

Theoretical justifications for the *Kovac* standard for economic persecution claims

Introduction

Across the globe governments have used economic weapons to harm their citizens. In Fiji Hindus are denied land owning rights, in Eastern Europe Roma are denied educational opportunities, and in China practitioners of the Falun Gong suffer economic restrictions. And in the most extreme historical example, the Nazis' economic boycott of Jews in the 1930's as part of their overall systematic repression. Clearly victims of harsh economic discrimination have suffered; but have they been persecuted?

To be granted asylum in the United States one must demonstrate that he or she has suffered from past persecution or has a well-founded fear of future persecution. This forces the question, what constitutes persecution? Clearly, torture, severe beatings, and numerous detainments can constitute persecution. But what if, for example, someone is denied an education and prevented from working because of his religion? Or if one is fined severely because of her political opinion? When does economic harm rise to the level of persecution? This is a question that the Board of Immigration Appeals (hereinafter the BIA) has failed to clearly answer. As a result, the circuits employ three different standards in analyzing asylum claims based on economic persecution. Predictably, inconsistent results have followed and the standard used has often become the determinative factor in whether or not one is granted asylum.

The BIA's failure to settle the issue is not surprising. The Immigration and Nationality Act does not define the term persecution and the legislative history provides little guidance. Congress enacted the INA in order to align US policy with United

Nations protocol. The UN and international community, however, have also not clearly defined the term persecution. Given this lack of guidance, the BIA should look to the underlying justifications for asylum in determining how to analyze claims of economic persecution.

This paper will outline the different standards that have been used as well as explore the dominant theories underlying the asylum system. Part I will provide background on the INA and introduce asylum procedure. Part II will discuss the BIA's lack of clarity and then lay out the three different standards--*Dunat*, *Kovac*, and *Acosta*--that the circuits have used. It will go on to demonstrate that the different standards have led to inconsistent decisions. Part III will show that the neither Congress nor international law has defined the term persecution, let alone economic persecution. I will then argue that the BIA should look to the theoretical underpinnings of asylum in determining the appropriate standard. I will then introduce two theories that justify asylum. The first is the membership theory of asylum which focuses on one's lack of membership in a society. Asylum is justified in that it provides the individual with membership in a new society. The second is the human rights protection theory that justifies asylum where a state fails to protect its citizen and violates his or her human rights. In Part IV I will use these theories to analyze the standards used in economic persecution cases. I will conclude that the BIA should adopt the *Kovac* standard because it is supported by both the membership and human rights protection theory.

Part I

A. Background on INA

Immigration law in the US, including asylum and refugee issues, are primarily governed by the Immigration and Nationality Act (hereinafter the INA). Under 8 U.S.C. 208(a), an alien must be considered a refugee to qualify for a grant of asylum. A refugee is defined in the Immigration and Nationality Act (INA) as:

Any person who is outside [his or her country] . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.¹

The INA uses the definition of a refugee found in the 1967 United Nations Protocol Relating to the Status of Refugees. The US ratified the protocol in 1968 and Congress adopted its refugee definition in 1980 in order to align US law with the United Nations Protocol.² An alien in the US who can meet the definition is eligible for a grant of asylum. One may qualify either because of past persecution or because of a well-founded fear of future persecution. If the claim is based on past persecution, the applicant must establish that

he or she has suffered persecution in the past in the applicant's country of nationality . . . on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim.³

For future persecution, the applicant must demonstrate that he or she has a

¹ 8 USC §1101(a)(42)

² See *I.N.S. v. Cardoza-Fonseca*, 480 US 421, 437 (1987) (“If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees to which the United States acceded in 1968. Indeed, the definition of ‘refugee’ that Congress adopted is virtually identical to the one prescribed by Article 1(2) of the Convention.”).

³ 8 C.F.R. § 208.13

- (A) fear of persecution in his or her country of nationality . . . on account of race, religion, nationality, membership in a particular social group, or political opinion;
- (B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and
- (C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.⁴

The INA, however, does not define “persecution.” Moreover, the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* also does not provide a clear definition of persecution. It simply provides that,

[T]here 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.... Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case....⁵

An earlier version of the INA was more specific in what was required for persecution. The 1952 version required that an asylum applicant demonstrate that he or she suffered “physical persecution.”⁶ In 1965, however, the INA was amended and the term “physical” was removed.⁷ Since then the BIA and the courts have struggled to interpret the term “persecution.”

B. Asylum Procedure

As an asylum applicant must prove that he or she is a refugee under the INA, refugee status and asylum status are closely related. The primary difference is where the

⁴ Id.

⁵ *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, UNHCR, Geneva, January 1992.

⁶ It provided, “[T]he Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such a period of time as he deems necessary for such reason.”

⁷ See *Kovac v. INS* 407 F.2d 102 (9th Cir. 1969), discussed below.

person seeks the status. Refugee status is sought by one outside of the US while asylum status is sought by one inside the US. One can request asylum at any port of entry upon arrival in the US with an asylum officer or apply for it within one year of arrival in the US with the United States Citizen and Immigration Services.⁸ One may also seek a grant of asylum from an Immigration Judge (IJ) while in removal proceedings. If the IJ denies asylum, the case can be appealed to the BIA and then to the court of appeals. If one is granted asylum, he or she can adjust status to permanent resident after residing in the US for a mandatory one year waiting period. There is no ceiling on the number of grants of asylum per year and as of 2005, no yearly cap on the number of asylees who can adjust status to permanent residents.⁹

Part II

A. The BIA's Lack of Clarity

The BIA has failed to clearly articulate a test for analyzing economic persecution claims. The BIA has used different standards and has even ruled on economic persecution claims without referencing any standard. In the 1960's, the BIA consistently used the *Dunat* standard, which is "economic proscription so severe as to deprive a person of all means of earning a livelihood may amount to physical persecution."¹⁰ The

⁸ One may seek asylum after being in the US for more than one year if country-wide or personal circumstances have changed or extraordinary circumstances prevented him or her from applying within the one year.

⁹ The REAL ID Act of 2005 removed the cap on the number of asylees who can adjust status each year. Prior to the Act, the cap was at 10,000 per year.

¹⁰ This standard originated in *Dunat v. Hurney*, 297 F.2d 744 (3rd Cir, 1962) and is discussed *infra*. *Dunat* was cited by the BIA in the following cases: *Matter of Nagy*, 11 I. & N. Dec. 888, 890 (Nov. 30, 1966) ("[The] record does not support a claim of complete deprivation of economic opportunity within the scope of the *Dunat* case...."); *Matter of Bufalino*, 11 I. & N. Dec. 351, 361 (Sept. 30, 1965) ("It has been held that economic proscription so severe as to deprive a person of *all* means of earning a living may amount to physical persecution."); *Matter of Vardjan*, 10 I. & N. Dec. 567, 575 (Jun. 3, 1964) ("Her economic prospects would not be good, but subsistence at a low level does not meet the statutory standard for physical persecution.... Only total proscription of employment for such reasons suffices.").

BIA has used this standard as recently as 1991 in *Matter of D—L--& A—M--*, I. & N. Dec. 409 (BIA 1991). In *Matter of D—L--& A—M--*, the Cuban applicant, a so-called counterrevolutionary, was forbidden from returning to his former job after he was released from detention.¹¹ He was, however, able to make a living growing tobacco and rice.¹² Citing *Dunat*, the BIA held “he therefore failed to show the Cuban government had placed him in a situation so severe as to deprive him of a livelihood.”¹³

In other cases the BIA has employed the *Kovac* standard, which defines economic persecution as the “deliberate imposition of substantial economic disadvantage upon an alien for reasons of race, religion, or political opinion.”¹⁴ In *Matter of Barrera*, which also dealt with Cuban asylum-seekers, the BIA used the standard of *Kovac*, not *Dunat*.¹⁵ The BIA itself established a third standard in *Matter of Acosta* in 1986, though it has not employed the standard to resolve any economic persecution claims.¹⁶ Under *Acosta*, which is discussed *infra.*, “economic deprivation or restrictions so severe that that they constitute a threat to an individual’s life or freedom” amount to persecution.¹⁷ Therefore, the BIA has referenced three different standards---*Dunat*, *Kovac*, and *Acosta*--- to evaluate economic persecution claims.

The Second Circuit has taken the BIA to task for its lack of clarity. In *Mirzoyan v. Gonzalez*, an ethnic Armenian’s asylum claim was based on the economic

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Kovac v. INS* 407 F.2d 102 (9th Cir. 1969), discussed *infra.*

¹⁵ 19 I. & N. Dec. 837 (BIA 1989) (Citing *Kovac*, the BIA finds “[t]here are no allegations that the returned Marielitos who are not considered a threat to Cuban society have been denied employment, education, housing, permission to travel, or other benefits of this sort.”); *see also In re V-T-S-*, 21 I. & N. Dec. 792 (BIA 1997) (citing *Kovac* for “holding that deliberate imposition of substantial economic harm can support a claim of political persecution”).

¹⁶ 19 I. & N. Dec. 211 (BIA 1985).

¹⁷ *Id.*

disadvantages she suffered in Georgia.¹⁸ Mirzoyan claimed she was unable to earn a livelihood in Georgia because she was Armenian.¹⁹ She received an unfairly low score on her university entrance exam and was thus forced to attend a less prestigious university.²⁰ After graduating, she was unable to find a job in her profession because of her ethnicity.²¹ She took a job as a courier but was fired as Georgian anti-Armenian sentiment grew.²²

An immigration judge found Mirzoyan and an expert who testified on the treatment of Armenians in Georgia credible.²³ However, she concluded that “discrimination such as mistreatment by school authorities, having trouble finding or maintaining employment, or being harassed does not rise to the level of persecution.”²⁴ She did not set forth the standard she used in making her determination.²⁵ In a short opinion, the BIA affirmed the denial of Mirzoyan’s asylum claim but made no reference to the appropriate test used to evaluate claims of economic persecution.²⁶

On appeal, the Second Circuit effectively threw up its hands and remanded the case in order for the BIA to articulate a clear standard. It noted that neither the IJ nor the BIA explained the standard they had used to evaluate the claim.²⁷ Moreover, the BIA had not previously established a standard for economic persecution claims; it had used three different standards. Therefore, the court was unable to determine the standard the

¹⁸ 457 F.3d 217 (2d Cir. 2006).

¹⁹ Id. at 219.

²⁰ Id.

²¹ Id.

²² Id.

²³ Id. at 220

²⁴ Id.

²⁵ Id.

²⁶ Id. at 221.

²⁷ Id.

BIA had used in this case.²⁸ The court then remanded the case with clear instructions to the BIA to clarify the standard governing economic persecution claims.²⁹ It added, “[b]ecause petitions for review involving claims of economic persecution are common in this Circuit, we ask the BIA to act as expeditiously as possible.”³⁰ The BIA has not yet announced the appropriate governing standard and the Second Circuit continues to remand cases that involve economic persecution claims.³¹

Moreover, since the BIA has not clearly adopted a test, the circuits have had been forced to determine for themselves which test to use in analyzing claims of economic persecution. As a result of this lack of clarity, the circuits employ different tests and often reach inconsistent results. Below I outline how the circuits have applied the three different standards.

B. The Standards

1. *Dunat* Standard

In *Dunat v. Hurney*, the Third Circuit recognized that economic abuse can constitute persecution. 297 F.2d 744 (3rd Cir, 1962). However, in keeping with the then current INA’s requirement of physical persecution, the court held that “economic proscription so severe as to deprive a person of all means of earning a livelihood may

²⁸ Id.

²⁹ Id. 223.

³⁰ Id. at 224.

³¹ *Jing Bin Jiang v. Gonzales*, WL 560399 at 2 (2nd Cir. 2007) (“Because it is unclear what petitioners must demonstrate to succeed on economic persecution claims, it cannot be determined whether the IJ was reasonable in rejecting Jiang's claim. . . .Since neither the IJ nor the BIA set forth a standard under which it reviewed Jiang's economic persecution claim, we remand to the BIA for it to provide a standard and re-evaluate the claim in light of that standard.”); *Quazoli v. Gonzales*, 204 Fed. Appx. 68 (2nd Cir. 2006) (the Second Circuit remanded a case where a political opponent of the Socialist Party was beaten, threatened, and had his business destroyed and noted “[o]n remand the BIA may wish to apply the standards it develops in *Mirzoyan*”).

amount to physical persecution.”³² This is the most stringent of the tests; few aliens are able to show that economic harm has deprived them of all means of earning a livelihood. While it may seem that the removal of the physical persecution requirement should have rendered the *Dunat* test obsolete, it is still used by the Eighth and Eleventh Circuits (and was used by the BIA as recently as 1991, discussed *supra.*).

In *Zheng v. U.S. Atty. Gen.*, the petitioner was a practitioner of Falun Gong who suffered at the hands of the Chinese government.³³ Zheng was arrested and detained for five days where he was forced to watch and read anti-Falun Gong materials and was dragged by his arms and forced to remain in the sun for two hours.³⁴ Upon release, he was fired from his job and was unable to find employment in his city.³⁵ He then moved to his parents’ rural village where he remained for three years.³⁶ In the village he did not work but was watched by local officials who occasionally searched his parents’ home. Zheng then fled to the US where he filed for asylum in 2002.³⁷ His claim was denied by both the Immigration Judge and the BIA.³⁸ Zheng appealed to the Eleventh Circuit and in his brief, Zheng cites to the *Kovac* standard as the proper test to evaluate his loss of employment and inability to procure new employment.³⁹ The Eleventh Circuit, however, employed the stringent *Dunat* standard and concluded that “Zheng’s evidence is

³² Id.

³³ 451 F.3d 1287 (11th Cir. 2006).

³⁴ Id. at 1290

³⁵ Id.

³⁶ Id.

³⁷ Id.

³⁸ Id.

³⁹ Petitioner’s Brief “Appellant was de facto subjected to harm and suffering including but not limited to “severe economic disadvantage or deprivation of liberty, food, housing, employment and other essentials of life” as contemplated in *Borca supra* and *Gonzales supra.*”

accordingly insufficient to compel a finding that he was deprived of all means of earning a living.”⁴⁰

Similarly, the Eighth Circuit⁴¹ has employed a test equally as stringent as the Eleventh Circuit and has denied all asylum claims based on economic persecution. It denied a Zoroastrian from Pakistan who alleged that he would be denied the possibility of obtaining a government job or political office and would be deprived of his livelihood because he would be unable to practice law in Pakistan⁴² and a Jehovah’s Witness from Eritrea who claimed Jehovah Witness’ who failed to vote in a national referendum were dismissed from their jobs, evicted from government housing, and denied passports and identity cards.⁴³ The claims of these applicants may have succeeded in other circuits, which employ a more expansive definition of economic persecution.

2. Kovac Standard

The *Kovac* test is the most expansive and is employed by numerous circuits. In *Kovac v. INS*, the Ninth Circuit defined economic persecution as the “deliberate imposition of substantial economic disadvantage upon an alien for reasons of race, religion, or political opinion.”⁴⁴ The court reasoned that this less stringent standard is warranted because Congress removed the term “physical” from the definition of

⁴⁰ *Zheng* 451 F.3d 1287; see also *Barreto-Claro v. U.S. Atty. Gen.* 275 F.3d 1334 (11th Cir. 2001) (“This type of employment discrimination which stops short of depriving an individual of a means of earning a living does not constitute persecution.”).

⁴¹ Recently the Eighth Circuit has framed its test similar to the *Acosta* standard. However, the stringency in which it was applied in the cases cited in this section mirror the *Dunat* standard.

⁴² *Minwalla v. INS* 706 F.2d 831, 835 (8th Cir. 1983) (“These allegations do not establish a well founded fear of persecution. Persecution requires a showing of a threat to one’s life or freedom. Mere economic detriment is not sufficient.”); see also *Feleke v. I.N.S.*, 118 F.3d 594, 598 (8th Cir. 1997) (“Fears of economic hardship or lack of opportunity do not establish a well-founded fear of persecution.”).

⁴³ *Woldemichael v. Ashcroft*, 448 F.3d 1000, 1004 (8th Cir. 2006) (“Persecution is a rigorous standard— ‘the infliction or threat of death, torture, or injury to one’s person or freedom on account of a statutory ground such as religion.’ Absent physical harm, subjecting members of an unpopular faith to hostility, harassment, discrimination, and even economic deprivation is not persecution unless those persons are prevented from practicing their religion or deprived of their freedom.”).

⁴⁴ 407 F.2d 102, 107 (9th Cir. 1969).

persecution.⁴⁵ Essential to its decision was the court’s determination that Congress had shifted “the emphasis from the consequences of the oppressive conduct to the motivation behind it.”⁴⁶ Thus the standard represents a move away from the restrictiveness of *Dunat* that focused solely on the level of harm.⁴⁷ Under *Kovac* the fact that the economic harm has been deliberately imposed, and not necessarily the level of harm, is critical.⁴⁸ Because the definition of persecution already contains the “on account of” provision, the *Kovac* standard can be viewed as including a double emphasis on the reasons behind the persecution.

The *Kovac* standard has been employed by numerous circuits—the Second⁴⁹, Third⁵⁰, Fourth⁵¹, Fifth⁵², Seventh⁵³, and Ninth⁵⁴. Under this standard aliens have been granted asylum where they probably would have been denied if the circuits employed a more restrictive test. In *Baballah*, for example, the Ninth Circuit granted an Israeli

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See Borca v. INS* 77 F.3d 210, 216 (7th Cir. 1996) (“Our review of this matter convinces us that the *Kovac* court was correct in concluding that the 1965 Amendment was intended to lessen the burden imposed upon petitioners.”).

⁴⁸ *Kovac*⁴⁸ 407 F.2d 107; see also *Borca* 77 F.3d 210 at 216 (“More importantly, the economic harm required under *Kovac* must be ‘deliberate[ly] impos[ed]’ as a form of punishment.”).

⁴⁹ *Liao v. US Dep’t of Justice*, 293 F.3d 61, 70 (2d Cir.2002) (“While we recognize that economic deprivation may constitute persecution, an asylum applicant must offer some proof that he suffered a ‘deliberate imposition of substantial economic disadvantage.’”)

⁵⁰ Need third, maybe Li

⁵¹ *Chen v. INS*, 195 F.3d 198, 204 (4th Cir.1999) (“Although economic deprivation can constitute “persecution” under the Act, the deprivation must at least rise to the level of a “deliberate imposition of substantial economic disadvantage.”) (citing *Borca* and *Kovac*).

⁵² *Eduard v. Ashcroft*, 379 F.3d 182, 187 (5th Cir.2004) (“The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.”).

⁵³ *Borca* 77 F.3d 210 at 216 (“To establish a well-founded fear of economic persecution, *Borca* must show that she faces a probability of deliberate imposition of substantial economic disadvantage on account of her political opinion.”).

⁵⁴ *Baballah v. Ashcroft*, 367 F.3d 1067, 1075 (9th Cir.2004) (“We have recognized that purely economic harm can rise to the level of persecution where there is ‘a probability of deliberate imposition of substantial economic disadvantage’ upon the applicant on account of a protected ground.”) (quoting *Kovac*).

Arab⁵⁵'s petition for asylum in part because it found he suffered economic persecution. Baballah was denied employment as an accountant, for which he was trained, and as a lifeguard because of his background.⁵⁶ He was forced to work as a fisherman.⁵⁷ The Israeli Marines, however, harassed him, fined him, ruined his fishing nets, and destroyed his boat.⁵⁸ The IJ failed to conclude that these actions constituted economic persecution because Baballah did not show that he would be unable to support his family if he returned to Israel.⁵⁹ The IJ used a strict standard, requiring Baballah show an absolute inability to earn a livelihood.⁶⁰ The court, however, cited *Kovac* and held that the IJ “erred as a matter of law by requiring that Baballah show an absolute inability to support his family.” Instead, under *Kovac*, one must show that the persecutor deliberately imposed a substantial economic disadvantage. Baballah was able to do this, and the court therefore found him eligible for asylum.

Similarly, the Seventh Circuit in *Borca* remanded the case in order for the BIA to apply the *Kovac* standard.⁶¹ Borca, a radiologist, became involved with the opposition movement in Romania and rallied against the health minister.⁶² Because of her activities, she was fired from her hospital and told that she was barred from all government employment except possibly as a farm laborer.⁶³ The IJ denied her petition for asylum because he concluded that Borca was not persecuted.⁶⁴ Both the IJ and BIA adhered to the *Dunat* standard that the economic persecution must be “so severe as to deprive an

⁵⁵ Id. Baballah father was Arab while his mother was Jewish.

⁵⁶ Id.

⁵⁷ Id. at 1079.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ 77 F.3d 210 at 216.

⁶² Id.

⁶³ Id.

⁶⁴ Id.

applicant of all means of earning their living.”⁶⁵ Because Borca might have been able to work as a farm laborer, she was not denied all means of earning a living.⁶⁶ The Seventh Circuit, however, rejected the IJ’s standard.⁶⁷ It discussed *Kovac* and adopted its reasoning that the removal of the term “physical” from the 1965 Amendment demonstrates that Congress opted for a more expansive standard.⁶⁸ Therefore, “[by] requiring Borca to show a deprivation of all means of earning a livelihood, the BIA failed to heed Congress’s intent, as expressed in the 1965 Amendment, to lessen the burden needed to show persecution.”⁶⁹ The case was thus remanded to be adjudicated using the *Kovac* standard.⁷⁰

3. *Acosta* standard

In *Acosta*, the BIA held that persecution “could consist of economic deprivation or restrictions so severe that they constitute a threat to an individual’s life or freedom.”⁷¹ However, in *Acosta* itself there was no claim of economic persecution; the case only established the general framework for persecution. Nonetheless, many circuits have adopted the *Acosta* standard. In fact, the standard represents a major challenge to the more expansive *Kovac* standard as circuits that previously followed *Kovac* have switched to *Acosta*. The Second⁷², Third⁷³, Fourth⁷⁴, Sixth⁷⁵, and Eighth⁷⁶ circuits have all used the *Acosta* standard.

⁶⁵ Id. at 219.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ 19 I&N Dec. 211 (1985).

⁷² *Damko v. INS* 430 F.3d 626 (2nd Cir. 2005) (“We therefore recognize the BIA’s definition of economic persecution- ‘economic deprivation or restrictions so severe that they constitute a threat to an individual’s life or freedom,’ *Acosta*, 19 I. & N. Dec. at 222-as the agency’s permissible construction of the INA to which we are required to defer.”).

Significantly, the Fourth Circuit switched from using the *Kovac* standard to the *Acosta* standard. In *Chen v. INS*, the Fourth Circuit evaluated an economic persecution claim under *Kovac*---that is whether the harm constituted a substantial disadvantage--- and cited only to *Kovac* and *Borca*⁷⁷. However, in *Li v. Gonzales* the circuit analyzed Li's claim in terms of whether the economic harm, mainly a large fine, constituted a threat to her life or freedom.⁷⁸ The court does not analyze whether the harm was a substantial disadvantage as it did in *Chen*.⁷⁹ The switch to *Acosta* is significant in that fewer people will be granted asylum under this standard, which is more restrictive than *Kovac*. Moreover, *Acosta* may actually represent a return to the *Dunat* standard given the similarity in the language used by the standards. Remember, under *Dunat*, economic persecution does not arise unless the applicant has been denied all means of earning a livelihood. In *Acosta*, which cites to *Dunat*, the standard requires that the harm must constitute a threat to the applicant's life or freedom. Because the BIA has never actually used the *Acosta* standard in analyzing an economic persecution claim, the circuits may feel at liberty to look to the BIA decisions applying *Dunat* as guidance. The *Acosta* standard represents a strong challenge to the more inclusive *Kovac* standard.

⁷⁴ *Li v. Gonzales*, 405 F.3d 171 (4th Cir. 2005) (“Similarly, economic penalties ‘rise to the level of persecution’ only if such ‘sanctions are sufficiently harsh to constitute a threat to life or freedom.’”).

⁷⁵ *Ljuljdjurovic v. Gonzales* 132 Fed.Appx. 607 (6th Cir. 2005) (“Although economic deprivations or restrictions can constitute such persecution, they must be ‘so severe that they constitute a threat to an individual’s life or freedom.’”) (citing *Acosta*).

⁷⁶ *Ahmed v. Ashcroft*, 396 F.3d 1011, 1012 (8th Cir.2005) (“Economic discrimination has been held to rise to the level of persecution if such sanctions are sufficiently harsh to constitute a threat to life or freedom.”).

⁷⁷ See footnote 19 *infra*.

⁷⁸ , 405 F.3d 171 (4th Cir. 2005).

⁷⁹ The Second Circuit had also seemed to be switching from *Kovac* to *Acosta*. The *Kovac* standard was used *Guan Shan Liao v. US Dep’t of Justice*, 293 F.3d 61, 69-70 (2d Cir. 2001). In *Damko*, however, the court explicitly adopted *Acosta*. The Second Circuit’s confusion on which test to follow resulted in its remanding of *Mirzoyan* (discussed *infra*.)

C. Importance of the standard used

The standard that a circuit uses to analyze an economic persecution claim can determine whether or not the applicant is granted asylum. Because the BIA has failed to clearly articulate the appropriate standard, the circuits have reached inconsistent results. A look at how the Third and Fourth circuits have analyzed similar claims using different standards demonstrates the inconsistent results.

In *Li v. Attorney General of the US*, the applicant and his wife had four children, which violated China's One Child Policy.⁸⁰ The Chinese government fined the couple 1200 Yuan, which Li testified was equivalent to 18 month's salary.⁸¹ He also was blacklisted from any government employment and without a job, lost his health care, food rations, and school tuition and had some household furniture confiscated.⁸² The IJ and BIA concluded that that did not amount to economic persecution.⁸³ The Third Circuit disagreed. It applied the *Kovac* test⁸⁴ and held that the fines and other economic

⁸⁰ 400 F.3d 157 (3rd 2005). The State Department's *Country Reports on Human Rights Practices*, discusses the economic consequences for violating China's One Child Policy. "The country's population control policy relied on education, propaganda, and economic incentives, as well as on more coercive measures such as the threat of job loss or demotion and social compensation fees. Psychological and economic pressures were common. According to provincial regulations, the fees ranged from one-half to 10 times the average worker's annual disposable income. Those who violated the child limit policy by having an unapproved child or helping another to do so faced disciplinary measures such as job loss or demotion, loss of promotion opportunity, expulsion from the party (membership in which was an unofficial requirement for certain jobs), and other administrative punishments, including in some cases the destruction of property. In the case of families that already had two children, one parent was often pressured to undergo sterilization. These penalties sometimes left women with little practical choice but to undergo abortion or sterilization." (2006). Available at: <http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* The court provides "the deliberate imposition of severe economic disadvantage which threatens a petitioner's life or freedom may constitute persecution." *Id.* Even though the court stated that this is the *Acosta* standard, it cites to *Kovac* and *Borca* and uses language in its analysis consistent with the *Kovac* test. Moreover, the dissent points out that the court actually employs the *Kovac* test, not *Acosta*. ("[i]t is disingenuous to use the words of the governing precedent to give the appearance of following in that path while in reality applying a far different standard. Rather than considering whether the restrictions on the Lis were 'so severe that they constitute a threat to life or freedom,' the majority applies instead the more expansive standard of 'substantial economic disadvantage' used by the Ninth Circuit in the *Kovac* case.

penalties constituted the deliberate imposition of severe economic disadvantage.⁸⁵ It stressed the fact that the harm was deliberately imposed on the Lis as punishment for their violation of the One Child Policy.⁸⁶

In contrast, the Fourth Circuit held that the economic harm suffered by an alien for violating China's One Child Policy did not constitute economic persecution under the *Acosta* standard.⁸⁷ The petitioner, Li, had an "unauthorized" child and as a result, was fined 10,000 Yuan (more than one year's wages for her family) and had an intrauterine contraceptive device (IUD) inserted against her will.⁸⁸ Both the IJ and the BIA denied her asylum claim.⁸⁹ On appeal, the Fourth Circuit affirmed the BIA's decision.⁹⁰ In analyzing the fine, it used the standard that "economic penalties rise to the level of persecution only if they are so harsh as to constitute a threat to life or liberty," which is the *Acosta* standard.⁹¹ The court held that the petitioner failed to demonstrate that this standard was met.⁹² These two asylum claims, both of which involved violations of China's One Child Policy, were evaluated using different tests and predictably, had different results.

The importance of the standard used is further demonstrated by *Mirzoyan*, which was discussed in Part II. Recall that Mirzoyan was denied admission to a prestigious Georgian university, denied work in her profession, and fired from her job at a furniture

That is simply not the same standard as 'a threat to life or freedom,' and smoke and mirrors cannot make them comparable." at 173.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Li v. Gonzales*, 405 F.3d 171 (4th Cir. 2005)

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* The court also held that the insertion of the IUD did not constitute persecution. It did not discuss the combined effect of the fine and the insertion

plant because of her Armenian ethnicity. This harm could constitute “the deliberate imposition of substantial economic disadvantage” (*Kovac*), however, it does not amount to a threat to Mirzoyan’s life or freedom (*Acosta*). As the Second Circuit reasoned, “Mirzoyan likely could not prevail under the standard referenced in *Acosta* or under the similarly stringent *Dunat* standard, but might prevail under the *Kovac* standard.”⁹³ Therefore, the court remanded the case in order for the BIA to set forth the governing standard.⁹⁴

Likewise, the standard used in *Koval v. Gonzales* would likely determine whether or not the applicant was granted asylum.⁹⁵ *Koval* is a Mormon woman from the Ukraine who was prevented by the government from completing her Ph.D. degree, from living in Kiev, and forced to work in menial jobs because of her religion.⁹⁶ The IJ found that this did not constitute persecution under *Acosta*.⁹⁷ The Seventh Circuit, however, concluded that the IJ and BIA applied the incorrect standard. It held that to demonstrate economic persecution, a “‘probability of deliberate imposition of substantial economic disadvantage’ can be sufficient.”⁹⁸ The court remanded the case, noting that an analysis under the *Kovac* standard “might compel a finding that Ms. Koval suffered economic persecution on account of her religion and membership in the Mormon Church.”⁹⁹ As these cases demonstrate, the standard used to evaluate claims of economic persecution often determines their outcome.

⁹³ 457 F.3d 221.

⁹⁴ *Id.*

⁹⁵ 418 F.3d 798 (7th Cir. 2005)

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* The court cites to *Borca*, which adopted the *Kovac* standard (see *infra*. Part II.B.2.).

⁹⁹ *Id.*

Part III.

A. Lack of guidance from US and international law

Clearly, the BIA must set forth the governing standard for economic persecution claims. Its task, however, is a difficult one. First, as discussed in Part I, the term “persecution” is not defined in the INA. Congress intended the definition to conform to the 1967 United Nations Protocol Relating to the Status of Refugees. Unfortunately for the BIA, the international community has also struggled in formulating a definition of persecution.¹⁰⁰

The BIA’s attempt to construe the definition of persecution in *Acosta* did not involve any analysis of economic persecution. It simply stated that persecution could also “consist of economic deprivation or restrictions so severe that they constitute a threat to an individual’s life or freedom,” citing *Dunat* and its progeny.¹⁰¹ When the BIA considers the issue on remand from the Second Circuit, its analysis of economic persecution claims must involve something more than an examination of the statutory history of the INA and the international’s community definition of persecution—these sources are ambiguous and provide little guidance. Given the ambiguity of the statutory history, the standard used should be determined by the underlying justifications for asylum.

The BIA should take a broader perspective and consider why the US should provide asylum in the first place. Below I discuss two answers to this question- that is two reasons that justify an asylum system. The first is that asylum provides membership in a new society to those who were denied membership in their native society. The

¹⁰⁰ James Hathaway, *The Law of Refugee Status*, 1991. In fact, many in the international refugee law community prefer a fluid definition that can evolve with the times. *Id.*

¹⁰¹ *Acosta*, discussed in Part II.

second rationale is that asylum provides protection to those who are victims of human rights violations. In Part IV I will analyze the different standards using both of these justifications and conclude that they provide support for the *Kovac* standard and that the BIA should adopt the *Kovac* standard. I will also address the primary counterargument to the more inclusive definition of persecution, the floodgates fear, and demonstrate that it is unwarranted.

B. Justifications for Asylum

1. Membership Theory of Asylum

Asylum is a unique concept in that it allows one who does not have any familial or employment connections to the US to enter the country and obtain membership in society: when one is granted asylum in the US, he or she is able to obtain permanent resident status and later full citizenship and as a result, the asylee becomes a member of US society.¹⁰² What justifies allowing a person with no prior connection to the US, to become a member of society? One clear justification exists where the person was denied membership in his or her native society: asylum is a means of remedying the denial of membership by providing membership a new society.

Professor Price has explained that asylum is a means of sheltering those fleeing from harm inflicted on them by the government and to condemn the governments that inflict the harm.¹⁰³ Instead of only protecting refugees from harm, asylum allows persecuted people to become members of a new society. Persecution by a government effectively invalidates a person membership in that society. Asylum is thus a necessary tool to

¹⁰² In a recent article, Professor Mathew Price has defined membership in a society as both have one's most basic recognized as well "rights to political participation and in some societies, welfare and advanced health care." the Harvard International Law Journal. Price, Mathew, Persecution Complex: Justifying Asylum Law's Preference for Persecuted People, 47 HVILJ 413 (2006).

¹⁰³ Id.

provide the victims with membership in a new society. This distinguishes the persecuted from others. Others who flee from civil strife or natural disasters have not been rejected by their societies. Asylum is thus not the appropriate means of helping them.

Governments could help in other ways such as by providing temporary protected status, humanitarian intervention, refugee resettlement, etc.

To illustrate, consider the following hypothetical. Person A from country X cannot find work in his town after a natural disaster while person B from the same country is denied the opportunity to work because of his religion. Both A and B are in the same situation in terms of their inability to work, however, the possible actions taken by the US to alleviate their problems are different. For A, his problems can possibly be solved by relocating to another area of the country, through foreign aid invested in the country, emergency humanitarian relief, or even being granted Temporary Protected Status¹⁰⁴ in the US, which would allow him to stay until conditions improve in country X. For B, however, asylum is the only solution. B would not be helped by an improvement in country X's economy as the harm he faces is a result of his religion, not the economy. B has been denied full-membership in country X and his situation can only be cured if he was granted membership in a different society (or if the country X's government was replaced).¹⁰⁵ In sum, the focus of this theory is on the state's culpability in harming the

¹⁰⁴Under the Immigration Act of 1990 ("IMMACT"), P.L. 101-649 and the Homeland Security Act of 2002, Public Law 107-296, the Secretary of Homeland Security can provide TPS status to nationals of designated-countries who are present in the US and are temporarily unable to safely return to their home country because of ongoing armed conflict, an environmental disaster, or other extraordinary and temporary conditions. Currently, nationals of 7 countries (Burundi, El Salvador, Honduras, Liberia, Nicaragua, Somalia, and Sudan) are entitled to TPS status in the US.

¹⁰⁵ This paradigm is rejected by the "humanitarian theorists." They contend that the persecuted have no greater claim to asylum than people who suffer from other causes. An alien in need of protection of his basic needs, whether from persecution or civil strife, famine, or natural disaster, has a moral claim to asylum. This theory has been adopted by the Organization of African Unity and their definition of refugee includes

persecuting. The state's actions deny the persecuted membership in that society and asylum is the appropriate response because it provides them membership in a new society.

2. Protection of Human Rights Theory of Asylum

The focus of this theory is on a state's duty to protect its citizens. Asylum is justified as it provides substitute protection for those, who, as the theory's leading proponent James Hathaway explains,¹⁰⁶ face an "injury that would be inconsistent with the basic duty of protection owed by a state to its own population."¹⁰⁷ Essential to this theory is the premise that a state owes a duty of protection to its citizens—it must protect their human rights. Certain societies, however, fail to protect their citizens and worse, even deliberately harm them. Hathaway has defined persecution "as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection." Again, the focus is on state protection. Refugees, as people who a society has failed to protect, exist in a "protection vacuum."¹⁰⁸ Asylum is justified and necessary in that it

every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of this country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of nationality.

If the BIA adopted this approach, it would lead to a drastic overhaul of the asylum system and likely eliminate the nexus clause: asylum could be granted to those facing serious harm, regardless of whether the harm is on account of their race, religion, nationality, particular social group, or political opinion. In effect, asylum would be granted to those in the most dire situation be it from persecution, civil war, famine, disease, etc. This would then require a prioritization based on who is suffering the most. For a discussion of the problems related to prioritizing the world's suffering, see Meital Waibsnaider, *How National Self-Interest and Foreign Policy Continue to Influence US Refugee Admission Program*. 75 *Fordham L. Rev.* 391 (2006).

¹⁰⁶ Hathaway is a professor at the University of Michigan and has published numerous articles and books on refugee and asylum law. His work has been quoted in judicial opinions. See *Adan v. Secretary of State for the Home Department*, UK House of Lords, 1 AC 293 (1999); *Horvath v. Secretary of State for the Home Department*, UK House of Lords, 3 WLR 376 (2000).

¹⁰⁷ James Hathaway, *The Law of Refugee Status*, 1991.

¹⁰⁸ See *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Edited by Erika Feller, Volker Turk, and Frances Nicholson, Cambridge University Press (2003) p.37 ("As for refugees, there was a protection vacuum and it was necessary to create a specific regime of rights for them.").

provides an individual whose human rights were violated the right to seek surrogate protection.

By focusing on the need of society to protect its members' human rights, this theory is inevitably linked with the broader human rights regime.¹⁰⁹ Therefore, "human rights" under this conception are defined by international law: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, etc.¹¹⁰ To summarize, the human rights conception justifies asylum as a surrogate protection available for those whose human rights were not protected.

Part IV. Examining the Standards Using the Membership and Human Rights Protection Theories of Asylum

As previously discussed in Part III, given the ambiguous definition of persecution, the BIA should look towards the underpinnings of asylum in order to determine the appropriate standard to evaluate claims of economic persecution claims. I have just introduced two of the primary justifications for asylum: providing membership in a new society and protecting victims of human rights violations. I will now use these justifications to further examine the different standards used in economic persecution claims. I will conclude that both justifications provide support for the *Kovac* standard and that the BIA should adopt that standard.

¹⁰⁹ See *Id.* "[T]he institution of international refugee protection . . . is embedded in the broader international human rights regime."

¹¹⁰ This theory has become increasingly popular in the Commonwealth countries. See Price at 5. See also James C. Hathaway, *Relationship between human rights and refugee law: What refugee law judges can contribute*, in *Realities of Refugee Determination on the Eve of a New Millennium* 86 (International Association of Refugee Law Judges 1998).

A. Membership Theory of Asylum Clearly Supports *Kovac*

The *Kovac* standard should be adopted as it is consistent with the membership theory of asylum. Recall that under *Kovac*, economic persecution is the “deliberate imposition of substantial disadvantage upon an alien for reasons of race, religion, or political opinion.”¹¹¹ Central to the *Kovac* standard is the motivation behind the harm; the court determined that Congress had shifted “the emphasis from the consequences of the oppressive conduct to the motivation behind it.”¹¹² As a result, the *Kovac* standard contains the “for reasons of” clause even though the INA definition of persecution already contains the “on account of” provision. This standard thus strongly emphasizes the reasons behind the harm. By doing so, it ensures that asylum is for people who have suffered as a result of their background, not for other reasons. In other words, it ensures that person B from the hypothetical would qualify for asylum because he suffered “for reasons of” religion while person A would not qualify.

As *Kovac* focuses more on the motivation behind harm and requires a lesser degree of harm than *Dunat* and *Acosta*, some people may qualify for asylum even though they do not fear life-threatening harm. This is justifiable under the membership theory of asylum because part of the harm stems from being denied membership in a society because of one’s race, religion, nationality, political opinion, or particular social group. A man’s life may not be threatened by a denial of employment opportunities and severe fines; however, he would be denied membership in the society and face a substantial disadvantage. Under *Kovac*, he would be eligible for asylum and may be provided with membership in a new society. Again looking at the still unresolved *Mirozan*, where,

¹¹¹ *Kovac*, discussed in Part II.

¹¹² *Id.*

because the harm may not be so severe as to constitute a threat to her life or freedom, she would not be eligible for a grant of asylum under *Acosta*. However, the economic persecution she suffered has effectively denied her membership in Georgian society. Asylum is thus an appropriate remedy because it would grant her membership into American society. Only the *Kovac* standard would ensure that Mirozan and others like her who have been denied membership in their societies, are eligible for asylum in a new society. The *Kovac* standard is therefore consistent with, and supported by the membership theory of asylum.

B. The Human Rights Protection Theory of Asylum Tends to Support *Kovac*

As this theory focuses on the harm rather than the motivation behind it, it may first appear that it would support either the *Dunat* or *Acosta* test, which require a higher degree of harm. However, the human rights approach is based on international definitions of human rights, which include economic rights. As a result, this theory tends to support the more inclusive *Kovac* test because it offers asylum to those whose economic rights have been violated. *Dunat* and *Acosta* offer protection that is too limited because they tend to only cover direct human rights violations- those that directly threaten one's life or freedom. As the international human rights regime has evolved, it has broadened the rights considered essential to one's existence. Economic rights, for one, have increased in importance in international law. In the United Nations High Commissioner for Refugees' Handbook it provides:

[W]here economic measures destroy the economic existence of a particular section of the population (e.g. withdrawal of trading rights from, or discriminatory or excessive taxation of, a specific ethnic or religious group), the victims may according to the circumstances become refugees on leaving the country.¹¹³

¹¹³ *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, UNHCR, reedited Geneva, January 1992, p. 16.

Under this theory then, the violation of one's economic rights may create a need for protection and thus asylum. Neither *Dunat* nor *Acosta* would provide protection due to their stringent requirement that there be a denial of all means of livelihood or a threat to one's life or freedom. Thus one's asylum claim may be denied under *Dunat* and *Acosta* even though one's human rights have been violated. This problem is less likely to arise under the more expansive *Kovac* standard, which requires "substantial disadvantage," not necessarily a threat to one's life or freedom.¹¹⁴

A clear example of the human rights protection theory supporting an expansive view of the economic persecution doctrine is found in the Hong Kong courts in the 1990's. Over time the Hong Kong Refugee Status Review Board came to accept the definitions of human rights found in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights in cases dealing with Indo-Chinese refugees. "In applying human rights standards from the ICCPR and ICESCR, the Board came to accept that the cumulative effect of depriving families of their ability to obtain adequate health care, employment and basic schooling could amount to 'persecution'."¹¹⁵ Under *Kovac*, a similar result would have been likely as the deprivation of health care, employment, and school constitutes a substantial disadvantage. This harm, however, might not have risen to the level of *Dunat* and *Acosta*. The human rights protection theory tends to support *Kovac* because it is more inclusive and would thus make more victims of human rights eligible for asylum than the other standards.

¹¹⁴ This is not to say, however, that all violations of economic rights constitute persecution under *Kovac*. See the discussion in Part C, which mentions cases that did not qualify under *Kovac*.

¹¹⁵ Richard Towle, PROCESSES AND CRITIQUES OF THE INDO-CHINESE COMPREHENSIVE PLAN OF ACTION: AN INSTRUMENT OF INTERNATIONAL BURDEN-SHARING?, 18 Intl' J. Refugee L. 537 (2006).

C. The Floodgates Myth

While both the membership and human rights protections theory support *Kovac*, it may become criticized for over inclusion. The primary argument against adopting *Kovac* is that a more inclusive standard would open up the floodgates--that is more people would rush to the US seeking asylum and many in fact would be granted asylum under *Kovac*.¹¹⁶ This fear, however, is unwarranted as asylum law has built in safeguards to protect against undeserving grants. First, in every case, the IJ must make a credibility determination and only applicants who have credible claims are eligible for asylum. Moreover, granting asylum to one victim of economic persecution in a given country does not automatically qualify every victim of economic persecution from that county.¹¹⁷ Asylum is an individual grant and every applicant must individually meet all the statutory requirements. They must prove that 1) they have a well-founded fear of persecution 2) that is based on a statutory protected ground, and 3) that they are not protected in their country. If an applicant can satisfy these requirements, the fact that a large number of people may also meet the requirements is alone insufficient to deny his or her application.¹¹⁸ Finally, no circuit that has employed the *Kovac* standard has reported a marked increase in asylum applicants or asylum grants. The floodgates fear remains

¹¹⁶ For an example of a floodgate argument, see *Fatin v. INS*, 12 F.3d 1233, 1240 (Persecution “does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional. If persecution were defined that expansively, a significant portion of the world’s population would qualify for asylum in this county...”).

¹¹⁷ Commentators have addressed this issue in other contexts of the refugee definition, particularly in defining particular social group. See Muller, Mathew, Anker, Deborah, and Rosenberg, Lory *Escobar v. Gonzales: A Backwards Step for Child Asylum Seekers and the Rule of Law in Particular Social Group Asylum Claims*, 10 UC Davis J. JLP 243 (for street children); Haley Schaffer, *Domestic Violence and Asylum in the United States: IN RE: R-A-*, 95 Nw.U.L. Rev. 779 (2001) (for victims of domestic violence); see also *Matter of Toboso-Alfonso* 20 I & N Dec. at 822 (a grant of asylum to one homosexual is not a grant to all homosexuals).

¹¹⁸ See Hathaway, James and Foster, Michelle, *Discussion Paper No. 4 Advanced Refugee Law Workshop International Association of Refugee Law Judges Auckland, New Zealand, October 2002*, 15 Int’l J. Refugee L. 477 (“[T]he fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.”).

unproven, unwarranted, and runs counter to the purpose of the INA, which is to provide asylum to those who qualify for it.

Moreover, the *Kovac* standard does not guarantee that one who has suffered economic harm will be granted asylum. In fact, numerous asylum claims have been rejected under *Kovac*. For example, “reverse discrimination” in South Africa,¹¹⁹ employment discrimination based on religious beliefs in the Ukraine,¹²⁰ and confiscation of a family business in Eritrea,¹²¹ were all held not to constitute persecution under *Kovac*. The unwarranted floodgate fear should not deter the BIA from adopting the *Kovac* standard.

Conclusion

Both the membership and human rights protection theory of asylum support the *Kovac* standard. As the statutory history and the United Nations Protocol provide little guidance, the BIA should look to these theories in formulating the governing standard for evaluating economic persecution claims and adopt *Kovac*. By adopting the *Kovac* standard, the BIA will take a big step towards ensuring that the United States serves as a refuge for the persecuted.

¹¹⁹ *Gormley v. Ashcroft*, 364 F.3d 1172, 1178-80 (9th Cir.2004)

¹²⁰ *Nagoulko v. INS*, 333 F.3d 1012, 1016 (9th Cir.2003)

¹²¹ *Zehatye v. Gonzales*, 453 F.3d 1182 (9th Cir. 2006).