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ASYLUM, WITHHOLDING OF REMOVAL, AND CAT BOILERPLATE

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A. Asylum

1. Burden of Proof[1]

To be statutorily eligible for asylum, an applicant bears the burden of establishing that he is a refugee, which requires a showing of past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA §§ 101(a)(42)(A), 208(b)(1)(A); 8 C.F.R. §§ 1208.13, 1240.8(d).

In Matter of E-F-H-L-, 26 I&N Dec. 319 (BIA 2014), the BIA held that in the ordinary course of removal proceedings, an applicant for asylum or for withholding or deferral of removal is entitled to a hearing on the merits of those applications, including an opportunity to provide oral testimony and other evidence, without first having to establish *prima facie* eligibility for the requested relief. This holding by the BIA has been vacated by the Attorney General. See Matter of E-F-H-L-, 27 I&N Dec. 226 (A.G. 2018).

a. Pre-REAL ID Burden of Proof

An alien requesting asylum bears the evidentiary burden of proof and persuasion in connection with any application under INA § 208. INA § 208(b)(1)(B); 8 C.F.R. § 1208.13(a). An applicant's own testimony is sufficient to meet his burden of proof for his asylum claim without corroboration if the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his fear. Matter of Dass, 20 I&N Dec. 120, 124 (BIA 1989); see also 8 C.F.R. § 1208.13(a). The BIA has recognized the difficulties an asylum applicant may face obtaining documentary or other corroborative evidence to support his claim of persecution. Dass, 20 I&N Dec. at 124. As such, "unreasonable demands are not placed on an asylum applicant to present evidence to corroborate particular experiences (e.g., corroboration from the persecutor)." Matter of S-M-J-, 21 I&N Dec. 722, 725 (BIA 1997). However, the weaker an applicant's testimony, the greater the need for corroborative evidence. Matter of Y-B-, 21 I&N Dec. 1136, 1139 (BIA 1998) (citing Matter of E-P-, 21 I&N Dec. 860 (BIA 1997) (determining that a finding of credible testimony by an asylum applicant is not dispositive as to whether asylum should be granted; rather, the specific content of the testimony and any other relevant evidence should be considered)).

Where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence must be provided as long as the applicant has or can reasonably obtain it. Chuilu Liu v. Holder, 575 F.3d 193, 196-97 (2d Cir. 2009) (citing Matter of S-M-J-, 21 I&N Dec. 722, 725 (1997)); see Diallo v. INS, 232 F.3d 279, 285 (2d Cir. 2000) ("While consistent, detailed, and credible testimony may be sufficient to carry the alien's burden, evidence corroborating his story, or an explanation for its absence, may be required where it would reasonably be expected."). If such evidence is unavailable, the applicant must explain its unavailability and the Immigration Judge must ensure that the applicant's explanation is included in the record. Matter of S-M-J-, 21 I&N Dec.722, 724 (BIA 1997); see also Diallo, 232 F.3d at

[1] When an application for relief is timely filed but supporting documents are not submitted within the time established, the Immigration Judge may deem the opportunity to file the documents to be waived but may not deem the application itself abandoned. Matter of Interiano-Rosa, 25 I&N Dec. 264, 264 (BIA 2010).

288-90 (an Immigration Judge should assess the applicant's reasons, if any, for not furnishing the corroboration at issue). The absence of such corroboration may lead to a finding that an applicant failed to meet his burden of proof. S-M-J-, 21 I&N Dec. at 725-26; see Kyaw Zwar Tun v. Ashcroft, 445 F.3d 554, 563 (2d Cir. 2006). Where an Immigration Judge finds that corroborative evidence is required to support an asylum application, he must identify specific pieces of missing, relevant documentation and show that this documentation was reasonably available to the applicant. Mei Chai Ye v. U.S. Dep't of Justice, 489 F.3d 517, 527 n.9 (2d Cir. 2007); see also Diallo, 232 F.3d at 290. The Second Circuit has noted, however, that nothing requires this be done *prior* to the Immigration Judge's disposition of the applicant's claim. Chuilu Liu, 575 F.3d at 198 (observing that a fact-finder may not be able to decide whether the evidence was sufficient until all the evidence has been presented and that the applicant bears the ultimate burden of introducing any necessary corroborating evidence without prompting from the Immigration Judge).

b. Post-REAL ID Burden of Proof

With respect to the established standards regarding corroborating evidence, the REAL ID Act "altered this landscape somewhat." Chuilu Liu v. Holder, 575 F.3d 193, 197 (2d Cir. 2009). For applications filed on or after May 11, 2005, the enactment date of the REAL ID Act, an applicant's own testimony may be sufficient to meet his burden of proof for his asylum claim without corroboration if the testimony is credible, persuasive, and "refers to specific facts sufficient to demonstrate that the applicant is a refugee." INA § 208(b)(1)(B)(ii); see also 8 C.F.R. § 1208.13(a); Urgen v. Holder, 768 F.3d 269, 272-273 (2d Cir. 2014) (finding that an Immigration Judge could not require an applicant to establish nationality through documentary evidence alone, and reaffirming that an applicant can meet his burden of proof based solely on credible testimony).

In determining whether the applicant met his burden of proof, the Immigration Judge "may weigh the credible testimony along with other evidence of record." INA § 208(b)(1)(B)(ii). However, where the Immigration Judge determines that the applicant should "provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." INA § 208(b)(1)(B)(ii); see Yan Juan Chen v. Holder, 658 F.3d 246 (2d Cir. 2011) (finding that an undocumented alien's fear of being arrested if he appeared at his wife's asylum hearing did not render him "unavailable" to testify because his testimony would have been to his benefit for purposes of derivative asylum); see also Matter of J-Y-C-, 24 I&N Dec. 260, 263 (BIA 2007). The REAL ID Act "thus codifies the rule that an IJ, weighing the evidence to determine if the alien has met his burden, may rely on the absence of corroborating evidence adduced by an otherwise credible applicant unless such evidence cannot be reasonably obtained." Chuilu Liu v. Holder, 575 F.3d 193, 197-98 (2d Cir. 2009). Substantial deference is given to an Immigration Judge's determination that corroborating evidence was reasonably available to the applicant. Chuilu Liu, 575 F.3d at 197-98. Although an Immigration Judge should provide an applicant who has not submitted reasonably available corroborating evidence both an opportunity to explain the absence of such evidence and a continuance if she shows good cause, the Immigration Judge is neither required to grant a continuance automatically nor to identify the specific evidence the applicant must submit to meet her burden of proof. Matter of L-A-C-, 26 I&N Dec. 516, 523 (BIA 2015); see Sun v. Sessions, 883 F.3d 23, 31 (2d Cir. 2018) (determining that it is not necessary for respondents to receive a second opportunity to present their case after the Immigration Judge has identified the specific evidence required for respondents to meet their burden or proof).

c. State Department Reports

In order to evaluate an applicant's claim in the context of the current political situation in his or her country of removal, the Immigration Judge must consider the relevant State Department report. Yan Chen v. Gonzales, 417 F.3d 268, 272 (2d Cir. 2005). The Second Circuit and the BIA have held that the U.S. State Department Country Reports are "highly probative evidence" on country conditions, and "should be accorded special weight," because they are based on "the collective expertise and experience of the Department of State." Matter of H-L-H- & Z-Y-Z, 25 I&N Dec. 209, 213 (BIA 2010), abrogated on other grounds sub nom. Hui Lin Huang v. Holder, 677 F.3d 130, 137-38 (2d Cir. 2012); Tu Lin v. Gonzales, 446 F.3d 395, 400 (2d Cir. 2006), Xiao Ji Chen v. U.S. Dep't of Justice, 471 F.3d 315, 341-42 (2d Cir. 2006) (holding that State Department country reports are "usually the best available source of information on country conditions"). If the most recent State Department report was not submitted by either party, the Immigration Judge may take administrative notice of its contents. See Yang v. McElroy, 277 F.3d 158, 163 (2d Cir. 2002); see also Shao v. Mukasey, 546 F.3d 138, 166 (2d Cir. 2008).

Although "the immigration court should be careful not to place *excessive* reliance on published reports of the Department of State,", the weight to afford such evidence "'lie[s] largely' within the discretion of the IJ." Tian-Yong Chen v. INS, 359 F.3d 121, 130 (2d Cir. 2004) (emphasis added); see also Xiao Ji Chen, 471 F.3d at 342 (alterations in original) (citations omitted). Although the Court is entitled to "accord greater weight" to State Department reports in the record than to countervailing documentary evidence, an Immigration Judge must consider all contrary and countervailing evidence and the particular circumstances of an applicant's case. See Jian Hui Shao v. Mukasey, 546 F.3d 138, 152 (2d Cir. 2008); see also Tambadou v. Gonzales, 446 F.3d 298 (2d Cir. 2006). Additionally, the Immigration Judge should not expect too much accuracy or information from the Country Reports, and the omission of an event from a report is not a reason to doubt its occurrence. See Diallo v. U.S. Dep't of Justice, 548 F.3d 232, 237 (2d Cir. 2008).

2. Credibility

At the threshold in all applications for asylum, the Immigration Judge should make a determination of the applicant's credibility. Matter of O-D-, 21 I&N Dec. 1079, 1081 (BIA 1998).[2] An Immigration Judge's findings as to credibility are factual determinations reviewable only for clear error. 8 C.F.R. § 1003.1(d)(3)(i); Wu Lin v. Lynch, 813 F.3d 122, 131 (2d Cir. 2016).[3]

[2] Regarding whether a respondent has established a genuine subjective fear of persecution, "where a mental health concern may be affecting the reliability of the applicant's testimony, the [IJ] should, as a safeguard, generally accept that the applicant believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim . . . . This safeguard will enhance the fairness of the proceedings by foreclosing the possibility that a claim is denied solely on testimony that is unreliable on account of the applicant's competency issues, rather than any deliberate fabrication." Matter of J-R-R-A-, 26 I&N Dec. 609, 612 (BIA 2015).

[3] The Second Circuit held in Wu Lin v. Lynch that the BIA's "clearly erroneous" standard of review requires that: (i) the BIA provide "sufficient justification" for its conclusion that an Immigration Judge's factual finding is not plausible in light of the record viewed in its entirety, and (ii) the BIA not violate the prohibition against making its own findings of fact. 813 F.3d 122, 129 (2d Cir. 2016).

a. Pre-REAL ID Credibility

If the testimony provided is otherwise "generally consistent, rational, and believable," the presence of some inconsistent testimony need not necessarily be fatal to an applicant's claims if the disparities are "relatively minor and isolated and do not concern material facts." Xiao Ji Chen v. U.S. Dep't of Justice, 471 F.3d 315, 335 (2d Cir. 2006) (citing Diallo v. INS, 232 F.3d 279, 288 (2d Cir.2000) (citation omitted)). In some cases, an applicant may be found to be credible even if he has trouble remembering specific facts. See, e.g., Matter of B-, 21 I&N Dec. 66, 70-71 (BIA 1995) (finding that an applicant who fled persecution may have trouble remembering exact dates when testifying, and such failure to provide precise dates may not be an indication of deception). "[A] finding of testimonial vagueness cannot, without more, support an adverse credibility determination unless government counsel or the IJ first attempts to solicit more detail from the alien." Shunfu Li v. Mukasey, 529 F.3d 141, 147 (2d Cir. 2008).[4]

(a) Adverse Credibility Finding

Although minor and isolated discrepancies in an applicant's testimony are not necessarily fatal to credibility, omission of key events coupled with numerous inconsistencies may lead to a finding that the applicant is not credible. Matter of A-S-, 21 I&N Dec. 1106, 1109-10 (BIA 1998). "[I]nconsistent statements, contradictory evidence, [] inherently improbable testimony" and omissions can support an adverse credibility finding. Matter of S-M-J-, 21 I&N Dec. 722, 729 (BIA 1997); see also A-S-, 21 I&N Dec. 1106, 1109-10 (BIA 1998); Tu Lin v. Gonzales, 446 F.3d 395, 401 (2d Cir. 2006).

An adverse credibility finding must be supported by "specific, cogent" reasons that have a legitimate nexus to the finding in the case. See Secaida-Rosales v. INS, 331 F.3d 297, 307 (2d Cir. 2003) (quoting Aguilera-Cota v. INS, 914 F.2d 1375, 1381 (9th Cir. 1990)); see also Li Zu Guan v. INS, 453 F.3d 129, 136 (2d Cir. 2006). When an asylum denial rests primarily on an adverse credibility determination, the Immigration Judge must give specific reasons for rejecting the applicant's testimony that, as a matter of logic, are valid grounds for rejecting the testimony. See Jin Chen v. U.S. Dep't of Justice, 426 F.3d 104, 113 (2d Cir. 2005). An Immigration Judge may not engage in speculation or rely solely on minor inconsistencies to find an applicant incredible. Cao He Lin v. U.S. Dep't of Justice, 428 F.3d 391, 394 (2d Cir. 2005); see also Chung Sai Zheng v. Gonzales, 440 F.3d 76, 80-81 (2d Cir. 2006); Singh v. Mukasey, 553 F.3d 207, 213 (2d Cir. 2009). The credibility determination must be based upon the record as a whole. See Latifi v. Gonzales, 430 F.3d 103, 105 (2d Cir. 2005).

Inconsistencies central to an applicant's claim of persecution are more significant than those peripheral to his claim. See Zhong v. U.S. Dep't of Justice, 480 F.3d 104, 128-29 (2d Cir. 2007). "Testimonial inconsistencies are not sufficient as the sole basis for an adverse credibility finding where the inconsistencies do not concern the *basis for the claim of asylum or withholding*, but rather matters collateral or ancillary to the claim." Zhong, 480 F.3d at 127 (emphasis in

[4] When basing an adverse credibility finding on a lack of sufficient detail in the applicant's testimony, an Immigration Judge must indicate which details absent in the applicant's testimony would have established the claim. Gui Yin Liu v. INS, 475 F.3d 135, 138-39 (2d Cir. 2007). The factual premise on which the adverse credibility finding is based must be supported by the record. See Singh v. Mukasey, 553 F.3d 207, 213 (2d Cir. 2009).

original, internal quotation marks omitted) (quoting Secaida-Rosales v. INS, 331 F.3d 297, 308 (2d Cir. 2003)). A single, significant inconsistency that goes to the heart of the asylum claim can be sufficient to support an adverse credibility finding. See Zhou Yi Ni v. U.S. Dep't of Justice, 424 F.3d 172, 174 (2d Cir. 2005); see also Yuanliang Liu v. U.S. Dep't of Justice, 455 F.3d 106, 110-11 (2d Cir. 2006).

If the applicant gives "dramatically different" accounts of the alleged persecution, the Immigration Judge is not required to first solicit an explanation from the applicant before making an adverse credibility finding based on the inconsistencies. Majidi v. Gonzales, 430 F.3d 77, 80-81 (2d Cir. 2005). However, if the inconsistency is not plainly obvious, the Immigration Judge must first give the applicant an opportunity to explain before relying on it to support an adverse credibility finding. Ming Shi Xue v. BIA, 439 F.3d 111, 119-21 (2d Cir. 2006); see also Zhi Wei Pang v. BCIS, 448 F.3d 102, 111 (2d Cir. 2006). An Immigration Judge is not *required* to accept a witness's explanation for the inconsistency unless the witness offers more than a "plausible explanation" and "demonstrate[s] that a reasonable fact-finder would be compelled to credit his testimony." Majidi, 430 F.3d at 80. However, the Immigration Judge must consider those explanations when making the credibility determination. Cao He Lin v. U.S. Dep't of Justice, 428 F.3d 391, 403 (2d Cir. 2005).

An Immigration Judge may find an applicant's testimony incredible on the basis of implausibility, so long as she explains in detail which of the applicant's "actions (and explanations for his actions) caused the IJ to find the testimony as a whole improbable." Wensheng Yan v. Mukasey, 509 F.3d 63, 67 (2d Cir. 2007). The Immigration Judge need not explain in detail why each action was implausible. Wensheng Yan, 509 F.3d at 67.

The Second Circuit cautions against basing an adverse credibility finding solely on the fact that details regarding incidents of persecution were omitted from the asylum application. Pavlova v. INS, 441 F.3d 82, 90 (2d Cir. 2006) (finding that an applicant should not have been faulted for describing her persecution in general terms on her asylum application because she explained that she filed her application close to the deadline and was told that there was not sufficient time to have a lengthy statement translated); see also Li Hua Lin v. U.S. Dep't of Justice, 453 F.3d 99, 109-10 (2d Cir. 2006) (stating that an Immigration Judge may consider the fact that an applicant testified about an IUD insertion but failed to mention it in her asylum application, but that the discrepancy should not be given "dispositive weight" in making an adverse credibility determination); but see Belortaja v. Gonzales, 484 F.3d 619, 626 (2d Cir. 2007) (finding an adverse credibility determination proper where significant events central to the petitioner's claim were omitted from his asylum application).

Both the BIA and the Second Circuit have recognized that an adverse credibility determination may properly be based upon the applicant's submission of a fraudulent birth certificate (or other fraudulent document), see, e.g., Siewe v. Gonzales, 480 F.3d 160, 170 (2d Cir. 2007) (finding it appropriate where an alien has provided a false document or false testimony to apply the maxim "false in one thing, false in everything" to discredit other unauthenticated or uncorroborated evidence), upon the applicant's presentation of contradictory stories in the original asylum application and supplemental affidavit, or upon the applicant's inconsistent testimony

regarding a document presented in support of the asylum claim.[5] In order to base a credibility finding on submission of fraudulent documents, the Immigration Judge must also find that an applicant knew or had reason to know that the documents were fraudulent. Corovic v. Mukasey, 519 F.3d 90, 97-98 (2d Cir. 2008).[6]

An adverse credibility finding may not be based solely on the fact that the applicant used a fraudulent document to escape imminent danger or persecution, especially if the applicant did not submit that fraudulent document to the immigration court. Rui Ying Lin v. Gonzales, 445 F.3d 127, 133 (2d Cir. 2006); Edimo-Doualla v. Gonzales, 464 F.3d 276, 288 (2d Cir. 2006).

It may be reasonable, in certain circumstances, to draw an inference of incredibility where an applicant submits an affidavit with "striking similarities" to an affidavit submitted in the same or a separate proceeding. Mei Chai Ye v. U.S. Dep't of Justice, 489 F.3d 517, 519-20 (2d Cir. 2007) (addressing the differences between intra-proceeding and inter-proceeding similarities); see also Ming Shi Xue v. BIA, 439 F.3d 111, 125 (2d Cir. 2006).

b. Post-REAL ID Credibility

The REAL ID Act of 2005 amended various sections of the INA relating to the adjudication of asylum applications.[7] Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005) ("REAL ID"). For asylum applications filed on or after May 11, 2005,[8] after considering "the totality of the circumstances, and all relevant factors," an Immigration Judge may base a credibility determination on: the demeanor, candor, or responsiveness of the applicant or witness; the inherent

[5] See Borovikova v. U.S. Dep't of Justice, 435 F.3d 151, 156-57 (2d Cir. 2006); Zaman v. Mukasey, 514 F.3d 233, 238-39 (2d Cir. 2008) (finding an Immigration Judge's adverse credibility determination proper where a document produced to corroborate membership in a persecuted group was determined to be false and was not created for the purpose of escaping persecution); but see Niang v. Mukasey, 511 F.3d 138, 141 (2d Cir. 2007) (holding that an adverse credibility determination may not be based "solely on a speculative finding that an applicant has submitted inauthentic documents in support of his application").

[6] The Second Circuit has observed that in order for consular reports to serve as the basis of an adverse credibility finding, they must be reliable. Zhen Nan Lin v. U.S. Dep't of Justice, 459 F.3d 255, 269-70 (2d Cir. 2006). The Second Circuit, while not providing an exhaustive list of factors to consider when assessing reliability, observed that the following factors "provide an analytic framework for assessing the reliability" of a consular report: "(i) the identity and qualifications of the investigator(s); (ii) the objective and extent of the investigation; and (iii) the methods used to verify the information discovered." Zhen Nan Lin, 459 F.3d at 271; see also Balachova v. Mukasey, 547 F.3d 374, 383 (2d Cir. 2008).

[7] The REAL ID Act was enacted on May 11, 2005. The changes it made to immigration law apply to all applications initially filed on or after that date with either an asylum officer or an Immigration Judge. Matter of S-B-, 24 I&N Dec. 42, 45 (BIA 2006). If an applicant filed his asylum application with an asylum officer prior to May 11, 2005, but then renewed his application before an Immigration Judge, the REAL ID Act and its provisions are not applicable to credibility determinations. S-B-, 24 I&N Dec. at 43.

[8] Where an applicant has filed an asylum application before May 11, 2005, the effective date of the REAL ID Act of 2005, Division B of Pub. L. No. 109-13, 119 Stat. 302, and, on or after that date, submitted a subsequent application that is properly viewed as a new application, the later filing date controls for purposes of determining the applicability of section 208(b)(1)(B)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)(iii) (2012), to credibility determinations. Matter of M-A-F-, 26 I&N Dec. 651 (BIA 2015).

plausibility of the account; the consistency between oral and written statements;[9] the internal consistency of such statements; the consistency of such statements with other evidence of record; and any inaccuracy or falsehood in such statements, "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim," or any other factor. INA § 208(b)(1)(B)(iii); see also Matter of J-Y-C-, 24 I&N Dec. 260, 265-66 (BIA 2007); Diallo v. U.S. Dep't of Justice, 548 F.3d 232, 234 n.1 (2d Cir. 2008).

In Xiu Xia Lin v. Mukasey, 534 F.3d 162, 165 (2d Cir. 2008), the Second Circuit determined that the REAL ID Act abrogated the Court's holding in Secaida-Rosales v. INS, 331 F.3d 297 (2d Cir. 2003), that an adverse credibility determination cannot be based on inconsistencies and omissions that are ancillary or collateral to an applicant's claims of persecution. Specifically, the Second Circuit explained that, under the REAL ID Act, "in evaluating an asylum applicant's credibility, an IJ may rely on omissions and inconsistencies that do not directly relate to the applicant's claim of persecution as long as the totality of the circumstances establish that the applicant is not credible." Xiu Xia Lin, 534 F.3d at 164. In Xiu Xia Lin, the Immigration Judge's adverse credibility finding was upheld because, even though the inconsistencies and omissions were not material to the applicant's claim, their cumulative effect "reasonably could have affected the IJ's evaluation of Lin's credibility." Xiu Xia Lin, 534 F.3d at 167. The Second Circuit observed that the REAL ID Act also abrogated its prior holding that an Immigration Judge's opinion as to the plausibility of an applicant's account could not serve as a basis for an adverse credibility finding. Xiu Xia Lin, 534 F.3d at 168.

The Second Circuit has cautioned that although Immigration Judges may rely on omissions in adverse credibility decisions, "in general 'omissions are less probative of credibility than inconsistencies created by direct contradictions in evidence and testimony." Gao v. Sessions, 891 F.3d 67, 78 (2d Cir. 2018) (citing Lai v. Holder, 773 F.3d 966, 971 (9th Cir. 2014)). Furthermore, "[i]n deciding on the appropriate weight to afford an omission, IJs must distinguish between (1) omissions that arise merely because an applicant's oral testimony is more detailed that his or her written application, and (2) omissions that tend to show that an applicant has fabricated his or her claim." Gao, 891 F.3d 82. Applicants for asylum are not required to list every incident of persecution or all medical treatment following an incident of persecution on their initial asylum application. Gao, 891 F.3d at 80; Li v. Lynch, 839 F.3d 144, 151 (2d Cir. 2016).

It is well-established in the Second Circuit that "striking similarities" between affidavits in the *same* proceedings are an indication that the statements are "canned." See Mei Chai Ye v. U.S. Dep't of Justice, 489 F.3d 517, 524 (2d Cir. 2007) (distinguishing, in a pre-REAL ID case, inter-proceeding and intra-proceeding similarities). The Second Circuit has also found that it is reasonable, in certain circumstances, to draw an inference of incredibility where an applicant submits an affidavit with notable similarities to an affidavit submitted in a *separate* proceeding. Mei Chai Ye, 489 F.3d at 519-20, 524-26 (describing that the Immigration Judge "meticulously followed certain procedural safeguards that adequately addressed the dangers inherent in relying on inter-proceeding similarities" and "carefully parsed through the remarkable similarities"); see also Ming Shi Xue v. BIA, 439 F.3d 111, 125 (2d Cir. 2006) (providing notice requirements).

[9] The consistency between written and oral statements can be considered regardless of when the statements were made and whether or not they were made under oath, although an Immigration Judge should consider the circumstances under which the statements were made. INA § 208(b)(1)(B)(iii).

However, the Second Circuit did "not purport to promulgate and impose a specific set of procedural safeguards which IJs must follow in all respects and in all cases." Mei Chai Ye, 489 F.3d at 526.[10] The Board, taking the Mei Chai Ye approach into consideration, subsequently adopted a three-part framework that permits Immigration Judges to draw an inference of incredibility when there are significant similarities between statements submitted by applicants in different proceedings. Matter of R-K-K-, 26 I&N Dec. 658, 660-61 (BIA 2015). The framework provides that an Immigration Judge should take the following steps on the record: 1) give the applicant meaningful notice of the similarities,[11] 2) provide the applicant with a reasonable opportunity to explain the similarities prior to making a credibility determination, and 3) base the credibility determination on the totality of the circumstances. R-K-K-, 26 I&N Dec. at 661.

c. Airport, Border, and Credible Fear Interviews

In pre-REAL ID Act cases, the Second Circuit held that in asylum proceedings, an IJ may rely on an alien's testimony in an airport or border interview as long as the record of that testimony is sufficiently reliable. *See Zhang v. Holder*, 585 F.3d 715, 721 (2d Cir. 2009); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 179–80 (2d Cir. 2004). The Second Circuit enumerated the following factors to be considered in determining whether such an interview is reliable: (1) whether the record of the interview is verbatim or merely summarizes or paraphrases the alien's statements; (2) whether the questions asked are designed to elicit the details of a claim and the interviewer asks follow-up questions that would aid the alien in developing his or her account; (3) whether the alien appears to have been reluctant to reveal information to the interviewer because of prior interrogation sessions or other coercive experiences in his or her home country; and (4) whether the alien's answers to the questions posed suggest that he or she did not understand English or the interpreter's translations. *Ramsameachire*, 357 F.3d at 179–80.

In the post-REAL ID Act case *Matter of J-C-H-F*, 27 I&N Dec. 211, 215 (BIA 2018), the Board stated held "although the factors listed in *Ramsameachire* are proper considerations for assessing the reliability of an interview, the IJ should assess the accuracy and reliability of the interview based on the totality of circumstances, rather than relying on any one factor among a list or mandated set of inquiries." *Id.* Under the REAL ID Act, there is a presumption that airport and border interviews are proper to consider in an adverse credibility determination. *Id.* There is generally a presumption of reliability of Government documents. *Id.* However, the "the Immigration Judge should address any arguments raised regarding the accuracy and reliability of the interview and explain why the arguments are or are not persuasive." *Id.*

The Second Circuit has also held that credible fear interviews can appropriately be considered in assessing an alien's credibility when "the record of a credible fear interview displays the hallmarks of reliability," considering the factors discussed in *Ramsameachire*. *Zhang v. Holder*, 585 F.3d 715, 725 (2d Cir. 2009). However, "credible fear interviews are more similar to

[10] The Second Circuit declined to address "what kinds of procedural safeguards are appropriate when an IJ wishes to rely on *intra*-proceeding similarities." Mei Chai Ye, 489 F.3d at 526 n.8 (emphasis added).

[11] The BIA expressly declined to address what procedural protections would sufficiently provide an adequate opportunity to explain similarities between asylum applications in the absence of a confidentiality waiver from the other applicant(s). R-K-K-, 26 I&N Dec. at 663, n.4.

airport interviews than asylum interviews and therefore warrant the close examination called for by *Ramsameachire*." *Id.*

3. One-Year Filing Deadline

As a threshold matter, an applicant must prove by clear and convincing evidence[12] that his asylum application was filed within one year of the date of his last arrival into the United States or April 1, 1997, whichever is later.[13] INA § 208(a)(2)(B); 8 C.F.R. § 1208.4(a)(2). The Board defines "last arrival" as the alien's most recent arrival in the U.S. from a trip abroad. Matter of F-P-R-, 24 I&N Dec. 681, 683-84 (BIA 2008). "Last arrival into the United States" does not include an alien's return to the U.S. after a brief trip abroad pursuant to a parole explicitly permitted by U.S. immigration authorities. Joaquin-Porras v. Gonzales, 435 F.3d 172, 179 (2d Cir. 2006).

The Immigration Judge must give some consideration to the date of entry reflected on the NTA. See Zheng v. Mukasey, 552 F.3d 277, 286 (2d Cir. 2009) ("We do not hold that a Notice to Appear by itself necessarily amounts to clear and convincing evidence of the date of a petitioner's entry into the United States. Rather, we hold that the failure of an IJ to give *any* consideration to such an undeniably probative piece of evidence amounts to a denial of the traditional standards of fairness that due process demands.").

Where such a subsequent application is deemed to be new, the filing date of the later application controls for purposes of determining whether the one-year statutory time bar applies under section 208(a)(2)(B) of the Act. Matter of M-A-F-, 26 I&N Dec. 651, 655-56 (BIA 2015). A subsequent asylum application is properly viewed as a new application if it presents a previously unraised basis for relief or is predicated on a new or substantially different factual basis.

a. Exceptions to the One-Year Filing Deadline

If the applicant files after the one-year deadline, he must show to the satisfaction of the Immigration Judge that he qualifies for an exception to the filing deadline. INA § 208(a)(2)(D); 8 C.F.R. § 1208.4(a)(2). To qualify for an exception to the filing deadline, the applicant must demonstrate the existence of either (1) changed circumstances that materially affect his eligibility for asylum, or (2) extraordinary circumstances relating to the delay in filing an application within the filing period. INA § 208(a)(2)(D); 8 C.F.R. § 1208.4(a)(4)-(5). In either instance, the applicant must apply within a reasonable period after the changed or extraordinary circumstances. 8 C.F.R. § 1208.4(a)(4)-(5). A "reasonable period" of time is not clearly defined, though generally if the

[12] The Second Circuit has not directly addressed whether a respondent's credible testimony is sufficient to meet the clear and convincing standard, although it has suggested that it may be sufficient. See Diallo v. I.N.S., 232 F.3d 279, 287 (2d Cir. 2000) ("the precedent of the BIA and of this court would sustain a petition for asylum or withholding of deportation based on credible testimony alone or, by extension, credible testimony combined with convincing explanations for lack of corroboration."); see also Li Hua Lin v. U.S. Dep't of Justice, 453 F.3d 99, 104 (2d Cir. 2006) (noting that the respondent would have met the clear and convincing standard based on her testimony and her husband's affidavit alone had the Immigration Judge found the respondent credible).

[13] The one-year filing deadline does not apply to applications filed before April 1, 1997. 8 C.F.R. §§ 1208.4(a)(2)(B)(ii), 1208.13(c). Time limits on filing asylum and the safe third country bar are inapplicable to unaccompanied children, as defined under 6 U.S.C. § 279(g)(2). INA § 208(a)(2)(E).

application is made within six months it will be "reasonable." Matter of T-M-H- & S-W-C-, 25 I&N Dec. 193, 193 (BIA 2010).

"Changed circumstances" include, but are not limited to: (1) changes in conditions in the applicant's country of nationality or, if the applicant is stateless, country of last habitual residence; (2) changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk;[14] or (3) the termination of a relationship that qualified an applicant as a dependent on another's pending asylum application, including attainment of age twenty-one by the dependent. 8 C.F.R. § 1208.4(a)(4)(i)(A)-(C). "Changed circumstances" refer to "changes in *objective* circumstances relating to the applicant" that may increase the respondent's risk profile. Weinong Lin v. Holder, 763 F.3d 244, 249 (2d Cir. 2014) (quoting Matter of C-W-L-, 24 I&N Dec. 346, 354 n.9 (BIA 2007)).

"Extraordinary circumstances" include, but are not limited to: (1) serious illness or mental or physical disability including effects of persecution; (2) legal disability; (3) ineffective assistance of counsel, provided that the applicant complies with the requirements set forth at 8 C.F.R. § 1208.4(5)(iii)(A)-(C); (4) the applicant maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the application; (5) the applicant filed an asylum application before the one-year deadline, but the application was rejected as not properly filed, was returned to applicant for corrections, and was re-filed within a reasonable period thereafter; or (6) the death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family. 8 C.F.R. § 1208.4(a)(5). The burden of proof is on the applicant to establish to the satisfaction of the Immigration Judge that the circumstances were not intentionally created by him through his own action or inaction, that those circumstances were directly related to his failure to file the application within the one-year period, and that the delay was reasonable under the circumstances. 8 C.F.R. § 1208.4(a)(5).

b. Mendez Rojas Class Members

The Court recognizes "the limitations of the persons seeking asylum," and the congressional intent to not "foreclose legitimate [asylum] claims." Mendez Rojas v. Johnson, 305 F.Supp.3d 1176, 1183-1185 (W.D. Wash. Mar. 29, 2018) (finding that the failure to inform class members of the asylum filing deadline and to provide a uniform mechanism through which class members may timely submit their applications violates their statutory and due process rights). As such, and in accordance with the court's order in Mendez Rojas, the Court accepts asylum applications filed by covered class members, [15] in pending adjudications, as timely filed. Mendez Rojas v. Johnson, 305

[14] See Shi Jie Ge v. Holder, 588 F.3d 90, 94-95 (2d Cir. 2009) (finding that the BIA erred in focusing on the date the applicant joined a political party, rather than the date on which he became publicly active or the date on which the government authorities in his home country found out about his activities).

[15] The following nationwide classes were certified: "CLASS A ("Credible Fear Class"): All individuals who have been released or will be released from DHS custody after they have been found to have a credible fear of persecution within the meaning of 8 U.S.C. §1225(b)(1)(B)(v) and did not receive notice from DHS of the one-year deadline to file an asylum application as set forth in 8 U.S.C. §1158(a)(2)(B). CLASS B ("Other Entrants Class"): All individuals who have been or will be detained upon entry; express a fear of return to their country of origin; are released or will be released from DHS custody without a credible fear determination; are issued a Notice to Appear (NTA); and did

F.Supp.3d at 1188 (directing DHS to adopt notice of the filing deadline, and ordering defendants, which included the Executive Office for Immigration Review ("EOIR"), "to accept as timely filed any asylum application from a class member filed within one year of the adoption of the notice").

4. Statutory Eligibility

a. Well-Founded fear

An asylum applicant may demonstrate that he is a "refugee"[16] in either of two ways. First, he may demonstrate that he suffered past persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA §§ 101(a)(42)(A), 208(b)(1)(A); 8 C.F.R. § 1208.13(b)(1). Second, he may demonstrate a well-founded fear of future persecution on account of a protected ground by demonstrating that he subjectively fears persecution and that his fear is objectively reasonable. INA § 101(a)(42)(A); Ramsameachire v. Ashcroft, 357 F.3d 169, 178 (2d Cir. 2004).

i. Definition of Persecution

There is no universally accepted definition of "persecution." See Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees ¶ 51, p.13 (Geneva, January 1992) ("Handbook"). "Persecution" has generally been interpreted to include threats to life or freedom, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom. Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985). "[It] is the infliction of suffering or harm upon those who differ on the basis of a protected statutory ground," and includes "non-life-threatening violence and physical abuse." Ivanishvili v. U.S. Dep't of Justice, 433 F.3d 332, 341 (2d Cir. 2006) (internal quotation marks and citations omitted); see also Manzur v. U.S. Dep't of Homeland Sec., 494 F.3d 281, 293 (2d Cir. 2007) ("There is no requirement that a petitioner claiming past persecution allege either detention or physical harm.").

To constitute persecution, threats typically must be "imminent," "concrete," or "so menacing as to cause significant actual suffering or harm." Ci Pan v. U.S. Att'y Gen., 449 F.3d 408, 412 (2d Cir. 2006); see also Guan Shan Liao v. U.S. Dep't of Justice, 293 F.3d 61, 70 (2d Cir. 2002). A severe fine can constitute economic persecution. Huo Quiang Chen v. Holder, 773 F.3d 396, 400 (2d Cir. 2014). An alien must show more than the imposition of such a fine, however; he must show that his payment or attempt to pay the fine, or the government's attempts to collect it, "actually deprived him of the basic necessities of life or reduced him to an impoverished existence." Chen, 773 F.3d at 400 (citing Matter of T-Z-, 24 I&N Dec. 163, 171, 174 (BIA 2007)). Moreover, to constitute persecution, economic disadvantages or restrictions "must be above and beyond those generally shared by others in the country of origin and involve noticeably more than mere loss of social advantages or physical comforts. Rather, the harm must be 'of deliberate and severe nature.'" Matter of T-Z-, 24 I&N Dec. 163, 173 (BIA 2007) (quoting

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not receive notice from DHS of the one-year deadline to file an asylum application set forth in 8 U.S.C. §1158(a)(2)(B). *Mendez Rojas*, 305 F.Supp.3d at 1178-79.

[16] An alien who is a citizen or national of more than one country but has no fear of persecution in one of those countries does not qualify as a "refugee" under INA § 101(a)(42)(A) and is ineligible for asylum. See Matter of B-R-, 26 I&N Dec. 119, 122 (BIA 2013).

H.R. Rep. No. 95-1452 at 7). An applicant, however, "need not demonstrate a total deprivation of livelihood or a total withdrawal of all economic opportunity in order to demonstrate harm amounting to persecution." T-Z-, 24 I&N Dec. at 173 The largescale confiscation of property or a "sweeping limitation of opportunities . . . in an established profession or business may amount to persecution even though the applicant could otherwise survive." T-Z-, 24 I&N Dec. at 174.

"Generally harsh conditions shared by many other persons" have been found not to amount to persecution. Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985); see also Matter of Sanchez & Escobar, 19 I&N Dec. 276, 284 (BIA 1985) (finding that harm resulting from country-wide civil strife is not persecution on account of one of the five enumerated grounds); Melgar de Torres v. Reno, 191 F.3d 307, 314 n.3 (2d Cir. 1999) ("General violence . . . does not constitute persecution, nor can it form a basis for petitioner's well-founded fear of persecution."). Harassment and discrimination also do not generally rise to the level of persecution as contemplated by the INA.[17] See Matter of A-E-M-, 21 I&N Dec. 1157, 1159 (BIA 1998); Kambolli v. Gonzales, 449 F.3d 454, 457 (2d Cir. 2006) (finding that the respondent, who was not physically harmed, had not suffered persecution because his only direct run-in with authorities consisted of a single threatening meeting with local police); Balachova v. Mukasey, 547 F.3d 374, 386 (2d Cir. 2008) (finding that house searches–even those performed without justification–would not cross the line from harassment to persecution). Fines or other economic sanctions do not generally constitute persecution. Matter of J-W-S-, 24 I&N Dec. 185, 191 (BIA 2007).

In the Second Circuit, "violent conduct generally goes beyond the mere annoyance and distress that characterize harassment." Edimo-Doualla v. Gonzales, 464 F.3d 276, 283 (2d Cir. 2006) (internal citations omitted). In addition, "a 'minor beating' or, for that matter, any physical degradation designed to cause pain, humiliation or other suffering, may rise to the level of persecution if it occurred in the context of an arrest or detention on the basis of a protected ground." Beskovic v. Gonzales, 467 F.3d 223, 226 (2d Cir. 2006). The Second Circuit, however, has "never held that a beating that occurs within the context of an arrest or detention constitutes persecution *per se*." Jian Qiu Liu v. Holder, 632 F.3d 820, 822 (2d Cir. 2011). Rather, such a beating *may* constitute persecution, and "the agency must be 'keenly sensitive' to context in evaluating whether the harm suffered rises to the level of *persecution*." Jian Qiu Liu, 632 F.3d at 822 (emphasis in original) (quoting Beskovic, 467 F.3d at 226).

When evaluating whether persecution has occurred, the Court must consider events cumulatively. See Poradisova v. Gonzales, 420 F.3d 70, 79-80 (2d Cir. 2005) (remanding a case for reconsideration of an asylum denial where the respondents alleged a lifelong course of verbal harassment, threats, vandalism, and one physical attack by anti-Semitic individuals on account of their Jewish ethnicity); see also Edimo-Doualla, 464 F.3d at 283; Matter of O-Z- & I-Z-, 22 I&N Dec. 23, 25-26 (BIA 1998) (finding that four physical attacks, repeated threats, humiliation, and vandalism in the aggregate rose to the level of persecution).[18] The determination of whether

[17] In Pan v. Holder, 777 F.3d 540, 544 (2d Cir. 2015), the Second Circuit addressed the IJ's conclusion that the petitioner was the victim of "hate crimes," which "per se, is a criminal act that is not a sufficient basis to find persecution." The Second Circuit noted that "hatred of a group that manifests itself in violent crimes against members of that group would seem to be at the core of persecution." 777 F.3d 540, 544 (2d Cir. 2015).

[18] In Pan v. Holder, 777 F.3d 540 (2d Cir. 2015), the Second Circuit vacated the BIA's decision affirming the IJ's denial of asylum from the Kyrgyz Republic and remanded for further proceedings based in part on the BIA's and IJ's failure to explain why the petitioner's three beatings over a four-year period, the last of which resulted in a two-week

mistreatment rises to the level of persecution must be made on a case-by-case basis. See Matter of C-Y-Z-, 21 I&N Dec. 915, 924 (BIA 1997) (abrogated on other grounds by Shi Liang Lin v. U.S. Dep't of Justice, 494 F.3d 296, 307 (2d Cir. 2007)).

Moreover, persecution must be inflicted by either the government or by a person or entity the government is "unwilling or unable to control."[19] Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985); see also Pavlova v. INS, 441 F.3d 82, 91 (2d Cir. 2006) ("we have never held that direct governmental action is required to make out a claim of persecution. On the contrary, 'it is well established that private acts may be persecution if the government has proved unwilling to control such actions.'") (internal citations omitted). The Attorney General stated that "[p]ersecution is something a government does," either directly or indirectly by being unwilling or unable to prevent private misconduct. Matter of A-B-, 27 I&N Dec. 316, 337 (A.G. 2018), citing Hor v. Gonzales, 400 F.3d 482, 485 (7th Cir. 2005). In the context of a non-governmental entity perpetrating the harm, an applicant must show that the government condoned the private actions "or at least demonstrated a complete helplessness to protect the victims."[20] Matter of A-B-, 27 I&N Dec. 316, 337 (A.G. 2018), citing Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000). Police inaction with respect to a particular individual's report does not necessarily establish that a government is unwilling or unable to control crime. Matter of A-B-, 27 I&N Dec. 316, 337 (A.G. 2018). Evidence of a prompt and meaningful response by the authorities may be significant in determining whether a government is willing or able to control nongovernmental persecutors. See Matter of E-A-G-, 24 I&N Dec. 591, 598 (BIA 2008); see also Dias Gomes v. Holder, 566 F.3d 232, 233 (1st Cir. 2009) (finding that the Brazilian government's prosecution of the persecutor was evidence that it was willing and able to control persecutor).

ii. Past Persecution

To establish past persecution, an asylum applicant must demonstrate that he suffered persecution in his country of nationality or, if stateless, in his country of last habitual residence, on account of a protected ground, and that he is unable or unwilling to return to, or avail himself of the protection of, that country because of such persecution. INA §§ 101(a)(42)(A), 208(b)(1)(B); 8 C.F.R. § 1208.13(b)(1).[21] "As a general principle, an asylum applicant cannot claim past persecution based solely on harm that was inflicted on a family member on account of that family member's political opinion or other protected characteristic." Jiang v. Gonzales, 500 F.3d 137, 141 (2d Cir. 2007); see also Melgar de Torres v. Reno, 191 F.3d 307, 313 n.2 (2d Cir.

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hospitalization, was insufficiently egregious to constitute persecution, when it was comparable to the harm in Matter of O-Z- & I-Z-, 22 I&N Dec. 23 (BIA 1998) and Ivanishvili v. U.S. Dep't of Justice, 433 F.3d 332 (2d Cir. 2006).

[19] In Pan v. Holder, 777 F.3d 540 (2d Cir. 2015), the Second Circuit found that the BIA and IJ failed to consider the petitioner's aunt's testimony and affidavit, which tended to prove that the Kyrgyz police were unwilling or unable to protect the petitioner, a similarly situated person, from private persecutors. Given the similarities between the petitioner's and petitioner's aunt's claims of persecution on account of their Korean ethnicity and evangelical Christianity, "it was error for the IJ and BIA to ignore record evidence that the Kyrgyz authorities were unwilling to protect [the petitioner's aunt] from persecution." Pan, 777 F.3d at 545.

[20] The applicant must establish that the harm was inflicted by an entity the government is unable or unwilling to control in order to establish persecution. See Matter of Acosta, 19 I&N 211 (BIA 1985).

[21] To establish past persecution the harm must be on account of a protected ground. If the harm is not on account of a protected ground it should be referred to as harm rather than persecution.

1999) ("Although persecution of close family members may support a well-founded fear of future persecution, it does not form the basis for a finding of past persecution" of an asylum applicant). An applicant, however, may be able to claim past persecution based solely on harm that was inflicted on a family member if the applicant can demonstrate that "he not only shares (or is perceived to share) the characteristic that motivated persecutors to harm the family member, but was also within the zone of risk when the family member was harmed, and suffered some continuing hardship after the incident." Jiang v. Gonzales, 500 F.3d 137, 141 (2d Cir. 2007). Neither the Second Circuit nor the BIA has defined "zone of risk" in a published decision in the context of asylum law. In determining whether an asylum applicant was within the zone of risk, however, the Second Circuit has, in unpublished decisions, considered the applicant's physical proximity to the harm perpetrated against his or her family members. See Garzon-Zapata v. Holder, 342 F. App'x 722, 724 (2d Cir. 2009); Tsering v. Mukasey, 263 F. App'x 142, 144 (2d Cir. 2008). Although not binding, these holdings can be instructive.

However, a persecution claim cannot be established if there is no proof that the applicant or other members of the family were targeted because of the family relationship. Matter of N-M-, 25 I&N Dec. 526, 530 (BIA 2011) (stating that an applicant "must provide some evidence that an alleged persecutor is motivated by a victim's protected trait"). To establish eligibility for asylum on the basis of membership in a particular social group composed of family members, an applicant must not only demonstrate that he or she is a member of the family but also that the family relationship is at least one central reason for the claimed harm. Matter of L-E-A-, 27 I&N Dec. 40 (BIA 2017).

If past persecution is established, a regulatory presumption arises that the applicant has a well-founded fear of future persecution on the basis of his original claim.[22] 8 C.F.R. § 1208.13(b)(1). The Department may rebut this presumption if it establishes by a preponderance of the evidence that the applicant's fear is no longer well-founded due to a fundamental change in circumstances or because the applicant could avoid future persecution by relocating to another part of the country and that it would be reasonable to expect him to do so. 8 C.F.R. § 1208.13(b)(1)(i)-(ii).

For an applicant to be able to internally relocate safely, there must be an area of the country where the circumstances are "substantially better" than those giving rise to a well-founded fear of persecution on the basis of the original claim. Matter of M-Z-M-R-, 26 I&N Dec. 28, 33 (BIA 2012). When determining whether it is reasonable to expect an applicant to relocate in the proposed country of removal, the IJ should consider, but is not limited to considering, the following factors: whether the respondent would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographic limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. 8 C.F.R. § 1208.13(b)(3); see also Dong Zhong Zheng v. Mukasey, 552 F.3d 277, 288 n.7 (2d Cir. 2009). Where the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless the Department establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate. 8 C.F.R. § 1208.13(b)(3)(ii).

[22] "Because the regulations set forth varying burdens of proof depending on whether an applicant suffered past persecution, it is of paramount importance that Immigration Judges make a specific finding that an applicant either has or has not suffered past persecution." Matter of D-I-M-, 24 I&N Dec. 448, 451 (BIA 2008).

The mere fact that an applicant may have made voluntary return trips to his home country, standing alone, does not suggest either any fundamental change in circumstances or the possibility of internal relocation, but rather should be considered as one factor among others in determining whether a presumption of future persecution has been rebutted. See Kone v. Holder, 596 F.3d 141, 148 (2d Cir. 2010).

When determining whether there has been a change in circumstances in the applicant's country of origin such that his or her fear is no longer well-founded, the Court must engage in an individualized analysis, including a consideration of the most recent U.S. Department of State report and consideration of evidence submitted by the applicant which contradicts the description of country conditions contained in that report. See Passi v. Mukasey, 535 F.3d 98, 101-03 (2d Cir. 2008) (remanding a case in which the BIA determined that an asylum applicant's fear was no longer well-founded due entirely to "a country report that detail[ed] general improvements" because the BIA ignored other evidence of record, including further details within the country report itself); see also Tambadou v. Gonzales, 446 F.3d 298, 303-04 (2d Cir. 2005) (same). However, "where . . . changed conditions evidently prevail in a country that is the subject of an appreciable proportion of asylum claims . . . an IJ need not enter specific findings premised on record evidence when making a finding of changed country conditions under the INA." Hoxhallari v. Gonzales, 468 F.3d 179, 187 (2d Cir. 2006). Hoxhallari stands for the premise that neither the Second Circuit nor the agency is "ignorant of indisputable historical events." Alibasic v. Mukasey, 547 F.3d 78, 86 (2d Cir. 2008) (citation omitted).

iii. Future Persecution

If an applicant has not demonstrated a well-founded fear of persecution based upon past persecution, he may nonetheless demonstrate statutory eligibility for asylum by establishing that he has a well-founded fear of future persecution.[23] See 8 C.F.R. § 1208.13(b)(2). To establish a well-founded fear of future persecution, the applicant must establish both that he has a subjective fear of persecution and that the fear is objectively reasonable. Ramsameachire v. Ashcroft, 357 F.3d 169, 178 (2d Cir. 2004).[24] Credible testimony by an applicant may satisfy the subjective component, depending on the circumstances. Ramsameachire, 357 F.3d at 178; see also Diallo v. INS, 232 F.3d 279, 286 (2d Cir. 2000). Once a subjective fear of persecution is established, the applicant need only show that such fear is grounded in reality to meet the objective element of the test; that is, he must present "reliable, specific, objective" evidence that his fear is reasonable. Ramsameachire, 357 F.3d at 178 (internal citation omitted). The applicant's fear may be well-founded even if there is "only a slight, though discernible, chance of persecution." Diallo, 232 F.3d at 284 (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987)).

[23] An applicant who fails to present a credible basis for a claim of past persecution may nevertheless demonstrate that he has a well-founded fear of future persecution as long as the factual predicate of the claim of future persecution is independent from the testimony found not to be credible. Paul v. Gonzales, 444 F.3d 148, 154 (2d Cir. 2006).

[24] The determination of what is likely to happen to the applicant if she returns home and how likely it is to occur are factual determinations, reviewable only for clear error. Hui Lin Huang v. Holder, 677 F.3d 130, 136 (2d Cir. 2012). The conclusion that such treatment of the applicant rises to the level of persecution is a question of law subject to *de novo* review. Hui Lin Huang, 677 F.3d at 136.

To demonstrate that his fear of persecution is objectively well-founded, an applicant must provide evidence:

> (1) that he has a belief or characteristic that a persecutor seeks to overcome by means of some mistreatment, that the persecutor has the (2) capability and (3) inclination to impose such mistreatment, and (4) that the persecutor is, or could become, aware of the applicant's possession of the disfavored belief or characteristic.[25]

Kyaw Zwar Tun v. INS, 445 F.3d 554, 565 (2d Cir. 2006); see also Hongsheng Leng v. Mukasey, 528 F.3d 135, 143 (2d Cir. 2008) ("[T]o establish a well-founded fear of persecution in the absence of any evidence of past persecution, an alien must make some showing that authorities in his country of nationality are either aware of his activities or likely to become aware of his activities.")[26]; Shi Jie Ge v. Holder, 588 F.3d 90, 96 (2d Cir. 2009) ("Tun does not require a petitioner to demonstrate that authorities in the country to which he is to be returned are possessed of an awareness of his involvement in a banned organization prior to his return. Rather, a petitioner may also demonstrate a well-founded fear of future persecution by demonstrating that his involvement in a banned organization may become known after his return.").

Evidence concerning treatment of the applicant's family or similarly situated friends may be probative of a threat against the applicant.[27] See Poradisova v. Gonzales, 420 F.3d 70, 80 (2d Cir. 2005); Matter of Villalta, 20 I&N Dec. 142, 147 (BIA 1990) ("The respondent's direct and uncontradicted testimony concerning life-threatening messages left at his family's home, as well as his testimony regarding the subsequent murder of his brother by a "Death Squad," proves that the respondent had good reason to fear persecution prior to his decision to join the guerrillas in 1980."); Matter of A-K-, 24 I&N Dec. 275, 278 (BIA 2007) ("[C]ourts have found that an applicant can establish a well-founded fear of persecution in cases . . . where his family was persecuted on

[25] Publication of one article on the Internet eight years prior and participation in candlelight vigils are insufficient to establish that Chinese authorities were aware or likely to become aware of an asylum applicant's purported pro-democracy activity. Y.C. v. Holder, X.W. v. Holder, 741 F.3d 324, 333-35 (2d Cir. 2013). The Second Circuit added a "Final Observation": "[P]ro-democracy claims may be especially easy to manufacture. Any Chinese alien who writes something supportive of democracy (or pays for such writing to be published in his or her name) and publishes it in print or on the Internet may in some cases do so principally in order to assert that he or she fears persecution. And, because Internet postings in particular may become accessible anywhere, the applicant can argue that the Chinese government is aware or likely to become aware of his or her pro-democracy stance. The petitions we review today reflect the especially strong need in this genre of cases for careful balancing of legal factors—the alien's credibility, the likelihood that the Chinese government is aware of the applicant's pro-democracy beliefs, evidence suggesting that the alien would be targeted because of those beliefs if returned to China, and such—as well as the political and practical concerns to which we have adverted." Y.C. v. Holder, X.W. v. Holder, 741 F.3d 324, 338 (2d Cir. 2013).

[26] The government's violation of an asylum applicant's confidentiality by disclosing to officials in the applicant's country of origin information "sufficient to give rise to a reasonable inference that [the applicant] had applied for asylum," may create a "new risk of persecution." Lin v. U.S. Dep't of Justice, 459 F.3d 255, 266-68 (2d Cir. 2006).

[27] In Pan v. Holder, 777 F.3d 540 (2d Cir. 2015), the Second Circuit found that the BIA and IJ failed to consider the petitioner's aunt's testimony and affidavit, which tended to prove that the Kyrgyz police were unwilling or unable to protect the petitioner, a similarly situated person, from private persecutors. Given the similarities between the petitioner's and petitioner's aunt's claims of persecution on account of their Korean ethnicity and evangelical Christianity, "it was error for the IJ and BIA to ignore record evidence that the Kyrgyz authorities were unwilling to protect [the petitioner's aunt] from persecution." 777 F.3d 540, 545 (2d Cir. 2015).

the basis of *their* political beliefs or activities, and it is reasonable to believe that the applicant himself would falsely be perceived to share his family's beliefs upon returning to his home country"). Conversely, "the fact that a family member who has also been threatened chooses to remain in the home country or not to apply for asylum should generally not be used to impugn an applicant's claim." Uwais v. U.S. Att'y Gen., 478 F.3d 513, 519 (2d Cir. 2007) (citing Pavlova v. INS, 441 F.3d 82, 89 (2d Cir. 2006)). Furthermore, the Second Circuit has found that it is improper to rely on the fact that the Respondent's family members remain unharmed in the country of persecution, when such family members are not similarly situated to the applicant**.** See Lianping Li v. Lynch, 839 F.3d 144, 151 (2d Cir. 2016).

An applicant is not required to provide evidence that he would be "singled out individually" for persecution in the country of removal if he establishes that, in the country from which he is seeking asylum, "there is a pattern or practice . . . of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion," and that the applicant is included in and identifies with that group, such that his "fear of persecution upon return is reasonable." 8 C.F.R. § 1208.13(b)(2)(iii); see also Shao v. Mukasey, 546 F.3d 138, 150 n.6 (2d Cir. 2008) ("Pattern-and-practice analysis affords a petitioner who cannot credibly demonstrate a reasonable possibility that he will be targeted as an individual for future persecution an alternative means to demonstrate that his fear of persecution is objectively reasonable."). To establish his eligibility for asylum based upon a pattern or practice of persecution, an applicant must demonstrate that the persecution against the group in which he is included is "systemic or pervasive." Matter of A-M-, 23 I&N Dec. 737, 741 (BIA 2005).

Where an alien claims fear of future economic persecution, "an unpaid fine and sanctions imposed after an alien is already in the United States for nonpayment of a fine may support a well-founded fear of future persecution if the alien were returned to his native country." Huo Quiang Chen v. Holder, 773 F.3d 396, 400 (2d Cir. 2014). This is particularly true where there is a likelihood that the foreign government would continue to demand payment of the fine and "such payment would impoverish the alien or deprive him of the basic necessities of life." Huo Quiang Chen, 773 F.3d at 400.

Where an applicant did not establish past persecution, the applicant has the burden "of establishing that it would not be reasonable for him or her to relocate." 8 C.F.R. § 1208.13 (b)(3)(i). However, where the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless the Department establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate. 8 C.F.R. § 1208.13(b)(3)(ii).

b. Nexus

An applicant for asylum must also demonstrate that the persecution he fears would be "on account of" his race, religion, nationality, membership in a particular social group, or political opinion. INA §§ 101(a)(42)(A), 208(b)(1)(A); 8 C.F.R. §§ 1208.13, 1240.8(d). In some cases, an applicant may demonstrate the required nexus to a protected ground by showing that the persecution he fears would be motivated by the perception, correct or incorrect, that he has a protected characteristic. See Gao v. Gonzales, 424 F.3d 122, 129 (2d Cir. 2005) (persecution on account of imputed political opinion would satisfy nexus requirement); see also Rizal v. Gonzales, 442 F.3d 84, 90 n.7 (2d Cir. 2006) (persecution on account of imputed religion "may well" satisfy

nexus requirement). In discerning persecutory motives, the Court must consider the "totality of the circumstances." Matter of S-P-, 21 I&N Dec. 486, 494 (BIA 1996); see also Vumi v. Gonzales, 502 F.3d 150, 157-58 (2d Cir. 2007) (citing S-P-, 21 I&N Dec. at 494).

For pre-REAL ID Act cases, an applicant need not conclusively show the motive for the persecution or that the persecutor would be motivated solely by a protected ground, but must produce evidence from which it is reasonable to conclude that the harm would be motivated, at least in part, by a protected ground. Aliyev v. Mukasey, 549 F.3d 111, 116 (2d Cir. 2008); Uwais v. U.S. Att'y Gen., 478 F.3d 513, 517 (2d Cir. 2007); Matter of S-P-, 21 I&N Dec. 486, 494-95 (BIA 1996). Mixed motive standards have "not been radically altered by the [REAL ID Act] amendments." See Acharya v. Holder,[28] 761 F.3d 289, 298 (2d Cir. 2014) (affirming that "'[o]n its face . . . the language employed [in the REAL ID Act] makes clear that mixed motive asylum claims continue to be viable and the BIA has so held") (internal citations omitted); Matter of J-B-N- & S-M-, 24 I&N Dec. 208, 214 (BIA 2007).

In post-REAL ID Act cases, the applicant must demonstrate that a protected ground was or will be "at least one central reason for persecuting the applicant." INA § 208(b)(1)(B)(i); see also Acharya v. Holder, 761 F.3d at 297; Matter of N-M-, 25 I&N Dec. 526, 526 (BIA 2011); Matter of J-B-N- & S-M-, 24 I&N Dec. 208, 212 (BIA 2007). In Matter of A-B-, the Attorney General focused on the perpetrator's motivation, finding that in domestic violence cases like Matter of A-R-C-G-, the applicant's abuser attacked her not because he was aware of, and hostile to, "married women in Guatemala who are unable to leave their relationship" but because of his preexisting personal relationship with the victim. 27 I&N Dec. 316, 339 (A.G. 2018). The Attorney General stated that when the alleged persecutor is not aware of the group's existence, "it becomes harder to understand how the persecutor may have been motivated by the victim's 'membership' in the group." Matter of A-B-, 27 I&N Dec. 316, 339 (A.G. 2018), citing Matter of R-A-, 22 I&N Dec. 906, 919 (BIA 1999). Furthermore, the persecutor's motivation is a factual determination, J-B-N-, 24 I&N Dec. at 214, and reviewable only for clear error. Hui Lin Huang v. Holder, 677 F.3d 130, 136 (2d Cir. 2012).

Generally, prosecution for a violation of a law of general applicability does not constitute persecution, even if a person objects to the law. Jin Jin Long v. Holder, 620 F.3d 162, 166 (2d Cir. 2010); see also Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 239 (2d Cir. 1992); Matter of Sibrun, 18 I&N Dec. 354, 359 (BIA 1983). However, "prosecution that is pretext for political persecution is not on account of law enforcement. Thus, someone who has been singled out for enforcement or harsh punishment because of his political opinion can show eligibility" for asylum. Jin Jin Long, 620 F.3d at 166 (internal citations omitted).

i. Religion

"The critical showing that an applicant must make to demonstrate eligibility for asylum on religious persecution grounds is that he has suffered past persecution, or fears future persecution, on the basis of religion." Rizal v. Gonzales, 442 F.3d 84, 90 (2d Cir. 2006). The applicant must

[28] In Acharya, the Second Circuit noted, "While use of this terminology [relating to "mixed motive asylum cases"] in our cases is of a relatively recent vintage, the relevant legal and logical principles which inform it are not, and have been recognized numerous times in this Court, particularly in the context of cases considering asylum eligibility on account of political opinion." 761 F.3d at 296-97 (internal citations omitted).

establish that he identifies with a particular religion or that others perceive the applicant as an adherent to that religion, but the applicant need not demonstrate detailed knowledge of the religion's doctrinal tenets. Rizal, 442 F.3d at 90.

Evidence of treatment of religious groups is probative of a threat against an applicant claiming religious persecution. See Ivanishvili v. Dep't of Justice, 433 F.3d 332, 339-43 (2d Cir. 2006) (IJ failed to evaluate Jehovah's Witness testimony about religious persecution in Georgia); Poradisova v. Gonzales, 420 F.3d 70, 81-82 (2d Cir. 2005) (where Jewish applicants from Belarus submitted reports from the Department of State and other organizations demonstrating that hostility to Jews had worsened since IJ/BIA decision, the BIA abused its discretion in not reopening); Chen v. Gonzales, 417 F.3d 268, 272-75 (2d Cir. 2005) (IJ ignored Department of State report supporting claim of religious persecution in China); Matter of L-K-, 23 I&N Dec. 677, 682-83 (BIA 2004) (evangelical Christian living in the Ukraine was seriously injured during a series of home invasions); Matter of G-A-, 23 I&N Dec. 366, 372 (BIA 2002) (burden met in CAT claim due to a combination of factors including applicant's Christianity); Matter of O-Z- & I-Z-, 22 I&N Dec. 23 (BIA 1998) (anti-Semitism in the Ukraine); Matter of Salama, 11 I&N Dec. 536 (BIA 1966) (Jews risked persecution in Egypt). The BIA has also found that abuse suffered by a woman in a Muslim country due to her father's orthodoxy amounts to religious persecution. Matter of S-A-, 22 I&N Dec. 1328, 1336 (BIA 2000).

Evidence of an applicant's religious conversion where the applicant converted after leaving his home country is also probative. See Rafiq v. Gonzales, 468 F.3d 165, 166 (2d Cir. 2006) (denial of CAT claim of Muslim who converted to Christianity reversed where IJ failed to use "willfully blind" test and ignored substantial evidence).

Denying relief because IJ believes that a certain level of doctrinal knowledge of the religion is necessary is reversible error. See Rizal v. Gonzales, 442 F.3d 84, 90-94 (2d Cir. 2006) (reversing where IJ denied case because she believed the applicant was not a follower of Christianity given his low level of doctrinal knowledge).

ii. Particular Social Group

In a claim of persecution on account of membership in a particular social group, the applicant must establish that he or she possesses an immutable characteristic shared by a group of people—a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it should not be required to be changed. See Matter of Kasinga, 21 I&N Dec. 357, 365-66 (BIA 1996) (holding that "young women of the Tchamba-Kunsuntu Tribe [of northern Togo] who have not had FGM [female genital mutilation], as practiced by that tribe, and who oppose the practice," were a particular social group); see also Matter of H-, 21 I&N Dec. 337, 343 (BIA 1996) (holding that members of the Marehan subclan of Somalia, who share ties of kinship and linguistic commonalities, were a particular social group); Matter of Toboso-Alfonso, 20 I&N Dec. 819, 822-23 (BIA 1990) (holding that individuals identified by the Cuban government as "homosexuals" were a particular social group). But see Matter of Acosta, 19 I&N Dec. 211, 233-34 (BIA 1985) (holding that Salvadoran taxi drivers were not a cognizable social group because they could change professions). The characteristic may be innate or based upon a shared past experience. Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985); see also Matter of C-A-, 23 I&N Dec. 951, 958 (BIA 2006). However, "not all applicants

who can point to membership in some group united by a shared past experience will qualify for asylum." Koudriachova v. Gonzales, 490 F.3d 255, 261 (2d Cir. 2007); see also Matter of M-E-V-G-, 26 I&N Dec. 227, 242-43 (BIA 2014) (discussing circumstances under which shared past experiences might give rise to a cognizable social group); Matter of W-G-R-, 26 I&N Dec. 208, 219-20 (BIA 2014) (same).

To constitute a particular social group, the proposed group must also exhibit a shared characteristic that is socially distinct[29] within the society in question and defined with sufficient particularity.[30] Matter of M-E-V-G-, 26 I&N Dec. 227, 237 (BIA 2014); Matter of W-G-R-, 26 I&N Dec. 208, 210-12 (BIA 2014); Paloka v. Holder, 762 F.3d 191, 196 (2d Cir. 2014). When assessing the particularity and social distinction of a putative social group, defining characteristics must be assessed in the social and cultural context of the applicant's country of citizenship or nationality. Matter of M-E-V-G-, 26 I&N Dec. 227, 241 (BIA 2014); see also Matter of W-G-R-, 26 I&N Dec. 208, 214-15 (BIA 2014). A proffered social group must avoid being too broad to have definable boundaries and too narrow to have larger significance in society. See Matter of A-B-, 27 I&N Dec. 316, 336 (A.G. 2018). A group is socially distinct if "society in general perceives, considers, or recognizes persons" sharing a particular characteristic or set of characteristics as constituting a group. Matter of W-G-R-, 26 I&N Dec. 208, 217 (BIA 2014); Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69, 74-76 (BIA 2007) (holding that the proposed social group of "affluent Guatemalans" lacked the requisite social distinction and did not have well-defined boundaries), aff'd sub nom. Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007); Matter of C-A-, 23 I&N Dec. 951, 960-61 (BIA 2006) (finding that non-criminal informants who provided information to the Colombian government about the Cali drug cartel were not a sufficiently socially distinct group); see also Koudriachova, 490 F.3d 255, 262 (2d Cir. 2007) (holding that the BIA's interpretation of "particular social group," including the social distinction requirement, is reasonable and merits deference). Whether a social group is "socially distinct" must be determined by the perception of the society in question, rather than solely by the perception of the persecutor. Matter of M-E-V-G-, 26 I&N Dec. 227, 242 (BIA 2014); see also Matter of W-G-R-, 26 I&N Dec. 208, 218 (BIA 2014) (noting that the "perception of the applicant's persecutors may be relevant because it can be indicative of whether society views the group as distinct," but that "the persecutors' perception is not itself enough to make a group socially distinct"). However, "persecution can be the 'catalyst' for a group of individuals to 'experience a sense of 'group'' and for society to 'discern that this group of individuals . . . is distinct in some significant way.'" Paloka v. Holder, 762 F.3d 191, 196 (2d Cir. 2014) (quoting M-E-V-G-, 26 I&N Dec. at 243). "Being the victim of a crime or even being a likely target for criminal opportunistic behavior does not necessarily preclude the existence of a valid asylum claim if the claimant would likely be targeted because of her membership in a sufficiently defined social group." Paloka v. Holder, 762 F.3d 191, 198 (2d Cir. 2014) (citing M-E-V-G-, 26 I&N Dec. at 243; Cece v. Holder, 733 F.3d

[29] The BIA renamed the "social visibility" requirement "social distinction" to clarify that it does not refer to the literal or "ocular" visibility of a social group. M-E-V-G-, 26 I&N Dec. at 236; W-G-R-, 26 I&N Dec. at 216; Paloka, 762 F.3d at 196 n.2. The two terms are substantively identical. M-E-V-G-, 26 I&N Dec. at 236; W-G-R-, 26 I&N Dec. at 216.

[30] The concept of particular social group is "broad enough to encompass groups whose main shared trait is a common one, such as gender, at least so long as the group shares a further characteristic that is identifiable to would-be persecutors and is immutable or fundamental." Gao v. Gonzales, 440 F.3d 62, 64 (2d Cir. 2006), vacated and remanded on other grounds sub nom. Keisler v. Gao, 552 U.S. 801 (2007).

662, 671-72 (7th Cir. 2013) (en banc)). There is no requirement that members of the group have a "voluntary associational relationship" or "share an element of 'cohesiveness' or homogeneity." Koudriachova, 490 F.3d 255, 263 (2d Cir. 2007) (citing Matter of C-A-, 23 I&N Dec. 951, 956-57 (BIA 2006).

In Matter of A-B-, though the Attorney General did not negate the possibility that violence inflicted by non-governmental actors may serve as the basis for an asylum or withholding application based on membership in a particular social group, he stated that outside 'exceptional circumstances,' such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address.[31] 27 I&N Dec. 316, 317 (A.G. 2018).

(1) Gang Cases

In Matter of S-E-G-, the BIA held that the proposed social groups of Salvadoran youths who have resisted gang recruitment and family members of such Salvadoran youths were insufficiently particular and the asserted characteristics were "amorphous," noting that the proposed groups (1) "make up a potentially large and diffuse segment of society and the motivation of gang members in recruiting and targeting young males could arise from motivations quite apart from any perception that the males in question were members of a class;" and (2) "are too broad to qualify because there is no unifying relationship or characteristic to narrow this diverse and disconnected group."[32] S-E-G- 24 I&N Dec. 579, 585-86 (BIA 2008) (internal quotation marks and citation omitted). The BIA further held that the groups lacked the requisite social distinction, finding "little in the background evidence of record to indicate that Salvadoran youth who are recruited by gangs but refuse to join (or their family members) would be 'perceived as a group' by society, or that these individuals suffer from a higher incidence of crime than the rest of the population." S-E-G- 24 I&N Dec. at 587. Similarly, in Matter of M-E-V-G-, the BIA noted that gang violence is a "large societal problem in many countries" that affects a broad range of the population. Matter of M-E-V-G-, 26 I&N Dec. 227, 250-51 (BIA 2014). Gang members "may target one segment of the population for recruitment, another for extortion, and yet others for kidnapping," or other crimes, and "certain segments of a population may be more susceptible to one type of criminal activity than another." Matter of M-E-V-G-, 26 I&N Dec. 227, 251 (BIA 2014). However, these victims of gang violence generally are not targeted on a protected basis, but "suffer from the gang's criminal efforts to sustain its enterprise in the area." Matter of M-E-V-G-, 26 I&N Dec. 227, 251 (BIA 2014); see also Matter of W-G-R-, 26 I&N Dec. 208, 221-23

[31] Determinations regarding factors such as an applicant's ability to leave the relationship, the unwillingness or inability of a government to protect the applicant, and the persecutor's motivation are all factual determinations and therefore, the BIA may overturn an IJ's decision on these issues only if it is clearly erroneous, i.e. "illogical or implausible," or without "support in inferences that may be drawn from the facts in the record." Matter of A-B-, 27 I&N Dec. 316, 317 (A.G. 2018).

[32] With respect to the viability of an "age-related particular social group," the BIA observed in S-E-G- that youth is not "entirely immutable," but that "mutability of age is not within one's control, and that if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual's age places him within the group, a claim for asylum may still be cognizable." 24 I&N Dec. at 583-84. In addition, "in order to clarify that the 'social visibility' element required to establish a cognizable 'particular social group' does not mean literal or 'ocular' visibility, that element is renamed as 'social distinction'." See Matter of W-G-R-, 26 I&N Dec. 208, 208 (BIA 2014).

(BIA 2014) (finding that the putative social group "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" lacked sufficient particularity and social distinction to constitute a cognizable social group); Matter of E-A-G-, 24 I&N Dec. 591, 594 (BIA 2008) (holding that a proposed social group of young persons who were resistant to gang membership lacked the requisite social distinction). The BIA has also held that a proposed group of persons perceived to be affiliated with gangs did not constitute a particular social group for asylum purposes because "[t]reating affiliation with a criminal organization as being protected membership in a social group is inconsistent with the principles underlying the bars to asylum and withholding of removal based on criminal behavior." Matter of E-A-G-, 24 I&N Dec. 591, 596 (BIA 2008); see also Matter of W-G-R-, 26 I&N Dec. 208, 215 n.5 (BIA 2014). However, the BIA has emphasized that its holdings in these cases "should not be read as a blanket rejection of all factual scenarios involving gangs." Matter of M-E-V-G-, 26 I&N Dec. 227, 251 (BIA 2014).

In the Second Circuit, there is support for the notion that witnesses to gang violence who cooperate with authorities may constitute a particular social group.[33] See Gashi v. Holder, 702 F.3d 130, 136-37 (2d Cir. 2012) (finding that the "proposed group of cooperating witnesses is a particular social group under the INA"); Rivas-Aparicio v. Whitaker, --- F.3d ---, No. 17-1107, 2019 WL 409427 (2d Cir. 2019) (finding that the petitioner's testimony regarding attacks by gang members in El Salvador following his cooperation with the police, could support a finding, under a mixed-motive analysis, that the gang targeted him for cooperating with the authorities). In Gashi v. Holder, the Second Circuit held that the proposed social group—persons who witnessed war crimes committed by a resistance group and cooperated with authorities investigating those crimes—constitutes a particular social group. 702 F.3d 130, 136-37 (2d Cir. 2012) (finding that "a group consisting of potential witnesses against [Kosovo Liberation Army Commander Ramush] Haradinaj" shared characteristics that were "both immutable and visible in the Kosovar society" so as to satisfy the legal elements of a particular social group). It is immutable because individuals in the group share a past experience—namely, having witnessed war crimes and having cooperated with authorities—which "cannot be undone." Id. at 137 (citing Matter of C-A-, 23 I&N Dec. 951, 958 (BIA 2006)). It is socially distinct where the witnesses were publicly known,[34] and it is sufficiently particular because "[t]he number of persons who have given interviews to, or otherwise cooperated with, official war crimes investigators is finite, and undoubtedly quite limited." Gashi,702 F.3d at 137; M-E-V-G-, 26 I&N Dec. at 236; W-G-R-, 26 I&N Dec. at 216. This analysis can be translated to the gang context and used to support a finding that witnesses to gang violence who cooperate with investigating authorities constitutes a particular social group.

(2) Domestic Violence

In Matter of A-B-, the Attorney General found that Matter of A-R-C-G-, 26 I&N Dec. 388 (BIA 2014) should not have been a precedential decision due to the BIA excessively relying on

[33] The Second Circuit has previously held that, "Opposition to government corruption may constitute a political opinion, and retaliation for expressing that opinion may amount to political persecution. Begolli v. Holder, 564 Fed. Appx. 629, (2d Cir. 2014) (citing Yueqing Zhang v. Gonzales, 426 F.3d 540, 547-48 (2d Cir. 2005)).

[34] The Court in Gashi focused not on whether the respondent's name was publicly published on a list, but rather whether the "people in [the respondent's] village knew that [he] spoke with [investigators]." 702 F.3d at 137; but c.f. Matter of C-A-, 23 I&N Dec. 951, 958 (BIA 2006) (finding that confidential informants against a drug cartel have no social visibility because "[i]n the normal course of events, an informant against the … cartel intends to remain unknown and undiscovered.").

DHS concessions and not engaging in a sufficiently rigorous analysis, and therefore overruled it. 27 I&N Dec. 316 (A.G. 2018). The Attorney General found that parties may not stipulate to the legal conclusions to be reached by the court; however, where an alien's asylum application is fatally flawed in one respect an IJ need not examine the remaining elements of the asylum claim. A-B-, 27 I&N Dec. at 340. The Attorney General resurrected Matter of R-A-, 22 I&N Dec. 906 (BIA 1999) and affirmed the PSG framework as clarified in Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014) and Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014), subject to his decision. A-B-, 27 I&N Dec. at 316. The Attorney General found that in A-R-C-G-, the BIA never considered that the proffered PSG did not exist independently of the harm asserted because the inability "to leave" was created by harm or threatened harm. A-B-, 27 I&N Dec. at 334-35.

(3) Female Genital Mutilation ("FGM")

It is well-settled that female genital mutilation ("FGM") constitutes persecution. Bah v. Mukasey, 529 F.3d 99, 112 (2d Cir. 2008) (FGM involves the infliction of grave harm constituting persecution); Matter of Kasinga, 21 I&N Dec. 357, 361 (BIA 1996) ("FGM is extremely painful and at least temporarily incapacitating. It permanently disfigures the female genitalia. FGM exposes the girl or woman to the risk of serious, potentially life-threatening complications.") Moreover, FGM constitutes persecution on account of membership in a particular group, including gender, ethnicity, tribal group, or nationality. Bah, 529 F.3d at 112 ("it appears to us that petitioners' gender—combined with their ethnicity, nationality, or tribal membership—satisfies the social group requirement"); see also Matter of S-A-K- and H-A-H-, 24 I&N Dec. 464, 465 (BIA 2008) (finding that Somali women subjected to FGM had suffered past persecution on account of their membership in a particular social group); Kasinga, 21 I&N Dec. at 367 (noting that "FGM is practiced, at least in some significant part, to overcome sexual characteristics of young women of the tribe").

In Bah v. Mukasey, the Second Circuit held that the BIA erred in assuming categorically that FGM is a one-time act and that, to rebut the presumption of a well-founded fear of future persecution, DHS must establish by a preponderance of the evidence that individual applicants "are not at risk of further mutilation." Bah, 529 F.3d at 114. The Court further held that FGM is not the only type of persecution relevant to the analysis of whether applicants warrant asylum or withholding of removal, stating that

> Nothing in the regulation suggests that the future threats to life or freedom must come in the same *form* or be the same *act* as the past persecution….[T]o rebut the regulatory presumption [of a well-founded fear of future persecution], the government must show that changed conditions obviate the risk to life or freedom related to the original claim, e.g., persecution on account of membership in her particular social group. It cannot satisfy its burden solely by showing that the particular act of persecution suffered by the victim in the past will not recur.

Bah, 529 F.3d at 115.

(4) Family

Membership in a family can constitute a basis for membership in a particular social group, depending on the nature and degree of the family relationship in question. Vumi v. Gonzales, 502 F.3d 150, 154 (2d Cir. 2007) ("[T]he Board has held unambiguously that membership in a nuclear family *may* substantiate a social group basis of persecution");[35] Matter of L-E-A-, 27 I&N Dec. 40, 42 (BIA 2017) (finding that "members of an immediate family may constitute a particular social group");[36] see also Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985) (recognizing "kinship ties" as an "immutable characteristic" that could serve as the basis for a particular social group); Matter of C-A-, 23 I&N Dec. 951, 959 (BIA 2006) ("Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups."), clarified by Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014), and Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014). Members of a nuclear family share immutable biological characteristics and fundamental social relationships that are basic to their identities such that they should not be required to forgo them to avoid persecution. See Matter of Acosta, 19 I&N Dec. 211, 233-34 (BIA 1985) ("shared characteristics might be an innate one such as sex, color or kinship ties"); Matter of H-, 21 I&N Dec. 337, 342 (BIA 1996). Also, the nuclear family is a recognized and discrete social unit. Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991). The immediate familial relationship is a trait that cannot and should not be required to change and, as such, constitutes an immutable characteristic. Matter of M-E-V-G-, 26 I&N Dec. 227, 231 (BIA 2014) (we can go on to include particularity and social distinction as applied to family PSGs).

When an alien claims fear based on membership in a particular social group composed of family members, the application must not only demonstrate that he or she is a member of the family, but also that the family relationship is at least one central reason for the claimed harm. Matter of L-E-A-, 27 I&N Dec. 40 (BIA 2017). Claims do not meet this nexus requirement when the persecutor's motivation to harm was for some other primary purpose, and family membership was merely incidental. Id. at 40. The Board in Matter of L-E-A- found that although "[n]ot all

[35] A number of circuit courts have also found family to be a cognizable particular social group. See Ayele v. Holder, 564 F.3d 862, 869-70 (7th Cir. 2009) ("Our circuit recognizes a family as a cognizable social group under the INA, as do our sister circuits.") (internal citations omitted); Djouma v. Gonzales, 429 F.3d 685, 688 (7th Cir. 2005) (stating that "particular social group" would encompass family members subject to collective punishment regardless of their political opinion); Al-Ghorbani v. Holder, 585 F.3d 980, 995 (6th Cir. 2009) ("a family is a 'particular social group' if it is recognizable as a distinctive subgroup of society."); Bernal-Rendon v. Gonzales, 419 F.3d 877, 881 (8th Cir. 2005) ("petitioners correctly contend that a nuclear family can constitute a social group."); Lopez-Soto v. Ashcroft, 383 F.3d 228, 235 (4th Cir. 2004); Gebremichael v. I.N.S., 10 F.3d 28, 36 (1st Cir. 1993) ("There can . . . be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family."). Additionally, the Office of the United Nations High Commissioner for Refugees ("UNHCR") has advised that family-based refugee status claims may be cognizable as a particular social group. See UNCHR, Position on claims for refugee status under the 1951 Convention relating to the Status of Refugees based on a fear of persecution due to an individual's membership of a family or clan engaged in a blood feud ¶ 18 (Mar. 2006) ("[I]t is UNHCR's view that a family unit represents a classic example of a 'particular social group.'"). Although UNHCR guidance is not binding on the Court, it often serves as a useful interpretive aid. INS v. Aguirre-Aguirre, 526 U.S. 415, 427-28 (1999).

[36] The Acting Attorney General recently directed the Board to refer its decision in Matter of L-E-A- to him pursuant to 8 C.F.R. § 1003.1(h)(1)(i) and stated that the Board's decision is automatically stayed pending his review pursuant to Matter of Haddam, A.G. Order No. 2380-2001 (Jan. 19, 2001). See Matter of L-E-A-, 27 I&N Dec. 494, 494 (2018). The Acting Attorney General certified to himself the question of "Whether, and under what circumstances, an alien may establish persecution on account of membership in a 'particular social group'… based on the alien's membership in a family unit." Id.

social groups that involve family members meet the requirements of particularity and social distinction" the inquiry in a claim based on family membership "depend[s] on the nature and degree of the relationships involved and how those relationships are regarded by the society in question." Id. at 42-43.

iii. Political Opinion

To establish persecution on account of a political opinion, the applicant must demonstrate through direct or circumstantial evidence that the persecution is "on account of the victim's political opinion, not the persecutor's." See INS v. Elias-Zacarias, 502 U.S. 478, 482 (1992) (emphasis in original); see also Castro v. Holder, 597 F.3d 93, 100 (2d Cir. 2010). The Second Circuit has explained that a political opinion does not necessarily mean the expression of an allegiance to a particular political group. Osorio v. I.N.S., 18 F.3d 1017, 1030 (2d Cir. 1994). Moreover, a political opinion may be expressed in actions rather than words. *Id.* (finding that the respondent's union activities in Guatemala was a vehicle for his political expression). Persecutor's motive must arise from "the applicant's political belief." Elias-Zacarias, 502 U.S. at 483. Thus, persecution arising from a persecutor's mere "generalized political motive" is insufficient to establish persecution on account of a political opinion. Elias-Zacarias, 502 U.S. at 482. Persecution on account of a political opinion "presupposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods." Handbook ¶ 80. Furthermore, "[i]t also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant...The relative importance or tenacity of the applicant's opinions—in so far as this can be established from all the circumstances of the case—will also be relevant." Handbook ¶ 80. An imputed political opinion can constitute a ground of persecution whether correctly or incorrectly attributed.[37] See Vumi v. Gonzales, 502 F.3d 150, 156 (2d Cir. 2007); see also Castro, 597 F.3d at 100. Even if a persecutor's original motivation was not based upon political opinion, the applicant's subsequent betrayal may be interpreted as an expression of political opinion on account of which the persecutor has acted or will act in the future. Delgado v. Mukasey, 508 F.3d 702, 707 (2d Cir. 2007).

The BIA has established a non-exhaustive list of factors that should be considered when an applicant alleges that the motive for persecution was "punishing or modifying perceived political views," which includes:

1. Indications in the particular case that the abuse was directed toward modifying or punishing opinion rather than conduct (e.g., statements or actions by the perpetrators or abuse out of proportion to nonpolitical ends);
2. Treatment of others in the population who might be confronted by government agents in similar circumstances;

[37] For example, an asylum applicant who sold books relating to the Falun Gong movement and was thereafter persecuted may have a claim based on imputed political opinion even if he does not adhere to the views of Falun Gong practitioners. The issue is not whether the applicant was a Falun Gong practitioner, but whether the governmental authorities would have perceived him as such because of his activities. See Koudriachova v. Gonzales, 490 F.3d 255, 264 (2d Cir. 2007) (finding that "the relevant question is not whether an asylum applicant subjectively holds a particular political view, but instead whether the authorities in the applicant's home county *perceive* him to hold a political opinion and would persecute him on that basis").

3. Conformity to procedures for criminal prosecution or military law including developing international norms regarding the law of war;
4. The extent to which antiterrorism laws are defined and applied to suppress political opinion as well as illegal conduct (e.g., an act may broadly prohibit "disruptive" activities to permit application to peaceful as well as violent expressions of views);
5. The extent to which suspected political opponents are subjected to arbitrary arrest, detention, and abuse.

Matter of S-P-, 21 I&N Dec. 486, 494 (BIA 1996); see also Vumi v. Gonzales, 502 F.3d at 150,158 (2d Cir. 2007) (citing S-P-, 21 I&N Dec. at 494). Where an individual claims that he was singled out for prosecution or harsh punishment on account of his political opinion, "[f]acts must be carefully sifted in context to ascertain whether there is a sufficient political element to the alleged persecution." Jin Jin Long v Holder, 620 F.3d 162, 167 (2d Cir. 2010);[38] see also Vumi, 502 F.3d at 158.

To avoid "an impoverished view of what political opinions are, especially within a country where . . . certain democratic rights have only a tenuous hold," the "broader political context" must be carefully considered to properly evaluate an applicant's claim. Castro v. Holder, 597 F.3d 93, 106 (2d Cir. 2010) (internal quotation marks and citations omitted). Furthermore, "[t]his analysis necessarily involves a complex and contextual factual inquiry into the nature of the asylum applicant's activities in relation to the political context in which the dispute took place." Ruqiang Yu v. Holder, 693 F.3d 294, 298 (2d Cir 2012) (internal quotation marks and citations omitted).

(1) "Whistle-blowing" and Opposition to State Corruption

Opposition to state corruption or "whistle-blowing" "may have a political dimension when it transcends mere self-protection and represents a challenge to the legitimacy or authority of the ruling regime" or governing institution. Castro v. Holder, 597 F.3d 93, 101 (2d Cir. 2010) (citing Yueqing Zhang v. Gonzales, 426 F.3d 540, 547-48 (2d Cir. 2005)); see also Ruqiang Yu v. Holder, 693 F.3d 294, 298 (2d Cir. 2012); Matter of N-M-, 25 I&N Dec. 526, 528 (BIA 2011). An applicant's opposition to "aberrational" corruption is distinct from opposition "directed toward a governing institution." Yueqing Zhang, 426 F.3d at 548 (internal quotation marks and citations omitted). Likewise, a persecutor's attempt to suppress "a challenge to isolated, aberrational acts of greed or malfeasance" is distinct from an attempt to suppress a challenge "toward a governing institution." Yueqing Zhang, 426 F.3d at 548; see also Castro, 597 F.3d at 101; Ruqiang Yu, 693

[38] In Jin Jin Long, the Second Circuit remanded to the BIA and made the following observation with respect to North Korean refugees in China:

> The Chinese government has apparently arrested numerous activists, missionaries, and others—both foreign and Chinese—for assisting North Korean refugees. This can be seen as enforcement of the law (assuming there is a law prohibiting assistance to North Korean refugees), but it may also suggest an active resistance to China's North Korean immigration policies, and an attempt at suppression. [The Respondent's] actions may have been viewed by the Chinese authorities as part of this resistance, and the BIA should therefore have considered the facts in that light.

620 F.3d at 167 (citations omitted).

F.3d at 298. Several incidents of corruption at a single state-operated factory are not categorically "aberrational." Ruqiang Yu, 693 F.3d at 298.

Where "the applicant's political belief takes the form of opposition to a government policy or practice that is visited on the population at large, mere subjection to that policy or practice will not itself qualify as persecution 'on account of' political opinion." Yueqing Zhang v. Gonzales, 426 F.3d 540, 545 (2d Cir. 2005). The applicant "must establish fear of reprisal that is different in kind from a desire to avoid the exactions (however harsh) that a foreign government may place upon its citizens." Zhang v. Slattery, 55 F.3d 732, 751 (2d Cir. 1995). Accordingly, in making this determination, the Court should consider:

> (1) Whether and to what extent the alien engaged in activities that could be perceived as expressions of anticorruption beliefs; (2) any direct or circumstantial evidence that the persecutor was motivated by the alien's actual or perceived anticorruption beliefs; and (3) any evidence regarding the pervasiveness of corruption within the governing regime.

Matter of N-M-, 25 I&N Dec. 526, 526, 532-33 (BIA 2011). To illustrate the application of these principles, "[c]ampaigning against state corruption" through activities like political party membership, attending political rallies, or writing or distributing political materials, may constitute expression of a political opinion. N-M-, 25 I&N Dec. at 528. Similarly, "exposing or threatening to expose government corruption to higher governmental authorities, the media, or nongovernmental watchdog organizations could constitute the expression of a political opinion." N-M-, 25 I&N Dec. at 528. Where an applicant exposed and reported endemic corruption related to drug sales in the police force, his actions could constitute a political challenge to the ruling regime because of that regime's connections to corruption and drug trafficking. Castro v. Holder, 597 F.3d 93, 102-03 (2d Cir. 2010). In addition, an applicant's resistance to extortion by government officials, which included refusing to pay bribes, "marshaling support from similarly afflicted business owners" and attempting to publicize the endemic corruption, could constitute a political challenge to the ruling regime. Yueqing Zhang, 426 F.3d at 542. Finally, in light of an applicant's lack of financial motive, his efforts to change the policy of a state-run factory of not paying certain workers, which included writing letters to his superiors, reporting the corruption to the authorities and organizing workers to demand their salaries, could constitute a political challenge to the ruling regime. Ruqiang Yu v. Holder, 693 F.3d 294, 294-97 (2d Cir. 2012).

(2) Neutrality or Refusal to Serve in the Armed Forces

Testimony that the applicant wishes to remain neutral in the midst of civil conflict in his country is insufficient to establish a well-founded fear of persecution on account of a political opinion. Matter of Vigil, 19 I&N Dec. 572, 576-77 (BIA 1988). Although compulsory military service does not generally "provide asylum seekers with adequate cause for claiming persecution," if the applicant's refusal to serve in the military "leads to disproportionately excessive penalties, inflicted on him or her because of that individual's . . . political opinion," he or she may have suffered persecution on account of political opinion. Islami v. Gonzales, 412 F.3d 391, 396 (2d Cir. 2005), overruled in part on other grounds by Shi Liang Lin v. U.S. Dep't of Justice, 494 F.3d 296, 305 (2d Cir. 2007).

(3) Coercive Population Control

Forced abortion, involuntary sterilization, or other coercive population control measures can constitute persecution on account of political opinion. INA § 101(a)(42); see also Matter of Y-T-L-, 23 I&N Dec. 601, 605 (BIA 2003); Matter of X-P-T-, 21 I&N Dec. 634, 638 (BIA 1996). Whether an applicant will suffer coercive population control measures in the future is a question of fact. Hui Lin Huang v Holder, 677 F.3d 130, 134-35 (2d Cir. 2012). Whether such harm constitutes persecution is a question of law. Huang, 677 F.3d at 135.

Where a respondent has previously undergone involuntary sterilization or a forced abortion, there is an "irrebuttable presumption of a well-founded fear of future persecution." Cao v. U.S. Dep't of Justice, 421 F.3d 149, 156 (2d Cir. 2005) (citing Matter of Y-T-L-, 23 I&N Dec. 601, 605-08 (BIA 2003)). This is because involuntary sterilization and forced abortions are considered to result in "permanent and continuous" persecution. Cao, 421 F.3d at 156.

Otherwise, to demonstrate an objective fear of future persecution based upon the violation of China's one-child policy, the applicant must prove: (1) "the details of the family planning policy relevant to each individual case;" (2) that the applicant "violated the policy;" and (3) that the applicant "would be punished in the local area in a way that" would amount to persecution. Shao v. Mukasey, 546 F.3d 138, 149 (2d Cir. 2008) (quoting Matter of J-H-S-, 24 I&N Dec. 196, 199 (BIA 2007)). It is inappropriate to categorically reject an applicant's asylum claim by relying solely on the three BIA decisions affirmed in Shao; determinations of asylum applications in Chinese family planning cases must be made on a case-by-case basis. Xiao Kui Lin v. Mukasey, 553 F.3d 217, 223 (2d Cir. 2009).

In making this case-by-case determination, the Court may rely on documents that do not specifically mention the applicant. Gao v. Mukasey, 508 F.3d 86, 87-88 (2d Cir. 2007). However, unsigned and unauthenticated documents obtained for the purpose of a hearing are subject to diminished weight. Matter of H-L-H- & Z-Y-Z-, 25 I&N Dec. 209, 214 (BIA 2010), remanded on other grounds sub nom; see also Hui Lin Huang v. Holder, 677 F.3d 130 (2d Cir. 2012). The Court may also rely on State Department reports, which are probative evidence and usually the best source of information on conditions in foreign nations. Hui Lin Huang v. Holder, 677 F.3d 130, 138 (2d Cir. 2012) (quoting Tu Lin v. Gonzalez, 446 F.3d 395, 400 (2d Cir. 2006) and quoting Xiao Ji Chen v. U.S. Dep't of Justice, 293 F.3d 61, 70 (2d Cir. 2002)). Indeed, State Department reports are afforded "greater weight" than other documentary evidence. Shao v. Mukasey, 546 F.3d 138, 152 (2d Cir. 2008); see also Huang, 677 F.3d at 138. However, they do not "automatically discredit contrary evidence presented by the applicant," and the IJ must consider and evaluate "any contrary or countervailing evidence… as well as the particular circumstances of the applicant's case." Alibasic v Mukasey, 547 F.3d 78, 88 n.6 (2d Cir. 2008).

However, certain facts are insufficient to establish a well-founded fear of persecution on account of coercive population control policies. For example, an applicant who voluntarily underwent an abortion to prevent the Chinese government from discovering a pregnancy was not "forced" to undergo abortion and therefore did not suffer persecution on account of political opinion. Xiu Fen Xia v. Mukasey, 510 F.3d 162, 165-166 (2d Cir. 2007). Additionally, "involuntary IUD insertion is not an involuntary sterilization." Xia Fan Huang v. Holder, 591 F.3d 124, 129-130 (2d Cir. 2010). The spouse of a person who has been physically subjected to a forced

abortion or sterilization procedure is not *per se* entitled to refugee status. Matter of J-S-, 24 I&N Dec. 520 (A.G. 2008), overruling Matter of S-L-L-, 24 I&N Dec. 1 (BIA 2006) and Matter of C-Y-Z-, 21 I&N Dec. 915 (BIA 1997); see also Shi Liang Lin v U.S. Dept. of Justice, 494 F.3d 296, 309-10 (2d Cir. 2007) (en banc). Parents and parents-in-law of a person subject to a coercive family planning policy are also not *per se* eligible for asylum. Yuan v. U.S. Dep't of Justice, 416 F.3d 192, 197 (2d Cir. 2005), overruled in part on other grounds by Shi Liang Lin, 494 F.3d 296, 309-10 (2d Cir. 2007) (en banc) (holding that a spouse, boyfriend, or fiancé of a person forced to undergo an abortion is not automatically eligible for refugee status). Similarly, children of those persecuted under China's family planning policy are not *per se* eligible for asylum because sterilization or abortion of a parent does not encroach on the reproductive rights of the child. Chen v. U.S. Dep't of Justice, 417 F.3d 303, 305 (2d Cir. 2005). Such individuals may have been persecuted or have a well-founded fear of persecution on the basis of "other resistance" to a coercive family planning policy, though the term "other resistance" remains undefined. See INA § 101(a)(42); Matter of J-S-, 24 I&N Dec. 520, 523 (A.G. 2008); Shi Liang Lin, 494 F.3d at 312-13.

To establish "other resistance," the applicant must first establish that he or she "resisted China's family planning policy. Mei Fun Wong v. Holder, 633 F.3d 64, 69 (2d Cir. 2011). An act that thwarts the goals of China's family planning policy, such as removing an intrauterine device ("IUD") or failing to attend a mandatory gynecological appointment, can constitute "resistance." Matter of M-F-W- & L-G-, 24 I&N Dec. 633, 638 (BIA 2008) vacated in part on other grounds by Mei Fun Wong, 633 F.3d 64, 80-81 (2d Cir. 2011).

Second, the applicant must show he or she has been persecuted (or has a well-founded fear of persecution). Matter of M-F-W- & L-G-, 24 I&N Dec. 633, 637 (BIA 2008). Involuntary insertion of an intrauterine device ("IUD") "must be accompanied by aggravating circumstances" to constitute persecution. Mei Fun Wong v. Holder, 633 F.3d 64, 75 (2d Cir. 2011); see also M-F-W- & L-G, 24 I&N Dec. at 643-44. However, it is an open question whether harm not rising to the level of persecution "in conjunction with an involuntary IUD insertion" can constitute persecution. Mei Fun Wong, 633 F.3d at 77.

Finally, the applicant must establish a nexus between the persecution and the resistance. Matter of M-F-W- & L-G-, 24 I&N Dec. 633, 637 (BIA 2008). In other words the applicant must establish that "the persecution was or would be because of the respondent's resistance to the policy." M-F-W- & L-G-, 24 I&N Dec. at 637 (emphasis in original). It is an open question whether a nexus can ever "be established by evidence that a person who resisted a population control policy was compelled to submit to a practice, such as IUD insertion, routinely performed in furtherance of that policy." Mei Fun Wong v. Holder, 633 F.3d 64, 79 (2d Cir. 2011).

c. Government Unable or Unwilling

Persecution must be inflicted by either the government or by a person or entity the government is "unwilling or unable to control." *See Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985); *see also Pavlova v. INS*, 441 F.3d 82, 91 (2d Cir. 2006). The Attorney General stated that "[p]ersecution is something a government does," either directly or indirectly by being unwilling or unable to prevent private misconduct. *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018), citing *Hor v. Gonzalez*, 400 F.3d 482, 485 (7th Cir. 2005). In the context of a non-governmental

entity perpetrating the harm, an applicant must show that the government condoned the private actions "or at least demonstrated a complete helplessness to protect the victims." *A-B-*, 27 I&N Dec. at 337, citing *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000).

5. Discretion

An applicant who establishes statutory eligibility for asylum still bears the burden of demonstrating that he merits a grant of asylum as a matter of discretion. INA § 208(b)(1)(A); INS v. Cardoza-Fonseca, 480 U.S. 421, 429 n.5 (1987) (noting that the Attorney General is not required to grant asylum to everyone who meets the refugee definition). In determining whether a favorable exercise of discretion is warranted, both favorable and adverse factors should be considered. Matter of Pula, 19 I&N Dec. 467, 473-74 (BIA 1987) (superseded by regulation on other grounds). General humanitarian factors, such as age, health, or family ties, should also be considered in the exercise of discretion. Matter of H-, 21 I&N Dec. 337, 347-48 (BIA 1996); Pula, 19 I&N Dec. at 474. In the absence of any adverse factors, asylum should be granted. Pula, 19 I&N Dec. at 474. In addition, the danger of persecution should outweigh all but the most egregious adverse factors. Wu Zheng Huang v. INS, 436 F.3d 89, 98 (2d Cir. 2006) (citing Matter of Kasinga, 21 I&N Dec. 357, 367 (BIA 1996)); see also Pula, 19 I&N Dec. at 474.

A decision to deny asylum in the exercise of discretion should not be based solely on the alien's use of a smuggler to enter the U.S. or on a partial adverse credibility determination. Wu Zheng Huang v. INS, 436 F.3d 89, 99 (2d Cir. 2006). Rather, "the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted." Matter of Pula, 19 I&N Dec. 467, 473 (BIA 1987); see also Wu Zheng Huang, 436 F.3d at 99. When an Immigration Judge denies asylum solely in the exercise of discretion and grants withholding of removal, she must reconsider the denial to take into account factors relevant to family unification. See 8 C.F.R. § 1208.16(e); see also Matter of T-Z-, 24 I&N Dec. 163, 176 (BIA 2007). Factors to be considered will include the reasons for the denial and reasonable alternatives available to the applicant such as reunification with his or her spouse or minor children in a third country. 8 C.F.R. § 1208.16(e).

6. Humanitarian Asylum

Where an applicant has established past persecution, but the presumption of a well-founded fear has been rebutted, an Immigration Judge should consider the applicant's eligibility for humanitarian asylum. Matter of L-S-, 25 I&N Dec. 705, 710 (BIA 2012); see also 8 C.F.R. § 1208.13(b)(1)(iii). Humanitarian asylum is a discretionary form of relief that may be granted if an applicant demonstrates either (1) "compelling reasons for being unwilling or unable to return to the country [from which he seeks protection] arising out of the severity of the past persecution," or (2) "a reasonable possibility that he or she may suffer other serious harm upon removal to that country." 8 C.F.R. § 1208.13(b)(1)(iii)(A)–(B).

Humanitarian asylum based on "compelling reasons" is warranted only if the applicant demonstrates that in the past he or his family "suffered under atrocious forms of persecution." Matter of L-S-, 25 I&N Dec. 705, 712 (BIA 2012); see also Matter of N-M-A-, 22 I&N Dec. 312, 325-26 (BIA 1998) (finding the respondent did not show "compelling reasons" considering the degree of harm suffered, the length of time over which the harm was inflicted, and the lack of

evidence of severe psychological trauma stemming from the harm). The applicant must establish both "the severe harm and the long-lasting effects of that harm." Jalloh v. Gonzales, 498 F.3d 148, 151 (2d Cir. 2007) (citing N-M-A-, 22 I&N Dec. at 326); see also Matter of S-A-K- & H-A-H-, 24 I&N Dec. 464, 465-66 (BIA 2008) (finding that applicants who had undergone female genital mutilation in Somalia with aggravated circumstances were eligible for humanitarian asylum because they had suffered "an atrocious form of persecution that result[ed] in continuing physical pain and discomfort"); Matter of B-, 21 I&N Dec. 66, 72 (BIA 1995) (finding that humanitarian asylum was warranted where an applicant was imprisoned on account of his political opinion for thirteen months under "deplorable" conditions); Matter of Chen, 20 I&N Dec. 16, 20-21 (BIA 1989) (granting humanitarian asylum to an applicant who suffered severe persecution in the past, leaving him physically debilitated, anxious and fearful, and often suicidal).

Whether an applicant has demonstrated a reasonable possibility of "other serious harm" is a determination that must be made on a case-by-case basis considering the totality of the circumstances. Matter of L-S-, 25 I&N Dec. 705, 714 (BIA 2012). "Other serious harm" need not be inflicted on account of a protected ground, and it may be wholly unrelated to the past harm. L-S-, 25 I&N Dec. at 714. The harm, however, must be "so serious that it equals the severity of persecution." L-S-, 25 I&N Dec. at 714. In making determinations regarding "other serious harm," the Court should focus on current country conditions and the potential for new physical or psychological harm that the applicant might suffer. L-S-, 25 I&N Dec. at 714. Relevant country conditions include, but are not limited to, those involving civil strife, extreme economic deprivation beyond economic disadvantage, or situations where the applicant could experience severe mental or emotional harm or physical injury. L-S-, 25 I&N Dec. at 714. Finally, the asylum applicant need only establish a "reasonable possibility" of "other serious harm"; a showing of "compelling reasons" is not required under 8 C.F.R. § 1208.13(b)(1)(iii)(B). L-S-, 25 I&N Dec. at 714.

7. Statutory Bar

Where "the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply." 8 C.F.R. § 1240.8(d); Matter of M-B-C-, 27 I&N Dec. 31 (BIA 2017); see also Matter of R-S-H-, 23 I&N Dec. 629, 640 (BIA 2003).

a. Particularly Serious Crime

An applicant is statutorily barred from asylum if the applicant, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community." INA § 208(b)(2)(A)(ii); see also 8 C.F.R. § 1208.13(c)(1). For asylum, all aggravated felonies are *per se* particularly serious crimes. INA § 208(b)(2)(B)(i). However, "[t]he Attorney General (or his agents) may determine that a crime is particularly serious for purposes of the asylum statute . . . even though it is not an aggravated felony." Nethagani v. Mukasey, 532 F.3d 150, 156 (2d Cir. 2008); see also INA § 208(b)(2)(B)(ii). If the IJ determines that an applicant has been convicted of a particularly serious crime, the applicant necessarily constitutes a danger to the community. Flores v. Holder, 779 F.3d 159 (2d Cir. 2015) (citing Nethagani, 522 F.3d at 154 n.1). Therefore, the proper focus for determining whether a crime is particularly serious is on the nature

of the crime and not the likelihood of future serious misconduct. Matter of N-A-M-, 24 I&N Dec. 336, 342 (BIA 2007).

In "determin[ing] whether the crime was particularly serious" the Immigration Judge should consider "(1) the nature of the conviction, (2) the circumstances and underlying facts of the conviction, (3) the type of sentence imposed, and (4) whether the type and circumstances of the crime indicate that the alien will be a danger to the community." Nethagani v. Mukasey, 532 F.3d 150, 155 (2d Cir. 2008) (citing Matter of Frentescu, 18 I&N Dec. 244, 247 (BIA 1982), modified, Matter of C-, 20 I&N Dec. 529 (BIA 1992)). The judge should first determine whether "the elements of the offense . . . potentially bring the crime into a category of particularly serious crimes." Matter of N-A-M-, 24 I&N Dec. 336, 342 (BIA 2007). If not, "the individual facts and circumstances of the offense are of no consequence," and the applicant is not barred from asylum. N-A-M-, 24 I&N Dec. at 342. However, "once the elements of the offense are examined and found to potentially bring the offense within the ambit of a particularly serious crime, all reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction." N-A-M-, 24 I&N Dec. at 342. Crimes against persons are more likely to be particularly serious than are crimes against property. Nethagani, 532 F.3d at 155 (internal citations omitted) (finding that a conviction for reckless endangerment in the first degree under the New York State Penal Law, for shooting a pistol in the air, was a conviction for a particularly serious crime); see also Matter of L-S-, 22 I&N Dec. 645, 649 (BIA 1999). An alien's mental health as a factor in a criminal act falls within the province of the criminal courts and is not considered in assessing whether the alien was convicted of a "particularly serious crime" for immigration purposes. Matter of G-G-S-, 26 I&N Dec. 339, 345 (BIA 2014).

b. Serious Non-Political Crime

An applicant is statutorily ineligible for asylum if "there are serious reasons for believing" that he committed a serious nonpolitical crime outside of the U.S. prior to his arrival in the U.S. INA § 208(b)(2)(A)(iii). Determining whether an offense is "nonpolitical" involves consideration of whether "'the political aspect of the offense outweigh[s] its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature.'" INS v. Aguirre-Aguirre, 526 U.S. 415, 429 (1999) (quoting Matter of McMullen, 19 I&N Dec. 90, 97-98 (BIA 1984)); see also Guo Qi Wang v. Holder, 583 F.3d 86, 90 (2d Cir. 2009).

The Immigration Judge ("IJ") need not determine whether the applicant actually committed a serious nonpolitical crime. Rather, it is "enough to find that there are serious reasons for considering that he has committed such a crime."[39] Matter of Ballester-Garcia, 17 I&N Dec. 592, 595 (BIA 1980) (internal quotation marks omitted). The BIA interprets "'serious reasons for believing' to be equivalent to probable cause," and an applicant's credible testimony can be

[39] Former INA § 243(h) prohibited an otherwise eligible applicant for withholding of deportation from receiving such relief if there were "serious reasons for considering that [the applicant] committed a serious nonpolitical crime." Matter of Ballester-Garcia, 17 I&N Dec. 592, 595 (BIA 1980). The statute has since been amended to require "serious reasons for believing" that such a crime had been committed, but with little change to the analysis applied in determining whether such a crime has been committed. INA § 208(b)(2)(A)(iii); Matter of E-A-, 26 I&N Dec. 1, 3 (BIA 2012).

sufficient to establish the requisite probable cause of involvement in a serious nonpolitical crime. Matter of E-A-, 26 I&N Dec. 1, 3 (BIA 2012) (quoting INA § 208(b)(2)(A)(iii)). In determining whether a crime was "serious," it is proper for the IJ to consider factors such as "the alien's description of the crime, the turpitudinous nature of the crime according to our precedents, the value of any property involved, the length of sentence imposed and served, and the usual punishments imposed for comparable offenses in the United States." Ballester-Garcia, 17 I&N Dec. at 595 (finding a serious nonpolitical crime where the petitioner broke into a building, took a large sum of money, and was sentenced to fifteen years' imprisonment).

Robbery and embezzlement are serious nonpolitical crimes. Ballester-Garcia, 17 I&N Dec. at 595 (robbery); Kenyeres v. Ashcroft, 538 U.S. 1301, 1302 (2003) (citing Matter of Castellon, 17 I&N Dec. 616 (BIA 1981)) (embezzlement). In addition, the Second Circuit has held that harvesting organs from executed prisoners and selling them on the black market for profit constitutes a serious nonpolitical crime. Guo Qi Wang v. Holder, 583 F.3d 86, 90-91 (2d Cir. 2009). In Matter of E-A-, the BIA held that the applicant, who was politically active in the Ivory Coast, had committed a serious nonpolitical crime, as he was a "member of a group that burned passenger buses and cars, threw stones, and disrupted the economic activity of merchants in the market, while pretending to be from the opposition party." 26 I&N Dec. at 1. Although recognizing the political nature of his conduct, the BIA held that his actions "reached the level of serious criminal conduct that … constituted a serious nonpolitical crime." E-A-, 26 I&N Dec. at 1.

c. Danger to U.S. Security

An applicant is statutorily barred from asylum if the Attorney General determines that there are reasonable grounds for regarding him as a danger to the security of the United States. INA § 208(b)(2)(A)(iv); 8 C.F.R. § 1208.13(c)(1). The phrase "danger to the security of the United States" means "a risk to the Nation's defense, foreign relations, or economic interests." Matter of A-H-, 23 I&N Dec. 774, 788 (A.G.2005). This statutory bar is applicable when "under the circumstances, information about an alien supports a reasonable belief that the alien poses a danger—that is, any nontrivial degree of risk—to the national security." A-H-, 23 I&N Dec. at 788.

d. Material Support and Terrorist Activities

An alien is statutorily barred from asylum if the alien is one described in INA § 212(a)(3)(B) (related to "engag[ing] in a terrorist activity" and membership in a "terrorist organization"). INA § 208(b)(2)(A)(v).[40] According to INA § 212(a)(3)(B)(i), an alien is inadmissible if the alien renders "material support" to a "terrorist organization" under certain circumstances.[41] An alien provides "material support" to a terrorist organization if the act has a

[40] Section 208(b)(2)(A)(v) refers to certain subsections of INA § 212(a)(3)(B); however, it also refers to INA § 237(a)(4)(B), which refers to all of INA § 212(a)(3)(B). Therefore, any alien described in INA § 212(a)(3)(B) is statutorily ineligible for asylum.

[41] There is no duress exception to the material support bar, either on the face of the statute or implied. Matter of M-H-Z-, 26 I&N Dec. 757, 761 (BIA 2016); see Hernandez v. Sessions, 884 F.3d 107 (2d Cir. 2018) (determining that

logical and reasonably foreseeable tendency to promote, sustain, or maintain the organization, even if only to a de minimis degree. Matter of A-C-M-, 27 I&N Dec. 303 (BIA 2018). **For the statutory definition of these terms see the boilerplate section entitled "Charges of Removability." If the case involves an organization that has not been designated as a terrorist organization, see the "Tier III Terrorist Organizations" boilerplate.**

e. Persecutors

An applicant is not eligible for asylum if it is determined that he or she ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 208(b)(2)(A)(i); see also INA § 101(a)(42) (noting that the term "refugee" does not include persecutors of others). Where evidence indicates that a person assisted in persecution, the applicant seeking relief from removal bears "the burden of proving by a preponderance of the evidence" that he or she "did not so act." 8 C.F.R. § 1208.13(c); see Zhang Jian Xie v. INS, 434 F.3d 136, 139 (2d Cir. 2006). However, an applicant who is subject to being barred based on the persecution of others may claim a duress defense, which is limited in nature. See Matter of Negusie, 27 I&N Dec. 347 (BIA 2018).

The Second Circuit has identified four factors relevant to determining when this persecutor bar applies: (1) "the alien must have been involved in acts of persecution"; (2) a "nexus must be shown between the persecution and the victim's race, religion, nationality, membership in a particular social group, or political opinion"; (3) if the alien "did not incite, order, or actively carry out" the persecution, the alien's conduct "must have assisted the persecution"; and (4) the alien must have had "sufficient knowledge that his or her actions may assist in persecution to make those actions culpable." Balachova v. Mukasey, 547 F.3d 374, 384-85 (2d Cir. 2008) (internal quotation marks omitted). "For the persecutor bar to apply, an alien's conduct must be persecution under *either* the first or third factors, *and* must also satisfy the second and fourth factors." Yan Yan Lin v. Holder, 584 F.3d 75, 80 (2d Cir. 2009) (emphasis in original).

When determining whether an applicant's conduct amounts to "assistance" in persecution, the Court "should consider (1) the nexus between the alien's role, acts, or inaction and the extrajudicial killing and (2) his scienter, meaning his prior or contemporaneous knowledge of the killing." See Matter of D-R- 27, I&N Dec. 105, 120 (BIA 2017) (discussing the standard for determining whether an applicant "assisted, or otherwise participated in" extrajudicial killings in the context of INA § 212(a)(3)(E)(iii)(II)). In doing so, the Court looks to the applicant's "behavior as a whole." Weng v. Holder, 562 F.3d 510, 514 (2d Cir. 2009) (quoting Zhang Jian Xie v. INS, 434 F.3d 139, 142-43 (2d Cir. 2006)). An applicant's conduct constitutes "assistance" in persecution where "the conduct was active and had direct consequences for the victims," whereas "conduct . . . tangential to the acts of oppression and passive in nature" is not persecution. Xie, 434 F.3d at 143; see Meng v. Holder, 770 F.3d 1071, 1075 (2d Cir. 2014) (holding that an officer's two-decade long history of reporting women pregnant in violation of China's family planning policy, knowing that these women would be subject to forcible abortions or involuntary sterilizations, was sufficiently active conduct to rise to the level of assisting in persecution); see also D-R-, 27 I&N Dec. at 121-23 (holding that the applicant, a platoon commander in a Serbian

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the BIA's decision in Matter of M-H-Z- that the material support bar contains no duress exception is reasonable and entitled to deference).

Special Police brigade during the Bosnian war, "assisted or participated" in extrajudicial killings when his unit captured 200 Bosnian civilian men who were later executed, because the applicant "had custody of the men and assisted in loading them onto the buses that would take them to their deaths"); Diaz-Zanatta v. Holder, 558 F.3d 450, 456-59 (6th Cir. 2009) (defining "assistance" as requiring an "actual connection between the individual's actions and the persecution of others" and holding that the applicant, a former intelligent analyst with the Peruvian military, had not assisted in the persecution of others through her undercover intelligence work); Chen v. U.S. Att'y Gen., 513 F.3d 1255, 1259-60 (11th Cir. 2008) (defining "assistance" as active, direct, and integral to the underlying persecution, rather than indirect, peripheral, and inconsequential, and holding that the applicant, a former employee for the Changle Family Planning Office, assisted in the persecution of others by monitoring confined women prior to forced abortions) (citing Xie, 434 F.3d at 143). Conduct is more likely to be "active" and "direct" if it "cause[s]" a persecutory act or makes it "easier" or "more likely . . . [to] occur." Weng v. Holder, 562 F.3d 510, 515 (2d Cir. 2009). However, regardless of whether the "objective effect" or direct consequence of an individual's actions leads to a persecutory event, the persecutor bar requires some level of culpable knowledge that the consequences of one's actions would assist in acts of persecution. Xu Sheng Gao v. U.S. Atty. Gen., 500 F.3d 93, 103 (2d Cir. 2007); D-R- 27, I&N Dec. 118-20; see Castañeda-Castillo v. Gonzales, 488 F.3d 17, 20 (1st Cir. 2007) (finding the term persecution strongly implies both scienter and illicit motivation, and that a former lieutenant in the Peruvian military, lacked prior or contemporaneous knowledge of a civilian massacre that occurred while he prevented residents from leaving the village, and thus could not be found to have assisted in the persecution of others). Finally, there is "no precedent indicating that failing to prevent persecution can constitute persecution." Balachova v. Mukasey, 547 F.3d 374, 387 (2d Cir. 2008).

Being "associated with an enterprise that engages in persecution is insufficient by itself to trigger the effects of the persecutor bar." Xu Shen Gao v. U.S. Att'y Gen., 500 F.3d 93, 99 (2d Cir. 2007) (holding that the persecutor bar did not apply to a government employee responsible for issuing citations to bookstores that sold prohibited materials where there was no evidence that any bookseller Gao or his inspectors issued citations to were arrested, detained, harmed, prosecuted, or imprisoned for selling the prohibited material); see also Fedorenko v. United States, 449 U.S. 490, 512 n.34 (1981) (distinguishing between the conduct of a concentration camp barber, who did not assist in persecution, and an armed guard, who did). Rather, the record must "reveal an identifiable act of persecution" in which the applicant allegedly assisted. Gao, 500 F.3d at 100.

To illustrate, the Second Circuit held that a nurse responsible for providing post-surgical care who, for one ten-minute period, guarded patients awaiting forced abortions and helped one of the patients escape, did not assist in persecution. Weng v. Holder, 562 F.3d 510, 515 (2d Cir. 2009). By contrast, a leader-in-exile of a political movement may have assisted in acts of persecution committed by an armed group connected to the movement where there was "evidence indicating that the leader was instrumental in creating and sustaining the ties between the political movement and the armed group and was aware of the atrocities committed by the armed group [or] evidence that he used his profile and position of influence to make public statements that encouraged those atrocities." Matter of A-H-, 23 I&N Dec. 774, 785 (A.G. 2005).

The Supreme Court has indicated that a duress exception can be recognized if it is reasonable to do so when determining whether an applicant "assisted or otherwise participated in" persecution. INA § 208(b)(2)(A)(i); Matter of Negusie, 27 I&N Dec. 347 (BIA 2018) (citing

Negusie v. Holder, 555 U.S. 511, 523 (2009)). The BIA concluded that it is reasonable to recognize a narrow duress exception to the persecutor bar based on traditional tools of statutory construction and common sense. Negusie, 27 I&N Dec. at 352. In light of this, the BIA adopts a limited and strictly construed duress defense to the persecutor bar. Negusie, 27 I&N Dec. at 362. The defense of duress has roots in statutory and common law of the United States, as well as international law. Negusie, 27 I&N Dec. at 362. The BIA found that minimum threshold requirements of the duress exception are based on formulations found in such law. They do not define the precise boundaries, but rather decide that at a minimum an applicant must establish by a preponderance of the evidence that (1) he acted under an imminent threat of death or serious bodily injury to himself or others; (2) he reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting; (3) he had no reasonable opportunity to escape or otherwise frustrate the threat; (4) he did not place himself in a situation in which he knew or reasonably should have known that he would likely be forced to act or refrain from acting; and (5) he knew or reasonably should have known that the harm he inflicted was not greater than the threatened harm to himself or others. See Negusie, 27 I&N Dec. at 363.

As a framework for analyzing duress claims, the BIA interprets "persecution" in this bar as carrying the same meaning as it does in context of determining an applicant's eligibility for asylum and withholding of removal. Duress is not relevant to establishing whether one has been subject to or reasonably fears persecution themselves. Matter of Negusie, 27 I&N Dec. 347, 366 (BIA 2018). Duress is likewise not relevant to whether one has "ordered, incited, or otherwise participated in persecution." See Negusie, 27 I&N Dec. at 366. Rather, the question of duress is distinct: whether protection afforded under the law should be foreclosed based on conduct that is claimed not to be culpable because of such duress. Negusie, 27 I&N Dec. at 366. An adjudicator should first determine whether an applicant is otherwise eligible for asylum or withholding of removal. Claims of duress, if accepted, will be considered within the regulatory structure of 8 C.F.R. § 1240.8(d). Pursuant to this regulation, the initial burden is on DHS to show evidence of the applicant assisting or participating in persecution. See Negusie, 27 I&N Dec. at 366 (citing Matter of A-H-, 23 I&N Dec. 774, 786 (A.G. 2005)). Once DHS meets its burden, the burden shifts to the applicant to show by a preponderance of the evidence that the bar does not apply, either because he did not engage in persecution or because he acted under duress. See Negusie, 27 I&N Dec. at 366 (citing Matter of M-B-C-, 27 I&N Dec. 31, 36 (BIA 2017)).

f. Firm Resettlement

An applicant is ineligible for asylum if he or she was "firmly resettled in another country prior to arriving in the United States." INA § 208(b)(2)(A)(vi). The regulations provide that an applicant "is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement." 8 C.F.R. § 1208.15. However, two exceptions exist. The first exception is that an applicant is not considered firmly resettled if "he or she establishes . . .[t]hat his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country." 8 C.F.R. § 1208.15(a). The second exception is that an applicant is not considered firmly resettled, despite an offer of permanent residence, if the conditions of that residence "were

so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled." 8 C.F.R. § 1208.15(b).

The Second Circuit has adopted a "totality of the circumstances" approach to determining whether an applicant was firmly resettled. See Tchitchui v. Holder, 657 F.3d 132, 136 (2d Cir. 2011); Jin Yi Liao v. Holder, 558 F.3d 152, 157 (2d Cir. 2009) (citing Sall v. Gonzales, 437 F.3d 229, 234-35 (2d Cir. 2006) (per curiam)). Under this approach, an official government offer is not necessary for a person to be firmly resettled in another country. Sall, 437 F.3d at 233; Liao, 558 F.3d at 157. Although an actual offer of permanent residence is of "particular importance," it is one of many factors, including "whether [the applicant] has family ties [in the country where he or she may have been firmly resettled], whether he [or she] has business or property connections that connote permanence, and whether he [or she] enjoyed the legal rights—such as the right to work and to enter and leave the country at will—that permanently settled persons can expect to have." Sall, 437 F.3d at 235. The totality of the applicant's activities in the third country prior to his or her arrival in the United States are relevant to the question of whether he or she was firmly resettled, regardless of whether such activities occurred pre- or post-persecution. See 8 C.F.R. § 1208.15; Tchitchui, 657 F.3d at 136-37.

The BIA has established a four-step analysis for making firm resettlement determinations. Matter of A-G-G-, 25 I&N Dec. 486, 501 (BIA 2011).[42] In the first step, the Department bears the burden of presenting *prima facie* evidence of an offer of firm resettlement. A-G-G-, 25 I&N Dec. at 501. The Department should first secure and produce "direct evidence of governmental documents indicating an alien's ability to stay in a country indefinitely." A-G-G-, 25 I&N Dec. at 501. If direct evidence of an offer of firm resettlement is unavailable, indirect evidence may be used to show that an offer of firm resettlement has been made "if it has a sufficient level of clarity and force to establish that an alien is able to permanently reside in the country." A-G-G-, 25 I&N Dec. at 502. Moreover, "[t]he existence of a legal mechanism in the country by which an alien can obtain permanent residence *may* be sufficient to make a prima facie showing of an offer of firm resettlement" whether or not the alien applies for that status. A-G-G-, 25 I&N Dec. at 502 (emphasis in original); see Elzour v. Ashcroft, 378 F.3d 1143, 1152 (10th Cir. 2004) ("If an alien who is entitled to permanent refuge in another country turns his or her back on that country's offer by failing to take advantage of its procedures for obtaining relief, he or she is not generally eligible for asylum in the United States"). A facially valid permit allowing an asylum applicant to reside in a third country constitutes prima facie evidence of an offer of firm resettlement, even if the permit was obtained fraudulently. See Matter of D-X- & Y-Z-, 25 I&N Dec. 664, 665-66 (BIA 2012).

In the second step of the firm resettlement analysis, the applicant may rebut the Department's evidence of an offer of firm resettlement "by showing by a preponderance of the evidence that such an offer has not, in fact, been made or that he or she would not qualify for it." Matter of A-G-G-, 25 I&N Dec. 486, 503 (BIA 2011); see also 8 C.F.R. § 1240.8(d). In the third step, the Immigration Judge is required to consider the totality of the evidence presented by the parties to determine whether the applicant has rebutted the evidence of firm resettlement. See A-G-G-, 25 I&N Dec. at 503.

[42] The BIA notes that its "framework is consistent with [] the [] totality of the circumstances approach[] because . . . it allows for the consideration of direct and indirect evidence." A-G-G-, 25 I&N Dec. at 501.

Finally, if the Immigration Judge finds that the applicant has not rebutted the evidence of firm resettlement, the burden shifts to the applicant to establish by a preponderance of the evidence that he or she is eligible for one of the regulatory exceptions to the firm resettlement bar. See Matter of A-G-G-, 25 I&N Dec. 486, 503 (BIA 2011); 8 C.F.R. § 1208.15 (a)-(b). An applicant can qualify for an exception to the firm resettlement bar if he establishes that: (1) his entry into that country was a necessary consequence of his flight from persecution, that he remained in that country only as long as was necessary to arrange onward travel, and that he did not establish significant ties to that country; or (2) the conditions of his residence in that country were so substantially and consciously restricted in that county that he was not in fact resettled. 8 C.F.R. § 1208.15 (a)-(b). Where an asylum applicant who has resettled in a third country travels to the United States and then returns to the country of resettlement, the applicant did not remain in that country "only as long as was necessary to arrange onward travel" for purposes of establishing an exception to firm resettlement See Matter of D-X- & Y-Z-, 25 I&N Dec. 664, 667-68 (BIA 2012).

e. Frivolous Filing

An applicant who "has knowingly made a frivolous application for asylum . . . shall be permanently ineligible for any benefits under this Act," including asylum. INA § 208(d)(6). Such an applicant is not ineligible for withholding of removal. 8 C.F.R. § 1208.20. There is no statute of limitations on making a frivolous determination, and Immigration Judges are not limited to considering the frivolousness of only currently pending asylum applications. Matter of X-M-C-, 25 I&N Dec. 322, 325 n.3 (BIA 2010). Either the Immigration Judge or the Department may raise the issue of frivolousness, but the Immigration Judge need not evaluate an application for frivolousness if the Department does not raise the issue. X-M-X-, 25 I&N Dec. at 324 n.1. The Department bears the burden to demonstrate frivolousness. Matter of B-Y-, 25 I&N Dec. 236, 240 (BIA 2010).

There are four requirements for a frivolousness finding. Matter of Y-L-, 24 I&N Dec. 151, 155 (BIA 2007). In making a frivolousness determination, an Immigration Judge must: (1) give notice to the alien of the consequences of filing a frivolous application; (2) make a specific finding that the alien knowingly filed a frivolous application; (3) identify sufficient evidence in the record to support the finding that a material element of the asylum application was deliberately fabricated; and (4) allow the alien sufficient opportunity to account for any discrepancies or implausible aspects of the claim. Mei Juan Zheng v. Mukasey, 514 F.3d 176, 180 (2d Cir. 2008) (citing Matter of Y–L–, 24 I&N Dec. at 155).

First, because of the serious consequences attendant upon a finding of frivolousness, the Immigration Judge should only make such a finding where an asylum applicant has been notified of the potential penalty. See, e.g., Biao Yang v. Gonzales, 496 F.3d 268, 274 (2d Cir. 2007) (citing Y-L, 24 I&N Dec. at 155). The written warning provided on the asylum application alone is adequate to satisfy this notice requirement without providing oral notice as well. Niang v. Holder, 762 F.3d 251, 254 (2d Cir. 2014). If frivolousness warnings have been given prior to the start of the merits hearing, the Immigration Judge is not required to afford additional warnings or seek further explanation with regard to inconsistencies that have become obvious in the course of the hearing. Matter of B-Y-, 25 I&N Dec. 240, 242 (BIA 2010).

Second, the IJ must make a specific finding that the alien knowingly filed a frivolous application. Matter of Y-L-, 24 I&N Dec. 151, 156 (BIA 2007); see 8 C.F.R. § 1208.20; see also Biao Yang v. Gonzales, 496 F.3d 268, 277-78 (2d Cir. 2007) (holding that a frivolous determination failed to comply with Y-L- because the Immigration Judge "did not find that the inconsistencies or discrepancies were 'deliberate' or 'material,' and the [Immigration Judge] did not inform the petitioner that she was considering a frivolousness finding during the course of the proceedings.").

Third, the preponderance of the evidence must support the Immigration Judge's determination that a material element of the asylum application was deliberately fabricated.[43] Matter of Y-L-, 24 I&N Dec. 151, 157 (BIA 2007). Certain factors that may be relevant to credibility determinations are, in and of themselves, insufficient to establish "materiality and deliberate fabrication." Matter of B-Y-, 25 I&N Dec. 240, 243 (BIA 2010). For example, an applicant's omission of facts or a finding that the applicant fabricated statements at an airport interview are insufficient to support a frivolous determination because the omitted or fabricated facts may or may not relate to the factual basis for the asylum application. B-Y-, 25 I&N Dec. at 243-44. Similarly, minor inconsistencies that are not material to the claim will be insufficient. B-Y-, 25 I&N Dec. at 244. Thus, an adverse credibility finding does not necessarily warrant a determination of frivolousness. Y-L-, 24 I&N Dec. at 156; see also Biao Yang v. Gonzales, 496 F.3d 268, 277-78 (2d Cir. 2007).

Fourth, the Immigration Judge must afford the applicant sufficient opportunity to account for any discrepancies or implausible aspects of the claim. Matter of Y-L, 24 I&N Dec. 151, 159 (BIA 2007) (citing 8 C.F.R. § 1208.20); see also Biao Yang v. Gonzales, 496 F.3d 268, 275-76 (2d Cir. 2007). Whether the applicant has had a full and fair opportunity to address inconsistencies is determined by the totality of the circumstances and includes such factors as whether the applicant had counsel at the merits hearing, the nature and extent of the inconsistencies, and the manner in which the asylum application was prepared. Matter of B-Y-, 25 I&N Dec. 240, 243 (BIA 2010).

An asylum application may be found frivolous at any time after it is "made" or "filed." Mei Juan Zheng v. Holder, 514 F.3d 178, 184 (2d Cir. 2012); Matter of X-M-C-, 25 I&N Dec. 322, 324 (BIA 2010). Thus, once a frivolous asylum application has been made and the required warnings have been given, withdrawal of the application by the applicant does not negate such a finding. Zheng, 514 F.3d at 184-85; X-M-C-, 25 I&N Dec. at 325. Furthermore, after a determination of frivolousness has been made, a separate evaluation of the merits of the application is not necessary. Zheng, 514 F.3d at 184-85; X-M-C-, 25 I&N Dec. at 324.

An Immigration Judge may have discretion not to make a frivolous finding, even if the statutory and regulatory elements necessary to support such a finding have been met. See Mei Juan Zheng v. Holder, 514 F.3d 178, 186-87 (2d Cir. 2012). In Mei Juan Zheng, the Second Circuit declined to follow an unpublished BIA opinion holding that an Immigration Judge must enter a frivolous finding if the statutory and regulatory requirements for doing so have been satisfied.

[43] An untimely application for asylum may be found frivolous if false statements in the application directly impacted the application's timeliness and the alien's eligibility for asylum. Matter of M-S-B-, 26 I&N Dec. 872 (BIA 2016) (distinguished from Luciana v. Att'y Gen. of the U.S., 502 F.3d 273 (3d Cir. 2007).

Zheng, 514 F.3d at 186. The Second Circuit rested its decision on the fact that the BIA decision was unpublished and thus "entitled deference [only] to the extent that it is persuasive." Zheng, 514 F.3d at 186. Because the BIA has not issued a precedential opinion on the matter, and it is unclear whether the Second Circuit would defer to a determination by the BIA that the Immigration Judge lacks discretion to make a frivolous finding once the statutory and regulatory requirements have been satisfied, there exists no binding case law on this issue.

The Immigration Judge must address the question of frivolousness separately from the credibility analysis and "include specific findings that the respondent deliberately fabricated material elements of his asylum claim." Matter of Y-L-, 24 I&N Dec. 151, 157 (BIA 2007). However, an Immigration Judge need not separate and repeat those aspects of a credibility determination that overlap with a frivolous determination. Matter of B-Y-, 25 I&N Dec. 236, 240 (BIA 2010). Although an Immigration Judge may incorporate by reference an adverse credibility finding and analysis, a frivolousness determination should separately address the applicant's explanations in the context of how they bear on the materiality and deliberateness requirements unique to such a finding. B-Y-, 25 I&N Dec. at 240. Ideally, a frivolousness determination will be addressed under a separate section from credibility. B-Y-, 25 I&N Dec. at 240. The Immigration Judge must "make specific findings based on cogent reasoning that material aspects of the claim were deliberately fabricated," and "[t]hese findings should not simply be left to be inferred or extrapolated from the strength of the overall adverse credibility determination." B-Y-, 25 I&N Dec. at 241.

B. Withholding of Removal

1. Burden of Proof

An applicant for withholding of removal bears the burden of establishing that his or her life or freedom would be threatened in the country from which the applicant seeks withholding of removal on account of one of the protected grounds. INA § 241(b)(3); 8 C.F.R. § 1240.8(d). A claim for withholding of removal is factually related to an asylum claim, but the applicant bears a heavier burden of proof to merit relief. Zhang v. INS, 386 F.3d 66, 71 (2d Cir. 2004), overruled on other grounds by Shi Liang Lin v. U.S. Dep't of Justice, 494 F.3d 296 (2d Cir. 2007). Where an application for asylum is denied because the applicant failed to demonstrate the "slight, though discernible, chance of persecution" required for asylum, the applicant necessarily fails to demonstrate the "clear probability of future persecution" required for withholding of removal and the "more likely than not" to be tortured standard required for CAT relief. Lecaj v. Holder, 616 F.3d 111, 119-20 (2d Cir. 2010) (quoting Kone v. Holder, 596 F.3d 141, 147 (2d Cir. 2010)); see also Zhang, 386 F.3d at 71; Ramsameachire v. Ashcroft, 357 F.3d 169, 178 (2d Cir. 2004). However, an applicant who establishes statutory eligibility for asylum, but is denied asylum in the exercise of discretion, remains eligible for withholding of removal. Osorio v. INS, 18 F.3d 1017, 1032 (2d Cir. 1994).

The applicant's credible testimony alone may be sufficient to sustain his burden of proof. 8 C.F.R. § 1208.16(b); see also Urgen v. Holder, 768 F.3d 269 (2d Cir. 2014) (finding that an Immigration Judge could not require an applicant to establish nationality through documentary evidence alone, and that this burden of proof could be met by providing credible testimony). Therefore, the Court must make a threshold determination as to the credibility of the applicant for

withholding of removal. INA § 241(b)(3)(C); see also INA §§ 208(b)(1)(B)(ii) and (iii).[44] The failure of an applicant to testify credibly, however, is not necessarily fatal to a withholding claim, which "depend[s] on objective evidence of future persecution" and does not have a subjective component. Paul v. Gonzales, 444 F.3d 148, 156 (2d Cir. 2006). Nonetheless, "where a withholding claim is based on the very fact, or set of facts, that the [Immigration Judge] found not to be credible," an adverse credibility ruling will preclude the withholding claim. Paul, 444 F.3d at 156.

In Matter of E-F-H-L-, 26 I&N Dec. 319 (BIA 2014), the BIA held that in the ordinary course of removal proceedings, an applicant for asylum or for withholding or deferral of removal is entitled to a hearing on the merits of those applications, including an opportunity to provide oral testimony and other evidence, without first having to establish prima facie eligibility for the requested relief. This holding by the BIA has been vacated by the Attorney General. See Matter of E-F-H-L-, 27 I&N Dec. 226 (A.G. 2018).

2. Statutory Eligibility

To qualify for withholding of removal, an applicant must establish a "clear probability" of persecution, meaning that it is "more likely than not" that he or she would be subject to persecution on account of a protected ground. INS v. Cardoza-Fonseca, 480 U.S. 421, 430 (1987) (citing INS v. Stevic, 467 U.S. 407 (1984)). A withholding applicant must "establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason" for the persecution he or she will face. Matter of C-T-L-, 25 I&N Dec. 341, 348 (BIA 2010).

Where the applicant establishes that he or she has suffered past persecution on the basis of one such statutory ground, it is presumed that the applicant's life or freedom will be threatened in the future, and the burden shifts to DHS to demonstrate by a preponderance of the evidence that (1) a fundamental change in circumstances has occurred in that country such that the applicant's life or freedom will not be threatened or (2) the applicant could safely relocate to another area in the proposed country of removal and that it would be reasonable to expect him or her to do so. 8 C.F.R. § 1208.16(b)(1); see also Makadji v. Gonzales, 470 F.3d 450, 458 (2d Cir. 2006); Serafimovich v. Ashcroft, 456 F.3d 81, 85 (2d Cir. 2006).

If the applicant did not suffer past persecution, or if the fear of future threat to life or freedom is unrelated to the past persecution that he or she suffered, the applicant must establish "that it is more likely than not" that he or she "would be persecuted" in the future on account of a protected ground.[45] 8 C.F.R. § 208.16(b)(2); Ivanishvili v. U.S. Dep't of Justice, 433 F.3d 332, 339 (2d Cir. 2006); see also Y.C. v. Holder, 741 F.3d 324, 334 (2d Cir. 2013) ("[Even assuming] that the Chinese government is aware of every anti-Communist or pro-democracy piece of commentary published…[an alien's] claim that the government would have discovered a single article published on the Internet more than eight years ago is pure speculation"). Such a showing

[44] The requirement of a separate credibility finding for withholding of removal applies to post-REAL ID cases only.
[45] There is no requirement that the feared future persecution be identical to the persecution suffered in the past. See Bah v. Mukasey, 529 F.3d 99, 115 (2d Cir. 2008) (holding that the BIA erred in finding FGM a "one-time" act and stating that "[n]othing in the regulation suggests that the future threats to life or freedom must come in the same *form* or be the same *act* as the past persecution") (emphasis in original).

does not require "evidence that [the applicant] would be singled out individually for such persecution" if the applicant can "prove[] the existence of 'a pattern or practice in his or her country of nationality. . . of persecution of a group of persons similarly situated to the applicant.'" Kyaw Zwar Tun v. INS, 445 F.3d 554, 564 (2d Cir. 2006) (quoting 8 C.F.R. § 208.13(b)(2)(iii)); see also Mufied v. Mukasey, 508 F.3d 88, 91 (2d Cir. 2007). To establish a pattern or practice of persecution against a particular group, a petitioner must demonstrate that the harm to that group is "so systemic or pervasive as to amount to a pattern or practice of persecution." Matter of A-M-, 23 I&N Dec. 737, 741 (BIA 2005); see also Mufied, 508 F.3d at 91.

Withholding of removal is a mandatory form of relief under the INA. Accordingly, once an applicant establishes entitlement to withholding, the applicant cannot, with certain exceptions,[46] be removed to the country in which he or she is likely to be persecuted. INA § 241(b)(3); see INS v. Aguirre-Aguirre, 526 U.S. 415, 419-20 (1999); see also Yang v. Gonzales, 478 F.3d 133, 141 (2d Cir. 2007) ("Once the [requisite] showing is made, withholding of removal is mandatory, whereas asylum may be refused to an eligible petitioner in the discretion of the Attorney General."). Additionally, there is no statutory time limit for bringing a withholding of removal claim. In the absence of a grant of asylum, withholding of removal pursuant to INA § 241(b)(3) may not be granted without first entering a removal order. See Matter of I-S- & C-S, 24 I&N Dec. 432, 434 (BIA 2008).

3. Bars to Withholding of Removal

An applicant is precluded from applying for relief under INA § 241(b)(3) if he or she participated in the persecution of others, if he or she was convicted of a particularly serious crime, if there are serious reasons to believe that he or she committed a serious nonpolitical crime outside of the United States, or if there are reasonable grounds to believe that he or she is a danger to the security of the United States. INA § 241(b)(3)(B)(i)-(iv). If the evidence indicates that one of the bars to withholding of removal applies, the burden shifts to the applicant to prove by a preponderance of the evidence that the bar is inapplicable. 8 C.F.R. § 1208.16(d)(2). Unlike applications for asylum, withholding applications have no filing deadline, and firm resettlement is not a bar to withholding of removal. See 8 C.F.R. 1208.4(a).

a. Particularly Serious Crime

The "particularly serious crime" bar to withholding of removal is not identical to the "particularly serious crime" bar in the asylum context. For withholding of removal, an alien has been *per se* convicted of a particularly serious crime if he or she has been convicted of one or more aggravated felonies that result in an aggregate prison sentence of at least five years."[47] INA § 241(b)(3)(B)(ii). In addition, the Attorney General may determine that an alien has been convicted of a particularly serious crime based upon a conviction that was not for an aggravated felony and did not result in an aggregate sentence of at least five years in prison. INA

[46] *See* 8 U.S.C. § 1231(b)(3)(B) (enumerating the statutory exceptions to mandatory withholding where the Attorney General determines that the alien has persecuted others, has committed certain serious crimes, or poses a danger to national security).

[47] For purposes of determining an "aggregate term of imprisonment" pursuant to INA § 241(b)(3)(B), concurrent sentences should not be added together, but rather should equal the length of the longest concurrent sentence. See Matter of Aldabesheh, 22 I&N Dec. 983, 988-89 (BIA 1999).

§ 241(b)(3)(B); see also Nethagani v. Mukasey, 532 F.3d 150, 156-57 (2d Cir. 2008). A person who has been convicted of particularly serious crimes shall be considered a "danger to the community of the United States" within the meaning of INA § 241(b)(3)(B)(ii). 8 C.F.R. § 1208.16(d)(2); see Matter of Q-T-M-T-, 21 I&N Dec. 639, 655-56 (BIA 1996); Matter of C-, 20 I&N Dec. 529 (BIA 1992); Ahmetovic v. INS, 62 F.3d 48, 53 (2d Cir. 1995).

Aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute "particularly serious crimes" within the meaning of INA § 241(b)(3)(B)(ii). Matter of Y-L-, 23 I&N Dec. 270, 274 (A.G. 2002), overruled in part on other grounds by Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004). This presumption may be rebutted "[o]nly under the most extenuating circumstances that are both extraordinary and compelling." Y-L-, 23 I&N Dec. at 274. Such a rebuttal must include at a minimum, evidence of all of the following: (1) a very small quantity of controlled substance; (2) a very modest amount of money paid for the drugs in the offending transaction; (3) merely peripheral involvement by the alien in the criminal activity, transaction, or conspiracy; (4) the absence of any violence or threat of violence, implicit or otherwise, associated with the offense; (5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles. Y-L-, 23 I&N Dec. at 276-77.

b. Serious Non-Political Crime

An applicant is statutorily ineligible for withholding of removal if "there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." INA § 241(b)(3)(B)(iii); see also 8 C.F.R. § 1208.16(d)(2). The "[s]erious reasons to believe" standard is the equivalent of probable cause. See Khouzam v. Ashcroft, 361 F.3d 161, 165-66 (2d Cir. 2004); see also Guo Qi Wang v. Holder, 583 F.3d 86, 90 (2d Cir. 2009) (equating "serious reasons for believing" to probable cause). Determining whether something is a "serious nonpolitical crime" involves, under the BIA's interpretation of the statute, considering whether "'the political aspect of the offense outweigh its common-law character. Wang, 583 F.3d at 90. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature.'" INS v. Aguirre-Aguirre, 526 U.S. 415, 429 (1999) (quoting Matter of McMullen, 19 I&N Dec. 90, 97-98 (BIA 1984)). Once the agency has determined that a statutory bar may apply, the applicant shall have the burden of proving by a preponderance of evidence that such grounds do not apply. See 8 C.F.R. §§ 1240.8(d), 1208.16(d)(2).

c. Danger to U.S. Security

A court may not grant withholding of removal to an alien if there are reasonable grounds to believe that the alien is a danger to the security of the United States. INA § 241(b)(3)(B)(iv); 8 C.F.R. § 1208.16(d)(2). The phrase "danger to the security of the United States" means "a risk to the Nation's defense, foreign relations, or economic interests." Matter of A-H-, 23 I&N Dec. 774, 788 (A.G. 2005). This statutory bar is applicable when "under the circumstances, information about an alien supports a reasonable belief that the alien poses a danger—that is, any nontrivial degree of risk—to the national security." A-H-, 23 I&N Dec. at 788. Any alien described in INA § 237(a)(4)(B), i.e. a terrorist as defined under subparagraph (B) or (F) of INA § 212(a)(3), is

considered an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States. INA § 241(b)(3)(B).

d. Persecutors

An applicant is ineligible for withholding of removal if he or she has ordered, incited, assisted, or otherwise participated in the persecution of any person on account of the person's race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3)(B)(i). The Second Circuit has identified four factors relevant to determining when this persecutor bar applies: (1) "the alien must have been involved in acts of persecution"; (2) a "nexus must be shown between the persecution and the victim's race, religion, nationality, membership in a particular social group, or political opinion"; (3) if the alien did not "incite, order, or actively carry out" the persecution, his or her conduct "must have assisted the persecution"; and (4) the alien must have had "sufficient knowledge that . . . [his or] her actions may assist in persecution to make those actions culpable." Suzhen Meng v. Holder, 770 F.3d 1071, 1074 (2d Cir. 2014) (citing Balachova v. Mukasey, 547 F.3d 374, 384-85 (2d Cir.2008) (internal quotation marks omitted)).[48] Where evidence indicates that an alien assisted in persecution, the alien seeking relief from removal bears "the burden of proving by a preponderance of the evidence" that he or she "did not so act." See 8 C.F.R. §§ 1240.8(d), 1208.16(d)(2); see also Zhang Jian Xie v. INS, 434 F.3d 136, 139 (2d Cir. 2006).

C. Withholding/Deferral of Removal under CAT[49]

The Convention Against Torture and its implementing regulations provide that no person shall be removed to a country where it is "more likely than not" that such person will be subject to torture. See 8 C.F.R. §§ 1208.16, 1208.17, 1208.18. "Torture" is "an extreme form of cruel and inhuman treatment,"[50] defined, in part, as the intentional infliction of severe pain or suffering by, or at the instigation of, or with the consent or acquiescence of a public official. 8 C.F.R. §§ 1208.18(a)(1)-(2); see Matter of J-E-, 23 I&N Dec. 291, 303 (BIA 2002); Pierre v. Gonzales, 502 F.3d 109, 115 (2d Cir. 2007). The definition of torture does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions, unless such sanctions defeat the object and purpose of the CAT. 8 C.F.R. § 1208.18(a)(3); see Pierre, 502 F.3d at 121 ("The failure

[48] *See Matter of J.M. Alvarado*, 27 I&N Dec. 27 (BIA 2017) ("[w]hen determining whether an alien has assisted or participated in persecution under section 241(b)(3)(B)(i) of the Act, the proper focus is not on the motive of the alien, but rather on the intent of the perpetrator of the underlying persecution").

[49] In Ortiz-Franco v. Holder, 782 F.3d 81, 86 (2d Cir. 2015), the Second Circuit held that pursuant to 8 U.S.C. §§ 1252(a)(2)(C), (D), its jurisdiction is limited to questions of law or constitutional claims in cases where a petitioner, who is removable because he committed a "covered" criminal offense, seeks deferral of removal under the Convention Against Torture. Section 1252(a)(2)(C) provides, "Notwithstanding any other provision of law [,] . . . no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a [covered] criminal offense." 8 U.S.C. § 1252(a)(2)(C). However, section 1252(a)(2)(D) provides an exception to this limited review where a petitioner raises constitutional claims or questions of law. 8 U.S.C. § 1252(a)(2)(D).

[50] The Second Circuit and BIA have yet to determine whether forced sterilization amounts to torture. Shu Ling Ni v. INS, 439 F.3d 177, 179-80 (2d Cir. 2006); Xue Hong Yang v. U.S. Dep't of Justice, 426 F.3d 520, 522-23 (2d Cir. 2005). In one instance, the Second Circuit held that an arrest and beating, that did not require medical attention, does not constitute severe pain or suffering under 8 CFR § 1208.18(a)(1) warranting CAT relief. See Ay v. Holder, 743 F.3d 317, 322 (2d Cir. 2014).

to maintain standards of diet, hygiene, and living space in prison does not constitute torture under the CAT unless the deficits are sufficiently extreme and are inflicted intentionally rather than as a result of poverty, neglect, or incompetence."). For an act to constitute torture, it must be directed against a person. Jo v. Gonzales, 458 F.3d 104, 109-10 (2d Cir. 2006) (finding the definition of "torture" does not encompass theft, destruction, expropriation, or other deprivation of property); see also 8 C.F.R. § 1208.18(a)(6).

Acquiescence of a public official requires that the official have awareness of or remain "willfully blind" to the activity constituting torture prior to its commission, and thereafter breach his or her legal responsibility to intervene to prevent such activity. 8 C.F.R. § 1208.18(a)(7); Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004). However, the fact that "some" officials take action to prevent torture is not enough to preclude a finding of government acquiescence "[w]here a government contains officials that would be complicit in torture, and that government, on the whole, is admittedly incapable of actually preventing that torture." De La Rosa v. Holder, 598 F.3d 103, 110 (2d Cir. 2010).

The applicant for CAT protection bears the burden of proof. 8 C.F.R. § 1208.16(c)(2). As with asylum adjudications, the applicant's testimony, if credible, may be sufficient to sustain the burden of proof without corroboration. 8 C.F.R. § 1208.16(c)(2). An adverse credibility finding in the context of an applicant's asylum claim does not necessarily discredit an applicant's CAT claim because a CAT claim may be established through objective evidence alone. See Ramsameachire v. Ashcroft, 357 F.3d 169, 184-85 (2d Cir. 2004). However, if the applicant's testimony is the primary basis for the CAT claim and it is found not to be credible, that adverse credibility finding may provide a sufficient basis for denial of CAT relief. See Xiao Ji Chen v. U.S. Dep't of Justice, 434 F.3d 144, 163 (2d Cir. 2006); Paul v. Gonzales, 444 F.3d 148, 157 (2d Cir. 2006); Xue Hong Yang v. U.S. Dep't of Justice, 426 F.3d 520, 523 (2d Cir. 2005).

In assessing whether an applicant has satisfied his or her burden of proof, the Court must consider all evidence relevant to the possibility of future torture, including evidence that the applicant has suffered torture in the past;[51] evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured; evidence of gross, flagrant or mass violations of human rights within the country of removal; and other relevant information on country conditions. 8 C.F.R. § 1208.16(c)(3); see also Ramsameachire v. Ashcroft, 357 F.3d 169, 184 (2d Cir. 2006); Doe v. Sessions, 886 F.3d 203 (2d Cir. 2018). To meet his or her burden of proof, an applicant for CAT relief must establish that someone in his or her particular alleged circumstances is more likely than not to be tortured in the country designated for removal. Mu-Xing Wang v. Ashcroft, 320 F.3d 130, 144 (2d Cir. 2003). Eligibility for CAT relief cannot be established by stringing together a series of suppositions to show that torture is more likely than not to occur unless the evidence shows that each step in the hypothetical chain of events is more likely than not to happen. Matter of J-F-F-, 23 I&N Dec. 912, 917-18 (A.G. 2006); see also Savchuck v. Mukasey, 518 F.3d 119, 123-24 (2d Cir. 2008). Where an application for asylum is denied because the applicant failed to demonstrate the "slight, though discernible, chance of

[51] Past torture does not give rise to a presumption of future torture. See Suzhen Meng v. Holder, 770 F.3d 1071, 1076-77 (2d Cir. 2014) (affirming the IJ's determination denying CAT where a person was released for more than 10 months after torture without any other incidents, given her passport, and allowed to travel, and her husband and children remained in China unharmed).

persecution" required for asylum, the applicant necessarily fails to meet the "more likely than not to be tortured" standard for CAT relief. Lecaj v. Holder, 616 F.3d 111, 119 (2d Cir. 2010).

An applicant who establishes eligibility for CAT protection shall be granted withholding of removal unless he or she is subject to mandatory denial of that relief, in which the applicant shall be granted deferral of removal. 8 C.F.R. §§ 1208.16(c)(4), 1208.17(a). An applicant is subject to mandatory denial of withholding of removal under CAT if the applicant participated in the persecution of others, was convicted of a particularly serious crime, committed a serious nonpolitical crime outside of the United States, or if there are reasonable grounds to believe the applicant is a danger to the security of the United States.[52] 8 C.F.R. § 1208.16(d)(2); see also INA § 241(b)(3)(B). Conversely, deferral does not consider any of the bars to withholding under INA § 241(b)(3)(B). See 8 C.F.R. § 1208.17(a); Negusie v. Holder, 555 U.S. 511 (2009) (finding the "persecutor bar" does not disqualify an alien from receiving a temporary deferral of removal under CAT); Matter of G-A-, 23 I&N Dec. 366, 368 (BIA 2002) ("[a]n alien's criminal convictions in the United States, however serious, are not a bar to deferral of removal under [CAT]"). There is no statutory time limit for filing a claim under CAT. A grant of protection under CAT must be accompanied by an order of removal. Chupina v. Holder, 570 F.3d 99, 104-105 (2d Cir. 2009), distinguished on other grounds by Cano-Saldarriaga v. Holder, 729 F.3d 25 (1st Cir. 2013).

Pursuant to 8 C.F.R. § 1208.17(b), after granting deferral of removal pursuant to 8 C.F.R. § 1208.17(a), an Immigration Judge shall inform the alien of certain mandatory advisals:

(1) Respondent's removal to the country where he or she is more likely than not to be tortured shall be deferred until such time as the deferral is terminated under this section. 8 C.F.R. § 1208.17(b)(1).
(2) Deferral of removal:
    (i) Does not confer upon the alien any lawful or permanent immigration status in the United States;
    (ii) Will not necessarily result in the alien being released from the custody of the Service if the alien is subject to such custody;
    (iii) Is effective only until terminated; and
    (iv) Is subject to review and termination if the Immigration Judge determines that it is not likely that the alien would be tortured in the country to which removal has been deferred, or if the alien requests that deferral be terminated. 8 C.F.R. § 1208.17(b)(1)(i)-(iv).
(3) Removal has been deferred only to the country in which it has been determined that the alien is likely to be tortured, and that the alien may be removed at any time to another country where he or she is not likely to be tortured. 8 C.F.R. § 1208.17(b)(2).

[52] See relevant language under ASYLUM and WITHHOLDING for boilerplate on any of these bars to relief.