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The Convention Against Torture and Third-Party Abuse: When Does a Government Breach Its Duty Through Acquiescence?

by Lissette Eusebio

The international community has long regarded torture as inhumane and repugnant. In an attempt to combat the problem, nations, including the United States, came together in joining the Convention Against Torture (CAT). The CAT prohibits a party State from removing any person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. *See* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988).

Although generally the torture must be inflicted at the hands of the government, an applicant for protection under the CAT may obtain relief when such pain or suffering is inflicted by a private party with the consent or *acquiescence* of a public official. 8 C.F.R. § 1208.18(a)(1). The regulation states that a public official acquiesces to torture when, prior to the activity constituting torture, the public official "[has] awareness of such activity and thereafter breach[es] his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7).[1] Black's Law Dictionary defines the verb "acquiesce" as "[t]o accept tacitly or passively; to give implied consent to (an act)." Black's Law Dictionary 26 (9th ed. 2009).

The issue of acquiescence may arise in cases where a person seeks protection from third-party violence in a country where the government appears to have the intent to provide protection, but is unable to do so. Although most circuits now consider a government to acquiesce where it demonstrates "willful blindness," the ability or inability of a government to offer its protection is a factor that may be intertwined with the issue

of acquiescence. This article will review developments in the circuit courts' interpretation of acquiescence and government action in the context of the CAT.

Background

In *Matter of S-V-,* the Board took the position that a government's inability to control a group ought not lead to the conclusion that the government acquiesced to the group's activities. 22 I&N Dec. 1306, 1312 (BIA 2000). Instead, the Board held that an applicant "must do more than show that the officials are aware of the activity constituting torture but are powerless to stop it." *Id.* The Board, however, acknowledged that actual knowledge is not required, and that acquiescence may be established through willful blindness. *See id.* at 1311–12. The Attorney General subsequently added that, "the relevant inquiry under the [CAT] . . . is whether governmental authorities would approve or 'willfully accept' atrocities committed against persons in the [applicant's] position." *Matter of Y-L-, A-G- & R-S-R-,* 23 I&N Dec. 270, 283 (A.G. 2002) (internal citation omitted).

Willful Blindness v. Willful Acceptance

As recognized in a prior article, the majority of circuit courts of appeal did not adopt the "willful acceptance" standard articulated in *Matter of Y-L-*, but instead adopted a "willful blindness" standard. *See* Brea C. Burgie, *The Convention Against Torture and Acquiescence: Willful Blindness or Willful Awareness?,* Immigration Law Advisor, Vol. 5, No. 4 (April 2011). "Willful blindness" is defined as "[d]eliberate avoidance of knowledge of a crime, esp. by failing to make a reasonable inquiry about suspected wrongdoing despite being aware that it is highly probable." Black's Law Dictionary 1737 (9th ed. 2009).

The willful blindness standard was most recently adopted by the Fourth Circuit, and is now applied in the majority of circuits, including the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits. *See Suarez v. Holder*, 714 F.3d 241 (4th Cir. 2013); *Hakim v. Holder*, 628 F.3d 151 (5th Cir. 2010); *Mouawad v. Gonzales*, 479 F.3d 589 (8th Cir. 2007); *Silva-Rengifo v. Att'y Gen. of U.S.,* 473 F.3d 58 (3d Cir. 2007); *Cruz-Funez v. Gonzales*, 406 F.3d 1187 (10th Cir. 2005); *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004); *Zheng v. Aschroft*, 332 F.3d 1186 (9th Cir. 2003); *Ali v. Reno*, 237 F.3d 591 (6th Cir. 2001). These courts of appeals have concluded that a government may acquiesce to torture either where the government has actual knowledge of such acts or where the government has awareness of such activity and demonstrates willful blindness.

The distinction between the "willful acceptance" and "willful blindness" standards was addressed by the Fourth Circuit in *Suarez v. Holder*, 714 F.3d 241, 245–46 (4th Cir. 2013). The applicant in the case argued that the Board, in citing *Matter of S-V-*, had wrongly relied on the "willful acceptance" standard. Specifically, the Board had cited *Matter of S-V-* for the proposition that the applicant "must demonstrate that officials are willfully accepting of the tortuous [sic] activities." *Suarez v. Holder*, 714 F.3d at 246. The court noted that the "willful acceptance" standard had been discredited in multiple circuits, and that it applied the "willful blindness" standard. *Id.* The court cited to *Zheng v. Ashcroft*, 332 F.3d 1186, 1194 (9th Cir. 2003), and stated, "pursuant to the willful blindness standard, government officials acquiesce to torture when they have actual knowledge of or turn a blind eye to torture." *Id.* (internal quotation and citation omitted).

However, the court in *Suarez v. Holder* concluded that the Board's actual analysis of the applicant's claim was not inconsistent with the "willful blindness" standard. *See id.* at 246–47. The court noted that the Board had not required the petitioner to show that the Peruvian government had actual knowledge of the mistreatment he feared. *Id.* at 247. The court also concluded that the Board had properly evaluated "whether the government was likely to turn a blind eye" to the applicant's torture. *Id.* at 247. The court found that the Board's denial of the CAT claim was supported by evidence that the Peruvian government would not acquiesce to future torture because officials had denounced a rogue police officer's behavior, prosecuted him, and incarcerated him. *Id.* at 247–48.

A Government's Inability to Oppose Third-Party Torture Generally Held Not to Constitute Acquiescence

Many circuits have addressed the issue of a government that is taking steps, but with mixed success, to address societal problems such as gang violence. For example, the Fourth Circuit has held that there is no acquiescence when the country report reflects that the government, although ineffectively, is taking steps to deal with the torturous activity. *See Martinez v. Holder*,

740 F.3d 902, 914 (4th Cir. 2014) (finding no acquiescence when a former member of the Mara Salvatrucha gang did not report attacks to the authorities and the country report reflected that the government had taken steps to address the "difficult problem" of gang violence). Similarly, in *Garcia v. Holder*, 746 F.3d 869 (8th Cir. 2014), the court held that evidence in the country report suggested that the government was trying to address the problem of gang violence, and that the applicant did not establish that the government was unwilling to protect him from the Mara Salvatrucha gang. In *Garcia*, the authorities arrested the assailant, and a rumor of the police receiving a bribe to release the assailant a week later was not substantiated by the evidence. *Id.* at 873–74. The court concluded that limitations in the government's ability to provide protection to the applicant did not necessarily constitute acquiescence through willful blindness. *See id.* at 874.

Adhering to the willful blindness standard, the Fifth Circuit has also clarified that a government's inability to provide complete protection against acts by third parties does not amount to acquiescence. *See Chen v. Gonzales*, 470 F.3d 1131, 1141–43 (5th Cir. 2006). The applicant in *Chen* argued that "the level of government involvement that constitutes 'acquiescence' is not actual acceptance of torture but rather mere awareness or willful blindness of torture, and failure to prevent it." *Id.* Thus, the applicant asserted that she was only required to prove that the government is aware of the torture and fails to prevent it. *Id.* The court disagreed, concluding that evidence of governmental action in addressing corruption and third-party abuse had been properly considered in determining whether the government would be willfully blind to mistreatment of the applicant. *Id.* at 1142–43; *see also Garcia v. Holder*, 756 F.3d 885, 892 (5th Cir. 2014) (noting that "potential instances of violence committed by non-governmental actors against citizens, together with speculation that the police might not prevent that violence, are generally insufficient to prove government acquiescence . . ."). However, with respect to official corruption, the Fifth Circuit has held that acts by corrupt officials operating "under color of law" in conjunction with third-parties may be sufficient to demonstrate government involvement in or acquiescence to torture. *Garcia v. Holder*, 756 F.3d at 892–93.

In *Mouawad v. Gonzales*, the Eighth Circuit also concluded that government acquiescence may be established through willful blindness, while noting that the government's inability to protect its citizens alone is not enough to establish acquiescence. 485 F.3d 405, 413 (8th Cir. 2007). The court reasoned that the inquiry must consider the willfulness of a government's non-intervention. "A government does not acquiesce in the torture of its citizens merely because it is aware of torture but powerless to stop it, but it does cross the line into acquiescence when it shows willful blindness towards the torture of citizens by third parties." *Id.* (internal citations and quotation marks omitted). The Eighth Circuit remanded the case for the Board to consider whether the Lebanese government would acquiesce to mistreatment of an individual by Hizballah given that the government had not attempted to disarm the group, members of the group had been elected to parliament, the government had limited control over Hizballah, and the applicant had previously reported threats to authorities only to be threatened with detention. *Id.* at 414.

With respect to corruption, the Eighth Circuit has taken issue with the Board's position that actions of low-level public officials are not sufficient for government action under the CAT because they are acting for personal gain and not in support of official policy. *See Ramirez-Peyro v. Holder*, 574 F.3d 893, 901 (8th Cir. 2009). The court reasoned, "[I]t is not contrary to the purposes of the CAT and the under-color-of-law standard to hold [a government] responsible for the acts of its officials, including low-level ones, even when those officials act in contravention of the nation's will and despite the fact that the actions may take place in circumstances where the officials should be acting on behalf of the state in another, legitimate, way." *Id.*

The First Circuit has not explicitly adopted the "willful acceptance" standard or explicitly rejected the "willful blindness" standard. However, the circuit's case law suggests that a government's inability to protect its citizens from third-party torture does not amount to acquiescence. *See, e.g.*, *Amilcar-Orellana v. Mukasey*, 551 F.3d 86, 92 (1st Cir. 2008) (finding no acquiescence in the applicant's claim that the Salvadoran government is unable to protect him from gang members seeking retribution when the country report suggests that the government is trying to eradicate the problem). The First Circuit has also taken the position that acts of a few rogue agents do not amount to acquiescence by a state actor acting in an official capacity. In *Costa v. Holder*, although there was evidence of police abuse and impunity, there

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CIRCUIT COURT DECISIONS FOR APRIL 2015

by John Guendelsberger

The United States courts of appeals issued 171 decisions in April 2015 in cases appealed from the Board. The courts affirmed the Board in 141 cases and reversed or remanded in 30, for an overall reversal rate of 17.5%, compared to last month's 15.4%. There were no reversals from the Fifth and Eighth Circuits.

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

Circuit	Total	Affirmed	Reversed	% Reversed
First	2	1	1	50.0
Second	22	20	2	9.1
Third	14	12	2	14.3
Fourth	11	10	1	9.1
Fifth	12	12	0	0.0
Sixth	7	6	1	14.3
Seventh	2	0	2	100.0
Eighth	4	4	0	0.0
Ninth	81	63	18	22.2
Tenth	7	5	2	28.6
Eleventh	9	8	1	11.1
All	171	141	30	17.5

The 171 decisions included 94 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 48 direct appeals from denials of other forms of relief from removal or from findings of removal; and 29 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	94	76	18	19.1
Other Relief	48	40	8	16.7
Motions	29	25	4	13.8

The 18 reversals or remands in asylum cases involved remand to further address particular social group (9 cases), nexus (2 cases), credibility (2 cases), past persecution, well-founded fear, corroboration, the material support bar, and protection under the Convention Against Torture.

The eight reversals or remands in the "other relief" category addressed aggravated felony crimes of violence (two cases), crimes involving moral turpitude (two cases), sexual abuse of a minor, application of the modified categorical approach, a section 212(h) waiver, and a removal ground for fraud not addressed by the Board. The four motions cases involved ineffective assistance of counsel (two cases), equitable tolling, and a jurisdictional issue.

The chart below shows the combined numbers for January through April 2015 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	14	11	3	21.4
Ninth	286	226	60	21.0
First	5	4	1	20.0
Tenth	25	21	4	16.0
Second	65	57	8	12.3
Sixth	29	26	3	10.3
Third	39	35	4	10.3
Eleventh	21	19	2	9.5
Fourth	37	34	3	8.1
Eighth	17	17	0	0.0
Fifth	36	36	0	0.0
All	574	486	88	15.3

Last year's reversal rate at this point (January through April 2014) was 14.0%, with 780 total decisions and 109 reversals or remands.

The numbers by type of case on appeal for the first 4 months of 2015 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	296	241	55	18.6
Other Relief	162	140	22	13.6
Motions	116	105	11	9.5

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

RECENT COURT OPINIONS

Second Circuit:

Guaman-Yuqui v. Lynch, No. 14-200-ag, 2015 WL 2365838 (2d Cir. May 19, 2015): The Second Circuit denied a petition for review of the Board's decision finding the petitioner ineligible for cancellation of removal under section 240A(b) of the Act based on application of the "stop-time" rule contained in section 240A(d)(1) of the Act. The petitioner entered the U.S. without inspection in January 2001. In March 2010, he was served with a Notice to Appear (NTA) in removal proceedings. The NTA stated that the time and location of hearing would "be set." The following month, a notice of hearing was sent to the petitioner, but not received due to an incorrect address. The respondent was ordered removed in absentia, but proceedings were then reopened, and a new hearing notice was mailed after the petitioner had accrued 10 years in the country. The petitioner applied for section 240A(b) cancellation but was found to be ineligible because he lacked the requisite 10 years of continuous physical presence, as the service of the NTA in 2010 had triggered the "stop-time" rule of section 240A(d)(1) of the Act. The Board dismissed the petitioner's appeal, relying on *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011), which held that service of an NTA stops the accrual of continuous physical presence even if it does not contain the date and time of the initial hearing. The court found the Board's decision deserving of *Chevron* deference. Under the first prong of *Chevron*, the court found the statute to be ambiguous, determining that the statute's "general overview" of the contents of the NTA (including the time and place of the proceeding) could be read as requiring either strict compliance with all provisions, or alternatively as "primarily definitional" (i.e. providing a reference point without requiring strict compliance). The court next found that the Board reasonably chose the second interpretation. The court further noted that the three other circuits to consider the issue — the Fourth, Sixth, and Seventh Circuits — had deferred to the Board's interpretation.

Fourth Circuit:

Hernandez-Avalos v. Lynch, No. 14-1331, 2015 WL 1936721 (4th Cir. Apr. 30, 2015): The Fourth Circuit granted a petition for review of the Board's decision affirming an Immigration Judge's denial of an application for asylum and withholding of removal to El Salvador. The petitioner had been threatened with death three times by members of "Mara 18," a criminal gang. She testified that she feared that gang members would kill her if she was returned to El Salvador. The Immigration Judge found the petitioner credible but denied her applications for relief, determining that she had not established a nexus to a protected ground. Additionally, the Immigration Judge found that the petitioner had not shown that she had been threatened by people that the Salvadoran government was unable or unwilling to control. The Board affirmed the Immigration Judge's decision. The court of appeals found that the petitioner had established a well-founded fear of persecution on account of a protected ground, namely her membership in the particular social group of her nuclear family. The court noted that, under Fourth Circuit precedent, an applicant for asylum must demonstrate that a protected ground serves as "at least one central reason for" the feared persecution, but not necessarily *the* central reason. The court determined that the petitioner had been threatened by Mara 18 in order to recruit her son into their ranks, but also because of her maternal relationship with her son. Therefore, the court found that the petitioner's relationship to her son was at least one central reason for the threats she received. The Fourth Circuit also rejected the Immigration Judge's conclusion that the petitioner had not shown that the Salvadoran government was unwilling or unable to control the gang members who threatened her. The court concluded that the Board and the Immigration Judge had drawn unjustified conclusions from the petitioner's testimony. The court further concluded that the petitioner's claims were supported by the 2011 State Department Human Rights Report for El Salvador, which noted the existence of widespread gang influence and corruption within El Salvador's prisons and judicial system. The court found this evidence (considered in conjunction with the petitioner's testimony) sufficient to establish that the government was unwilling or unable to protect the petitioner from the gang members who threatened her. The Fourth Circuit also held that the Immigration Judge had relied on his "unsupported personal knowledge of conditions in El Salvador" in assessing whether the Salvadoran government was willing and able to protect the petitioner.

Seventh Circuit:

Palma-Martinez v. Lynch, No. 14-1866, 2015 WL 2167719 (7th Cir. May 11, 2015): The Seventh Circuit denied a petition for review of the Board's decision affirming an Immigration Judge's order of removal. The petitioner became a lawful permanent resident in 2007. In 2011, he pleaded guilty to conspiracy to knowingly transfering a false identification document in violation of

18 U.S.C. § 1028(f). As a result, he was placed in removal proceedings and charged with removability under section 237(a)(2)(A)(i) of the Act for having committed a crime involving moral turpitude within 5 years after admission. The petitioner conceded the charge of removability but requested a continuance because he had filed a motion to set aside and vacate his conviction. He also argued that he was eligible to apply for a stand-alone 212(h) waiver nunc pro tunc. The Immigration Judge denied the motion based on the absence of a showing of good cause, found the petitioner ineligible for the stand-alone waiver, and entered an order of removal. The Board affirmed. The court observed that the Board had clarified in *Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013), that nunc pro tunc stand-alone 212(h) waivers are not available. The court noted that its own earlier decision in *Margulis v. Holder*, 725 F.3d 785 (7th Cir. 2013) (questioning the validity of *Rivas*), was based on distinguishable facts because the petitioner in that case had physically departed the U.S. The court additionally noted that since its decision in *Margulis*, the Eleventh Circuit affirmed *Matter of Rivas*, which was also followed by the Sixth Circuit. The court concluded that the petitioner could only seek a 212(h) waiver in conjunction with an adjustment application or while seeking admission from outside the U.S. The court found that the issue of the denial of a continuance was moot since the motion for post-conviction relief had been dismissed by the district court. The court alternatively ruled that the Immigration Judge had not committed an abuse of discretion in denying a continuance because "a pending collateral attack is not good cause [for a continuance] because its tentative nature does not affect the finality of the conviction for immigration purposes."

Eighth Circuit:

Martinez v. Lynch, Nos. 14-1213, 14-1926, 2015 WL 2217720 (8th Cir. May 12, 2015): The Eighth Circuit denied a petition for review of the Board's affirmance of an Immigration Judge's denial of a motion to reopen and the Board's subsequent denial of a motion for reconsideration. The petitioner was granted 120 days for voluntary departure (until February 19, 2013). On February 20, 2013, the petitioner filed a motion to reopen with the Immigration Judge, who denied the motion upon finding no change in country conditions that would cure the untimeliness of the motion. The Board affirmed. The petitioner next filed a motion to reconsider with the Board, attaching an affidavit from his aunt stating that gangs in Guatemala "now" target members of a church youth group to which the petitioner belonged when he resided in Guatemala. The Board denied the motion because it did not specify any errors of fact or law in the prior Board decision. The Eighth Circuit agreed with the Board's determination that the petitioner had not demonstrated changed country conditions in Guatemala. Although the petitioner offered proof of the death of his friend in Guatemala, the court found that similar violence was occurring at the time of the petitioner's hearing. Further, the Eighth Circuit stated that the petitioner did not establish that his friend's death indicated a change in country conditions. Regarding the merits of the motion to reconsider, the court court concluded that the petitioner did not specify any errors of fact or law in the Board's decision affirming the Immigration Judge's denial of the motion to reopen.

United States v. Mathis, No. 14-2396, 2015 WL 2193010 (8th Cir. May 12, 2015): The Eighth Circuit, in a criminal sentencing case, held that the district court did not err in finding that the appellant's convictions were for "violent felonies." The appellant pleaded guilty to one count of being a felon in possession of a firearm. The issue was whether his prior burglary convictions qualified him for the imposition of a 15-year mandatory minimum sentence. The district court found that the Iowa burglary statutes at issue (sections 713.1 and 713.5 of the Iowa Code) were divisible under *Descamps v. United States*, 133 S. Ct. 2276 (2013). Applying the modified categorical approach, the district court concluded that the convictions were for violent felonies because the particular elements of the Iowa statutes "were substantially similar to generic burglary and posed the same risk of harm to others." On appeal, the Eighth Circuit disagreed with the petitioner's claim that the statutes were not divisible because the statutes presented different means (specifically, different types of structures that could be burgled) under which the same crime could be committed, as opposed to different sets of elements that would result in conviction for the same crime. In other words, the petitioner argued that the jury could have found the same elements satisfied, but might have disagreed on whether the structure burgled was a building, a boat, or a car. The circuit court found this argument unpersuasive, stating that the "means/elements distinction" was "explicitly rejected in *Descamps.*" Noting that the statutes listed various structures that could be burgled, the court concluded that "whether these amount to alternative elements or merely alternative means to fulfilling an element, the statute is divisible, and we must apply the modified categorical approach."

Ninth Circuit:

Garcia v. Lynch, No. 11-73406, 2015 WL 2385402 (9th Cir. May 20, 2015): The Ninth Circuit granted a petition for review of the Board's denial of a motion to reconsider its prior dismissal of an appeal. An Immigration Judge had concluded that the petitioner (who was not represented by counsel) had been convicted of an aggravated felony. The Immigration Judge advised the respondent that he was ineligible to adjust his status and ordered his removal. Based on this advice, the petitioner waived his right to appeal to the Board. The petitioner nevertheless filed a pro se notice of appeal, which was dismissed because the petitioner had waived his right to file it. The petitioner thereafter retained counsel and filed a motion to reconsider, claiming that his waiver of appeal was not a knowing one. The Board denied the motion. The Ninth Circuit held that the petitioner's conviction was not for an aggravated felony and therefore concluded that the Immigration Judge was incorrect when he advised the petitioner that he was ineligible for relief from removal. The court held that the petitioner's waiver of appeal was thus not "considered and intelligent" and that the Board should have granted his motion for reconsideration.

BIA PRECEDENT DECISIONS

In *Matter of Fitzpatrick*, 26 I&N Dec. 559 (BIA 2015), the Board held that an alien who has voted in an election in violation of a Federal statute, namely 18 U.S.C. § 611(a), is removable under section 237(a)(6)(A) of the Act. The respondent did not dispute that she had voted in a Federal election but argued that she had not intended to violate 18 U.S.C. § 611. The respondent argued that she was thus not removable under section 237(a)(6) of the Act. The Board disagreed, noting that 18 U.S.C. § 611 does not contain a specific intent requirement but is, instead, a general intent statute. Therefore, the Board concluded that the alien's act of voting was in violation of 18 U.S.C. § 611(a). The Board acknowledged that 18 U.S.C. § 611 contains limited exceptions, including an exception where the Federal election at issue is conducted for an additional State or local purpose, provided that voting for that other purpose is conducted in a manner that does not permit the alien to vote for a Federal office. However, the alien did not establish that the election in which she voted was conducted in such a manner. Accordingly, the Board dismissed her appeal.

In *Matter of J-H-J-*, 26 I&N Dec. 563 (BIA 2015), the Board held that an alien who has been convicted of an aggravated felony is not barred from establishing eligibility for a waiver of inadmissibility under section 212(h) of the Act if the alien adjusted his status in the United States, rather than having entered as a lawful permanent resident. In so holding, the Board withdrew from its decisions in *Matter of E.W. Rodriguez*, 25 I&N Dec. 784 (BIA 2012), and *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010). The Board noted that the overwhelming majority of circuit courts to have addressed the issue have disagreed with the Board's prior position, which was that a section 212(h) waiver is not available to an alien who has been convicted of an aggravated felony since the time that he or she adjusted status in the United States. Instead, nine circuit courts have held that the plain language of section 212(h) only precludes aliens from establishing statutory eligibility for the waiver if they entered the United States as a lawful permanent resident and subsequently committed an aggravated felony. The Board concluded that it was appropriate to accede to the clear majority view of the circuit courts, noting that consistency is an important principle of immigration law.

In *Matter of Agour*, 26 I&N Dec. 566 (BIA 2015), the Board held that an alien's adjustment of status in the United States constitutes an "admission" for the purpose of determining whether the alien is eligible to seek a waiver under section 237(a)(1)(H) of the Act. That section provides that a waiver may be available to certain aliens with a qualifying relative who are removable based on the fact that they were inadmissible at the time of admission under section 212(a)(6)(C)(i) of the Act as the result of fraud. The respondent admitted that she had submitted a fraudulent lease in order to establish the bona fides of the marriage that was the basis for her adjustment of status application. She sought relief from removal in the form of a discretionary waiver pursuant to section 237(a)(1)(H) of the Act. The Immigration Judge concluded that the respondent was not eligible for such a waiver because the relevant "admission" described in section 237(a)(1)(H) had occurred when the respondent entered the country with a nonimmigrant visa.

The Board sustained the respondent's appeal and remanded the record for further proceedings, finding that she was statutorily eligible to seek a section 237(a)(1)(H) waiver. In reaching this conclusion, the

Board examined the history of the terms "entry" and "admission" as they have been employed in the Act. The Board noted that it had held in prior precedent decisions, including *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011), and *Matter of Rosas*, 22 I&N Dec. 616 (BIA 1999), that adjustment of status may be the functional equivalent of an "admission" in certain cases. The Board also examined the legislative history of the waiver provision, including its evolution through a series of legislative amendments. The Board further noted that construing the term admission to include adjustment of status is consistent with the humanitarian goals behind the waiver's creation.

The decision contained a dissenting opinion, noting that it was settled law prior to the most recent legislative amendments that the fraud waiver could only be sought to waive fraud that occurred at entry. The dissent acknowledged that the term "admission" has been held in other circumstances to include adjustment of status where doing otherwise would lead to absurd or bizarre results. However, the dissent did not find this to be the case with the current language of section 237(a)(1)(H) of the Act.

In Matter of Z-Z-O-, 26 I&N Dec. 586 (BIA 2015), the Board held that an Immigration Judge's predictive findings as to what may occur in the future are findings of fact, which are reviewed under the clearly erroneous standard. The Board's present decision overrules contrary holdings in *Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008), and *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008). However, the Board held that it will continue to review de novo whether an asylum applicant has shown an objectively reasonable fear of persecution based on the Immigration Judge's findings as to what may occur upon his or her return to the country of removal. The question of whether an applicant has met his burden in this respect is a legal determination that is subject to de novo review.

The respondent had sought asylum based on past events and a fear of future harm resulting from enforcement of China's one-child policy. The Immigration Judge determined that the respondent had not established asylum eligibility through either past persecution or an independent well-founded fear of future persecution. The Board first affirmed the Immigration Judge's conclusion that the respondent had not suffered past persecution in China. Turning to the likelihood of future persecution, the Board noted that six circuit courts of appeals have held that an Immigration Judge's predictive findings must be reviewed under the clearly erroneous standard. The Board acceded to this majority view concerning predictive findings. Applying this standard to the respondent's case, the Board found no clear error in the Immigration Judge's findings as to what may occur to the respondent if he is returned to China. Based on the Immigration Judge's findings, the Board affirmed the Immigration Judge's determination that the respondent had not satisfied his burden of showing that his fear of persecution in China was objectively reasonable

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were also procedures in place to address corruption. 733 F.3d 13 (1st Cir. 2013) (concluding that the applicant had not established CAT eligibility based on the alleged participation of several police officers where a system was in place for addressing police misconduct).

Similarly, the Eleventh Circuit has neither rejected "willful acceptance," nor has it adopted the "willful blindness" standard. However, the Eleventh Circuit has indicated that a government's inability to provide complete protection to its citizens does not amount to acquiescence. In *Reyes-Sanchez v. U.S. Att'y Gen.*, the Eleventh Circuit found no acquiescence where the applicant argued the government could not protect him against a Peruvian terrorist group, and the country report reflected that the government had been actively combatting the group, "albeit not entirely successfully." 369 F.3d. 1239, 1243 (11th Cir. 2004).

Circuits Concluding That a Government's Inability to Provide Protection is Not Necessarily Dispositive

The Third Circuit has continued to employ the willful blindness standard, but has taken the position that a government's inability to protect against torture committed by third-party actors is not a dispositive factor in determining whether the government acquiesces to torture. *See Pieschacon-Villegas v. Att'y Gen. of U.S.*, 671 F.3d 303, 310 (3d Cir. 2011). In *Pieschacon-Villegas*, the applicant was involved in money laundering for a Colombian drug cartel and he later cooperated with the FBI in an investigation of some members of the drug cartel. He feared torture at the hands of the drug cartel for assisting the FBI and claimed that the

Colombian government would acquiesce to the torture. *Id.* at 306–08. The Third Circuit noted that the Board had not discussed country reports that indicated that a number of government officials had been linked to civil rights violations or involvement in paramilitary atrocities, and that the government's claims that all paramilitary organizations had demobilized were undercut by evidence to the contrary. *Id.* at 314. The Third Circuit then held that a government can still acquiesce through willful blindness, even when the government is unable to protect; simply because there is evidence of the government actively opposing the third-party torture, it does not automatically prove that the government is not turning a blind eye to it. *Id.* at 310–12.

In *Khouzam v. Ashcroft*, 361 F.3d 161, 170–71 (2d Cir. 2004), the Second Circuit rejected *Matter of Y-L-* to the extent that the case espoused a "consent or approval" requirement. More recently, the Second Circuit has requested that the Board address whether, as a matter of law, a government acquiesces to a person's torture when "(1) some officials attempt to prevent that torture (2) while other officials are complicit, and (3) the government is admittedly unable to actually prevent the torture from taking place." *De La Rosa v. Holder,* 598 F.3d 103, 110–11 (2d Cir. 2010). In *De La Rosa*, the applicant assisted federal prosecutors in a case against a Dominican drug dealer and feared torture in the Dominican Republic at the hands of the drug dealer, who had government connections. *See id.* at 106. The court reasoned that where some government officials would be complicit in torture, and the government as a whole is admittedly incapable of preventing that torture, the fact that some officials take action to prevent the torture "would seem neither inconsistent with a finding of government acquiescence nor necessarily responsive to the question of whether torture would be inflicted by or at the instigation of or with the consent or acquiescence of a public official or another person acting in an official capacity." *Id.* at 110 (quotation marks and citations omitted).

Circuits Suggesting that a Government's Inability to Confront Third-Party Actors Could Form the Basis for Acquiescence

Without explicitly rejecting *Matter of S-V-,* the Seventh Circuit has concluded that a government's ineffective policy to provide protection against third-party torture amounts to acquiescence. *See Sarhan v. Holder*, 658 F.3d 649, 657–58 (7th Cir. 2011). In *Sarhan*, the applicant argued that the Jordanian government could not and would not do anything to protect her from an honor killing by a third-party. The Seventh Circuit held that the evidence "permits no conclusion other than that the government is *ineffective* when it comes to providing protection to [potential victims of honor killings]." *Id.* at 657 (emphasis added).[2] The court noted that "this showing satisfies both the standards for finding governmental action for purposes of withholding and also those under the CAT." *Id.* at 657–58. Thus, the Seventh Circuit has taken the position that a government's ineffective approach towards intervention may amount to a breach of the duty to prevent torture, thereby constituting acquiescence. *See id.*; 8 C.F.R. § 1208.18(a)(7) (stating that a public official acquiesces when he or she is aware of an activity constituting torture and thereafter breaches his or her legal responsibility to intervene to prevent such activity).

The Ninth Circuit, which first established the "willful blindness" standard in 2003, has stated that "acquiescence suggests passive assent because of inability or unwillingness to oppose." *Zheng v. Ashcroft*, 332 F.3d 1186, 1198 at n.8 (9th Cir 2003). The Ninth Circuit explained in *Garcia-Milian v. Holder* that "[p]ublic officials acquiesce in torture if, prior to the activity constituting torture, the officials: (1) have awareness of the activity (or consciously close their eyes to the fact it is going on); and (2) breach their legal responsibility to intervene to prevent the activity because they are unable or unwilling to oppose it." 755 F.3d 1026, 1034 (internal quotation marks and citations omitted). The *Garcia-Milian* court went on to explain that, "[a] government does not acquiesce in the torture of its citizens merely because it is aware of torture but powerless to stop it." *Id.* at 1034. The court stated that the inability of police to bring the perpetrators of a crime to justice does not by itself establish acquiescence absent evidence that "police are unable or unwilling to oppose the crime." *Id.* The court noted that the same holds true where a government is "generally ineffective in preventing or investigating criminal activities." *Id.* Instead, an applicant must show "evidence of corruption or other inability or unwillingness to oppose criminal organizations." *Id.*

Conclusion

In sum, almost every circuit has adopted the willful blindness standard, with the Fourth Circuit having recently joined the majority. The First and Eleventh Circuits remain silent on the issue of willful blindness but,

along with the Fourth, Fifth, and Eighth Circuits, they generally hold that a government's ineffective protection or inability to oppose third-party torture does not amount to acquiescence in the context of the CAT. While the Second and Third Circuits do not find the government's inability to oppose torture to be the dispositive factor in an acquiescence determination, the Seventh and Ninth Circuits have suggested that a government's inability to prevent third-party torture may be a factor in determining acquiescence.

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1. An applicant for protection under the CAT bears the burden of showing that it is more likely than not that he or she would be tortured if returned to the proposed country of removal. 8 C.F.R. § 1208.16(c)(2). The regulation contained at 8 C.F.R. § 1208.18(a)(1) defines torture as:

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

2. *See also Bhatt v. Att'y Gen. of U.S.*, No. 14-1485, 2015 WL 1477887 (3d Cir. April 2, 2015) (remanding in an unpublished decision for the Board to consider the issue of acquiescence where the Immigration Judge found that a government's apathetic enforcement of official policy amounted to a "de facto policy of discrimination and violence").

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