ASYLUM, WITHHOLDING and the CONVENTION AGAINST TORTURE

I. THE CONTEXT

The heart of United States asylum law is the protection of refugees fleeing persecution. This court has recognized that independent judicial review is critical in this "area where administrative decisions can mean the difference between freedom and oppression and, quite possibly, life and death." *Rodriguez-Roman v. INS*, 98 F.3d 416, 432 (9th Cir. 1996) (Kozinski, J., concurring).

Under 8 U.S.C. § 1158(b)(1), the Attorney General may grant asylum to any applicant who qualifies as a "refugee." The Immigration and Nationality Act defines a "refugee" as

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

INS v. Cardoza-Fonseca, 480 U.S. 421, 428 (1987) (quoting 8 U.S.C. § 1101(a)(42)(A)); *see also* 8 C.F.R. § 1208.13. An applicant may apply for asylum if she is "physically present in the United States" or at the border. 8 U.S.C. § 1158(a)(1). Individuals seeking protection from outside the United States may apply for refugee status under 8 U.S.C. § 1157.

"The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution." 8 C.F.R. § 1208.13(b). More specifically,

> the applicant can show past persecution on account of a protected ground. Once past persecution is demonstrated, then

> fear of future persecution is presumed, and the burden shifts to the government to show, by a preponderance of the evidence, that there has been a fundamental change in circumstances such that the applicant no longer has a well founded fear of persecution, or [t]he applicant could avoid future persecution by relocating to another part of the applicant's country. An applicant may also qualify for asylum by actually showing a well founded fear of future persecution, again on account of a protected ground.

Deloso v. Ashcroft, 378 F.3d 907, 913 (9th Cir. 2004) (internal citations and quotation marks omitted).

In enacting the Refugee Act of 1980, "one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *Cardoza-Fonseca*, 480 U.S. at 436–37. When interpreting the definition of "refugee," the courts are guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, U.N. Doc. HCR/IP/4/Eng./REV.2 (ed. 1992) (1979) ("UNHCR Handbook"). *Id.* at 438–39; *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (recognizing the UNHCR Handbook as "a useful interpretative aid" that is "not binding on the Attorney General, the BIA, or United States courts").

II. ASYLUM

A. Defining Persecution

The term "persecution" is not defined by the Immigration and Nationality Act. "Our caselaw characterizes persecution as an extreme concept, marked by the infliction of suffering or harm . . . in a way regarded as offensive." *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc) (internal quotation marks and citations omitted). Persecution covers a range of acts and harms, and "[t]he determination that actions rise to the level of persecution is very fact-dependent." *Cordon-Garcia v. INS*, 204 F.3d 985, 991 (9th Cir. 2000); *see also* Forms of Persecution, below. Minor

disadvantages or trivial inconveniences do not rise to the level of persecution. *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969).

1. Cumulative Effect of Harms

The cumulative effect of harms and abuses that might not individually rise to the level of persecution, may support an asylum claim. *See Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (finding persecution where Ukranian Jew witnessed violent attacks, and suffered extortion, harassment, and threats by anti-Semitic ultra-nationalists). The court "look[s] at the totality of the circumstances in deciding whether a finding of persecution is compelled." *Guo v. Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004) (finding persecution where Chinese Christian was arrested, detained twice, physically abused, and forced to renounce religion).

See also Mashiri v. Ashcroft, No. 02-71841, 2004 WL 2103416, *7 (9th Cir. Sept. 22, 2004) (death threats, violence against family, vandalism, economic harm and emotional trauma suffered by ethnic-Afghan family in Germany); *Narayan v. Ashcroft*, No. 03-70199, 2004 WL 2062555, *1 (9th Cir. Sept. 16, 2004) (Indo-Fijian was attacked, "bashed," denied medical treatment and police assistance, and his home was burglarized); *Faruk v. Ashcroft*, 378 F.3d 940, 942 (9th Cir. 2004) (mixed-race, mixed-religion Fijian couple was beaten, attacked, verbally assaulted, assailed with rocks, repeatedly threatened, and denied marriage certificate); *Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) (cumulative effect of severe harassment, threats, violence and discrimination against Israeli Arab and his family amounted to persecution); *Gui v. INS*, 280 F.3d 1217, 1229 (9th Cir. 2002) (holding that harassment, wiretapping, staged car crashes, detention, and interrogation of anti-communist Romanian constituted persecution); *Popova v. INS*, 273 F.3d 1251, 1258–58 (9th Cir. 2001) (anti-communist Bulgarian was harassed, fired, interrogated, threatened, assaulted and arrested); *Surita v. INS*, 95 F.3d 814, 819–21 (9th Cir. 1996) (Indo-Fijian was robbed multiple times, she was compelled to quit her job, and soldiers looted her family's home); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) (Indo-Fijian family was harassed, assaulted and threatened).

2. No Subjective Intent to Harm Required

A subjective intent to harm or punish an applicant is not required for a finding of persecution. *See Pitcherskaia v. INS*, 118 F.3d 641, 646–48 (9th Cir. 1997) (holding that Russian government's attempt to "cure" lesbian applicant established persecution). Moreover, harm can constitute persecution even if the persecutor had an "entirely rational and strategic purpose behind it." *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990).

3. Forms of Persecution

a. Physical Violence

Various forms of physical violence, including rape, torture, assault, and beatings, amount to persecution. *See Chand v. INS*, 222 F.3d 1066, 1073–74 (9th Cir. 2000) ("Physical harm has consistently been treated as persecution."). An applicant's failure to "seek medical treatment for the [injury] suffered is hardly the touchstone of whether [the harm] amounted to persecution." *Lopez v. Ashcroft*, 366 F.3d 799, 803 (9th Cir. 2004) (holding that Guatemalan applicant suffered past persecution when he was tied up by guerrillas and left to die in a burning building).

See also Garcia-Martinez v. Ashcroft, 371 F.3d 1066, 1072 (9th Cir. 2004) (gang raped by Guatemalan soldiers); *Hoque v. Ashcroft*, 367 F.3d 1190, 1197–98 (9th Cir. 2004) (Bangladeshi kidnaped, beaten and stabbed); *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (raped by Ethiopian soldiers); *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc) (Chinese applicant subjected to physically invasive and emotionally traumatic forced pregnancy examination); *Rios v. Ashcroft*, 287 F.3d 895, 900 (9th Cir. 2002) (kidnaped and wounded by Guatemalan guerrillas, husband and brother killed); *Agbuya v. INS*, 241 F.3d 1224, 1227–28 (9th Cir. 2001) (kidnaped by NPA, falsely imprisoned, hit, threatened with a gun); *Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000) (Indian Sikh arrested and tortured, including electric shocks); *Gafoor v. INS*, 231 F.3d 645, 650 (9th Cir. 2000) (Indo-Fijian assaulted in front of family, held captive for a week, beaten unconscious); *Salaam v. INS*, 229 F.3d 1234, 1240 (9th Cir. 2000) (per curiam) (politically active Nigerian arrested, tortured and scarred); *Shoafera v. INS*, 228 F.3d 1070, 1074 (9th Cir. 2000) (ethnic Amhara Ethiopian beaten and raped at gunpoint); *Bandari v. INS*,

227 F.3d 1160, 1168 (9th Cir. 2000) (Iranian beaten repeatedly, falsely accused of rape); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097 (9th Cir. 2000) (Mexican homosexual raped and sexually assaulted by police); *Chand v. INS*, 222 F.3d 1066, 1073–74 (9th Cir. 2000) (Indo-Fijian repeatedly attacked and robbed, forced to leave home); *Maini v. INS*, 212 F.3d 1167, 1174 (9th Cir. 2000) (inter-faith Indian family subjected to physical attacks, death threats, and harassment at home, school and work); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1161–62 (9th Cir. 1999) (repeated beatings and severe verbal harassment in the Guatemalan military); *Prasad v. INS*, 101 F.3d 614, 617 (9th Cir. 1996) (Indo-Fijian jailed, beaten, suffered sadistic and degrading treatment); *Lopez-Galarza v. INS*, 99 F.3d 954, 960 (9th Cir. 1996) (raped by Sandinista soldiers, abused, deprived of food, subjected to forced labor); *Singh v. Ilchert*, 69 F.3d 375, 377–79 (9th Cir. 1995) (per curiam) (Indian Sikh arrested, detained and tortured); *Singh v. Moschorak*, 53 F.3d 1031, 1032–34 (9th Cir. 1995) (Indian Sikh arrested and tortured).

Cf. Hoxha v. Ashcroft, 319 F.3d 1179, 1182 (9th Cir. 2003) (harassment, threats, and one beating unconnected with any particular threat, did not compel finding that ethnic Albanian suffered past persecution in Kosovo); *Prasad v. INS*, 47 F.3d 336, 339–40 (9th Cir. 1995) (minor abuse of Indo-Fijian during 4–6 hour detention did not compel finding of past persecution).

b. Threats

Threats of serious harm, particularly when combined with confrontation or other mistreatment, may constitute persecution. *See*, *e.g.*, *Mashiri v. Ashcroft*, No. 02-71841, 2004 WL 2103416, *7 (9th Cir. Sept. 22, 2004) (death threats, violence against family, vandalism, economic harm and emotional trauma suffered by ethnic Afghan family in Germany); *Ndom v. Ashcroft*, No. 02-74419, 2004 WL 2021275, *5 (9th Cir. Sept. 10, 2004) (Senegalese native subjected to severe death threats coupled with two detentions); *Deloso v. Ashcroft*, 378 F.3d 907, 914 (9th Cir. 2004) (Filipino applicant attacked, death threats, followed, and store ransacked); *Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004) (threats, combined with anguish suffered as a result of torture and killing of fellow Burmese Christian preacher); *Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) (severe

harassment, threats, violence and discrimination against Israeli Arab and family amounted to persecution); *Ruano v. Ashcroft*, 301 F.3d 1155, 1160–61 (9th Cir. 2002) (Guatemalan who faced multiple death threats at home and business, "closely confronted" and actively chased); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074–75 (multiple death threats, harm to family, and murders of his counterparts by Shining Path guerrillas constituted past persecution), *as amended by* 290 F.3d 964 (9th Cir. 2002); *Chouchkov v. INS*, 220 F.3d 1077, 1083–84 (9th Cir. 2000) (Russian who suffered harassment, including threats, attacks on family, intimidation, and thefts); *Shah v. INS*, 220 F.3d 1062, 1072 (9th Cir. 2000) (applicant's politically active husband was killed, she and family repeatedly threatened in India); *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000) ("we have consistently held that death threats alone can constitute persecution;" Salvadoran threatened, shot at, family members killed, mother beaten); *Cordon-Garcia v. INS*, 204 F.3d 985, 991 (9th Cir. 2000) ("The determination that actions rise to the level of persecution is very fact-dependent, . . . though threats of violence and death are enough."); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1246 (9th Cir. 1999) (multiple death threats faced by Colombian prosecutor constituted past persecution); *Leiva-Montalvo v. INS*, 173 F.3d 749, 752 (9th Cir. 1999) (Salvadoran harassed, detained and threatened by former guerrillas); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir. 1999) (two death threats from Salvadoran guerrillas, cousins and their families killed); *Garrovillas v. INS*, 156 F.3d 1010, 1016–17 (9th Cir. 1998) (if credible, three death threat letters received by former Filipino military agent would appear to constitute past persecution); *Gonzales-Neyra v. INS*, 122 F.3d 1293, 1295–96 (9th Cir. 1997), *as amended by* 133 F.3d 726 (9th Cir. 1998) (suggesting that threats to life and business based on opposition to Shining Path constituted past persecution); *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997) (breaking into Indian Sikh's home, beating his father, and making threats to the applicant would constitute persecution); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (death threats by Sandinistas, including marking her house, taking her ration card, and harassment of family constitute past persecution).

Cf. Mendez-Gutierrez v. Ashcroft, 340 F.3d 865, 870 n.6 (9th Cir. 2003) ("unspecified threats" received by Mexican national not "sufficiently menacing to constitute past persecution"); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) (unfulfilled threats received by ethnic Albanian

"constitute harassment rather than persecution"); *Lim v. INS*, 224 F.3d 929, 936–37 (9th Cir. 2000) (mail and telephone threats received by former Filipino intelligence officer, without more, do not compel a finding of past persecution); *Quintanilla-Ticas v. INS*, 783 F.2d 955, 957 (9th Cir. 1986) (no well-founded fear based on anonymous threat received by Salvadoran military musician).

c. Detention

Detention and confinement may constitute persecution. *See Ndom v. Ashcroft*, No. 02-74419, 2004 WL 2021275, *5 (9th Cir. Sept. 10, 2004) (Senegalese applicant suffered two detentions for a total of 25 days, under harsh conditions, along with death threats); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1136 (9th Cir. 2004) (imprisonment in over-crowded Congolese jail cell with harsh, unsanitary and life-threatening conditions established past persecution); *see also Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997) (suggesting that forced institutionalization of Russian lesbian could amount to persecution).

Cf. Abebe v. Ashcroft, 379 F.3d 755, 758 (9th Cir. 2004) (detention for a few days, nine years before leaving Ethiopia, did not rise to the level of persecution); *Khup v. Ashcroft*, 376 F.3d 898, 903–04 (9th Cir. 2004) (evidence did not compel finding that one day of forced porterage suffered by Burmese Christian preacher amounted to persecution); *Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) (five to six day detention of Iraqi, without abuse or threats, did not amount to persecution), *amended by* 355 F.3d 1140 (9th Cir. 2004); *Khourassany v. INS*, 208 F.3d 1096, 1100-01 (9th Cir. 2000) (short detentions of Palestinian Israeli did not constitute persecution); *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc) (brief detention and searches of Iranian woman did not constitute persecution); *Mendez-Efrain v. INS*, 813 F.2d 279, 283 (9th Cir. 1987) (four-day detention of Salvadoran, without more, did not rise to the level of persecution).

d. Mental, Emotional, and Psychological Harm

Physical harm is not required for a finding of persecution. *See Kovac v. INS*, 407 F.2d 102, 105–07 (9th Cir. 1969) (holding that persecution is not

limited to physical suffering). "Persecution may be emotional or psychological, as well as physical." *Mashiri v. Ashcroft*, No. 02-71841, 2004 WL 2103416, *6 (9th Cir. Sept. 22, 2004) (discussing emotional trauma suffered by ethnic Afghan family based on anti-foreigner violence in Germany); *see also Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004) (threats, combined with anguish suffered as a result of torture and killing of fellow Burmese preacher); *Kahssai v. INS*, 16 F.3d 323, 329 (9th Cir. 1994) (per curiam) (Reinhardt, J., concurring) (stating in case of Ethiopian Jew that "when a young girl loses her father, mother and brother–sees her family effectively destroyed–she plainly suffers severe emotional and developmental injury.").

This court has stated that a finding of persecution on account of social ostracism is inconsistent with our precedent. *See Abebe v. Ashcroft*, 379 F.3d 755, 759 (9th Cir. 2004) (citing *Kazlauskas v. INS*, 46 F.3d 902, 907 (9th Cir. 1995) (holding that harassment and ostracism of Lithuanian was not sufficiently atrocious to support a humanitarian grant of asylum)) .

e. Substantial Economic Deprivation

Substantial economic deprivation, which constitutes a threat to life or freedom, can constitute persecution. *See Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) (severe harassment, threats, violence and discrimination made it virtually impossible for Israeli Arab to earn a living). The absolute inability to support one's family is not required. *Id.* In *El Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004), *as amended by* 2004 WL 1879255 (9th Cir. Aug. 24, 2004), the court granted withholding of removal to stateless Palestinians born in Kuwait based on the extreme state-sponsored economic discrimination that they would face.

See also Tawadrus v. Ashcroft, 364 F.3d 1099, 1106 (9th Cir. 2004) (holding that Egyptian Coptic Christian had a "potentially viable" asylum claim based on government-imposed economic sanctions); *Surita v. INS*, 95 F.3d 814, 819–21 (1996) (Indo-Fijian suffered multiple robberies, house was looted by soldiers, threatened, compelled to quit her job); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (threats by Sandinistas, violence against family, and seizure of family land, ration card, and ability to buy business inventory);

Desir v. Ilchert, 840 F.2d 723, 727–29 (9th Cir. 1988) (considering impact of extortion by government security forces on Haitian fisherman's ability to earn livelihood); *Samimi v. INS*, 714 F.2d 992, 995 (9th Cir. 1983) (holding that seizure of land and livelihood could contribute to a finding of persecution)*; Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969) (persecution may encompass "a deliberate imposition of substantial economic disadvantage").

However, "mere economic disadvantage alone does not rise to the level of persecution." *Gormley v. Ashcroft*, 364 F.3d 1172, 1178 (9th Cir. 2004) (holding that loss of employment pursuant to South Africa's affirmative action plan did not amount to persecution based on the deliberate infliction of substantial economic disadvantage); *Nagoulko v. INS*, 333 F.3d 1012, 1016 (9th Cir. 2003) (employment discrimination faced by Ukranian Christian did not rise to level of persecution); *Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000) (forced closing of Palestinian Israeli's restaurant, when he continued to operate other businesses, did not constitute persecution); *Ubau-Marenco v. INS*, 67 F.3d 750, 755 (9th Cir. 1995) (noting that confiscation of Nicaraguan family business by Sandinistas may not be enough to support finding of economic persecution), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1264 (9th Cir. 1985) (denial of food discounts and special work permit by Sandinistas did not amount to persecution); *Raass v. INS*, 692 F.2d 596 (9th Cir. 1982) (asylum claim filed by Tonga Islanders required more than "generalized economic disadvantage").

f. Discrimination and Harassment

Severe and pervasive discriminatory measures can amount to persecution. *See Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (noting that the BIA has held that severe and pervasive discrimination can constitute persecution in "extraordinary cases"); *see also El Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004), *as amended by* 2004 WL 1879255 (9th Cir. Aug. 24, 2004) (granting withholding of removal based on the extreme state-sponsored economic discrimination that stateless Palestinians born in Kuwait would face); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1161–62 (9th Cir. 1999) (rejecting BIA's determination that Guatemalan soldier suffered

discrimination, rather than persecution, where he was subjected to repeated beatings, severe verbal harassment, and race-based insults).

Discrimination, in combination with other harms, may be sufficient to establish persecution. *See, e.g.*, *Kotasz v. INS*, 31 F.3d 847, 853 (9th Cir. 1994) ("Proof that the government or other persecutor has discriminated against a group to which the petitioner belongs is, accordingly, *always* relevant to an asylum claim."); *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (discrimination, harassment and violence against Ukranian Jew can constitute persecution); *Vallecillo-Castillo v. INS*, 121 F.3d 1237, 1239 (9th Cir. 1996) (finding persecution where Nicaraguan school teacher was branded as a traitor, harassed, threatened, home vandalized and relative imprisoned for refusing to teach Sandinista doctrine); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) (discrimination, harassment and violence against Indo-Fijian family can constitute persecution).

However, persecution "does not include mere discrimination, as offensive as it may be." *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc) (brief detention and searches of Iranian women accused of violating dress and conduct rules did not constitute persecution); *see also Padash v. INS*, 358 F.3d 1161, 1166 (9th Cir. 2004) (discrimination by isolated individuals against Indian Muslims did not amount to past persecution); *Halaim v. INS*, 358 F.3d 1128, 1132 (9th Cir. 2004) (holding that discrimination against Ukranian sisters on account of Pentecostal Christian religion did not compel a finding that they suffered past persecution); *Nagoulko v. INS*, 333 F.3d 1012, 1016–17 (9th Cir. 2003) (record did not compel finding that Ukranian Pentecostal Christian who was "teased, bothered, discriminated against and harassed" suffered from past persecution); *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1201–02 (9th Cir. 2000) (harassment of ethnic Armenian in Russia, inability to get a job, and violence against friend did not rise to level of past persecution, but did support her well-founded fear); *Singh v. INS*, 134 F.3d 962, 969 (9th Cir. 1998) (repeated vandalism of Indo-Fijian's property, with no physical injury or threat of injury, not persecution).

B. Source or Agent of Persecution

In order to qualify for asylum, the source of the persecution must be the government, a quasi-official group, or persons or groups that the government is unwilling or unable to control. *See Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000). The fact that financial considerations may account for the state's inability to stop the persecution is not relevant. *Id.* at 1198. When the government is responsible for the persecution, there is no need to inquire whether petitioner sought help from the police. *See Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004) (Israeli Arab persecuted by Israeli Marines).

Affirmative state action is not necessary to establish a well-founded fear of persecution if the government is unable or unwilling to control the agents of persecution. *Siong v. INS*, 376 F.3d 1030, 1039 (9th Cir. 2004). In cases of non-governmental persecution, "we consider whether an applicant reported the incidents to police, because in such cases a report of this nature may show governmental inability to control the actors." *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004).

1. Harm Inflicted by Relatives

"There is no exception to the asylum statute for violence from family members; if the government is unable or unwilling to control persecution, it matters not who inflicts it." *Faruk v. Ashcroft*, 378 F.3d 940, 943 (9th Cir. 2004) (holding that mixed-race, mixed-religion couple in Fiji suffered persecution at the hand of family members and others).

2. Cases Discussing Source or Agent of Persecution

Mashiri v. Ashcroft, No. 02-71841, 2004 WL 2103416, *7 (9th Cir. Sept. 22, 2004) (ethnic Afghan family in Germany attacked by anti-foreigner mobs); *Deloso v. Ashcroft*, 378 F.3d 907, 914 (9th Cir. 2004) (attacks by a Filipino Communist party henchman); *Gormley v. Ashcroft*, 364 F.3d 1172, 1177 (9th Cir. 2004) ("Random, isolated criminal acts perpetrated by anonymous thieves do not establish persecution."); *Jahed v. INS*, 356 F.3d 991, 998–99 (9th Cir. 2004) (extortion by member of the Iranian Revolutionary Guard); *Rodas-Mendoza v. INS*, 246 F.3d 1237, 1239–40 (9th Cir. 2001) (fear of violence from cousin in El Salvador not sufficient);

Shoafera v. INS, 228 F.3d 1070, 1074 (9th Cir. 2000) (rape by Ethiopian government official where government never prosecuted the perpetrator); *Ladha v. INS*, 215 F.3d 889, 902 (9th Cir. 2000) (Pakistani government unable to control violence by non-state actors); *Mgoian v. INS*, 184 F.3d 1029, 1036–37 (9th Cir. 1999) (state action not required to establish persecution of Kurdish-Moslem family in Armenia); *Andriasian v. INS*, 180 F.3d 1033, 1042–43 (9th Cir. 1999) (Azerbaijani government did not protect ethnic Armenian); *Borja v. INS*, 175 F.3d 732, 736 n.1 (9th Cir. 1999) (en banc) (non-state actors in the Philippines); *Korablina v. INS*, 158 F.3d 1038, 1045 (9th Cir. 1998) (ultra-nationalist anti-Semitic Ukranian group); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) (government encouraged discrimination, harassment and violence against Indo-Fijians); *Montoya-Ulloa v. INS*, 79 F.3d 930, 931 (9th Cir. 1996) (persecution of Nicaraguan by a government-sponsored group); *Gomez-Saballos v. INS*, 79 F.3d 912, 916–17 (9th Cir. 1996) (fear of former Nicaraguan National Guard members); *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (denying petition because harm feared by Egyptian Coptic Christian was not "condoned by the state nor the prevailing social norm"); *Desir v. Ilchert*, 840 F.2d 723, 727–28 (9th Cir. 1988) (persecution by quasi-official Haitian security force); *Arteaga v. INS*, 836 F.2d 1227, 1231 (9th Cir. 1988) (Salvadoran guerrilla movement); *Lazo-Majano v. INS*, 813 F.2d 1432, 1434–35 (9th Cir. 1987) (persecution by Salvadoran army sergeant), *overruled in part on judicial notice grounds by Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc).

C. Past Persecution

An applicant may qualify as a refugee in two ways:

> First, the applicant can show past persecution on account of a protected ground. Once past persecution is demonstrated, then fear of future persecution is presumed, and the burden shifts to the government to show, by a preponderance of the evidence, that there has been a fundamental change in circumstances such that the applicant no longer has a well founded fear of persecution, or [t]he applicant could avoid future persecution by relocating to another part of the applicant's country. An

> applicant may also qualify for asylum by actually showing a well founded fear of future persecution, again on account of a protected ground.

Deloso v. Ashcroft, 378 F.3d 907, 913 (9th Cir. 2004) (internal citations and quotation marks omitted); *see also Ratnam v. INS*, 154 F.3d 990, 994 (9th Cir. 1998) ("Either past persecution or a well-founded fear of future persecution provides eligibility for a discretionary grant of asylum."); 8 C.F.R. § 1208.13(b).

Once an applicant establishes past persecution, he is a refugee eligible for a grant of asylum, and the likelihood of future persecution is a relevant factor to consider in the exercise of discretion. *See Rodriguez-Matamoros v. INS*, 86 F.3d 158, 161 (9th Cir. 1996); *Kazlauskas v. INS*, 46 F.3d 902, 905 (9th Cir. 1995); *see also* 8 C.F.R. § 1208.13(b)(1)(i)(A). The IJ also shall consider whether the applicant could avoid persecution by relocating to another part of his or her country. 8 C.F.R. § 1208.13(b)(1)(i)(B).

In order to establish "past persecution, an applicant must show: (1) an incident, or incidents, that rise to the level of persecution; (2) that is 'on account of' one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either 'unable or unwilling' to control." *Navas v. INS*, 217 F.3d 646, 655–56 (9th Cir. 2000).

"[P]roof of particularized persecution is not required to establish past persecution." *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211 (9th Cir. 2004) (Serb petitioners suffered past persecution because their town was specifically targeted for bombing, invasion, occupation and ethnic cleansing by Croat military). In other words, "even in situations of widespread civil strife, it is irrelevant whether one person, twenty persons, or a thousand persons were targeted or placed at risk so long as there is a nexus to a protected ground." *Ndom v. Ashcroft*, No. 02-74419, 2004 WL 2021275, *8 (9th Cir. Sept. 10, 2004) (internal quotation marks and citation omitted).

1. Presumption of a Well-Founded Fear

"If past persecution is established, a rebuttable presumption of a well-founded fear arises, 8 C.F.R. § 208.13(b)(1), and the burden shifts to the government to demonstrate that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear." *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004) (internal quotation marks omitted); *see also Singh v. Ilchert*, 63 F.3d 1501, 1510 (9th Cir. 1995) ("[O]nce an applicant has demonstrated that he suffered past persecution, there is a presumption that he faces a similar threat on return.").

Past persecution need not be atrocious to give rise to the presumption of future persecution. *See Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (past persecution by Sandinistas). The presumption raised by a finding of past persecution applies only to a future fear based on the original claim, and not to a fear of persecution from a new source. *See* 8 C.F.R. § 1208.13(b)(1) (2002) ("If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.").

2. Rebutting the Presumption of a Well-Founded Fear

a. Fundamental Change in Circumstances

Under the current version of 8 C.F.R. § 1208.13(b)(1)(i), in order to rebut the presumption of a well-founded fear, the government must show "by a preponderance of the evidence" that there has been a "fundamental change in circumstances such that the applicant no longer has a well-founded fear;" *see also Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004); *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004) (government failed to meet burden); *Ruano v. Ashcroft*, 301 F.3d 1155, 1161 (9th Cir. 2002) (1996 State Department report was insufficient to established changed country conditions in Guatemala); *Gui v. INS*, 280 F.3d 1217, 1228 (9th Cir. 2002) (State Department report insufficient to establish changed country conditions in Romania). If the government does not rebut the presumption, the petitioner is statutorily eligible for asylum. *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004).

b. Changed Country Conditions

Under the previous version of the regulation, formerly codified at 8 C.F.R. § 208.13(b)(1), the government bore "the burden to demonstrate by a preponderance of the evidence that country conditions [had] changed sufficiently." *Salaam v. INS*, 229 F.3d 1234, 1240 (9th Cir. 2000) (per curiam) (holding that the INS, failed to introduce the requisite country conditions information regarding Nigeria). In order to meet this burden, the government was "obligated to introduce evidence that, on an individualized basis, rebuts a particular applicant's specific grounds for his well-founded fear of future persecution." *Popova v. INS*, 273 F.3d 1251, 1259 (9th Cir. 2001) (internal quotation marks omitted) (Bulgaria). "If past persecution is shown, the BIA cannot discount it merely on a say-so. Rather, our precedent establishes that in such a case the BIA must provide an individualized analysis of how changed conditions will affect the specific petitioner's situation." *Lopez v. Ashcroft*, 366 F.3d 799, 805 (9th Cir. 2004) (citation and internal quotation marks omitted) (Guatemala). "Information about general changes in the country is not sufficient." *Garrovillas v. INS*, 156 F.3d 1010, 1017 (9th Cir. 1998) (Philippines).

(i) State Department Report

Where past persecution has been established, generalized information from a State Department report on country conditions is not sufficient to rebut the presumption of future persecution. *See Molina-Estrada v. INS*, 293 F.3d 1089, 1096 (9th Cir. 2002) (Guatemala); *see also Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1074 (9th Cir. 2004) (same). "Instead, we have required an individualized analysis of how changed conditions will affect the specific petitioner's situation." *Garcia-Martinez*, 371 F.3d at 1074 (internal quotation marks omitted); *see also Lopez v. Ashcroft*, 366 F.3d 799, 805 (9th Cir. 2004) (same).

In *Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995 (9th Cir. 2003), the Ninth Circuit held that substantial evidence supported the BIA's determination that the government rebutted the presumption of a well-founded fear based on a sufficiently individualized State Department Guatemala Profile Report, *id.* at 998–1000; *see also Marcu v. INS*, 147 F.3d 1078, 1081–82 (9th Cir. 1998) (assuming past persecution and holding that

presumption was rebutted by individualized State Department letter and report regarding sweeping changes in Romania).

Where the applicant has not established past persecution, the "IJ and the BIA are entitled to rely on all relevant evidence in the record, including a State Department report." *Molina-Estrada*, 293 F.3d at 1096 (Guatemala).

(ii) Administrative Notice of Changed Country Conditions

The BIA may not take administrative notice of changed conditions in the country of feared persecution without giving the applicant notice of its intent to do so, and an opportunity to show cause why such notice should not be taken, or to present additional evidence. *See Castillo-Villagra v. INS*, 972 F.2d 1017, 1026–31 (9th Cir. 1992) (holding that the denial of pre-decisional notice violates due process, and showed a failure to make an individualized assessment of the Nicaraguan applicant's claims); *see also Getachew v. INS*, 25 F.3d 841, 846–47 (9th Cir. 1994) (holding that request in INS brief to take administrative notice of changes in Ethiopia did not provide adequate notice to petitioner); *Kahssai v. INS*, 16 F.3d 323, 324–25 (9th Cir. 1994) (per curiam) (Ethiopia); *Gomez-Vigil v. INS*, 990 F.2d 1111, 1114 (9th Cir. 1993) (per curiam) (Nicaragua).

If an IJ takes administrative notice of changed country conditions during the hearing, there is no violation of due process because the applicant has an opportunity to respond with rebuttal evidence. *See Kazlauskas v. INS*, 46 F.3d 902, 906 n.4 (9th Cir. 1995) (Lithuania); *Acewicz v. INS*, 984 F.2d 1056, 1061 (9th Cir. 1993) (holding that Polish Solidarity supporters "had ample opportunity to argue before the immigration judges and before the [BIA] that their fear of persecution remained well founded"); *Kotasz v. INS*, 31 F.3d 847, 855 n.13 (9th Cir. 1994) (applicants were given ample opportunity to discuss changes in Hungary).

This court may take judicial notice of recent events occurring after the BIA's decision. *See Gafoor v. INS*, 231 F.3d 645, 655–56 (9th Cir. 2000) (taking judicial notice of recent events in Fiji, and noting that the government

would have an opportunity to challenge the significance of the evidence on remand).

The court of appeals may not determine the issue of changed country conditions in the first instance. *See INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam); *Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995, 999–1000 (9th Cir. 2003) (Guatemala).

c. Failure to Rebut Presumption Based on Changed Circumstances or Conditions

In the following cases, the court held that the INS failed to rebut the presumption of changed circumstances or conditions. Note that in some pre-*Ventura* cases, the court decided the issue of changed country conditions in the first instance.

Baballah v. Ashcroft, 367 F.3d 1067, 1078–79 (9th Cir. 2004) (Israel); *Ruano v. Ashcroft*, 301 F.3d 1155, 1161–62 (9th Cir. 2002) (Guatemala); *Rios v. Ashcroft*, 287 F.3d 895, 901–02 (9th Cir. 2002) (Guatemala); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1076–77, *as amended by* 290 F.3d 964 (9th Cir. 2002) (Peru); *Gui v. INS*, 280 F.3d 1217, 1229 (9th Cir. 2002) (Romania); *Popova v. INS*, 273 F.3d 1251, 1259–60 (9th Cir. 2001) (Bulgaria); *Lal v. INS*, 255 F.3d 998, 1010–11 (9th Cir. 2001) (Fiji), *as amended by* 268 F.3d 1148 (9th Cir. 2001); *Agbuya v. INS*, 241 F.3d 1224, 1230–31 (9th Cir. 2001) (past persecution by NPA in the Philippines); *Kataria v. INS*, 232 F.3d 1107, 1115–16 (9th Cir. 2000) (State Department report stating that arrests and killings had declined significantly in India not sufficient); *Bandari v. INS*, 227 F.3d 1160, 1169 (9th Cir. 2000) (past persecution of religious minority in Iran); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1099 (9th Cir. 2000) (rape and assault by Mexican police); *Chand v. INS*, 222 F.3d 1066, 1078–79 (9th Cir. 2000) (past persecution of ethnic Indian in Fiji); *Chanchavac v. INS*, 207 F.3d 584, 592 (9th Cir. 2000) (Guatemala); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1246 (9th Cir. 1999) (Colombia); *Tarubac v. INS*, 182 F.3d 1114, 1119–20 (9th Cir. 1999) (State Department mixed assessment of human rights conditions in the Philippines insufficient); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1163 (9th Cir. 1999) (Guatemala); *Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1999) (en banc)

(Philippines); *Leiva-Montalvo v. INS*, 173 F.3d 749, 752 (9th Cir. 1999) (El Salvador); *Meza-Manay v. INS*, 139 F.3d 759, 765–66 (9th Cir. 1998) (Peru); *Vallecillo-Castillo v. INS*, 121 F.3d 1237, 1239–40 (9th Cir. 1996) (Nicaragua); *Prasad v. INS*, 101 F.3d 614, 617 (9th Cir. 1996) (Fiji); *Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995) (India).

d. Internal Relocation

"[B]ecause a presumption of well-founded fear arises upon a showing of past persecution, the burden is on the INS to demonstrate by a preponderance of the evidence, once such a showing is made, that the applicant can reasonably relocate internally to an area of safety." *Melkonian v. Ashcroft*, 320 F.3d 1061, 1070 (9th Cir. 2003); *see also Mashiri v. Ashcroft*, No. 02-71841, 2004 WL 2103416, *8 (9th Cir. Sept. 22, 2004) (holding that the IJ erred by placing the burden of proof on ethnic Afghan to show "that the German government was unable or unwilling to control anti-foreigner violence 'on a countrywide basis'"); 8 C.F.R. § 1208.13(b)(1)(i)(B).

"The reasonableness of internal relocation is determined by considering whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and family ties." *Knezevic v. Ashcroft*, 367 F.3d 1206, 1214–15 (9th Cir. 2004) (citing 8 C.F.R. § 1208.13(b)(3); remanding for determination of whether internal relocation would be reasonable for elderly Serbian couple from Bosnia). This non-exhaustive list of factors "may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate." 8 C.F.R. § 1208.13(b)(3). *See also Mashiri*, 2004 WL 2103416, *9 (holding that relocation was not reasonable given evidence of anti-foreigner violence through Germany, financial and logistical barriers, and family ties in the US); *Cardenas v. INS*, 294 F.3d 1062, 1066 (9th Cir. 2002) (discussing reasonableness in light of threats in Peru); *Hasan v. Ashcroft*, 380 F.3d 1114, 1121–22 (9th Cir. 2004) (noting the different legal standards for evaluation of internal relocation in

the context of asylum and Convention Against Torture relief).

Where the persecutor is the government, "[i]t has never been thought that there are safe places within a nation" for the applicant to return. *Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995). "In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service 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).

3. Humanitarian Asylum

The IJ or BIA may grant asylum to a victim of past persecution, even where the government has rebutted the applicant's fear of future persecution, "if the asylum seeker establishes (1) 'compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution,' 8 C.F.R. § 1208.13(b)(1)(iii)(A), 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)(B)." *Belishta v. Ashcroft*, 378 F.3d 1078, 1081 (9th Cir. Aug. 9, 2004) (order).

a. Severe Past Persecution

In cases of severe past persecution, an applicant may obtain asylum even if he has no well-founded fear in the future, provided that he has "compelling reasons" for being unwilling to return. *See* 8 C.F.R. § 1208.13(b)(1)(iii)(A). The United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979), para. 136, states that "[i]t is frequently recognized that a person who–or whose family–has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee." The court has not decided whether an applicant could be eligible for relief based on the severity of the past

persecution of his family, where the applicant himself did not suffer severe past persecution.

"This avenue for asylum has been reserved for rare situations of 'atrocious' persecution, where the alien establishes that, regardless of any threat of future persecution, the circumstances surrounding the past persecution were so unusual and severe that he is unable to return to his home country." *Vongsakdy v. INS*, 171 F.3d 1203, 1205 (9th Cir. 1999) (Laos). Ongoing disability as a result of the persecution is not required. *Lal v. INS*, 255 F.3d 998, 1004 (Indo-Fijian), *as amended by* 268 F.3d 1148 (9th Cir. 2001).

(i) Compelling Cases of Past Persecution

Lal v. INS, 255 F.3d 998, 1009–10, *as amended by* 268 F.3d 1148 (9th Cir. 2001) (Indo-Fijian was arrested, detained three times, beaten, tortured [urine forced into his mouth, cut with knives, burned with cigarettes], forced to watch sexual assault of wife, forced to eat meat, and his house was set ablaze twice, his temple was ransacked, and his holy text was burned); *Vongsakdy v. INS*, 171 F.3d 1203, 1206–07 (9th Cir. 1999) (in labor camp applicant was threatened, beaten and attacked, forced to perform hard manual labor and to attend "reeducation," he was fed once a day, denied adequate water and medical care, and was forced to watch the guards kill one of his friends); *Lopez-Galarza v. INS*, 99 F.3d 954, 960–63 (9th Cir. 1996) (imprisoned for 15 days where she was raped repeatedly, confined in a jail cell for long periods without food, forced to clean the bathrooms and floors of the men's jail cells, and subjected to other forms of physical abuse; after her release mobs stoned and vandalized the family's house, and the authorities took away their food ration card); *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988) (Haitian was arrested, assaulted, beaten some fifty times with a wooden stick, and threatened with death by the Macoutes on several occasions); *see also Matter of Chen*, 20 I. & N. Dec. 16, 20–21 (BIA 1989) (Red Guards ransacked and destroyed the applicant's home, imprisoned and dragged his father through the streets, and badly burned him in a bonfire of Bibles; as a child, the applicant was placed under house arrest, kept from school, interrogated, beaten, and deprived of food; he was seriously injured when rocks were thrown at him, and he was exiled to the countryside for "re-

education," where he was abused, forced to criticize his father, and was denied medical care; as a result of his mistreatment, the applicant was physically debilitated, anxious, fearful, and suicidal).

The court has remanded for consideration of humanitarian relief in: *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (remanding where Ethiopian family suffered repeated harassment and serious harm, and Kebede was raped by two soldiers during one house search); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078 (9th Cir. 2004) (remanding where applicant was gang raped by Guatemalan soldiers as part of an "orchestrated campaign" to punish her entire village); *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 160–61 (9th Cir. 1996) (remanding where Sandinistas dragged one of applicant's sisters out of bed, tortured her, then shot and killed her in front of the applicant; applicant was severely beaten, threatened with death, the family was denied food rations and a work permit, and applicant was imprisoned for working without a permit).

(ii) Insufficiently Severe Past Persecution

Belishta v. Ashcroft, 378 F.3d 1078, 1081, n.2 (9th Cir. 2004) (order) (economic and emotional persecution based on father's 10-year imprisonment in Albania); *Rodas-Mendoza v. INS*, 246 F.3d 1237, 1240 (9th Cir. 2001) (per curiam) (sporadic persecution by Salvadoran government between 1978 and 1980, and then nothing until 1991 when government forces went to her home looking for FMLN sympathizers); *Belayneh v. INS*, 213 F.3d 488, 491 (9th Cir. 2000) (ethnic Amhara Ethiopian and family were harassed; she was detained for a month, interrogated, beaten for 45 minutes, and experienced attempted rape by the guards; her children were temporarily detained and beaten); *Kumar v. INS*, 204 F.3d 931, 934–35 (9th Cir. 2000) (soldiers tied up and beat Indo-Fijian's parents, then stripped and fondled her in front of her parents; father was detained and beaten severely; temple ransacked; mother was knocked unconscious; applicant punched and kicked, forced to renounce religion, and beaten unconscious); *Marcu v. INS*, 147 F.3d 1078, 1082–83 (9th Cir. 1998) (Romanian family's possessions were confiscated and mother was imprisoned for refusing to renounce her U.S. citizenship; as a child, Marcu was taunted, denounced as an "enemy of the people" and later detained, interrogated and beaten by the police on a number

of occasions); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (Sandinista authorities made multiple death threats, marked applicant's house, took away her ration card and means to buy inventory, and harassed and confiscated family property); *Kazlauskas v. INS*, 46 F.3d 902, 906–907 (9th Cir. 1995) (Lithuanian's father was a political prisoner in Soviet labor camps; applicant was ostracized, harassed by his teachers and peers, and prevented from advancing to the university); *Acewicz v. INS*, 984 F.2d 1056, 1062 (9th Cir. 1993) (Polish citizens suffered insufficiently severe past persecution).

b. Fear of Other Serious Harm

Effective January 5, 2001, victims of past persecution who no longer reasonably fear future persecution on account of a protected ground may be granted asylum if they can establish a reasonable possibility that they may suffer other serious harm upon removal to that country. *See Belishta v. Ashcroft*, 378 F.3d 1078, 1081 (9th Cir. 2004) (order); 8 C.F.R. § 1208.13(b)(1)(iii)(B). The fear of future harm need not be related to a protected ground. *Belishta*, 378 F.3d at 1081 (remanding for consideration of humanitarian grant where former government agents terrorized Albanian family in an effort to take over their residence).

D. Well-Founded Fear of Persecution

Even in the absence of past persecution, an applicant may be eligible for asylum based on a well-founded fear of future persecution. *See* 8 C.F.R. § 1208.13(b). A well-founded fear must be subjectively genuine and objectively reasonable. *See Montecino v. INS*, 915 F.2d 518, 520–21 (9th Cir. 1990) (noting the importance of the applicant's subjective state of mind). An applicant can demonstrate a well-founded fear of persecution if: (A) she has a fear of persecution in her country; (B) there is a reasonable possibility of suffering such persecution; and (C) she is unable or unwilling to return to that country because of such fear. *See* 8 C.F.R. § 1208.13(b)(2)(i). A "'well-founded fear' . . . can only be given concrete meaning through a process of case-by-case adjudication." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

1. Past Persecution Not Required

A showing of past persecution is not required to qualify for asylum. *See Velarde v. INS*, 140 F.3d 1305, 1309 (9th Cir. 1998) ("Either past persecution or a well-founded fear of future persecution provides eligibility for a discretionary grant of asylum."); *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 870 (9th Cir. 2003). However the past persecution of an applicant creates a rebuttable presumption that he will be persecuted in the future. *See* Past Persecution, above. Moreover, past harm not amounting to persecution is relevant to the reasonableness of an applicant's fear of future persecution. *See Avetova-Elisseva v. INS*, 213 F.3d 1192, 1198 (9th Cir. 2000) (harassment of ethnic Armenian in Russia, inability to get a job, and violence against friend did not rise to level of past persecution, but did support her well-founded fear).

2. Subjective Prong

The subjective prong of the well-founded fear test is satisfied by an applicant's credible testimony that he or she genuinely fears harm. *See Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995) (Indian Sikh). "[F]ortitude in face of danger" does not denote an "absence of fear." *Id.*; *cf. Mejia-Paiz v. INS*, 111 F.3d 720, 723–24 (9th Cir. 1996) (finding no subjective fear where testimony of Nicaraguan who claimed to be a Jehovah's Witness was not credible); *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1257–58 (9th Cir. 1992) (Nicaraguan who "failed to present 'candid, credible and sincere testimony' demonstrating a genuine fear of persecution, . . . failed to satisfy the subjective component of the well-founded fear standard").

A fear of persecution need not be the applicant's only reason for leaving his country of origin. *See Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374–75 (9th Cir. 1985) (holding that Salvadoran's mixed motives for departure, including economic motives, did not bar asylum claim).

3. Objective Prong

The objective prong of the well-founded fear analysis can be satisfied in two different ways: "One way to satisfy the objective component is to prove persecution in the past, giving rise to a rebuttable presumption that a

well-founded fear of future persecution exists. The second way is to show a good reason to fear future persecution by adducing credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution. The objective requirement can be met by either through the production of specific documentary evidence or by credible and persuasive testimony." *Ladha v. INS*, 215 F.3d 889, 897 (9th Cir. 2000) (internal citations and quotation marks omitted).

"A well-founded fear does not require certainty of persecution or even a probability of persecution." *Hoxha v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003). "[E]ven a ten percent chance of persecution may establish a well-founded fear." *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001). This court has stated that objective circumstances "must be determined in the political, social and cultural milieu of the place where the petitioner lived." *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990).

A claim based solely on general civil strife or widespread random violence is not sufficient. *See, e.g., Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000) (Christian Armenians fearful of Azeris); *Limsico v. INS*, 951 F.2d 210, 212 (9th Cir. 1991) (Chinese-Filipino); *Vides-Vides v. INS*, 783 F.2d 1463, 1469 (9th Cir. 1986) (El Salvador). However, the existence of general civil unrest does not preclude asylum eligibility. *See Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) ("[T]he fact that the individual resides in a country where the lives and freedom of a large number of persons has been threatened may make the threat *more* serious or credible." (internal quotation marks and alterations omitted)); *Ndom v. Ashcroft*, No. 02-74419, 2004 WL 2021275, *6 (9th Cir. Sept. 10, 2004).

4. Demonstrating a Well-Founded Fear

An applicant's fear must generally be based on an individualized, rather than generalized, risk of persecution. *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003). However, if the applicant is a member of a mistreated group, the level of individualized targeting that she must show is inversely related to the degree of persecution directed toward that group generally. *Id*. at 1182–83 (member of disfavored group of ethnic Albanians in Kosovo).

a. Pattern and Practice of Persecution

An applicant need not show that she will be singled out individually for persecution if:

> (A) The applicant establishes that there is a pattern or practice in his or her country . . . 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
> (B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

8 C.F.R. § 1208.13(b)(2)(iii); *see also Knezevic v. Ashcroft*, 367 F.3d 1206, 1213 (9th Cir. 2004) (evidence of a Croat pattern and practice of ethnically cleansing Bosnian Serbs); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (pattern and practice of persecution of Kurdish Moslem intelligentsia in Armenia). "[T]his 'group' of similarly situated persons is not necessarily the same as the more limited 'social group' category mentioned in the asylum statute." *Mgoian*, 184 F.3d at 1036.

b. Membership in Disfavored Group

A member of a "disfavored group" that is not subject to a pattern or practice of persecution may also demonstrate a well-founded fear. *See Kotasz v. INS*, 31 F.3d 847, 853–54 (9th Cir. 1994) (disfavored group of active opponents of the Communist Regime in Hungary). "[T]his court will look to (1) the risk level of membership in the group (i.e., the extent and the severity of persecution suffered by the group) and (2) the alien's individual risk level (i.e., whether the alien has a special role in the group or is more likely to come to the attention of the persecutors making him a more likely target for persecution)." *Mgoian v. INS*, 184 F.3d 1029, 1035 n.4 (9th Cir. 1999). "The relationship between these two factors is correlational; that is to say, the more serious and widespread the threat of persecution to the group, the less individualized the threat of persecution needs to be." *Id.*

See also El Himri v. Ashcroft, 378 F.3d 932, 937 (9th Cir. 2004), *as amended by* 2004 WL 1879255 (9th Cir. Aug. 24, 2004) (holding that stateless Palestinians born in Kuwait were members of a persecuted minority); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182–83 (9th Cir. 2003) (ethnic Albanians in Kosovo); *Singh v. INS*, 94 F.3d 1353, 1359 (9th Cir. 1996) (Indo-Fijians).

c. Targeted for Persecution

An applicant may demonstrate a well-founded fear by showing that he has been targeted for persecution. *See, e.g., Ndom v. Ashcroft*, No. 02-74419, 2004 WL 2021275, *5 (9th Cir. Sept. 10, 2004) (applicant was personally targeted for abuse by Senegalese government); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003) (holding that Abkhazian applicant was eligible for asylum because the Separatists specifically targeted him for conscription); *Lim v. INS*, 224 F.3d 929, 935 (9th Cir. 2000) (Filipino applicant was threatened, followed, appeared on a death list, and several colleagues were killed); *Mendoza Perez v. INS*, 902 F.2d 760, 762 (9th Cir. 1990) (Salvadoran applicant received a direct, specific and individual threat from death squad).

d. Family Ties

Acts of violence against an applicant's family members and friends may establish a well-founded fear of persecution. *See Korablina v. INS*, 158 F.3d 1038, 1044–45 (9th Cir. 1998) (Jewish citizen of the Ukraine). However, the violence must "create a pattern of persecution closely tied to the petitioner." *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) (Guatemala). "[T]he death of one family member does not automatically trigger a sweeping entitlement to asylum eligibility for all members of her extended family. Rather, when evidence regarding a family history of persecution is considered, the relationship that exists between the persecution of family members and the circumstances of the applicant must be examined." *Navas v. INS*, 217 F.3d 646, 659 n.18 (9th Cir. 2000) (internal quotation marks, punctuation, and citations omitted).

See also Njuguna v. Ashcroft, 374 F.3d 765, 769 (9th Cir. 2004) (persecution of family in Kenya); *Mgoian v. INS*, 184 F.3d 1029, 1035 n.4 (9th Cir. 1999) (violence and harassment against entire Kurdish Muslim family in Armenia); *Gonzalez v. INS*, 82 F.3d 903, 909–10 (9th Cir. 1996) (Nicaraguan family suffered violence for supporting Somoza); *Ramirez Rivas v. INS*, 899 F.2d 864, 868–69 (9th Cir. 1990) (granting relief where applicant was a member of a large politically active family that had been persecuted by Salvadoran authorities); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 515 (9th Cir. 1985) (Salvadoran applicant presented prima facie eligibility for asylum based on the persecution of her family).

5. Countrywide Persecution

"The ability of an applicant to relocate to a place of safety within his country of origin may . . . be considered by the IJ in determining whether an applicant's fear is "'well-founded.'" *Melkonian v. Ashcroft*, 320 F.3d 1061, 1069 (9th Cir. 2003). "Specifically, the IJ may deny eligibility for asylum to an applicant who has otherwise demonstrated a well-founded fear of persecution where the evidence establishes that internal relocation is a reasonable option under all of the circumstances." *Id.* (remanding for a determination of the reasonableness of internal relocation in Georgia); *see also Knezevic v. Ashcroft*, 367 F.3d 1206, 1213 (9th Cir. 2004) ("The Immigration and Nationality Act . . . defines a 'refugee' in terms of a person who cannot return to a 'country,' not a particular village, city, or area within a country."); 8 C.F.R. § 1208.13(b)(2)(ii).

"In cases in which the persecutor is a government or is government-sponsored, . . . it shall be presumed that internal relocation would not be reasonable, unless the Service 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); *see also Melkonian*, 320 F.3d at 1069 (If the source of persecution is the government, a rebuttable presumption arises that the threat exists nationwide, and that internal relocation would be unreasonable); *Damaize-Job v. INS*, 787 F.2d 1332, 1336–37 (9th Cir. 1986) (no need for Miskito Indian from Nicaragua to demonstrate countrywide persecution if persecutor shows no intent to limit his persecution to one area, and applicant can be readily identified); *cf. Quintanilla-Ticas v. INS*, 783

F.2d 955, 957 (9th Cir. 1986) (no country-wide danger based on anonymous threat in hometown in El Salvador).

The regulations state that the reasonableness of internal relocation may be based on "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." 8 C.F.R. § 1208.13(b)(3) (stating that this non-exhaustive list may, or may not, be relevant, depending on the case); *see also Knezevic v. Ashcroft*, 367 F.3d 1206, 1215 (9th Cir. 2004) (holding that Bosnian Serb couple could safely relocate to Serb-held areas of Bosnia, and remanding for determination whether such relocation would be reasonable).

6. Continued Presence of Applicant

An applicant's continued presence in her country of persecution before flight, while relevant, does not necessarily undermine a well-founded fear. *See, e.g., Lim v. INS*, 224 F.3d 929, 935 (9th Cir. 2000) (post-threat harmless period did not undermine well-founded fear of former Filipino police officer). There is no "rule that if the departure was a considerable time after the first threat, then the fear was not genuine or well founded." *Gonzalez v. INS*, 82 F.3d 903, 909 (9th Cir. 1996); *see also Lopez-Galarza v. INS*, 99 F.3d 954, 962 (9th Cir. 1996) (8-year stay in Nicaragua after release from prison did not negate claim based on severe past persecution); *Turcios v. INS*, 821 F.2d 1396, 1401–02 (9th Cir. 1987) (remaining in El Salvador for several months after release from prison did not negate fear); *Damaize-Job v. INS*, 787 F.2d 1332, 1336 (9th Cir. 1986) (two-year stay in Nicaragua after release not determinative).

Cf. Lata v. INS, 204 F.3d 1241, 1245 (9th Cir. 2000) (Indo-Fijian's fear undermined by two-year stay in Fiji after incidents of harm)*; Castillo v. INS*, 951 F.2d 1117, 1122 (9th Cir. 1991) (asylum denied where applicant remained over five years in Nicaragua after interrogation without further harm or contacts from authorities).

7. Continued Presence of Family

The continued presence of family members in the country of origin does not necessarily rebut an applicant's well-founded fear, unless there is evidence that the family was similarly situated or subject to similar risk. *See Khup v. Ashcroft*, 376 F.3d 898, 905 (9th Cir. 2004) (family in Burma not similarly situated because they "didn't do anything against the government"); *Jahed v. INS*, 356 F.3d 991, 1001 (9th Cir. 2004) (where petitioner was singled out for persecution, the situation of remaining relatives in Iran is "manifestly irrelevant"); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003) (evidence of the condition of the applicant's family is relevant only when the family is similarly situated to the applicant); *Rios v. Ashcroft*, 287 F.3d 895, 902 (9th Cir. 2002) (Guatemala); *Lim v. INS*, 224 F.3d 929, 935 (9th Cir. 2000) (Philippines).

Cf. Li v. Ashcroft, 378 F.3d 959, 964 (9th Cir. 2004) (claim that applicant's family was so afraid of being arrested that it was forced to go deep into hiding was inconsistent with wife's travel to hometown without trouble); *Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001) ("An applicant's claim of persecution upon return is weakened, even undercut, when similarly-situated family members continue to live in the country without incident, . . . or when the applicant has returned to the country without incident." (internal quotation marks and citation omitted)); *Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000) (Israel); *Aruta v. INS*, 80 F.3d 1389, 1395 (9th Cir. 1996) (sister remained in the Philippines without incident); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1006 (9th Cir.1988) (per curiam) (family unmolested in El Salvador); *Mendez-Efrain v. INS*, 813 F.2d 279, 282 (9th Cir. 1987) (continued and unmolested presence of family undermined well-founded fear).

8. Possession of Passport

Possession of a valid passport does not necessarily undermine the subjective or objective basis for an applicant's fear. *See Khup v. Ashcroft*, 376 F.3d 898, 905 (9th Cir. 2004) (possession and renewal of Burmese passport did not undermine petitioner's subjective fear of persecution); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003) (holding that ethnic Albanian from Kosovo who obtained passport had well-founded fear because "Serbian authorities actively supported an Albanian exodus instead of

opposing it"); *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1200 (9th Cir. 2000) (minimizing significance of Russian passport issuance); *Turcios v. INS*, 821 F.2d 1396, 1402 (9th Cir. 1987) (rejecting IJ's presumption that Salvadoran government would not persecute an individual that was allowed to leave the country); *Damaize-Job v. INS*, 787 F.2d 1332, 1336 (9th Cir. 1986) (obtaining passport through a friend did not undermine fear); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374 (9th Cir. 1985).

Cf. Khourassany v. INS, 208 F.3d 1096, 1101 (9th Cir. 2000) (denying, in part, because Palestinian retained Israeli passport and was able to travel freely); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1006 (9th Cir. 1988) (per curiam) (observing that ability to obtain passport is a relevant factor); *Espinoza-Martinez v. INS*, 74 F.2d 1536, 1540 (9th Cir. 1985) (holding that acquisition of Nicaraguan passport without difficulty cut against applicant's asylum claim).

9. Cases Finding No Well-Founded Fear

Abebe v. Ashcroft, 379 F.3d 755, 759 (9th Cir. 2004) (applicants were not threatened, and parents could protect daughter from FGM in Ethiopia); *Nagoulko v. INS*, 333 F.3d 1012, 1018 (9th Cir. 2003) (possibility of future persecution in Ukraine too speculative); *Belayneh v. INS*, 213 F.3d 488, 491 (9th Cir. 2000) (no well-founded fear of persecution in Ethiopia on account of imputed political opinion); *Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000) (holding that Armenians from Nagorno-Karabakh region did not establish past persecution or a well-founded fear of future persecution by Azeris); *Acewicz v. INS*, 984 F.2d 1056, 1059–61 (9th Cir. 1993) (holding that the BIA properly took administrative notice of changed political conditions in Poland); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1006 (9th Cir. 1988) (per curiam) (finding no well-founded fear of Salvadoran guerrillas where, *inter alia*, potential persecutor was dead).

E. Nexus to the Five Grounds

In order to be eligible for asylum, the past or anticipated persecution must be "on account of" one or more of the five grounds enumerated in the statute: race, religion, nationality, membership in a particular social group, or

political opinion. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481–82 (1992); *Sangha v. INS*, 103 F.3d 1482, 1486 (9th Cir. 1997). The applicant must provide some evidence, direct or circumstantial, that the persecutor was or would be motivated to persecute him because of the victim's actual or imputed status or belief. *See Sangha*, 103 F.3d at 1486–87.

1. Proving a Nexus

The persecutor's motivation may be established by direct or circumstantial evidence. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). "[A]n applicant need only produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or implied protected ground." *Gafoor v. INS*, 231 F.3d 645, 650–51 (9th Cir. 2000) (internal quotation marks omitted).

An applicant's uncontroverted credible testimony as to the persecutor's motivations may be sufficient to establish nexus. *See, e.g., Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076–77 (9th Cir. 2004) (accepting applicant's testimony that the Guatemalan government persecuted entire village based on imputed political opinion); *Shoafera v. INS*, 228 F.3d 1070, 1074–75 (9th Cir. 2000) (Ethiopian applicant established through her credible testimony and witness testimony that the perpetrator was motivated to rape her based, in part, on her Amhara ethnicity); *Maini v. INS*, 212 F.3d 1167, 1175–76 (9th Cir. 2000) (evidence compelled a finding that Indian family was persecuted on account of inter-faith marriage based on credible witness testimony and statements by attackers).

a. Direct Evidence

Direct proof of motivation may consist of statements made by the persecutor to the victim, or by victim to persecutor. *See, e.g., Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (soldiers stated that rape was because of Kebede's family's position in prior Ethiopian regime); *Lopez v. Ashcroft*, 366 F.3d 799, 804 (9th Cir. 2004) (Guatemalan guerrillas told applicant that he should not work for the wealthy); *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 2000) (en banc) (applicant articulated her political opposition to the NPA); *Gonzalez-Neyra v. INS*, 122 F.3d 1293, 1295 (9th

Cir. 1997) (applicant told Shining Path that he would not submit to extortion because of opposition), *amended by* 133 F.3d 726 (9th Cir. 1998).

b. Circumstantial Evidence

Circumstantial proof of motivation may consist of severe or disproportionate punishment for violations of laws, or other evidence that the persecutor generally regards those who resist as political enemies. *See, e.g.*, *Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996) (severe punishment for illegal departure). Circumstantial evidence of motive may also include, *inter alia*, the timing of the persecution and signs or emblems left at the site of persecution. *See Deloso v. Ashcroft*, 378 F.3d 907, 915 (9th Cir. 2004). Statements made by the persecutor may constitute circumstantial evidence of motive. *See Gafoor v. INS*, 231 F.3d 645, 651–52 (9th Cir. 2000) (holding that Fijian "soldiers' statements to Gafoor [to 'go back to India' were] unmistakable circumstantial evidence that they were motivated by his race and imputed political opinion").

"In some cases, the factual circumstances alone may provide sufficient reason to conclude that acts of persecution were committed on account of political opinion, or one of the other protected grounds. Indeed, this court has held persecution to be on account of political opinion where there appears to be no other logical reason for the persecution at issue." *Navas v. INS*, 217 F.3d 646, 657 (9th Cir. 2000) (internal citation omitted). Moreover, "if there is no evidence of a legitimate prosecutorial purpose for a government's harassment of a person . . . there arises a presumption that the motive for harassment is political." *Ratnam v. INS*, 154 F.3d 990, 995 (9th Cir. 1998) (internal quotation marks omitted); *see also* Imputed Political Opinion, below.

2. Mixed-Motive Cases

A persecutor may have multiple motives for inflicting harm on an applicant. As long as the applicant produces evidence from which it is reasonable to believe that the persecutor's action was motivated, at least in part, by a protected ground, the applicant is eligible for asylum. *See, e.g.*, *Deloso v. Ashcroft*, 378 F.3d 907, 915 (9th Cir. 2004) (Filipino anti-

communist targeted on account of political opinion and revenge); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (gang rape by Guatemalan soldiers motivated in part by imputed political opinion); *Hoque v. Ashcroft*, 367 F.3d 1190, 1198 (9th Cir. 2004) (Bangladeshi targeted based on "political jealousy" and political opinion); *Jahed v. INS*, 356 F.3d 991, 999 (9th Cir. 2004) (Even though soldier of the Iranian Revolutionary Guard was motivated in part by his desire for money, the motive was also "inextricably intertwined with petitioner's past political affiliation."); *Gafoor v. INS*, 231 F.3d 645, 652–54 (9th Cir. 2000) (Indo-Fijian targeted for race, political opinion, and personal vendetta); *Shoafera v. INS*, 228 F.3d 1070, 1075–76 (9th Cir. 2000) (rape by Ethiopian government official motivated in part by ethnicity); *Lim v. INS*, 224 F.3d 929, 934 (9th Cir. 2000) ("revenge plus" motive of guerillas to harm former Filipino police officer who testified against the NPA); *Navas v. INS*, 217 F.3d 646, 661 (9th Cir. 2000) (at least one motive was the imputation of pro-guerrilla political opinion to Salvadoran applicant); *Maini v. INS*, 212 F.3d 1167, 1176 n.1 (9th Cir. 2000) (persecution of Indian family motivated by religious and economic grounds); *Tarubac v. INS*, 182 F.3d 1114, 1118–19 (9th Cir. 1999) (NPA persecution based on political opinion and economic motives); *Borja v. INS*, 175 F.3d 732, 736–37 (9th Cir. 1999) (en banc) (Filipino targeted for extortion plus political motives); *Ratnam v. INS*, 154 F.3d 990, 996 (9th Cir. 1998) ("Torture in the absence of any legitimate criminal prosecution, conducted at least in part on account of political opinion, provides a proper basis for asylum and withholding of deportation even if the torture served intelligence gathering purposes.").

3. Shared Identity Between Victim and Persecutor

"That a person shares an identity with a persecutor does not . . . foreclose a claim of persecution on account of a protected ground. If an applicant can establish that others in his group persecuted him because they found him insufficiently loyal or authentic to the religious, political, national, racial, or ethnic ideal they espouse, he has shown persecution on account of a protected ground." *Maini v. INS*, 212 F.3d 1167, 1175 (9th Cir. 2000) (internal citation and parenthetical omitted) (persecution of interfaith Indian family).

4. Civil Unrest and Motive

Although wide-spread civil unrest does not, on its own, establish asylum eligibility, the existence of general civil strife does not preclude relief. *See Ndom v. Ashcroft*, No. 02-74419, 2004 WL 2021275 *6 (9th Cir. Sept. 10, 2004) ("[T]he existence of civil strife does not alter our normal approach to determining refugee status or make a particular asylum claim less compelling."). "The difficulty of determining motive in situations of general civil unrest should not . . . diminish the protections of asylum for persons who have been punished because of their actual or imputed political views, as opposed to their criminal or violent conduct." *Arulampalam v. Ashcroft*, 353 F.3d 679, 685 n.4 (9th Cir. 2003) (internal quotation marks omitted).

"In certain contexts, . . . the existence of civil strife supports a finding that claimed persecution was on account of a protected ground." *Ndom v. Ashcroft*, No. 02-74419, 2004 WL 2021275 *6 (9th Cir. Sept. 10, 2004) (armed conflict between Senegalese forces and secessionist rebels).

See also Garcia-Martinez v. Ashcroft, 371 F.3d 1066, 1073 (9th Cir. 2004) (Guatemalan civil war); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211–12 (9th Cir. 2004) (distinguishing between displaced persons fleeing the ravages of war and refugees fleeing ethnic cleansing); *Hoque v. Ashcroft*, 367 F.3d 1190, 1198 (9th Cir. 2004) (widespread political violence in Bangladesh "says very little about" whether applicant could demonstrate a persecutory motive).

5. Resistance to Discriminatory Government Action

Resistance to discriminatory government action that results in persecution is persecution on account of a protected ground. *See Guo v. Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004) (Chinese Christian who was arrested and physically abused after he attempted to stop an officer from removing a cross from a tomb was persecuted on account of religion); *Chand v. INS*, 222 F.3d 1066, 1077 (9th Cir. 2000) (persecution of Indo-Fijian for resisting racial discrimination).

6. The Protected Grounds

a. Race

Claims of race and nationality persecution often overlap. *See Duarte de Guinac v. INS*, 179 F.3d 1156, 1160 n.5 (9th Cir. 1999) (Quiche Indian from Guatemala). Recent cases use the more precise term "ethnicity," "which falls somewhere between and within the protected grounds of race and nationality." *Shoafera v. INS*, 228 F.3d 1070, 1074 n.2 (9th Cir. 2000) (internal quotation marks omitted) (ethnic Amhara in Ethiopia); *see also Baballah v. Ashcroft*, 367 F.3d 1067, 1077 n.10 (9th Cir. 2004) (Arab Israeli). Individuals forced to flee ethnic cleansing by hostile military forces are refugees who fear persecution on account of ethnicity. *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211–12 (9th Cir. 2004) (distinguishing displaced persons).

(i) Cases Finding Racial or Ethnic Persecution

Mashiri v. Ashcroft, No. 02-71841, 2004 WL 2103416, *5–6 (9th Cir. Sept. 22, 2004) (past persecution of ethnic Afghans in Germany); *Faruk v. Ashcroft*, 378 F.3d 940, 944 (9th Cir. 2004) (mixed-race, mixed-religion couple from Fiji suffered past persecution); *Knezevic v. Ashcroft*, 367 F.3d 1206 (9th Cir. 2004) (Serbian couple from Bosnia-Herzegovina established past persecution and a well-founded fear of future persecution on account of ethnicity because their town was targeted for bombing, invasion, occupation, and a "systematic campaign of ethnic cleansing by the Croats"); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003) (holding that applicant was eligible for asylum because the Separatists specifically targeted him for conscription based on his ethnicity and religion); *Gafoor v. INS*, 231 F.3d 645, 651–52 (9th Cir. 2000) (Indo-Fijian persecuted on account of race and imputed political opinion); *Shoafera v. INS*, 228 F.3d 1070, 1075–76 (9th Cir. 2000) (rape motivated in part by Amhara ethnicity); *Chand v. INS*, 222 F.3d 1066, 1076 (9th Cir. 2000) (past persecution of ethnic Indian in Fiji); *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1197–98 (9th Cir. 2000) (well-founded fear of persecution on the basis of Armenian ethnicity); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (pattern and practice of persecution of Kurdish Moslem in Armenia); *Duarte de Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999) (past persecution of Quiche Indian from Guatemala); *Surita v. INS*, 95 F.3d 814, 819 (9th Cir. 1996) (past persecution of Indo-Fijian);

(ii) Cases Finding No Racial or Ethnic Persecution

Gormley v. Ashcroft, 364 F.3d 1172, 1177 (9th Cir. 2004) (holding that random criminal acts in South Africa bore no nexus to race); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1151 (9th Cir. 2000) (Kanjobal Indian from Guatemala failed to establish asylum eligibility on basis of race); *Limsico v. INS*, 951 F.2d 210, 212 (9th Cir. 1991) (Chinese Filipino failed to establish a well-founded fear on account of race or ethnicity).

b. Religion

Persecution on the basis of religion may assume various forms. *See* UNHCR Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (HCR/GIP/04/06, 28 April 2004) (discussing forms of religious persecution).

(i) Cases Finding Religious Persecution

Malty v. Ashcroft, 381 F.3d 942, 948 (9th Cir. 2004) (holding that BIA erred in denying motion to reopen because Egyptian Coptic Christian demonstrated prima facie eligibility for asylum); *Faruk v. Ashcroft*, 378 F.3d 940, 944 (9th Cir. 2004) (mixed-race, mixed-religion couple from Fiji suffered past persecution); *Khup v. Ashcroft*, 376 F.3d 898, (9th Cir. 2004) (Burmese Seventh Day Adventist minister); *Guo v. Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004) (Chinese Christian was persecuted on account of his religion when he was arrested, detained, physically abused, and forced to sign an affidavit renouncing his religion, after he participated in illegal religious activities and attempted to stop an officer from removing a cross from a tomb); *Baballah v. Ashcroft*, 367 F.3d 1067, 1077 n.9 (9th Cir. 2004) (noting strong correlation between ethnicity and religion in the Middle East); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003) (holding that applicant was eligible for asylum because the Separatists specifically targeted him for conscription based on his ethnicity and religion); *Popova v. INS*, 273 F.3d 1251, 1257–58 (9th Cir. 2001) (harassment and threats in Bulgaria based on applicant's religious surname and political opinion); *Lal v. INS*, 255 F.3d 998 (9th Cir. 2001) (Indo-Fijian faced religious and political persecution), *as amended by* 268 F.3d 1148 (9th Cir. 2001); *Bandari v. INS*, 227 F.3d 1160

(9th Cir. 2000) (past persecution of Christian who attempted interfaith dating in Iran); *Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000) (if credible, past persecution of Shia Muslims by Sunni Muslims in Pakistan); *Maini v. INS*, 212 F.3d 1167, 1175 (9th Cir. 2000) ("persecution aimed at stamping out an interfaith marriage is without question persecution on account of religion"); *Korablina v. INS*, 158 F.3d 1038 (9th Cir. 1998) (past persecution of Jewish citizen of the Ukraine); *Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996) (arrest of family member at church may provide basis for eligibility); *Hartooni v. INS*, 21 F.3d 336, 341–42 (9th Cir. 1994) (if credible, Christian Armenian in Iran eligible for asylum).

(ii). Cases Finding No Religious Persecution

Padash v. INS, 358 F.3d 1161, 1166 (9th Cir. 2004) (Indian Muslim was not eligible for asylum based on two incidents of religious-inspired violence at his father's restaurant); *Halaim v. INS*, 358 F.3d 1128, 1132 (9th Cir. 2004) (holding that discrimination against Ukranian sisters on account of Pentecostal Christian religion did not compel a finding that they suffered past persecution); *Nagoulko v. INS*, 333 F.3d 1012, 1016–17, 1018 (9th Cir. 2003) (past harassment of Christian in Ukraine not persecution; future fear too speculative); *Hakeem v. INS*, 273 F.3d 812, 817 (9th Cir. 2001) (Ahmadi in Pakistan not eligible for withholding); *Tecun-Florian v. INS*, 207 F.3d 1107, 1110 (9th Cir. 2000) (past torture had no nexus to applicant's religious beliefs); *Gonzalez v. INS*, 82 F.3d 903, 909 (9th Cir. 1996) (conscription of Jehovah's Witness); *Abedini v. INS*, 971 F.2d 188, 191–92 (9th Cir. 1992) (prosecution of Iranian for distribution of Western videos); *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc) (petitioner's violation of restrictive dress and conduct rules did not establish persecution on account of religion or political opinion); *Ghaly v. INS*, 58 F.3d 1425 (9th Cir. 1995) (prejudice and discrimination against Egyptian Coptic Christian insufficient); *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992) (religious objection to service in the Salvadoran military insufficient to establish a nexus); *Elnager v. INS*, 930 F.2d 784, 788 (9th Cir. 1991) (religious converts in Egypt).

c. Nationality

Claims of race and nationality persecution often overlap. *See* cases cited under Race, above. Recent cases use the more precise term "ethnicity," "which falls somewhere between and within the protected grounds of race and nationality." *Shoafera v. INS*, 228 F.3d 1070, 1074 n.2 (9th Cir. 2000) (internal quotation marks omitted) (ethnic Amhara in Ethiopia); *see also Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000) (Armenians from Nagorno-Karabakh had no well-founded fear); *Andriasian v. INS*, 180 F.3d 1033, 1042 (9th Cir. 1999) (persecution of Armenian in Azerbaijan).

d. Membership in a Particular Social Group

"[A] 'particular social group' is one united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (holding that Mexican gay men with female sexual identities constitute a particular social group). This court has also stated that a particular social group "implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest." *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576–77 (9th Cir. 1986) (stating that a family is a "prototypical example" of a social group, but young working class urban males of military age are not); *see also Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985) (focusing on the presence of a "common, immutable characteristic"), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987); UNHCR's Guidelines on International Protection: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/02, 7 May 2002).

The Ninth Circuit has held that large, internally diverse, demographic groups would rarely constitute distinct social groups. *See Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576–77 (9th Cir. 1986) ("Major segments of the population of an embattled nation, even though undoubtedly at some risk from general political violence, will rarely, if ever, constitute a distinct 'social group' for the purposes of establishing refugee status.").

(i) Types of Social Groups

(A) Family and Clan

This court has "recognized that, in some circumstances, a family constitutes a social group for purposes of the asylum and withholding-of-removal statutes." *Molina-Estrada v. INS*, 293 F.3d 1089, 1095 (9th Cir. 2002); *see also Lin v. Ashcroft*, 377 F.3d 1014, 1028–29 (9th Cir. 2004) (holding that family membership may be a plausible basis for protected social group refugee status in the context of families who have violated China's coercive population control policy); *Sanchez-Trujillo v. INS*, 801 F.2d 1572, 1576–77 (9th Cir. 1986) (stating that a family is a "prototypical example" of a social group); *but see Estrada-Posados v. INS*, 924 F.2d 916, 919 (9th Cir. 1991) (holding that "the concept of persecution of a social group [does not extend] to the persecution of a family").

(B) Gender-Related Claims

"Gender" is not listed as a protected ground in the refugee definition. However, this court and others are beginning to address the circumstances under which a social group may be defined by gender. For example, in *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000), the Ninth Circuit held that a gender-defined group of Mexican gay men with female sexual identities constituted a particular social group. *See also Fisher v. INS*, 79 F.3d 955, 965–66 (9th Cir. 1996) (en banc) (Canby, J., concurring) (stating that although petitioner did not establish persecution on account of religion or political opinion based on her violation of restrictive dress and conduct rules, eligibility on account of membership in a particular social group was not argued, and thus not foreclosed).

The BIA recognized a gender-defined social group in *In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) (en banc) (granting asylum based on a gender-defined social group of "young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation], as practiced by the tribe, and who oppose the practice"); *see also Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985) (defining persecution on account of membership in a particular social group as "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic . . . such as sex, color, or kinship ties, . . ."),

overruled on other grounds by Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).

Gender-specific harm can take many forms, including sexual violence, domestic or family violence, female genital mutilation or cutting, persecution of gays and lesbians, coerced family planning, and repressive social norms. *See* UNHCR's Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/01, 7 May 2002) (discussing various forms of gender-related persecution); *see also* INS Office of International Affairs, Gender Guidelines, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women* (May 26, 1995) (described in *Fisher v. INS*, 79 F.3d 955, 967 (9th Cir. 1996) (en banc) (Noonan, J., dissenting)).

The challenging analytical issues involved in claims of domestic violence and social group protection have not yet been addressed by the Ninth Circuit. A widely-publicized domestic violence asylum claim, which arises under the jurisdiction of the Ninth Circuit, is currently pending before the Attorney General in *Matter of Rodi Alvarado Pena ("In re R–A–")*, 22 I. & N. Dec. 906 (BIA 1999), *vacated* (AG 2001), *certified* to Attorney General Ashcroft (2003). *In re R–A–* raises the issue of whether a Guatemalan domestic violence survivor was persecuted by her army soldier husband on account of her membership in a particular social group of "married women in Guatemala who are unable to leave the relationship." For background on the convoluted procedural history of *In re R–A–*, *see* K. Musalo & S. Knight, "Asylum for Victims of Gender Violence: An Overview of the Law, and an Analysis of 45 Unpublished Decisions," *reprinted in*: 03-12 Immigr. Briefings 1.

The Ninth Circuit has discussed female genital mutilation in two recent cases. *See Abebe v. Ashcroft*, 379 F.3d 755, 759 (9th Cir. 2004) (holding that Ethiopian petitioners were not eligible for asylum because they did not show "that the subjection of their daughter to FGM is inevitable or even probable"); *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004) (remanding CAT claim based on petitioner's past FGM in Nigeria, and fear that her daughter would suffer FGM if returned).

The Ninth Circuit has long held that rape and other forms of sexual or gender-based violence can constitute persecution on account of political opinion or other enumerated grounds. *See, e.g.*, *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987) (holding that prolonged sexual abuse by Salvadoran military sergeant was persecution on account of political opinion), *overruled in part on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc); *Lopez-Galarza v. INS*, 99 F.3d 954, 959–60 (9th Cir. 1996) (Nicaraguan woman was raped, abused, deprived of food, and subjected to forced labor on account of political opinion); *Shoafera v. INS*, 228 F.3d 1070, 1075–76 (9th Cir. 2000) (beaten and raped at gunpoint on account of Amhara ethnicity); *Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004) (en banc) (forced pregnancy examination constituted persecution on account of political opposition to China's coercive family planning policy); *Kebede v. Ashcroft*, 366 F.3d 808 (9th Cir. 2004) (Ethiopian woman raped because of her family's association with the previous government); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066 (9th Cir. 2004) (Guatemalan woman who was gang raped by soldiers was persecuted on account of a pro-guerrilla political opinion imputed to her entire village).

(C) Sexual Orientation

Sexual orientation and sexual identity can be the basis for establishing a particular social group. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094–95 (9th Cir. 2000) (holding that Mexican gay men with female sexual identities constitute a particular social group). The *Hernandez-Montiel* court discussed the BIA's precedent decision in *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822–23 (BIA 1990), which held that a Cuban homosexual established membership in a particular social group, and an IJ's decision in *Matter of Tenorio*, No. A72-093-558 (IJ July 26, 1993), granting asylum to a gay Brazilian man who had been beaten and stabbed by a group using anti-gay epithets, *id*. at 1094.

(D) Former Status

An alien's status based on her former occupations, associations, or shared experiences, may be the basis for social group claim. *See, e.g.*, *Cruz-*

Navarro v. INS, 232 F.3d 1024, 1028–29 (9th Cir. 2000) (member of Peruvian National Police). "Persons who are persecuted because of their status as a former police or military officer, for example, may constitute a cognizable social group under the INA." *Id*. at 1029 (holding that current police or military are not a social group).

(ii) Cases Denying Social Group Claims

Molina-Estrada v. INS, 293 F.3d 1089, 1095 (9th Cir. 2002) (evidence did not compel a finding that Guatemalan applicant was persecuted on account of family membership); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1050–51 (9th Cir. 2000) (Kanjobal Indians comprising large percentage of population in a given area are not a particular social group); *Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996) (persons of low economic status in China not a particular social group); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) (former servicemen in Guatemalan military not a social group); *Estrada-Posados v. INS*, 924 F.2d 916, 919 (9th Cir. 1991) (family not a social group); *De Valle v. INS*, 901 F.2d 787, 792–93 (9th Cir. 1990) (family members of Salvadoran military deserter).

e. Political Opinion

"[A]n asylum applicant must satisfy two requirements in order to show that he was persecuted 'on account of' a political opinion. First, the applicant must show that he held (or that his persecutors believed that he held) a political opinion. Second, the applicant must show that his persecutors persecuted him (or that he faces the prospect of such persecution) *because of* his political opinion." *Navas v. INS*, 217 F.3d 646, 656 (9th Cir. 2000) (internal citation omitted). In other words, that an applicant holds a political opinion "is not, by itself, enough to establish that any future persecution would be 'on account' of this opinion. He must establish that the political opinion would motivate his potential persecutors." *Njuguna v. Ashcroft*, 374 F.3d 765, 770 (9th Cir. 2004).

Political opinion encompasses more than electoral politics or formal political ideology or action. *See, e.g., Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) (recognizing that an applicant's statements regarding the

unfair distribution of food in Iraq resulted in the imputation of an anti-government political opinion), *amended by* 355 F.3d 1140 (9th Cir. 2004); *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc) (refusal to pay revolutionary tax to the NPA in the face of threats constitutes an expression of political belief). A political opinion can be an actual opinion held by the applicant, or an opinion imputed to him or her by the persecutor. *See Sangha v. INS*, 103 F.3d 1482, 1488–89 (9th Cir. 1997); *see also* Imputed Political Opinion, below.

(i) Organizational Membership

An applicant may manifest his or her political opinion by membership or participation in an organization with political purposes or goals. *See, e.g., Montoya-Ulloa v. INS*, 79 F.3d 930, 931 (9th Cir. 1996) (membership in political group opposing the Sandinistas); *Mendoza Perez v. INS*, 902 F.2d 760 (9th Cir. 1990) (involvement with Salvadoran land reform organization); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374 (9th Cir. 1985) (active member of anti-government political organization in El Salvador).

(ii) Refusal to Support Organization

An applicant may manifest a political opinion by his refusal to join or support an organization, or departing from the same. *See, e.g., Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc) (opposition to NPA); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir. 1999) (death threats and forced recruitment, where applicant did not agree with Salvadoran guerrillas); *Gonzales-Neyra v. INS*, 122 F.3d 1293 (9th Cir. 1997) (refusal to make payments to Shining Path guerrilla movement), *amended by* 133 F.3d 726 (9th Cir. 1998); *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 160 (9th Cir. 1996) (refusal to support Sandinistas); *Gonzalez v. INS*, 82 F.3d 903, 906 (9th Cir. 1996) (same).

(iii) Labor Union Membership and Activities

Cases recognizing the political nature of trade union and workplace activity include: *Agbuya v. INS*, 241 F.3d 1224, 1229 (9th Cir. 2001) (applicant was viewed by NPA guerrillas as politically aligned with mining

company and government); *Vera-Valera v. INS*, 147 F.3d 1036 (9th Cir. 1998) (president of street vendors' cooperative in Peru targeted by Shining Path on account of imputed political opinion); *Prasad v. INS*, 101 F.3d 614 (9th Cir. 1996) (secretary of labor union in Fiji); *Zavala-Bonilla v. INS*, 730 F.2d 562, 563 (9th Cir. 1984) (persecution of Salvadoran trade union member).

(iv) Opposition to Government Corruption

A whistleblower's exposure of government corruption "may constitute political activity sufficient to form the basis of persecution on account of political opinion." *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000) (Filipino policeman and customs officer). "When the alleged corruption is inextricably intertwined with governmental operation, the exposure and prosecution of such an abuse of public trust is necessarily political." *Id.* (distinguishing personal retaliation "completely untethered to a governmental system"). *See also Hasan v. Ashcroft*, 380 F.3d 1114, 1121 (9th Cir. 2004) ("When a powerful political leader uses his political office as a means to siphon public money for personal use, and uses political connections throughout a wide swath of government agencies, both to facilitate and to protect his illicit operations, exposure of his corruption is inherently political."); *Njuguna v. Ashcroft*, 374 F.3d 765, 770–71 (9th Cir. 2004) (retaliation against Kenyan applicant who opposed government corruption by helping domestic servants escape was on account of political opinion); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1245–46 (9th Cir. 1999) (holding that death threats received after Colombian prosecutor investigated political corruption by opposition political party constituted persecution on account of political opinion); *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988) (Haitian fisherman's refusal to accede to government extortion).

Cf. Kozulin v. INS, 218 F.3d 1112, 1115–17 (9th Cir. 2000) (evidence did not compel conclusion that beating of Russian anti-communist, shortly after he reported misconduct of his ship captain, was on account of political opinion); *Zayas-Marini v. INS*, 785 F.2d 801 (9th Cir. 1986) (although petitioner was threatened with death after accusing Paraguayan government officials of corruption, the threats were grounded in personal animosity given, *inter alia*, petitioner's continued close association with ruling members of the government).

(v) Neutrality

The Ninth Circuit recognizes that a conscious choice not to side with any political faction can be a manifestation of a political opinion. *See Sangha v. INS*, 103 F.3d 1482, 1488 (9th Cir. 1997) (recognizing the doctrine of hazardous neutrality, and noting that *Elias-Zacarias* questioned, but did not overrule this theory); *Ramos-Vasquez v. INS*, 57 F.3d 857, 863 (9th Cir. 1995) (desertion from Honduran military established neutrality). An applicant's neutrality must be result of an affirmative decision to remain neutral, rather than mere apathy. *See Lopez v. INS*, 775 F.2d 1015, 1016–17 (9th Cir. 1985) (El Salvador).

(A) Cases Discussing Neutrality

Navas v. INS, 217 F.3d 646, 656 n.12 (9th Cir. 2000) (El Salvador); *Rivera-Moreno v. INS*, 213 F.3d 481 (9th Cir. 2000) (rejecting Salvadoran's claim of neutrality); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 413–14 (9th Cir. 1991) (rejecting Guatemalan soldier's neutrality claim); *Cuadras v. INS*, 910 F.2d 567, 571 (9th Cir. 1990) (rejecting Salvadoran's claim of neutrality); *Maldonado-Cruz v. INS*, 883 F.2d 788, 791 (9th Cir. 1989) (Salvadoran applicant had fear of persecution on basis of neutrality); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984) ("Choosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction."); *Argueta v. INS*, 759 F.2d 1395, 1397 (9th Cir. 1985) (Salvadoran established political neutrality).

(vi) Other Expressions of Political Opinion

See Zahedi v. INS, 222 F.3d 1157 (9th Cir. 2000) (holding that applicant who was involved in translation and distribution of "The Satanic Verses" had a well-founded fear of persecution on account of political opinion); *Chouchkov v. INS*, 220 F.3d 1077 (9th Cir. 2000) (Russian nuclear engineer's belief that his government should not sell nuclear technology to Iran); *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (Salvadoran woman's resistance to rape and beating through flight constituted assertion of a political opinion opposing forced sexual subjugation), *overruled in part on*

judicial notice grounds by Fisher v. INS, 79 F.3d 955 (9th Cir. 1996) (en banc).

(vii) Imputed Political Opinion

"Imputed political opinion is still a valid basis for relief after Elias-Zacarias." *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992); *see also Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997). An imputed political opinion arises when "[a] persecutor falsely attributes an opinion to the victim, and then persecutes the victim because of that mistaken belief about the victim's views." *Canas-Segovia*, 970 F.2d at 602. Under the imputed political opinion doctrine, the applicant's own opinions are irrelevant. *See Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985). "[O]ur analysis focuses on how the persecutor perceived the applicant's actions and allegiances, and what motivated their abuse." *Agbuya v. INS*, 241 F.3d 1224, 1229 (9th Cir. 2001) (NPA perceived applicant to be an enemy of the laborers, the communist cause, and the NPA itself).

(A) Family Association

An imputed political opinion claim may arise from the applicant's associations with others, including family, organizational, governmental or personal affiliations, which cause assumptions to be made about him. "Typically, where killings and other acts of violence are inflicted on members of the same family by government forces, the inference that they are connected and politically motivated is an appropriate one." *Navas v. INS*, 217 F.3d 646, 661 (9th Cir. 2000) (imputation of pro-guerrilla political opinion by Salvadoran soldiers) (internal quotation marks omitted)); *see also Lopez-Galarza v. INS*, 99 F.3d 954, 959–60 (9th Cir. 1996) (Sandinistas imputed a political opinion based on family's ties to former government); *Ramirez Rivas v. INS*, 899 F.2d 864 (9th Cir. 1990) (imputed opinion based on association with large, historically politically active Salvadoran family); *cf. Sangha v. INS*, 103 F.3d 1482, 1489–90 (9th Cir. 1997) (Sikh failed to show that the militants imputed his father's Akali Dal political opinion to him).

(B) No Evidence of Legitimate Prosecutorial Purpose

"[I]f there is no evidence of a legitimate prosecutorial purpose for a government's harassment of a person . . . there arises a presumption that the motive for harassment is political." *Ratnam v. INS*, 154 F.3d 990, 995 (9th Cir. 1998) (internal quotation marks omitted). Moreover, "extra-judicial punishment of suspected anti-government guerrillas can constitute persecution on account of imputed political opinion." *Singh v. Ilchert*, 63 F.3d 1501, 1508–09 (9th Cir. 1995) (discussing difference between legitimate criminal prosecution and persecution); *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988) (refusing to characterize death threats by Salvadoran security forces "as an example of legitimate criminal prosecution"); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985) ("When a government exerts its military strength against an individual or a group within its population and there is no reason to believe that the individual or group has engaged in any criminal activity or other conduct that would provide a legitimate basis for governmental action, the most reasonable presumption is that the government's actions are politically motivated.").

Cf. Dinu v. Ashcroft, 372 F.3d 1041, 1044–45 (9th Cir. 2004) (distinguishing the above line of cases because Dinu acknowledged that the Romanian authorities had a legitimate goal of apprehending those who shot civilian demonstrators during the uprising).

(C) Other Cases Discussing Imputed Political Opinion

Ndom v. Ashcroft, No. 02-74419, 2004 WL 2021275, *6 (9th Cir. Sept. 10, 2004) (applicant was persecuted by Senegalese armed forces on account of imputed political opinion); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076–77 (9th Cir. 2004) (Guatemalan woman who was gang raped by soldiers was persecuted on account of a pro-guerrilla political opinion imputed to her entire village); *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (rape because of applicant's family's association with the previous Ethiopian government); *Rios v. Ashcroft*, 287 F.3d 895, 900–01 (9th Cir. 2002) (perceived to be political opponents of the Guatemalan guerrillas); *Al-Harbi v. INS*, 242 F.3d 882, 890 (9th Cir. 2001) (imputed political opinion based on United States evacuation from Iraq); *Lim v. INS*, 224 F.3d 929, 934 (9th Cir.

2000) (former Filipino intelligence officer feared retaliation for testifying against guerrilla leaders); *Yazitchian v. INS*, 207 F.3d 1164, 1168 (9th Cir. 2000) (political opinion of prominent Dashnak imputed to Armenian couple); *Chanchavac v. INS*, 207 F.3d 584, 591 (9th Cir. 2000) (Guatemalan military accused applicant of being a guerrilla when beating him); *Cordon-Garcia v. INS*, 204 F.3d 985, 991–92 (9th Cir. 2000) (Guatemalan guerrilla abductor told applicant that her teaching efforts undermined their recruitment efforts); *Briones v. INS*, 175 F.3d 727, 729 (9th Cir. 1999) (en banc) (Filipino military informant placed on NPA death list); *Ratnam v. INS*, 154 F.3d 990, 995–96 (9th Cir. 1998) (torture by Sri Lankan government on account of imputed political opinion); *Vera-Valera v. INS*, 147 F.3d 1036, 1039 (9th Cir. 1998) (president of street vendor's cooperative in Peru); *Velarde v. INS*, 140 F.3d 1305, 1312 (9th Cir. 1998) (bodyguard to former Peruvian President's family), *superseded in part on other grounds by Falcon Carriche v. Ashcroft*, 350 F.3d 845, 854 n.9 (9th Cir. 2003); *Meza-Manay v. INS*, 139 F.3d 759, 764 (9th Cir. 1998) (husband was member of Peruvian counter-insurgency unit); *Rodriguez-Roman v. INS*, 98 F.3d 416, 429–30 (9th Cir. 1996) (Cuban illegal departure statute imputes disloyalty); *Gomez-Saballos v. INS*, 79 F.3d 912, 917 (9th Cir. 1996) (Sandinista prison director); *Singh v. Ilchert*, 69 F.3d 375, 379 (9th Cir. 1995) (per curiam) (imputed beliefs of Sikh separatists); *Alonzo v. INS*, 915 F.2d 546, 549 (9th Cir. 1990) (refusal to join Guatemalan military); *Beltran-Zavala v. INS*, 912 F.2d 1027, 1029–30 (9th Cir. 1990) (based on friendship with Guatemalan guerrilla supporter), *overruled in part on other grounds by Rueda-Menicucci v. INS*, 132 F.3d 493 (9th Cir. 1997); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1380 (9th Cir. 1990) (imputed opinion based on employment by Salvadoran government); *Maldonado-Cruz v. INS*, 883 F.2d 788, 792 (9th Cir. 1989) (supposed association with Salvadoran guerrillas); *Blanco-Lopez v. INS*, 858 F.2d 531, 533 (9th Cir. 1988) (false accusation that applicant was a Salvadoran guerrilla); *Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir. 1988) (Haitian's refusal to accede to extortion led to classification and treatment as a subversive); *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (deliberate and cynical imputation of a political viewpoint by Salvadoran military official), *overruled in part on judicial notice grounds by Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc).

(viii) Opposition to Coercive Population Control Policies

Congress amended the refugee definition in 1996 to provide that forced abortion or sterilization, and punishment for opposition to coercive population control policies, constitute persecution on account of political opinion. *See* 8 U.S.C. § 1101(a)(42)(B) (added by section 601 of IIRIRA).

The Immigration and Nationality Act now provides that:

> a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

Id. Only 1,000 people may be admitted under this provision each year. *See* 8 U.S.C. § 1157(a)(5). However, the BIA has granted conditional asylum until the eligible applicant can adjust her status consistent with the statutory cap. *See Li v. Ashcroft*, 356 F.3d 1153, 1161 n.6 (9th Cir. 2004) (en banc).

(A) Forced Abortion

"The plain language of the statute provides that forced abortions are per se persecution and trigger asylum eligibility." *Wang v. Ashcroft*, 341 F.3d 1015, 1020 (9th Cir. 2003) (reversing negative credibility finding and holding that applicant who had two forced abortions and an IUD inserted was eligible for asylum and withholding).

(B) Forced Sterilization

"[A] person who has been forcibly sterilized is automatically classified as a refugee, and is therefore automatically eligible for asylum." *He v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003) (reversing BIA's negative credibility finding and holding that husband whose wife was forcibly sterilized after the birth of her second child, was entitled to asylum).

(C) Other Resistance to a Coercive Population Control Policy

In *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc), the court held that a forced pregnancy examination constituted persecution, given the timing and physical force involved in the procedure. The applicant described a physically invasive and emotionally traumatic half-hour exam, which was conducted over her physical protests. Li was also threatened with future exams, abortion, sterilization of her boyfriend, and arrest. The court held that the persecutory pregnancy exam was on account of petitioner's vocal and physical resistance to China's marriage-age restriction and one-child policy.

In *Chen v. Ashcroft*, 362 F.3d 611, 621–23 (9th Cir. 2004), the court reversed a negative credibility finding and remanded to the BIA to allow it to determine whether the involuntary insertion of an IUD and the imposition of a large fine for an unauthorized pregnancy constituted past persecution. The court also ordered the BIA to determine whether petitioner's future fear of forced abortion, sterilization, or other persecution, was well founded.

(D) Family Members

The spouse of an individual who has been forced to undergo abortion or sterilization is also eligible for asylum. *See He v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003). In *Ge v. Ashcroft*, 367 F.3d 1121, 1126–27 (9th Cir. 2004), this court reversed a negative credibility finding and held that the applicant conclusively established past persecution based on his wife's three forced abortions. Ge was also detained, interrogated, and

beaten when his wife failed to appear for a mandatory physical examination, and both Ge and his wife were fired from their jobs.

The Ninth Circuit recently held that the prohibition on underage marriage is an integral part of China's population control policy, and that a husband who could not legally register his marriage because of his age was eligible for asylum based on his wife's forced abortion. *Ma v. Ashcroft*, 361 F.3d 553, 559–61 (9th Cir. 2004); *see also Zheng v. Ashcroft*, 382 F.3d 993, 1001–02 (9th Cir. 2004) (same).

The children of families who have violated China's coercive population control policy may also be entitled to relief. In *Lin v. Ashcroft*, 377 F.3d 1014, 1028–31 (9th Cir. 2004), the court held that a 14-year-old petitioner was prejudiced by his attorney's ineffective assistance because counsel failed to raise plausible claims for relief under particular social group theory and imputed political opinion. Lin's parents violated the mandatory limits on procreation by having a second child, his mother was forcibly sterilized, and the family faced other forms of harassment and harm.

(E) Continuing Act of Persecution

The BIA has held that past sterilization pursuant to a coercive population control policy constitutes a continuing act of persecution. Accordingly, the government could not show a fundamental change in circumstances to meet the standard for a discretionary denial under 8 C.F.R. § 1208.13(b)(1)(i)(A), based on the fact that the applicant could not fear future sterilization. *In re Y-T-L-*, 23 I. & N. Dec. 601, 606–07 (BIA 2003).

f. Prosecution

Ordinary prosecution for criminal activity is generally not persecution. *Chanco v. INS*, 82 F.3d 298, 301 (9th Cir. 1996) (prosecution for involvement in military coup in the Philippines); *Mabugat v. INS*, 937 F.2d 426 (9th Cir. 1991) (prosecution for misappropriation of funds); *Fisher v. INS*, 79 F.3d 955, 961–62 (9th Cir. 1996) (en banc) (punishment

for violation of Iranian dress and conduct rules); *Abedini v. INS*, 971 F.2d 188, 191–92 (9th Cir. 1992) (punishment for distribution of Western videos and films, use of false passport, and avoidance of conscription in Iran); *cf. Hoque v. Ashcroft*, 367 F.3d 1190, 1197–98 (9th Cir. 2004) (holding that the IJ's determination that Bangladeshi applicant feared prosecution rather than persecution was unsupported by the record).

(i) Pretextual Prosecution

However, if the prosecution is motivated by a protected ground, and the punishment is sufficiently serious or disproportionate, the sanctions imposed could amount to persecution. *See Bandari v. INS*, 227 F.3d 1160, 1168 (9th Cir. 2000) (violation of Iranian law against public displays of affection can be basis for asylum claim). Additionally, "even if the government authorities' motivation for detaining and mistreating [an applicant] was partially for reasons of security, persecution in the absence of any legitimate criminal prosecution, conducted at least in part on account of political opinion, provides a proper basis for asylum and withholding of deportation, even if the persecution served intelligence gathering purposes." *Ndom v. Ashcroft*, No. 02-74419, 2004 WL 2021275, *9 & n.6 (9th Cir. Sept. 10, 2004) (past persecution by Senegalese armed forces) (internal quotation marks and alterations omitted); *see also Navas v. INS*, 217 F.3d 646, 660 (9th Cir. 2000) ("If there is no evidence of a legitimate prosecutorial purpose for a government's harassment of a person . . . there arises a presumption that the motive for harassment is political." (internal quotation marks omitted)); *Ratnam v. INS*, 154 F.3d 990, 996 (9th Cir. 1998) (extra-prosecutorial torture of Sri Lankan applicant, even if conducted for intelligence gathering purposes, constitutes persecution); *Rodriguez-Roman v. INS*, 98 F.3d 416, 427 (9th Cir. 1996) (severe punishment under Cuban illegal departure law); *Ramirez Rivas v. INS*, 899 F.2d 864, 867–68 (9th Cir. 1990) (extra-prosecutorial mistreatment of family members in El Salvador); *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988) (governmental harm without formal prosecutorial measures is persecution).

(ii) Illegal Departure Laws

"Criminal prosecution for illegal departure is generally not considered to be persecution." *Li v. INS*, 92 F.3d 985, 988 (9th Cir. 1996) (fine and three-week confinement upon return to China not persecution); *Kozulin v. INS*, 218 F.3d 1112, 1117–18 (9th Cir. 2000) (applicant failed to establish that illegal departure from Russia would result in disproportionately severe punishment); *Abedini v. INS*, 971 F.2d 188, 191–92 (9th Cir. 1992) (punishment of Iranian for use of false passport not persecution).

However, an applicant may establish persecution where there is evidence that departure control laws provide severe or disproportionate punishment, or label violators as defectors, traitors, or enemies of the government. *See Al-Harbi v. INS*, 242 F.3d 882, 893–94 (9th Cir. 2001) (fear of execution based on US evacuation from Iraq); *Rodriguez-Roman v. INS*, 98 F.3d 416, 430–31 (9th Cir. 1996) (severe punishment for violation of Cuban illegal departure law which "imputes to those who are prosecuted pursuant to it, a political opinion"); *Kovac v. INS*, 407 F.2d 102, 104 (9th Cir. 1969) (holding in Yugoslavian case that asylum law protects applicants who would be punished for violation of a "politically motivated prohibition against defection from a police state").

g. Military and Conscription Issues

(i) Conscription Generally Not Persecution

Punishment for evading a country's military or conscription laws is generally not persecution. *Padash v. INS*, 358 F.3d 1161, 1166–67 (9th Cir. 2004) (petitioner presented no evidence that Iranian military sought to recruit or harm him on account of a statutory ground); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1150–51 (9th Cir. 2000) (attempts by military and guerrillas to recruit Guatemalan not persecution absent evidence of discriminatory purpose); *Ubau-Marenco v. INS*, 67 F.3d 750, 754 (9th Cir. 1995) (active military duty in Cuba), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc); *Abedini v. INS*, 971 F.2d 188, 191 (9th Cir. 1992) (conscription in Iran); *Castillo v. INS*, 951 F.2d

1117, 1122 (9th Cir. 1991) (unmotivated Nicaraguan conscientious objector); *Alonzo v. INS*, 915 F.2d 546, 548 (9th Cir. 1990) (conscription attempts by Guatemalan military not persecution absent indication that military knew of applicant's religious or political beliefs); *Kaveh-Haghigy v. INS*, 783 F.2d 1321, 1323 (9th Cir. 1986) (per curiam) (conscription in Iran); *Zepeda-Melendez v. INS*, 741 F.2d 285, 289–90 (9th Cir. 1984).

(ii) Exceptions

However, the Ninth Circuit has recognized that forced conscription or punishment for violation of military service rules can constitute persecution in the following circumstances:

(A) Disproportionately Severe Punishment

Where individual would suffer disproportionately severe punishment for evasion on account of one of the grounds. *See Ramos-Vasquez v. INS*, 57 F.3d 857, 864 (9th Cir. 1995); *Barraza Rivera v. INS*, 913 F.2d 1443, 1451 (9th Cir. 1990); *see also Duarte de Guinac v. INS*, 179 F.3d 1156, 1161 (9th Cir. 1999) (after conscription, Guatemalan petitioner was subjected to repeated beatings, severe verbal harassment, and race-based insults).

(B) Inhuman Conduct

Where individual would be forced to engage in conduct that is condemned by the international community as contrary to basics rules of human conduct. *See Ramos-Vasquez v. INS*, 57 F.3d 857, 863–64 (9th Cir. 1995) ("Both this court and the BIA have recognized conscientious objection to military service as grounds for relief from deportation, where the alien would be required to engage in inhuman conduct were he to continue serving in the military."); *Barraza Rivera v. INS*, 913 F.2d 1443, 1450–52 (9th Cir. 1990) (no objection to military service per se, but fear of death or punishment for desertion given his refusal to assassinate two men in El Salvador); *Tagaga v. INS*, 228 F.3d 1030, 1034–35 (9th Cir. 2000) (prosecution for refusal to persecute Indo-Fijians).

(C) Moral or Religious Grounds

Where an individual refuses to serve based on moral or religious beliefs. *Barraza Rivera v. INS*, 913 F.2d 1443, 1450-51 (9th Cir. 1990).

(iii) Participation in Coup

"Prosecution for participation in a coup does not constitute persecution on account of political opinion when peaceful means of protest are available for which the alien would not face punishment." *Chanco v. INS*, 82 F.3d 298, 302 (9th Cir. 1996). The Ninth Circuit has not decided whether punishment for a failed coup against a regime which prohibits peaceful protest or change could be eligible for asylum. *See id.*

(iv) Military Informers

An informer for the military in a conflict that is "political at its core" would be perceived as a political opponent by the group informed upon. *Mejia v. Ashcroft*, 298 F.3d 873, 877 (9th Cir. 2002) (holding that "if an informer against the NPA appears on a NPA hit list, he has a well-founded fear of persecution based on imputed political opinion"); *see also Lim v. INS*, 224 F.3d 929, 934 (9th Cir. 2000) (NPA infiltrator); *Briones v. INS*, 175 F.3d 727, 728–29 (9th Cir. 1999) (en banc) (NPA infiltrator).

(v) Military or Law Enforcement Membership

(A) Current Status

To the extent that an applicant fears that he will be targeted as a current member of the military, this danger does not constitute persecution on account of political opinion or membership in a social group. *See Cruz-Navarro v. INS*, 232 F.3d 1024, 1028–29 (9th Cir. 2000) (current member of Peruvian military); *Chanco v. INS*, 82 F.3d 298, 302–03 (9th Cir. 1996) (current member of Philippines' military); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) ("Military enlistment in Central America does not create automatic asylum eligibility."); *cf. Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000) (Granting petition where Filipino whistle-

blowing law enforcement officer feared political retribution by government, not mere criminals or guerrilla forces).

(B) Former Status

However, an applicant's status based on his former service could be the basis for a claim based on social group or imputed political opinion. *See Velarde v. INS*, 140 F.3d 1305, 1311 (9th Cir. 1998) (former body guard to daughters of former Peruvian president); *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990) (ex-soldier eligible for asylum because guerrilla persecutors identified him politically with the Salvadoran government); *cf. Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) (prior military service in Guatemala not a basis for asylum).

(vi) Non-Governmental Conscription

A guerilla group's attempt to conscript an asylum seeker does not necessarily constitute persecution on account of political opinion. *INS v. Elias-Zacarias*, 502 U.S. 478, 481–82 (1992); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003). In order to establish asylum eligibility, the applicant must show that the guerillas will persecute him because of his political opinion, or other protected ground, rather than merely because he refused to fight with them. *Melkonian*, 320 F.3d at 1068 (holding that applicant was eligible for asylum because the Separatists specifically targeted him for conscription based on his Armenian ethnicity and religion); *see also Pedro-Mateo v. INS*, 224 F.3d 1147, 1150–51 (9th Cir. 2000) (indigenous Guatemalan not eligible for failure to show that forced recruitment was on account of statutory ground); *Tecun-Florian v. INS*, 207 F.3d 1107, 1109 (9th Cir. 2000) (Guatemalan not eligible when guerrillas tortured him because he refused to join them); *Sebastian-Sebastian v. INS*, 195 F.3d 504, 509 (9th Cir. 1999) (Guatemalan not eligible for failure to show that guerrillas beat and threatened him on account of imputed political opinion rather than for refusal to join them); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir. 1999) (granting petition where substantial evidence did not support BIA's determination that Salvadoran guerrillas' threats were merely recruitment attempts);

Maldonado-Cruz v. INS, 883 F.2d 788 (9th Cir. 1989) (petition for review granted, pre *Elias-Zacarias*).

h. Cases Finding no Nexus

Dinu v. Ashcroft, 372 F.3d 1041, 1044–45 (9th Cir. 2004) (Dinu failed to meet his burden of proof that the authorities imputed a pro-Ceausescu political opinion to him, or that the purported criminal investigation had no bona fide objective); *Gormley v. Ashcroft*, 364 F.3d 1172, 1177 (9th Cir. 2004) (random criminal acts bore no nexus to race); *Molina-Estrada v. INS*, 293 F.3d 1089, 1094–95 (9th Cir. 2002) (no evidence to compel finding that Guatemalan guerrillas attacked applicant's family on account of actual or imputed political opinion); *Ochave v. INS*, 254 F.3d 859, 865–66 (9th Cir. 2001) (no nexus between rape by NPA guerrillas and any protected ground); *Molina-Morales v. INS*, 237 F.3d 1048, 1052 (9th Cir. 2001) (rape and murder of aunt by government politician in El Salvador was personal dispute); *Cruz-Navarro v. INS*, 232 F.3d 1024, 1029 (9th Cir. 2000) (no evidence to show that guerrillas imputed contrary political opinion to Peruvian police officer); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1151 (9th Cir. 2000) (kidnaping by Guatemalan government soldiers and guerrillas not on account of political opinion, race or social group); *Kozulin v. INS*, 218 F.3d 1112, 1115–17 (9th Cir. 2000) (failed to prove attack was motivated by anti-Communist views); *Belayneh v. INS*, 213 F.3d 488, 491 (9th Cir. 2000) (no imputed political opinion based on views of former husband); *Rivera-Moreno v. INS*, 213 F.3d 481, 486 (9th Cir. 2000) (no nexus between bombing of applicant's home and her refusal to join guerrillas); *Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000) (random violence during civil strife in Armenia); *Tecun-Florian v. INS*, 207 F.3d 1107, 1109–10 (9th Cir. 2000) (past torture by Guatemalan guerrillas had no nexus to applicant's religious beliefs or political opinion); *Bolshakov v. INS*, 133 F.3d 1279, 1281 (9th Cir. 1998) (criminal extortion and robbery by Russian thugs); *Sangha v. INS*, 103 F.3d 1482, 1488–91 (9th Cir. 1997) (Sikh applicant failed to provide direct or circumstantial evidence that the militants sought to recruit him on account of an actual or imputed political opinion); *Li v. INS*, 92 F.3d 985, 987–88 (9th Cir. 1996) (fear of punishment from unpaid smugglers); *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc)

(petitioner's violation of restrictive dress and conduct rules did not establish persecution on account of religion or political opinion); *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991) (no evidence of imputed political opinion); *Alonzo v. INS*, 915 F.2d 546, 548 (9th Cir. 1990) (no imputed neutrality); *De Valle v. INS*, 901 F.2d 787, 791 (9th Cir. 1990) (rejecting claim of "doubly imputed" political opinion based on husband's desertion from Salvadoran army); *Florez-de Solis v. INS*, 796 F.2d 330, 335 (9th Cir. 1986) (violent collection of private debt or random crime during civil strife in El Salvador); *Rebollo-Jovel v. INS*, 94 F.2d 441, 447–48 (9th Cir. 1986) (general conditions of unrest in El Salvador); *Zayas-Marini v. INS*, 785 F.2d 801, 806 (9th Cir. 1986) (death threats based on personal hostility); *Zepeda-Melendez v. INS*, 741 F.2d 285, 289 (9th Cir. 1984) (danger based on family's ownership of strategically located house or non-commitment to either faction in El Salvador not on account of protected ground).

i. Exercise of Discretion

"Asylum is a two-step process, requiring the applicant first to establish his *eligibility* for asylum by demonstrating that he meets the statutory definition of a 'refugee,' and second to show that he is *entitled* to asylum as a matter of discretion." *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004). Once an "applicant establishes statutory eligibility for asylum, the Attorney General must, by a proper exercise of [] discretion, determine whether to grant that relief." *Navas v. INS*, 217 F.3d 646, 655 (9th Cir. 2000); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987) ("It is important to note that the Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee. Instead, a finding that an alien is a refugee does no more than establish that 'the alien *may* be granted asylum *in the discretion of the Attorney General.*'"); *see also* 8 U.S.C. § 1158(b).

The BIA must "state its reasons and show proper consideration of all factors when weighing equities and denying relief." *Kalubi*, 364 F.3d at 1140 (internal quotation marks omitted). Conclusory statements are inappropriate, and the BIA must sufficiently explain how each factor figures in the balance so that the court can tell that it has been heard,

considered, and decided. *Id.* at 1141–42; *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 161 (9th Cir. 1996).

In exercising its discretion, the BIA must consider both favorable and unfavorable factors, including the severity of the past persecution suffered. *See Kazlauskas v. INS*, 46 F.3d 902, 907 (9th Cir. 1995) (discussing likelihood of future persecution, severity of past persecution, alcohol rehabilitation, circumstances surrounding departure and entry into U.S., and criminal record in U.S.); *see also Andriasian v. INS*, 180 F.3d 1033, 1043–47 (9th Cir. 1999) (discussing petitioner's temporary stay in a third country); *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 161 (9th Cir. 1996) (discussing likelihood of future persecution and humanitarian considerations).

"There is no definitive list of factors that the BIA must consider or may not consider. Each asylum application is different, and factors that are probative in one context may not be in others. However, all relevant favorable and adverse factors must be considered and weighed." *Kalubi,* 364 F.3d at 1139, 1140 & n.6 (holding that the relevant factors in Kalubi's case were: membership in a terrorist organization, forum shopping, the likelihood of future persecution, separation from a spouse, and the applicant's health). "[T]he likelihood of future persecution is a particularly important factor to consider." *Id.* at 1141 (internal quotation marks omitted); *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 161 (9th Cir. 1996).

The Attorney General's ultimate decision to grant or deny asylum to an eligible applicant is reviewed for abuse of discretion. *See Andriasian v. INS*, 180 F.3d 1033, 1040 (9th Cir. 1999); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004) ("By statute, 'the Attorney General's discretionary judgment whether to grant [asylum] shall be conclusive unless manifestly contrary to the law and an abuse of discretion.'")(quoting 8 U.S.C. § 1252(b)(4)(D)).

If asylum is denied in the exercise of discretion, the applicant remains eligible for withholding. *See Osorio v. INS*, 18 F.3d 1017, 1032 (9th Cir. 1994) (granting petition).

j. Remanding Under *INS v. Ventura*

In *INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam), the Court held that where the BIA has not yet considered an issue, the proper course is to remand to allow the BIA to consider the issue in the first instance, *id.* at 16; *see also Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078 (9th Cir. 2004) (holding that petitioner was persecuted on account of protected ground, and remanding for a determination of changed circumstances); *Singh v. Ashcroft*, 362 F.3d 1164, 1172 (9th Cir. 2004) (reversing negative credibility finding and remanding for determination of eligibility); *Guo v. Ashcroft*, 361 F.3d 1194, 1204 (9th Cir. 2004) (reversing a negative credibility finding and remanding for a determination of changed country conditions).

The ordinary remand rule is unnecessary where the applicant is automatically eligible for asylum. *See He v. Ashcroft*, 328 F.3d 593, 603–04 (9th Cir. 2003) (holding that applicant was statutorily eligible for asylum based on the forced sterilization of his spouse); *Wang v. Ashcroft*, 341 F.3d 1015, 1023 (9th Cir. 2003) (reversing negative credibility finding and holding that applicant who had two forced abortions and an IUD inserted was statutorily eligible for asylum and withholding); *cf. Chen v. Ashcroft*, 362 F.3d 611, 621–23 (9th Cir. 2004) (reversing negative credibility finding and remanding to allow BIA to determine whether the involuntary insertion of an IUD and the imposition of a large fine for an unauthorized pregnancy constituted past persecution, and whether she had a well-founded fear of future persecution).

Where the IJ has already passed on the relevant issue, this court may or may not remand. In *Khup v. Ashcroft*, 376 F.3d 898, 904–05 (9th Cir. 2004), and *Baballah v. Ashcroft*, 367 F.3d 1067, 1078–78 (9th Cir. 2004), the court declined to remand because the IJ had already considered the applicants' eligibility for asylum and withholding. In *Lopez v. Ashcroft*, 366 F.3d 799, 806 (9th Cir. 2004), the court held that the petitioner had established past persecution, and determined that a remand for a redetermination of changed country conditions was "more consistent with the spirit and reasoning of *Ventura*." *See also Jahed v. INS*, 356 F.3d 991, 1001 (9th Cir. 2004) (remanding withholding claim).

k. Derivative Asylees

"A spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien." *Ma v. Ashcroft*, 361 F.3d 553, 561 n.10 (9th Cir. 2004) (quoting 8 U.S.C. § 1158(b)(3)); *see also* 8 C.F.R. § 1208.21. An individual who is eligible for asylum in her own right cannot benefit from the derivative status set forth in § 1158(b)(3). *Ma*, 361 F.3d at 560–61.

l. Bars to Asylum

(i) One-Year Bar

Under IIRIRA, effective April 1, 1997, an applicant must demonstrate by clear and convincing evidence that his or her application for asylum was filed within one year after arrival in the United States. *Hakeem v. INS*, 273 F.3d 812, 815 (9th Cir. 2001); 8 U.S.C. § 1158(a)(2)(B). "The 1-year period shall be calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later." 8 C.F.R. § 1208.4(a)(2)(ii). Pursuant to 8 U.S.C. § 1158(a)(3), this court lacks jurisdiction to review the IJ's determination under this section. *Hakeem*, 273 F.3d at 815; *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002); *Reyes-Reyes v. Ashcroft*, No. 03-72100, 2004 WL 2047563, *2 (9th Cir. Sept. 13, 1004). "There is no statutory time limit for bringing a petition for withholding of removal." *El Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004), *as amended by* 2004 WL 1879255 (9th Cir. Aug. 24, 2004).

(A) Exceptions to the Deadline

If the applicant can show a material change in circumstances or that extraordinary circumstances caused the delay in filing, the limitations period will be tolled. See 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 1208.4(a)(4) & (5). However, the court lacks jurisdiction over the BIA's determination that no extraordinary circumstances excused the untimely

filing of the application. *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002) (citing 8 U.S.C. § 1158(a)(3)).

In *El Himri v. Ashcroft*, 378 F.3d 932, 936 (9th Cir. 2004), *as amended by* 2004 WL 1879255 (9th Cir. Aug. 24, 2004), the court held that the petitioner's asylum application was time-barred because she failed to apply for asylum within one year of arrival in the United States. However, the court considered the merits of her son's asylum claim because of his status as a minor.

(ii) Previous-Denial Bar

An applicant who previously applied for and was denied asylum is barred. 8 U.S.C. § 1158(a)(2)(C). Pursuant to 8 U.S.C. § 1158(a)(3), this court lacks jurisdiction to review the IJ's determination under this section. Applicants who filed before April 1, 1997 are not barred under this section. *See* 8 C.F.R. § 1208.13(c)(1) and (2).

(iii) Safe Third Country Bar

An applicant has no right to apply for asylum if he or she "may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality . . .) in which the alien's life or freedom would not be threatened on account of" the statutory grounds. 8 U.S.C. § 1158(a)(2)(A). Pursuant to 8 U.S.C. § 1158(a)(3), this court lacks jurisdiction to review the IJ's determination under this section. Applicants who filed before April 1, 1997 are not barred under this section. *See* 8 C.F.R. § 1208.13(c)(1) and (2). The DHS has issued proposed rules governing a bilateral agreement between the United States and Canada. *See* 69 FR 10620–01 (Mar. 8, 2004) ("Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry").

(iv) Firm Resettlement Bar

An applicant may not be granted asylum if "the alien was firmly resettled in another country prior to arriving in the United States." *See* 8 U.S.C. § 1158(b)(2)(A)(vi). The definition of firm resettlement is found in the administrative regulations at 8 C.F.R. § 1208.15. "Subject to two exceptions, an alien has firmly resettled if, prior to arrival in the United States, he or she entered another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement." *Camposeco-Montejo v. Ashcroft*, No. 02-74259, 2004 WL 2072038, *3 (9th Cir. Sept. 17, 2004). An applicant who received an offer of permanent resettlement will not be firmly resettled if he can establish:

> (a) That 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; or
>
> (b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.

8 C.F.R. § 1208.15. "In the absence of direct evidence of an offer [of permanent resettlement], a lengthy, undisturbed residence in a third country may establish a rebuttable presumption that an individual has the right to return to that country and remain there permanently." *Camposeco-Montejo*, 2004 WL 2072038, *3. (Guatemalan was not firmly resettled in

Mexico because he did not receive an offer of permanent resettlement, and he was restricted to the municipality in which his refugee camp was located, was not allowed to attend Mexican schools, and was threatened with repatriation) (internal quotation marks omitted).

See also Andriasian v. INS, 180 F.3d 1033, 1043–47 (9th Cir. 1999) (holding that ethnic Armenian from Azerbaijan had not firmly resettled in Armenia because he was harassed and threatened there, and accused of being loyal to the Azerbaijanis); *Cheo v. INS*, 162 F.3d 1227, 1229–30 (9th Cir. 1998) (applicants failed to rebut inference of firm resettlement based on three-year undisturbed stay in Malaysia); *Vang v. INS*, 146 F.3d 1114, 1116–17 (9th Cir. 1998) (applicant ineligible based on firm resettlement of parents); *Yang v. INS*, 79 F.3d 932, 934–39 (9th Cir. 1996) (discussing 1990 firm resettlement regulation).

A finding of firm resettlement does not bar eligibility for withholding of removal. *Siong v. INS*, 376 F.3d 1030, 1041 (9th Cir. 2004) (reversing denial of a motion to reopen in a Laotian asylum case because petitioners presented plausible grounds for claiming that they were not firmly resettled in France, their country of citizenship, given their credible fear of persecution in France).

(v) Persecution-of-Others Bar

A person who "ordered, incited, assisted, or otherwise participated in the persecution" of any person on account of one of the five grounds may not be granted asylum. 8 U.S.C. § 1158(b)(2)(A)(i); 8 U.S.C. § 1101(a)(42). Individual accountability for the persecutory acts must be established, and mere acquiescence or membership in an organization is insufficient. *See Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004) (holding that to the extent that the IJ denied asylum based on the imputed persecutory actions of other Bosnian Serbs, the IJ failed to conduct a particularized evaluation to determine the applicant's individual accountability for the persecution). Additionally, acts of true self-defense do not constitute persecution of others. *Id*. at 1253 ("As a textual matter, holding that acts of true self-defense qualify as persecution would run afoul of the 'on account of' requirement in the provision. It would also be

contrary to the purpose of the statute."); *see also Kalubi v. Ashcroft*, 364 F.3d 1134, 1139 (9th Cir. 2004) (recognizing that merely being a member of an organization that persecutes others is insufficient to render an alien statutorily ineligible for asylum as a persecutor).

See also Laipenieks v. INS, 750 F.2d 1427, 1431 (9th Cir. 1985) (interpreting former 8 U.S.C. § 1251(a)(19), and holding that there was insufficient evidence that applicant assisted or participated in persecution of others based on political beliefs); *Fedorenko v. United States*, 449 U.S. 490, 514 n.34 (1981) (noting that an individual who merely cut the hair of inmates before execution did not assist in the persecution of civilians, but that an armed uniformed guard who shot at escaping inmates qualified as a persecutor).

(vi) Particularly-Serious-Crime Bar

An applicant in removal proceedings is barred from relief if, "having been convicted by a final judgment of a particularly serious crime, [he] constitutes a danger to the community in the United States." *See* 8 U.S.C. § 1158 (b)(2)(A)(ii); *see also Kankamalage v. INS*, 335 F.3d 858, 864 (9th Cir. 2003) (noting that this statutory provision applies only to immigration proceedings commenced on or after April 1, 1997). A person convicted of a particularly serious crime is considered per se to be a danger to the community. *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397 (9th Cir. 1987) (upholding BIA's decision not to balance the seriousness of the offense [drug possession and trafficking] against the degree of persecution feared in El Salvador); *see also Komarenko v. INS*, 35 F.3d 432, 436 (9th Cir. 1994) (noting that the bar "is based on the reasonable determination that persons convicted of particularly serious crimes pose a danger to the community").

A person convicted of an aggravated felony "shall be considered to have been convicted of a particularly serious crime." 8 U.S.C. § 1158(b)(2)(B)(i). For more information on aggravated felonies, *see* Criminal Issues in Immigration Law.

If an applicant pleaded guilty to the crime before October 1, 1990, the particularly serious crime bar cannot be applied to categorically deny relief. *See Kankamalage v. INS*, 335 F.3d 858, 864 (9th Cir. 2003). Instead, the conviction may be considered in the exercise of discretion. *Id.*

(vii) Serious Non-Political Crime Bar

An applicant is barred from relief if there are serious reasons for believing that he or she committed a serious, non-political crime outside the United States prior to arrival. 8 U.S.C. § 1158 (b)(2)(A)(iii); *McMullen v. INS*, 788 F.2d 591, 599 (9th Cir. 1986) ("serious reasons for believing" means probable cause). The IJ is not required to balance the seriousness of the offense against the degree of persecution feared. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 432 (1999).

(viii) Security Bar

An applicant is barred from relief if there are reasonable grounds for regarding the applicant as a danger to the security of the United States. 8 U.S.C. § 1158(b)(2)(A)(iv).

(ix) Terrorism Bar

"An alien is ineligible for asylum if he is inadmissible or removable for engaging in terrorist activity or if 'the Attorney General determines' that 'there are reasonable grounds for regarding an alien as a danger to the security of the United States.'" *Bellout v. Ashcroft*, 363 F.3d 975, 979 (9th Cir. 2004) (quoting 8 U.S.C. § 1158(b)(2)(A)(iv)-(v) (1997)). "Terrorist activities" include membership in a State-Department-designated foreign terrorist organization. *Id.* at 977 (quoting 8 U.S.C. § 1182(a)(3)(B)(i)(V) (1997)).

In *Cheema v. Ashcroft*, No. 02-71311, 2004 WL 1977671, *7 (9th Cir. Sept. 8, 2004), the court interpreted the pre-IIRIRA version of the statute, which barred individuals who had engaged in terrorist activity, *unless* the Attorney General found that there were not reasonable grounds for regarding the alien as a danger to U.S. security. Given this two-pronged inquiry, the Ninth Circuit held that the BIA erred by focusing

solely on the issue of terrorist activity. The court held that substantial evidence supported the BIA's determination that Cheema participated in terrorist activity by soliciting funds for individuals and groups involved in terrorism and providing material support to terrorists by connecting calls from Sikh militants, but remanded on the issue of dangerousness. The court also held that substantial evidence did not support the BIA's finding that Cheemas's wife, Rajwinder Kaur, had participated in terrorist activity by donating money to Sikh widows and orphans.

III. WITHHOLDING OF REMOVAL OR DEPORTATION

An application for asylum under 8 U.S.C. § 1158 is generally considered an application for withholding of removal under 8 U.S.C. § 1231(b)(3), (INA § 241(b)(3)), as well. *See* 8 C.F.R. § 1208.3(b); *Ghadessi v. INS*, 797 F.2d 804, 804 n.1 (9th Cir. 1986). Where deportation or exclusion proceedings were commenced before April 1, 1997, withholding of deportation is available under former 8 U.S.C. § 1253(h) (INA § 243(h)). Withholding codifies the international norm of "nonrefoulement" or non-return to a country where an applicant would face persecution. *See Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1998) (en banc); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) ("The basic withholding provision . . . parallels Article 33 [of the Refugee Convention], which provides that no Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of [a protected ground].") (internal quotation marks and alteration omitted).

In order to qualify for withholding of removal, an applicant must show that her "life or freedom would be threatened" if she is returned to her homeland, on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 1208.16(b). The agent of persecution must be "the government or . . . persons or organizations which the government is unable or unwilling to control." *Reyes-Reyes v. Ashcroft*, No. 03-72100, 2004 WL 2047563, *4 (9th Cir. Sept. 13, 2004) (internal quotation marks omitted).

A. Eligibility for Withholding

1. Higher Burden of Proof

"To qualify for withholding of removal, an alien must demonstrate that it is more likely than not that he would be subject to persecution on one of the specified grounds." *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (internal quotation marks omitted); *see also INS v. Stevic*, 467 U.S. 407, 430 (1984); 8 C.F.R. § 1208.16(b)(2). "This clear probability standard for withholding of removal is more stringent than the well-founded fear standard governing asylum." *Al-Harbi*, 242 F.3d at 888–89 (internal quotation marks and citation omitted). The "standard has no subjective component, but, in fact, requires objective evidence that it is more likely than not that the alien will be subject to persecution upon deportation." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987).

An applicant who fails to satisfy the lower standard of proof for asylum necessarily fails to satisfy the more stringent standard for withholding of removal. *See Farah v. Ashcroft*, 348 F.3d 1153, 1156 (9th Cir. 2003). However, if asylum is denied in the exercise of discretion, the applicant remains eligible for withholding. *See Osorio v. INS*, 18 F.3d 1017, 1032 (9th Cir. 1994).

2. Mandatory Relief

"Unlike asylum, withholding of removal is not discretionary. The Attorney General is not permitted to deport an alien to a country where his life or freedom would be threatened on account of one of the same protected grounds." *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (fear of execution based on US evacuation from Iraq) (internal quotation marks and citation omitted).

3. Nature of Relief

Under asylum, an applicant granted relief may apply for permanent residence after one year. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 n.6 (1987). Under withholding, the successful applicant is only given a right not to be removed to the country of persecution. *See INS v. Aguirre-*

Aguirre, 526 U.S. 415, 419–20 (1999). "Withholding does not confer protection from removal to any other country." *El Himri v. Ashcroft*, 378 F.3d 932 (9th Cir. 2004), *as amended by* 2004 WL 1879255 (9th Cir. Aug. 24, 2004).

4. Past Persecution

Past persecution generates a presumption of eligibility for withholding of removal. *See Baballah v. Ashcroft*, 367 F.3d 1067, 1079 (9th Cir. 2004); *Kataria v. INS*, 232 F.3d 1107, 1115 (9th Cir. 2000); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1164 (9th Cir. 1999); *Korablina v. INS*, 158 F.3d 1038, 1046 (9th Cir. 1998); *see also* 8 C.F.R. § 1208.16(b)(1)(i) (if past persecution, "it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim"). The presumption may be rebutted if the government establishes "by a preponderance of the evidence" that: (A) that there has been a fundamental change in circumstances; or (B) the applicant could reasonably relocate internally to avoid a future threat to life or freedom. 8 C.F.R. § 1208.16(b)(1)(i) & (ii).

5. No Time Limit

"There is no statutory time limit for bringing a petition for withholding of removal." *El Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004), *as amended by* 2004 WL 1879255 (9th Cir. Aug. 24, 2004).

6. Firm Resettlement Not a Bar

A finding of firm resettlement does not bar eligibility for withholding of removal. *See Siong v. INS*, 376 F.3d 1030, 1041 (9th Cir. 2004).

7. Entitled to Withholding

Ndom v. Ashcroft, No. 02-74419, 2004 WL 2021275 (9th Cir. Sept. 10, 2004) (past persecution by Senegalese armed forces); *El Himri v. Ashcroft*, 378 F.3d 932 (9th Cir. 2004) (stateless Palestinians in Kuwait subjected to severe economic discrimination), *as amended by* 2004 WL

1879255 (9th Cir. Aug. 24, 2004); *Khup v. Ashcroft*, 376 F.3d 898, 905 (9th Cir. 2004) (arrest, torture and killing of fellow preachers, military pursuit and documented history of human rights abuses in Burma); *Njuguna v. Ashcroft*, 374 F.3d 765, 772 (9th Cir. 2004) (applicant threatened and family members in Kenya were attacked and imprisoned); *Wang v. Ashcroft*, 341 F.3d 1015, 1023 (9th Cir. 2003) (applicant was harassed and forced to have two abortions and an IUD inserted); *Baballah v. Ashcroft*, 367 F.3d 1067, 1079 (9th Cir. 2004) (applicant and family suffered severe harassment, threats, violence and discrimination); *Ruano v. Ashcroft*, 301 F.3d 1155, 1162 (9th Cir. 2002) (applicant received multiple death threats at home and business, was "closely confronted" and actively chased); *Cardenas v. INS*, 294 F.3d 1062, 1068 (9th Cir. 2002) (direct threats by Shining Path guerrillas); *Rios v. Ashcroft*, 287 F.3d 895, 902–03 (9th Cir. 2002) (kidnaped and wounded by guerrillas, husband and brother killed); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074–75 (death threats combined with harm to family and murders of his counterparts), *as amended by* 290 F.3d 964 (9th Cir. 2002); *Popova v. INS*, 273 F.3d 1251, 1260 (9th Cir. 2001) (harassed, fired, interrogated, threatened, assaulted and arrested); *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (fear of execution based on evacuation from Iraq by United States); *Agbuya v. INS*, 241 F.3d 1224, 1231 (9th Cir. 2001) (kidnaped, falsely imprisoned, hit, threatened with a gun by NPA); *Kataria v. INS*, 232 F.3d 1107, 1115 (9th Cir. 2000) (past torture by Indian authorities); *Salaam v. INS*, 229 F.3d 1234, 1240 (9th Cir. 2000) (per curiam) (arrested, tortured, and scarred); *Tagaga v. INS*, 228 F.3d 1030, 1035 (9th Cir. 2000) (past sentence and would face treason trial if returned); *Bandari v. INS*, 227 F.3d 1160, 1169 (9th Cir. 2000) (past persecution of religious minority who engaged in prohibited interfaith commingling); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1099 (9th Cir. 2000) (rape and assault by Mexican police); *Zahedi v. INS*, 222 F.3d 1157, 1168 (9th Cir. 2000) (summoned for interrogation based on effort to translate and distribute banned book in Iran); *Shah v. INS*, 220 F.3d 1062, 1072 (9th Cir. 2000) (husband killed, applicant and family threatened in India); *Maini v. INS*, 212 F.3d 1167, 1177–78 (9th Cir. 2000) (physical attacks, death threats, and harassment at home, school and work in India); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1246 (9th Cir. 1999) (multiple death threats by opposition political party in Colombia); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (pattern and practice

of persecution of Kurdish Moslem intelligentsia in Armenia); *Andriasian v. INS*, 180 F.3d 1033, 1043 (9th Cir. 1999) (ethnic Armenian from Azerbaijan); *Duarte de Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999) (applicant beaten harassed and threatened with death by military); *Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1999) (en banc) (death threats from Philippine guerillas); *Leiva-Montalvo v. INS*, 173 F.3d 749, 752 (9th Cir. 1999) (death threats from Salvadoran Recontra guerillas); *Ratnam v. INS*, 154 F.3d 990, 995 (9th Cir. 1998) (torture by Sri Lankan authorities); *Gonzales-Neyra v. INS*, 122 F.3d 1293, 1297 (9th Cir. 1997), *as amended on denial of rehearing*, 133 F.3d 726 (9th Cir. 1998) (harassment by Peruvian Shining Path guerillas); *Korablina v. INS*, 158 F.3d 1038, 1045–46 (9th Cir. 1998) (past discrimination, harassment and violence); *Vallecillo-Castillo v. INS*, 121 F.3d 1237, 1240 (9th Cir. 1996) (harassment by Sandinista government in Nicaragua); *Montoya-Ulloa v. INS*, 79 F.3d 930, 932 (9th Cir. 1996) (harassed, threatened, beaten, placed on "black list" by Nicaraguan authorities); *Gomez-Saballos v. INS*, 79 F.3d 912, 918 (9th Cir. 1996) (death threats by Sandinistas); *Singh v. Ilchert*, 69 F.3d 375, 380–81 (9th Cir. 1995) (per curiam); *Osorio v. INS*, 18 F.3d 1017, 1032 (9th Cir. 1994) (applicant threatened and close colleagues persecuted); *Mendoza Perez v. INS*, 902 F.2d 760, 763–64 (9th Cir. 1990); *Ramirez Rivas v. INS*, 899 F.2d 864, 872-73 (9th Cir. 1990) (death squads killed many family members and a close friend).

8. Not Entitled to Withholding

Faruk v. Ashcroft, 378 F.3d 940, 944 (9th Cir. 2004) (evidence of harassment and attacks on interracial and interreligious couple in Fiji not strong enough); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1185 (9th Cir. 2003) (no compelling evidence that persecution of non-political Albanians in Kosovo is so widespread that applicant faced a clear probability of persecution); *Gui v. INS*, 280 F.3d 1217, 1230 (9th Cir. 2002) (given changes in Romania since departure); *Hakeem v. INS*, 273 F.3d 812, 817 (9th Cir. 2001) (remaining family unharmed, and applicant made two trips to Pakistan); *Lim v. INS*, 224 F.3d 929, 938 (9th Cir. 2000) (given post-threat harmless period and family safety); *Barraza Rivera v. INS*, 913 F.2d 1443, 1454 (9th Cir. 1990) (insufficient evidence to show that he would be forced to participate in assassinations); *Arteaga v. INS*, 836 F.2d 1227,

1231 n.6 (9th Cir. 1988) (one-time threat of conscription sufficient for asylum, but not for withholding); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1373 (9th Cir. 1985) (no specific threat, and government unaware of applicant's protest activities).

B. Bars to Withholding

As a general rule, withholding is mandatory, unless an exception applies. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999).

1. Nazis

Those who assisted in Nazi persecution or engaged in genocide are barred from withholding. *See* 8 U.S.C. § 1231(b)(3)(B) (stating that withholding does not apply to aliens deportable for Nazi persecution or genocide under 8 U.S.C. § 1227(a)(4)(D)).

2. Persecution-of-Others Bar

Withholding is not available if the applicant "ordered, incited, assisted, or otherwise participated in the persecution of an individual" on account of the protected grounds. 8 U.S.C. § 1231(b)(3)(B)(i).

3. Particularly Serious Crime Bar

Withholding is not available if the applicant, "having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii); *Singh v. Ashcroft*, 351 F.3d 435, 438–39 (9th Cir. 2003). This bar is more narrowly defined than the bar in the asylum context because not all aggravated felonies are considered to be particularly serious. For cases filed on or after April 1, 1997, an aggravated felony conviction is considered to be a particularly serious crime if the applicant has been sentenced to an aggregate term of imprisonment of at least five years. 8 U.S.C. § 1231(b)(3)(B).

The Attorney General has "discretion, pursuant to Section 1231(b)(3)(B)(ii), 'to determine whether an aggravated felony conviction resulting in a sentence of less than 5 years is a particularly serious crime.'" *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001). This court lacks jurisdiction to review this discretionary finding under 8 U.S.C. § 1252(a)(2)(B)(ii). *Id*. (leaving open the question of whether the court would have jurisdiction over a non-discretionary denial of withholding). For more information on aggravated felonies, *see* Criminal Issues in Immigration Law.

4. Serious Non-Political Crime Bar

Withholding is not available if "there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before" arrival. 8 U.S.C. § 1231(b)(3)(B)(iii); *see also McMullen v. INS*, 788 F.2d 591, 598–99 (9th Cir. 1986) (holding that applicant was ineligible for withholding because he facilitated or assisted Provisional Irish Republican Army terrorists to commit serious non-political crimes). The BIA is not required to balance the applicant's criminal acts against the risk of persecution. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999); *see also Kenyeres v. Ashcroft*, 538 U.S. 1301, 1306 (2003) (holding that petitioner was not eligible for a stay of removal pending review because substantial evidence supported the IJ's determination that petitioner committed serious financial crimes in Hungary).

5. Security and Terrorist Bar

Withholding is not available if "there are reasonable grounds to believe that the alien is a danger to the security of the United States." 8 U.S.C. § 1231(b)(3)(B)(iv). "[A]n alien who engages in terrorist activity 'shall be considered to be an alien for whom there are reasonable grounds for regarding as a danger to the security of the United States.'" *Bellout v. Ashcroft*, 363 F.3d 975, 979 (9th Cir. 2004) (quoting 8 U.S.C. § 1231(b)(3)(B)(iv) (1996)). In *Bellout*, the court held that substantial evidence supported the IJ's determination that there were reasonable grounds to believe that petitioner is a danger to the security of the United

States based on his membership in a State-Department-recognized terrorist organization.

IV. CONVENTION AGAINST TORTURE

Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment absolutely prohibits states from returning anyone to another state where he or she may be tortured. *See Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) ("Article 3 provides that a signatory nation will not expel, return . . . or extradite a person to another country where there are substantial grounds for believing that he would be in danger of being subjected to torture.") (internal quotation marks omitted), *amended by* 355 F.3d 1140 (9th Cir. 2004).

The implementing regulations for the Convention are found in 8 C.F.R. § 1208.16 to 1208.18. Asylum applications filed on or after April 1, 1997, "shall also be considered for eligibility for withholding of removal under the Convention Against Torture if the applicant requests such consideration or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal." 8 C.F.R. § 1208.13(c)(1).

A. Standard of Review

This court reviews for substantial evidence the factual findings underlying the BIA's determination that an applicant is not eligible for relief under the Convention Against Torture. *See Zheng v. Ashcroft*, 332 F.3d 1186, 1193 (9th Cir. 2003). The BIA's interpretation of purely legal questions is reviewed de novo. *See id.* at 1194.

B. Definition of Torture

"Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has

committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.18(a)(1) (2000)). "'Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.'" *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (quoting 8 C.F.R. § 208.18(a)(2)), *amended by* 355 F.3d 1140 (9th Cir. 2004). "'Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'" *Id.* (quoting 8 C.F.R. § 208.18(a)(3) (2002)).

C. Burden of Proof

In order to be eligible for withholding of removal under the Convention Against Torture, the petitioner has the burden of proof "'to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.'" *Kamalthas v. INS*, 251 F.3d 1279, 1284 (9th Cir. 2001) (quoting 8 C.F.R. § 208.16(c)(2)). "The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." *Id.* at 1282 (quoting 8 C.F.R. § 208.16(c)(2)). A "petitioner carries this burden whenever he or she presents evidence establishing 'substantial grounds for believing that he [or she] would be in danger of being subjected to torture' in the country of removal" *Id.* at 1284. "A failure to establish eligibility for asylum does not necessarily doom an application for relief under the United Nations Convention Against Torture . . ." *Farah v. Ashcroft*, 348 F.3d 1153, 1156–57 (9th Cir. 2003) (noting rule, but rejecting CAT claim because petitioner failed to present any additional credible evidence).

D. Country Conditions Evidence

"[C]ountry conditions alone can play a decisive role in granting relief under the Convention." *Kamalthas v. INS*, 251 F.3d 1279, 1280, 1283 (9th Cir. 2001) (holding that a negative credibility finding in asylum

claim does not preclude relief under the Convention, especially where documented country conditions information corroborated the "widespread practice of torture against Tamil males"). "[A]ll evidence relevant to the possibility of future torture shall be considered, including, but not limited to . . . [e]vidence of gross, flagrant or mass violations of human rights within the country of removal; and [o]ther relevant information regarding conditions in the country of removal." *Kamalthas v. INS*, 251 F.3d 1279, 1280, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.16(c)(3) (emphasis deleted)); *see also Abassi v. INS*, 305 F.3d 1028, 1029 (9th Cir. 2002) (holding that the BIA must consider the most recent State Department country conditions report where a pro se applicant refers to the report in his moving papers); *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (stating that the BIA was required to consider relevant information in the State Department report on Iraq), *amended by* 355 F.3d 1140 (9th Cir. 2004); *Khup v. Ashcroft*, 376 F.3d 898, 906–07 (9th Cir. 2004) (Seventh Day Adventist petitioner eligible for CAT relief given past persecution, and country conditions reports indicating that the Burmese government regularly tortures detainees).

E. Past Torture

Evidence of past torture is relevant to a determination of eligibility for relief. *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.16(c)(3) (2000)). However, unlike asylum, past torture does not provide a separate basis for eligibility.

F. Internal Relocation

"Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured" is relevant to the possibility of future torture. *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.16(c)(3) (2000)); *see also Singh v. Ashcroft*, 351 F.3d 435, 443 (9th Cir. 2003) (substantial evidence supported BIA's denial of CAT relief where petitioner could settle in a part of India where he is not likely to be tortured and he was not personally threatened); *Hasan v. Ashcroft*, 380 F.3d 1114, 1122 (9th Cir. 2004) (noting the different legal standards for evaluation of internal relocation in

the context of asylum and Convention Against Torture relief).

G. Differences From Asylum and Withholding

"[T]he Convention's reach is both broader and narrower than that of a claim for asylum or withholding of deportation: coverage is broader because a petitioner need not show that he or she would be tortured 'on account of' a protected ground; it is narrower, however, because the petitioner must show that it is 'more likely than not' that he or she will be tortured, and not simply persecuted upon removal to a given country." *Kamalthas v. INS*, 251 F.3d 1279, 1283 (9th Cir. 2001); *see also Khup v. Ashcroft*, 376 F.3d 898, 906–07 (9th Cir. 2004).

H. Agent or Source of Torture

To qualify for relief under the Convention, the torture must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Zheng v. Ashcroft*, 332 F.3d 1186, 1188 (9th Cir. 2003) (quoting 8 C.F.R. § 208.18(a)(1) (2002)) (emphasis and internal quotation marks omitted). "Acquiescence" by government officials does not require actual knowledge or willful acceptance; awareness and willful blindness by governmental officials is sufficient. *See id.* at 1197 (remanding Convention claim of Chinese applicant who feared being killed by the smugglers who brought him to the United States). An applicant need not demonstrate that she would face torture while under public officials' prospective custody or physical control. *Azanor v. Ashcroft*, 364 F.3d 1013, 1019 (9th Cir. 2004) (holding in Nigerian FGM case that "a petitioner may qualify for withholding of removal by showing that he or she would likely suffer torture while under *private parties*' exclusive custody or physical control"); *see also Reyes-Reyes v. Ashcroft*, No. 03-72100, 2004 WL 2047563, *3 (9th Cir. Sept. 13, 2004) (same in the case of a Salvadoran homosexual male with a female sexual identity).

I. Mandatory Relief

Although an applicant will be denied withholding of removal under CAT if the Attorney General has reasonable grounds to believe that the alien is a danger to the security of the United States, *see* 8 U.S.C. § 1231(b)(3)(B)(iv) and 8 C.F.R. § 1208.16(d)(2), he may still be eligible for deferral of removal under CAT, *see* 8 C.F.R. § 1208.17(a); *see also Bellout v. Ashcroft*, 363 F.3d 975, 979 (9th Cir. 2004) (discussing Algerian terrorist's eligibility for deferral of removal); *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1253 (9th Cir. 2004) (holding, in the case of a Bosnian Serb, that even a persecutor may be eligible for deferral of removal).

J. Nature of Relief

Unlike asylum, Convention relief does not confer status, only protection from return to the country where the applicant would be tortured. *See* 8 C.F.R. § 1208.16(f).

K. Derivative Torture Claims

The court has not yet decided whether an applicant may assert a derivative torture claim on behalf of a child. *See Azanor v. Ashcroft*, 364 F.3d 1013, 1021 (9th Cir. 2004) (remanding for determination of whether Nigerian applicant may assert a derivative torture claim based on feared FGM of her daughter).

L. Exhaustion

This court will not address a Convention claim unless it was first raised before the BIA. *See Ortiz v. INS*, 179 F.3d 1148, 1152–53 (9th Cir. 1999) (granting a stay of the mandate to allow the applicants to move the BIA to reopen to apply for CAT relief). The proper procedure is for the applicant to file a motion to reopen with the BIA to apply for protection. *See Khourassany v. INS*, 208 F.3d 1096, 1100–01 (9th Cir. 2000) (denying applicant's motion to remand his case; staying the mandate to allow applicant to file motion to reopen with the BIA).

M. Habeas Jurisdiction

CAT claims are cognizable under habeas jurisdiction. *See Singh v. Ashcroft*, 351 F.3d 435, 442 (9th Cir. 2003).

N. Cases Granting CAT Protection

Al-Saher v. INS, 268 F.3d 1143, 1147 (9th Cir. 2001) (repeated beatings and cigarette burns of Iraqi Sunni Muslim constitute torture), *amended by* 355 F.3d 1140 (9th Cir. 2004); *Khup v. Ashcroft*, 376 F.3d 898, 906–07 (9th Cir. 2004) (Seventh Day Adventist petitioner entitled to CAT relief given past persecution, and country conditions reports indicating that the Burmese government regularly tortures detainees).

O. Cases Finding No Eligibility for CAT Protection

Hasan v. Ashcroft, 380 F.3d 1114, 1122–23 (9th Cir. 2004) (journalist from Bangladesh failed to show future harm rising to level of torture, or inability to avoid harm by relocating); *El Himri v. Ashcroft*, 378 F.3d 932, 938 (9th Cir. 2004), *as amended by* 2004 WL 1879255 (9th Cir. Aug. 24, 2004) (stateless Palestinians in Kuwait, where "most of most of the physical violence perpetrated by the government against Palestinians ended when constitutional government returned"); *Bellout v. Ashcroft*, 363 F.3d 975, 979 (9th Cir. 2004) (member of State-Department-designated terrorist organization failed to show that Algerian government was aware of or interested in him); *Singh v. Ashcroft*, 351 F.3d 435, 443 (9th Cir. 2003) (fear of members of mother's family who are police officers); *Farah v. Ashcroft*, 348 F.3d 1153, 1156 (9th Cir. 2003) (Somali petitioner's claim was "based on the same statements . . . that the BIA determined to be not credible"); *Cano-Merida v. INS*, 311 F.3d 960, 965–66 (9th Cir. 2002) (affirming BIA's denial of motion to reopen to present Convention claim based on fear of return to Guatemala); *Gui v. INS*, 280 F.3d 1217, 1230 (9th Cir. 2002) (harassment, wiretapping, staged car crashes, detention and interrogation of Romanian anti-Communist did not amount to torture).

V. CREDIBILITY DETERMINATIONS

A. Standard of Review

Adverse credibility findings are reviewed under the substantial evidence standard. *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002).

Deference is given to the IJ's credibility determination, because the IJ is in the best position to assess the trustworthiness of the applicant's testimony. *See Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 661 (9th Cir. 2003); *Canjura-Flores v. INS*, 784 F.2d 885, 888 (9th Cir. 1985).

"While the substantial evidence standard demands deference to the IJ, we do not accept blindly an IJ's conclusion that a petitioner is not credible. Rather, we examine the record to see whether substantial evidence supports that conclusion and determine whether the reasoning employed by the IJ is fatally flawed." *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002) (internal quotation marks omitted).

An IJ must articulate a legitimate basis to question the applicant's credibility, and must offer specific and cogent reasons for any stated disbelief. *Id.* "Any such reason must be substantial and bear a legitimate nexus to the finding." *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000) (per curiam) (internal quotation marks omitted). "Generalized statements that do not identify specific examples of evasiveness or contradiction in the petitioner's testimony" are insufficient. *Garrovillas v. INS*, 156 F.3d 1010, 1013 (9th Cir. 1998). However, "[t]he obligation to provide a specific, cogent reason for a negative credibility finding does not require the recitation of unique or particular words." *de Leon-Barrios v. INS*, 116 F.3d 391, 394 (9th Cir. 1997) (concluding that the IJ made a specific and cogent negative credibility finding).

The IJ or BIA must explain "the significance of the discrepancy or point[] to the petitioner's obvious evasiveness when asked about it." *Bandari v. INS*, 227 F.3d 1160, 1166 (9th Cir. 2000); *see also Singh v. INS*, 362 F.3d 1164, 1171 (9th Cir. 2004) (BIA failed to clarify why purported discrepancy was significant).

As long as one of the identified grounds underlying a negative credibility finding is supported by substantial evidence and goes to the heart of the claims of persecution, the court is bound to accept the negative

credibility finding. *Li v. Ashcroft*, 378 F.3d 959, 964 (9th Cir. 2004) (affirming negative credibility finding even though some of the factors were factually unsupported or irrelevant); *see also Wang v. INS*, 352 F.3d 1250, 1259 (9th Cir. 2003) ("whether we have rejected some of the IJ's grounds for an adverse credibility finding is irrelevant").

B. Opportunity to Explain

"[T]he BIA must provide a petitioner with a reasonable opportunity to offer an explanation of any perceived inconsistencies that form the basis of a denial of asylum." *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999); *see also Chen v. Ashcroft*, 362 F.3d 611, 618 (9th Cir. 2004) (reversing negative credibility finding because, *inter alia*, petitioner was denied a reasonable opportunity to explain a perceived inconsistency); *Guo v. Ashcroft*, 361 F.3d 1194, 1200 (9th Cir. 2004) (reversing negative credibility finding because, *inter alia*, petitioner was not afforded an opportunity to explain ambiguous witness testimony); *Ordonez v. INS*, 345 F.3d 777, 786 (9th Cir. 2003) ("[T]he BIA did not identify and respond to Ordonez's explanations. Either Ordonez was given no chance to contest the issue or the BIA did not address his arguments. Either way, Ordonez's rights were violated.").

The IJ must also consider and address the applicant's explanation for the identified discrepancy. *See Kaur v. Ashcroft*, 379 F.3d 876, 887 (9th Cir. 2004) ("An adverse credibility finding is improper when an IJ fails to address a petitioner's explanation for a discrepancy or inconsistency."); *Guo v. Ashcroft*, 361 F.3d 1194, 1200 (9th Cir. 2004) (reversing negative credibility finding because, *inter alia*, the IJ did not address Guo's reasonable and plausible explanation for a perceived inconsistency); *Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001) (substantial evidence lacking where petitioner provided an explanation for a discrepancy, but neither the BIA nor the IJ addressed it); *Chen v. INS*, 266 F.3d 1094, 1100 (9th Cir. 2001) ("[B]y not considering Chen's explanation [for a date discrepancy], the IJ and the [BIA] ignored well-established precedent that testimonial evidence may be the most important and dispositive part of any asylum claim."), *overruled on other grounds by INS v. Ventura*, 537 U.S. 12 (2002) (per curiam); *cf. Li v.*

Ashcroft, 378 F.3d 959 (9th Cir. 2004) (affirming negative credibility finding and noting that the IJ addressed Li's explanation for an inconsistency).

C. Credibility Factors

1. Demeanor

Credibility determinations that are based on an applicant's demeanor are given "special deference." *Singh-Kaur v. INS*, 183 F.3d 1147, 1151 (9th Cir. 1999) (deferring to the IJ's observation that the applicant "began to literally jump around in his seat and to squirm rather uncomfortably while testifying" on cross-examination). However, boilerplate demeanor findings are not appropriate. *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1048, 1051–52 (9th Cir. 2002) ("Cookie cutter credibility findings are the antithesis of the individualized determination required in asylum cases."). Moreover, an IJ's demeanor-based negative credibility finding must specifically and cogently refer to the non-credible aspects of the applicant's demeanor. *See Arulampalam v. Ashcroft*, 353 F.3d 679, 686 (9th Cir. 2003). A petitioner's demeanor has been described as "including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication." *Id.* (internal quotation marks omitted).

2. Responsiveness

"To support an adverse credibility determination based on unresponsiveness, the BIA must identify particular instances in the record where the petitioner refused to answer questions asked of him." *Singh v. Ashcroft*, 301 F.3d 1109, 1114 (9th Cir. 2002); *see also Garrovillas v. INS*, 156 F.3d 1010, 1014–15 (9th Cir. 1998) (decisions below "fail[ed] to specify any particular instances in his testimony when Garrovillas refused to answer questions"); *Arulampalam v. Ashcroft*, 353 F.3d 679, 687 (9th Cir. 2003) (noting importance of sensitivity to petitioner's cultural and educational background when appraising manner of speech).

3. Specificity and Detail

The level of specificity in an applicant's testimony is an appropriate consideration. *See Singh-Kaur v. INS*, 183 F.3d 1147, 1153 (9th Cir. 1999) (approving IJ's finding that an applicant's testimony was suspicious given its lack of specificity); *cf. Zheng v. Ashcroft*, No. 03-70087, 2004 WL 1945330, *5 (9th Cir. Sept. 2, 2004) (testimony was fairly detailed, and IJ did not identify examples of how Zheng's testimony lacked detail); *Kaur v. Ashcroft*, 379 F.3d 876, 887 (9th Cir. 2004) ("[A] general response to questioning, followed by a more specific, consistent response to further questioning is not a cogent reason for supporting a negative credibility finding."); *Akinmade v. INS*, 196 F.3d 951. 957 (9th Cir. 1999) (finding testimony to be sufficiently detailed and specific, "especially when Akinmade was not given notice that he should provide such information, nor asked at the hearing to do so").

4. Inconsistencies

a. Minor Inconsistencies

"Minor inconsistencies in the record that do not relate to the basis of an applicant's alleged fear of persecution, go to the heart of the asylum claim, or reveal anything about an asylum applicant's fear for his safety are insufficient to support an adverse credibility finding." *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir. 2003); *see also Bandari v. INS*, 227 F.3d 1160, 1166 (9th Cir. 2000) ("Any alleged inconsistencies in dates that reveal nothing about a petitioner's credibility cannot form the basis of an adverse credibility finding."). "[I]nconsistencies of less than substantial importance for which a plausible explanation is offered" also cannot serve as the sole basis for an negative credibility finding. *Garrovillas v. INS*, 156 F.3d 1010, 1014 (9th Cir. 1998); *see also Guo v. Ashcroft*, 361 F.3d 1194, 1201 (9th Cir. 2004) (petitioner's failure to remember company name claimed on his B-1 visa application did not go to the heart of his claim involving persecution on account of his Christian beliefs).

Discrepancies that cannot be viewed as attempts to enhance claims of persecution have no bearing on credibility. *Singh v. Ashcroft*, 362 F.3d 1164, 1171 (9th Cir. 2004); *Wang v. Ashcroft*, 341 F.3d 1015, 1021 (9th Cir. 2003); *Shah v. INS*, 220 F.3d 1062, 1068 (9th Cir. 2000).

b. Substantial Inconsistencies

Substantial inconsistencies, however, damage a claim and support a negative credibility finding. *See, e.g., Malhi v. INS*, 336 F.3d 989, 993 (9th Cir. 2003) ("geographic discrepancies which went to the heart" of petitioner's claim). "An adverse credibility ruling will be upheld so long as identified inconsistencies go to the heart of the asylum claim." *Li v. Ashcroft*, 378 F.3d 959, 962 (9th Cir. 2004) (affirming negative credibility finding based, in part, on three prior asylum applications containing key omissions and discrepancies) (internal quotation marks and alteration omitted); *see also Alvarez-Santos v. INS*, 332 F.3d 1245, 1254 (9th Cir. 2003) (petitioned failed to include in either of his two asylum applications or his principal testimony the incident that precipitated his flight from Guatemala); *Chebchoub v. INS*, 257 F.3d 1038, 1043 (9th Cir. 2001) (inconsistencies relating to "the events leading up to his departure and the number of times he was arrested"); *de Leon-Barrios v. INS*, 116 F.3d 391, 393–94 (9th Cir. 1997) (inconsistency relating to the basis for the alleged fear).

c. Mistranslation/Miscommunication

Apparent inconsistencies based on faulty or unreliable translations may not be sufficient to support a negative credibility finding. *See Kebede v. Ashcroft*, 366 F.3d 808, 811 (9th Cir. 2004) (holding that discrepancies had more to do with the witness's difficulties with English rather than prevarication); *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003) ("Even where there is no due process violation, faulty or unreliable translations can undermine the evidence on which an adverse credibility determination is based."); *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2003) ("[W]e have long recognized that difficulties in interpretation may result in seeming inconsistencies, especially in cases . . . where there is a language barrier."); *Singh v. INS*, 292 F.3d 1017, 1021–23 (9th Cir. 2002)

(holding that perceived inconsistencies between applicant's airport interview and testimony did not constitute a valid ground for an adverse credibility determination, especially given the lack of an interpreter who spoke applicant's language); *Zahedi v. INS*, 222 F.3d 1157, 1167 (9th Cir. 2000) (petitioner "was not enhancing his claim with any of the confusing dates, and the confusion seems to have stemmed, at least in part, from language problems"); *Abovian v. INS*, 219 F.3d 972, 979, *as amended by* 228 F.3d 1127 *and* 234 F.3d 492 (9th Cir. 2000) (noting that translation difficulties may have contributed to the purported disjointedness and incoherence in petitioner's testimony).

Cf. Singh v. Ashcroft, 367 F.3d 1139, 1143 (9th Cir. 2004) (where petitioner suggests that transcription of the hearing was problematic, but did not contest any particular portion of the transcript, or ask the court to remand the matter for clarification, the IJ's specific and cogent negative credibility finding was proper).

Discrepancies "capable of being attributed to a typographical or clerical error . . . cannot form the basis of an adverse credibility finding." *Shah v. INS*, 220 F.3d 1062, 1068 (9th Cir. 2000); *see also Wang v. INS*, 352 F.3d 1250, 1254 (9th Cir. 2003) (forensic experts' inability to determine authenticity of documents cannot alone constitute a basis for an adverse credibility finding).

5. Omissions

"[T]he mere omission of details is insufficient to uphold an adverse credibility finding." *Bandari v. INS*, 227 F.3d 1160, 1167 (9th Cir. 2000). For example, an omission of one detail included in an applicant's oral testimony does not make a supporting document inconsistent or incompatible. *See Singh v. Ashcroft*, 301 F.3d 1109, 1112 (9th Cir. 2002) (doctor's letter failed to mention all of the applicant's injuries). Where an applicant gives one account of persecution but then revises the story "so as to lessen the degree of persecution he experienced, rather than to increase it, the discrepancy generally does not support an adverse credibility finding." *Stoyanov v. INS*, 172 F.3d 731, 736 (9th Cir. 1999) (internal quotation marks omitted); *see also Garrovillas v. INS*, 156 F.3d 1010,

1013–14 (9th Cir. 1998) ("there was no reason for Garrovillas to disavow the earlier statement other than a desire to correct an error of which he had not been aware").

6. Incomplete Asylum Application

"It is well settled that an applicant's testimony is not per se lacking in credibility simply because it includes details that are not set forth in the asylum application." *Lopez-Reyes v. INS*, 79 F.3d 908, 911 (9th Cir. 1996); *see also Singh v. INS*, 292 F.3d 1017, 1021 (9th Cir. 2002) (adverse credibility determination cannot be based on trial testimony that is more detailed than the applicant's initial statements at the airport); *Akinmade v. INS*, 196 F.3d 951, 956 (9th Cir. 1999) ("[A] concern that the affidavit is not as complete as might be desired cannot, without more, properly serve as a basis for a finding of lack of credibility.") (internal quotation marks omitted); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990) (failure to mention two collateral incidents involving relatives on application not sufficient for adverse credibility determination).

7. Sexual Abuse or Assault

An applicant's failure to relate details about sexual assault or abuse at the first opportunity "cannot reasonably be characterized as an inconsistency." *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052–53 (9th Cir. 2002). "That a woman who has suffered sexual abuse at the hands of male officials does not spontaneously reveal the details of that abuse to a male interviewer does not constitute an inconsistency from which it could reasonably be inferred that she is lying." *Id.* at 1053; *see also Kebede v. Ashcroft*, 366 F.3d 808, 811 (9th Cir. 2004) ("A victim of sexual assault does not irredeemably compromise his or her credibility by failing to report the assault at the first opportunity.").

8. Airport Interviews

This court "hesitate[s] to view statements given during airport interviews as valuable impeachment sources because of the conditions under which they are taken and because a newly-arriving alien cannot be

expected to divulge every detail of the persecution he or she sustained." *Li v. Ashcroft*, 378 F.3d 959, 962–63 (9th Cir. 2004) (affirming negative credibility finding because, *inter alia*, substantial evidence supported the IJ's conclusion that petitioner's sworn airport interview statement was a reliable impeachment source); *see also Arulampalam v. Ashcroft*, 353 F.3d 679, 688 (9th Cir. 2003) (omission at the airport of specific details of torture that were revealed later did not support negative credibility finding); *Singh v. INS*, 292 F.3d 1017, 1021–24 (9th Cir. 2002) (adverse credibility determination cannot be based on trial testimony that is more detailed than the applicant's initial statements at the airport).

9. State Department Reports

"The IJ may consider the State Department's reports in evaluating a petitioner's credibility." *Zheng v. Ashcroft*, No. 03-70087, 2004 WL 1945330, *3 (9th Cir. Sept. 2, 2004). "[A]s a predicate, the petitioner's testimony must be inconsistent with facts contained in the country report or profile before the IJ may discredit the petitioner's testimony." *Id.* (concluding that petitioner's testimony was not inconsistent with the State Department reports on China). Additionally, the court "will not infer that a petitioner's otherwise credible testimony is not believable merely because the events he relates are not described in a State Department document." *Chand v. INS*, 222 F.3d 1066, 1077 (9th Cir. 2000) ("[W]e have never assumed that all potentially relevant incidents of persecution in a country are collected in the State Department's documentation.").

The IJ must conduct an individualized credibility analysis, and it is improper for the BIA to rely exclusively "on a factually unsupported assertion in a State Department report to deem [an applicant] not credible." *Shah v. INS*, 220 F.3d 1062, 1069 (9th Cir. 2000) (noting the "perennial concern that the [State] Department soft-pedals human rights violations by countries that the United States wants to have good relations with.") (internal quotation marks omitted). For instance, a general assertion about conditions of peace in India was insufficient to support a negative credibility finding because it was a blanket statement without individualized analysis, and it was based on conjecture and speculation. *Id.*

It is permissible, however, for the agency to place supplemental reliance on a State Department report to discredit general portions of an applicant's testimony. *See Chebchoub v. INS*, 257 F.3d 1038, 1043–44 (9th Cir. 2001) (affirming negative credibility finding based in part on country conditions evidence that Morocco did not practice enforced exile of dissidents). In *Chebchoub*, the court also noted that the State Department report was not used to discredit specific testimony regarding the petitioner's individual experiences. *Id.* at 1044.

See also Li v. Ashcroft, 378 F.3d 959, 964 (9th Cir. 2004) (alleged discrepancy based on country report statement that early marriage fines and regular IUD insertions were common, had no bearing on applicant's credibility); *Ge v. Ashcroft*, 367 F.3d 1121, 1126 (9th Cir. 2004) (to the extent that the IJ relied on blanket statements in the State Department report regarding detention conditions in China, the IJ's finding was not sufficiently individualized); *Wang v. INS*, 352 F.3d 1250, 1254 (9th Cir. 2003) ("Mere failure to authenticate documents, at least in the absence of evidence undermining their reliability, does not constitute a sufficient foundation for an adverse credibility finding," despite State Department's observations regarding high incidence of document fabrication in China.).

10. Speculation and Conjecture

"Speculation and conjecture cannot form the basis of an adverse credibility finding, which must instead be based on substantial evidence." *Shah v. INS*, 220 F.3d 1062, 1071 (9th Cir. 2000).

See also Kaur v. Ashcroft, 379 F.3d 876, 887, 888 (9th Cir. 2004) ("personal conjecture about the manner in which Indian passport officials carry out their duties" and how an applicant would describe an event); *Ge v. Ashcroft*, 367 F.3d 1121, 1125 (9th Cir. 2004) (personal conjecture about what the Chinese authorities would or would not do); *Guo v. Ashcroft*, 361 F.3d 1194, 1201–02 (9th Cir. 2004) (speculation as to why Guo did not apply for asylum immediately upon entry); *Arulampalam v. Ashcroft*, 353 F.3d 679, 687–88 (9th Cir. 2003) (IJ's hypotheses regarding

abilities of Sri Lankan soldiers and police, and official registration requirements); *Wang v. INS*, 352 F.3d 1250, 1255–56 (9th Cir. 2003) (speculation regarding China's use of force against demonstrators and enforcement of one-child policy); *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052 (9th Cir. 2002) (IJ's hypothesis as to what motivated the applicant's departure from Sri Lanka); *Singh v. INS*, 292 F.3d 1017, 1024 (9th Cir. 2002) (assumption regarding Indian police motives); *Gui v. INS*, 280 F.3d 1217, 1226–27 (9th Cir. 2002) (IJ's opinion "as to how best to silence a dissident" and that "the Romanian government must not be repressive because it merely harassed and threatened but did not kill" petitioner, not legitimate); *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000) (per curiam) (rejecting BIA's unsupported assumptions regarding the plausibility of applicant's political activities in Nigeria); *Bandari v. INS*, 227 F.3d 1160, 1167–68 (9th Cir. 2000) ("IJ's subjective view of what a persecuted person would include in his asylum application," personal belief that applicant should have bled when he was flogged, and speculation about a foreign government's educational policies); *Chouchkov v. INS*, 220 F.3d 1077, 1083 (9th Cir. 2000) (personal conjecture about expected efficiency and competence of government officials); *Shah v. INS*, 220 F.3d 1062, 1069, 1071 (9th Cir. 2000) (State Department conjecture about the effect electoral victory would have on existing political persecution, BIA's belief about what a letter should look like, and how many the applicant should have received); *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996) ("personal conjecture about what guerillas likely would and would not do" not sufficient).

11. Counterfeit Documents

Use of counterfeit documents is not a legitimate basis for a negative credibility finding if the evidence does not go the heart of the asylum claim. *See Akinmade v. INS*, 196 F.3d 951, 955–56 (9th Cir. 1999) (use of false passport and false declaration that petitioner was a Canadian citizen supported claim of persecution); *Kaur v. Ashcroft*, 379 F.3d 876, 889 (9th Cir. 2004) ("the fact that an asylum seeker . . . used false passports to enter this or another country, without more, is not a proper basis for finding her not credible"). Failure to supply affirmative authentication for documents does not meet substantial evidence standard. *Wang v. INS*, 352 F.3d 1250,

1254 (9th Cir. 2003) (noting that "State Department's general observations regarding the high incidence of document fabrication in China" cannot alone support adverse credibility finding).

Cf. Desta v. Ashcroft, 365 F.3d 741, 745 (9th Cir. 2004) (petitioner submitted fraudulent documents to support his alleged membership in the All Amhara People's Organization and the Ethiopian Medhin Democratic Party, and the genuineness of these documents went to the heart of his claim); *Pal v. INS*, 204 F.3d 935, 938 (9th Cir. 2000) (noting contradictions between testimony and doctor's letter).

12. Previous Misrepresentations

"Untrue statements by themselves are not reason for refusal of refugee status. . ." *Turcios v. INS*, 821 F.2d 1396, 1400–01 (9th Cir. 1987) (holding that Salvadoran applicant's false claim to INS officials that he was Mexican did not undermine his credibility). "[T]he fact that an asylum seeker has lied to immigration officers or used false passports to enter this or another country, without more, is not a proper basis for finding her not credible." *Kaur v. Ashcroft*, 379 F.3d 876, 889 (9th Cir. 2004). These statements must be examined in light of all of the circumstances of the case. *Turcios*, 821 F.2d at 1400–01. *See also Guo v. Ashcroft*, 361 F.3d 1194, 1202 (9th Cir. 2004) (false statements made to extend B-1 visa); *Akinmade v. INS*, 196 F.3d 951, 956 (9th Cir. 1999) (distinguishing between "false statements made to establish the critical elements of the asylum claim from false statements made to evade INS officials").

False statements regarding alleged persecution may support a negative credibility finding. *See Al-Harbi v. INS*, 242 F.3d 882, 889–90 (9th Cir. 2001) (affirming negative credibility finding based on Iraqi dissident's "propensity to change his story regarding incidents of past persecution"); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1393 (9th Cir. 1985) (negative credibility based on Salvadoran applicant's lies to get passport, and under oath to INS officials, travel under an assumed name, and conviction of illegally transporting aliens into the United States).

13. Classified Information

If the IJ makes an adverse credibility determination on the basis of classified evidence, such evidence must be produced before this court. *Singh v. INS*, 328 F.3d 1205, 1206 (9th Cir. 2003) (order).

D. Presumption of Credibility

Where the BIA does not make an adverse credibility finding, this court accepts petitioner's factual contentions as true. *See Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004) ("Testimony must be accepted as true in the absence of an explicit adverse credibility finding."); *Navas v. INS*, 217 F.3d 646, 652 n.3 (9th Cir. 2000) (same); *Maldonado-Cruz v. INS*, 883 F.2d 788, 792 (9th Cir. 1989) ("The BIA's refusal to consider credibility leads to the presumption that it found the petitioner credible").

E. Implied Credibility Findings

1. Immigration Judges

"[I]t is clearly our rule that when the IJ makes implicit credibility observations in passing, . . . this does not constitute a credibility finding." *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137–38 (9th Cir. 2004) (internal quotation marks and alteration omitted); *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 658–59 (9th Cir. 2003) (same); *see also Shoafera v. INS*, 228 F.3d 1070, 1075 n.3 (9th Cir. 2000) (and cases cited therein); *Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000) ("In the absence of an explicit adverse credibility finding, we must assume that [the aplicant's] factual contentions are true."); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1383 (9th Cir. 1990) ("The mere statement that a petitioner is 'not entirely credible' is not enough."); *see also* section on Sua Sponte Credibility Determinations and Notice, below; *cf. Sebastian-Sebastian v. INS*, 195 F.3d 504, 511 (9th Cir. 1999) (Wiggins, J., concurring) (giving deference to the IJ's implied negative credibility finding).

2. Board of Immigration Appeals

When the BIA finds that an applicant's testimony is "implausible," but does not make an explicit credibility finding of its own, this court may treat the implausibility finding as an adverse credibility determination. *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000) (per curiam) ("Because a finding that testimony is 'implausible' indicates disbelief, for the purposes of this appeal, we treat the BIA's comments regarding 'implausibility' as an adverse credibility finding.").

F. Sua Sponte Credibility Determinations and Notice

The BIA may not make an adverse credibility determination in the first instance unless the applicant is afforded certain due process protections. *See Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 661 (9th Cir. 2003) (due process violation where the IJ made a credibility observation, but failed to make an express credibility determination). In *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999), this court held that the BIA violated due process by sua sponte reversing an IJ's favorable credibility finding; *see also Stoyanov v. INS*, 172 F.3d 731, 736 (9th Cir. 1999) (remanding to allow the applicant to explain issues raised in BIA's sua sponte negative credibility finding). In *Abovian v. INS*, 219 F.3d 972, 978, *as amended by* 228 F.3d 1127 *and* 234 F.3d 492, this court extended the logic of *Campos-Sanchez* to include cases where the IJ fails to make a credibility finding.

Where credibility is determinative, the BIA should remand to the IJ to make a legally sufficient credibility determination, or provide the applicant with specific notice that his credibility is at issue, and an opportunity to respond. *See Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 661 (9th Cir. 2003) (noting that "under the most recent INS regulations, the BIA would have no choice but to remand to the IJ for an initial credibility determination, as the BIA is now limited to reviewing the IJ's factual findings, including credibility determinations, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i) (2003).").

Where the IJ makes an adverse credibility determination and the BIA affirms that determination, but for different reasons, there is no due

process violation because the applicant was on notice that her credibility was at issue. *Pal v. INS*, 204 F.3d 935, 939 (9th Cir. 2000).

Where an applicant had no notice that a negative credibility finding could be based on his failure to call a witness to corroborate his testimony, due process required a remand for a new hearing. *Sidhu v. INS*, 220 F.3d 1085, 1092 (9th Cir. 2000).

G. Discretionary Decisions

If an applicant's testimony on an issue is found to be credible for purposes of determining whether he is eligible for asylum, he cannot be found incredible on the same issue for purposes of determining whether he is entitled to asylum as a matter of discretion. *See Kalubi v. Ashcroft*, 364 F.3d 1134, 1138 (9th Cir. 2004) ("It makes no sense that Kalubi could be both truthful and untruthful on the same issue in the same proceeding.")

H. Frivolous Applications

Under 8 U.S.C. § 1158(d)(6), any individual who knowingly files a "frivolous" application for asylum shall be permanently ineligible for any immigration relief under the Act. The implementing regulations state that a frivolousness finding "shall only be made if the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim." 8 C.F.R. § 1208.20. In *Farah v. Ashcroft*, 348 F.3d 1153 (9th Cir. 2003), the court interpreted the regulatory provision to require that the IJ "go through specific inconsistencies or implausible elements of [the] claim," and "give [the applicant] an opportunity to explain them." *Id*. at 1156.

I. Remedy

When this court reverses the BIA's adverse credibility determination, it must ordinarily remand the case so that the BIA can determine in the first instance whether the applicant has met the other criteria for eligibility. *See He v. Ashcroft*, 328 F.3d 593, 603–04 (9th Cir.

2003) (citing *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam)); *see also Singh v. Ashcroft*, 362 F.3d 1164, 1172 (9th Cir. 2004) (reversing negative credibility finding and remanding for determination of eligibility).

However, if the applicant automatically would be eligible for asylum once the credibility determination is reversed, remand is unnecessary. *See He*, 328 F.3d at 604 (holding that applicant was statutorily eligible for asylum based on the forced sterilization of his spouse); *see also Wang v. Ashcroft*, 341 F.3d 1015, 1023 (9th Cir. 2003) (reversing negative credibility finding and holding that applicant who had two forced abortions and an IUD inserted was statutorily eligible for asylum and withholding); *cf. Chen v. Ashcroft*, 362 F.3d 611, 622–23 (9th Cir. 2004) (reversing negative credibility finding and remanding to allow BIA to determine whether the involuntary insertion of an IUD and the imposition of a large fine for an unauthorized pregnancy constituted past persecution, and whether petitioner had a well-founded fear of future persecution).

Where the IJ makes an additional finding on the merits of the case, once this court reverse**s** a negative credibility finding, a remand for "further consideration and investigation in light of the ruling that the petitioner is credible" is not required with respect to the issues addressed by the IJ. *See Guo v. Ashcroft*, 361 F.3d 1194, 1204 (9th Cir. 2004).

When this court determines that substantial evidence does not support a negative credibility finding, it may deem the applicant credible, *see, e.g., Arulampalam v. Ashcroft*, 353 F.3d 679, 689 (9th Cir. 2003), or it may remand for a renewed credibility determination, *see, e.g., Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998); *Hartooni v. INS*, 21 F.3d 336, 343 (9th Cir. 1994) (remanding for credibility finding because the court could not "say that 'no doubts have been raised' about" petitioner's credibility).

J. Cases Reversing Negative Credibility Findings

Zheng v. Ashcroft, No. 03-70087, 2004 WL 1945330 (9th Cir. Sept. 2, 2004) (State Department reports on China were not inconsistent with

petitioner's testimony); *Kaur v. Ashcroft*, 379 F.3d 876 (9th Cir. 2004) (failure to address explanation; conjecture); *Hoque v. Ashcroft*, 367 F.3d 1190 (9th Cir. 2004) (discrepancy in documents; minor omissions; and no evidence to support finding that wife's testimony was unresponsive); *Ge v. Ashcroft*, 367 F.3d 1121 (9th Cir. 2004) (many of the IJ's findings were based on speculation and conjecture); *Kebede v. Ashcroft*, 366 F.3d 808 (9th Cir. 2004) (reluctance to discuss rape and minor inconsistencies in testimony of applicant and witness); *Singh v. INS*, 362 F.3d 1164 (9th Cir. 2004) (perceived inconsistencies insufficient); *Chen v. Ashcroft*, 362 F.3d 611 (9th Cir. 2004) (IJ failed to give applicant opportunity to explain perceived inconsistency); *Guo v. Ashcroft*, 361 F.3d 1194 (9th Cir. 2004) (no opportunity to explain); *Arulampalam v. Ashcroft*, 353 F.3d 679 (9th Cir. 2003) (insufficient demeanor-based finding; speculation); *Wang v. Ashcroft*, 341 F.3d 1015 (9th Cir. 2003) (immaterial inconsistencies between two witnesses); *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003) (IJ misstated the evidence; other perceived problems explained); *Singh v. Ashcroft*, 301 F.3d 1109 (9th Cir. 2002) (minor omission in doctor's note; trivial inconsistency regarding location of rally; no examples of unresponsiveness); *Singh v. INS*, 292 F.3d 1017 (9th Cir. 2002) (inconsistencies between initial airport interview and testimony; speculation and conjecture); *Gui v. INS*, 280 F.3d 1217 (9th Cir. 2002) (mischaracterizations of testimony; speculation); *Paramasamy v. Ashcroft*, 295 F.3d 1047 (9th Cir. 2002) (boilerplate negative credibility finding); *Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001) (neither the IJ or the BIA addressed the applicant's explanation for the identified discrepancy); *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000) (per curiam) (implausibility finding based on impermissible grounds); *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) (conjecture; minor inconsistencies); *Zahedi v. INS*, 222 F.3d 1157 (9th Cir. 2000) (translation problems; confusion about dates that did not enhance petitioner's claim); *Shah v. INS*, 220 F.3d 1062, 1067–71 (9th Cir. 2000) (no identification of evasiveness in the record; State Department conjecture; BIA's speculation); *Chanchavac v. INS*, 207 F.3d 584, 588 (9th Cir. 2000) (based on explainable inconsistencies and IJ's cultural assumptions); *Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999) (false passport and false declaration that petitioner was a Canadian citizen; minor or non-existent discrepancies); *Osorio v. INS*, 99 F.3d 928, 931–32 (9th Cir. 1996) (no identification of specific inconsistencies); *Mosa v.*

Rogers, 89 F.3d 601, 604–05 (9th Cir. 1996) (unsupported disbelief); *Ramos-Vasquez v. INS*, 57 F.3d 857, 861 (9th Cir. 1995) (circular reasoning); *Hartooni v. INS*, 21 F.3d 336, 342 (9th Cir. 1994) (remanding for credibility finding); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990) ("failure to file an application form that was as complete as might be desired;" failure to present copy of threatening note); *Vilorio-Lopez v. INS*, 852 F.2d 1137, 1147 (9th Cir. 1988) (minor inconsistency between testimony of two witnesses regarding date of death squad incident); *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1043 (9th Cir. 1987) (discrepancy as to date father was killed); *Turcios v. INS*, 821 F.2d 1396, 1399–1401 (9th Cir. 1987) (purportedly evasive answer; false claim of Mexican nationality to INS officials); *Plateros-Cortez v. INS*, 804 F.2d 1127, 1131 (9th Cir. 1986) (uncertainty regarding dates; inconsistency regarding place of employer's death); *Martinez-Sanchez v. INS*, 794 F.2d 1396, 1400 (9th Cir. 1986) (trivial date error; application listed two children, he testified that he had four); *Damaize-Job v. INS*, 787 F.2d 1332, 1337–38 (9th Cir. 1986) (failure to marry mother of children; discrepancy between application and testimony on children's birth dates; failure to apply for asylum in any of the countries through which petitioner passed); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1375 n.9 (9th Cir. 1985) (out-of-wedlock child is impermissible factor); *Zavala-Bonilla v. INS*, 730 F.2d 562, 565–66 (9th Cir. 1984) (no evidence that submitted letters were false; inadequate discrepancies).

K. Cases Upholding Negative Credibility Findings

Li v. Ashcroft, 378 F.3d 959 (9th Cir. 2004) (omissions and discrepancies among three asylum applications, testimony, and airport interview statement); *Singh v. Ashcroft*, 367 F.3d 1139, 1143 (9th Cir. 2004) (major inconsistencies; petitioner's inability to explain what he did for his political party); *Desta v. Ashcroft*, 365 F.3d 741, 745 (9th Cir. 2004) (fraudulent documents and material testimonial inconsistencies); *Wang v. INS*, 352 F.3d 1250 (9th Cir. 2003) (inconsistencies in testimonial and documentary evidence; evasiveness; new story); *Farah v. Ashcroft*, 348 F.3d 1153 (9th Cir. 2003) (discrepancies regarding identity, membership in a persecuted group, and date of entry); *Malhi v. INS*, 336 F.3d 989, 993 (9th Cir. 2003) (geographic discrepancies going to heart of

the claim); *Alvarez-Santos v. INS*, 332 F.3d 1245, 1254 (9th Cir. 2003) ("last-minute, uncorroborated story" regarding dramatic attack and stabbing); *Valderrama v. INS*, 260 F.3d 1083 (9th Cir. 2001) (per curiam) (material differences in two asylum applications regarding the basis of applicant's fear); *Chebchoub v. INS*, 257 F.3d 1038 (9th Cir. 2001) (inconsistent statements about number of arrests; implausibility of other testimony); *Pal v. INS*, 204 F.3d 935, 940 (9th Cir. 2000) (contradictions between testimony and doctor's letter); *Singh-Kaur v. INS*, 183 F.3d 1147 (9th Cir. 1999) (applicant jumped around during cross examination, inconsistent testimony, sudden change in name to coincide with newspaper article); *de Leon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997) (major discrepancies in two asylum applications); *Mejia-Paiz v. INS*, 111 F.3d 720, 723–24 (9th Cir. 1997) (inconsistencies in testimony and failure to offer proof that applicant was a Jehovah's Witness); *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1256–57 (9th Cir. 1992) (discrepancies between testimony and application regarding number of arrests and lack of detail); *Ceballos-Castillo v. INS*, 904 F.2d 519 (9th Cir. 1990) (inconsistencies, including one regarding identity of alleged persecutors); *Estrada v. INS*, 775 F.2d 1018, 1021 (9th Cir. 1985) (vague allegations regarding threats); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387 (9th Cir. 1985) (negative credibility based on applicant's lies to get passport, and under oath to INS officials, travel under an assumed name, and conviction of illegally transporting aliens in the United States); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1263–64 (9th Cir. 1985) (substantial inconsistencies between application and testimony).

VI. CORROBORATIVE EVIDENCE

A. Credible Testimony

"Because asylum cases are inherently difficult to prove, an applicant may establish his case through his own testimony alone." *Garrovillas v. INS*, 156 F.3d 1010, 1016–17 (9th Cir. 1998) (internal quotation marks omitted); *see also* 8 C.F.R. § 1208.13(a) ("The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."). Once an applicant's testimony is deemed credible, no further corroboration is required to establish the facts to which

the applicant testified. *See Kaur v. Ashcroft*, 379 F.3d 876, 890 (9th Cir. 2004); *see also Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000) (per curiam) (holding that credible applicant was not required to produce evidence of organizational membership, political fliers or medical records).

Moreover, "when each of the IJ's or BIA's proffered reasons for an adverse credibility finding fails, we must accept a petitioner's testimony as credible[,]" and further corroboration is not required. *Kaur*, 379 F.3d at 890 (reversing the IJ's five-factor negative credibility finding and holding that corroboration was not required); *see also Abovian v. INS*, 219 F.3d 972, 978 (9th Cir. 2000) ("It is well settled in this circuit that independent corroborative evidence is not required from asylum applicants where their testimony is unrefuted."), *as amended by* 228 F.3d 1127 *and* 234 F.3d 492 (9th Cir. 2000).

B. Credibility Assumed

If the BIA assumes, without deciding, that the applicant is credible, further corroboration is not required. *See Ladha v. INS*, 215 F.3d 889, 897 (9th Cir. 2000) (holding that the BIA erred by requiring independent corroboration of the facts where the BIA expressly declined to determine credibility). In reversing the BIA, the *Ladha* court reviewed the three lines of cases supporting the Ninth Circuit's rule on corroboration. *Id.* at 899–901. First, given the difficulty of proving specific threats by a persecutor, credible testimony regarding a threat is sufficient to show that a threat was made. *Id.* at 899–900 (citing, *inter alia*, *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) ("Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.")). Second, "other facts that serve as the basis for an asylum or withholding claim can be shown by credible testimony alone if corroborative evidence is 'unavailable.'" *Id.* at 900 ("conclud[ing] that this circuit assumes evidence corroborating testimony found to be credible is 'unavailable' if not presented"). Third, "when an alien credibly testifies to certain facts, those facts are deemed true, and the question remaining to be answered becomes whether these facts, and their reasonable inferences, satisfy the elements of the claim for relief." *Id.*

C. No Explicit Adverse Credibility Finding

Where the BIA raises questions about an applicant's claim, but does not make an explicit negative credibility finding, the factual contentions are deemed true, and no further corroboration of the facts is required. *See Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000) (rejecting BIA's finding that applicant did not meet his burden of proof because he failed to provide documentary evidence to corroborate his testimony).

D. Negative Credibility Finding

"[W]here the IJ has reason to question the applicant's credibility, and the applicant fails to produce non-duplicative, material, easily available corroborating evidence and provides no credible explanation for such failure, an adverse credibility finding will withstand appellate review." *Sidhu v. INS*, 220 F.3d 1085, 1092 (9th Cir. 2000) (holding that Sikh applicant should have presented his father at the hearing to corroborate his testimony, but remanding because applicant had no notice that negative credibility finding could be based on this failure); *see also id.* at 1090 ("[I]f the trier of fact either does not believe the applicant or does not know what to believe, the applicant's failure to corroborate his testimony can be fatal to his asylum application"); *Chebchoub v. INS*, 257 F.3d 1038, 1045 (9th Cir. 2001) (substantial evidence supported the BIA's determination that Moroccan applicant filed to satisfy his burden of proof based on a negative credibility finding and the failure to provide easily available corroborating evidence); *Mejia-Paiz v. INS*, 111 F.3d 720, 723–24 (9th Cir. 1997) (affirming negative credibility finding based on gaps and inconsistencies in testimony, and failure to provide documentary evidence proving membership in the Nicaraguan Jehovah's Witness Church).

1. Non-Duplicative Corroborative Evidence

"[W]here an applicant produces credible corroborating evidence to buttress an aspect of his own testimony, an IJ may not base an adverse credibility determination on the applicant's failure to produce additional evidence that would further support that particular claim." *Sidhu*, 220 F.3d

at 1091; *see also Chen v. Ashcroft*, 362 F.3d 611, 620–21 (9th Cir. 2004) (failure of brother to testify on applicant's behalf was not determinative because she produced other corroborating evidence regarding her child in China); *Gui v. INS*, 280 F.3d 1217, 1227 (9th Cir. 2002) ("Where, as here, a petitioner provides some corroborative evidence to strengthen his case, his failure to produce still more supporting evidence should not be held against him.").

2. Easily-Available Corroborative Evidence

Corroborative documentation may not be "easily available" where the applicant fled his or her country in haste, or where it would be dangerous to be caught with material evidence. *See Salaam*, 229 F.3d at 1239; *Shah v. INS*, 220 F.3d 1062, 1070 (9th Cir. 2000). "[I]t is inappropriate to base an adverse credibility determination on an applicant's inability to obtain corroborating affidavits from relatives or acquaintances living outside of the United States–such corroboration is almost never easily available." *Sidhu v. INS*, 220 F.3d 1085, 1091–92 (9th Cir. 2000); *see also Kaur v. Ashcroft*, 379 F.3d 876, 890 (9th Cir. 2004) (affidavits or letters from friends and neighbors in India not easily available); *Ge v. Ashcroft*, 367 F.3d 1121, 1127 (9th Cir. 2004) (Chinese employment records were not easily available because applicant was fired); *Guo v. Ashcroft*, 361 F.3d 1194, 1201 (9th Cir. 2004) (corroborative evidence of job termination not easily available because it was in China); *Arulampalam v. Ashcroft*, 353 F.3d 679, 688 (9th Cir. 2003) (affidavits from Sri Lanka not easily available); *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996) (corroborating letters or statements from mother in Guatemala and friend in Mexico not required); *McMullen v. INS*, 658 F.2d 1312, 1319 (9th Cir. 1981) (noting the difficulty in obtaining corroborative information of threats by members of an underground terrorist organization, who "obviously would not testify or otherwise make public their intentions"), *superseded on other grounds as stated in Ghebllawi v. INS*, 28 F.3d 83, 85 (9th Cir. 1994).

However, affidavits from close relatives in Western Europe and from individuals in the United States should be "easily available." *See Chebchoub v. INS*, 257 F.3d 1038, 1044–45 (9th Cir. 2001); *see also*

Sidhu, 220 F.3d at 1091 (father living in nearby suburb was an "easily available" witness); *Mejia-Paiz v. INS*, 111 F.3d 720, 723–24 (9th Cir. 1997) ("Proving one's membership in a church does not pose the type of particularized evidentiary burden that would excuse corroboration.")

3. Opportunity to Explain

If corroborative evidence is required, the applicant must be given an opportunity to explain the failure to provide material corroboration. *See Sidhu,* 220 F.3d at 1091 (applicant was specifically asked to explain the lack of corroboration); *Chen v. Ashcroft*, 362 F.3d 611, 621 (9th Cir. 2004) (failure of brother to testify on applicant's behalf was not determinative because she presented a plausible explanation for his absence); *Arulampalam v. Ashcroft*, 353 F.3d 679, 688 (9th Cir. 2003) (Sri Lankan applicant was not given an opportunity to explain failure to produce corroborative evidence).

E. Forms of Evidence

Corroborative evidence may be in the form of documents, witness testimony, expert testimony, or physical evidence, such as scars. *See, e.g.*, *Singh v. Ashcroft*, 301 F.3d 1109, 1112 (9th Cir. 2002) (burn marks on arms; doctor's letter); *Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000) (per curiam) (country conditions reports; witness testimony; and scars); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (expert testimony); *Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1199 (9th Cir. 2000) (expert testimony); *Akinmade v. INS,* 196 F.3d 951, 957 (9th Cir. 1999) (country conditions reports).

F. Country Conditions Evidence

Country conditions evidence generally provides the context for evaluating an applicant's credibility, rather than corroborating specifics of a claim. *See Duarte de Guinac v. INS*, 179 F.3d 1156, 1162 (9th Cir. 1999); *cf. Chebchoub v. INS*, 257 F.3d 1038, 1044 (9th Cir. 2001) (affirming BIA's use of country reports to "refute a generalized statement" regarding the practice of exile in Morocco).

This court has remanded a claim for reconsideration where the BIA relied on a flawed State Department report. *See Stoyanov v. INS*, 149 F.3d 1226 (9th Cir. 1998).

G. Certification of Records

Failure to obtain consular certification of foreign official records under 8 C.F.R. § 287.6(b) is not a basis to exclude corroborating documents. *See Khan v. INS*, 237 F.3d 1143, 1144 (9th Cir. 2001) (per curiam). "Documents may be authenticated in immigration proceedings through any recognized procedure, such as those required by INS regulations or by the Federal Rules of Civil Procedure." *Id.* (internal quotation marks omitted). Failure to supply affirmative authentication for documents, in the absence of evidence undermining their reliability, does not constitute a sufficient foundation for an adverse credibility finding. *See Wang v. INS*, 352 F.3d 1250, 1254 (9th Cir. 2003); *Wang v. Ashcroft*, 341 F.3d 1015, 1021 (9th Cir. 2003) (failure to testify to the authenticity of medical records, or to present original documents, was insufficient to support negative credibility finding).