



# Immigration Law Advisor

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## Asylum and Withholding of Removal Claims Involving Corruption and Whistleblowing

by Aimee L. Mayer-Salins

Many people fear persecution because they have challenged a regime's legitimacy by bringing corruption or other wrongdoing to light. Others fear that corruption will prevent the government from providing effective protection from private actors seeking to harm them. These fears, based on whistleblowing and corruption, can act as the backbone for the asylum and withholding of removal claims of applicants seeking refuge in the United States.

Adjudicators often overlook the differences between the definitions of corruption and whistleblowing. Corruption and whistleblowing are related but distinct concepts. Corruption is "dishonest or fraudulent conduct by those in power, typically involving bribery." *Oxford Dictionaries*, [http://www.oxforddictionaries.com/us/definition/american\\_english/corruption](http://www.oxforddictionaries.com/us/definition/american_english/corruption) (last visited Feb. 24, 2015). A whistleblower is a "person who informs on a person or organization regarded as engaging in an illicit activity." *Oxford Dictionaries*, [http://www.oxforddictionaries.com/us/definition/american\\_english/whistle-blower](http://www.oxforddictionaries.com/us/definition/american_english/whistle-blower) (last visited Feb. 24, 2015); see also *Black's Law Dictionary* 1627 (8th ed. 2004) (defining a whistleblower as "an employee who reports employer wrongdoing to a governmental or law-enforcement agency"). In other words, corruption relates to dishonest behavior, while whistleblowing relates to reporting bad (although not necessarily dishonest) behavior.

When analyzing asylum and withholding of removal claims involving corruption and whistleblowing, adjudicators must carefully consider whether the claim involves a protected ground, whether the individual has shown a nexus to the protected ground, and whether the persecution is attributable to governmental action or inaction. This article will address special considerations in making each of these determinations in corruption and whistleblowing cases.

## Protected Grounds

The adjudicator must first determine whether the individual seeking protection fears harm on account of a protected ground. Typically, applicants present asylum and withholding of removal claims by describing the corruption or whistleblowing in terms of a particular social group or a political opinion.

### *Particular Social Group*

When determining whether an applicant has presented a cognizable particular social group, adjudicators must always decide whether the group satisfies the requirements of particularity, immutability, and social distinction. *See, e.g., Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014). Adjudicators therefore also apply this analysis in corruption and whistleblowing cases. *See, e.g., Pavlyk v. Gonzales*, 469 F.3d 1082, 1088 (7th Cir. 2006).

In *Pavlyk v. Gonzalez*, the United States Court of Appeals for the Seventh Circuit rejected the proposed particular social group, alternatively described as “Ukrainian prosecutors” or “uncorrupt prosecutors who were subjected to persecution for exposing government corruption,” because being a prosecutor was not an unchangeable or fundamental characteristic. 469 F.3d at 1088. In fact, the court noted that the petitioner subsequently worked as a carpenter and a painter while in the United States. Additionally, the court stressed that the petitioner had not framed his particular social group as *former* prosecutors, and thus his case was distinguishable from those in which the particular social group is based on shared past experiences. *Id.*

The Seventh Circuit’s analysis of the particular social group in *Ruiz-Cabrera v. Holder*, 748 F.3d 754 (7th Cir. 2014), provides another example of how to employ the particular social group analysis in corruption and whistleblowing cases. In that case, the particular social group was defined as “persons who face persecution by corrupt governmental and law enforcement authorities instigated by a politically connected spouse.” *Id.* at 755. The court concluded that members of this group shared only one characteristic: they faced persecution. The Seventh Circuit has consistently held that the social group must be defined by something more than persecution. *Id.* at 757 (citing *Jonaitiene v. Holder*, 660 F.3d 267, 271–72 (7th Cir. 2011)). Therefore, the court rejected the

particular social group for lack of a cognizable immutable characteristic. *Id.*

Thus, it is often difficult for a person claiming harm to define a particular social group in terms of whistleblowing or opposition to corruption because these types of particular social group formulations often lack immutability. Additionally, in cases involving widespread corruption, it may be difficult to show social distinction and particularity.

### *Political Opinion*

With regard to political opinion, there are several special considerations in whistleblowing and corruption cases. Most importantly, adjudicators must remember that opposition to government corruption may be a political opinion. *See, e.g., Castro v. Holder*, 597 F.3d 93, 100,106 (2d Cir. 2010); *Zhang v. Gonzales*, 426 F.3d 540, 546–47 (2d Cir. 2005). Opposing corruption that is institutionalized or inextricably intertwined with the ruling regime is political. *Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1337 (10th Cir. 2008); *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000). Additionally, while there is no categorical distinction between opposition to corruption and other disputes with government policy or practice, opposition to corruption must go beyond mere self-protection and, instead, symbolize a challenge to the legitimacy or authority of a government in order to constitute a political opinion. *Castro v. Holder*, 597 F.3d at 100–01; *Zhang v. Gonzales*, 426 F.3d at 547.

So when does opposition go beyond self-protection and symbolize a challenge to the regime’s legitimacy? The facts of *Bu v. Gonzales*, 490 F.3d 424 (6th Cir. 2007), and *Haichun Liu v. Holder*, 692 F.3d 848 (7th Cir. 2012), provide an illustrative comparison. In *Bu*, the Sixth Circuit determined that Chinese Government officials persecuted the petitioner, not simply for protesting his impending job loss, but because he was a political activist trying to expose government corruption and protect workers’ rights. 490 F.3d at 429. The court’s conclusion rested on several salient facts. First, the petitioner was the chairman of a labor union and was jailed for organizing and participating in a sit-in in which 1,800 workers participated. He also refused to accede to a police order to prevent further protests. *Id.* Moreover, after the petitioner fled China, a group of his co-workers who had participated in the demonstration were jailed for

reporting that the head of the factory was corrupt. *Id.* at 430. Finally, the State Department Country Report stated that the Chinese Government deems criticism of government corruption to be political expression and indicated that those who spoke out against corruption were detained without charges or were charged with “subverting state power.” *Id.* at 431.

In contrast, in *Haichun Liu*, the Seventh Circuit characterized the petitioner’s demand for employment as an economic demand, rather than a protest of government corruption. 692 F.3d at 852. The court listed common examples of political speech, including “[c]ampaigning against the government, writing op-ed pieces, urging voters to oust corrupt officials, founding an anti-corruption political party, actively participating in an anti-corruption party’s activities, or speaking out repeatedly as a ‘public gadfly.’” *Id.* The Seventh Circuit then emphasized that although the petitioner worked at a government-owned factory, he never belonged to a political organization or demonstrated against the government. *Id.* Rather, he brought 16 of his co-workers to ask the manager for their jobs back. The court described this as an economic demand and noted that the petitioner was removed from the premises for causing a “verbal quarrel,” rather than for the content of the protest. *Id.* Additionally, the Seventh Circuit declared that sending an anonymous letter asserting corruption in the layoffs did not transform an economic protest into a political one because the petitioner never publicly admitted to writing the letter and there was no evidence that anyone knew he wrote it. *Id.* at 852–53.

Thus, opposition goes beyond self-protection and symbolizes a challenge to the regime’s legitimacy where it involves organizing large groups to protest government corruption, the protest is public, and the applicant creates a political organization or actively participates in a political organization’s activities. Where he merely asks for his job back but does not publically highlight broader problems with corruption, the protest can be characterized as an economic demand, rather than an expression of a political opinion.

### Nexus

If the applicant has articulated a cognizable particular social group or political opinion, the adjudicator must then determine whether the person has established that he or she was persecuted on account of

that protected ground. Pursuant to the language of the REAL ID Act of 2005, Division B of Pub. L. No. 109-13, 119 Stat. 302, aliens must demonstrate that the protected ground is “one central reason” for the persecution. *Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011); *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010). Consequently, there is no “automatic equation between retaliatory harm and the motivation behind the retaliation,” because such an automatic equation would not account for corrupt officials who are merely seeking revenge or attempting to avoid the exposure of a profitable corruption scheme. *Matter of N-M-*, 25 I&N Dec. at 531.

In *Matter of N-M-*, the Board outlined several important factors for adjudicators to consider when conducting the nexus analysis in corruption cases. These factors include (1) whether and to what extent an applicant engaged in activities that could be perceived as expressions of anticorruption beliefs, (2) whether there is direct or circumstantial evidence that the persecutor was motivated by the applicant’s perceived or actual beliefs, (3) whether there is evidence of pervasive government corruption and direct ties between the corrupt actor and high level officials, and (4) whether the governing regime, rather than just the corrupt individual, retaliates against the applicant for the anticorruption beliefs. 25 I&N Dec. at 532–33. The Board applied those factors to the respondent’s case and concluded that the callers who threatened her after she refused to falsify records were not necessarily motivated by her perceived or actual political opinion. *Id.* at 534. The Board explained that an event may trigger harm even though the reason for the harm is not the applicant’s imputed or actual political opinion. *Id.* (citing *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (holding that the applicant did not demonstrate that threats made by guerrillas in response to his refusal to join them were on account of his political opinion, rather than because of their desire to increase their ranks)). Accordingly, the Board remanded for the Immigration Judge to make factual findings regarding whether the callers believed the respondent posed a political threat or whether they merely saw her as a threat to their personal scheme. *Id.* at 534.

### Perceived or Actual Political Beliefs

Adjudicators can think about the first two factors outlined in *Matter of N-M-* as essentially asking whether the government officials had any reason to believe that the applicant’s actions were politically motivated and then

acted based on that belief. In some cases, there is ample evidence that the persecutor had reason to believe that the applicant's actions were politically motivated. For example, in *Baghdasaryan v. Holder*, 592 F.3d 1018, 1025 (9th Cir. 2010), the court found that the petitioner had shown a nexus between the persecution and his political opinion because a government official told him while he was being beaten in detention that he was "defaming" and "raising his head" against the politician who had tried to extort payments from him. The court stated that this was "direct and concrete evidence" that the petitioner was beaten *because of* his opposition to corruption. *Id.* Additionally, this harm occurred right after he filed a complaint and publicly protested extortion. *Id.*

Conversely, courts have found no nexus where the applicant never publically expressed opposition to corruption or other government practices. In these cases, courts have found that there was no indication that the persecutor knew or had reason to believe that the applicant opposed corruption or had any particular political opinion. See *Li v. Gonzales*, 416 F.3d 681, 685 (7th Cir. 2005); *Marku v. Ashcroft*, 380 F.3d 982, 988 (6th Cir. 2004) (noting that the persecutor was unlikely to interpret the petitioner's refusal to doctor balance sheets as politically motivated because the joint venture was mainly private in nature, the attempted corruption was limited to avoiding financial disclosure obligations, and the misconduct was an attempt to circumvent a law that applied only to private entities). Accordingly, courts have found that the persecutor's actions were not motivated by the applicant's opposition to the corrupt government practices.

#### *Pervasive Corruption*

The Board also instructed adjudicators to consider evidence of pervasive corruption and direct ties between the corrupt individuals and high level officials. The Board explained that "if corruption is entrenched in the ruling party, a challenge to the corrupt practices of this party may be more likely to represent a challenge to the political position of the ruling party, and not just the financial standing or reputation of a small group of corrupt officials." *Matter of N-M-*, 25 I&N at 533. This dynamic was evident in *Castro v. Holder*, 597 F.3d at 104, where the court concluded that the petitioner's whistleblowing would likely be viewed as opposition to the regime because there was evidence of widespread corruption, including

evidence of direct ties between the corrupt elements and the Guatemalan president. Likewise, in *Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir. 1988), the Ninth Circuit determined that the Macoutes' political system in Haiti was a kleptocracy based on extortion. Thus, the court concluded that the Haitian Government would view the petitioner's refusal to accede to its extortionist practices as subversive.

However, when considering evidence of pervasive corruption, adjudicators must distinguish between claims in which an applicant fears that he will be targeted on account of his opposition to widespread corruption or his whistleblowing and claims in which he simply has a fear of generalized corruption and political instability. In the latter case, evidence of pervasive corruption is insufficient to demonstrate a nexus because the applicant is essentially claiming that corruption and instability impacts all people in his country of nationality. See, e.g., *Jamal v. Mukasey*, 531 F.3d 60, 67 (1st Cir. 2008) (finding no evidence that the corruption and political turmoil in Pakistan would affect the petitioner more than other Pakistanis).

#### **Additional Nexus Considerations**

In cases where the applicant has alleged persecution on account of political opinion or membership in a particular social group, corruption and whistleblower claims raise several additional issues related to nexus. The circuit courts have supplemented the factors outlined in *Matter of N-M-* by including other considerations in the nexus analysis.

#### *Applicant's Job Is To Fight Corruption*

Only the Seventh and Ninth Circuits have directly addressed whether an applicant can establish a nexus in cases where his job duties include combatting corruption.<sup>1</sup> In the Seventh Circuit, a petitioner must (1) have acted beyond the scope of his duties and (2) gone public with allegations of wrongdoing or gone outside the chain of command. Compare *Haxhiu v. Mukasey*, 519 F.3d 685, 690–91 (7th Cir. 2008) (concluding that an Albanian military officer whose duties included eradicating corruption was eligible for asylum because he sent a letter to Albania's Supreme Court, he contacted journalists, and his anticorruption activities continued after his army career ended), with *Pavlyk v. Gonzales*, 469 F.3d 1082 (finding the petitioner,

*continued on page 9*



# FEDERAL COURT ACTIVITY

## CIRCUIT COURT DECISIONS FOR JANUARY 2015

by John Guendelsberger

The United States courts of appeals issued 122 decisions in January 2015 in cases appealed from the Board. The courts affirmed the Board in 99 cases and reversed or remanded in 23, for an overall reversal rate of 18.9%. There were no reversals from the First, Third, Fifth, Seventh, Eighth, and Tenth Circuits. In January 2014, by way of comparison, the courts of appeals issued 202 decisions and reversed or remanded in 30, a reversal rate of 14.9%

The chart below shows the results from each circuit for January 2015 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	1	1	0	0.0
Second	14	9	5	35.7
Third	6	6	0	0.0
Fourth	9	7	2	22.2
Fifth	5	5	0	0.0
Sixth	9	8	1	11.1
Seventh	3	3	0	0.0
Eighth	5	5	0	0.0
Ninth	63	49	14	22.2
Tenth	2	2	0	0.0
Eleventh	5	4	1	20.0
All	122	99	23	18.9

The 122 decisions included 73 direct appeals from denials of asylum, withholding of removal, or protection under the Convention Against Torture; 26 direct appeals from denials of other forms of relief from removal or from findings of removal; and 23 appeals from denials of motions to reopen or reconsider. Reversals or remands within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	73	56	17	23.3
Other Relief	26	22	4	15.4
Motions	23	21	2	8.7

The 17 reversals or remands in asylum cases involved particular social group (8 cases), credibility (6 cases), and level of harm for past persecution (3 cases). The four reversals or remands in the “other relief” category included a crime involving moral turpitude, an aggravated felony theft offense, a section 212(h) waiver, and cancellation of removal. The two motions cases involved changed country conditions.

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

## RECENT COURT OPINIONS

### *Seventh Circuit:*

*Sibanda v. Holder*, No. 14-2157, 2015 WL 590313 (7th Cir. Feb. 13, 2015): The court granted a petition for review challenging the Board’s denial of the petitioner’s application for asylum. The Board upheld the Immigration Judge’s denial of asylum on the grounds that the petitioner did not provide sufficient evidence to corroborate her claim. Specifically, the Immigration Judge had requested country conditions information to corroborate the petitioner’s claim that, pursuant to her tribe’s “bride-price” custom, she was required to marry her brother-in-law following her husband’s death. Additionally, the Immigration Judge requested letters or affidavits from relatives and a police report to confirm that her brother-in-law attacked her when she refused to marry him. The court acknowledged that under section 208(b)(1)(B)(ii) of the Act, an asylum applicant must submit evidence at the request of the Immigration Judge to corroborate credible testimony. However, the court noted that the applicant is not required to provide the evidence if she does not have it and cannot reasonably obtain it. The court found that it was not reasonable to expect the petitioner to obtain affidavits or letters because she credibly testified that her relatives had supported her brother-in-law or had received threats warning them not to assist her. The court additionally noted that the petitioner could not reasonably be expected to obtain a

police record because the police had informed her that they would not provide assistance. Finally, the court pointed out that there were no witnesses to the events in question. Regarding country conditions information, the court observed that although not required to do so, the Immigration Judge could have included State Department reports in the record. Such general country conditions reports would have shown that the petitioner's claim was plausible without corroboration of the specific facts. The court directed the Immigration Judge to determine whether the applicant's account was credible on remand. It also instructed the Board to rule in the first instance on the applicant's proposed social group, "married women subject to the bride-price custom," but noted that the proposed group appeared to fall within the circuit's established particular social group definition. Finally, the court directed the Immigration Judge and the Board to rule on whether the Government of Zimbabwe was unable or unwilling to protect the applicant and, if past persecution was established, whether the Department of Homeland Security rebutted the presumption of a well-founded fear of future persecution.

#### ***Eighth Circuit:***

*Kanagu v. Holder*, No. 13-3563, 2015 WL 508838 (8th Cir. Feb. 9, 2015): The court upheld the Board's decision affirming an Immigration Judge's denial of the petitioner's application for asylum. The petitioner, a native and citizen of Kenya, had provided financial support to a group opposing Kenya's largest criminal enterprise, the Mungiki. In 2009, the Mungiki threatened and kidnapped the petitioner in order to extort payments from him. The petitioner claimed that this treatment was persecution on account of his membership in a particular social group, "individuals who are openly opposing the Mungiki sect." The Board concluded that the petitioner's proposed group did not meet the definition of a particular social group, namely, it lacked "social visibility" (now "social distinction"), was not recognized in the community as an identifiable group, and was too amorphous. The Board further held that the petitioner had not established the required nexus because it appeared that the Mungiki were motivated by their desire to extort the petitioner for money, rather than to punish him for opposing them. The court upheld the Board's social group determination and found no basis to remand in light of the Board's intervening precedent decisions regarding the definition of a particular social group. Additionally, the

court upheld the Board's determination regarding lack of nexus, concluding that the Immigration Judge adequately considered the documentary evidence in the record. The court therefore denied the petition for review.

*Tejado v. Holder*, No. 13-3113, 2015 WL 364017 (8th Cir. Jan. 29, 2015): The court denied a petition for review challenging the Board's affirmance of an Immigration Judge's denial of the petitioner's applications for cancellation of removal and asylum. The petitioner, a Honduran national, misrepresented himself as a national of El Salvador for the purpose of applying for temporary protected status and asylum. He first admitted his true nationality after he was placed in removal proceedings. The Immigration Judge denied both of the petitioner's applications, finding that he did not merit a favorable exercise of discretion because of his misrepresentations, prior convictions, and arrest. Additionally, the Immigration Judge denied the petitioner's application for cancellation of removal on the basis that he had not established that his United States citizen son would suffer exceptional and extremely unusual hardship. Finally, the Immigration Judge denied the petitioner's application for asylum, finding that he was not credible and, alternatively, did not establish a well-founded fear of persecution on account of his membership in a particular social group. The court found that it did not have jurisdiction to review the Immigration Judge's discretionary denial or factual evaluation of the petitioner's application for cancellation of removal. Further, the court found that the Immigration Judge and the Board did not abuse their discretion in denying the petitioner's application for asylum because he did not meet his burden of establishing his eligibility relief.

#### ***Ninth Circuit:***

*Hernandez-Gonzalez v. Holder*, No. 11-70359, 2015 WL 618776 (9th Cir. Feb. 13, 2015): The court granted a petition for review challenging the Board's conclusion that the petitioner's conviction for possession of a billy club with an enhancement for sentencing purposes under section 186.22(b)(1) of the California Penal Code was for a crime involving moral turpitude ("CIMT"). Section 186.22(b)(1) states that an additional term of punishment may be imposed if an individual is convicted of a felony committed "for the benefit of, at the direction of, or in association with any street gang," and "with the specific intent to promote, further, or assist in any criminal

conduct by gang members.” The court first acknowledged that the Board did not find that the underlying weapons possession offense alone constituted a CIMT. Applying the categorical approach, the court noted that in order to be a CIMT, the crime in question must be “vile, base, or depraved” and violate accepted moral standards. The court observed that the language of section 186.22(b)(1) does not require an intent to injure, actual injury, a protected class of victims, or the use of violence. Instead, it only requires the intent to benefit gang-related activity. The court further noted that no specific type of gang-related activity is required. Reviewing California case law, the court found a “realistic probability” that the gang enhancement could be applied to conduct that does not involve moral turpitude. The court also declined to accord deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Board’s holding in *Matter of E.E. Hernandez*, 26 I&N Dec. 397 (BIA 2014). In addition to the reasons summarized above, the court found that the Board did not explain why the offense of maliciously defacing property with graffiti in violation of section 594(a) of the California Penal Code with the added gang enhancement constituted “inherently base, vile, or depraved” conduct.

## BIA PRECEDENT DECISIONS

In *Matter of Chairez*, 26 I&N Dec. 478 (BIA 2015) (“*Chairez II*”), the Board granted, in part, the Department of Homeland Security’s motion for reconsideration of *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014) (“*Chairez I*”). The Board determined that its interpretation of *Descamps v. United States*, 133 S. Ct. 2276 (2013), in *Chairez I* applies only to the extent that there is no controlling authority to the contrary in the relevant circuit. Since the Tenth Circuit, in whose jurisdiction this case arose, has taken a different approach to divisibility from that adopted in *Chairez I*, Tenth Circuit law controls.

The respondent was convicted of felony discharge of a firearm in violation of section 76-10-508.1 of the Utah Code and sentenced to an indeterminate term of imprisonment not to exceed 5 years. The Immigration Judge found him removable under section 237(a)(2)(A)(iii) of the Act as an alien convicted of a “crime of violence” aggravated felony under section 101(a)(43)(F), and under section 237(a)(2)(C) as an alien convicted of a firearms offense.

In *Chairez I*, the Board concluded that the DHS had not satisfied its burden of proving that the respondent was removable under section 237(a)(2)(A)(iii) of the Act. The Board noted that in *Descamps*, the Court defined an offense’s “elements” as the facts about the crime that a jury must find unanimously in order to convict. The Board therefore determined that section 76-10-508.1 can only be divisible if Utah law required jury unanimity regarding the mens rea with which the accused discharged the firearm. The Board then reviewed Utah law and, finding no such requirement, determined that the statute is not divisible. The Board thus concluded that the modified categorical approach was inapplicable and, accordingly, the DHS had not established that the respondent’s conviction rendered him removable as an alien convicted of an aggravated felony.

The DHS sought reconsideration, arguing that the Board misinterpreted *Descamps* because it treated statutory divisibility as a “threshold” requirement to be established prior to proceeding to the modified categorical inquiry. The DHS contended that this interpretation contravened the Tenth Circuit’s opinion in *United States v. Trent*, 767 F.3d 1046 (10th Cir. 2014), and footnote 2 in *Descamps*. In *Chairez II*, the Board acknowledged that it defers to circuit law as to the application of the categorical and modified categorical approaches and agreed that, pursuant to the Tenth Circuit’s broader approach to divisibility, section 76-10-508.1(1)(a) is divisible into three separate offenses with distinct mens rea elements. It was therefore proper for the Immigration Judge to employ the modified categorical approach. Since the respondent’s conviction record supported the Immigration Judge’s determination that he had knowingly discharged a firearm in the direction of a person, the Board concurred that the respondent’s offense was an aggravated felony and he was therefore removable under section 237(a)(2)(A)(iii) of the Act. The Board vacated the portion of *Chairez I* to the contrary and remanded the record for consideration of the respondent’s eligibility for relief from removal.

In *Matter of Cross*, 26 I&N Dec. 485 (BIA 2015), the Board receded from *Matter of Hines*, 24 I&N Dec. 544 (BIA 2008), and *Matter of Rowe*, 23 I&N Dec. 962 (BIA 2006), to the extent that those decisions hold that the concept of “legitimation” must be interpreted uniformly throughout the Act. The Board reinstated and reaffirmed its holdings in *Matter of Clabar*, 18 I&N Dec. 1 (BIA 1981) (holding that a Jamaican child born out

of wedlock after the effective date of the Jamaican Status of Children Act (“JSCA”) is legitimated under Jamaican law for purposes of visa preference classification), and *Matter of Goorahoo*, 20 I&N Dec. 782 (BIA 1994) (holding that children born out of wedlock after the effective date of the Guyanese Children Born Out of Wedlock (Removal of Discrimination) Act of 1983 and individuals who were under the age of 18 when the Act became effective are deemed legitimate for purposes of visa preference classification).

The respondent was born out of wedlock in Jamaica. His father subsequently placed his name on the respondent’s Jamaican birth registration form, which qualified the respondent as a legitimated child for visa preference classification under the Act. His father eventually immigrated to the United States, which allowed the respondent to be admitted as a lawful permanent resident (“LPR”) based on his visa preference classification as the child of an LPR. His father then became a United States citizen while the respondent was in his legal custody in the United States. The respondent was placed in removal proceedings following a burglary conviction. The Immigration Judge concluded that the respondent did not derive citizenship from his father because he did not qualify as a “child” under section 101(c) of the Act. In support of this conclusion, the Immigration Judge found that, pursuant to *Matter of Hines*, the respondent was not legitimated under Jamaican law because his parents had never married.

On appeal, the Board compared its interpretation of the term “legitimation” for the purpose of defining a “child” in section 101(c)(1) of the Act with “paternity . . . established by legitimation” in former section 321(a)(3) of the Act. The Board maintained that the term “legitimation” in the context of former section 321(a)(3), which was at issue in *Matter of Hines* and *Matter of Rowe*, can only be established through the affirmative act of parental marriage. However, the Board receded from *Matter of Hines* and *Matter of Rowe* to the extent they held that the term “legitimation” should not have two separate meanings within the Act, regardless of variations in statutory context. The Board then pointed out that a conflict exists if “legitimation” in section 101(c)(1) has the same meaning as “paternity . . . established by legitimation” in former section 321(a)(3). Accordingly, the Board interpreted section 101(c)(1) to mean that a person born abroad to unmarried parents

can be a “child” for purposes of automatic citizenship under section 320(a) if he or she is otherwise eligible and was born in a country or State that had eliminated legal distinctions between children based on the marital status of their parents, or had a residence or domicile in such a country or State, including within the United States.

The Board concluded that the respondent was his father’s “child” within the meaning of sections 101(c)(1) and 320(a) of the Act because the respondent is the biological child of the man through whom he seeks to derive United States citizenship, was born in Jamaica after the effective date of the JSCA, and was in his father’s legal custody at the time he was born. Accordingly, the Board terminated removal proceedings.

## REGULATORY UPDATE

**80 Fed. Reg. 10,284 (Feb. 25, 2015)**

**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Parts 214 and 274a**

**[CIS No. 2501–10; DHS Docket No. USCIS–2010–0017]**

**RIN 1615–AB92**

**Employment Authorization for Certain H–4 Dependent Spouses**

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends Department of Homeland Security (“DHS” or “Department”) regulations by extending eligibility for employment authorization to certain H–4 dependent spouses of H–1B nonimmigrants who are seeking employment-based lawful permanent resident (“LPR”) status. Such H–1B nonimmigrants must be the principal beneficiaries of an approved Immigrant Petition for Alien Worker (Form I–140), or have been granted H–1B status in the United States under the American Competitiveness in the Twenty-first Century Act of 2000, as amended by the 21st Century Department of Justice Appropriations Authorization Act. DHS anticipates that this regulatory change will reduce personal and economic burdens faced



by H-1B nonimmigrants and eligible H-4 dependent spouses during the transition from nonimmigrant to LPR status. The final rule will also support the goals of attracting and retaining highly skilled foreign workers and minimizing the disruption to U.S. businesses resulting from H-1B nonimmigrants who choose not to pursue LPR status in the United States. By providing the possibility of employment authorization to certain H-4 dependent spouses, the rule will ameliorate certain disincentives for talented H-1B nonimmigrants to permanently remain in the United States and continue contributing to the U.S. economy as LPRs. This is an important goal considering the contributions such individuals make to entrepreneurship and research and development, which are highly correlated with overall economic growth and job creation. The rule also will bring U.S. immigration policies concerning this class of highly skilled workers more in line with those of other countries that are also competing to attract and retain similar highly skilled workers.

**DATES:** This final rule is effective May 26, 2015.

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### **Asylum and Withholding** *continued*

a Ukrainian prosecutor whose duties included prosecuting corruption cases, ineligible for relief because he resigned rather than going public with his investigation into corruption).<sup>2</sup>

In contrast, in the Ninth Circuit, a whistleblower need not go outside the chain of command or alert the public at large. *Perez-Ramirez v. Holder*, 648 F.3d 953, 957 (9th Cir. 2011); *Fedunyak v. Gonzales*, 477 F.3d 1126, 1128–29 (9th Cir. 2007). The Ninth Circuit instead has focused on the context in which the applicant's actions took place. *E.g.*, *Sagaydak v. Gonzales*, 405 F.3d 1035, 1043 (9th Cir. 2005). In *Sagaydak*, the petitioner was a tax auditor from Ukraine who refused to accept bribes from a company under investigation for tax evasion. He reported the company to prosecutors after company officials attempted to bribe him. *Id.* at 1037. As a result, he and his family received threats, his wife was assaulted, his apartment was vandalized, and his cousin was shot. *Id.* The Ninth Circuit considered these facts in context, explaining that Ukraine was transitioning to a free-market economy following the fall of the Soviet Union. *Id.* at 1043. The court noted that a new president who pushed for economic reforms was elected in 1994, and this president's policies were implemented through the

Tax Inspectorate where the petitioner worked. *Id.* The petitioner's work was therefore intricately connected with the political and economic reforms occurring at the time. *Id.* From the company's perspective, the petitioner's stance against corruption represented a threat to the old system that had allowed the company to thrive. *Id.* at 1044. The court thus found that although the petitioner's refusal to accept bribes and abandon his duty to testify was not a position critical of any particular political party or politician, it was undeniably a political statement in the context of the political and economic reforms occurring in Ukraine.<sup>3</sup> *Id.*

### *Personal Disputes*

In many whistleblowing cases, the nexus analysis turns on whether the applicant really faced persecution on account of a protected ground or whether the situation boils down to a personal dispute. The facts of *Zayas-Marini v. INS*, 785 F.2d 801 (9th Cir. 1986), provide a quintessential example of a personal dispute. The petitioner was a member of a prominent political family in Paraguay. Police officers jailed the petitioner after he attempted to help his father recoup part of the family business from a high-ranking government official. *Id.* at 803. However, the Paraguayan Government later released him when it was announced that he would marry the daughter of the Chief of Security. On the petitioner's wedding day, the high-ranking official asked him to participate in a smuggling scheme, but he refused. *Id.* In another incident, the petitioner confronted a second Paraguayan official about embezzling funds for a water project, a fight ensued, and the official brought charges against him. *Id.* at 804. The court determined that the petitioner had a personal dispute with certain government officials and, accordingly, had not established a nexus to a political opinion.

The facts of *Silva v. Ashcroft*, 394 F.3d 1 (1st Cir. 2005), present a closer call. In that case, the petitioner was an accountant for a government-funded drug rehab center who aided the center's CEO in embezzling funds. When the Brazilian Government started investigating, the CEO threatened to kill the petitioner and his family if he spoke about the corruption. *Id.* at 2. In support of his asylum application, the petitioner proposed the following particular social groups: (1) those who refused to perform illegal tasks because of pressure from workplace supervisors, (2) trapped employees forced

to acquiesce to the demands of corrupt employers, and (3) whistleblowers. *Id.* at 5. However, the court found no nexus to any of the particular social groups because substantial evidence supported the finding that the petitioner was persecuted on account of a personal dispute with the CEO, rather than membership in a proposed particular social group. *Id.* at 6.

In contrast, the Ninth Circuit found that the petitioner established a nexus to a protected ground in *Yan Xia Zhu v. Mukasey*, 537 F.3d 1034 (9th Cir. 2008), a case in which the petitioner was raped by the manager of a state-owned factory. The petitioner wrote a letter to the town government reporting the rape and denouncing the appointment and protection of the manager who raped her. A week later, police officers arrived at the petitioner's home and arrested her because she "wrote a letter and tried to sue the government" and did "something against the government." *Id.* at 1037, 1044. The court found that this evidence made it clear that this case involved much more than a mere personal dispute with a factory manager. *Id.* at 1044–45. Rather, the court concluded that the petitioner's "complaint to the town government about the manager's protection was interpreted as an act of political dissent," and the police acted in response to that complaint. *Id.* at 1045.

Thus, courts generally characterize a situation as a personal dispute where the dispute pertains only to certain government officials, rather than the government as a whole, and where the individuals involved in the persecution are acting to protect their own interests. Conversely, courts have found a nexus between the persecution and the protected ground where the persecution occurs in response to actions that challenge the legitimacy of the government as a whole and are thus interpreted by the persecutors as a form of political dissent.

### **State Actor**

Persecution "always implies some connection to government action or inaction." *Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014) (internal quotation marks and citations omitted). Accordingly, in corruption and whistleblowing cases, it is important to determine whether the persecution is attributable to the government's actions or lack thereof.

### *Unable or Unwilling To Control*

In some instances, the persecutor is clearly a private actor. In these cases, applicants often assert that the government is unable or unwilling to control the persecutor because of corruption. The analysis of whether a government is unable or unwilling to control a private actor is fact-intensive and complex.<sup>4</sup> General evidence of corruption is normally insufficient to show that the government is unable or unwilling to control the persecutor. However, such evidence is relevant where there is also evidence that the government took no action to protect the applicant or that government action is stymied by the persecutor's connections to high-ranking officials. *See Aliyev v. Mukasey*, 549 F.3d 111, 118 (2d Cir. 2008). For example, in *Aliyev v. Mukasey*, the Second Circuit noted that in addition to State Department reports stating that the Kazakh police were "poorly paid and widely believed to be corrupt," there was specific evidence that the police did not take action despite repeated reports of violence. *Id.* at 118–19 (explaining that the police did not investigate the petitioner's report of being assaulted by Kazakh nationalists, nor did they investigate a bombing of his home). Moreover, one of the attackers was the nephew of a high-ranking government official. *Id.* at 118. Similarly, in *Bi Xia Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010), the court found evidence that the Chinese Government was unable or unwilling to protect the petitioner where her "family was unable to secure her release during the two week period that she was held captive" and the persecutor had "powerful connections to the police."

### *Private Entity or State Actor*

Other times, it may be unclear whether the persecutor is a private entity or a state actor. Where an applicant works for a state-owned factory and is arrested and beaten by police, the state is the persecutor. *See, e.g., Mamouzian v. Ashcroft*, 390 F.3d 1129 (9th Cir. 2004). However, where the government merely enforces a court order that settles a dispute between private parties, there is no culpable state action. *See Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354 (5th Cir. 2002) (rejecting a claim for protection under the Convention Against Torture by finding no state acquiescence where the police only enforced a court order concerning a land dispute between peasants and wealthy landlords).

### *Rogue Officials*

The analysis is also complex where government officials are involved in the persecution, but may be acting beyond the scope of their authority. When analyzing whether the actions of rogue officials may be attributed to the government as a whole, the Board has held that where officers were disciplined and suspended, the officers' scheme represents "aberrational" conduct by individuals, not systemic government-sanctioned corruption. *Matter of C-T-L-*, 25 I&N Dec. at 349.

The circuit courts have focused on the broader context in which the officials acted to determine whether their actions can be attributed to the government. In *Costa v. Holder*, 733 F.3d 13 (1st Cir. 2013), the court determined that the actions of two rogue police officers did not constitute government action. The petitioner had worked with U.S. Immigration and Customs Enforcement ("ICE") to find sellers of fraudulent documents. She feared returning to Brazil because a Brazilian police officer whose brother was arrested in the United States for selling fraudulent documents had threatened her. *Id.* at 15. In finding that the actions of this rogue police officer and his partner did not constitute government action, the court specifically noted that although there was a high level of police abuse and impunity in Brazil, the government had clamped down on corruption and prosecuted police officers for crimes. *Id.* at 17–18.

In contrast, in *Castro v. Holder*, 597 F.3d 93, the court determined that the officers' actions were attributable to the government. In that case, the petitioner, a former Guatemalan police officer, witnessed one of his superiors selling cocaine. After reporting the incident, the petitioner was suspended from his position, and individuals claiming to be sent "from the above" repeatedly threatened his life. *Id.* at 97. The court concluded that the corrupt officers did not merely target the petitioner because he resisted their attempts to recruit him. Rather, the court emphasized the importance of the broader political context. *Id.* at 101. Specifically, the court noted that President Portillo had assumed power in 2000, and his regime was opposed to the goals of the peace accords that had ended the Guatemalan civil war. *Id.* In particular, under his regime, many officials who had been dismissed for criminal activity or human rights violations regained their positions. Corruption became

endemic in the national police and in the government as a whole. *Id.* Thus, the court determined that the petitioner's whistleblowing was perceived as a challenge to the ruling regime. *Id.* at 102.

### *Under Color of Law*

Another key consideration in deciding whether an officer's actions are attributable to the government is whether the officer was acting under color of law. See *Ramirez-Peyro v. Holder*, 574 F.3d 893, 900 (8th Cir. 2009). The analysis in this regard is based on civil rights law. *Id.* Specifically, the Eighth Circuit explained that the Supreme Court's analysis in *United States v. Price*, 383 U.S. 787 (1966), could be applied in immigration cases. In *Price*, a deputy sheriff released three voting rights workers from jail in the middle of the night and followed them in his squad car as they left the jail. 383 U.S. at 790. The deputy sheriff then intercepted the voting rights workers and drove them to a location where he, 2 other police officers, and 15 private individuals murdered them. *Id.* The Supreme Court concluded that all of the people involved in the murders acted under color of law because the state detention and the deputy sheriff's calculated release of the men made the murder possible. *Id.* at 794–96.

The facts in *Ramirez-Peyro v. Holder* echo those in *Price*. In that case, the petitioner infiltrated a Mexican drug cartel on behalf of ICE and helped the United States arrest over 50 members of the cartel. 574 F.3d at 895. After two attempts on his life, ICE paroled the petitioner into the United States and put him in protective custody. When his parole expired, ICE put him in expedited removal proceedings. *Id.* at 896. The petitioner sought protection under the Convention Against Torture, claiming that he feared Mexican officials would turn him over to the cartel. *Id.* The court determined that, like the police in *Price*, the officials would only be able to turn the petitioner over to the cartel because their government positions provided them with the knowledge of where he was located and how to gain access to him. *Id.* at 904. The court also noted that the Mexican officials had a duty to stop the kind of behavior in which they were allegedly participating. *Id.* at 905.

Accordingly, when determining whether an officer is acting under color of law, adjudicators should ask the

following questions: (1) whether officer's job provides him with the means by which to find, access, and/or harm the applicant, and (2) whether the officer participating in the unlawful activity has a duty to stop or prevent the unlawful activity.

### Conclusion

Adjudicators should be on the lookout for issues related to corruption and whistleblowing. In cases where these issues are presented, adjudicators should pay special attention to whether the applicant has established that he belonged to a cognizable particular social group or had a political opinion, has demonstrated a nexus, and has shown a connection to government action or inaction.

<sup>1</sup> The Sixth Circuit has not discussed this issue directly, but it would likely follow the Seventh Circuit. *See Marku v. Ashcroft*, 380 F.3d 982 (finding no nexus because the petitioner, an accountant who refused to falsify records, never publicly opposed corruption and never attempted to expose corruption to the public).

<sup>2</sup> In *Pavlyk v. Gonzales*, the court also considered whether the persecution occurred on account of the petitioner's particular social group or on account of specific conduct. The case involved a Ukrainian prosecutor who was persecuted after he investigated a powerful businessman for murder. 469 F.3d 1082. The court found no nexus to a protected ground because the threats the petitioner received arose only from two specific investigations, suggesting that the persecution was tied to his conduct in those investigations and not to his membership in the particular social group presented. *Id.*

<sup>3</sup> This Ninth Circuit case is part of a line of pre-REAL ID Act cases.

<sup>4</sup> An in-depth discussion of the analysis required to determine whether a government is unable or unwilling to control a private actor is beyond the scope of this article. For further information on that topic, see Joseph Hassell, *Persecutor or Common Criminal? Assessing a Government's Inability or Unwillingness to Control Private Persecution*, *Immigration Law Advisor*, Vol. 8, No. 7 (Sept. 2014).

*Aimee L. Mayer-Salins is a Judicial Law Clerk at the Board of Immigration Appeals.*

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