the backdrop of widespread gang violence affecting vast segments of the country’s population, the applicant in Matter of S-E-G- could not establish that he had been targeted on a protected basis. See Al-Fara v. Gonzales, 404 F.3d at 740; Abdille v. Ashcroft, 242 F.3d at 494-95; Matter of N-M-A-, 22 I&N Dec. at 323, 326. Although he was subjected to one of the many different criminal activities that the gang used to sustain its criminal enterprise, he did not demonstrate that he was more likely to be persecuted by the gang on account of a protected ground than was any other member of the society. Matter of S-E-G-, 24 I&N Dec. at 587 (“[G]angs have directed harm against anyone and everyone perceived to have interfered with, or who might present a threat to, their criminal enterprises and territorial power.”).

**22 The prevalence of gang violence in many countries is a large societal problem. The gangs may target one segment of the population for recruitment, another for extortion, and yet others for kidnapping, trafficking in drugs and people, and other crimes. Although certain segments of a population may be more susceptible to one type of criminal activity than *251 another, the residents all generally suffer from the gang’s criminal efforts to sustain its enterprise in the arca. A national community may struggle with significant societal problems resulting from gangs, but not all societal problems are bases for asylum. See Konan v. Att’y Gen. of U.S., 432 F.3d at 506; Al Fara v. Gonzales, 404 F.3d at 740; Abdille v. Ashcroft, 242 F.3d at 494-95; see also Matter of Sosa Ventura, 25 I&N Dec. at 394 (discussing the history of Temporary Protected Status and the fact that individuals fleeing life-threatening natural disasters or a generalized state of violence were not entitled to either asylum or withholding of removal). Congress may choose to provide relief to those suffering from difficult situations not covered by asylum and withholding of removal. See, e.g., section 244(a)(1) of the Act, 8 U.S.C. § 1254a(a)(1) (2012); Ruth Ellen Wasem & Karma Ester, Cong. Research Serv., RS 20844, Temporary Protected Status: Current Immigration Policy and Issues 2 (2010), available at http://fpc.state.gov/documents/organization/137267.pdf.

Nevertheless, we emphasize that our holdings in Matter of S-E-G- and Matter of E-A-G- should not be read as a blanket rejection of all factual scenarios involving gangs. Matter of S-E-G-, 24 I&N Dec. at 587 (recognizing that the evidence of record did not “indicate that Salvadoran youth who are recruited by gangs but refuse to join (or their family members) would be ‘perceived as a group’ by society, or that these individuals suffer from a higher incidence of crime than the rest of the population”). Social group determinations are made on a case-by-case basis. Matter of Acosta, 19 I&N Dec. at 233. For example, a
factual scenario in which gangs are targeting homosexuals may support a particular social group claim. While persecution on account of a protected ground cannot be inferred merely from acts of random violence and the existence of civil strife, it is clear that persecution on account of a protected ground may occur during periods of civil strife if the victim is targeted on account of a protected ground. See Konan v. Att'y Gen. of U.S., 432 F.3d at 506; Matter of Villalta, 20 I&N Dec. 142, 147 (BIA 1990); see also, e.g., Ochave v. INS, 254 F.3d 859, 865 (9th Cir. 2001) ("Asylum generally is not available to victims of civil strife, unless they are singled out on account of a protected ground.").

VI. CONCLUSION

The respondent has requested a remand and the DHS has expressed that it has no opposition. Because the respondent’s proposed particular social group has evolved during the pendency of his appeal, our guidance on particular social group claims has been clarified since this case was last before the Immigration Judge, and the Third Circuit has indicated that a remand may be appropriate, we will remand this case. A remand will enable the Immigration Judge to engage in any fact-finding that may be necessary to resolve the issues in this case, consistent with standard Immigration Court practice and procedure.

Further, a remand is appropriate to allow the Immigration Judge to revisit the issues of the respondent’s possible relocation and the Honduran Government’s inability or unwillingness to control the gangs.

**24 ...On remand, both parties will have *253 an opportunity to present updated country conditions evidence and arguments regarding the respondent’s particular social group claim, and the Immigration Judge may conduct further proceedings as is deemed appropriate under the circumstances. Accordingly, the record will be remanded to the Immigration Judge.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.
Supreme Court of the United States  
No. 07-499.  
Argued Nov. 5, 2008.  

Background: Alien, dual national of Britena and Ethiopia, petitioned for judicial review of Board of Immigration Appeals' (BIA) order affirming denial by immigration judge (IJ) of application for asylum and withholding of removal. The United States Court of Appeals for the Fifth Circuit denied petition, 441 Fed.Appx. 325, based on "persecutor bar" of Immigration and Nationality Act (INA). Certiorari was granted.

Holdings: The United States Supreme Court, Justice Kennedy, held that:
(1) INA's persecutor bar provision was ambiguous as to whether coercion or distress was relevant in determining if alien had participated in persecution; but
(2) BIA's construction of persecutor bar as not requiring any motivation or intent on alien's part was not entitled to Chevron deference, since it was based on legal error; and
(3) remand was appropriate rather than Court's providing its own answer to whether persecutor bar contained coercion exception.

Reversed and remanded.

*1160 Spillabus

**1160 Spillabus

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 59 L.Ed. 499.

The Immigration and Nationality Act (INA) bars an alien from obtaining refugee status in this country if

he "assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §1101(a)(42). This so-called "persecutor bar" applies to those seeking asylum or withholding of removal, but does not disqualify an alien from receiving a temporary deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). During the time petitioner, an Eritrean national, was forced to work as a prison guard in that country, the prisoners he guarded were persecuted on grounds protected under §1101(a)(42). After escaping to the United States, petitioner applied for asylum and withholding of removal. Concluding that he assisted in the persecution of prisoners by working as an armed guard, the Immigration Judge denied relief on the basis of the persecutor bar, but granted deferral of removal under CAT because petitioner was likely to be tortured if returned to Eritrea. The Board of Immigration Appeals (BIA) affirmed in all respects, holding, inter alia, that the persecutor bar applies even if the alien's assistance in persecution was coerced or otherwise the product of duress.

The BIA followed its earlier decisions finding Fedorenko v. United States, 449 U.S. 499, 101 S.Ct. 737, 66 L.Ed.2d 686, controlling. The Fifth Circuit affirmed, relying on its precedent following the same reasoning.

Held: The BIA and Fifth Circuit misapplied Fedorenko as mandating that whether an alien is compelled to assist in persecution is immaterial for persecutor-bar purposes. The BIA must interpret the statute, free from this mistaken legal premise, in the first instance. Pp. 1163 - 1168.

(a) Under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694, the BIA is entitled to deference in interpreting ambiguous INA provisions, see, e.g., INS v. Aguirre-Aguire, 526 U.S. 415, 424-425, 119 S.Ct. 1439, 143 L.Ed.2d 590. When the BIA has not spoken on "a matter that statutes place primarily in agency hands," this Court's ordinary rule is to remand to allow "the BIA ... to address the matter in the first instance in light of its own experience," INS v. Orlando Ventura, 537 U.S. 12, 16-17, 123

As there is substance both to petitioner's contention that involuntary acts cannot implicate the persecutor bar because "persecution" presumes moral blameworthiness, and to the Government's argument that the question at issue is *1161 answered by the statute's failure to provide an exception for coerced conduct, it must be concluded that the INA has an ambiguity that the BIA should address in the first instance. Fedorenko, which addressed a different statute enacted for a different purpose, does not control the BIA's interpretation of this persecutor bar. In holding that voluntariness was not required with respect to such a bar in the Displaced Persons Act of 1948 (DPA), Fedorenko contrasted the omission there of the word "voluntary" with the word's inclusion in a related statutory subsection. 449 U.S. at 512, 101 S.Ct. 737. Because Congress did not use the word "voluntary" anywhere in the persecutor bar at issue here, its omission cannot carry the same significance as it did in Fedorenko. Moreover, the DPA's exclusion of even those involved in nonculpable, involuntary assistance in persecution was enacted in part to address the Holocaust and its horror, see id. at 511, n. 32, 101 S.Ct. 737, whereas the persecutor bar in this case was enacted as part of the Refugee Act of 1980, which was designed to provide a general rule for the ongoing treatment of all refugees and displaced persons, see, e.g., Aguirre-Aguirre, supra, at 427, 119 S.Ct. 1429, pp. 1164 - 1166.

(c) Whether a BIA determination that the persecution bar contains no exception for coerced conduct would be reasonable, and thus owed Chevron deference, is a legitimate question; but it is not presented here. In denying petitioner relief, the BIA recited a rule it has developed in its cases: An alien's motivation and intent are irrelevant to the issue whether he "assisted" in persecution; rather, his actions' objective effect controls. A reading of those decisions confirms that the BIA has not exercised its interpretive authority but, instead, has deemed its interpretation to be mandated by Fedorenko. This error prevented the BIA from fully considering the statutory question presented. Its mistaken assumption stems from a failure to recognize the inapplicability of the statutory construction principle invoked in Fedorenko, as well as a failure to appreciate the differences in statutory purpose. The BIA is not bound to apply the Fedorenko rule to the persecutor bar here at issue. Whether the statute permits such an interpretation based on a different course of reasoning must be determined in the first instance by the agency. Pp. 1166 - 1167.

(d) Because the BIA has not yet exercised its Chevron discretion to interpret the statute, the proper course is to remand to it for additional investigation or explanation, e.g., Gonzalez v. Thomas, 547 U.S. 183, 186, 126 S.Ct. 1613, 164 L.Ed.2d 358, allowing it to bring its expertise to bear on the matter, evaluate the evidence, make an initial determination, and thereby help a court later determine whether its decision exceeds the leeway that the law provides, e.g., id., at 186-187, 126 S.Ct. 1613, pp. 1167 - 1168.

231 Fed.Appx. 325, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBRETS, C.J., and SCALIA, SOUTER, GINSBURG, and ALITO, JJ., joined, SCALIA, J., filed a concurring opinion, in which ALITO, J., joined, STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BREYER, J., joined, THOMAS, J., filed a dissenting opinion.

Andrew J. Pincus, Washington, DC, for Petitioner.

An alien who fears persecution in his homeland and seeks refugee status in this country is barred from obtaining that relief if he has persecuted others.

"The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." Immigration and Nationality Act (INA), § 101, 66 Stat. 166, as added by Refugee Act of 1980, § 201(a), 94 Stat. 102-103, 8 U.S.C. § 1101(a)(42).

This so-called "persecutor bar" applies to those seeking asylum, § 1158(b)(2)(A)(i), or withholding of removal, § 1231(b)(3)(B)(i). It does not disqualify an alien from receiving a temporary deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, p. 20, 1465 U.N.T.S. 85; 8 CPR § 1208.17(a) (2008).
In this case the Board of Immigration Appeals (BIA) determined that the persecutor bar applies even if the alien's assistance in persecution was coerced or otherwise the product of duress. In so ruling the BIA followed its earlier decisions that found *Fedorenko v. United States*, 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981), controlling. The Court of Appeals for the Fifth Circuit, in affirming the agency, relied on its precedent following the same reasoning. We hold that the BIA and the Court of Appeals misapplied *Fedorenko*. We reverse and remand for the agency to interpret the statute, free from the error, in the first instance.

Petitioner in this Court is Daniel Girmai Negusie, a dual national of Eritrea and Ethiopia, his father having been a national of the former and his mother of the latter. Born and educated in Ethiopia, he left there for Eritrea around the age of 18 to see his mother and find employment. The year was 1994. After a few months in Eritrea, state officials took custody of petitioner and others when they were attending a movie. He was forced to perform hard labor for a month and then was conscripted into the military for a time. War broke out between Ethiopia and Eritrea in 1998, and he was conscripted again.

When petitioner refused to fight against Ethiopia, his other homeland, the Eritrean Government incarcerated him. Prison guards punished petitioner by beating him with sticks and placing him in the hot sun. He was released after two years and forced to work as a prison guard, a duty he performed on a rotating basis for about four years. It is undisputed that the prisoners he guarded were being persecuted on account of a protected ground—i.e., "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). Petitioner testified that he carried a gun, guarded the *1163* gate to prevent escape, and kept prisoners from taking showers and obtaining fresh air. He also guarded prisoners to make sure they stayed in the sun, which he knew was a form of punishment. He saw at least one man die after being in the sun for more than two hours. Petitioner testified that he had not shot at or directly punished any prisoner and that he helped prisoners on various occasions. Petitioner escaped from the prison and hid in a container, which was loaded on board a ship heading to the United States. Once here he applied for asylum and withholding of removal.

In a careful opinion the Immigration Judge, W. Wayne Stogner, found that petitioner's testimony, for the most part, was credible. He concluded that petitioner assisted in persecution by working as an armed guard. The judge determined that although "there's no evidence to establish that [petitioner] is a malicious person or that he was an aggressive person who mistreated the prisoners, ... the very fact that he helped [the government] in the prison compound where he had reason to know that they were persecuted constitutes assisting in the persecution of others and bars [petitioner] from obtaining asylum or withholding of removal. App. to Pet. for Cert. 16a-17n (citing *inter alia, Fedorenko, supra*). The judge, however, granted deferral of removal under CAT because petitioner was likely to be tortured if returned to Eritrea.

The BIA affirmed the denial of asylum and withholding. It noted petitioner's role as an armed guard in a facility where "prisoners were tortured and left to die out in the sun ... on account of a protected ground." App. to Pet. for Cert. 6a. The BIA held that "[t]he fact that [petitioner] was compelled to participate as a prison guard, and may not have actively tortured or mistreated anyone, is immaterial." *Ibid.* That is because ". . . an alien's motivation and intent are irrelevant to the issue of whether he "assisted" in persecution ... [It is the objective effect of an alien's actions which is controlling.""] *Ibid.* (quoting *Matter of Fedorenko*, 19 I. & N. Dec. 57, 60 (BIA 1984)). The BIA also affirmed the grant of deferral of removal under CAT.

On petition for review the Court of Appeals agreed with the BIA that whether an alien is compelled to assist in persecution is immaterial for persecutor-bar purposes. App. to Pet. for Cert. 2a (citing *Fedorenko*, 449 U.S., at 512, n. 34, 101 S.Ct. 737). We granted certiorari, 552 U.S. ----, 128 S.Ct. 1695, 170 L.Ed.2d 252 (2008).

II

Consistent with the rule in *Cheyenne U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the BIA is entitled to deference in interpreting ambiguous provisions of the INA. The question here is whether an alien who was compelled to assist
in persecution can be eligible for asylum or withholding of removal. We conclude that the BIA misapplied our precedent in *Fedorenko* as mandating that an alien’s motivation and intent are irrelevant to the issue whether an alien assisted in persecution. The agency must confront the same question free of this mistaken legal premise.

A

[1] It is well settled that “principles of *Chevron* deference are applicable to this statutory scheme.” *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999). Congress has charged the Attorney General with administering the INA, and a “ruling by the Attorney General with respect to all questions of law shall be controlling.” *11648 INS v. AGB*., U.S.C. § 1103(a)(1). Judicial deference in the immigration context is of special importance, for executive officials “exercise especially sensitive political functions that implicate questions of foreign relations.” *INS v. Abadie*, 485 U.S. 94, 100, 108 S.Ct. 904, 99 L.Ed.2d 90 (1988). The Attorney General’s decision to bar an alien who has participated in persecution “may affect our relations with [the alien’s native] country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.” *Aguirre-Aguirre*, 526 U.S., at 425, 119 S.Ct. 1439.

The Attorney General, in turn, has delegated to the BIA the “‘discretion and authority conferred upon the Attorney General by law’” in the course of “‘considering and determining cases before it.’” *Hid.* (quoting 8 C.F.R. § 3.1(o)(1) (1998)). As a consequence, “the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms ‘concrete meaning through a process of case-by-case adjudication.’” *Aguirre-Aguirre*, supra, at 425, 119 S.Ct. 1439 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 444-449, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987)). When the BIA has not spoken on “a matter that statutes place primarily in agency hands,” our ordinary rule is to remand to “give[e] the BIA the opportunity to address the matter in the first instance in light of its own experience.” *INS v. Orlando Ventura*, 537 U.S. 12, 16-17, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002) (per curiam).

B

[2] The parties disagree over whether coercion or duress is relevant in determining if an alien assisted or otherwise participated in persecution. As there is substance to both contentions, we conclude that the statute has an ambiguity that the agency should address in the first instance.

Petitioner argues that the statute’s plain language makes clear that involuntary acts do not implicate the persecutor bar because “‘persecution’” presumes moral blameworthiness. Brief for Petitioner 23-28. He invokes principles of criminal culpability, concepts of international law, and the rule of lenity. *Id.*, at 28-45. Those arguments may be persuasive in determining whether a particular agency interpretation is reasonable, but they do not demonstrate that the statute is unambiguous. Petitioner all but conceded as much at argument in this Court when he indicated that the BIA has discretion to construe the duress defense in either a narrow or a broad way. Tr. of Oral Arg., 20-24.

The Government, on the other hand, asserts that the statute does not allow petitioner’s construction. “The statutory text,” the Government says, “directly answers that question: there is no exception for conduct that is coerced because Congress did not include one. Brief for Respondent 11. We disagree. The silence is not conclusive. The question is whether the statutory text mandates that coerced actions must be deemed assistance in persecution. On that point the statute, in its precise terms, is not explicit. Nor is this a case where it is clear that Congress had an intention on the precise question at issue. Cf. *Cardoza-Fonseca*, supra, at 448-449, 107 S.Ct. 1207.

The Government, like the BIA and the Court of Appeals, relies on *Fedorenko* to provide the answer. This reliance is not without some basis, as the Court there held that voluntariness was not required with respect to another persecutor bar, 449 U.S. at 512, 101 S.Ct. 737. To the extent, however, the Government deems *Fedorenko* to be controlling, it is in error.

*1165* In *Fedorenko*, the Court interpreted the Displaced Persons Act of 1948 (DPA), 62 Stat. 1009. The DPA was enacted “to enable European refugees driven from their homelands by the [second world] war to emigrate to the United States without regard to
traditional immigration quotas." 449 U.S. at 495, 101 S.Ct. 737, Section 2(b) of the DPA provides relief to "any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization" of the United Nations (IRO Convention), 62 Stat. 1009. The IRO Convention, as codified by Congress, excludes any individual "who can be shown: (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations." Annex I, Part II, § 2, 62 Stat. 3051-3052.

The Fedorenko Court held that "an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa" under § 2(a) of the IRO Convention. 449 U.S. at 512, 101 S.Ct. 737. That Congress did not adopt a voluntariness requirement for § 2(a), the Court noted, "is plain from comparing § 2(a) with § 2(b), which excludes only those individuals who 'voluntarily assisted the enemy forces.'" 449 U.S. at 512. The Court relied on the principle of statutory construction that "the deliberate omission of the word 'voluntary' from § 2(a) compels the conclusion that the statute made all those who assisted in persecution of civilians ineligible for visas." 449 U.S. at 512.

Fedorenko does not compel the same conclusion in the case now before us. The textual structure of the statute in Fedorenko ("voluntary" is in one subsection but not the other) is not part of the statutory framework considered here. Congress did not use the word "voluntary" in any subsection of the persecutor bar, so its omission cannot carry the same significance.

The difference between the statutory scheme in Fedorenko and the one here is confirmed when we "look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." Dada v. Mukasey, 554 U.S. 1, --, 128 S.Ct. 2307, 2317, 171 L.Ed.2d 178 (2008) (quoting Gonzalez-Perez v. United States, 498 U.S. 395, 407, 111 S.Ct. 840, 112 L.Ed.2d 919 (1991)). Both statutes were enacted to reflect principles set forth in international agreements, but the principles differ in significant respects.

As discussed, Congress enacted the DPA in 1948 as part of an international effort to address individuals who were forced to leave their homelands during and after the second World War. Pedersen v. Pedersen, supra, at 495, 101 S.Ct. 737. The DPA excludes those who "voluntarily assisted the enemy forces since the outbreak of the second world war," 62 Stat. 3052, as well as all who "assisted the enemy in persecuting civil populations of countries," id., at 3051. The latter exclusion clause makes no reference to culpability. The exclusion of even those involved in nonculpable, involuntary assistance in Nazi persecution, as an expert testified in Pedersen, may be "because the crime against humanity that is involved in the concentration camp puts it into a different category." 449 U.S. at 511, n. 32, 101 S.Ct. 737.

The persecutor bar in this case, by contrast, was enacted as part of the Refugee Act of 1980. Unlike the DPA, which was enacted to address not just the post war refugee problem but also the Holocaust and its horror, the Refugee Act was designed to provide a general rule for the ongoing treatment of all refugees and displaced persons. As this Court has twice *1166 recognized, "'one of Congress' primary purposes' in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, T.I.A.S. 6577 (1968)," as well as the "United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951), reprinted in 19 U.S.T. 6259." Aguirre-Aguirre, 526 U.S. at 427, 119 S.Ct. 1439 (quoting Cardoza-Fonseca, 480 U.S. at 436-437, 107 S.Ct. 1207).

These authorities illustrate why Fedorenko, which addressed a different statute enacted for a different purpose, does not control the BIA's interpretation of this persecutor bar. Whatever weight or relevance these various authorities may have in interpreting the statute should be considered by the agency in the first instance, and by any subsequent reviewing court, after our remand.

[3] The Government argues that "if there were any ambiguity in the text, the Board's determination that the bar contains no such exception is reasonable and thus controlling." Brief for Respondent 11. Whether such an interpretation would be reasonable, and thus owed Chevron deference, is a legitimate question; but
it is not now before us. The BIA deemed its interpretation to be mandated by Fedorenko, and that error prevented it from a full consideration of the statutory question here presented.

In denying relief in this case the BIA recited a rule that has developed in its own case law in reliance on Fedorenko: "[A]n alien's motivation and intent are irrelevant to the issue of whether he 'assisted' in persecution ... [I]t is the objective effect of an alien's actions which is controlling." App. to Pet. for Cert. 6a. The rule is based on three earlier decisions: Matter of Lapenikis, 18 I. & N. Dec. 433 (1983); Matter of Fedorenko, 19 I. & N. Dec. 57; and Matter of Rodriguez-Majano, 19 I. & N. Dec. 811 (1988).

... The second decision, Matter of Fedorenko, also dealt with § 1182(a)(3)(E)(i), and it involved the same alien whose citizenship was revoked by this Court's Fedorenko decision. This time the agency sought to deport him. Fedorenko responded by requesting suspension of deportation. He argued that, unlike the DPA's bar on any assistance-voluntary or involuntary—in persecution, see Fedorenko, 449 U.S., at 512, 101 S.Ct. 757, the text and structure of § 1182(a)(3)(E)(i) required deportation only of those who voluntarily assisted in persecuting others. The BIA rejected that distinction, noting that it was foreclosed by Matter of Lapenikis: "It may be, as [Fedorenko] argues, that his service at Treblinka was involuntary. ... We need *1167 not resolve the issue, however, because as a matter of law [Fedorenko]'s motivations for serving as a guard at Treblinka are immaterial to the question of his deportability under § 1182(a)(3)(E)(i), 191 & N. Dec., at 69-70.

Later, the BIA applied this Court's Fedorenko rule to the persecutor bar that is at issue in the present case. In Matter of Rodriguez-Majano, the BIA granted relief because the alien's coerced conduct as a guerrilla was not persecution based on a protected ground. 19 I. & N. Dec., at 815-816. Nevertheless, in reaching its conclusion the BIA incorporated without additional analysis the Fedorenko rule as applied in Matter of Lapenikis and reiterated in Matter of Fedorenko, 191 & N. Dec., at 814-815. The BIA reaffirmed that "[t]he participation or assistance of an alien in persecution need not be of his own volition to bar him from relief." Id., at 814 (citing Fedorenko, 449 U.S., at 499, 101 S.Ct. 737, 66 L.Ed.2d 686).

Our reading of these decisions confirms that the BIA has not exercised its interpretive authority but, instead, has determined that Fedorenko controls. This mistaken assumption stems from a failure to recognize the inapplicability of the principle of statutory construction invoked in Fedorenko, as well as a failure to appreciate the differences in statutory purpose. The BIA is not bound to apply the Fedorenko rule that motive and intent are irrelevant to the persecutor bar at issue in this case. Whether the statute permits such an interpretation based on a different course of reasoning must be determined in the first instance by the agency.

III

[4] Having concluded that the BIA has not yet exercised its Chevron discretion to interpret the statute in question, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." " " Gonzales v. Thomas, 547 U.S. 183, 186, 126 S.Ct. 1613, 164 L.Ed.2d 258 (2006) (per curiam) (quoting Ventapo, 537 U.S., at 16, 123 S.Ct. 353, in turn quoting Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985)). This remand rule exists, in part, because "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps ... involves difficult policy choices that agencies are better equipped to make than courts." National Cable & Telecommunications Assn. v. Brand X Internet Services, 545 U.S., 967, 980, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005).

... Ventapo and Thomas counsel a similar result here. Because of the important differences between the statute before us and the one at issue in Fedorenko, we find it appropriate to remand to the agency for its initial determination of the statutory interpretation question and its application to this case. The agency's interpretation of the statutory meaning of "persecution" may be explained by a more comprehensive definition, one designed to elaborate on the term in anticipation of a wide range of potential conduct; and that expanded definition in turn may be influenced by how practical, or impractical, the standard would be in terms of its application to specific cases. Those
matters may have relevance in determining whether its statutory interpretation is a permissible one.

As the Court said in *Ventura* and reiterated in *Thomas*, "'[t]he agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides.'" 547 U.S., at 186-187, 126 S.Ct. 1613 (quoting *Ventura*, supra, at 17, 123 S.Ct. 352). If the BIA decides to adopt a standard that considers voluntariness to some degree, it may be prudent and necessary for the Immigration Judge to conduct additional factfinding based on the new standard. Those determinations are for the agency to make in the first instance.

***

We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.
TERRORIST-RELATED INADMISSIBILITY GROUNDS (TRIG)

Application to applicants for refugee status, asylum, and withholding: refugees are inadmissible, and applicants for asylum and withholding are ineligible for relief if they fall under the TRIG (INA § 208(b)(v); INA § 241(b)(3)(B)).

INA § 212(a)(3)(B) – the terrorist inadmissibility ground - a person is inadmissible if he or she, inter alia, has:

- Engaged in a terrorist activity
- Is a member of a Tier I or Tier II terrorist organization
- Is a member of a Tier III terrorist organization, unless demonstrates by clear and convincing evidence that did not know and should not reasonably have known that organization was a terrorist organization
- Endorses or espouses terrorist activity
- Is spouse or child of an alien inadmissible under this section, if the activity causing the alien to be found inadmissible occurred within the last five years, UNLESS should not reasonably have known or has renounced.

Definitions:
- “Terrorist activities”: includes hijacking, seizing of persons, assassination, violent attack, use of explosives, or threat, attempt, or conspiracy to do any of them.

- “Engage in terrorist activities”: includes committing act, planning, solicitation of funds, gathering information on potential targets, and providing material support.
  - Providing material support: committing act person knows or reasonably should know affords material support, including a safe house, transportation, communications, funds, transfer of funds, or other material financial benefit, false documentation or id, weapons, explosives, or training,
  - for commission of terrorist activity
  - to any individual who person knows or seasonably should know has committed or plans to commit terrorist activity; to designated terrorist org.; or to non-designated terrorist org. UNLESS actor shows by clear and convincing evidence that he did not know and should not reasonably have known that organization was terrorist organization.

Terrorist organizations are:

- Tier I: designated organizations under INA 219;
- Tier II: Designated upon publication in Federal Register by Secretary of State in consultation with AG, DHS.
- Tier III Not designated, but group of two or more individuals, whether organized or not, that engages in or has a subgroup that engages in terrorist activities.
Abriel Refugee Law 2013

Relief under Consolidated Appropriations Act of 2007 and other provisions:


- Secretaries of DHS and State, in consultation with AG, may exempt individuals from TRIG bars. Some limitations, e.g., members and officers of Tier I and II orgs. To date, conduct and group exemptions:

  - Conduct exemptions:
    - Material support under duress
    - Solicitation under duress
    - Military-type training under duress
    - Voluntary provision of medical care

  - Group exemptions: association or activities with All-Burma Student’s Democratic Front; material support to All India Sikh Student’s Federation-Bittu Faction; certain association or activities with Iraqi National Congress, Kurdish Democratic Party, Patriotic Union of Kurdistan, Kosovo Liberation Army, participation in Iraqi uprisings against Saddam Hussein.

  - Factors for showing duress:
    - Whether the applicant reasonable could have avoided, or took steps to avoid, providing material support
    - The severity and type of harm inflicted or threatened
    - To whom the harm or threat of harm was directed
    - The perceived imminence of the harm threatened
    - The perceived likelihood that the threatened harm would be inflicted
    - Any other relevant factor regarding the circumstances under which the applicant felt compelled

- And must establish individual requirements.
  - Establish that he or she is otherwise eligible for the immigration benefit
  - Undergo and pass all required background and security checks;
  - Fully disclose, in all relevant applications and interviews with USG representatives and agents, the nature and circumstances of each provision of material support; and
  - Establish that he or she poses no danger to the safety and security of the United States.

Statistics: as of Sept. 1, 2012, 14,995 exemptions granted (not all refugees, some in other categories); 4,170 cases on hold.
Update on Terrorism-Related Inadmissibility Grounds: Most Recent Exemptions

By Jennie Guilfoyle

During the past decade, with the passage of the PATRIOT and REAL ID Acts, the terrorism-related bars to inadmissibility have grown far more complex, and have resulted in the denial of benefits – or indefinite hold in decisions – for many asylum seekers, potential refugees, asylees, refugees, and others. These grounds are found at INA § 212(a)(3)(B), and they make inadmissible any non-citizen who has “engaged in” “terrorist activities,” or been involved with “terrorist organizations,” including providing “material support” to a “terrorist organization.” The definitions of “terrorist,” “terrorist activities,” and “terrorist organizations” are highly complicated, and include in their broad sweep many activities and associations that we might otherwise view as heroic resistance, or as victimization by terrorists, such as being forced to assist terrorist organizations. Asylees and refugees have seen the very facts that gave rise to their initial protection claims used as a reason to deny or put on hold related applications like adjustment of status.

The law as originally written provided the Department of Homeland Security (DHS) and the Department of State (DOS) with some authority to exempt individuals from these grounds, but for a number of years both agencies did not exercise this discretion. DHS instead placed many adjustment of status applications for asylees and refugees on hold because of concerns that these applicants might be inadmissible under 212(a)(3)(B) either for terrorist activity or for providing material support to a terrorist organization.

There are no waivers available for these grounds, often referred to as “TRIG” (short for “terrorism-related inadmissibility grounds”), but DHS and DOS have in recent years begun to exercise their discretionary authority to grant exemptions from these grounds to some individuals. This article will summarize the exemptions that have been implemented from 2009 to the present, and will explain how DHS is currently handling TRIG-related cases – both those for which exemptions are currently available and those for which exemptions are not available.

Overview of Terrorism-Related Inadmissibility Grounds. INA § 212(a)(3)(B) makes inadmissible anyone who has “engaged in terrorist activity” or been involved in promoting terrorist activity, whether through specific acts or membership in a terrorist organization. This includes providing “material support” to a “terrorist organization.”

Under INA § 212(a)(3)(B)(1)(I-IX), anyone is inadmissible who has engaged in terrorist activity” or whom a consular officer, the Attorney General, or whom the DHS “knows or has reasonable ground to believe” is engaged in, or likely to engage in, terrorist activity after entry to the United States. It also includes those who has incited terrorist activity under circumstances intended to cause death or serious bodily harm, who is a representative or member of a terrorist organization, who endorses or espouses terrorist activity, who received military-type training
from a terrorist organization, or who is the spouse or child of anyone who did any of the above within the last five years.

The only exception is for spouses and children, who either did not know or could not reasonably have known about the terrorist activity in question, or who have “renounced” the terrorist activity.

What, then, is “terrorist activity”? The INA defines it at § 212(a)(3)(B)(iii) as hijacking or sabotage of a conveyance; seizing or detaining, and threatening to kill or injure someone in order to compel a third person (including a government) to do or not do something, as a condition of releasing the seized or detained person; violent attack against internationally protected person; assassination; using biological, chemical or nuclear weapon, explosive, firearm, or other weapon to endanger the safety of one or more persons or cause substantial property damage; threatening, attempting or conspiring to do any of foregoing.

The INA further defines “engaging in terrorist activity” at INA § 212 (a)(3)(B)(iv). The definition includes anyone who, as an individual, or as a member of an organization commits, or incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; prepares or plan a terrorist activity; solicits funds or “other things of value” for a terrorist activity or organization; or gives “material support” for the commission of a terrorist activity to an individual the supporter knows has committed or plans to commit terrorist activity or to a terrorist organization.

“Material support” under this provision includes: “a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons, explosives, or training.” The statute does not specify a minimum amount of support, monetary or otherwise, that would be considered “material,” and DHS has taken the position that there is no minimum amount. DHS considers that any support to or for terrorist activities, individuals or organizations, constitutes “material” support.

The only exception available is for someone who did not know and should not reasonably have known that the organization for which he or she was soliciting funds or providing material support, was a terrorist organization.
Terrorist Organizations: Tiers I, II, and III. Because belonging to, receiving military-type training from, or providing support to a “terrorist organization” makes one inadmissible, it’s essential to know what constitutes a “terrorist organization.” INA § 212(a)(3)(B)(vi)(I-III) sets out three categories of “terrorist organizations,” which are known as Tier I, II, and III organizations. Tiers I and II are organizations specifically designated by name by the State Department. They are posted on the State Department website; Tier I groups, known as “Foreign Terrorist Organizations” are currently listed at: http://www.state.gov/s/ct/rls/other/des/123085.htm. Tier II groups, known as the “Terrorist Exclusion List” are currently found at: http://www.state.gov/s/ct/rls/other/des/123086.htm.

Tier III groups, on the other hand, are not named specifically anywhere. DHS and EOIR adjudicators have the authority to determine that an organization falls into Tier III. The definition of a Tier III group is found at INA § 212(a)(3)(B)(iv): “a group of two or more individuals, whether organized or not, which engages in, or has a subgroup that engages in...terrorist activity.” Note that this definition, which puts “engage” in the present tense, specifies that the group must currently engage in “terrorist activity.” Groups that engaged in terrorist activity in the past but no longer do, including groups that no longer exist, should therefore not be considered Tier III organizations.

Exemptions Implemented in 2009-2011. During 2009, 2010, and 2011, DHS has exercised its exemption authority in two different ways: through group-specific and conduct-specific exemptions. The group-specific exemptions each name a specific organization or organizations, and allow exemptions for certain TRIG-related activities on behalf of those groups. The conduct-specific exemptions, on the other hand, relate to certain kinds of conduct, and may be granted for TRIG-related activities on behalf of any organization (for which there is overall exemption authority).


Pursuant to this memo, DHS will consider exemptions for individuals who engaged in certain activities on behalf of these three groups, as long as no civilians were targeted or harmed during the commission of the activities. These activities include: soliciting funds of things of value for one of these groups; soliciting an individual for membership in one of these groups; providing material support to one of these groups; being a representative of one of these groups; being a member of one of these groups; persuading others to support one of these groups; and getting military-type training from one of these groups.

The DHS will especially scrutinize exemption requests in cases in which the alien: committed (or incited) a terrorist activity, with intention to cause death or serious bodily injury; prepared or
planned a terrorist activity; gathered information on potential targets for terrorist activity; solicited funds (or other things of value) for a terrorist activity, or another activity described in INA § 212(a)(3)(B)(iv); committed an act alien knows, or should reasonably have known, gives material support for commission of a terrorist activity, or to a person whom the alien knows, or reasonably should know, has committed or plans to commit a terrorist activity; has incited terrorist activity, with the intention to cause death or serious bodily harm; is a representative of a political, social or other group that endorses or espouses terrorist activity; or endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity.

On December 29, 2010, USCIS issued a memo implementing two more group-specific exemptions by DHS, for a Burmese organization, the ABSDF, and an Indian organization, AISSF-Bitu – but each exemption works somewhat differently and encompasses different conduct. The ABSDF exemption is broader – it allows for a discretionary exemption for individuals who engaged in TRIG-related activities or associations on behalf of the ABSDF, whether or not their conduct occurred under duress. The AISSF-Bitu exemption covers only individuals who have provided material support to AISSF-Bitu, whether or not they did so under duress.

ABSDF (Burma). The All Burma Students’ Democratic Front, known as the ABSDF, is neither a Tier I nor a Tier II organization; DHS considers it a Tier III organization. Pursuant to the December 29, 2010 memo, USCIS has discretion to exempt from the TRIG grounds individuals with “TRIG-related activities or associations relating to ABSDF,” whether or not these took place under duress. Along with determining that an individual is in fact eligible for the benefit he or she is seeking, and that he or she has passed background and security checks, USCIS will look at the following threshold requirements when determining whether or not to allow such exemptions, and will not grant exemptions to anyone who has participated in, or knowingly provided material support to, terrorist activities that targeted noncombatants, or U.S. interests, or who poses any danger to the safety and security of the United States.

The USCIS will also examine the following factors: nature of the individual’s activities with the ABSDF; whether or not the individual participated in any “violent activities”; the frequency of the support the individual provided; and the applicant’s conduct since he or she arrived in the United States.

The ABSDF exemption is quite broad, allowing USCIS to issue exemptions for almost all TRIG-related conduct on behalf of the ABSDF, as long as the individual did not engage in activities that targeted noncombatants or U.S. interests.

AISSF-Bitu (India). December 29, 2010 saw the issuance of a second USCIS memo implementing another group-based exemption, for the All India Sikh Students Federation – Bittu Faction (AISSF-Bitu). This memo has a somewhat narrower scope than the ABSDF exemption outlined above: it allows exemptions only for individuals who provided material support to the
AISSF-Bittu. As with the ABSDF exemption, USCIS will only grant exemptions to individuals who have not participated in, or knowingly provided material support to, terrorist activities that targeted either noncombatants or U.S. interests, or who pose any danger to the safety or security of the U.S. USCIS will also consider the same additional factors that it considers in ABSDF determinations: nature of the individual’s activities with AISSF-Bittu; whether or not the individual participated in any “violent activities”; the frequency of the support the individual provided; the applicant’s conduct since he or she arrived in the United States.

Conduct-Specific Exemptions: Military Training and Solicitation of Funds or Members Under Duress. The USCIS issued two memos in February 2011 that provide for exemptions based on specific conduct. Prior memos focused on exemptions for specific organizations. These new exemptions are focused on conduct, not on specific organizations. The two types of conduct covered by the memos are military-type training under duress, and solicitation of funds or members under duress.

The memo on solicitation explains that the solicitation-related exemption covers only the conduct described in INA § 212(a)(3)(B)(iv)(IV)(bb) and 212(a)(3)(B)(iv)(IV)(cc), solicitation of funds or other things of value for a terrorist organization, or solicitation of any individual for membership in a terrorist organization. The terrorist organizations may be from Tiers I, II, or III. The exemption does not cover solicitation of funds or individuals for a terrorist activity.

The military-type training exemption covers conduct laid out at 18 USC § 2339D(c)(1), and includes “training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production or assembly of any explosive, firearm, or other weapon, including any weapon of mass destruction.” The exemption only covers military-type training with organizations that were “terrorist organizations” at the time the persons in question received the training. The organizations may be from Tiers I, II, or III.

Both exemptions require that the activities in question occurred under duress, and both memos explain that duress means that the activities occurred “in response to a reasonably-perceived threat of serious harm.” Adjudicators are directed to examine the following factors (as well as others) in determining whether or not there was duress: whether the individual reasonably could have avoided, or took steps to avoid, the training or solicitation; the severity and type of harm inflicted or threatened, and to whom the harm was directed; and the perceived imminence of the harm threatened, and the perceived likelihood at the harm would be inflicted.

Both memos note that threats need not be directly communicated, but may be implicit from context and circumstances.

What is Happening with TRIG Cases Currently. As of early March 2011, USCIS had almost 4,000 cases on hold for TRIG-related issues. Those cases include a few hundred refugee and asylum applications, more than 3,000 refugee and asylee adjustment applications, and a much
smaller number of I-730 and other cases. As USCIS implements new exemptions, it will be looking at its on-hold caseload to determine which of those cases could be eligible for the new exemptions. As it identifies cases that are exemption-eligible, CIS has said that it will take these cases off hold for adjudication. At the same time, it will continue to keep on hold cases for which there is exemption authority, but that authority has not yet been exercised. These include cases for applicants inadmissible for TRIG-related activities, not under duress, for Tier III organizations, other than those for which exemptions already exist; applicants inadmissible for TRIG-related activities under duress (other than military-type training and solicitation of funds or members, as outlined in this article); applicant; and who voluntarily provided medical care to Tier I, II or III organizations, members of such organizations, or individuals who have engaged in terrorist activity; and the spouses and children of such applicants described above who fall under the bar at INA 212(a)(3)(B)(i)(IX).

**Conclusion.** The terrorism-related grounds are by far the most statutorily complex and convoluted grounds of inadmissibility. The growing list of exemptions is also extremely complex. If you are representing clients who might be subject to these bars, it is very important to keep up to date on which types of conduct and which groups are eligible for exemptions, and to keep copies of the relevant memos. There are more and more exemptions available, but as the outline in this article suggests, there are many factors for USCIS to consider in making exemption determinations, and so advocates will need to be well-informed in order to best advocate for clients who might be eligible for TRIG-related exemptions.
712 F.3d 1338  
United States Court of Appeals,  
Ninth Circuit.

Roberto Javier BLANDINO-MEDINA,  
Petitioner,  
v.  
Eric H. HOLDER, Jr., Attorney General,  
Respondent.

| Filed April 10, 2013.


Before: CARLOS T. BEA and ANDREW D. HURWITZ, Circuit Judges, and WILLIAM K. SESSIONS, District Judge.*

OPINION

BEA, Circuit Judge:

Roberto Xavier Blandino-Medina, a Nicaraguan citizen, seeks review of two decisions by the Board of Immigration Appeals ("BIA"): (1) a decision reversing an Immigration Judge's ("IJ's") grant of withholding of removal pursuant to the Convention Against Torture ("CAT"), and (2) a decision affirming the IJ's finding that Blandino's conviction for lewd and lascivious acts with a child under the age of 14, in violation of California Penal Code § 288(a), is a particularly serious crime, rendering him statutorily ineligible for withholding of removal.

We have jurisdiction under 8 U.S.C. § 1252(a)(1). We affirm the BIA's decision concerning withholding of removal pursuant to the CAT, but vacate its decision holding that Blandino's conviction under Section 288(a) is a particularly serious crime per se, and remand to the BIA to consider the circumstances of the offense.

I. Facts and Procedural Background

Blandino is a Nicaraguan citizen, born in 1982. Several members of Blandino's family were affiliated with the Somoza regime, and after the Sandinistas took power, his family was persecuted. Blandino's father fled to the United States in 1986 and was later granted political asylum. In 1987, Blandino came to California to live with his father.

When Blandino was ten years old, his father sent him back to Nicaragua. Shortly after returning, Blandino encountered problems with the Sandinista National Liberation Front ("FSLN"). While Blandino was in school, the FSLN forced students to do manual labor. Blandino was forced to build barricades and beaten for not complying with the FSLN's instructions. When he
was fifteen years old, Blandino was detained by the police for three days and questioned about his parents.

On December 19, 1998, Blandino entered the United States without permission and was apprehended by Border Patrol agents. The Immigration and Nationalization Service ("INS") sought to remove him for entering the country illegally. Blandino applied for Temporary Protected Status ("TPS"), and in 1999 the INS granted that application and closed removal proceedings.

Since 1999, Blandino has been convicted of three crimes. The third conviction is central to this appeal: a 2008 guilty plea to the felony of lewd and lascivious conduct with a child under the age of fourteen in *1341 violation of Section 288(a), for which Blandino was sentenced to one year in county jail, five years of felony probation, and registration as a sex offender.

In 2009, the Department of Homeland Security ("DHS") re-instituted removal proceedings. Blandino appeared before an IJ, conceded the legal and factual bases for removal, but sought cancellation of removal and adjustment of status (along with a waiver of inadmissibility) pursuant to 8 U.S.C. § 1182(h), as a spouse or child of a person granted asylum. Claiming political persecution, Blandino also applied for asylum, withholding of removal under 8 U.S.C. § 1231(b)(3), and relief under the CAT.

The IJ denied Blandino’s applications for cancellation of removal and for a waiver of inadmissibility in conjunction with his application for adjustment of status. The IJ also denied Blandino’s asylum application. However, the IJ granted Blandino’s application for withholding of removal under 8 U.S.C. § 1231(b)(3), and relief under the CAT.

On remand, the IJ noted that he had previously found Blandino’s Section 288(a) conviction not particularly serious because “respondent honestly believed based upon the victim’s representation that she was 19 years old.” After examining the elements of Section 288(a), but without reexamining the facts and circumstances of Blandino’s conviction, the IJ concluded that Blandino had been convicted of a particularly serious crime.

The BIA dismissed Blandino’s appeal, agreeing “with the Immigration Judge’s determination that the respondent is ineligible for withholding of removal under the [INA] as his offense constitutes a ‘particularly serious crime’ per se.” This petition for review followed.

III. The BIA’s Authority to Determine that Certain Offenses Are “Particularly Serious Crimes” Per Se

Whether the BIA applied the proper legal standard in determining whether Blandino’s crime was “particularly serious” *1343 raises a question of law. We have jurisdiction over questions of law raised in petitions for review. 8 U.S.C. § 1252(a)(2)(D); see also Miguel–Miguel v. Gonzales, 500 F.3d 941, 944 (9th Cir.2007). Although we “cannot reweigh evidence to determine if the crime was indeed particularly serious, [we] can determine whether the BIA applied the correct legal standard.” Afriyie v. Gonzalez, 442 F.3d 1212, 1218 (9th Cir.2006). This Court reviews both the BIA’s decision and those portions of the IJ’s decision incorporated by the BIA. See Kalubi v. Ashcroft, 364 F.3d 1134, 1137 n. 3 (9th Cir.2004).

A. Standard of Review and Chevron Deference


The first step of the Chevron analysis considers whether “the statute is silent or ambiguous with respect to the specific issue.” Chevron, 467 U.S. at 843, 104 S.Ct. 2778. “If the intent of Congress is clear, that is the end of the
matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842–43, 104 S.Ct. 2778. Courts "only defer ... to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous." INS v. St. Cyr, 533 U.S. 289, 320 n. 45, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (quoting Chevron, 467 U.S. at 843, 104 S.Ct. 2778).

"[I]f the statute is silent or ambiguous with respect to the specific issue," the court moves to step two of the Chevron inquiry, and considers "whether the agency's answer is based on a permissible construction of the statute." Chevron, 467 U.S. at 843, 104 S.Ct. 2778. "Deference 'is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations.'" Aguirre–Aguirre, 526 U.S. at 425, 119 S.Ct. 1439 (quoting INS v. Abuda, 485 U.S. 94, 110, 108 S.Ct. 904, 99 L.Ed.2d 90 (1988)).

B. Statutory Framework

Applying the "traditional tools of statutory construction," we conclude that 8 U.S.C. § 1231(b)(3)(A) is not ambiguous.

We begin with the text and the history of the statute. Section 1231(b)(3)(A)(i) provides that an alien may not be removed to a nation in which his life or freedom would be threatened on a protected ground unless "the Attorney General decides ... the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." Before 1990, the Immigration and Nationality Act did not define "particularly serious crime." See Miguel–Miguel, 500 F.3d at 945.

In Matter of Frentescu, 18 I. & N. Dec. 244 (BIA 1982), the BIA developed a multi-factor test for determining whether a crime was particularly serious. Frentescu had been convicted of burglary, sentenced to three months in jail, and placed on probation for one year. Id. at 245. To determine whether Frentescu had been convicted of a "particularly serious crime," the BIA described the required inquiry as follows:

*1344 While there are crimes which, on their face, are "particularly serious crimes," or clearly are not "particularly serious

Id. at 247. After applying these “Frentescu factors” the BIA found that Frentescu’s crime was not particularly serious, because it was a crime against property, he had not been armed, and had received a relatively short sentence. Id.

In 1990, we held that Frentescu’s case-by-case analysis was mandatory and that the BIA could not create categories of per se particularly serious crimes. Beltran–Zavala v. INS, 912 F.2d 1027 (9th Cir.1990). We explained:

If Congress wanted to erect per se classifications of crimes precluding immigration and nationality benefits, it knew how to do so ... In contrast, the language of [the particularly serious crime provision], as interpreted in Frentescu, commits the BIA to an analysis of the characteristics and circumstances of the alien’s conviction.

Id.

Since Beltran–Zavala, Congress has thrice amended the provision barring withholding of removal for those convicted of certain crimes. In 1990, Congress amended the INA to provide that all aggravated felonies were categorically particularly serious crimes. Immigration Act of 1990, Pub.L. No. 101–649, § 515 (Nov. 29, 1990). This amendment effectively overruled Matter of Frentescu and Beltran–Zavala in part, by precluding case-by-case analysis of an aggravated felony. See Afridi,
442 F.3d at 1220 n. 4.


*1345 [A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.


Thus, the current version of the statute establishes a two-tiered approach. Aggravated felonies for which an alien receives a sentence of imprisonment of five years or more are particularly serious crimes per se. This per se class, however, "shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime." Id. The question at the first step of the Chevron inquiry is whether the statute is ambiguous as to whether the Attorney General has authority to create additional categories of per se particularly serious crimes.

We find that Congress has clearly expressed its intent: the overall structure of the INA compels the conclusion that Section 1231(b)(3)(B)(iv) establishes but one category of per se particularly serious crimes, and requires the agency to conduct a case-by-case analysis of convictions falling outside the category established by Congress. See Illinois Pub. Telecommcns Ass’n v. Federal Commcns Comm., 117 F.3d 555, 568, decision clarified on reh’g, 123 F.3d 693 (D.C.Cir.1997) ("[U]nder step one of Chevron, we consider not only the language of the particular statutory provision under scrutiny, but also the structure and context of the statutory scheme of which it is a part.").

We start by applying the basic statutory construction principle of expressio unius est exclusio alterius. Under that principle, the express creation of one category of per se particularly serious crimes should be understood as the exclusion of other categorically particularly serious crimes. See Silvers v. Sony Pictures Ent’ts, Inc., 402 F.3d 881, 885 (9th Cir.2005) (en banc) ("The doctrine of expressio unius est exclusio alterius ‘as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.’ " ) (quoting Boudette v. Barnette, 923 F.2d 754, 756–57 (9th Cir.1991)).

This reading is also the most consistent with the structure of the INA as a whole. Congress put considerable effort into delineating which crimes should be categorized as particularly serious per se. The extensive and detailed definition of the term "aggravated felony" in 8 U.S.C. § 1101(a)(43) demonstrates that Congress made specific decisions about what sorts of crimes should qualify as facially particularly serious. Cf. Alphonseus v. Holder, 705 F.3d 1031, 1043 (9th Cir.2013) ("The aggravated felony definitions serve both to delineate the group of per se particularly serious crimes and to suggest the types of crimes most likely to be covered by the statute even when the aggregate sentence is less than five years.").

Our conclusion that Section 1231(b)(3)(B)(iv) precludes the agency’s creation of additional categories of particularly serious crimes per se is supported by a comparison between Section 1231, which *1346 governs withholding of removal, and Section 1158, which governs asylum. Section 1158(b)(2)(A)(ii) prohibits the Attorney General from granting asylum to an alien "if the Attorney General determines that ... the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." This language is nearly identical to the provision at issue in this case, which provides that an alien shall not be eligible for withholding of removal "if the Attorney General decides that ... the alien, having been convicted by a final judgment of a particularly

There are, however, key differences between the two provisions. All aggravated felonies are categorically particularly serious crimes for the purposes of asylum, but only aggravated felonies for which the alien was sentenced to at least five years' imprisonment are categorically particularly serious for the purposes of withholding of removal. Compare 8 U.S.C. § 1182(a)(3)(B) (asylum) with 8 U.S.C. § 1231(b)(3)(B)(iv) (withholding of removal). More importantly, the provisions differ in describing how the Attorney General may designate other crimes as “particularly serious.” The withholding of removal provision allows the Attorney General to determine “that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.” 8 U.S.C. § 1231(b)(3)(B)(iv). In contrast, the asylum statute allows the Attorney General to “designate by regulation offenses that will be considered to be a [particularly serious crime].” 8 U.S.C. § 1182(a)(3)(B)(ii).

We noted in Delgado v. Holder that “[t]here is little question that [the asylum] provision permits the Attorney General, by regulation, to make particular crimes categorically particularly serious even though they are not aggravated felonies.” 648 F.3d 1095, 1106 (9th Cir.2011) (en banc) (emphasis in original). However, the withholding of removal statute is notably missing an analogue provision permitting the Attorney General to designate crimes as categorically particularly serious even if they are not aggravated felonies for which the defendant has received a sentence of at least five years.

The current language of both provisions was simultaneously enacted by Congress in 1996, when it passed the IRIRA. See Pub.L. No. 104-208, div. C, sec. 305, § 241, and sec. 604, § 208 (Sept. 30, 1996). “When Congress includes particular language in one section of a statute but omits it in another section of the same Act... it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.” Clay v. United States, 537 U.S. 522, 528-29, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003) (quoting Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)). This principle bolsters our conclusion that Congress's failure to include a provision explicitly granting the Attorney General the authority to designate offenses as categorically particularly serious crimes in the withholding of removal context precludes the agency’s interpretation of the statute as granting it that authority.

For these reasons, we conclude that Section 1231(b)(3)(B)(iv) unambiguously provides one category of particularly serious crimes per se, precluding the agency's interpretation of the statute as allowing it to create additional categories of facially particularly serious crimes.

C. BIA and Ninth Circuit Precedent

Although we base our conclusion on the text, history, and structure of the statute, our holding also comports with Ninth Circuit precedent and with the BIA's practice of applying the Frentescu case-by-case analysis in most cases involving convictions of offenses other than aggravated felonies. In two en banc decisions, the BIA held that the IRIRA revived the Frentescu case-by-case analysis for aggravated felony convictions resulting in a sentence of less than five years. See Matter of L-S-, 22 I. & N. Dec. 645, 649 (BIA 1999) (en banc), Matter of S-S-, 22 I. & N. Dec. 458, 463-65 (BIA 1999) (en banc). In 2006, this court accordingly reversed a decision by the BIA for failure to apply the Frentescu factors. See Afridi, 442 F.3d at 1218. Afridi was convicted under California Penal Code § 261.5(c) for unlawful intercourse with a minor who was more than three years younger than the perpetrator and was sentenced to three years' probation. Id. at 1214. The BIA found him statutorily ineligible for withholding of removal because he had been convicted of a particularly serious crime. Id. at 1217. This court granted the petition for review in part noting, "The BIA considered two of the Frentescu factors, the nature of the conviction and the sentence imposed...[but] the BIA did not consider the circumstances and underlying facts of the conviction." Id. at 1219. We specifically noted that under the most recent statutory amendments, “aggravated felonies resulting in sentences fewer than five years are not per se particularly serious and still require a case-by-case analysis, as laid out in Frentescu.” Id. at 1220 n. 4.

The government argues that we should defer to the BIA's construction of 8 U.S.C. § 1231 in Matter of N-A-M-, 24 I. & N. Dec. 336 (BIA 2007), that it may designate an offense as a particularly serious crime per se. But, because we have already resolved this case at the first step of the Chevron inquiry, we do not move to the second
The step of the inquiry, in which we ask whether the agency's interpretation is a “permissible construction” of the statute. *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. We note briefly, however, that *Matter of N-A-M* does not necessarily support the government’s position. The respondent in that case was convicted of felony menacing and sentenced to four years' deferred judgment. 24 I. & N. Dec. at 337. The BIA stated that where “a conviction is not for an aggravated felony for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years, we examine the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction.” *Id.* at 342. The agency noted in dictum that “[o]n some occasions, we have focused exclusively on the elements of the offense,” but “we have generally *1348 examined a variety of factors and found that the consideration of the individual facts and circumstances is appropriate.” *Id.* (internal quotations omitted). And, although stating that “the respondent’s offense is a particularly serious crime based solely on its elements,” the BIA nonetheless examined the individualized characteristics of the offense, including the fact that the offense was a crime against a person, that the respondent was required to register as a sex offender, and the statement in support of the warrantless arrest describing the nature of the respondent’s crime. *Id.* at 343.

We acknowledge that two other circuits have assumed, without explicitly deciding, that the BIA can make the “particularly serious crime” determination based solely on the elements of the offense. However, no Ninth Circuit decision so holds, and our considered analysis of the statute at issue compels a contrary conclusion.

**IV. Substantial Evidence Supported the BIA’s Finding that Blandino Failed to Establish a Clear Probability of Torture**

*14 We affirm the BIA’s denial of withholding of removal under the CAT because Blandino has not established a clear probability that he would be tortured if he returned to Nicaragua. This court reviews “for substantial evidence the factual findings underlying the ... BIA’s determination that [the applicant] was not eligible for deferral of removal under the CAT.” *Arbid v. Holder*, 674 F.3d 1138, 1143 (9th Cir.2012). Under this standard, “administrative findings of fact are conclusive unless any reasonable

adjudicator would be compelled to conclude to the contrary.” 8 U.S.C. § 1252(b)(4)(B).

In its initial decision to grant Blandino relief under CAT, the IJ specifically identified the past persecution of Blandino’s family as grounds for granting relief. On appeal, the BIA found that the record as a whole provided insufficient evidence to establish that it was “more likely than not” that Blandino would be tortured by the Nicaraguan government, and noted that rather than presenting hard evidence of a probability that he would be tortured, Blandino merely presented a series of worst-case scenarios. Furthermore, he did not present evidence that similarly-situated individuals are being tortured by Nicaraguan officials. Given the deference this court must afford to the BIA’s findings of fact, we affirm its decision to deny CAT relief to Blandino.

**Conclusion**

For the foregoing reasons, we GRANT Blandino’s petition for review of the BIA’s *1349 determination that* he committed a particularly serious crime, and we REMAND with instructions that the agency engage in a case-specific analysis in accordance with *Matter of Frenescu* to determine whether Blandino’s conviction under Section 288(a) is a particularly serious crime, rendering him statutorily ineligible for withholding of removal.

We DENY Blandino’s petition for review of the BIA’s denial of his claim for relief under the Convention Against Torture.

All pending motions in this case are DENIED.

**GRANTED IN PART, DENIED IN PART, AND REMANDED.**

**Parallel Citations**

The Honorable William K. Sessions, III, District Judge for the U.S. District Court for the District of Vermont, sitting by designation.

California Penal Code § 288(a) states: "Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part I, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

8 U.S.C. § 1231(b)(3)(B)(i) provides that an alien may not be removed to a nation in which his life or freedom would be threatened on a protected ground unless "the Attorney General decides ... the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States."

The BIA did not identify in Matter of Frentescu any crimes that were, on their face, "particularly serious crimes" or clearly not "particularly serious crimes."

The Frentescu factors have evolved slightly. The BIA no longer engages "in a separate determination to address whether the alien is a danger to the community. Matter of N-A-M-, 24 I. & N. Dec. 336, 342 (BIA 2007); see also Kankanamalage v. I.N.S., 335 F.3d 856, 861 n. 2 (9th Cir.2003) ("Once the INS makes a finding that an offense constitutes a particularly serious crime, a separate determination of danger to the community is not required.").

At that time, only a limited number of offenses had been designated "aggravated felonies." See Pub.L. No. 100–690, § 7342, 102 Stat. 4181, 4469–70 (1988 version of the INA) (defining "aggravated felony" as: "murder; any drug trafficking crime ... or any illicit trafficking in any firearms or destructive devices"). The Immigration Act of 1990 added money laundering and crimes of violence for which the term of imprisonment is at least five years to the list of aggravated felonies. See Pub.L. No. 101–649, § 501, 104 Stat. 4976, 5048.

"As used in immigration law, 'aggravated felony' is a term of art referring to the offenses enumerated in [8 U.S.C.] § 1101(a)(43)." Delgado v. Holder, 566 F.3d 1085, 1101 (9th Cir.2011) (en banc).

Prior to the enactment of the IIRIRA, the asylum statute did not have a "particularly serious crime" provision; rather, it simply stated that aliens convicted of aggravated felonies were ineligible for asylum. See 8 U.S.C. § 1158 (Apr. 24, 1996).

In Matter of S–S–, the BIA also noted that "Congress easily could have designated categories of aggravated felonies that it considered to be particularly serious crimes—either independently or in conjunction with a specific sentence—but it did not do so." 22 I. & N. Dec. at 464. After holding that an individualized consideration of the facts and circumstances of each conviction for aggravated felonies resulting in less than five years' imprisonment was necessary, the BIA went on to note, "We leave for another day the question of whether, and under what conditions, it might be appropriate, as a matter of discretion, for the Attorney General to designate certain offenses as being particularly serious crimes per se." Id. at 465 n. 7.

The BIA cited Matter of Garcia–Garrocho, 19 I. & N. Dec. 423, 425–26 (BIA 1986), in support of this proposition. The applicant in Garcia–Garrocho has been convicted of first-degree burglary in violation of New York Penal Law § 140.30. Id. at 425. The BIA stated that certain crimes are "inherently" or "per se" particularly serious, and require "no further inquiry into the nature and circumstances of the underlying conviction," id., and held that "the applicant's conviction for burglary in the first degree is within the category of crimes that are per se 'particularly serious.' " Id. at 426. However, Garcia–Garrocho predates the 1996 passage of IIRIRA, which established the two-tier approach to determining which offenses are particularly serious crimes.

In Hamama v. INS, which was decided several months before the "particularly serious crimes" provision at issue in this case was enacted by the IIRIRA, the Sixth Circuit stated that the BIA "has the prerogative to declare a crime particularly serious without examining each and every Frentescu factor." 78 F.3d 233, 240 (6th Cir.1996). In LapaiX v. U.S. Attorney General, the Eleventh Circuit stated that in making the "particularly serious crime" determination, the IJ is "free to rely solely on the elements of the offense," but that "IJ's generally consider additional evidence" and apply the Frentescu factors. 605 F.3d 1138, 1143 (11th Cir.2010).
Relief under the Convention against Torture
Refugee Law

Protection Under the UN Convention against Torture
- DHS prohibited from returning person to country where person would be subjected to torture
- CAT - 8 CFR §§ 208.16, 17, and 18
- Apply before CIS or IJ
- Form I-589 (same as for asylum and withholding)
- Applicant must prove more likely than not would be tortured if returned.

ELEMENTS OF CAT CLAIM
- Nature of harm: infliction of torture (intentional acts that cause severe physical or mental pain)
- Motivation to harm: for an impermissible purpose (i.e., coercion, intimidation, or discrimination) as opposed to lawful sanction.
- Agent of harm: with the involvement (instigation, consent, or acquiescence) of public authority.

Elements of CAT claim as implemented by the United States:
- Applicant must prove more likely than not would be tortured if returned.
- Not all physical and mental mistreatment amounts to torture; extreme form of cruel and inhuman treatment.

Assessing the CAT claim
- All evidence relevant to the possibility of future torture shall be considered, including, but not limited to:
  - Evidence of past torture inflicted upon the applicant;
  - Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
  - Evidence of gross, flagrant, or mass violations of human rights within the country of removal; and
  - Other relevant information regarding conditions in the country of removal.
- 8 C.F.R. §§ 208.16(c)(2) and (3).

Mental pain or suffering can result from:
- Intentional infliction or threatened infliction of severe physical pain or suffering;
- Administration or threatened administration of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality;
- Threats of imminent death;
- Threats to another person.
For CAT, torture must be:
- Specifically intended to cause severe pain or suffering.
- By, at instigation of or with acquiescence of person acting in official capacity who has custody or control of victim
- Not arising out of lawful sanctions, such as death penalty
- Inflicted for purpose of obtaining information, punishing, intimidating, coercing person or third person.
- Need not be on account of one of the Convention grounds.

Two types of relief under CAT
- Article 3 withholding of removal
- Deferral for persons who fall under one of mandatory bars
  - Persecutors of others
  - Conviction of particularly serious crime
  - National security risks
- Neither gives permanent residence, neither provides for family members.
An alien seeking protection under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment must establish that it is more likely than not that he will be tortured in the country of removal.

Torture within the meaning of the Convention Against Torture and 8 C.F.R. § 208.18(a) (2001) is an extreme form of cruel and inhuman treatment and does not extend to lesser forms of cruel, inhuman, or degrading treatment or punishment.

For an act to constitute “torture” it must satisfy each of the following five elements in the definition of torture set forth at 8 C.F.R. § 208.18(a): (1) the act must cause severe physical or mental pain or suffering; (2) the act must be intentionally inflicted; (3) the act must be inflicted for a proscribed purpose; (4) the act must be inflicted by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) the act cannot arise from lawful sanctions.

According to 8 C.F.R. § 208.16(c)(3) (2001), in adjudicating a claim for protection under Article 3 of the Convention Against Torture, all evidence relevant to the possibility of future torture must be considered, including, but not limited to: (1) evidence of past torture inflicted upon the applicant; (2) evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured; (3) evidence of gross, flagrant, or mass violations of human rights within the country of removal, where applicable; and (4) other relevant information regarding conditions in the country of removal.

The indefinite detention of criminal deportees by Haitian authorities does not constitute torture within the meaning of 8 C.F.R. § 208.18(a) where there is no evidence that the authorities intentionally and deliberately detain deportees in order to inflict torture.

Substandard prison conditions in Haiti do not constitute torture within the meaning of 8 C.F.R. § 208.18(a) where there is no evidence that the authorities intentionally create and maintain such conditions in order to inflict torture.

Evidence of the occurrence in Haitian prisons of isolated instances of mistreatment that may rise to the level of torture as defined in the Convention Against Torture is insufficient to establish that it is
more likely than not that the respondent will be tortured if returned to Haiti.


I. ISSUE

The issue before us is whether the respondent is eligible for protection under Article 3 of the Convention Against Torture. To decide this issue, we must address two questions in particular: first, whether any actions by the Haitian authorities—indefinite detention, inhuman prison conditions, and police mistreatment—constitute torturous acts within the definition of torture at 8 C.F.R. § 208.18(a) (2001); and, if so, whether the respondent has established that it is more likely than not that he will be tortured if removed to Haiti. See 8 C.F.R. § 208.16(c) (2001).

II. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of Haiti. He entered the United States without inspection at an unknown time and place, On June 22, 2000, the respondent was convicted of sale of cocaine, a second degree felony under Florida law.

*293 At a continued removal hearing on July 2, 2001, the respondent testified that upon his return to Haiti he will be persecuted and tortured by Haitian authorities. He related that he left Haiti in 1990, and that his mother was killed in 1990 and his grandfather in 1995, each as a result of a property dispute. The respondent’s father, who testified on his son’s behalf, explained that his family had never had any problems with the Haitian Government, only property disputes with neighbors. His testimony differed from the respondent’s regarding his last trip to Haiti.

In further support of his claim, the respondent submitted five recent newspaper articles addressing Haitian prison conditions, as well as a set of photographs of malnourished, dying Haitian inmates. He also submitted the Department of State’s Background Note: Haiti, dated April 2001. Bureau of Western Hemisphere Affairs, U.S. Dep’t of State, Background Note: Haiti (Apr. 2001), available at

http://www.state.gov/r/ia/bgn/index.htm ("Background Note"). All of the articles confirm the Department of State’s assessment of the inhuman prison conditions in Haiti. Only one article, written by a Miami Herald reporter in 2001, references police mistreatment. The reporter spoke with two inmates at the Penitentier National prison, who stated that they had been abused by the authorities. One male inmate had burn marks on his chest and arm, and one female inmate claimed that the guard beat her. When confronted with these accusations, the prison warden’s response was equivocal. He intimated that prisoners are beaten, but not severely.

**3** The record also contains a letter dated April 12, 2001, to the Immigration Judge from Mr. William E. Dilday, Director of the Office of Country Reports and Asylum Affairs at the Department of State’s Bureau of Democracy, Human Rights and Labor. Mr. Dilday reports that Haitians deported from the United States on criminal grounds will be detained in Haiti until a commission determines a release date. The commission does not meet regularly, so Haitian detainees may be held for weeks in police holding cells before they are released. According to Haitian authorities, criminal detainees are temporarily detained to deter criminal activity in Haiti. The State Department also reports that prison facilities are overcrowded and inadequate. Haitian prisoners are deprived of adequate food, water, medical care, sanitation, and exercise. Many prisoners are malnourished. According to prison officials, in November 2000, 5 of the 10 prison deaths were attributable to malnutrition. At the conclusion of the respondent’s hearing, the Immigration Judge found him removable as charged; statutorily ineligible for asylum because of his aggravated felony conviction; ineligible for withholding of removal; and ineligible for protection under Article 3 of the Convention Against Torture because of his failure to establish that it is more likely than not that he will be tortured if returned to Haiti. Accordingly, he ordered the respondent deported to Haiti.

*294 On appeal, the respondent claims that he will be persecuted and tortured if returned to Haiti because he will be subject to indefinite detention as a repatriated Haitian convict. The Immigration and Naturalization Service filed a memorandum adopting the decision of the Immigration Judge and requesting that his decision be affirmed. For the reasons set forth below, the appeal will be dismissed.

III. ANALYSIS

A. Convention Against Torture

Article 3 of the Convention Against Torture precludes the United States from returning an alien to a state where there are substantial grounds for believing that he would be subjected to torture. To ascertain the nature and extent of the protection afforded by the United States under Article 3, we must examine the history of the negotiations, ratification, and implementation of the Convention in the United States.

We begin our analysis by examining the origins of the Convention Against Torture. In 1977, the United Nations General Assembly requested that the United Nations Human Rights Commission draft a convention against torture. For more than 6 years, several nations, including the United States, negotiated the provisions of the instrument. In March 1984, a draft convention was accepted by the

**4*295 The history of the negotiations reveals that a central issue for the drafters of the Convention Against Torture was whether the definition of "torture" should include solely acts of torture or also "other acts of cruel, inhuman, and degrading treatment or punishment." See Ahecne Boulesbaa, The U.N. Convention on Torture and the Prospects for Enforcement 5 (1999) (citing U.N. Doc. E/CN.4/1314 (1978)). The United States took the position that "torture" is limited to extreme forms of cruel, inhuman, or degrading treatment or punishment. Id.; see also Senate Report, supra, at 2-3. The definition of torture ultimately adopted by the General Assembly and set forth in Article I of the Convention Against Torture does not include "other acts of cruel, inhuman or degrading treatment or punishment."4

Instead, "other acts of cruel, inhuman or degrading treatment or punishment" are prohibited under Article 16 of the Convention. Article 16.1 obligates Convention signatories to prevent in any territory under their jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Thus, the Convention Against Torture draws a clear distinction between torturous acts as defined in Article I and acts not involving torture referenced in Article 16. The severity of the pain and suffering inflicted is a distinguishing characteristic of torture.5 This distinction is further emphasized by the different obligations that attach to each. The obligations undertaken by a State Party regarding acts of torture are far more comprehensive than those regarding nontorturous acts.6 Notably, the protection afforded under *296 Article 3 extends only to acts of torture as defined in Article 1 of the Convention.

On April 18, 1988, President Reagan signed the Convention Against Torture and transmitted it to the Senate the following month with 17 conditions, which were later revised by the Bush Administration. On October 27, 1990, the Senate adopted its resolution of advice and consent to ratification. The treaty became effective binding on the United States on November 20, 1994.

The Senate ratified the Convention subject to two reservations, five understandings, two declarations, and a proviso. See 136 Cong. Rec. S17,486, S17,491-92 (daily ed. Oct. 27, 1990) ("Senate Resolution"). Two of the Senate's understandings directly relate to Article 3 of the Convention and, consequently, to this case in particular.7 These understandings, which have been incorporated in the implementing regulations, are critical to comprehending the United States' obligations under Article 3. Notably, the Senate ratified the Convention subject to an understanding that refines the definition of torture contained in Article 1 of the Convention. See Senate Resolution, supra, II.(1)(a)-(e). As detailed below, this understanding is incorporated into the federal regulations at 8 C.F.R. § 208.18(a).
Another of the Senate’s understandings provides that “where there are substantial grounds for believing that he would be in danger of being subjected to torture,” as used in Article 3 of the Convention, means “if it is more likely than not that he would be tortured.” Senate Resolution, supra, II.(2). The ratification history reveals that the standard of proof for protection under Article 3 is the same as the standard of proof for withholding of removal under section 241(b)(3) of the Act. See Report of the Committee on Foreign Relations, S. Exec. Rep. No. 30, 101st Cong., 2d Sess., 16-17 (1990) (“Senate Report”). This understanding is incorporated in the federal regulations at 8 C.F.R. § 208.16(c)(2).

B. Regulatory Definition of Torture


These federal regulations govern our decision in this case. The regulatory definition of torture incorporates the definition of Article 1 of the Convention and draws directly from the reservations, understandings, declarations, and proviso contained in the Senate’s resolution of advice and consent to ratify the Convention, and the ratification documents. See Senate Resolution, supra, II.(1)(a)-(c), 4; see also Regulations Concerning the Convention Against Torture, 64 Fed. Reg. at 8482-83 (Supplementary Information). The regulations reflect the United States’ longstanding position that torture is an extreme form of cruel, inhuman, or degrading treatment or punishment. See 8 C.F.R. §§ 208.18(a)(1), (2); see also Senate Report, supra, at 13.

Instead of categorizing acts that constitute torture, the regulatory definition of torture sets forth criteria that must be applied in determining whether a given act amounts to torture. See Regulations Concerning the Convention Against Torture, 64 Fed. Reg. at 8482. For an act to constitute torture it must be: (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions. 8 C.F.R. § 208.18(a).

First, the act must cause severe pain or suffering, physical or mental. It must be an extreme form of cruel and inhuman treatment, not lesser forms of cruel, inhuman, or degrading treatment or punishment that do not amount to torture. 8 C.F.R. §§ 208.18(a)(1), (2). Mental pain or suffering may constitute torture if it falls within the regulatory definition at 8 C.F.R. § 208.18(a)(4). See Senate Resolution, supra, II.(1)(a).

While the Convention Against Torture makes a clear distinction between torturous and nontorturous
acts, actually differentiating between acts of torture and other bad acts is not so obvious. Although not binding on the United States, the opinions of other governmental bodies adjudicating torture claims can be instructive.

Pursuant to Article 3 of the European Convention on Human Rights, a Contracting State Party may not expel an individual to a country where he would be placed at risk of torture or inhuman or degrading treatment. *298 European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950 (“European Convention”), available at http://www.hrcr.org/docs/Eur_Convention/euroconv.html.* In adjudicating such claims, the European Court has differentiated three levels of mistreatment: torture, inhuman treatment, and degrading treatment. *10 See Greek Case, 12 Y.B. Eur. Conv. on H.R. 1 (1969).*

In *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25 (1978), the European Court struggled to determine whether the acts complained of constituted torture or other, lesser forms of cruel or inhuman treatment. It observed that torture is an aggravated and deliberate form of cruel, inhuman, or degrading treatment resulting in intense suffering. Degrading treatment is characterized by gross humiliation of an individual. In that case, the court held that suspected terrorists who were detained and subjected to wall standing, hooding, and constant loud, hissing noise, and who were deprived of sleep, food, and drink by the British Army had been subjected to inhuman and degrading treatment, but not torture.

Second, the act must be *specifically intended* to inflict severe physical or mental pain or suffering. 8 C.F.R. § 208.18(a)(5). This specific intent requirement is taken directly from the understanding contained in the Senate’s ratification resolution. Senate Resolution, *supra*, II.1(a). Thus, an act that results in unanticipated or unintended severity of pain or suffering does not constitute torture. In view of the specific intent requirement, the Senate Foreign Relations Committee noted that rough and deplorable treatment, such as police brutality, does not amount to torture. *See* Senate Report, *supra*, at 13-14.11

**7 Third, the act must have an illicit purpose. The definition of torture illustrates, but does not define, what constitutes a proscribed or prohibited purpose. Examples of such purposes include the following: obtaining information or a confession; punishment for a victim’s or another’s act; intimidating or coercing a victim or another; or any discriminatory purpose. The Foreign Relations Committee noted that these listed purposes indicate the type of motivation that typically underlies torture, and it recognized that the illicit purpose requirement emphasizes the specific intent requirement. *Id.* at 14.

*299 Fourth, torture covers intentional governmental acts, not negligent acts or acts by private individuals not acting on behalf of the government. The regulations require that the harm be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” 8 C.F.R. § 208.18(a)(1); *see also* Matter of Y-L-, A-G- & R-S-R-, 23 I&N Dec. 270 (A.G. 2002); *Matter of S-V-,* Interim Decision 3430 (BIA 2000).

To constitute torture, an act must be directed against a person in the offender’s custody or control. 8 C.F.R. § 208.18(a)(6). The term “acquiescence” requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to
intervene to prevent such activity. 8 C.F.R. § 208.18(a)(7). These federal regulations are taken directly from the Senate’s understandings upon which ratification was conditioned. See Senate Resolution, supra, II.(1)(b), (d); see also Matter of Y-L., A-G- & R-S-R., supra; Matter of S-V., supra.

Finally, the regulations incorporate the second sentence of Article 1 of the Convention Against Torture, which states that torture “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” 8 C.F.R. § 208.18(a)(3) (emphasis added). “Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.” Id.; see also Senate Resolution, supra, II.(1)(c), (e).

C. Treatment of Deportees to Haiti

In the case before us, the respondent asserts that he will be tortured in Haiti by the Government because Haitians deported from the United States on criminal grounds are detained indefinitely in prison facilities where prisoners are subjected to inhuman conditions and police mistreatment. We must determine whether any of these state actions—indefinite detention, inhuman prison conditions, and police mistreatment—constitute torturous acts within the meaning of the regulatory definition of torture.

**8 First, the respondent asserts that he will be tortured if returned to Haiti because he will be indefinitely detained by the Haitian authorities. It is undisputed that the respondent will be subject to detention of an indeterminate length on his return to Haiti. Letter from William E. Dilday, Director of Office of Country Reports and Asylum Affairs, Bureau of Democracy, Human Rights and Labor, U.S. Dep’t of State, to Immigration Judge (Apr. 12, 2001) (“Dilday letter”); Bureau of Democracy, Human Rights, and Labor, U.S. Dep’t of State, Haiti Country Reports on Human Rights Practices - 2000 (Feb. 2001), available at *300 http://www.state.gov/j/rls/hrrpt/2000/vha/index.htm, reprinted in Committees on Foreign Relations and International Relations, 107th Cong., 1st Sess., Country Reports on Human Rights Practices for 2000 2625 (Joint Comm. Print 2001) (“Country Reports”). According to the State Department, criminal deportees were once processed and released within 1 week. Country Reports, supra, at 2630. Now, due to irregular commission meetings, deportees are held for weeks in police holding cells prior to their release. Dilday letter, supra.

We recognize that Haiti has a legitimate national interest in protecting its citizens from increased criminal activity. According to the Country Reports, this detention procedure is designed “to prevent the ‘bandits’ from increasing the level of insecurity and crime in the country.” Country Reports, supra, at 2630. This confirms Mr. Dilday’s report that Haitian authorities detain criminal deportees “as a warning and deterrent not to commit crimes in Haiti.” Dilday letter, supra. Thus, Haiti’s detention policy in itself appears to be a lawful enforcement sanction designed by the Haitian Ministry of Justice to protect the populace from criminal acts committed by Haitians who are forced to return to the country after having been convicted of crimes abroad. We find that this policy is a lawful sanction and, therefore, does not constitute torture. See 8 C.F.R. § 208.18(a)(3). Additionally, there is no evidence that Haiti’s detention policy is intended to defeat the purpose of the Convention to prohibit torture.
Notwithstanding, the United States has condemned the manner in which Haiti is implementing its detention policy, that is, by detaining deportees for an indeterminate period. Although this practice is unacceptable and must be discontinued, there is no evidence that Haitian authorities are detaining criminal deportees with the specific intent to inflict severe physical or mental pain or suffering. 8 C.F.R. § 208.18(a)(5). Nor is there any evidence that Haiti’s detention procedure is inflicted on criminal deportees for a proscribed purpose, such as obtaining information or a confession; punishment for a victim’s or another’s act; intimidating or coercing a victim or another; or any discriminatory purpose. 8 C.F.R. § 208.18(a)(1). Based on the foregoing, we find that Haiti’s detention practice alone does not constitute torture within the meaning of the regulations.

*9 The respondent asserts that such indefinite detention, coupled with inhuman prison conditions, amounts to torture. In order to constitute torture, the act must be specifically intended to inflict severe pain or suffering. The *301 ratification documents make it clear that this is a “specific intent” requirement, not a “general intent” requirement. Senate Report, supra, at 14; see also Senate Resolution, supra, II.(a)(1). “Specific intent” is defined as the “intent to accomplish the precise criminal act that one is later charged with” while “general intent” commonly “takes the form of recklessness . . . or negligence.” Black’s Law Dictionary 813-14 (7th ed. 1999).

Although Haitian authorities are intentionally detaining criminal deportees knowing that the detention facilities are substandard, there is no evidence that they are intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture. See 8 C.F.R. §§ 208.18(a)(1), (5). In fact, according to an article submitted by the respondent, it was reported that President Aristide and his wife visited one of the prisons. President Aristide commuted the sentences of seven women in honor of Women’s Day and promised to make judicial reform one of his priorities in his 5-year term.

The record establishes that Haitian prison conditions are the result of budgetary and management problems as well as the country’s severe economic difficulties. Two thirds of the country’s population live in extreme poverty. Country Reports, supra, at 2626. According to the Department of State, even when the prison authorities purchase adequate food, there is no effective delivery system. Id. at 2630. Individual prison officials come to the warehouse, traveling by bus or taxi, and carry away as much food as they can. There is evidence that, although lacking in resources and effective management, the Haitian Government is attempting to improve its prison system.

Additionally, the Country Reports state that the Haitian Government “freely permitted the ICRC [International Committee of the Red Cross], the Haitian Red Cross, MICAH [International Civilian Mission for Support in Haiti], and other human rights groups to enter prisons and police stations, monitor conditions, and assist prisoners with medical care, food, and legal aid.” Country Reports, supra, at 2630. The ICRC funds and manages its own programs within the prison system. Id. at 2629. Moreover, as evidenced by the respondent’s documentary submissions, a reporter and a photographer from the Miami Herald were recently given access to Haiti’s prisons. For these reasons, we cannot find that these inexcusable prison conditions constitute torture within the meaning of the regulatory definition.
Finally, the respondent bases his torture claim on the likelihood that he will be mistreated by the Haitian authorities while indefinitely detained. The Country Reports describe incidents of deliberate mistreatment of detainees:

Police mistreatment of suspects at both the time of arrest and during detention remains pervasive in all parts of the country. Beating with the fists, sticks, and belts is by far the most common form of abuse. However, international organizations documented other forms of mistreatment, such as burning with cigarettes, choking, hooding, and kalot marassa (severe boxing of the ears, which can result in eardrum damage). Those who reported such abuse often had visible injuries consistent with the alleged maltreatment. There were also isolated allegations of torture by electric shock. Mistreatment also takes the form of withholding medical treatment from injured jail inmates. Police almost never are prosecuted for the abuse of detainees.

Country Reports, supra, at 2629.

This single paragraph in a 15-page report documents many forms of mistreatment which can be categorized as either torturous or nontorturous acts. Instances of police brutality do not necessarily rise to the level of torture, whereas deliberate vicious acts such as burning with cigarettes, choking, hooding, kalot marassa, and electric shock may constitute acts of torture. As noted above, the distinguishing characteristic of torture is the severity of the pain and suffering inflicted. The record reflects that there are isolated instances of mistreatment in Haitian prisons that rise to the level of torture within the meaning of 8 C.F.R. § 208.18(a).

D. Burden of Proof

The question before us is whether the respondent has established his eligibility for protection under Article 3 of the Convention. The respondent bears the burden of proving that it is more likely than not that he will be tortured if returned to Haiti. The respondent’s testimony, if credible, may be sufficient to sustain the burden of proof without corroboration. See 8 C.F.R. § 208.16(c)(2).

As noted, the ratification history of the Convention underscores the concept that the standard of proof for protection under Article 3 is the same as the standard of proof for withholding of removal under section 241(b)(3) of the Act. See INS v. Stevic, 467 U.S. 407 (1984). The “more likely than not” standard of proof has no subjective component, but instead requires the alien to establish, by objective evidence, that it is more likely than not that he or she will be subject to torture upon removal. See INS v. Cardoza-Fonseca, 480 U.S. 421, 430 (1987).

In assessing whether it is more likely than not that an alien would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to: (1) evidence of past torture inflicted upon the applicant; (2) evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured; (3) evidence of gross, flagrant, or mass violations of human rights within the country of
removal, where applicable; and (4) other relevant information regarding conditions in the country of removal. 8 C.F.R. § 208.16(c)(3).

The United Nations Committee Against Torture has consistently held that the existence of a consistent pattern of gross, flagrant, or mass violations of human rights in a particular country does not, as such, constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture upon his return to that country. Specific grounds must exist that indicate the individual would be personally at risk. At the same time, the absence of such human rights violations does not preclude an individual from establishing eligibility for protection under the Convention. See Mutombo v. Switzerland, Comm. No. 13/1993, CAT/C/12/D/13/1993 (Apr. 27, 1994); see also Matter of S-V-, supra, at 9.

The respondent has made no claim of past torture. His torture claim is premised on the mistreatment he would face while detained for an indeterminate period on returning to Haiti. Neither he nor his father had personal knowledge of Haitian prison conditions. The respondent’s evidence consists of five newspaper articles, the Department of State Country Reports, and a letter from a State Department official. This documentary evidence contains only two references to police mistreatment, as the Miami Herald reporter who was given access to the Haitian prisons reported two complaints of police misconduct. In addition, the Department of State reported only isolated allegations of misconduct that rise to the level of torture.

The evidence establishes that isolated acts of torture occur in Haitian detention facilities. However, this evidence is insufficient to establish that it is more likely than not that the respondent will be subject to torture if he is removed to Haiti. For example, there is no evidence that deliberately inflicted acts of torture are pervasive and widespread; that the Haitian authorities use torture as a matter of policy; or that meaningful international oversight or intervention is lacking. Additionally, the United States has urged the Aristide administration to discontinue this detention practice.

**12 *304 On the basis of this evidence, we find that the respondent has failed to establish that these severe instances of mistreatment are so pervasive as to establish a probability that a person detained in a Haitian prison will be subject to torture, as opposed to other acts of cruel, inhuman, or degrading punishment or treatment. See, e.g., Al-Saheer v. INS, 268 F.3d 1143 (9th Cir. 2001) (finding an Iraqi national eligible for protection under Article 3 of the Convention where he established that he was likely to be detained by the Iraqi authorities, and the record indicated that the security services routinely tortured detainees and that Iraqi refugees often reported instances of torture).

As we read the State Department Country Reports in their entirety, it is clear that most of the range of mistreatment described therein falls outside the scope of Article I of the Convention, while fitting squarely within Article 16 of the Convention. Nothing could be clearer from the language of the Convention, the Senate ratification documents, and the implementing regulations than that the nonrefoulement obligation of Article 3 does not apply to most of the abysmal conditions described in the Country Reports. It bears repeating that although these prison conditions do not rise to the level of torture, every effort must be made to improve such conditions.
IV. CONCLUSION

As the foregoing discussion demonstrates, the regulations implementing the Convention Against Torture, drawn directly from the language of the Convention and the Senate’s resolution of ratification, govern our analysis and decision regarding Article 3 claims for protection. In applying these regulatory standards to the evidence before us, we cannot find that the respondent has established that it is more likely than not that he will be tortured if he is returned to Haiti. Accordingly, the respondent’s appeal will be dismissed.

ORDER: The appeal is dismissed.

**13 DISSENTING OPINION: Paul Wickham Schmidt, Board Member, in which John W. Guendelsberger, Noel Ann Brennan, Cecelia M. Espenoza, and Juan P. Osuna, Board Members, joined

I respectfully dissent.  


I. ISSUE

This case involves an important issue of mandatory protection under the Convention Against Torture, an international instrument to which our country is a party. The respondent is a removable Haitian national who committed a crime in the United States. It is undisputed that, as a returning criminal, the respondent will be detained by the Haitian Government for an indeterminate period, during which he is likely to be subject to mistreatment at a level that has been condemned by our Government.

The issue is whether the respondent has shown that it is “more likely than not” that he will be “tortured” upon return to Haiti. The respondent meets this standard.

II. DEFINITION OF TORTURE

The regulations define “torture” as follows:

Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third
person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 208.18(a)(1).

Torture “is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.” 8 C.F.R. § 208.18(a)(2). We are directed to consider all relevant evidence including evidence “of gross, flagrant or mass violations of human rights within the country of removal, where applicable.” 8 C.F.R. § 208.16(c)(3)(iii).

The standard of proof is “more likely than not.” 8 C.F.R. § 208.16(c)(2). Deferral of removal for those covered by the Convention is mandatory, and there are no exceptions. 8 C.F.R. § 208.17(a). This means that we are compelled by law to defer removal of anyone who shows that it is more likely than not that he or she would be subjected to torture, even if that person has engaged in serious criminal activity.

**14 The reasoning behind this absolute prohibition is plain: torture is so abhorrent that it can never be justified, and its application is “outside the domain of a criminal justice system.” Suresh v. Canada, [2002] S.C.R. 1, 12 (noting that “[t]orture is an instrument of terror and not of justice”). This *306 prohibition on torture is a principle that has attained the status of a peremptory norm in international law. Id. at 13. The corollary of that principle is that removal of an individual to a country where he or she would be tortured can never be justified. See 8 C.F.R. § 208.17(a); David Weissbrodt & Isabel Hortreiter, The Principle of Non-refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties, 5 Buff. Hum. Rts. L. Rev. 1, 16 (1999) (pointing out that “no exceptional circumstances justify expelling a person to a country where he or she would be in danger of being subjected to torture,” and that the drafters of Article 3 of the Convention Against Torture deliberately did not adopt the limitations on nonrefoulement included in other treaties, such as the “particularly serious crime” limitation on nonrefoulement included in Article 33(1) of the 1951 Convention Relating to the Status of Refugees).

Therefore, if we conclude that the conditions in Haiti to which the respondent would be returned constitute torture, and if the respondent establishes that it is more likely than not that he would be subjected to that torture, we must defer his removal, despite his serious criminal record.

III. EVIDENCE

The *Country Reports* further describe how detainees are mistreated:
Police mistreatment of suspects at both the time of arrest and during detention remains pervasive in all parts of the country. Beating with the fists, sticks, and belts is by far the most common form of abuse. However, international organizations documented other forms of mistreatment, such as burning with cigarettes, choking, hooding, and kalot marassa (severe boxing of the ears, which can result in eardrum damage). Those who reported such abuse often had visible injuries consistent with the alleged maltreatment. There were also isolated allegations of torture by electric shock. Mistreatment also takes the form of withholding medical treatment from injured jail inmates. Police almost never are prosecuted for the abuse of detainees.

**15 Country Reports, supra, at 2629.**

The respondent also submitted a number of newspaper articles describing the deplorable conditions in Haitian prisons. One article, acknowledged by *307* the majority, chronicles widespread official mistreatment and contains accounts by inmates who were beaten and burned, as well as a response in which the warden basically admits that inmates are beaten but tries to minimize the severity of the beatings.

Inmates receive “insufficient calories to sustain life.” “Corruption, not just malnutrition, is killing inmates,” bluntly states one report. Another article tells of a returnee from the United States who was dumped in a police substation detention cell “unfit for human habitation.” She was denied food and potable water and died after 4 days. Overall, these squalid, inhuman conditions describe an atmosphere in which unchecked, officially sanctioned abuse of the type highlighted in the State Department *Country Reports* is likely to be the rule, not the exception.

Of particular importance in determining whether the respondent has met his burden of proof is the apparent blanket policy of the Haitian authorities to automatically detain all criminal returnees to Haiti. As the majority concedes, it is undisputed that the respondent will be detained upon his return to Haiti. According to the State Department, this detention may last many weeks.

Thus, it appears that the respondent has shown that he falls in the class of persons who are guaranteed to be subjected to the treatment at issue in this case. If we conclude that such treatment rises to the level of torture, the respondent has therefore met his burden of proof.

**IV. ANALYSIS**

Clearly, the abuse documented in the record is extreme, deliberate, cruel, and intentionally inflicted to
cause severe pain and suffering. It fits squarely within the regulatory definition of torture. See 8 C.F.R. § 208.18(a)(1).

The majority errs by concluding that because the Haitian authorities do not have a specific intent to subject returnees to severe physical or mental pain or suffering, the treatment does not rise to the level of torture. These authorities have continued the policy of detaining returnees with the full knowledge, as documented by the State Department and international organizations, that returnees will be forced to endure horrific prison conditions as well as starvation, beatings, and other forms of physical abuse.

This is not a case where the authorities merely are being negligent. See J. Herman Burgers & Hans Danelius, The United Nations Convention Against Torture 118 (1988) (noting that where the pain or suffering is the result of an accident or mere negligence, it is not torture). Rather, it is an instance of a government deliberately continuing a policy that leads directly to torturous acts.

*308 The Government of Haiti cannot claim that it does not know what happens to detainees in its prisons. Therefore, its conduct falls squarely within the meaning of 8 C.F.R. § 208.18(a)(1).

**16 Beatings with sticks, fists, and belts have no legitimate purpose and obviously are specifically intended to inflict extreme pain and suffering upon the victims. Burning with cigarettes, choking, hoarding, and kalot marassa are not accidental occurrences, nor are they the result of lack of resources or mere mismanagement in a poor country’s prison system. Rather, they are well-recognized ways in which torturers torment their victims. Electric shock, in this case, is intentionally applied to cause excruciating pain and prolonged physical and mental anguish.

The Country Reports do not purport to provide a statistical analysis of the odds on torture in Haiti. Indeed, given the international condemnation of torture, there is every incentive for the Haitian Government to conceal or minimize the evidence of torture occurring in its detention system. It is likely, therefore, that the Country Reports substantially understated the actual number of instances and severity of torture.

What is striking, however, is the clearly documented acceptance of extreme mistreatment amounting to torture as a routine aspect of detention in Haiti. Even the prison warden freely admits to a reporter that systematic beatings occur; he merely attempts to minimize the severity of the misconduct for which he is responsible. This confirms the State Department’s report that torture by government officials is carried out with impunity.

Few, if any, prospective torture victims will be able to provide “statistical proof” of a “50.001% chance” of torture. But the information in the Country Reports shows that torture of detainees in Haiti is routine, widespread, horrific, and officially tolerated. This satisfies a reasonable, common-sense application of the “more likely than not” standard for protection under the Convention.

2d Sess. 1, 14 (1990). I disagree with the majority’s attempt to characterize certain aspects of the systematic, aggravated abuse documented in the Country Reports—beating with fists, sticks, and belts—as mere “rough treatment” or “police brutality.”

The majority’s characterization of the Haitian Government’s practice of detaining returning Haitian citizens as a “lawful sanction” is also unusual. Such citizens of Haiti committed crimes in the United States, completed their sentences here, and have committed no apparent crimes in Haiti that would earn them such “sanctions.” Moreover, their detention has been condemned by our Government. Furthermore, torture can never be a “lawful sanction.” See 8 C.F.R. § 208.18(a)(3) (stating that lawful sanctions do not include sanctions that defeat the object and purpose of the Convention).

*309 In essence, the majority errs by looking at the various factors that contribute to the abuse of Haitian returnees in isolation, and not as a whole. Generally, deplorable prison conditions, by themselves, do not rise to the level of torture, although they can rise to the level of cruel, inhuman, and degrading treatment. See Amnesty International, Haiti: Unfinished Business: justice and liberties at risk, AI Index: AMR 36/01/00, at 9 (Mar. 21, 2000) (noting that the physical conditions in Haitian prisons give rise to cruel, inhuman, and degrading instances).

**17 In this case, however, we must examine not only the prison conditions, but also the effect on someone who, while having to endure those deplorable conditions, has to endure various forms of physical abuse, including beatings, electric shock, burning with cigarettes, choking, and other forms of mistreatment, as well as the withholding of food and medical treatment, in an atmosphere where his abusers act with almost complete impunity. It is only by looking at this entire picture that we can be faithful to the mandate in the regulations that we consider “all evidence relevant to the possibility of future torture.” 8 C.F.R. § 208.16(c)(3).

V. CONCLUSION
The majority concludes that the extreme mistreatment likely to befall this respondent in Haiti is not “torture,” but merely “cruel, inhuman or degrading treatment.” The majority further concludes that conduct defined as “torture” occurs in the Haitian detention system, but is not “likely” for this respondent. In short, the majority goes to great lengths to avoid applying the Convention Against Torture to this respondent.

We are in the early stages of the very difficult and thankless task of construing the Convention. Only time will tell whether the majority’s narrow reading of the torture definition and its highly technical approach to the standard of proof will be the long-term benchmarks for our country’s implementation of this international treaty.

*310 Although I am certainly bound to follow and apply the majority’s constructions in all future cases, I do not believe that the majority adequately carries out the language or the purposes of the Convention and the implementing regulations. Therefore, I fear that we are failing to comply with our international obligations.
I conclude that the respondent is more likely than not to face officially sanctioned torture if returned to Haiti. Therefore, I would grant his application for deferral of removal under the Convention Against Torture and the implementing regulations. Consequently, I respectfully dissent.

**18 DISSENTING OPINION:** Lory Diana Rosenberg, Board Member, in which Cecelia M. Espenoza, Board Member, joined [omitted]
Complementary protection

On the 24 March 2012 complementary protection was introduced into Australian migration law. The DIAC and the RRT must now consider the Refugee Convention along with obligations which come from other international human rights conventions when they decide whether to grant you a Protection visa. This fact sheet is about complementary protection.

What is complementary protection?

Complementary protection is protection which can be given to a person who:

- Is not found to be a refugee under the Refugee Convention, but
- Cannot be returned to their country of origin because there is a real risk that they will face significant harm.

Australia has signed international human rights covenant the UNHCR states that Australia's

accords must return a person home if there is a real risk that the person will suffer significant harm if they are removed from Australia.

The obligation not to return people home to a situation of significant harm is the legal recognition which means you have.

What international conventions can be considered for my case?

Australia's obligation not to return a person to a situation where they will suffer significant harm exists because Australia has signed these two international agreements:

- International Covenant on Civil and Political Rights (ICCPR)
- Convention Against Torture (CAT)

The introduction of complementary protection means that Australia's obligations under these two agreements as well as the Refugee Convention can be considered by the DIAC and the RRT when they decide whether or not to grant a Protection visa.

What is significant harm?

Complementary protection is a new law so it is still not clear exactly how the decision makers will interpret it in practice. However under the new law significant harm has been clearly defined.
Complementary protection can only be granted when you will face significant harm if you are returned home. Under the complementary protection law significant harm must be one of the following things:

- **Arbitrary deprivation of life**
  You cannot be returned home if it means you will be killed by others for no good reason if you go home.

- **Death penalty**
  You cannot be returned home if you will face the death penalty for a crime you have been charged with in your home country.

- **Torture**
  You cannot be returned home if you will face an act that causes you severe physical or mental pain and suffering and this pain and suffering will be intentionally inflicted on you to get a confession, to get information or to intimidate you.

- **Cruel or inhuman treatment or punishment**
  You cannot be returned home if you will face severe pain and suffering, whether physical or mental, and it could be considered cruel or inhuman.

- **Degrading treatment or punishment**
  You cannot be returned home if you will face an act that causes extreme humiliation to you that is unreasonable and degrading.

**What does the change to the law mean?**
Before the law changed the Minister did consider these international agreements when he decided whether or not to intervene in people’s cases to grant a visa.

The new law means that Australia’s obligations under these international conventions can now be considered at the beginning of the process when you apply for a Protection visa at the DIAC stage and also at the RRT. You will not have to wait for your case to get to the Minister to have complementary protection considered in your case.

**Do I need to make a separate application for complementary protection?**
You do not need to make a separate application for complementary protection. When you apply for a Protection visa the decision maker will first consider whether you are a refugee under the Refugee Convention. If you are a refugee then you can be granted a protection visa.

If you are not a refugee under the Refugee Convention then the decision maker will think about whether complementary protection applies to you. If they decide that...
complementary protection does apply to you then they can give you a Protection visa.

What if I am found to be a refugee?
The DIAC and RRT decision makers will now go through a two step process when deciding whether to grant you a Protection visa. The decision maker only has to consider complementary protection if they decide that you are not a refugee.

If the decision maker decides that you are a refugee then Australia has an obligation to protect you under the Refugee Convention and the decision maker will usually grant you a visa. They will not need to consider whether complementary protection applies to you.

What if I applied for a protection visa before the 24 March 2012?

I applied before 24 March 2012 and my case is at DIAC.

If you applied for a Protection visa, and DIAC did not make a decision about your case, before 24 March 2012, then the case officer must consider whether complementary protection applies to your case before they make their decision.

I applied before 24 March 2012 and my case is at the RRT.

If your case is at the RRT and a decision was not made before 24 March 2012 then the RRT must consider whether complementary protection applies to your case before they make a decision.

I applied before 24 March 2012 and my case is at Court.

If your case is at Court for Judicial review, the Court cannot consider whether complementary protection applies in your case. The Court can only consider the original decision. The Court cannot consider the new law.

If your case is successful at Court then it will be sent back to the RRT for another hearing. The RRT will then be able to consider complementary protection when making its decision.

For more information about Judicial review please see: fact sheet 7 Judicial review (Federal Magistrates Court).

I applied before 24 March 2012 and have asked the Minister to intervene in my case.

The Minister has certain guidelines which he will consider when he decides whether or not to intervene in your case. See fact sheet 8: Ministerial Intervention for more information about these guidelines and about applying to the Minister.

These guidelines already include Australia’s complementary protection obligations. If your case is with the Minister then you can ask the Minister to consider complementary protection when he decides whether to intervene to either grant you a visa or give you a chance to apply for a Protection visa again.
What visa will I receive if I am granted complementary protection?

If you are granted protection as a result of complementary protection you will receive a Protection visa. This is the same visa you would be granted if you were found to be a refugee. This visa will give you access to social security, Medicare and English classes.

Disclaimer: This fact sheet provides general information to people seeking asylum in Australia through the onshore visa application process. We have tried to make sure that this fact sheet contains correct information and has not left out anything important. However, we cannot guarantee this because immigration law is complex and changes regularly. This fact sheet is not legal advice. You should not rely on this fact sheet to make decisions about your immigration matter. We strongly recommend that you get independent advice from a registered Migration Agent. For information about registered migration agents please visit: https://www.mara.gov.au. Date: April 2012
Victims' Stories

OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS

_Trafficking in Persons Report 2013_

Report

The victims' testimonies included in this Report are meant to be illustrative only and do not reflect all forms of trafficking that occur. These stories could take place anywhere in the world. They illustrate the many forms of trafficking and the wide variety of places in which they occur. Many of the victims' names have been changed in this Report. Most uncaptioned photographs are not images of confirmed trafficking victims. Still, they illustrate the myriad forms of exploitation that comprise trafficking and the variety of situations in which trafficking victims are found.

**United States**

Mauri was only 16 years old when she was prostituted on the streets of Honolulu, Hawaii. For her, there was no escape; her pimp threatened to kill her family if she did not go out on the street night after night to make him money. If Mauri tried to use some of the money to buy food, she was severely beaten. Mauri finally escaped when she was picked up by law enforcement. She is now in a rehabilitation program and has reunited with her parents, but her road to recovery has been long and difficult. She suffers from terrible flashbacks and severe depression, and has even attempted suicide. Mauri says she was lucky to get out alive: "The longer you stay the less hope you have."

**El Salvador – Mexico**

Liliana was unemployed and unable to find a job in El Salvador when she decided to leave El Salvador in search of work. A family friend promised to take Liliana to the United States, but instead took her to Mexico. When Liliana discovered that she had been tricked, she ran away and ended up in an area where other migrants like herself waited to go back to El Salvador. One day a group of men invited her and the others to join their organization, the Zetas, a notorious drug cartel. They said they would give her work and feed her. When she joined them, she was forced into prostitution, tricked for the second time. Liliana was drugged the first day and woke up with a “Z” tattoo, branded for life. She was forced to ingest drugs and was never allowed to travel unaccompanied. After three months, her aunt in El Salvador paid for her freedom and she was freed. With Liliana’s help, her traffickers were brought to court but were acquitted. Liliana will not testify again.
Burma – Thailand

Kyi and Mya, both 16 years old, were promised work as domestic helpers in Thailand. With the help of five different local brokers, they traveled from Burma walking all day and night through a forest, crossing a river in a small boat, and spending a few nights in various homes along the way. Once they arrived, they were placed in a meat-processing factory and forced to work from 4 a.m. to 11 p.m. Kyi and Maya complained to the factory manager of the hard work and long working hours, and told him this was not what they were told they would be doing in Thailand. The factory manager told the girls they owed him for their “traveling expenses” from Burma to Thailand and could not leave until it was paid off. He continued to subtract their “debt” from what little income they received. Eventually the girls were able to contact one of their relatives in Burma who then contacted an NGO; the organization arranged their safe removal from the factory. They are now in a Thai government shelter in Bangkok, receiving counseling while waiting for repatriation.

Uganda – Kenya

Latulo was desperate to find a job to pay for his university school tuition. While in town one day, Latulo met a man who said he needed people to work for him at a factory in Kenya. Hoping this job would help pay for his tuition, Latulo agreed to accompany the man to Kenya and met with him the very next day to travel. Other men and women also met them to travel to Kenya. Eventually they arrived at their final destination in Kenya at a huge house. The man, who had earlier been kind to them all, suddenly became rude and ordered them to give him their identification and phones. They were shown a video of a man who had been suffocated with a bag because he attempted to escape. They were all told that they would not be working at a factory, but rather would be working as sex slaves. Every room had a camera and they were recorded while they were forced to have sex with strangers. After a month and half of captivity, Latulo was allowed to accompany his captors into town. When they stopped to have lunch, he ran away. Law enforcement officials in Kenya opened an investigation and Latulo was able to return to Uganda and received medical attention.

Thailand

Tola was seven years old when she was lured away from her parents by a couple who owned the field her family worked. While enslaved, she was forced to take care of cats and dogs for the couple’s pet grooming shop. For five years, Tola’s parents hoped to see her again, never knowing how she disappeared or where she might be. They never imagined that Tola was close, enduring torture and abuse. If Tola did not do her job properly, she was kicked, slapped, and beaten with a broom. Sometimes the couple locked her in a cage and poured boiling hot water over her. On one occasion, the traffickers cut off her ear lobe with a pair of scissors. One day, she climbed a concrete fence of the house while chasing a cat and realized she was free. A neighbor called the police and she was taken to a nearby shelter where her mother identified her. The couple was arrested and charged with various charges, including torture, detaining a person against their will, enslavement, and kidnapping. The couple posted bail and escaped. As for Tola, injuries on her arms affected her muscles; she can no longer move her left arm. For now, she is safe with her family and is beginning her mental, emotional, and physical journey to recovery.
Zambia – South Africa

Chewazi was offered a better life in South Africa working for an organization that ran a Boy Scouts group. Excited about the job, he left Zimbabwe for South Africa. Instead of receiving the job he was promised, he was forced to work every day on a farm for a piece of bread and some water. For six months, Chewazi was transported between farms in Zambia and South Africa, enduring physical and other abuses, dreaming of the day he would escape. When Chewazi and a friend finally did escape, they made their way to Cape Town; a security guard on the street found them and helped them to safety. Through the Department of Social Development, they were taken to an NGO, which helped provide support and services to them both. Chewazi suffers from post-traumatic stress, but decided to stay in South Africa, hopeful that he will still find that better life that led him away from home.

Philippines – Qatar

Dalisy signed a contract with an employment agency in the Philippines to work as a housemaid in Qatar for $400 a month, plus room and board. But when she arrived, her employer said he would pay her only $250 a month. She knew her family back in the Philippines depended on her earnings and felt she had no choice but to stay to help her family. She quickly realized that her low pay was not the only unexpected condition of her work situation. She was fed one meal a day, leftovers from the family’s lunch: “If no leftovers, I didn’t eat.” She worked seven days a week. When she was finished working in her employers’ house, she was forced to clean his mother-in-law’s house, and then his sister’s without any additional pay. After eight months, Dalisy tried to leave but her boss just laughed and said “You can’t quit.” As a domestic worker not covered under the labor law, Dalisy was subject only to the restrictive kafala, or sponsorship system, meaning that she could not resign without her employer’s permission, change jobs, leave the country, get a driver’s license, or open a checking account without the permission of her employer. She also learned that her employer could withdraw sponsorship at any time and send her back home, so she fled and joined 56 other women who sought shelter at the Philippines Overseas Labor Office.

India

Naveen was 14 years old when a placement agency found him a job as a domestic worker for a couple with two children. For the two years he served the family, Naveen was confined to the house, never allowed to leave. He was beaten regularly for trivial matters and, on several occasions, branded with hot tongs. Unable to endure his situation anymore, he ran away. Naveen is living in a children’s home and receiving counseling. The couple, meanwhile, have been charged and are out on bail awaiting a court date.

United States

For over 20 years, the owners and staff of a turkey-processing plant subjected 32 men with intellectual disabilities to severe verbal and physical abuse. The company housed the workers in a “bunkhouse” with inadequate heating, dirty mattresses, and a roof in such disrepair that buckets were put out to catch rainwater; the infestation of insects was so serious the men swatted
cockroaches away as they ate. Although the men were as productive as other workers, the company paid them only $15 a week (41 cents an hour) for labor that legally should have been compensated at $11-12 an hour. The employers hit, kicked, and generally subjected the men to abuse, forcing some of the men to carry heavy weights as punishment and in at least one case handcuffed a man to a bed. Supervisors dismissed complaints of injuries or pain, denied the men recreation, cellphones, and health care. The U.S. government filed an abuse and discrimination case against the company for damages under the Americans with Disabilities Act. During the trial, the attorney representing the men said: “The evidence is these men were treated like property...these men are people. They are individuals.” A jury awarded the men a total of approximately $3,000,000, the largest jury verdict in the history of U.S. Equal Employment Opportunity Commission.

West Africa – Egypt

Sussan was only 10 when her father sold her to an Egyptian family to serve as a domestic worker. Despite her protests, Sussan accompanied the family back to Egypt. Once there, she was forced to work excessive hours, never received compensation, and her passport was confiscated. She was locked in the house where she was physically and emotionally abused daily. During her six years of enslavement, she was not allowed to speak to her family; when her relatives tried to reach her by phone, Sussan’s employer would hang up the phone. One day, she summoned the courage to escape. She was arrested shortly after her escape for immigration violations, but with the cooperation of an international NGO and Egyptian authorities, she was released from detention and recognized as a trafficking victim. While staying at a government shelter in Egypt, the international NGO arranged for Sussan’s return to her country in West Africa. Once there, UNICEF and the child protection police arranged for her to stay in a designated shelter for trafficking victims while her family was located. After three weeks, she was reunited with her family and given the chance to enroll in vocational training as part of her reintegration process. Sussan looks to brighter days now and hopes to open an Egyptian restaurant in her town.

Uzbekistan – Russia

Ayauly and Bibihul were among 12 migrants from Kazakhstan and Uzbekistan, including three children, who were held captive for 10 years in a supermarket after being promised employment in Russia. In Russia, they were beaten and forced to work without pay by the couple who owned the supermarket. Their passports were confiscated by their traffickers who said they needed the documents to officially register them as workers with authorities. The passports were never returned. Side by side with 10 others, Ayauly and Bibihul lifted heavy goods in and out of the shop every day. The couple used threats of violence, beatings, and sexual violence to demand subservience. Based on a tip from Ayauly’s mother, two Russian civic activists rescued Ayauly and Bibihul as well the other workers found at the supermarket. While a criminal investigation was opened it was closed shortly thereafter. Prosecutors claimed there was no evidence of a crime. Ayauly and Bibihul are now facing deportation for residing in Russia illegally.
Nigeria – France

Since her parents passed away, Ogochukwu had been struggling to care for her younger brothers. An acquaintance offered to take her abroad and find her a job. Ogochukwu was ecstatic; she accepted his offer, believing that she would now be able to help her family in Nigeria. Before setting off to Europe, she was taken to a juju priest to seal the deal with local magic. During the ceremony, she vowed she would obey her boss in Europe and pay back her travel expenses. The “spell” called for death if she failed to fulfill her oath. It was not too long before she realized that something was wrong, she had joined about 30 other women in an open-back truck headed toward the Sahara Desert. They finally reached their destination and were met by a “madam” in France who told her she owed travel expenses for her passage to Europe and would be forced to pay it back by selling her body. She worked the streets as many as 20 hours a day and was forced to pay for her own food and clothes as well as for rent. Despite the juju oath, she was encouraged by a man she befriended to go to the police. Once at the police station, she explained her situation. Her traffickers were arrested but so was she, for being in France illegally. Before her deportation, workers at the detention center gave her money out of good will for her safe return to Nigeria. She is now building her life again and says, “I am very much stronger than juju.”
Relief for victims of human trafficking
Refugee Law
Summer 2015 Prof. Abriel

What is Trafficking in Persons?
• The use of coercion, deception or force for the purpose of placing men, women, or children in slavery or in slavery-like conditions.
• E.g., forced labor, domestic servitude, debt bondage, and forced commercial sexual exploitation.

Some statistics on human trafficking
• Exact figures are impossible to acquire, but educated estimates are:
  • Between 800,000 – 800,000 people trafficked across international borders annually.
  • Larger number of people trafficked within countries.
  • Between 14,500 – 17,500 trafficked into the United States
  • About 70% are female.
  • About 50% are children.
  • 3rd largest criminal enterprise worldwide.

What are the causes of Human Trafficking?
• Poverty
• The attraction of a perceived higher standard of living elsewhere
• Weak social and economic structures
• A lack of employment opportunities
• Organized crime

What are the causes of Human Trafficking?
• Vulnerability of women and children
• Political instability
• Armed conflict
• Environmental disasters
• Cultural traditions (e.g., traditional slavery).

What are the causes of Human Trafficking?
• On the “demand” side:
  • The sex industry (e.g., sex tourism and child pornography);
  • Growing demand for exploitable labor for a global market (i.e., cheap, vulnerable, and illegal labor).
### Identifying trafficking victims – common industries
- sex workers
- migrant workers
- factory workers
- domestic workers
- household employees of diplomats.

### Culturally and linguistically appropriate services needed
- Protection against traffickers
- Assistance in certification by ORR
- Interpretation
- Basic needs – shelter, food, clothing
- Medical and dental care
- Mental health care and counseling

### Civil legal services
- Assistance in working with law enforcement
- Representation in immigration proceedings
- Life skills – language and job training
- Safety planning and protection from renewed victimization

### Human Trafficking vs. Human Smuggling
- Smuggling – procurement or transport for profit of a person for illegal entry into a country.
- But smuggling can become trafficking.

### Human Trafficking vs. Human Smuggling
- Human Trafficking – unlike smuggling involves (1) fraud, force, or coercion AND (2) involuntary servitude, commercial sex act, etc.
- Trafficking victims either never consented or their consent was negated by the coercive, deceptive or abusive actions of the traffickers.
- Trafficking occurs regardless of whether person is moved internally or across a border.

### Key U.S. govt. agencies working to combat human trafficking
- Department of Justice – FBI and Criminal Section of Civil Rights Division
- Department of State – Office to Monitor and Combat Trafficking in Persons
- Department of Labor – Wage and Hour Division of Employment Standards Admin.
- Dept. of Health and Human Services – Office of Refugee Resettlement
- Dept. of Homeland Security – ICE, CIS, CBP
- Agency for Int’l Dev.
- Interagency Task Force on Trafficking in Persons, Senior Policy Operating Group
**T visa requirement 1**

Applicant must be or have been a victim of a severe form of trafficking in persons, defined as:
- Trafficking in sex (commercial sex act induced by force, fraud, or coercion, or victim under 18 years old) OR
- Trafficking in labor (recruitment, harboring, transportation, provision, or obtaining of person through force, fraud or coercion, for purpose of subjecting to involuntary servitude, peonage, debt bondage, or slavery).

**Other T visa requirements**

2. Applicant either is under 18 or has complied with any LEA reasonable request for assistance in the investigation or prosecution of acts of trafficking;
3. Applicant physically present in the U.S., Am. Samoa, N. Mariana Islands due to trafficking; &
4. Applicant would suffer extreme hardship involving unusual and severe harm if removed.
   Plus:
   - Applicant has not engaged in trafficking and
   - Applicant must be admissible.

**Applicants under 18**

- Need not establish compliance with LEA reasonable requests for assistance and
- Victims forced to perform commercial sex act while under 18 need not show force, fraud, or coercion.
- But must still demonstrate that s/he (1) is a victim of a severe form of trafficking in persons, and (2) faces extreme hardship involving unusual and severe harm if removed.

**First reqmt: applicant victim of severe form of human trafficking**

- LEA endorsement on Form I-914; **OR**
- DHS arranged for applicant’s continued presence; **OR**
- Sufficient credible secondary evidence.

**Law enforcement endorsements**

- Preamble to regs says CIS strongly encourages LEA, but other types of evidence ("secondary evidence") may be submitted instead, with explanation of attempts to obtain LEA.
- After Trafficking Victims Protection Reauthorization Act of 2004, LEA may be done by federal, state, or local law enforcement authority, thus overriding regs on this point.
- Until regs or further guidance on state/local LEA, treated as secondary evidence.
- If LEA endorsement used, done on Form I-914 Supp. B.

**Secondary evidence must include**

- Original statement by applicant;
- Credible evidence of victimization and cooperation (describing what applicant has done to report crime to LEA);
- Statement indicating whether records of time and place of crime are available.
- The secondary evidence must include a statement or evidence describing good faith efforts to get LEA endorsement.
2d reqmt – complying with reasonable requests from LEA

- The reasonableness of a request for assistance depends on the totality of the circumstances, taking into account general law enforcement and prosecutorial practices, the nature of the victimization, and the specific circumstances of the victim, including fear, severe traumatization (mental and/or physical), and age and maturity. CIS, not LEA, decides whether reasonable or not.

VAWA 2005 amendments

- After VAWA 2005, offenses for which acts of trafficking are at least one central reason for commission of the offense will support a T visa.
- Where victim is unable to comply with requests for assistance because of psychological or physical trauma, request is deemed unreasonable.
- No requirement of prosecution. Responding and cooperating with requests for evidence and information satisfies requirement.

Initiating the process

- For T visa, applicants over 18 must have had some contact with an LEA in order to receive any requests for assistance.
- Before contacting LEA, (1) analyze case to determine whether it is a trafficking case and (2) if it is a trafficking case, advise client fully re law enforcement involvement and requirement of cooperation. It is client’s decision whether or not to proceed.

Reqmt 3: physical presence on account of trafficking

- Applicant recently liberated from traffickers
- Applicant subjected to trafficking in past and continued presence in U.S. is directly related to the original trafficking.
- If victim escaped from traffickers before LEA became involved with case, then must demonstrate that applicant did not have a clear chance to leave U.S. in interim. Examples: traffickers lock travel docs; trauma, injury, lack of resources, etc.

Where victim departed U.S. after trafficking

- If applicant voluntarily departed U.S. or was removed from U.S. after the act of severe form of trafficking, then government will not deem applicant present on account of trafficking UNLESS applicant’s re-entry into U.S. was a result of continued victimization or an incident of new victimization.

Reqmt 4: extreme hardship involving unusual and severe harm

<table>
<thead>
<tr>
<th>CIS will consider:</th>
<th>The reasonable expectation that leur, social practice, or customs in the applicant’s country would penalize the applicant severely for leaving behind the victim of trafficking;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applicant’s age and circumstances;</td>
<td>The likelihood of re-victimization and the ability and willingness of foreign authorities to protect the applicant;</td>
</tr>
<tr>
<td>Applicant’s severe physical or mental illness and availability of medical or psychological attention in foreign country;</td>
<td>The likelihood of harm to applicant by trafficker or others on trafficker’s behalf; and</td>
</tr>
<tr>
<td>The physical and psychological consequences of the trafficking activity;</td>
<td>Civil unrest or armed conflict in applicant’s country that are likely to affect applicant’s safety.</td>
</tr>
<tr>
<td>The impact on applicant of loss of access to U.S. courts and criminal justice system, for ex., for protection of the applicant and criminal and civil relief for the acts of trafficking.</td>
<td></td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th><strong>Waivers of inadmissibility grounds for T non-immigrants</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>- Public charge ground does not apply to T applicants.</td>
</tr>
<tr>
<td>- INA § 212(a)(9)(B) unlawful presence ground does not apply if demonstrate that trafficking was at least one central reason for the alien's unlawful presence (New in VAWA 2005).</td>
</tr>
<tr>
<td>- CIS may waive the medical grounds if in the national interest.</td>
</tr>
<tr>
<td>- In unforeseen emergencies, CIS may waive the ground of lack of proper immigration documents.</td>
</tr>
</tbody>
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<thead>
<tr>
<th><strong>More on inadmissibility grounds</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>- Where inadmissibility caused by the victimization, CIS may also waive all other inadmissibility grounds, except for the security and related, international child abduction, and renunciation of citizenship to avoid taxation grounds.</td>
</tr>
<tr>
<td>- Waiver filed on Form I-192. Fee is $250 (may apply for fee waiver).</td>
</tr>
<tr>
<td>- INA § 212(d)(13).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Evidentiary Standard</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>- Applicant for T visa can submit <em>any credible evidence relevant</em> to the essential elements of the T nonimmigrant status.</td>
</tr>
<tr>
<td>- But primary evidence (official documents) is strongest.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>What to expect after filing application for T visa</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>- Applicant receives notice for fingerprint appointment at Application Support Center.</td>
</tr>
<tr>
<td>- CIS then determines whether application is bona fide and if so, sends bona fide notice.</td>
</tr>
<tr>
<td>- The bona fide determination:</td>
</tr>
<tr>
<td>- Establishes eligibility for ORR certification for public benefits.</td>
</tr>
<tr>
<td>- Automatically stays execution of exclusion, deportation, or removal order.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Application is bona-fide if:</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>- Complete and properly filed.</td>
</tr>
<tr>
<td>- Contains LEA endorsement or credible secondary evidence.</td>
</tr>
<tr>
<td>- Includes completed fingerprint and background checks.</td>
</tr>
<tr>
<td>- Presents prima facie evidence to show eligibility for T nonimmigrant status, including admissibility.</td>
</tr>
<tr>
<td>- Does not indicate fraud.</td>
</tr>
</tbody>
</table>

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<thead>
<tr>
<th><strong>Next events:</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>- VSC may issue Request for Evidence (RFE) or Notice of Intent to Deny (NOID). Very important to respond to these; otherwise application may be denied. Send responses by certified mail.</td>
</tr>
<tr>
<td>- VSC may issue notice of need for application to waive inadmissibility grounds.</td>
</tr>
<tr>
<td>- Grant or denial.</td>
</tr>
<tr>
<td>- Notice of denial to Applicant, LEA, ORR</td>
</tr>
<tr>
<td>- Upon initial denial, benefits granted as a result of a bona fide application will be revoked.</td>
</tr>
<tr>
<td>- Denial may be appealed to CIS Administrative Appeals Unit.</td>
</tr>
</tbody>
</table>
Applicants in removal proceedings or with final order

- Inform ICE that applicant intends to apply for T nonimmigrant status.
- Upon ICE agreement or IJ or BIA’s initiative, proceedings may be administratively closed to allow person to pursue T nonimmigrant status with CIS.
- If T status denied, ICE may move to reopen removal proceedings.
- Source: 8 CFR § 214.11(d)(6)

FILING DEADLINE

- If victimization occurred prior to 10/28/00
- Must file within one year of 1/31/2002
- Unless child, who can apply within later of one year after 21st birthday or 1/31/02
- Imposed by regs, advocates say no statutory basis.
- No filing deadline if victimization occurred on or after 10/28/00.

Annual Limit

- Annual limit: 5,000 T visas.
- Limit applies only to T-1 visas and not to the T-2 visas issued to family members.
- Waiting list if cap exceeded

Expiration of T nonimmigrant status

- Per CIS regs, T nonimm. status expires 3 years after date of approval; not renewable.
- But changes in VAWA 2005: Maximum T status of 4 years, and may be extended if a federal, state, or local law enforcement official, prosecutor, judge, or other authority investigating or prosecuting activity relating to human trafficking certifies that the victim's presence is necessary to assist in the investigation or prosecution.

Adjustment from T to LPR

- After T visa, 3 yrs. physical presence in the US OR (new in VAWA 2005) a continuous period during the investigation or prosecution of acts of trafficking, where the AG deems the investigation or prosecution complete.
- Single 90 day or aggregate 180 day absence breaks physical presence.
- Good moral character during that time.
- Compliance with any real or law enforcement request for assistance OR would suffer extreme hardship involving unusual and severe harm if removed from US; and
- Applicant admissible, but same waivers available as for T nonimmigrant status.
- Yearly limit of 5,000 adjustments, count principals only.

Visas for trafficking victim’s family

- Statute allows visas for:
  Victims 21 and older - spouse and children
  Victims under 21 - spouse, children, unmarried siblings under 18, and parents.
- Called “derivative beneficiaries” or “derivatives”
- VAWA 2005 repealed requirement that issuance of T visa to derivative be necessary to avoid extreme hardship to principal T visa holder or derivative.
Protection from “aging out”

• Generally, "child" = unmarried and under age 21, so child who turns 21 is no longer eligible for benefits which "child" would derive from principal.
• But for T visa derivatives - as long as unmarried child derivative was under 21 on date principal filed T application and turns 21 while application is pending, then child will not age out.
• In addition, derivative parents of principal applicant remain eligible where child turns 21 while application is pending.

Criteria for minors’ eligibility for public benefits

• Individual must be determined to be victim of severe form of trafficking
• Individual has not attained 18 years of age

Minor DOES NOT NEED to:

• Be willing to assist in investigation and prosecution of trafficking case
• Have either a bona fide T visa application or approved T visa
• Have been granted “continued presence”

ORR Certification Process

• Receive fax from DHS documenting bona fide T visa application, approved T visa, or continued presence
• ORR contacts DOJ victim/witness coordinator for “request for victim certification” letter
• ORR coordinates benefits with ORR trafficking grantee
• Victim contacted by NGO/legal advocate and benefits and services options explained
• Victim chooses best option and ORR issues certification letter

Federal Benefits and Services for Certified Victims

• Federal and state mainstream public assistance benefits include:
  – Temporary Assistance for Needy Families
  – Medicaid
  – Supplemental Security Income (SSI)
  – Food Stamps

Benefits for Minors

• URM Program establishes legal responsibility to ensure that unaccompanied child victims receive a full range of assistance, care and services
• Legal authority designated to act in place of child’s unavailable parent(s)
• Reunification of minors with their parents or other appropriate adult relatives encouraged
# TIER PLACEMENTS

## TIER 1

| Armenia | Austria | Australia | Azerbaijan | Belgium | Canada | Chile | Czech Republic | Denmark | Finland | France | Germany | Iceland | Ireland | Israel | Italy | Korea, South | Luxembourg | Macedonia | Netherlands | New Zealand | Nicaragua | Norway | Poland | Slovak Republic | Slovenia | Spain | Sweden | Switzerland | Taiwan | United Kingdom | United States of America |
|---------|---------|-----------|------------|---------|--------|-------|--------------|---------|----------|---------|---------|---------|--------|--------|-------|-----------|-----------|-----------|-----------|-----------|----------|--------|---------|-----------|---------|----------------|------------------|

## TIER 2

| Afghanistan | Albania | Argentina | Aruba | Azerbaijan | Bangladesh | Barbados | Benin | Bhutan | Brazil | Brunei | Bulgaria | Burkina Faso | Cabo Verde | Cameroon | Chad | Colombia | Congo, Republic of the | Costa Rica | Cote d'Ivoire | Croatia | Curacao | Dominican Republic | Ecuador | Egypt | El Salvador | Estonia | Ethiopia | Fiji | Gabon | Georgia | Ghana | Greece | Guatemala | Honduras | Hong Kong | Hungary | India | Indonesia | Iraq | Japan | Jordan | Kazakhstan | Kiribati | Kosovo | Kyrgyz Republic | Latvia | Liberia | Lithuania | Macau | Maldives | Mali | Malawi | Malta | Mauritius | Mexico | Micronesia | Moldova | Mongolia | Montenegro | Mozambique | Nepal | Niger | Nigeria | Oman | Palau | Paraguay | Peru | Philippines | Portugal | Romania | St. Lucia | St. Maarten | Senegal | Serbia | Seychelles | Sierra Leone | Singapore | South Africa | Swaziland | Tajikistan | Trinidad & Tobago | Tonga | Turkey | Uganda | United Arab Emirates | Vietnam | Zambia | |

## TIER 2 WATCH LIST


## TIER 3

| Algeria | Central African Republic | Congo, Democratic Republic of the | Equatorial Guinea | Eritrea | The Gambia | Guinea-Bissau | Iran | Korea, North | Kuwait | Libya | Malaysia | Mauritania | Papua New Guinea | Russia | Saudi Arabia | Syria | Thailand | Uzbekistan | Yemen | Veneuela* | Zimbabwe |

## SPECIAL CASE

| Somalia | |

* Auto downgrading from Tier 2 Watch List
May 2011

California Supply Chain Transparency Law May Affect Non-California Businesses

Thomas W. White
Ayo Badejo

On September 30, 2010, California Senate Bill 657, the California Transparency in Supply Chains Act of 2010 (the “Act”), was signed into law and codified in Section 1714.43 of the California Civil Code and Section 19547.5 of the California Revenue and Taxation Code. The Act requires retail and manufacturing companies to disclose what efforts they have taken to eliminate slavery and human trafficking from their supply chains. As explained in the policy statement in the beginning of the Act, the law aims to “provide consumers with information regarding [companies’] efforts to eradicate slavery and human trafficking from their supply chains” and to “educate consumers on how to purchase goods produced by companies that responsibly manage their supply chains.” The Act becomes effective on January 1, 2012.

While the law has garnered significant attention in California, it has been less noticed outside that state. However, the law’s expansive jurisdictional provisions will make it applicable to many companies that are based outside California. Companies that fall within the scope of the Act need to be aware of its requirements and consider how and to what extent they can provide the disclosures that it envisions.

Businesses Subject to the Act

The Act will require any company that (1) is a retail seller or manufacturer; (2) does business in California; and (3) has annual worldwide gross receipts that exceed $100,000,000, to disclose its efforts to eradicate slavery and human trafficking from the company’s direct supply chain for tangible goods offered for sale.3 The Act, referencing the California Revenue and Taxation Code, defines the terms used in (1) - (3) as follows:

Retail Seller -- means a business entity with retail trade as its principal business activity code, as reported on the entity’s tax return.

1 Thomas W. White is a partner and Ayo Badejo is an associate with Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C.
2 California Senate Bill 657 Section 2(j).
3 California Civil Code Section 1714.43.
Manufacturer — means a business entity with manufacturing as its principal business activity code, as reported on the entity’s tax return.

Doing Business in California — an entity is deemed to be doing business in California if:

1. it is organized or commercially domiciled in California;

2. sales in California for the applicable tax year exceed the lesser of $500,000 or 25 percent of the company’s total sales;

3. the real property and the tangible personal property of the company in California exceeds the lesser of $50,000 or 25 percent of the company’s total real property and tangible property;

4. the amount paid in California by the company for compensation exceeds the lesser of $50,000 or 25 percent of the total compensation paid by the company.

Gross Receipts — means gross amounts realized (the sum of money and the fair market value of other property or services received) on the sale or exchange of property, the performance of services, or the use of property or capital (including rents, royalties, interest, and dividends) in a transaction that produces business income, in which the income, gain, or loss is recognized (or would be recognized if the transaction were in the United States) under the Internal Revenue Code, as applicable for purposes of this part.

All retail sellers and manufacturers that do business in California, as set forth in Section 23101 of the California Revenue and Taxation Code, and have annual worldwide gross receipts that exceed $100,000,000 fall within the scope of the Act’s disclosure requirements and should respond accordingly.

Many large retail sellers and manufacturers that are organized or domiciled outside of California are likely to be affected by the Act, even if the activities and operations that such retail sellers and manufacturers perform in California are relatively small. The Act was intended to only target the state’s largest retailers and manufacturers who, based on information provided by California’s tax authority to the Act’s author, account for the majority of the income and cost of goods sold in California (over 87%). Despite this intention, the Act does not provide an exemption for large companies with relatively few California contacts.

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4 Section 23101 of the California Revenue and Taxation Code.
5 Section 25120 of the California Revenue and Taxation Code.
6 California State Assembly Committee on Judiciary, Analysis of Senate Bill No. 657, June 29, 2010, p. 10.
Companies that do business in California should note that annual gross receipts are measured globally, under the Act. The requirement that such receipts exceed $100,000,000 is intended to serve as a “small business exemption” for those companies that lack the ability to exert substantial economic influence on their suppliers. This exemption does not, and was not intended to, release larger companies from for the Act’s disclosure requirements based on economic activity in California.

Disclosure Requirements of the Act

Each Company that is required to comply with the Act must, at a minimum, disclose whether, and to what extent, the company:

1. engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery, and whether the verification was conducted by a third party;

2. conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains, and whether the audits were independent and unannounced;

3. requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business;

4. maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking; and

5. provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.

The required disclosures must be made available on the company’s website with a conspicuous link to the disclosure placed on the company’s homepage. Companies that do not have websites must provide written copies of the disclosure within 30 days of receiving a written request for the disclosures from a consumer. The California Attorney General is empowered to enforce compliance with the Act. The exclusive remedy available to the California Attorney

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7 California State Assembly Committee on Judiciary, Analysis of Senate Bill No. 657, June 29, 2010, p. 9.
General for violations of the Act is an action for injunctive relief. The Act does not create a private right of action.\textsuperscript{8}

\textit{Conclusion}

The Act is a disclosure law and does not impose any substantive regulation on supply chain activities. Nor, unlike the "conflict minerals" provisions of the Dodd-Frank regulatory reform law,\textsuperscript{9} does it impose any affirmative obligations on companies to perform diligence regarding the existence of slavery or human trafficking in their supply chains. Nonetheless, as a matter of corporate social responsibility as well as public image, companies may wish to consider whether it is appropriate to adopt policies or procedures to mitigate the risk that slavery or human trafficking exist in their supply chains.

\textsuperscript{8} \textit{California Civil Code Section 1714.43.}

\textsuperscript{9} \textit{Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 1502 (2010). This provision requires U.S. public reporting companies to make disclosures regarding whether their products contain certain minerals the production of which is supporting groups engaged in human rights abuses in the Democratic Republic of Congo and surrounding regions.}
GE’s Supplier Expectations are incorporated into GE’s Supplier Integrity Guide and our supplier contracts.

GE expects its suppliers to treat workers fairly, respect freedom of association, prohibit discrimination and harassment, provide a safe and healthy working environment, and protect environmental quality. More specifically, our suppliers must:

- Comply with laws and regulations protecting the environment, continuously improve their resource efficiency, and not adversely affect the local community
- Provide workers with a safe and healthy workplace
- Employ workers above the applicable minimum age requirement or the age of 16, whichever is higher
- Comply with laws and regulations governing wages, hours, days of service, and overtime payment for workers
• Not utilize forced, prison or indentured labor, or subject workers to any form of compulsion, coercion or human trafficking.

• Allow their workers to choose freely whether or not to organize or join associations for the purpose of collective bargaining, as provided by local law.

• Prohibit physical, sexual or psychological harassment or coercion.

• Assure that workers are hired, paid and otherwise subject to terms and conditions of employment based on their ability to do the job, not on their personal characteristics such as race, national origin, sex, religion, ethnicity, disability, maternity, age and other characteristics protected by local law. (This does not bar compliance with affirmative preferences that may be required by local law.)

• Maintain and enforce a Company policy requiring adherence to ethical business practices, including a prohibition on bribery of government officials.

• Respect the intellectual property of others.

• Adopt policies and establish systems to procure tantalum, tin, tungsten and gold from sources that have been verified as conflict-free, and provide supporting data on their supply chains for tantalum, tin, tungsten and/or gold to GE when requested, on a platform to be designated by GE.

• Maintain security measures consistent with international standards for the protection of their operations and facilities against exploitation by criminal or terrorist individuals and organizations.

• Expect their suppliers to conform to similar standards.

A supplier's failure to correct any assessment findings inconsistent with the policies above within designated time frames results in termination of business. Supplier employee concerns or supplier concerns with GE employees' conduct can be anonymously reported to GE's Ombudsperson lines or through other processes that result in investigations and follow-up.

View our supply chain-related performance goals and metrics.
Selected internet sites on trafficking in persons

List of governmental, international, and non-governmental agencies working to combat trafficking in persons:
Department of State’s Office to Monitor and Combat trafficking in Persons
http://www.state.gov/g/tp/

State Department’s Annual Trafficking in Persons Reports
http://www.state.gov/g/tp/rls/tiprrp/index.htm

Department of Labor’s list of goods produced by child labor or forced labor

Department of Justice, Office of Overseas Prosecutorial Development’s work to increase capacity for prosecuting trafficking in persons:
http://www.justice.gov/criminal/opdat/acheive/traffic-n-persons.html

DHHS, Administration for Families and Children, Trafficking in Persons, the Campaign to Rescue and Restore Victims of Human Trafficking
http://www.acf.hhs.gov/trafficking/resources/index.html

U.S. Department of Justice trafficking in persons page
http://www.justice.gov/archive/olp/human_trafficking.htm
Other forms of relief for victims of abuse, crime, and disaster
Temporary Protected Status, Cuban Adjustment Act, U visas, NACARA, HRIFA, SIJS
(Abriel 2014)

- In addition to refugee status, asylum, withholding of removal, and CAT, Congress has enacted some general protection programs.
- In addition, Congress passes forms of relief directed to specific nationalities or events.

Overview of immigration protection remedies under U.S. law
- General programs:
  - Refugee status
  - Asylum
  - Withholding of removal
  - Relief under Convention against Torture
  - Temporary Protected Status
  - T visas (victims of human trafficking)
  - U visas (victims of crime)
  - Self-petitioning under VAWA
  - Special Immigrant Juvenile Status
- Special programs:
  - Amerasian Children
  - Cuban Adjustment Act
  - NACARA 202 for Nicaraguans and Cubans
  - NACARA 203 for Salvadorans, Guatemalans, USSR
  - HRIFA for Haitians
  - DACA
  - Iraq and Afghan Interpreters
  - And others

Temporary Protected Status

Benefits of Temporary Protected Status - INA § 244
- Temporary authorized stay during designation period
- Employment authorization
- Drawbacks:
  - Does not include spouses and children
  - Does not lead to permanent status, unless Senate approves by 3/5 majority.

TPS designation requirements
AG/DHS designates:
Country or region where:
- ongoing armed conflict poses threat to nationals, or
- earthquake, flood, drought, epidemic, or other environ't disaster causing substanb'l but temporary disruption, if foreign state unable to handle return and has requested designation, or
- Extraordinary and temporary conditions that prevent nationals from returning safely.
Designations may be for 6-18 months; can be extended.
TPS individual requirements

- Physically present in U.S. since date of designation & continuously resided in U.S. since designated date
- Admissible, but docs. & labor certif. grds. don't apply, also, all inadmissibility grds. may be waived except for certain crim'l grds. § 244(c)(2).
- Cannot have been convicted of any felony or 2 or more misdemeanors
- Cannot fail under asylum ineligibility grds. at INA § 208(b)(2)(A)

- Register during registration period.
- Re-register during registration periods.
- Countries currently designated for TPS: El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan, Syria.

SPECIAL IMMIGRANT JUVENILE STATUS

INA § 101(a)(27)(J), 245(h).

Benefits of Special Immigrant Juvenile Status

- Provides LPR status to children in state dependency and some delinquency proceedings.
- Permanent right to live and work legally in the U.S. and to travel.
- Same public benefits as refugee children, including educational assistance.
- Does not allow immigration of parents and may not allow immigration of siblings

SIJS requirements

- Applicant is dependent on a juvenile court or committed to custody of state agency or dept. or individual or entity appointed by state agency or dept. May include delinquency and probate as well as dependency.
- Reunification with one or both parents is not viable due to abuse, neglect, abandonment, or similar basis under state law.
- It is determined in judicial or administrative proceedings that it is not in the child's best interest to be returned to his or her country.

Obtaining permanent residence based on Juvenile Court's order

- Applicant is unmarried and files for SIJS status before turning 21.
- Applicant then applies for SIJS status with CIS and for adjustment of status (with CIS or if in removal proceedings with IU).
- NOTE: No requirement of relation to USC or LPR
- Unlawful status not a bar
- Certain inadmissibility grounds do not apply; some others may be waived.
Self-petitioning under the Violence against Women Act
- Allows spouses, children, and parents of USC's and spouses and children of LPRs to self-petition for an LPR visa, rather than waiting for abuser to apply for them.

BENEFITS OF SELF-PETITIONING UNDER VAWA
- Compare with regular family-based immigration process:
  Step 1: USC or LPR relative (the petitioner) files Form I-130 with INS/CIS
  Step 2: If I-130 approved, alien spouse and children (the principal and derivative beneficiaries) apply for permanent resident visa.

VAWA REQUIREMENTS FOR SELF-PETITIONING SPOUSE
- Marriage or "intended marriage" to abuser, and
- Abusive spouse is USC or LPR, and
- Victim entered into marriage in good faith, and
- USC or LPR spouse subjected victim to Battery or extreme cruelty during marriage, and
- Good moral character, and

- Past or present residence with USC/LPR spouse, and
- Either current residence in U.S. or, if living outside U.S., abusive spouse is employee of USG or member of USAF OR some abuse occurred in U.S.

- "Intended spouse"
  - Believes he or she has married a USC or LPR and
  - a marriage ceremony was actually performed, and
  - the marriage is not legitimate, because of the USC's or LPR's bigamy.
  - Not the same as "common law marriage"
  - "Marriage" includes common law marriages in common law states
SELF-PETITIONING CHILD

- Applicant is a "child" (unmarried and under 21) of
- USC or LPR parent
- USC or LPR parent battered child or subjected child to extreme cruelty
- Good moral character (presumed if under 14)
- Some residence past or present with abusive parent

- Current residence in U.S. or, if living outside U.S., some abuse in U.S. or abusive parent is employee of USG or member of USAF.

U non-imm. visa for victims of crime

- Nonimmigrant status in U.S. for 3 years
- Employment authorization
- Possibility of nonimmigrant status for family members (spouse, children, and for apples under 21, parents and unmarried siblings under 18).
- Possibility of becoming LPR after 3 yrs.

U visa requirements
INA §§ 101(a)(15)(U); 214(p)

1. Applicant has suffered substantial physical or mental abuse because of being victim of certain criminal activity.
2. Applicant (or if under 16, parent or guardian) possesses information about crime and is or was helpful to investigation or prosecution.
3. Federal, state, or law enforcement authority certifies # 2.
4. Criminal activity violated U.S. law or occurred in U.S. or territories or possessions.
5. Plus, applicant must be admissible (but special exceptions and waivers).

Criminal activity for U visas

- Rape, torture, trafficking, incest, dom. violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, FGM, being held hostage, pecunage, involuntary servitude, slave trade, kidnapping, abduction, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, or attempt, conspiracy, or solicitation to commit any of the above-mentioned crimes, or any similar activity in violation of federal, state or local criminal law.

Cuban Adjustment Act
Pub. L. 89-732 (1966)

- Gives LPR status
- To nationals of Cuba and their spouses and children, even if not Cuban nationals, if relationship existed when Cuban spouse or parent obtained LPR status.
- Must be admitted or paroled into U.S. (but can be paroled nunc pro tunc)
- Must be physically present in U.S. for 1 yr. before application
- Must be admissible, but special exceptions and waiver provisions.
Amerasian children
INA § 204(f)

- AG has reason to believe person born in Korea, Vietnam, Laos, Kampuchea, or Thailand after 1950 and before Oct. 22, 1982,
- AG has reason to believe person fathered by USC (but need not establish father's identity),
- AG receives acceptable guarantee of legal custody and financial responsibility
- If person is under 16, person is placed with appropriate sponsor in U.S. and mother or guardian has in writing irrevocably released person for immigration.

Examples of evidence to establish father a USC

- Person's birth records
- Affidavits from persons with relevant personal knowledge
- Letter from or photographs of father
- Evidence of financial support from father
- Western characteristics in person's physical appearance.

NACARA Sec. 203
Cancellation of Removal

- Nicaraguan and Central American Relief Act, Pub. L. 105-100 (1997)
- Gives permanent residence for
  - For Salvadorans, Guatemalans, and persons from former USSR

NACARA § 203 requirements

- Nationality of one of specified countries
- 7 years continuous physical presence in U.S.
  (10 yrs. if fall under criminal or security inadmissibility or deportation grounds)
  (Only brief, casual & innocent absences)
- Good moral character during that time
- Removal would cause extreme hardship to self or USC or LPR spouse, parent, or child (presumed for ABC class members)
- Meet country-specific requirements

NACARA Sec. 203
requirements for Guatemalans

- Category 1:
  - Entered U.S. on or before October 1, 1990
  - Registered for ABC benefits on or before Dec. 31, 1991
  - Was not apprehended at time of entry after Dec. 19, 1999
- Category 2:
  - Filed asylum application before April 1, 1990

NACARA Sec. 203
Requirements for Salvadorans

- Category 1:
  - Entered U.S. on or before Sept. 19, 1990
  - Registered for ABC benefits on or before Oct. 31, 1991 (by direct registration or by applying for TPS)
- Category 2:
  - Filed asylum application on or before April 1, 1990
NACARA Sec. 203 Reqmts for Nationals of former USSR

- Entered U.S. on or before Dec. 31, 1990
- Applied for asylum on or before Dec. 31, 1991
- At time of filing, was national of Soviet Union, Russia, any republic of former USSR, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or former Yugoslavia.

Deferred Action for Childhood Arrivals (DACA)

- By Executive Order.
- Provides deferred action (protection from removal) and employment authorization.
- Requirements:
  - Have come to U.S. before 16th b-day;
  - Be under 31 and undocumented as of June 15, 2012;
  - Have resided continuously in U.S. since June 15, 2007;
  - Completed or be pursuing high school or GED, or be honorably discharged vet;
  - No conviction as adult of felony, significant misdemeanor, or three or more other misdemeanors;
  - Not otherwise pose threat to national security or public safety.

Examples of past relief for specific nationalities – deadline passed

- Nicaraguan and Central American Relief Act, Pub. L. 105-100, § 202 – adjustment to LPR for Nicaraguans and Cubans with long residence in U.S.
- Haitian Refugee and Immigrant Fairness Act, Pub. L. 105-277, § 902 – adjustment to LPR for Haitians with long residence in U.S.
- Indochinese Adjustment Act (2005) - adjustment to LPR for nationals of Vietnam, Cambodia, Laos, paroled into U.S. under Orderly Departure Program or from refugee camp.
DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)
Fact Sheet

Deferred Action is a form of prosecutorial discretion that provides a work permit and relief from removal for two years to certain eligible undocumented youth.

What are the benefits of Deferred Action for Childhood Arrivals (DACA)?
- Protects the youth from being placed into removal proceedings and from being removed.
- Provides an employment authorization document that allows the youth to work.
- Can obtain a Social Security Number.
- DACA can be renewed after two years.
- In certain states, a DACA-recipient can apply for a state identification card and a driver's license.

Who is eligible for DACA?
An undocumented youth that is currently living in the United States may be eligible for DACA. The youth can request DACA, even if they are currently in removal proceedings or have a final order of removal. If the youth is detained, he or she can also request DACA or ask to be released based on prima facie DACA eligibility.

What are the requirements for DACA?
A youth can request DACA if he or she:

1. Is at least 15 years old at the time of filing his or her request.
   a. Exception: a youth that is currently in removal proceedings or has a final order of removal, or a voluntary departure order can request DACA under the age of 15.
2. Was under the age of 31 as of June 15, 2012;
3. Came to the United States before his or her 16th birthday;
   a. However, if the youth has entered and left the United States before age 16, he or she will have to show established residency in the U.S. before age 16.
4. Has continuously resided in the United States since June 15, 2007, up to the present time;
5. Was physically present in the United States on June 15, 2012, and at the time of making his or her request for DACA;
6. Entered without inspection before June 15, 2012, or his or her lawful immigration status expired as of June 15, 2012 (i.e., person was undocumented as of June 15, 2012);
7. Is currently in school, has graduated or obtained a certificate of completion from high school, has obtained a general education development (GED) certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
8. Has not been convicted (as an adult) of a felony, significant misdemeanor, three or more other misdemeanors, and does not otherwise pose a threat to national security or public safety.

For more information, please visit the ILRC DACA web page at http://www.ilrc.org/info-on-immigration-law/deferred-action-for-childhood-arrivals.

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Temporary Protected Status

What is TPS

The Secretary of Homeland Security may designate a foreign country for TPS due to conditions in the country that temporarily prevent the country’s nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately. USCIS may grant TPS to eligible nationals of certain countries (or parts of countries), who are already in the United States. Eligible individuals without nationality who last resided in the designated country may also be granted TPS.

The Secretary may designate a country for TPS due to the following temporary conditions in the country:

- Ongoing armed conflict (such as civil war)
- An environmental disaster (such as earthquake or hurricane), or an epidemic
- Other extraordinary and temporary conditions

During a designated period, individuals who are TPS beneficiaries or who are found preliminarily eligible for TPS upon initial review of their cases (prima facie eligible):

- Are not removable from the United States
- Can obtain an employment authorization document (EAD)
- May be granted travel authorization

Once granted TPS, an individual also cannot be detained by DHS on the basis of his or her immigration status in the United States.

TPS is a temporary benefit that does not lead to lawful permanent resident status or give any other immigration status. However, registration for TPS does not prevent you from:

- Applying for nonimmigrant status
- Filing for adjustment of status based on an immigrant petition
- Applying for any other immigration benefit or protection for which you may be eligible

PLEASE NOTE: To be granted any other immigration benefit you must still meet all the eligibility requirements for that particular benefit. An application for TPS does not affect an application for asylum or any other immigration benefit and vice versa. Denial of an application for asylum or any other immigration benefit does not affect your ability to register for TPS, although the grounds of denial of that application may also lead to denial of TPS.

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Countries Currently Designated for TPS

Select the country link for additional specific country information.

http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status#Countries Currently Designated for TPS
Temporary Protected Status | USCIS

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<th>Designated Country</th>
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<td>Somalia</td>
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<td>N/A</td>
<td>NO Automatic Extension*</td>
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Eligibility Requirements

To be eligible for TPS, you must:

- Be a national of a country designated for TPS, or a person without nationality who last habitually resided in the designated country;
- File during the open initial registration or re-registration period, or you meet the requirements for late initial filing during any extension of your country’s TPS designation (Late initial filers see ‘Filing Late’ section below);
- Have been continuously physically present (CPP) in the United States since the effective date of the most recent designation date of your country, and
- Have been continuously residing (CR) in the United States since the date specified for your country. (See your country’s TPS Web page to the left). The law allows an exception to the continuous physical presence and continuous residence requirements for brief, casual and innocent departures from the United States. When you apply or re-register for TPS, you must inform USCIS of all absences from the United States since the CPP and CR dates. USCIS will determine whether the exception applies in your case.

You may NOT be eligible for TPS or to maintain your existing TPS if you:

http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status#CountriesCurrentlyDesignatedforTPS
U.S. eases rules to admit more Syrian refugees, after 31 last year

Wed, Feb 5 2014

By Patricia Zengerle

WASHINGTON (Reuters) - President Barack Obama's administration announced on Wednesday that it had eased some immigration rules to allow more of the millions of Syrians forced from their homes during the country's three-year civil war to come to the United States.

Only 31 Syrian refugees - out of an estimated 2.3 million - were admitted in the fiscal year that ended in October, prompting demands for change from rights advocates and many lawmakers.

Hundreds of thousands of Syrians have been taken in by neighboring countries such as Jordan, Lebanon and Turkey.

The rules changes granted exemptions on a case by case basis to the "material support" bar in U.S. immigration law, according to an announcement in the Federal Register signed by Secretary of State John Kerry and Jeh Johnson, the Secretary of Homeland Security.

That bar had made it impossible for anyone who had provided any support to armed rebel groups to come to the United States, even if the groups themselves receive aid from Washington.

The advocacy group Human Rights First said, for example, that the existing law had been invoked to bar a refugee who had been robbed of $4 and his lunch by armed rebels, and a florist who had sold bouquets to a group the United States had designated as a terrorist organization.

"These exemptions will help address the plight of Syrian refugees who are caught up in the worst humanitarian crisis in a generation," Illinois Senator Richard Durbin, chairman of the U.S. Senate subcommittee on human rights, said in a statement.

It was not immediately clear how many Syrians would be affected by the rules change.

By early January, 135,000 Syrians had applied for asylum in the United States. But the strict restrictions on immigration, many instilled to prevent terrorists from entering the country, had kept almost all of them out.

Washington has provided $1.3 billion in humanitarian assistance to aid Syrian refugees. This year, the United Nations is also trying to relocate 30,000 displaced Syrians it considers especially vulnerable. Witnesses at a Senate hearing last month had testified that Washington would normally accept half.

(Editing by Grant McCool)