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Relief After Rebuttal: Reaching Humanitarian Asylum Under the Regulations

by Rebekah Bailey and Laura Lunn

Introduction

The regulations are clear that an asylum applicant who experienced past persecution may merit asylum even if the Government rebuts the presumption that the applicant has a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1)(iii); *see also Matter of L-S-*, 25 I&N Dec. 705, 710 (BIA 2012). This form of relief from removal is commonly termed "humanitarian asylum." While the scope and boundaries of humanitarian asylum are relatively undefined, this area of immigration law is slowly developing.

The seminal case in which the Board of Immigration Appeals addressed eligibility for humanitarian asylum was *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989). The respondent in *Chen* was a Chinese national who suffered from grave past persecution but could not establish a well-founded fear of future persecution because of changed country conditions. The Board examined the severity of his past persecution and determined that he merited asylum because of the extreme nature of the persecution he suffered. The *Chen* standard for a grant of humanitarian asylum in the absence of a well-founded fear of persecution was later formalized and added to the Code of Federal Regulations at 8 C.F.R. § 208.13(b)(1)(ii). *See Matter of L-S-*, 25 I&N Dec. at 711 n.6 (citing Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674, 30,683 (July 27, 1990) (codified at 8 C.F.R. § 208.13(b)(1)(ii) (1991))). In 2001, the regulatory definition of humanitarian asylum was expanded to include applicants who experienced past persecution and would face "other serious harm" if they were to return. *See* Asylum Procedures, 65 Fed. Reg. 76,121, 76,133 (final rule Dec. 6, 2000) (effective Jan. 5, 2001); *see also* 8 C.F.R. § 1208.13(b)(1)(iii)(B). The types of harm that may qualify one for humanitarian asylum continue to be considered by the Board and the courts through a case-by-case analysis. *See Matter of L-S-*, 25 I&N Dec. at 715.

This article will first address when and how an alien may qualify for humanitarian asylum. Then it will discuss the initial basis for humanitarian asylum—the severity of past persecution. Next, the article will discuss the newer method of qualifying for humanitarian asylum based on "other serious harm." Finally, the article will conclude with a discussion of how different circuit courts have considered "other serious harm" claims.

Reaching Humanitarian Asylum: Burden Shifting Under the Regulations

The preliminary issue that adjudicators must address in making a determination on an asylum application is whether the applicant meets the initial burden of establishing that he or she qualifies as a refugee under the Act. Section 208(b)(1)(B) of the Act, 8 U.S.C. § 1158(b)(1)(B). A "refugee" is defined as

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

Section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A). There are many elements within the definition of who constitutes a refugee that an adjudicator must evaluate in determining whether an applicant is eligible for asylum (e.g., the applicant's inability or unwillingness to return; a government's inability or unwillingness to provide protection; past persecution or well-founded fear of future persecution; nexus to a protected ground).

The Board's decision in *Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008), provides an excellent roadmap to begin the proper process for evaluating asylum claims, including those based on humanitarian asylum. In that case, the Board noted that an asylum applicant has the burden to establish refugee status, but the basis for the claim, whether past persecution or a well-founded fear of future persecution, dictates the regulatory framework applicable in determining overall asylum eligibility. *Id.* at 449-50. In a humanitarian asylum analysis, the first question that the fact-finder must address is whether the asylum applicant established past persecution on account of one of the protected grounds. *Id.* If not, then the inquiry as to humanitarian asylum eligibility goes no further. *Id.* at 450. If, however, the applicant is able to establish past persecution on account of one of the protected grounds, then the Department of Homeland Security ("DHS") must rebut the presumption of a well-founded fear of future persecution on account of the same ground. *See* 8 C.F.R. § 1208.13(b)(1)(i)-(ii). If the DHS rebuts the presumption, then the burden shifts to the applicant to demonstrate another basis for a well-founded fear of future persecution. If the adjudicator finds there is no other basis for a well-founded fear of future persecution, then the burden is on the applicant to establish that he or she merits relief based on humanitarian asylum. *See* 8 C.F.R. § 1208.13(b)(1)(iii).

A good roadmap for the final stages of the humanitarian asylum analysis can be found in the Board's recent decision in *Matter of L-S-*, 25 I&N Dec. 705. As the Board noted there, the regulations disjunctively state two ways in which an applicant may establish humanitarian asylum. *Id.* at 710. The first requires that the applicant demonstrate "*compelling reasons* for being unwilling or unable to return to the country *arising out of the severity of the past persecution*." 8 C.F.R. § 1208.13(b)(1)(iii)(A) (emphasis added). The second requires the applicant to establish "that there is a *reasonable possibility* that he or she may suffer *other serious harm* upon removal to that country." 8 C.F.R. § 1208.13(b)(1)(iii)(B) (emphasis added). As the Board explained, if the adjudicator determines that an asylum applicant has not demonstrated "compelling reasons" for granting humanitarian asylum, then the applicant can still fulfill his or her burden by showing that there is a "reasonable possibility" that "other serious harm" may be suffered upon removal. *Matter of L-S-*, 25 I&N Dec. at 713. Finally, if the applicant has shown that either basis exists, an Immigration Judge considering whether to grant humanitarian asylum must also determine if the applicant deserves a favorable exercise of discretion, as would be the case with any application for asylum. 8 C.F.R § 1208.13(b)(1)(iii). Ultimately, an Immigration Judge should consider both favorable and adverse factors when making determinations regarding humanitarian asylum. *Matter of Chen*, 20 I&N Dec. at 19; *see also Matter of Pula* 19 I&N Dec. 467 (BIA 1987) (noting the special considerations present in asylum cases). The central consideration should be the compelling humanitarian concerns involved. *See Matter of H-*, 21 I&N Dec. 337, 347 (BIA 1996).

Severe Past Persecution

The first possible ground for a grant of humanitarian asylum is raised when the applicant shows compelling reasons arising out of the severity of past persecution that make him or her unwilling or unable to return to the country designated for removal. 8 C.F.R. § 1208.13(b)(1)(iii)(A).

In *Matter of Chen* the alien's persecution began when he was 8 years old and continued into his adulthood, causing physical, psychological, and emotional scarring. 20 I&N Dec. at 21. Furthermore, he was traumatized by the Chinese Government's mistreatment of his father, which ultimately led to his father's death. In its decision, the Board referenced the United Nations High Commissioner for Refugees ("UNHCR") Handbook, which discussed the "general humanitarian principle" recognizing that individuals should not be expected to repatriate to countries in which they or their family members suffered from "atrocious forms of persecution." *Id.* at 19 (quoting *The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva, 1988)).[1]

The Board found that Chen suffered from severe past persecution on account of his family and their religious beliefs but that he did not have a well-founded fear of future persecution because of changed country conditions. Nevertheless, the Board granted Chen's application for asylum in the exercise of its discretion based on the severity of his past persecution. Thus, the majority of decisions addressing the issue of humanitarian asylum discuss whether past persecution in a case meets the *Chen* standard, that is, whether the applicant suffered particularly "severe" or "atrocious" persecution. *See, e.g.*, *Matter of H-*, 21 I&N Dec. at 347-48 (remanding to the Immigration Judge based on the Board's analysis of humanitarian asylum and its finding that the petitioner suffered past persecution on account of his membership in a particular social group); *Matter of B-*, 21 I&N Dec. 66 (BIA 1995) (granting humanitarian asylum based on the severity of the past persecution).

The Board expanded the application of humanitarian asylum in its holding in *Matter of B-*, 21 I&N Dec. 66. The Board found that the applicant established that he suffered past persecution in Afghanistan when the KHAD, the Afghan secret police, arrested and imprisoned him for 13 months. The harms that he faced during imprisonment as a result of his support for the mujahidin constituted past persecution on account of his political opinion, and the conditions he faced were "deplorable, involving the routine use of various forms of physical torture and psychological abuse, inadequate diet and medical care, and the integration of political prisoners with criminal and mentally ill prisoners." *Id.* at 72.

In contrast, in *Matter of N-M-A-*, 22 I&N Dec. 312 (BIA 1998), the Board determined that the asylum applicant's past persecution did not rise to the level of severe past harm demonstrated in *Matter of Chen* and *Matter of B-*. The applicant, also from Afghanistan, described past harms that he endured for a month while he was detained by the KHAD who hit and kicked him and deprived him of food for 3 days. He sustained severe bruising and a painful wound on his right leg, as well as mental anguish from not knowing his father's fate. Nevertheless, this past persecution did not rise to the level of harm required to merit a grant of humanitarian asylum, and the Board remanded for the Immigration Judge to evaluate the merits of the applicant's claim solely based on his fear of future persecution. *Id.* at 327.

"Other Serious Harm"

As previously mentioned, the preliminary question in cases that may qualify for humanitarian asylum is the same as the basic asylum inquiry: whether the applicant suffered from past persecution on account of a protected ground. *See Matter of L-S-*, 25 I&N Dec. at 710. The Board clearly indicated in *Matter of Chen* and *Matter of B-* how to establish humanitarian asylum on grounds relating to the severity of past persecution. If the applicant did not suffer from past persecution severe enough to provide a basis for humanitarian asylum under 8 C.F.R. § 1208.13(b)(1)(iii)(A), then an adjudicator may also consider whether the applicant merits humanitarian asylum based on "other serious harm" he or she may face in the country of removal. *See* 8 C.F.R. § 1208.13(b)(1)(iii)(B).

In *Matter of L-S-*, the Board provided a comprehensive discussion of humanitarian asylum on the "other serious harm" ground. The Board explained that unlike severe past persecution, the analysis of "other serious harm" is a forward-looking inquiry, which requires the applicant to show that the current conditions in his

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CIRCUIT COURT DECISIONS FOR DECEMBER 2012 AND CALENDAR YEAR 2012 TOTALS

by John Guendelsberger

The United States courts of appeals issued 172 decisions in December 2012 in cases appealed from the Board. The courts affirmed the Board in 160 cases and reversed or remanded in 12, for an overall reversal rate of 7.0%, compared to last month's 11%. There were no reversals from the First, Third, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for December 2012 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	2	2	0	0.0
Second	3	2	1	33.3
Third	8	8	0	0.0
Fourth	6	6	0	0.0
Fifth	6	6	0	0.0
Sixth	11	10	1	9.1
Seventh	5	4	1	20.0
Eighth	5	5	0	0.0
Ninth	110	101	9	8.2
Tenth	7	7	0	0.0
Eleventh	9	9	0	0.0
All	172	160	12	7.0

The 172 decisions included 81 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 44 direct appeals from denials of other forms of relief from removal or from findings of removal; and 47 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	81	75	6	7.4
Other Relief	44	40	4	9.1
Motions	47	45	2	4.3

The six reversals or remands in asylum cases involved credibility, the 1-year bar, and nexus. Reversals in the "other relief" category covered issues related to eligibility for cancellation of removal, the departure bar, and application of the categorical approach in determining removal for an aggravated felony. The motions cases addressed new evidence related to eligibility for relief and changed country conditions.

The chart below shows the combined numbers for calendar year 2012 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Ninth	1097	939	158	14.4
First	48	43	5	10.4
Seventh	47	43	4	8.5
Eighth	53	49	4	7.5
Fifth	133	123	10	7.5
Third	224	209	15	6.7
Sixth	106	99	7	6.6
Tenth	48	45	3	6.3
Eleventh	138	130	8	5.8
Second	686	653	33	4.8
Fourth	131	125	6	4.6
All	2711	2458	253	9.3

Last year's reversal rate for calendar year 2011 was 12.8% with 3123 total decisions and 399 reversals.

The numbers by type of case on appeal for calendar year 2012 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	1292	1169	123	9.5
Other Relief	536	451	85	15.9
Motions	883	838	45	5.1

As the chart below indicates, over the last 7 calendar years we have seen a significant downward trend in the number of circuit court decisions each year, as well as a significant drop in the number and percentage of reversals or remands.

	2006	2007	2008	2009	2010	2011	2012
Cases	5398	4932	4510	4829	4050	3123	2711
Reversals	944	753	568	540	466	399	253
% Reversals	17.5	15.3	12.6	11.2	11.5	12.8	9.3

The reversal rates by circuit for the last 7 calendar years are shown in the following chart.

Circuit	2006	2007	2008	2009	2010	2011	2012
First	7.1	3.8	4.2	5.6	8.6	19.0	10.4
Second	22.6	18.0	11.8	5.5	4.9	4.9	4.8
Third	15.8	10.0	9.0	16.4	10.7	11.3	6.7
Fourth	5.2	7.2	2.8	3.3	5.2	5.2	4.6
Fifth	5.9	8.7	3.1	4.0	13.5	2.9	7.5
Sixth	13.0	13.6	12.0	8.6	8.7	6.8	6.6
Seventh	24.8	29.2	17.1	14.3	21.0	19.4	8.5
Eighth	11.3	15.9	8.2	7.7	8.1	7.5	7.5
Ninth	18.1	16.4	16.2	17.2	15.9	18.6	14.4
Tenth	18.0	7.0	5.5	1.8	4.9	9.5	6.3
Eleventh	8.6	10.9	8.9	7.1	6.5	6.8	5.8
All	17.5	15.3	12.6	11.2	11.5	12.8	9.3

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

First Circuit:

Bead v. Holder, No. 12-1434, 2013 WL 68571 (1st Cir. Jan. 7, 2013): The First Circuit denied a petition for review of a decision of the Board denying the petitioner's motion to reopen as untimely. At a master calendar hearing, the Immigration Judge set the petitioner's asylum application for a merits hearing and reminded the petitioner of the need to have fingerprints taken. Prior to the merits hearing, the Immigration Judge directed the petitioner's attorney to provide proof of compliance with the biometric and biographical requirements of 8 C.F.R. § 1003.47. When no response was received, the Immigration Judge ruled the asylum application abandoned and ordered the petitioner removed. The petitioner did not appeal, but 3 years later, in February 2010, he filed a motion to reopen claiming ineffective assistance of his prior counsel. The petitioner argued in his motion that his prior counsel had failed to inform him of the biometrics requirement and of the removal order. He stated that he did not learn of the order until June 2009, after he had obtained new counsel to inquire. The Immigration Judge denied the motion, finding that the petitioner had not established the due diligence necessary for equitable tolling, because the petitioner was present at the time the merits hearing was set and was directed to have his fingerprints taken. Furthermore, the Immigration Judge found that the 8-month delay between the time when the petitioner claimed to have learned of the removal order and when he filed the motion further established a lack of due diligence. The Board affirmed. In its decision, the circuit court stated that to make a claim for equitable tolling, the petitioner must establish both that he has pursued his rights diligently and that "some extraordinary circumstance stood in his way." The court found no abuse of discretion in the Board's ruling that the petitioner had not established due diligence, noting that the petitioner was present at the master calendar hearing where the merits hearing was set and the fingerprint instruction was issued, and pointing to the absence of detail in the petitioner's affidavit regarding what steps he took to learn of the status of his case in the 5 years between his master calendar hearing and his retention of new counsel. The court also concluded that the petitioner did not provide sufficient detail of his attempts to contact prior counsel, and he did not explain his 8-month delay in filing the motion after learning of the removal order from his new counsel. The court rejected the petitioner's claim that the Immigration Judge improperly denied the motion because the DHS did not oppose it. The court noted that while the regulations state that a motion should be considered unopposed where no timely response is made, the discretion whether to grant or deny the motion lies with the Immigration Judge, and the petitioner has the burden of proof to show that reopening is appropriate, whether or not the motion is opposed.

Martinez-Lopez v. Holder, No. 12-1121, 2013 WL 49826 (1st Cir. Jan. 4, 2013): The First Circuit denied a petition for review of the Board's denial of the petitioner's motion to reconsider. The petitioner had previously appealed the Immigration Judge's denial of his asylum claim to the Board, arguing that his refusal to join a gang in El Salvador made him a member of a particular social group.

The Board dismissed the appeal, and the petitioner did not file a timely petition for review with the circuit. Instead, he filed a timely motion to reconsider with the Board, arguing for the first time that he feared persecution on account of his membership in a different particular social group, namely, his family. The Board denied this motion on the grounds that it did not identify an error of fact or law in the Board's prior decision, but instead raised new theories of law that were previously available but not asserted. In seeking review, the petitioner relied on language in *Matter of Cerna*, 20 I&N Dec. 399, 402 n.2 (BIA 1991), suggesting that a motion to reconsider might be properly made to consider additional legal arguments that were overlooked before. However, the court noted that *Cerna* was superseded by a change in the language of the relevant regulation (8 C.F.R. § 1003.2(b)(1)), limiting the scope of a motion to reconsider to addressing errors of fact or law in the Board's prior decision. The court continued that the Board clarified this in *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006), holding that "the 'additional legal arguments' referenced in *Cerna* cannot relate to grounds for relief not previously asserted." The court found the Board's approach to be "not only lawful but also wise," creating a reasonable limit on additional arguments while preventing "claim splitting" (in which a respondent in removal proceedings might keep some arguments in reserve should his original claim fail).

Sixth Circuit:

Camara v. Holder, No. 11-4043, 2013 WL 149836 (6th Cir. Jan. 15, 2013): The Sixth Circuit denied a petition for review of the Board's decision upholding the Immigration Judge's denial of the petitioner's applications for derivative asylum and withholding of removal. The petitioner relied on his wife's application for asylum, which was based on her being subjected to female genital mutilation ("FGM") at the age of 1 year. The Immigration Judge pretermitted the petitioner's asylum application as untimely but granted his wife withholding of removal. Since withholding is not available derivatively, the petitioner was ordered removed to Mali. The Board affirmed. On petition for review, the petitioner raised a due process argument. He argued that derivative asylum should be available and alternatively claimed that he was eligible for individual withholding. The court found no support for the petitioner's due process allegation that the Immigration Judge ignored his attempt to raise his own independent claim or submit evidence that he was independently eligible for relief. The court noted that the only indication of such intent was their counsel's use of the plural "we" in response to the Immigration Judge's question of what relief was being requested, which the court found to be insufficient. The court was also not persuaded by the petitioner's additional claim that once his asylum application was found to be untimely, the Immigration Judge should have either treated the petitioner's request for withholding independently or required him to submit his own application for asylum and withholding. Regarding the availability of derivative withholding, the court cited to the Board's decision in *Matter of A-K-*, 24 I&N Dec. 275, 279 (BIA 2007) (holding that while the Act makes derivative asylum available in some circumstances, it does not allow for derivative withholding under any circumstances). Noting that the petitioner did not challenge the reasonableness of the Board's statutory interpretation, the court declined to consider the question. In response to the petitioner's argument that he was independently eligible for withholding of removal as the husband of an FGM victim, the court held that because the petitioner did not indicate under which protected ground his claim fell, it could not say that the Board's denial was manifestly contrary to law.

Seventh Circuit:

Yi Xian Chen v. Holder, No. 12-1623, 2013 WL 197835 (7th Cir. Jan. 18, 2013): The Seventh Circuit denied the petition for review of the Board's decision upholding the Immigration Judge's denial of an application for asylum from China. The petitioner illegally entered the U.S. while his pregnant wife remained in China. After she gave birth to the child (the couple's second), the petitioner's wife was forcibly sterilized. The petitioner filed a timely application for asylum, which the DHS referred to the Immigration Judge. In 2009, while his removal proceedings were still pending, the petitioner began to practice Falun Gong and amended his asylum claim to include a fear of persecution based on such practice. The Immigration Judge denied asylum on both the family planning and Falun Gong grounds. The Board affirmed and further denied the petitioner's motion to remand based on additional evidence of his Falun Gong activities. The Board found the additional evidence to be lacking in reliability and, in some instances, self-serving. On petition for review, the circuit court rejected the petitioner's argument that he had suffered past persecution because of his wife's sterilization, which caused him emotional distress, and because he desired to have more children. The court noted that it had previously deferred to the Attorney General's decision in *Matter of J-S-*, 24 I&N Dec. 520 (A.G. 2008) (holding that an asylum applicant cannot establish persecution

on the basis of a spouse's sterilization alone). The court continued that "to hold that the emotional distress naturally arising from a spouse's forced sterilization amounts in itself to persecution would be to effectively abrogate the Attorney General's ruling." The court also stated that such emotional stress does not fit within the circuit's definition of "persecution," as defined by its case law. Regarding the Falun Gong claim, the court noted that the Government did not contest either that the petitioner is a genuine practitioner or that such practice can form the basis for asylum. The court therefore addressed the sole question whether the Immigration Judge erred in finding that the petitioner did not meet his burden of proof because he did not establish that his practice of Falun Gong would likely come to the attention of the authorities. Since the petitioner testified that if returned to China, he would practice Falun Gong at home or at an adjacent farm, rather than a public place, the court found that the record "does not compel a contrary result." The court did not disturb the Board's denial of the motion to remand, because it did not find the Board's rulings regarding the unreliability and self-serving nature of the documents to be irrational or an abuse of discretion.

Ninth Circuit:

Alphonsus v. Holder, No. 10-73298, 2013 WL 208930 (9th Cir. Jan. 18, 2013): The Ninth Circuit granted in part a petition for review of the Board's decision affirming an Immigration Judge's determination that the petitioner's conviction for resisting arrest was for a "particularly serious crime" and thus rendered him ineligible for withholding of removal. The Immigration Judge stated that the crime in question interfered with the orderly pursuit of justice and that it also created a meaningful risk of harm. The court determined that remand was necessary for the Board (1) to clarify if it had relied on one or both of these rationales in determining the crime to be a particularly serious one, and (2) to further explain the rationale for relying on either basis in determining whether a crime is particularly serious. Regarding interference with the orderly pursuit of justice, the court noted that this rationale was a departure from the Board's consistent practice of focusing on crimes posing a "significant, nonabstract danger to the community" (i.e., crimes against persons). The court noted that a change of course by an agency does not necessarily invalidate its new conclusion. However, the court explained that the agency must both acknowledge a change in course and provide a reasoned explanation for the change. The court added the caveat that the Government's oral argument—that "dangerousness is not an essential touchstone for particularly serious crime determinations"—runs counter to the Board's prior holding in *Matter of Carballe*, 19 I&N Dec. 357, 360 (BIA 1986), that the "danger" inherent in the crime is an "essential key" in determining whether a crime is particularly serious. Regarding whether the offense created a "meaningful risk of harm," the court found that while the Board has not addressed under what circumstances resisting arrest might constitute a particularly serious crime, its prior precedent decisions have reserved such designation for more grave conduct. The court advised that on remand, the Board must explain why the petitioner's offense is distinguishable from those addressed in its precedent decisions. Furthermore, the court directed that the explanation must be consistent with the statutory language, which indicates that not all crimes, or even all serious crimes, will meet the statutory standard, but only those that are "particularly serious." The petition for review was denied as to the petitioner's claim for deferral of removal under the Convention Against Torture.

Eleventh Circuit:

Zhou Hua Zhu v. U.S. Att'y Gen., No. 11-13266, 2013 WL 42998 (11th Cir. Jan. 4, 2013): The Eleventh Circuit vacated a decision of the Board reversing an Immigration Judge's grant of asylum. The Immigration Judge found that the petitioner established a well-founded fear of being sterilized in China because he had three U.S.-born children. The Immigration Judge based this conclusion on the petitioner's testimony and other evidence (including a letter from the petitioner's local village committee indicating that he would be sterilized because he had three children), which had not been meaningfully disproved. On appeal, the Board concluded that the petitioner did not face a reasonable possibility of sterilization and that his U.S.-born children would not be counted under China's "one-child" family planning policy. The Board relied on its published decision in *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010), holding that the question whether an alien submitted sufficient proof to establish a well-founded fear of persecution is one of law or judgment that may be reviewed by the Board de novo. The circuit court did not accord deference to the Board's holding in *H-L-H & Z-Y-Z-* or to its similar holding in *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008), disagreeing with the Board's position in these cases that a finding as to the likelihood of a future event is not a factual finding. The court noted that the regulation that these cases sought to interpret, 8 C.F.R. § 1003.1(d)(3)(i), clearly states that the

Board may review an Immigration Judge's findings of fact only for clear error. The court added that the definition of "fact" under the regulation "is identical to what constitutes a fact in federal courts," a conclusion supported by the regulation's explanatory comments published in the Federal Register. The court stated that predictions of future harm have long been considered to be findings of fact under Federal case law. In response to the Board's statement in *H-L-H- & Z-Y-Z-* that it is impossible to declare an event yet to occur a "fact," the court provided examples in which the law has done so, including the tort law calculations of loss of future earnings and future medical expenses likely to be incurred and the calculation of lost profits in contract law. The court noted that all of these findings are subject to review as to whether they are "clearly erroneous." Similarly, in the immigration context, in *Arboleda v. U.S. Attorney General*, 434 F.3d 1220 (11th Cir. 2006), the court considered the Board's finding that an asylum seeker could avoid persecution by reasonably relocating if returned to Colombia to be a factual one. The court added that its holding is consistent with that reached by at least four other circuits and recognized that determining a "well-founded fear of persecution is a mixed question of law and fact." The court noted that the Board had conducted de novo review in reversing the Immigration Judge as to the likelihood of sterilization and whether U.S.-born children are counted under China's family planning policies. It found these determinations to be "fact-finding about the likelihood of a future event," as opposed to the legal determination "whether that future event would constitute persecution or whether the likelihood was sufficiently probable to warrant a well-founded fear." Therefore the court remanded the record to the Board to consider in the first instance if the Immigration Judge's findings of fact were clearly erroneous.

BIA PRECEDENT DECISIONS

In *Matter of Cortes Medina*, 26 I&N Dec. 79 (BIA 2013), the Board determined that a violation of section 314(1) of the California Penal Code, a statute proscribing indecent exposure, is categorically a crime involving moral turpitude ("CIMT"). The respondent had sustained two convictions under section 314(1) and was charged with removability under section 237(a)(2)(A)(ii) for two or more CIMT convictions. The Immigration Judge had terminated proceedings based on *Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010), finding that a violation of section 314(1) was not categorically a CIMT and, although the statute was divisible, the DHS had not proven removability.

Considering the DHS's appeal, the Board pointed out that because the term "crime involving moral turpitude" is inherently ambiguous, the Board derives authority under *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to determine whether a violation of section 314(1) categorically constitutes a CIMT. Observing that it has found that indecent behavior is not inherently turpitudinous without lewd or lascivious intent, the Board held that for an indecent exposure offense to be considered a CIMT under the Act, the statute at issue must require both willful exposure of private parts and a lewd intent. Parsing section 314(1) and examining California court decisions, the Board explained that a conviction under that statute requires that a defendant intentionally expose himself "lewdly" to others who are likely to be offended or annoyed. Thus, the Board concluded that a person convicted under the statute has committed a CIMT because of the requisite finding of lewd intent for a conviction.

The Board considered as too narrow the Ninth Circuit's view in *Nunez v. Holder* that indecent exposure under section 314(1) did not normally involve moral turpitude because no harm was required for a conviction. Discussing cases prosecuted under section 314(1) that involved "sexual affront" and "nude dancing," the Board concluded that only a conviction involving lewd behavior would implicate moral turpitude under the Act. The Board saw no "realistic probability" of a conviction in California under section 314(1) for nude dancing or for any other conduct that did not involve moral turpitude. Invoking its authority under *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005), the Board held that indecent exposure under section 314(1) is categorically a crime involving moral turpitude. The Immigration Judge's decision was vacated and the record was remanded.

REGULATORY UPDATE

78 Fed. Reg. 4154 (Jan. 18, 2013)
DEPARTMENT OF HOMELAND SECURITY

Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H–2A and H–2B Nonimmigrant Worker Programs

Action: Notice.
SUMMARY: Under Department of Homeland Security (DHS) regulations, U.S. Citizenship and Immigration Services (USCIS) may approve petitions for H–2A and H–2B nonimmigrant status only for nationals of countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated by notice published in the Federal Register. That notice must be renewed each year. This notice announces that the Secretary of Homeland Security, in consultation with the Secretary of State, is identifying 59 countries whose nationals are eligible to participate in the H–2A and H–2B programs for the coming year. The list published today includes one new addition: Grenada.
DATES: Effective Date: This notice is effective January 18, 2013, and shall be without effect at the end of one year after January 18, 2013.

78 Fed. Reg. 3496 (Jan. 16, 2013)
DEPARTMENT OF STATE

The Designation of Michel Samaha, AKA Saadah al-Naib Mishal Fuad Samahah, AKA Mishal Fuad Samahah, as a Specially Designated Global Terrorist Pursuant to Section 1(b) of Executive Order 13224, as Amended

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the individual known as Michel Samaha, AKA Saadah al-Naib Mishal Fuad Samahah, AKA Mishal Fuad Samahah committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States. Consistent with the determination in Section 10 of Executive Order 13224 that "prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously," I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.
This notice shall be published in the Federal Register.
Dated: January 8, 2013.
William J. Burns,
Deputy Secretary of State.

78 Fed. Reg. 536 (Jan. 3, 2013)
DEPARTMENT OF HOMELAND SECURITY
8 CFR Parts 103 and 212

Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives

AGENCY: U.S. Citizenship and Immigration Services, DHS

ACTION: Final rule.
SUMMARY: On April 2, 2012, U.S. Citizenship and Immigration Services (USCIS) published a proposed rule to amend its regulations to allow certain immediate relatives of U.S. citizens who are physically present in the United States to request provisional unlawful presence waivers prior to departing from the United States for consular processing of their immigrant visa applications. This final rule implements the provisional unlawful presence waiver process. It also finalizes clarifying amendments to other provisions within our regulations. The Department of Homeland Security (DHS) anticipates that these changes will significantly reduce the length of time U.S. citizens are separated from their immediate relatives who engage in consular processing abroad. DHS also believes that this new process will reduce the degree of interchange between the U.S. Department of State (DOS) and USCIS and create greater efficiencies for both the U.S. Government and most provisional unlawful presence waiver applicants. DHS reminds the public that the filing or approval of a provisional unlawful presence waiver application will *not*: Confer any legal status, protect against the accrual of additional periods of unlawful presence, authorize an alien to enter the United States without securing a visa or other appropriate entry document, convey any interim benefits (*e.g.*, employment authorization, parole, or advance parole), or protect an alien from being placed in removal proceedings or removed from the United States in accordance with current DHS policies governing initiation of removal proceedings and the use of prosecutorial discretion.
DATES: This final rule is effective March 4, 2013.

Relief After Rebuttal: Reaching Humanitarian Asylum *continued*

or her country of removal are bad enough that he or she might suffer new "physical or psychological harm" if removed. *Matter of L-S-*, 25 I&N Dec. at 714. Although the applicant must have suffered past harm sufficient to establish past persecution, he or she need not show that this past harm was atrocious. *Id*. The Board was careful to point out that there is *no nexus* that must be shown between the future "other serious harm" and an asylum ground protected under the Act. The applicant must show that the potential future harm will be equal to the severity of persecution but "it may be wholly unrelated to the past harm." *Id*.

Ultimately, the "other serious harm" analysis must consider "the totality of the circumstances in a given situation" and should be determined on a case-by-case basis. *Id*. at 715. The threshold of proof is different from the other humanitarian asylum ground, which requires compelling reasons—a "reasonable possibility" of serious harm must be shown. The Immigration Judge should be aware of and consider conditions in the applicant's country of return, paying particular attention to major problems that large segments of the population might face and any conditions that might not significantly harm others but that could severely affect the applicant. *Id*. at 714. Examples of these conditions or problems may include, but are not restricted to, civil strife, extreme economic deprivation beyond economic disadvantage, or situations where claimants could experience severe mental or emotional harm or physical injury. *Id*.

Since the Board possesses limited fact-finding authority, it ultimately remanded the case to the Immigration Judge for a consideration of both grounds of humanitarian asylum. The Board instructed the Immigration Judge to first consider if the severity of the respondent's past persecution evidenced "compelling reasons" for being unable or unwilling to return to Albania. The Board stated that relevant considerations would include not only the specifics of the respondent's internment, but also the experiences of his politically active family members. The Board found that even if compelling reasons were not shown, the Immigration Judge should consider whether the respondent established a "reasonable possibility" of suffering "other serious harm" upon return to Albania.

Prior to the Board's decision in *Matter of L-S-*, each circuit raised, or at least discussed, the topic of humanitarian asylum, although some only in passing. Since the Board rendered its decision in *Matter of L-S-* last year, no circuit courts have issued published decisions that create binding precedent specifically adopting or interpreting *Matter of L-S-*.[2]

Circuit Courts' Interpretation of Other Serious Harm

In deciding *Matter of L-S-*, the Board looked extensively to circuit court cases examining "other serious harm" humanitarian asylum cases. 25 I&N Dec. at 714-15. The cases discussed below involve the Board's examples of conditions that may qualify as "other serious harm" for purposes of humanitarian asylum.

Civil Strife

The Ninth Circuit addressed whether civil strife may constitute "other serious harm" in *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005). While the court did not definitively grant humanitarian asylum, it did remand to the Board to examine the possibility of relief based on civil strife. Particularly, it cited to the U.S. State Department report that described the frequent human rights abuses in the petitioner's home of Somalia and took into account the applicant's "risk for other harm, because the Benadiri clan has been so decimated by violence, leaving its female members particularly vulnerable." *Id.* at 801; *see also Marrogi v. Holder*, 375 F. App'x 781 (9th Cir. 2010); *Hanna v. Keisler*, 506 F.3d 933 (9th Cir. 2007); *Belishta v. Ashcroft*, 378 F.3d 1078 (9th Cir. 2004).

Extreme Economic Deprivation

In an unpublished decision, the Sixth Circuit explored the issue whether economic deprivation constitutes an "other serious harm" under the Act. *Pergega-Gjonaj v. Gonzales* 128 F. App'x 507 (6th Cir. 2005) (unpublished); *accord Marku v. Gonzales*, 200 F. App'x 454, 460 (6th Cir. 2006) (unpublished) (denying humanitarian asylum where the alien cited only poor general conditions and not specific harms that would be faced upon removal). In *Pergega-Gjonaj*, the petitioner was from the former Yugoslavia and claimed that "any future in Kosovo would be grim because it would be difficult to find work and food." 128 F. App'x at 512. However, the Sixth Circuit found that the petitioner failed to establish that he would suffer from any specific harm, let alone a serious harm if returned to his country. Therefore, the

applicant's economic deprivation was a consideration, but the court found that his harm did not rise to the requisite level needed to qualify for humanitarian asylum based on "other serious harm." *Id.* at 512-13.

Severe Mental or Emotional Harm

The Second Circuit considered when "other serious harm" exists on account of severe mental anguish and emotional hardship in *Kone v. Holder*, 596 F.3d 141 (2d Cir. 2010). The petitioner in this case suffered from past persecution in the form of female genital mutilation ("FGM") in her home country of Côte d'Ivoire. She argued that if she were returned it was likely that her daughter would suffer the same fate. The circuit court instructed the Board to examine whether "the mental anguish of a mother who was herself a victim of genital mutilation who faces the choice of seeing her daughter suffer the same fate, or avoiding that outcome by separation from her child, may qualify as such 'other serious harm.'" *Id.* at 153.

Both the Fourth and Fifth Circuits considered similar claims by female aliens fearing for their daughters' safety upon removal. *Niang v. Gonzales*, 492 F.3d 505, 514 n.13 (4th Cir. 2007); *Osigwe v. Ashcroft*, 77 F. App'x 235 (5th Cir. 2003) (unpublished). The Fifth Circuit in *Osigwe* remanded the petition to the Board so that it could address the applicant's claim that her daughter would be compelled to undergo FGM if her mother and father were forced to return to Nigeria. *Osigwe v. Ashcroft*, 77 F. App'x 235. The court recognized that while this claim failed under the general asylum provisions, it might be a viable claim under the humanitarian asylum grounds based on the previous severe persecution of the mother or some other serious harm. The Fourth Circuit, in a footnote, cited to the Fifth Circuit's decision in *Osigwe* and noted that humanitarian asylum may be warranted "in circumstances where a mother, who has been subjected to FGM, fears her daughter will be subjected to FGM if she accompanies her mother to the country of removal." *Niang v. Gonzales*, 492 F.3d at 514 n.13. The court did not decide the "other serious harm" issue, however, because the alien did not raise it on petition for review. *Id*.

Physical Injury

Other serious harm related to mental and physical health issues has been discussed by the Third, Sixth, and Seventh Circuits. *Lleshi v. Holder*, 460 F. App'x 520 (6th Cir. 2012) (unpublished); *Pllumi v. Att'y Gen. of U.S.*, 642 F.3d 155 (3d Cir. 2011); *Sheriff v. Att'y Gen. of U.S.*, 587 F.3d 584 (3d Cir. 2009); *Kholyavskiy v. Mukasey*, 540 F.3d 555 (7th Cir. 2008). In *Kholyavskiy*, the alien, who was from the former Soviet Union, began suffering harassment, humiliation, and physical attacks because of his Jewish ethnicity during his childhood. *Kholyavskiy*, 540 F.3d at 559-60. As a side effect of the attacks, the alien was diagnosed with severe social anxiety disorder and depression in his teenage years. While the Seventh Circuit did not find that the past attacks amounted to severe persecution, it remanded the case to the Board to consider whether the inevitable debilitation and homelessness the alien would suffer in Russia because of the lack of medications for his mental illness and lack of housing would amount to an "other serious harm." *Id*. at 577.

The Third Circuit discussed the possibility of relief on the "other serious harm" ground of humanitarian asylum in a case involving an alien from Liberia who suffered numerous incidents of physical harm. *Sheriff v. Att'y Gen. of U.S.*, 587 F.3d at 595 (remanding to the Board with instruction to consider the "other serious harm" issue). She witnessed the murder of her mother, the murder and rape of her daughter, and the murder of her caregiver; watched her home being burned to the ground; and endured being tied with electrical wire and raped multiple times. *Id*. at 586, 595. Even though the alien suffered this harm at the hands of the defunct Charles Taylor regime and therefore could not argue fear of future persecution, the court remanded for consideration of humanitarian asylum. *Id*. at 595-96. The Third Circuit cited to the Seventh Circuit's decision in *Kholyavskiy*, 540 F.3d at 577, commenting that if "debilitation and homelessness are 'serious' enough" for "other serious harm" consideration, "one wonders how the harms Sheriff faces . . . could not be 'serious.'" *Id*. at 596.

In *Pllumi v. Attorney General of the United States*, the Third Circuit applied the "other serious harm" framework again to examine an alien's claim that the healthcare in Albania was insufficient to treat his severe injuries. 642 F.3d at 162-63 (citing *Kholyavskiy v. Mukasey*, 540 F.3d at 557). The court remanded on a motion to reopen for the fact-finder to consider the availability of health care for the alien, stating "it is conceivable that, in extreme circumstances, harm resulting from the unavailability of necessary medical care could constitute 'other serious harm'" for purposes of humanitarian asylum. *Id.* at 162.

Similarly, in *Lleshi v. Holder*, 460 F. App'x 520, the Sixth Circuit affirmed the Board's holding that the various other harms the aliens claimed they would face if returned to Albania, including inadequate medical care for one of the aliens who had been hospitalized for her psychiatric condition, were not sufficiently serious to warrant a grant of humanitarian asylum. In addition to poor medical care, the aliens had also listed "discrimination, inferior education, risk of kidnapping and trafficking, [and] police corruption" as the "other harms" they would face upon removal. *Id*. at 526. The court pointed out that the "other serious harm" considered by the Seventh Circuit in *Kholyavskiy*, 540 F.3d at 577, was not the poor mental health facilities, but rather, it was the resulting debilitation and homelessness from the inadequate care. Since the Lleshis did not make any showing of such resulting harms, the Sixth Circuit found that poor mental health facilities were not sufficient alone to warrant a finding of humanitarian asylum.

Other Circuit Cases Addressing Humanitarian Asylum

The First, Eighth, Tenth, and Eleventh Circuits have considered humanitarian asylum based on the severity of past persecution, but have not discussed the merits of "other serious harm" claims. *See, e.g.*, *Precetaj v. Holder*, 649 F.3d 72, 78 (1st Cir. 2011) (finding that the past persecution was not severe enough to warrant humanitarian asylum); *Hernandez v. Holder*, 579 F.3d 864, 876 (8th Cir. 2009) (remanding to the Board for consideration of the alien's "other serious harm" claim), *vacated in part on other grounds*, 606 F.3d 900 (2010); *Mehmeti v. U.S. Att'y Gen.*, 572 F.3d 1196, 1200-01 (11th Cir. 2009) (referring to both avenues of humanitarian asylum under the regulations but only considering the severity of past persecution ground); *Wambugu v. Gonzales*, 140 F. App'x 7, 13 (10th Cir. 2005) (unpublished) (finding that since the alien failed to establish past persecution, there was no basis for showing "other serious" harm that might be suffered upon removal).

Conclusion

Asylum laws in the United States protect aliens from returning to countries in which they have faced past persecution or have a well-founded fear of future persecution. *See* section 101(a)(42)(A) of the Act; *see also* section 208 of the Act. Humanitarian asylum expands this protection for individuals who suffered past persecution but who do not have a well-founded fear of future persecution based on a protected ground. 8 C.F.R. § 1208.13(b)(1)(iii). The regulatory scheme for humanitarian asylum recognizes the importance of providing refuge for those individuals who experienced past persecution and either (1) demonstrate compelling reasons arising out of the severity of persecution they experienced; or (2) demonstrate a reasonable possibility of "other serious harm" if returned to the country where they previously suffered persecution. While this area of law is still developing, the aforementioned cases provide important considerations for how to analyze claims based on humanitarian asylum.

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1 While the UNHCR Handbook is not binding on the Attorney General, the Board, or the courts, the United States Supreme Court has stated that it "provides significant guidance" in interpreting and construing the 1967 Protocol Relating to the Status of Refugees. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437-39 (1987); *see also INS. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).

2 The Second Circuit, however, has issued three unpublished decisions on this topic, suggesting that it will likely adopt the "other serious harm" analysis as set forth in *Matter of L-S-*. *See Obando-Flores v. Holder*, No. 11-3451, 2012 WL 3932645, at *2 (2d Cir. Sept. 11, 2012) (unpublished); *Zongxun Jiang v. Holder*, No. 11-3158-ag., 2012 WL 2819385, at *2 (2d Cir. Jul. 11, 2012) (unpublished); *Bello v. Holder*, 480 F. App'x 646, 648 (2d Cir. 2012) (unpublished).